

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 45597/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO

OTHER JUDGES: NO

E.M. KUBUSHI

DATE: 12 OCTOBER 2023

In the matter between:

JOHANNES MOGAU NGOBENI

APPLICANT

and

BIOMERIEUX S.A 69280

FIRST RESPONDENT

BIOMERIEUX SOUTH AFRICA (PROPRIETARY)
LIMITED

SECOND RESPONDENT

In re:

BIOMERIEUX S.A 69280

FIRST PLAINTIFF

BIOMERIEUX SOUTH AFRICA (PROPRIETARY)
LIMITED

SECOND PLAINTIFF

And

JOHANNES MOGAU NGOBENI

DEFENDANT

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 12 October 2023.

[1] This matter served before me in the Unopposed Motion Court.

[2] The Applicant sought default judgment against the First Respondent. No order was sought against the Second Respondent specifically. The default judgment was sought because the First Respondent failed to deliver its plea within the time period prescribed by an order of the Court.

[3] The Respondents have filed a Notice to oppose the application. They oppose the application on the ground that the Applicant ought to have barred the Respondent, that is, issued a Notice of Bar, before it could launch a default judgment application.

[4] However, when the parties appeared before me in open court the Respondents' representative raised an *in limine* point arguing for the dismissal of the application on the basis that the default judgment application was wholly defective in that it does not provide the Court with all the correct facts that the Court would require in order to grant the default judgment.

[5] The Applicant on the other hand, arguing against the *in limine* point of the Respondents' representative, conceded that the Respondents had filed a plea but contended that such plea was filed out of time and the Respondents were supposed to have in terms of Rule 27(1) applied for condonation, which they failed to do.

[6] I do not intend to deal with all the issues that were raised in argument before me by the respective parties but simply to conclude that the Default Judgment Application is defective and ought to be dismissed on the reasons that follow hereunder.

[7] It is common cause that when the parties appeared before me in open court, the Respondents argued for the dismissal of the application on the ground that the

papers in which the application is based are wholly defective and insufficient to sustain the application as they relate to a factual situation that pertained around February 2022 and that a lot has happened since then which the Applicant has failed to bring to the attention of the Court in the application.

[8] As an example of the lot that have since happened, the Respondents contends that, in the first instance, the Applicant has in its papers failed to inform the Court that the Respondent has subsequent to the filing of the default judgment application, applied for leave to appeal the judgment and order on which the default judgment is based, which application was dismissed by the Court. Secondly, the Applicant failed to inform the Court that after the application for leave to appeal was dismissed, the Respondents filed their plea, even though as the Applicant avers, was out of time.

[9] The Respondents' representative argued further that the Applicant purported to make out a case for the default judgment relief, through submissions of evidence and facts from the Applicant's representative's practice note and short heads of argument. The application for default judgment did not speak to all the events that transpired since February 2022, when the default judgment was launched.

[10] In order to rectify this obvious defect in the application for default judgment the Applicant's representative gives evidence in his short heads of argument such as paragraph 3.11 of the short heads of argument. This, according to the Respondents' representative, is not appropriate but, also, the submissions that the Applicant's representative made to this Court did not originate in the affidavits in the application for the default judgement. Where the application for default judgment does not provide evidence upon which default judgment may be granted, the Applicant's representative may not give evidence from the Bar or through his heads. This Court, so the Respondents' representative argued, can only adjudicate the default judgment on the strength of the application and the affidavits before Court, and thus the application for default judgment is materially defective and the Applicant has failed to make out a case for default judgment.

[11] The Respondents' representative is correct. In order for this Court to consider the submissions made by the Applicant's representative in oral argument and his short heads or argument, the Applicant should have supplemented the founding affidavit to the default judgment application. The application was launched well before the application for leave to appeal and the plea were filed. It was thus incumbent upon the Applicant to take the Court into his confidence and divulge all the facts of the case, particularly as the Applicant was in the unopposed motion court where the Respondent was not expected to make an appearance.

[12] Consequently, the application falls to be dismissed with costs.

E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

APPLICANT COUNSEL: ADV KENNEDEY TSATSAWANE SC

APPLICANT ATTORNEYS: EDWARD NATHAN SONNENBERGS INC.

RESPONDENTS' COUNSEL: ADV ANTHONIE P JANSEN VAN VUUREN

RESPONDENTS' ATTORNEYS: SNYMAN ATTORNEYS