IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

23/3/2016

CASE NO: 32512/2011

DATE OF HEARING: 30 November 2015

Not reportable

Not of interest to other judges

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

23/3/2016
DATE

SIGNATURE

In the matter between:

KWALO TRADING CC	First Applicant
CEBANI MTHOBA	Second Applicant

and

AMATHOLE FORESTRY COMPANY (PTY) LTD	Respondent

In re:

AMATHOLE FORESTRY COMPANY (PTY) LTD	Plaintiff

and

KWALO TRADING CC	First defendant
CEBANI MTHOBA	Second defendant

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS Third defendant

MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES Fourth defendant

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JUDGMENT

OLIVIER AJ

[1] This is an application to rescind a default judgment granted by Pretorius J in this court against the applicants, on 14 August 2013. The application was first launched on 18 August 2014. A supplementary affidavit was filed on 8 October 2014 to rectify certain fatal defects in the original application.

[2] The second applicant in this matter is Cebani Mthoba, an adult male person. The respondent is Amathole Forestry Company (Pty) Ltd, a private company properly registered in terms of the laws of South Africa. The second applicant was the sole member of the first applicant, Kwalo Trading CC.

[3] It is common cause that the first applicant had been deregistered by the time that default judgment was granted. Respondent therefore correctly submitted that second applicant lacked the requisite locus standi to act on behalf of the first applicant, which is now a non-entity. Respondent conceded in the answering affidavit of Davron Swift that the judgment obtained against the first applicant was invalid. For purposes of convenience, I shall continue to refer to Kwalo Trading CC as the first applicant, even though it is a non-entity.

[4] The default judgment application arose from a damages claim instituted by the respondent (plaintiff in the main matter) in this court on or about 6 June 2011 against four defendants, including the first and second applicants, resulting from a fire on 14 September 2008, which the plaintiff alleged had destroyed some of the plaintiff's plantations. It was alleged that the fire had spread from the farm of the first applicant. The claim was initially instituted in the Eastern Cape (Grahamstown High Court), but the action was withdrawn and subsequently instituted here in this division.

[5] The application for default judgment was brought in terms of rule 31(2)(a) on the basis that the applicants (defendants) had failed to file a notice of intention to defend, or a plea. The application for default judgment was served on the second applicant on 6 August 2013, in accordance with the practice rules of this division, considering that more than 6 months had passed between the service of the summons and the application for default judgment.

[6] In his supplementary affidavit the second applicant stated that he was bringing his application in terms of Rule 42(1)(a), even though in his founding affidavit he referred to rule 31 as the basis for his application. I shall consider only the rule 42 application, even though respondent's counsel also dealt with rule 31 in his heads of argument. In terms of rule 42(1)(a) the court may rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[7] The basis of the second applicant's argument is that default judgment had been granted erroneously, as the state attorney had entered a notice of intention to defend the action on his behalf. He claims that the court was misled that this notice had been withdrawn, which means that the judgment was granted erroneously. The notice of withdrawal as attorney of record filed by the State Attorney did not mean that the notice of intention to defend was withdrawn. It was still in effect at the time of the granting of the default judgment.

[8] Second Applicant further submitted that Respondent admitted that the state attorney had entered notice on behalf of the second to fourth defendants. It matters not who files it; if there is a notice, there is a notice. The withdrawal of the attorney from the case does not impact on the notice of intention to defend.

[9] The second applicant argued that there is no affidavit or other proof from the state attorney confirming the alleged mistake; nor was there an order setting aside or striking out the notice of intention to defend. The applicant's case may have benefitted from more legal argument on this point.

[10] Erasmus ***Superior Court Practice*** D1-567/8 states the following about rule 42(1)(a):

> In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment. It follows that if material facts are not disclosed in an ex parte application or if a fraud is committed (ie the facts are deliberately misrepresented to the court) the order will be erroneously granted. ... An order or judgment is also erroneously granted if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such an order. The subrule does not cover orders wrongly granted."

It is important to note that the rule does not extend to orders that were granted incorrectly.

[11] On 25 July 2011 the State Attorney entered a notice of intention to defend on behalf of the second applicant, following earlier service. But on 31 August 2011 a notice of withdrawal as attorneys of record was issued by the State Attorney. The respondent claims that the notice of intention to defend was erroneously entered by the State Attorney.

[12] Respondent contacted the State Attorney on 6 September 2011, who confirmed that the notice of intention to defend filed by the State Attorney had been a mistake. A file note prepared by the respondent's attorneys and an affidavit confirming the discussion with the State Attorney were part of the papers before the court during the default application proceedings.

[13] Respondent argued further that because the State Attorney does not act on behalf of individuals in their personality capacity, the second applicant would never have been able to instruct the State Attorney in his personal capacity to file a notice of intention to defend. The State Attorney therefore clearly made an error.

[14] The founding affidavit of the second applicant seems to confirm that the State Attorney had made a mistake in entering notice. See par 32 of his founding affidavit:

> 32.1 I am further informed by my attorneys that after issuing the summons out of the above Honourable Court in this action, the respondent caused the said summons to be served on the office of the State Attorney in Pretoria on behalf of the Ministers and myself. 32.2 The State Attorney then filed notices of intention to defend on behalf of the Ministers and myself, as it was believed by the State Attorney's office at the time that I was being sued in my capacity as an employee acting during the course and scope of my employment with the Department concerned. 32.3 Shortly thereafter it transpired to the State Attorney's office that I was being sued in my personal capacity and they withdrew as my attorneys of record.

In his supplementary affidavit the second applicant elaborates on this further, providing a version that is partly at variance with the one provided in the founding affidavit. Respondent calls it "astonishing and self-explanatory that the second applicant fails to attach a confirmatory affidavit from the State Attorney in this respect".

[15] According to the respondent, as a matter of courtesy its attorney contacted first the second applicant, on 6 September 2011, and then his attorneys, on 7 September, to inform them of the issuing of the summons in the Gauteng High Court. Certified copies of the summons and the return of service were sent to the attorneys, along with a request that they file a notice of intention to defend. On 13 September and 10 October 2011 the second applicant's attorneys confirmed acceptance of the service of the summons on them. But no notice to defend was subsequently filed. Respondents aver that the second applicant was aware of the summons since at least 13 September 2013.

[16] The second applicant further contends that by virtue of the existence of a notice of intention to defend the respondent should have served a notice of bar in terms of rule 16, at the same address where notice of application for default judgment was served, and that he should have been given the opportunity to file a plea. This is wrong, says the respondent. The reason why the application for default judgment was served on second applicant was to comply with the requirement in the practice manual, as the application was brought more than six months after the original service of summons.

[17] In my opinion it was clear to all concerned, including the second applicant, that the State Attorney had erroneously filed the notice.

[18] Considering the content of the default judgment application and the papers placed before the court, I am of the view that the respondent did not mislead or withhold any pertinent facts from the court. All the relevant papers were placed before the court – and the judge was directed to them by respondent's counsel.

[19] Any possible doubt created by the founding affidavit of Christopher Hugh Rance, in which he stated in par 8.7 that "the State Attorney withdrew the notice of intention to defend on behalf of the second respondent, see annexure "J", was ameliorated by the short heads of argument of Amathole in the default judgment application, where the issue of the notice of intention to defend was explained as follows: "It however later transpired that the State

Attorney erroneously entered an appearance to defend on behalf of the Second Respondent, and a Notice of Withdrawal was then filed by the State Attorney on 31 August 2011. See paginated papers, page 105, Annexure "J"; Founding Affidavit, page 11, paragraphs 8.7 to 8.8, page 12, paragraph 8.8."

[20] The court was therefore alerted to the notice of withdrawal, and also the file note and confirmatory affidavit referred to above. Any possible uncertainty created by the statement in the affidavit of Rance was thus removed.

[21] To sum up, I do not consider the court to have been misled by the respondent in the default judgment application. There was no irregularity in the proceedings, nor was any fraud committed. Pretorius J had all the relevant papers before her to make an informed decision.

ORDER

[22] The application is dismissed with costs.

OLIVIER, AJ

Acting judge of the High Court