

SOUTH AFRICA / JUDGMENT

Autopax Passenger Service SOC v Mashile and Others (3360/2018) [2021] ZAMPMBHC 66 (21 May 2021)

[2021] ZAMPMBHC 66

COURT

Mbombela High Court, Mpumalanga

BEFORE

Greyling-Coetzer AJ

CASE / FILE NUMBER

3360/2018

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IN THE HIGH COURT OF

SOUTH AFRICA

MPUMALANGA DIVISION,

MBOMBELA (MAIN SEAT)

CASE

NUMBER: 3360/2018

(1) REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE:

21/05/2021

SIGNATURE:

In the matter between: AUTOPAX
 PASSENGER SERVICE SOC
 Applicant
 and
 MICHAEL
 MASHILE
 First
 Respondent
 SHERIFF,
 PRETORIA CENTRAL
 Second
 Respondent
 SHERIFF,
 PHALABORWA
 Third
 Respondent
In
re:-
 MICHAEL
 MASHILE
 Plaintiff
 and
 BONGANI
 KUPE
 First
 Defendant
 AUTOPAX
 PASSENGER SERVICE SOC
 Second
 Defendant

JUDGMENT

GREYLING-COETZER AJ

INTRODUCTION

- [1] This is an application in which the applicant seeks rescission of the default judgment granted against it on 28 January 2019 in favour of the first respondent for an amount of R1 700 000.00, founded on Uniform Rule 42.
- [2] The opposed application was enrolled for hearing on 2 March 2021. On 22 February 2021 the parties were informed that the matter had not been allocated for hearing as the court file did not comply with the practice directives. The applicant was afforded an opportunity to correct same by 10h00 on 24 February 2021, to ensure that the matter is allocated.[1]

- [3] The first respondent took it upon himself to correct the court file and filed corrected bundles on 23 February 2021. Accordingly the parties were provided with the virtual hearing guidelines on 26 February 2021, as well as an allocated time of 11h00 to 11h45.[2]
- [4] In terms of paragraph 2 of the virtual hearing guidelines provided to the parties, the applicant is responsible to set up a reliable link, which link needs to be sent to all participants prior to the hearing, but no later than 1 (one) day before the hearing date. In addition, the parties were directed to file a detailed chronology by 10h00 on 2 March 2021, and be prepared to make submissions in respect of the issues of *lis pendens*, withdrawal of a pending action post fact and the rules of court relied on for the relief sought. Only the first respondent adhered to aforesaid directive.
- [5] By 11h20 on the hearing date, no virtual hearing link had made its way to the court. Pursuant to enquiring, it became evident that the link was not sent in compliance with the virtual hearing guidelines, but only in the late afternoon on 1 March 2021, thereby not timeously reaching all the parties concerned. At the time, when aforementioned was established, the allocated hearing time of 11h00 – 11h45 had already run out, and only 15 minutes was left of the allocated time.
- [6] Accordingly and due to the remainder of the court roll having to be dealt with as per their individual allocated times, to avoid a postponement it was agreed that the matter will be dealt with on the papers, and both parties were granted an opportunity to file supplementary heads of argument, dealing inter alia with the issue of the wasted costs of the hearing of 2 March 2021, the issue of cost occasioned by the filing of the supplementary heads of argument, the effect of *lis pendens* in the present circumstances, the withdrawal of a pending action post fact and the rule relied on by the applicant in respect of the rescission application.
- [7] In this respect the applicant was granted until 15 March 2021 to file its supplementary heads of argument, and the first respondent until 29 March 2021. Both All parties field same.

FACTS

- [8] The applicant alleges that it became aware of the default

judgment

having been granted against it during the afternoon of 12 April 2019, when the second respondent (“ the Sheriff, Pretoria Central”) attended to the applicant’s offices at 4[...] P[...] K[...] Street, Pretoria, to execute a writ of execution. There are no indication on the papers that the first respondent demanded payment from the applicant on the strength of the judgment granted on 28 January 2019.

[9] According to the applicant the first respondent during May 2018 caused a summons to be issued against the applicant founded on a lease agreement purportedly entered into between the applicant and first respondent. This summons was issued under case number 1204/2018 (“first summons”) and defended by the applicant. Unbeknown to the applicant the first respondent then gave a different attorney instruction to instated a second summons 6 months later and during November of the same year. The second summons is founded on the same cause of action but under case number 3360/2018.

[10] On becoming aware of the default judgment, the applicant instructed Madlanga and Partners Inc Attorneys to establish when and how the default judgment was obtained, and to approach the court for a stay of execution. Over the days of 12 April 2019 to 16 April 2019 copies of all the relevant court documents were obtained. It was established

during the afternoon of 15 April 2019 that NM Mabunda Attorneys obtained the default judgment against the applicant, and the circumstances set out in paragraph 9 above.

[11] From the court documents obtained, it became clear that there were two active summonses, based on the same cause of action and essentially containing the same parties, at the time of the default

judgment

having been granted. It further appeared that the honourable court which granted the default judgment was not aware of this duplication.

[12] It is averred by the applicant that the crux of its defence is that the applicant is bound to observe and comply with Section 217 of the Constitution of the Republic of South Africa, the provisions of the Public Finance Management Act 1 of 1999, Treasury Regulations and its own supply chain management policy in procuring services. The contract concluded between the applicant and the first respondent did not comply with the aforesaid regulatory framework.

[13] The applicant explains that upon receipt of the second summons, none of the employees of the applicant acted on the summons, as it appeared on the face of it to be duplication of a matter which had

already been attended to. In substantiation it was alleged that such conduct was reasonable in the circumstances where the first summons was already defended, or at the very least that was defended but not yet pleaded to. In this respect the applicant caused a plea to be sent to its correspondent attorneys during August 2018. It however transpired that this plea was only filed later, and during April 2019.

- [14] The first respondent, in opposition, alleges that although he gave his erstwhile attorney instruction to pursue a claim against the applicant he was unaware of the pending matter under case number 1204/2018 at the time of the granting of the default judgment. The first respondent further states that he ended the mandate with his erstwhile attorney and gave instructed to NM Mabunda Attorneys to prosecute the said claim. No specificity in respect of the timing was placed before court.
- [15] The first respondent denies the validity of the defence relied on by the applicant. He elaborates that at no stage had an application or counter-claim been brought in order to declare the contract entered into between the applicant and the first respondent void ab initio or unenforceable. The first respondent further alleges that the non-attendance to the summons upon service thereof is negligent, as the case numbers between the two actions clearly differed.

ISSUES

- [16] It stands to be decided whether the default judgment was erroneously sought and granted.

LEGAL PRINCIPLES

- [17] The instant application is brought in terms of Rule 42(1) of the Uniform Rules of Court.[3] Rule 42 provides as follows:-

“(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;
- (b) an order of judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error omission;
- (c) an order or judgment granted as a result of a mistake common to the parties.

...”

- [18] From aforesaid it is clear that the application falls within the realm of Rule 42(1)(a).

- [19] As held in *Kgomo and Another v Standard Bank of South Africa*,^[4] with reference to *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*^[5] and *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*,^[6] the following principles govern rescissions under Rule 42(1)(a):-

- (a) The rule must be understood against its common law background.
- (b) The basic principle at common law is that once a judgment has been granted, the judge becomes *functus officio*, but subject to certain exceptions of which Rule 42(1)(a) is one.

- (c) The rule caters for a mistake in the proceedings.
 - (d) The mistake may either be one which appears on the record of proceedings, or one which subsequently becomes apparent from the information made available in an application for a rescission of judgment.
 - (e) A judgment cannot be said to have been granted erroneously in light of a subsequent disclosed defence, which was not known or raised at the time of the default judgment.
 - (f) The error may arise either in the process of seeking the judgment on the part of the applicant for default judgment, or in the process of granting the default judgment on the part of the court.
 - (g) The applicant for a rescission is not required to show, over and above the error, that there is good cause for the rescission, as contemplated in Rule 31(2)(b).
- [20] Therefore the only thing which is necessary to be shown by the applicant is that the prior order was erroneously sought or erroneously granted in the absence of a party affected thereby. Once the court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order, and it is not necessary for a party to show good cause for the sub-rule to apply.[7]
- [21] In deciding whether a judgment was erroneously granted, a court is not confined to the record of proceedings.[8] An order or judgment is 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.[9]
- [22] It is trite that an application in terms of Rule 42 needs to be launched within a reasonable time. For a judgment or order to be erroneously sought and granted, there needs to exist, at the time of its issue, an unknown fact which would have precluded the granting of the judgment, and which would have induced, if aware of it, a basis not to grant the judgment. [10]
- [23] It is common cause that two sets of legal proceedings were commenced with, the first summons under case number 1204/2018 during May 2018 and the second summons under case number 3360/2018 during November of the same year. It is further common cause that the cause of actions relied upon in both these summons are identical, being a written lease agreement.
- [24] I am of the view that had the court known about the lis pendens as established between these two summonses, it would in all probability not have granted the default judgment. But even should I be wrong in this respect, the court would not have granted the default judgment had it been aware of the first summons and that on comparing the allegations made in the first- and second summons and particulars of claim, it is clear that the first respondent was not entitled to the default judgment.

[25] In illustration, it was alleged in the first summons that pursuant to taking occupation of the leased premises on 1 December 2016, the applicant remained in the premises until 31 July 2017 when it vacated the premises. Prior to aforementioned, and on 20 February 2017, the applicant, in writing through its sales manager of Mpumalanga and Pretoria, repudiated the said lease agreement, in which notice the applicant terminated its lease agreement with the first respondent, as it had received threats from local taxi associations and believed itself to be at risk as to lives and property. In this letter it indicated that it intended to terminate the lease on 31 July 2017.[11]

[26] The first respondent then allege that it accepted the applicant's

repudiation and had cancelled the lease agreement, alternatively cancels it herewith. The first respondent then proceeded to formulate

its claim under three categories, being outstanding rental, past damages and future damages.

[27] Under "CLAIM FOR OUTSTANDING RENTAL" it was alleged that between the period 1 December 2016 to 31 July 2017, and prior to the applicant repudiating the lease agreement, the applicant failed to make payment of rental in the amount of R120 000.00. Same was calculated as follows:-

DUE DATE	FOR RENT	RENT DUE	RENT PAID	BALANCE
07/12/2016	R27 000	R25 000	R2 000	(DT)
07/01/2017	R27 000	R25 000	R4 000	(DT)
07/02/2017	R27 000	R0.00	R31 000	(DT)
07/03/2017	R27 000	R0.00	R58 000	(DT)
07/04/2017	R27 000	R0.00	R85 000	(DT)
07/05/2017	R27 000	R0.00	R112 000	(DT)
07/06/2017	R27 000	R25 000	R114 000	(DT)
07/07/2017	R27 000	R25 000	R116 000	(DT)

[28] The first respondent had set off the applicant's deposit of R27 000.00, therefore the outstanding rental amounts to R89 000.00

[29] Under the heading "PAST DAMAGES" it was alleged that pursuant to the repudiation of the lease agreement, and the subsequent cancellation thereof, and notwithstanding the first respondent's best efforts, the first respondent had not been able to secure an alternative tenant for the lease premises, and as a result had lost rental income for the months of August 2017 to March

2018. This was calculated to the value of R222 480.00 as follows:-

DUE DATE	FOR RENT	RENT DUE	RENT PAID	BALANCE
07/08/2017	R27 000	R0	R27 000	(DT)
07/09/2017	R27 000	R0	R54 000	(DT)
07/10/2017	R27 000	R0	R81 000	(DT)
07/11/2017	R27 000	R0	R108 000	(DT)
07/12/2017	R28 620	(Esc.)	R0	R136 620 (DT)
07/01/2018	R28 620	R0	R165 240	(DT)
07/02/2018	R28 620	R0	R193 860	(DT)
07/03/2018	R28 620	R0	R222 480	(DT)

[30] Under the heading 'FUTURE DAMAGES' it was alleged that as a result of the first respondent not being able to obtain a tenant to occupy the vacant lease premises, the first respondent leads (sic) damages as a result of loss of rental income for each month that the lease premises remained unoccupied. Same had been quantified at R593 036.40 as follows:-

DUE DATE FOR RENT RENT DUE RENT PAID BALANCE 07/04/2018 R28 620 R0 R28 620 (DT) 07/05/2018 R28 620 R0 R57 240 (DT) 07/06/2018 R28 620 R0 R85 860 (DT) 07/07/2018 R28 620 R0 R114 820 (DT) 07/08/2018 R28 620 R0 R143 100 (DT) 07/09/2018 R28 620 R0 R171 720 (DT) 07/10/2018 R28 620 R0 R200 370 (DT) 07/11/2018 R28 620 R0 R228 990 (DT) 07/12/2018 R30 337.20 (esc.) R0 R259 327.20 (DT) 07/01/2019 R30 337.20 R0 R289 664.44 (DT) 07/02/2019 R30 337.20 R0 R320 001.60 (DT) 07/03/2019 R30 337.20 R0 R350 338.80 (DT) 07/04/2019 R30 337.20 R0 R380 676.00 (DT) 07/05/2019 R30 337.20 R0 R411 013.20 (DT) 07/06/2019 R30 337.20 R0 R441 350.40 (DT) 07/07/2019 R30 337.20 R0 R471 687.60 (DT) 07/08/2019 R30 337.20 R0 R502 024.80 (DT) 07/09/2019 R30 337.20 R0 R532 362.00 (DT) 07/10/2019 R30 337.20 R0 R561 699.20 (DT) 07/11/2019 R30 337.20 R0 R593 036.40 (DT)

- [31] The lease agreement relied on by the first respondent in seeking the default judgment, does not make provision for an acceleration clause on which the amount of R1 700 000.00 is ostensibly based. Yet the first respondent applying in January 2019, almost 12 months before the lease was to terminate seek a rounded-off amount of R1 700 000.00, and in substantiation thereof, it is alleged that the lease agreement was entered not for a period of 3 (three) years at a monthly rental amount of R27 000.00. As a result of the aforementioned breach and consequences thereof, the plaintiff suffered damages amounting to R1 700 000.00, being the rental amount for a period of 20 (twenty) months on which the applicant defaulted. Briefly calculated same constitutes a little less than double the full term value of the lease.
- [32] The first respondent allege and confirm under oath, that the applicant occupied the lease premises as stipulated in the lease agreement, however the applicant had failed and/or refused and/or neglected to make rental payments in terms of the lease agreement as from February 2018 to date.[12] Yet the tax invoices/statements relied on are dated commencing in 2017.
- [33] Furthermore, the amounts claimed in terms of the said tax invoices/statements are different from that set out in the first summons, and seemingly included various balances brought forward. The final amount also does not line up as at 25 October 2019. On the first respondent's version, in the second summons, an amount of R1 700 254.08 was due, owing and payable.
- [34] Had the court been aware of the facts alleged in the first summons, more particularly above and that the applicant repudiated the lease agreement and that a substantial portion of the claim amount was

therefore unliquidated damages, the court would not have granted the default judgment in the absence of evidence in this regard.

Alternatively the court would have sought an explanation or made an appropriate order addressing same.

- [35] In the circumstances the default judgment stands to be rescinded.

PROSECUTION WITHIN ONE YEAR

- [36] On the papers filed by the first respondent, a point in limine was raised to the extent that the applicant failed to prosecute its application for rescission to finality within 1 (one) year of the date on which it was issued, as envisaged in the practice directives. No specific relief was sought based on this point in limine. I however briefly deal therewith.
- [37] The practice directives for the Mpumalanga Division of the High Court, issued in terms of Section 8(3) of the Superior Courts Act 10 of 2013, read with Rule 37A (i) and (ii) of the Uniform Rules of Court (as amended), issued on 9 January 2020, at clause 1.1 stipulates that:-
- “All judicial officers must strive to finalise all matters, including outstanding judgments, decisions or orders as expeditiously as possible. As a result civil cases in the High Court should be finalised within one year from the date of issue of summons or from date of issue of motion proceedings.”*
- [38] The aforesaid being so, there is no punitive provision in either the Rules of Court, alternatively the practice directive, stipulating what the circumstances ought to be, or what the remedy would be, should same not be complied with.
- [39] Consequentially I do not find same to be a absolute bases for refusal of the relief sought by the applicant. The point in limine therefore fails.

LIS PENDENS

- [40] It was submitted on behalf of the first respondent that as defence, the special plea of lis pendens is merely dilatory. If it is upheld, the usual practice is to stay the proceedings in the matter and not to dismiss the matter. It is trite, so the argument goes, that lis alibi pendens, if not successfully invoked, puts an end to the plaintiff's or applicant's case. Rather, it allows for the stay of the matter pending the final determination of an earlier matter.
- [41] The first respondent placed reliance on the matter of *Starita v Absa Bank Ltd and Another*. [13] . I agree with that held by Gautschi AJ in the aforementioned matter, however and more particularly that the mere existence of a secondary summons does not invalidate a default judgment granted on a second summons.
- [42] However, authorities stand to be considered in context. In the *Starita* matter (supra) it is confirmed that in such circumstances the applicant would enjoy a defence. As held the existences of a defence is not relevant under Ruel 42 (1) (a). In the present application, the contentions on behalf of the applicant is that had Her Ladyship Justice Mali known of the existence of the second summons, she would not have granted the default judgment. This, in my mind, is correct. Although she would maybe not have dismissed the default judgment application, she would have considered the content of the first summons as against that of the second summons, alternatively she would have investigated the circumstances under which two summons have been issued by two different attorneys within a very short period of time. In the further alternative she would have enquired as to why two summonses existed, or why no mention of the first summons was made in the application for default judgment. All of aforesaid would have caused the default judgment not to be granted.

[43] Relying on the Supreme Court judgment of Caesarstone SDot-Yam Ltd v The World of Marble and Granite 2000 CC and Others[14] where it was held by Wallace J in respect of the doctrine of lis pendens that:-

“... The policy underpinning it (this now being the doctrine of lis pendens) it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over a hundred years.”

[44] It was argued that in line with aforesaid policy consideration, that the second summons was lis pendens. But in addition to this, and founded on aforesaid policy consideration, had Her Ladyship Justice Mali been aware of the fact that the second summons existed, she would in all probability not have granted the default judgment in exercising her discretion. By not knowing of the existence of the second summons, the court was unable to exercise any discretion, as it was unaware of the parallel summons.

EFFECT OF THE FIRST RESPONDENT'S NOTICE OF WITHDRAWAL OF THE FIRST SUMMONS POST FACT

[45] It was submitted in above respect by the first respondent that the notice of withdrawal served to affirm that the first summons had indeed been finalised between the parties.

[46] On behalf of the applicant it was submitted that same has no effect, as it was served post the institution of the rescission proceedings, and therefore had no effect on the fact that the first summons was in existence when the default judgment was erroneously sought and granted.

[47] I am in agreement with the applicant contentions. The matter stand to be considered as at the time of granting of the default judgment.

WASTED COSTS OF 2 MARCH 2021

[48] It is evident that the applicant was the cause of the wasted costs as

it was the party who did not comply with the virtual hearing guideline and thereby caused the matter not to proceed within the

allocated time thereby necessitating the additional heads of argument to be filed in order to effectively deal with the matter avoiding a further cost incurring postponement.

ORDER

[49] The following order is made:-

1. The default judgment granted against the applicant under case number 3360/2018 is hereby rescinded and set aside.

2. The applicant is granted leave to defend the action and ordered to enter an appearance to defend within 10 days of this order;
3. The cost to be cost in the action;
4. The applicant is ordered to pay the wasted costs occasioned by the hearing of 2 March 2021 and the filing of supplementary heads of argument in line with the order of 2 March 2021.

DATE OF HEARING:

2 March 2021

DATE OF FURTHER

SUBMISSIONS

RECEIVED: 29 March 2021

DATE OF JUDGMENT: 21 May 2021

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[1]

The opposed motion court roll closes at 12h00 on Wednesday two weeks before the week in which the matter is set down for hearing therefore the applicable opposed motion roll closed on 17 February 2021 for all filing and preparation of files.

[2]

In terms of the applicable Practice Directives, an opposed motion stands to be dealt with within 45 minutes, unless the parties

advance reasons substantiating a longer period of time to be allocated.

[3] Applicant's supplementary heads of argument par 13

[4] 2016

(2) SA 184 (GP)

[5] 2003

(6) SA 1 (SCA)

[6] 2007

(6) SA 87 (SCA)

[7] *Rossitter v Nedbank Ltd* (Unreported) SCA case number 96/2014 (dated 1 December 2015) at par [16]

[8] *Lodhi* (supra) at 93C - H

[9] *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP) at 593F – 594I and *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C) at 417G - H

[10] *Occupiers, Berea v De Wet N.O. and Another* 2017 (5) SA 346 (CC) at 366E – 367A

[11] A copy of the letter of termination was annexed to the particulars of claim as “POC2”

[12] “...to date” being November 2018

[13] 2010

(3) SA 443 (GSJ)

[14] 2013

(6) SA 499 (SCA)

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