



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 38605/2020

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

SIGNATURE

DATE

2022-04-29

In the matter between:

MOGALE CITY MUNICIPALITY

APPLICANT

And

CARINA VAN WYK

1ST RESPONDENT

BAREND JOHANNES WEBBER
DENTAL CLINIC INCORPORATED

2ND RESPONDENT

(Delivered: This judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of handing down is deemed to be 29 April 2022)

JUDGMENT

PHAHLAMOHHLAKA AJ

- [1] This is an application for rescission of judgment granted by this court on 24 November 2020. The application is premised on the provisions of Rule 31(2) (b), alternatively Rule 42(1) (a) of the Uniform Rules of Court. The application is opposed.
- [2] The respondents issued summons against the applicant on 19 August 2020 for payment of the sum of money. The applicant never filed a notice of intention to defend the action. Default judgment was obtained by the respondents on 24 November 2020, some three months after the summons was issued. The explanation given by the applicant for default is that on 20 August 2020 the summons, together with particulars of claim were sent to the Insurance Brokers for defending on behalf of the applicant.
- [3] The Supreme Court of Appeal settled the requirements that must be satisfied by the applicant in terms of Rule 31(2) (b) in **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)**¹ where the following was said: *"The applicant must show cause why the remedy should be granted. That entails (a) giving a reasonable explanation of the default; (b) showing that the application is made bona fide; and (c) showing that there is a bona fide defence to the plaintiff's claim which prima facie has some prospects of success."*
- [4] In terms of Rule 42(1) the court may, in addition to any other powers it may have *meru motu* or upon the application by any party affected, rescind or vary;
- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) An order or judgment in which there is an ambiguity or a patent error or omission but only to the extent of that ambiguity, error or omission;
- (c) An order or judgment granted as a result of a mistake common to the parties.
- [5] I was referred to the Supreme Court judgment of **Lodhi 2 Properties v Bondev**² which is very helpful and relevant to this case. On paragraph 17 the learned Judge of Appeal remarked as follows; *"17. In any event, a judgment granted against a party in his absence cannot be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the judge who granted the judgment."*
- [6] On paragraph 25 of **Lodhi** the following was said; *"However, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the judge who granted the judgment, as he was entitled to do, was unaware, as was held to be the case by Nepeen J in Stander."*

¹ 2003(6) SA 19 SCA; 9200302 ALLSA 113AT PARAGRAPH 11

² 2007 SCA 85 RSA

- [7] The applicant's counsel argued that the respondents issued summons at Johannesburg high court and therefore there is a defence of *lis pendens*. It must be noted that the applicant had not defended the Johannesburg matter too as the explanation for not defending is that the applicant was under the impression that the insurance brokers would defend the matter. The applicant further argued that had the court that granted the judgment been aware of the summons that was issued in Johannesburg the court would not have granted the judgment. I am not persuaded by this argument for the reason I have already advanced earlier that the applicant had not filed a notice to defend. I cannot find fault in the respondents' explanation that the Johannesburg matter was abandoned.
- [8] The explanation given by the applicant for default in filing a notice of intention to defend is that after being served with the summons the applicant forwarded the summons to its insurance brokers to deal with the matter. The applicant argues that it is the insurance brokers that had to defend the matter. The applicant is a municipality, most probably with a legal section, but chose to forward the summons to the insurance brokers and not the attorneys on its panel of attorneys. It might be the policy the applicant adopted to refer their legal matters to the insurance brokers but when the insurance brokers fail to defend matters the applicant cannot come to court and plead that they failed to defend a matter because it was referred to the insurance brokers. The applicant took a risk and therefore it must live with the consequences.
- [9] I am of the view that the applicant failed to satisfy the requirement of good cause. I unfortunately cannot find that the applicant proffered a reasonable explanation for the default. The applicant was deliberate in not defending the matter.
- [10] In my view all other arguments, among others, that the respondents issued summons in the Johannesburg high court, and that the respondents have not filed a damages affidavit cannot stand. Firstly, the applicant did not defend the Johannesburg matter as well. This shows the attitude adopted by the applicant in this matter. Secondly, my duty is not to review the judgment of the judge who granted the default judgment. My duty is to assess the application and to determine if the applicant has made out a case for the relief sought, namely rescission the judgment.
- [11] Rule 42(1) was also dealt with in Constitutional Court in **Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others**³ where the principle was reaffirmed when it was said that when relying on the rule, both grounds must be shown to exist; meaning that the applicant must show that the order sought to be rescinded was granted in their absence and that it was erroneously granted or sought. The court further noted that if the requirements are

³ [2021] ZACC 28

met, a court is merely endowed with a discretion-which must be influenced by considerations of fairness and justice-and is not compelled to rescind an order.

[12] The applicant argues that in the event the Court would find in favour of the respondents on the merits, there are reasonable prospects that the Court would have awarded less quantum than that which was awarded on default judgment. Further, the applicant argued that the respondents' claim is illiquid and therefore oral testimony regarding the merits was necessary. Also, expert evidence according to the applicant was needed to prove quantum. I am of the view that there is no merit in either of the applicant's arguments.

[13] It is clear from the applicant's heads of argument as well as oral submissions by the applicant's counsel that the applicant is just throwing a wide net into the river hoping to catch some fish. In essence the applicant is on a fishing expedition. It flows from the applicant's case that the applicant does not have a bona fide defence to the respondent's claim

[14] I am therefore of the view that the applicant brought this application solely to delay the proceedings and to frustrate the respondents.

[15] I have already found that the applicant could not give a satisfactory account for its default and therefore on that ground alone the application should fail. More so, the applicant failed to satisfy me that it had a bona fide defence to the respondents' claim.

[16] Consequently, the applicant's application should fail. Costs should follow the event as is the established principle of our law.

[17] In the result I make the following order:

17.1 The application is dismissed with costs.

KGANKI PHAHLAMOHLEKA
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION,
PRETORIA

JUDGMENT RESERVED ON: 31 JANUARY 2022
COUNSEL FOR THE APPLICANT: ADV MTETO
COUNSEL FOR THE RESPONDENT: ADV LEARN
DATE OF JUDGMENT: 29 APRIL 2022