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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 8/3/16

CASE NO: 37803/2013

DELETE WHICHEVER IS NOT APPLICABLE

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

6.3.2016

DATE SIGNATURE

In the matter between:

BAKONE BA PHETLA COMMUNAL PROPERTY ASSOCIATION APPLICANT

And

CARMANI SUPPLY CHAIN SPECIALISTS RESPONDENT

JUDGMENT

MSIMEKI, J

[1] This is an application for the rescission of a judgment granted by default against applicant. Applicant based the application on rule 31(2)(b) of the Uniform Rules of Court.

[2] I shall refer to the parties as applicant and respondent. The parties, respectively, are represented by advocate B Van der Merwe ("Mr Van der Merwe") and advocate H P West ("Mr West").

[3] The action brought against first defendant and applicant contains three claims, namely claims 1, 2 and 3. Only claims 1 and 2 concern applicant.

[4] Plaintiff's claims are based on pledges of movable property annexures POC1 and POC2.

[5] The summons, in respect of first defendant, was served on Mr Matthews Phetla of BB Transport Services (Pty) Ltd. Insofar as applicant is concerned, the summons could not be served as the sheriff, Alberton, reported that "the business was unknown at given address". This is obviously a return of non-service.

[6] Applicant, in paragraph 22 of its founding affidavit, states that the summons in respect of first defendant was served on Mr Matthews Phetla who, according to the sheriff, represented first defendant.

[7] Mr Van der Merwe, in the event that it would be argued that Mr Matthews Phetla also represented applicant when the summons was

served on first defendant, argued that applicant clearly stated that Mr Phetla was not authorized to accept service of the summons on its behalf and that the summons therefore "was never received by any legitimate representative of the applicant". This does not seem to have been seriously contested by Mr West. If this authority lacked, one then has to ask oneself if what was done without the authority of applicant, for instance, the conclusion of the pledges of movable property was lawfully done. I shall not answer the question which I believe is best left to the court which will ultimately hear the matter to deal with. The answer is not necessary for the purposes of this application. In any event the sheriff, insofar as service on applicant is concerned, stated that there was no service.

[8] Mr Van der Merwe, during his argument, when dealing with Mr Matthews Phetla's alleged authority referred to the second paragraph under introduction, in the forensic report appearing on page 115 of the paginated papers.

The paragraph reads:

> "The main allegation amongst others is that the terms of office for which the members of the CPA had been appointed for, had expired and new elections needed to be held. Therefore the executive members of the CPA whose term of office was for a period of 5 years, since appointment in 2004 were acting illegally and without authority."

This aspect too does not deserve my attention as the court which will deal with the matter is best suited for that. Given the facts of this application, it is unnecessary to deal with the issue. The necessity has been removed because the issue which I regard as significant is whether the judgment by default was erroneously sought and granted. This, in my view, is dispositive of the application."

[9] To get back to the sheriff's return of service, we shall recall that he provided respondent with a return of non-service. Can it, in the absence of proper service on applicant, be said that the combined summons came to the notice of applicant. According to the sheriff, there was no service. Applicant in its reply, and in so many words, states that it did "not receive a copy of the summons and/or application for default entity (*sic*)" and that it was therefore unable to respond properly. It challenged, respondent "to provide the applicant with the summons and application for default judgment which forms the subject matter of this application". It also reserved "its rights of (*sic*) deal with summons and application for default judgment once the documents have been provided by the respondent."

[10] The gist of applicant's case seems to be that "default judgment was erroneously taken against a wrong entity (applicant) and in its absence. This is clearer in paragraph 30 of applicant's replying affidavit.

[11] Respondent's contention that applicant failed to satisfy the requirement of rule 31(2)(b) to bring its application for the rescission of the default judgment "within twenty days of having become aware of the judgment",

according to applicant's version, is incorrect. Indeed this has been set out.

[12] Respondent contends that applicant's forensic report and the 3rd Party Assessment annexed as B1 and B2 to applicant's founding affidavit should be rejected as inadmissible hearsay evidence which, according to it, discloses no defence. Again, without determining whether the pledges of movable property are proper and valid, reference for instance, to the second paragraph of page 117 of the paginated papers has been made in applicant's affidavit and this portion has been confirmed by the author of the forensic report in his confirmatory affidavit annexure RA1 to the replying affidavit. This cannot be hearsay evidence.

[13] Applicant's address which respondent invited applicant to furnish has been furnished.

[14] It must be noted that Mr Namudi Phillip Phetla, in the founding affidavit, specifically states that applicant, at the time of deposing to the affidavit, was not in possession of the judgment that had been granted against it. It is clear that from the time applicant became aware of the judgment up to the time the applicantion was brought, applicant observed the twenty day rule. According to the deponent applicant became aware of the judgment on 15 May 2014. The founding affidavit was deposed to on 5 June 2014 which was within the time prescribed by the rules. Applicant, despite going through the court file, has not been able to establish when the judgment by default was granted.

[15] Applicant based its application on rule 31(2)(b). This, however, does not preclude the court from invoking rule 42(1)(a). Applicant also has dealt with non-receipt of the summons. Rule 42(1)(a) provides:

> "42 Variation and rescission of orders
>
> (1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
>
> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby." (My emphasis)

[16] Clearly the court is enjoined to *mero motu* rescind an order or judgment erroneously sought or erroneously granted in the absence of any party affected by the order or the judgment.

[17] Based on the sheriff's return there was no service of the combined summons on applicant. The sheriff's return of non-service is undisputed. What is more, applicant states that the summons never came to its notice. This has not been disputed either. This, in any event, confirms what the sheriff says. The judgment was granted in the absence of applicant. This cannot be denied. The sheriff furnished a return of non-service. This too cannot be denied. This, coupled with the fact that it is applicant's contention that it never received the summons, explains why applicant entered no appearance to defend.

[18] The word "may" in rule 42(1) denotes that the court has power and a discretion to exercise to rescind the judgment. It also refers to the circumstances under which the court will consider a rescission of the judgment. In this instance the court acts *mero motu*. The rule is meant to correct expeditiously an obviously wrong judgment. (See Van Loggerenberg: Superior Court Practice D1-562 and D1-563 and the cases cited).

At D1-563 the author says:

> "The rule should be construed to mean that once one of the grounds is established, for example, that the judgment was erroneously granted in the absence of a party affected thereby, the rescission of the judgment should be granted. [See also *Mutebwa v Mutebwa* 2001 (2) SA 193 (TK) at 199I-J]"

[19] Evidence, at the disposal of the court, is such that it will be prudent to rescind the judgment and allow the parties to properly ventilate what the court hearing the matter should hear and know for it to arrive at a balanced and appropriate judgment. The application, in my view, should succeed.

[20] <u>COSTS</u>

Mr West, in the event that the court was inclined to rescind the judgment, implored the court to find that applicant ought to bear the costs. The submission was based on the fact that the opposition that respondent

mounted against the application was reasonable. Mr Van der Merwe, on the contrary, submitted that the facts and circumstances which demonstrate that judgment ought not to have been granted existed at the date and time of the judgment. This simply means that there is a causal connection between the circumstances which gave rise to the claim for rescission and the judgment. [See *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C).] This, according to Mr Van der Merwe, means that applicant is entitled to the costs. I agree.

[22] I, in the result, make the following order:

1. The judgment granted against applicant by default under case number 37803/13 is hereby rescinded.

2. Respondent is ordered to pay the costs of this application.

M W MSIMEKI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:	12/10/2015
For the Applicant:	Adv B Van der Merwe
Instructed by:	N Maharaj Attorneys
For the Respondent:	Adv HP West
Instructed by:	Freedland Hart Solomon & Nicolson
Date of Judgment:	