

SOUTH AFRICA / JUDGMENT

Belchir v Malik Laboraties Pty (Ltd) (58472/2020) [2022] ZAGPPHC 397 (26 May 2022) [2022] ZAGPPHC 397

COURT

North Gauteng High Court, Pretoria

BEFORE

N.P. Mali

CASE / FILE NUMBER

58472/2020

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION PRETORIA
CASE
NO: 58472/2020

DOH: 22 NOVEMBER 2021

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
26/2/2022
MAHAMOUD
ADAM BECHIR
APPLICANT
and
MALIK
LABORATIES PTY
(LTD)
RESPONDENT

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE OF HAND DOWN SHALL BE DEEMED TO 26 MAY 2022

MALI J

1. This is an application for the rescission of default judgment brought in terms of Rule 42 of the Rules of Court and in terms of common law. The judgment sought to be rescinded was granted by this honorable on 24 May 2019 for the payment of the sum of R 1 476 694.83 (One million, Four Hundred and Seventy-Six Thousand, Six Hundred and Ninety-Four Rand, Eighty-three Cents).

2. On 20 June 2016 the parties entered into a residential lease

agree-ment. The lease was terminated due to applicant's non-payment of water and electricity bills. As a result, in 2008 the

applicant signed acknowledgment of debt ("AOD"). The applicant breached the terms of AOD hence the application for default

judgment.

3. The issue for determination is whether the order sought to be

rescinded was granted erroneously as envisaged in terms common law or in terms of Rule 42 of the Uniform Rules of the Court ("the Rules")

4. Judgment obtained by default under common law can be rescinded by court if the applicant has shown, sufficient cause for rescission. Where a judgment is to be set aside on the basis of Justus error under common law in *De Wet v Western Bank Ltd* 1979 (2) SA 1031(A) it was held that the discretion of the courts in setting aside a default judgment under common law extend beyond, and is not limited to, the grounds provided for in rules 31 and 42(1) of the Rules. Rule 31 2(b) provides;

"a defendant may within twenty days after 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 such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

Rule 42(1) (a) of the rules provide;

"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.

5. In the case of *Kratshi v Absa Bank Limited and Others* (39859/2015)

[2016] ZAG-PPHC 221 (15 April 2016), Majiki J clearly restated the applicable principles. She held as follows:

"[13] If the applicant relies on common law in her application, she/he has to show sufficient cause for rescission of the judgment. This legal dispensation too, requires that she presents reasonable and acceptable explanation for the default and that on the merits she has a bona fide defence which prima facie, carries some prospect or probability of success. The enquiry as to sufficient cause both under Rule 31(2) (b) or common law has been held to be linked to whether the applicant acted in willful disregard of the court rules,

processes and time limits.

[14] This leaves the applicant with the determination of whether she has satisfied the requirements of Rule 42(1) (a). The consideration of the issue of the existence of an error in the sense referred to in Rule 42(1) (a) has been a subject of interrogation in the past by the courts. According to the decision in *Topal v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650 0-J no good cause need be established for rescission application brought in terms of Rule 42(1) (a).

[15] Similarly I do not deem it necessary to deal with the aspect of existence of bona fide defence. In *Lodhi 2 Properties Investment CC v Border Developments* 2007 (6) SA 87 at 95F it was held that the existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment"

6. It is common cause that the judgment was granted in the absence of the applicant. The argument proffered on behalf of the applicant is that the applicant was out of the country, this is despite the summons having been served upon Simon, according to the applicant his brother who informed him about the summons. The summons was served at the residential address which is a subject of lease.

7. It is common cause that the respondent took almost a year to apply for rescission of the judgment. This is despite him knowing about the execution order against movables which was served upon his brother again. After Sheriff had attached certain movable property ("movables") on 5 November 2019, the respondent's attorney of record received a letter from Boshego Attorneys demanding urgent release of the movables. The reason for release of movables was that the attached movables belonged to *Dourba (Pty) Ltd* wherein the applicant is a Director.

8. The issue left is whether the applicant on the merits has a bona fide defence which prima facie, carries some prospect or probability of success. The defence submitted on behalf of the applicant is that he has diplomatic immunity, therefore exempted from litigation in South Africa. The defence does not have probability of success as is clear from the certificate issued by the Department of International Relations and Co-operation ("DIRCO") on 1 December 2020. The content reads as follows:

"According to the Department's record, Mr. Adam Bechir Mahamoud, the former Ambassador of the Republic of Chad to South Africa, enjoyed full diplomatic immunity and privileges for the duration of his term as Ambassador, from 19 May 2012 until 19 May 2016 in the Republic of South Africa in terms of the Vienna Convention on Diplomatic Relations, 1961 ("Vienna Convention"; which has the force of law in South Africa pursuant to Section 9(3) of the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001).

As from 20 May 2016 Mr. Mahamoud does not qualify for any immunities and privileges under the Diplomatic Immunities and Privileges Act, 2001 (Act No 37 of 2001), as amended, or the Conventions."

9. From the above the certificate makes it clear that the applicant's

immunity which qualifies him privileges ceased on 19 May 2016. The cause of action arose on 2018, when he breached the terms of AOD. On merits I find that there are no prospects of success. Same as in Kratshi above, the issue left for determination is whether the applicant has satisfied the requirements of Rule 42 (1) above.

RULE 42 (1)

10. As at 19 May 2012 the applicant was a Diplomatic agent of the sending state the Republic of Chad ("Chad") to the receiving state the Republic of South Africa ("South Africa"). The applicant leased residential property from the respondent for consideration. As alluded above, the applicant breached the terms of the AOD he had signed in his personal capacity arising from the lease agreement between the parties.
11. It has been submitted on behalf of the applicant that the order was granted erroneously because the court did not know that the applicant was a diplomat therefore clothed with immunity. In its defense the respondent relies on the certificate issued by the DIRCO. The contents of the certificate can be gleaned from paragraph 8 above.
12. Furthermore, Section 9 of the Act reads as follows:
- "9. Register of persons entitled for immunities or privileges.-
- (1) The Minister must keep a register in which there must be registered the names of all the persons who enjoy-
- (a) immunity from the civil and criminal jurisdiction of the courts of the Republic; or

- (b) immunities and privileges in accordance with the Conventions or in terms of any agreement contemplated in section 7. (2) The Minister must cause a complete list of all persons on the register to be published on the Website of the Department of Foreign Affairs, and must cause the list to be updated as frequently as may be necessary, and made publicly available.

[Subs. (2) substituted by s. 2 of Act 35/2008]

- (3) If any question arises as to whether or not any person enjoys any immunity or privilege under this Act or the Conventions, a certificate under the hand or issued under the authority of the Director-General stating any fact relating to that question, is prima facie evidence of that fact.

[Subs. (3) substituted by s. 2 of Act 35/2008]"

13. In essence the applicant's argument is that in the event the court which granted default judgment was made aware of his Diplomatic status the court would not have granted the judgment. The applicant has not proved that his name is on the register as stated above. This is further confirmed by the certificate from DIRCO which self-explanatory. Applicant is challenging the certificate and its contents. The attack is against the form and in the alternative the substance of the certificate that it has not been issued under the hand of the Director General ("OG"). In the present case it is issued by Chief of Protocol not DG according to the respondent is defective. On behalf of the respondent it was submitted that the Deputy Chief of State Protocol was authorized by the DG.
14. Further argument proffered on behalf of the applicant is that in terms of Article 31(1) of the Convention. The Convention confers a jurisdictional immunity on diplomatic agents in respect of both private and official acts, except for three designated categories of private act, namely-
- (a) "a real action relating to private immovable property situated in the territory of the receiving State, unless the diplomat holds it on behalf of the sending State for the purposes of the mission;
- (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the State;
- (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."
15. None of the above exemptions are applicable to the applicant. The action giving rise to the judgment is indeed an action relating to commercial activity exercised by the applicant outside his official functions. It is not in dispute that he leased the property for his stay and his family.

16. Applicant's version is that his diplomatic status was valid from 19 May 2012 until 9 May 2017 on the basis of the Diplomatic passport annexed to his replying affidavit. The reason the passport was not annexed to the founding affidavit is because the applicant believed that the re-spondent was in agreement with the applicant's version. This is be-cause the applicant kept on referring to the applicant as a diplomatic personnel. It is exactly this reason that

the applicant believes the court would not had granted default judgement if the applicant had informed the court that he was a

diplomat.

17. Further argument proffered on behalf of the respondent is that the pass- port the applicant seeks to use as a defence was issued by Chad, not South Africa. On his own version the applicant's Chad issued passport was valid until 2017. As stated above the cause of action arose in 2018. His passport cannot on its own confer immunity upon the applicant when DIRCO certificate specifically mentions the applicant has no im-munity.
18. Having regard to the above I take consideration of the prevailing rules of interpretation; see amongst Natal Joint Municipal Pension Fund v Endumeni Municipality (92012010) {2012} ZASCA. In this case the court held as follows as to the manner of interpreting documents:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instru-ment, or contract, having regard to the context provided by read-ing

the particular provision or provisions in the light of the docu-ment as a whole and the circumstances attendant upon its com-ing into existence. Whatever the nature of the document, consid-eration

must be given to the language used in the light of the or-dinary rules of grammar and syntax; the context in which the pro- vision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

19. It cannot make business like results that any former Diplomat because he chooses to stay in the receiving country even though the Diplomatic status had come to an end that they continue to enjoy privileges and immunities. Even if the DIRCO certificate must be disregarded accord-ing to the applicant the answer is still that he is not a diplomat. The sensible and business like interpretation is that the applicant was not a Diplomat clothed with immunity at the time of hearing the default judge-ment. There was nothing pertaining to Diplomatic immunity needed to be presented to the court. As to whether the respondent refers to the applicant as a Diplomat is irrelevant for the purposes of this application.

20. It is concluded that the default judgment granted on 24 May 2019 was not issued erroneously, it therefore does not meet the requirement of Rule 42 (1). The application cannot succeed.

ORDER

1. The application is dismissed with costs.

N.P. MALI

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:

Adv. M I Boko

Instructed by Boshego Attorneys

For the Respondent:

Adv. R A Foden

Instructed by Ross & Jacobz Inc

packages constituting the bag but he shall nor be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

Article 28

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2. His papers, correspondence and, except as provided in paragraph 3 of article 31, his property, shall likewise enjoy inviolability.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
 - (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
 - (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
 - (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
2. A diplomatic agent is not obliged to give evidence as a witness.
3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.
4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

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