

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

CASE NO: 15175/2008

**MOHAMMED EBRAHIM t/a MITCHELL'S PLAIN FISH
WHOLESALEERS**

Applicant

and

NEXCLO NO 28 CC

Respondent

JUDGMENT DELIVERED ON THIS 18TH DAY OF OCTOBER 2010

FORTUIN J:

[1] This is an opposed application to rescind a summary judgment granted against Applicant in his absence under Case No: 15175/2008. Further, that Applicant be granted leave to oppose the action and that Respondent pay the costs of this application.

[2] Respondent opposed the relief claimed by Applicant on the following basis:

- 2.1 Applicant did not explain the reason for failing to appear at Court to oppose the summary judgment which was sought by Respondent.
- 2.2 Applicant does not have any defence to Respondent's action.

COMMON CAUSE

- [3] During July 2008, Respondent issued a summons under Case No: 11490/2008 against Applicant on terms of goods sold and delivered in the amount of R176 101.14.
- [4] On 18 September 2008, Respondent's attorney delivered a Notice of Withdrawal of action in respect of the abovementioned Case Number and, on the same date, instituted a new action on the same cause of action against Applicant under Case No: 15175/2008.
- [5] The summons was served on Applicant on 25 September 2008 at his shop in Mitchell's Plain.
- [6] Applicant filed a Notice of Opposition, which notice was served on Respondent's attorneys at the Court on 1 October 2008.
- [7] On 14 October 2008, an application for summary judgement, which was set down for hearing on 31 October 2008, was served on Applicant's

chosen service address, being Mitchell's Plain Fish Wholesalers, CC 24 Losak Avenue, Epping 2.

[8] In response to the application for summary judgment, Applicant filed a Notice of Opposition, together with an Affidavit, setting out his defences and the losses suffered as a result of the defective product, which document was prepared by Mr Duvinage, who accepted service of the application on behalf of Applicant.

[9] On 31 October 2008, the application for summary judgment was postponed, on Respondent's version, to 10 November 2008, in order for its attorneys to consider "what to do", given the opposing papers received from Applicant.

[10] Applicant was not present at Court on 31 October 2008 when the matter was called, and no one contacted Applicant in regard to the matter.

[11] Applicant states in his application that he was under the *bona fide*, but mistaken, belief that the affidavit deposed to in response to the summary judgment application was in respect of the action and that he was not aware that he should be in Court on 31 October 2008, as the matter was dealt with by Mr Duvinage, who had prepared the opposing papers. Had he known that the matter was set down for hearing on 31 October 2008, he would have appeared.

[12] Applicant received no notification that the application for summary judgment was in fact postponed to 10 November 2008, nor why it was postponed.

[13] On 10 November 2008, Respondent alleges that the court file was not in order and the matter was postponed to 12 November 2008 before judge Ndita, who was seized with the matter on the 10th.

[14] Applicant was not present when the matter was postponed from 10 November to 12 November 2008, as he received no notification that the matter was postponed and or enrolled for hearing on those dates.

[15] On 12 November 2008, on Respondent's version, Applicant's name was called inside and outside Court, but he was not present, whereafter the Honourable Judge Ndita granted summary judgment in the absence of Applicant. It would appear that Ndita J was not advised by Respondent that Applicant was not informed of the postponement dates resulting in her instruction to call Applicant's name, both inside and outside of court, before she considered the matter.

[16] On 14 November 2008, Applicant delivered a notice to the Registrar of this Court, as well as to Respondent's attorney, enquiring about the date on which the matter should be placed on the Roll for hearing, as Applicant had received no further communications from Respondent, his attorneys or the Court after delivery of the opposing papers.

[17] Applicant submits that he was not in wilful default when he did not appear on 31 October 2008. He believed that the matter was opposed and that a date would be allocated in order for the parties to lead their evidence and properly argue the matter before a Judge.

[18] The fact that Respondent failed to notify Applicant of the postponement and the fact that Respondent failed to notify the court that Applicant was not aware of the postponement dates, raises serious concerns. It is trite that, when dealing with a litigant who appear in person, extra care should be taken in ensuring that such a litigant is aware of his/her rights, as well as the processes of Court. From the record of the hearing on 12 November 2010, it is clear that the honourable Judge Ndita took extra care in ascertaining whether Applicant, who was unrepresented, was present.

[19] It is clear from the action, the notices and the Affidavits filed by Applicant that he had always intended to oppose the matter.

[20] The respondent's version is in short that the alleged defects in the fish does not relate to the fish in respect of which the respondent's claim is based and that the alleged counterclaim amounts to R54 351,00 and therefore does not exceed Respondent's claim.

[21] The issues to be determined are the following.

21.1 What are the legal principles with regards to rescission of an order made by a court;

21.2 Do the facts in this matter comply with these requirements.

[22] It is trite that an applicant has 3 grounds available on which to base an application for rescission of judgment. The common law and rules 31(2) and 42 of the Uniform rules may provide grounds for a rescission of a judgment.

[23] The grounds in terms of the common law are as follows:

- (a) Applicant must show sufficient cause;
- (b) Such cause should have existed at the date of the final judgment;
and
- (c) There should be a causal connection between the circumstances that gave rise to the claim for rescission and the judgment.

[24] Rule 31(2)(b) reads as follows:

"A defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

[25] Rule 42 of the uniform rules also provides for variation and rescission of orders. Sub-rule 1 sets out the grounds on which an application of the rule can be brought:

- (a) Where an order or judgment was erroneously sought or granted in the absence of any affected party;
- (b) Where there is an ambiguity or patent error or omission to the extent of that ambiguity, error or omission.
- (c) Where an order or judgment was granted as a result of a common mistake to the parties.

[26] The grounds on which an application for rescission in terms of the common law can be brought are very narrow. The grounds subsequently introduced in terms of rules 31 and 42 are meant to add to these narrow measures.

[27] The application *in casu* will now be tested for compliance with the grounds listed in one of the abovementioned rules. It is clear from the papers that Rule 31 is not applicable as no confession or default judgment is present

[28] In *De Wet and Others v Western Bank Ltd*¹ it was held that this inherent jurisdiction of the court, does not include the right to interfere with the principle of finality of judgments, other than in circumstances specifically provided for in the rules or at common law. This is also the view I subscribe to. (See especially *Lazarus and Another v Nedcor Bank Ltd*, *Lazarus and Another v Absa Bank Ltd* 1999(2) SA 782 (WLD).

¹ 1979(2) SA 1031 (A)

[29] I am further of the view that the facts of this matter falls squarely within Rule 42(1)(a), i.e. that the order was erroneously sought or granted in the absence of an affected party.

[30] I am further of the view that Applicant should be granted leave to oppose Respondent's action.

[31] In the circumstances,

- (a) The summary judgment granted in the absence of Applicant under case no 15175/2008 is rescinded;
- (b) Applicant is granted leave to oppose the action.
- (c) Respondent is to pay the costs of this application.



FORTUIN, J