IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: 23/02/2022 ***Signature***:

Case No. 25821/19

In the matter between:

EUNICE SEBATA Applicant

and

THE MASTER OF THE HIGH COURT First Respondent

LEAH MOTSUSI SEBATA Second Respondent

JUDGMENT

MAHOMED, AJ

INTRODUCTION

The applicant in this matter applies for a rescission of a judgment which was granted on 25 June 2020, in her absence. The application is based on the common law. The second respondent opposes the application. The applicant failed to file her heads of argument, chronology, practise note and list of authorities within 3 days of the order granted by an interlocutory court in terms of the Practise Manual and Directives of this Division. In her main application, the applicant seeks to set aside her late husband's will, on grounds (1) that he bequeathed her half share of their joint estate, and (2) that his signature in a will was forged.

THE EVIDENCE

1. Mr Thinane appeared for the applicant and submitted that the judgment had been erroneously sought because the order granted on 25 June 2020 was superfluous given that by that date, he had filed the replying affidavit.

2. Furthermore, Mr Thinane submits that he contacted the attorneys for the respondent on 24 June 2020, the day before this order was granted when he advised them that he had filed the "replying affidavit" and that he was of the view there was no reason for him to be compelled to do so.

3. Mr Kruger appeared for the second respondent, and he submitted the filing of a reply is irrelevant to this application. He explained that his attorney

approached the interlocutory court in terms of the provisions of the Practise Manuel and Directives of this Division, dated 11 May 2020, in particular paragraph 9.8.2.12, to compel the applicant to file her heads of argument, practise note, chronology, and list of authorities, so that he may procced to obtain a date from the registrar for a hearing of the main application.

4. The Judge President's Consolidated Directive dated 11 May 2020 and the Practice Manual of this Division.at paragraph 9.8.2.12 , provides that should a practitioner be aggrieved by the other party's neglect, dilatoriness, failure or refusal to comply with a rule of court, provision of the practise manual or directives, he/she/it may approach the interlocutory court for an order to compel the opponent to comply with the Rules of Court, the manual or directive. This is a formal application procedure on notice, in that a founding affidavit, answering and replying papers are submitted upon which a court grants or refuses such an order. I noted that in casu, the second respondent's attorneys had confirmed service on the applicants.

5. Furthermore, the directives provide that upon such an order being granted, the non-compliant party is ordered to file its documents within 3 days of the order failing which, the application/claim or defence of the non-compliant party will be struck/dismissed.

6. On 25 June 2020, the applicant was ordered to file her heads of argument, practise note, chronology, and list of authorities, pertaining to her main application which I referred to earlier, within 3 days of the order.

7. Mr Thinane submitted that on the date the matter was set down he attended at court, to oppose the application in that he had filed the replying affidavit and no order should be granted in the circumstances. He reminded the court that those were the early days of the pandemic and the virtual courts in this division.

8. He proffered that no one at the courthouse was able to assist him in connecting to the presiding judge's registrar. The support personnel at court on that date were themselves unsure of the procedures and he was told the Judge was working from home. He further stated that he had the documents on hand but obviously could not present them to the presiding judge.

9. The order was granted in his client's absence, and he submitted that his client was not in wilful default, he was in court, he was not familiar with the new system of operations and no one else at the courthouse could assist him on the date the application was heard.

10. He submitted further, that his client's matter had good prospects of success in the main application as she looks to the Above Honourable

Court to preserve her legal rights to own and manage her half share of the joint estate, in her marriage in community of property.

11. He submitted that effectively, the order granted denuded her of her right, which she had never alienated at any point during her marriage to her late husband. He proffered that the applicant has always been committed to the matter and has not ignored this court.

11.1. The applicant alleges that her deceased husband in his will bequeathed property that belonged to her, that is, their home and their belongings.

11.2. She further alleges that it was not a joint will, the deceased had no authority to dispose of property that belonged to her and to bequeath same to the second respondent.

11.3. The applicant claims to have paid for most of the purchase price of their home and their contents and did not consent to his bequest of her half share to anyone.

11.3.1. It was submitted she has obligations to her children as well and her share must be preserved to support them.

11.4. She further alleges that his signature was forged, and she intends to lead evidence of an expert in that regard.

12. Mr Thinane submitted that if the Court on the date knew of the above facts it would not have granted the order which is sought to be rescinded.

13. Mr Kruger who appeared for the second respondent submitted that the application before this court is “exclusively” regarding the filing of heads of argument, a practise note, a chronology, and list of authorities. He informed the court that the second respondent filed her heads of argument on 22 November 2019, the applicant’s heads were due 10 days later.

14. In March 2020 four months later, the second respondent’s attorney addressed a letter to Mr Thinane and “reminded “him that the heads were outstanding and “warned him” that should he fail to file same he held instructions to proceed to apply for an order to compel him to file them. The applicant failed to heed the reminder and warning.

15. The application to compel was launched and a notice of set down was served several months before the application was heard.

16. Mr Kruger submitted that Mr Thinane is incorrect in his submissions that the heads are before this court, he could not and cannot now find them on case lines. He further submitted that the applicant made no mention in his papers that “they were served.”

17. Mr Kruger alerted the court to the applicant's submission in her papers, that "she saw the heads and they were going to be delivered." It was therefore in her control to avoid this order being executed.

18. He submitted, she knew the heads were to be served, she saw the documents, she did nothing to serve them and therefore she is in wilful default. She cannot complain at this stage.

19. On the merits, Mr Kruger referred to the allegation of the forged signature and expert report, which he submitted cannot assist this applicant on the prospects of success. The applicant has no knowledge of the signature she was not there, and the expert findings were inconclusive about the alleged forgery. He further submitted that this expert is not even qualified.

20. In the circumstances, he submitted, she is unlikely to succeed in the main application in any event.

21. Mr Kruger submitted that if this court had regard to the evidence of the second respondent, and her witnesses' evidence, a dispute of fact arises, and the court then must apply the rule in Plascon Evans when the matter must be decided on the second respondent's version.

22. He submitted that the applicant has not shown good cause and that if this court were to be lenient the parties would simply go back in another opposed motion proceeding and the application will likely be dismissed

23. In conclusion Mr Kruger submitted that the applicant failed to show good cause why this order should be set aside and does not have prospects of success.

23.1. Mr Kruger submitted that the practice manual was drafted to ensure the efficient prosecution of matters and that for as long as the applicant “dragged her heels” his client, is prejudiced and is unable to obtain a date for a hearing without the heads of argument and related documents being filed. The situation is a stalemate and is unacceptable.

23.2. Mr Kruger argued that the order cannot be seen as prejudicial to a party, who is allowed a further 3 days to file the documents and if complied with the matter can proceed on the normal course when his client could have obtained a date for the hearing of the matter.

24. In reply, Mr Thinane, submitted that the second respondent’s attorney knew the matter was being opposed and should not have sought and obtained a dismissal or strike out of his client’s application, in her absence.

He implored the court to consider the far-reaching impact of this order, which will result in a grave injustice to his client.

25. Earlier, he submitted that the application to compel was unnecessary as he had filed pleadings and they were closed. However, in reply he apologised to the Court, when he retracted the submission and admitted that no heads of argument were filed to date of this hearing.

26. Mr Thinane informed this court that the heads of argument are available and are in his file.

27. He denies having ignored the court order but intended to argue on the day that his client's application could not be dismissed because of her failure to file her heads. He was of the view that the practise directives are draconian and seriously prejudice his client.

28. Mr Thinane submitted there could be no procedural rule that could deny his client her legal rights and that it is in the interest of justice that she be permitted to enforce her right and fully ventilate her dispute.

29. Mr Thinane disagreed that the practise directives could have intended the dismissal of a claim or defence.

THE LAW

30. Judgments may be set aside at common law, inter alia,

30.1. where the judgment was *granted by default,*

30.2. *in other circumstances based on justice and fairness*, (see Stephen Pete, et al Civil Procedure, A practical Guide, 2nd ed, p 276 at 2.1.2 (c).

31. The applicant must show sufficient cause for the rescission, that is,

31.1. The party seeking relief must present a reasonable and acceptable explanation for his default and

31.2. *that he has a bona fide defence, which prima facie, carries prospect of success*. (Civil Procedure a Practical Guide, supra)

32. A court must consider a party's "mental attitude" to the consequences of default. That is, did he act as a result of indifference to the consequences? Did he adopt a "don't care attitude?' If a party failed to understand the legal consequences of default, he cannot be said to be in wilful default.

33. The writers Stephen Pete et al, supra at 275, state negligence on a party's part or that of his attorney also *"may not amount to indifference or wilful default* ", although a bona fide defence must still be examined.

34. A court must exercise its discretion considering the conspectus of the evidence to determine if there is sufficient cause for a rescission.

35. The High Court has *an inherent jurisdiction* to rescind default judgments.

36. Earlier I set out the provisions of the practise manual, the directives, and their ethos, which are clear regarding regulating the litigation process and the powers of the interlocutory court.

JUDGMENT

37. I agree with Mr Kruger that the Practise Directives are in place to regulate the litigation process, the Uniform Rules, have proven to be limited in that regard, particularly regarding the ever-evolving style of practice and increasing demands on the judiciary.

38. I also agree with Mr Kruger that as much as the applicant complains about the unfairness or prejudice she suffers; his client also has rights to efficient operations of the court and to finality of her matter.

39. The second respondent in casu had no other way to get the applicant to cooperate and file her heads of argument. In fact, to date as I heard the matter, the heads of argument are not on case lines. This is indeed of serious concern to this Court, particularly in that the applicant seeks this court's indulgence in these proceedings yet remains in default of the provisions of the Practice manual and directives.

40. On the evidence before this Court, it was clear that the applicant's legal representative had "confused" the service of the replying affidavit, with the filing of heads of argument, practise note, chronology, and list of authorities, for the main application.

    40.1. In fact, it was clear that Mr Thinane was not familiar with the provisions of the practise directives. Not only did he fail to comply with them he also "argues that there can be no such provision that strikes off or dismisses a claim or defence.

41. I posed the question to Mr Kruger as to who would be responsible for the filing of such documents and he agreed that the attorney is responsible for service and filing on case lines, but also informed this court that he could find no answering papers or practise note in relation to **this** interlocutory application, on case lines, either.

42. Mr Thinane had failed to comply with the directives on both occasions. The question then arises as to whether such noncompliance, “dilutes/nullifies” the applicant’s sufficient cause.

43. The applicant chose her attorney whom she understood to have reasonable skill and knowledge to represent her. I noted Mr Kruger’s submissions that our courts have found that in fact a party can be visited with the ineptitude of its legal representatives.

43.1. I noted the contents of the respondent’s letter dated 3 March 2020 (001-11) in which is stated

> *“Due to the abovementioned (referring to the failure to file heads), we have no other alternative but to proceed with an application, in terms of paragraph 9.8.2.12 of the Practise Manual.”*

It does not include a “warning” about a dismissal of the claim.

43.2. I agree that second respondent is not obliged to be as detailed, however, in my view it is onerous to expect “the applicant” to know of these supplementary rules of practise. Indeed. even qualified and seasoned practitioners from other jurisdictions have failed to comply with the directives and many still seek clarity on aspects of their implementation.

43.3. Mr Thinane was at cross purposes when he noted the application to compel filing of the heads. He clearly understood it to pertain to the filing of the replying affidavit which he knew to be outstanding at the time as I mentioned in paragraphs 2 and 3 supra.

44. I am of the view that the failure to comply was not due to inadvertence or indifference to the consequences but to a "confusion," which is again evident in Mr Thiane's correspondence dated 20 May 2020, (001-16), which no reasonable party/or member of public could anticipate and be held responsible for. I cannot impute those shortcomings to this "applicant."

45. In **AIRPORTS COMPANY SOUTH AFRICA SOC LIMITED v TOURVEST HOLDINGS PTY LTD AND TOURVEST FINANCIAL SERVCES PTY LTD 26/1/2016,** Kganyago AJ, at 24-26, considered the negligence of an attorney, and stated:

> *"from the beginning the applicant's instructions to their attorneys, was clear, and was to oppose the respondent's review application. … The applicant could not have foreseen that their attorney would have acted the way they did."*

46. The second respondent could have known that given the martial regime of the parties, and the dispute raised, the applicant may have a valid claim. I have noted the second respondent's arguments on the defence raised, but Mr Thinane submitted that the matter can be argued without the assistance of an expert. That is a matter for another court.

47. It would be a travesty if the rules of procedure should impose such a burden on a litigant in the circumstances of this applicant. No court can overlook, the history and experience of most of our people on their full knowledge of and full participation in our legal and economic systems. This court is hard pressed to deny this litigant the enforcement of her rights.

48. Having considered the facts I set out in paragraph 11 above, I am satisfied that the applicant has succeeded in proving sufficient cause as well as that she has a bona fide defence with prospects of success. Her marital regime gives her that legal right that this court is enjoined to protect.

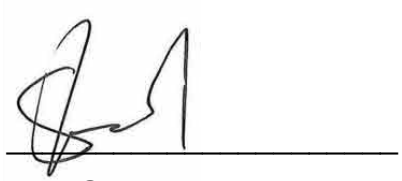
49. The application must succeed.

I make the following order:

1. The order granted in default on 25 June 2020 is hereby rescinded and set aside.

2. The applicant is ordered file its papers within 5 days of this order.

3. Costs are cost in the cause.



MAHOMED AJ

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