

SOUTH AFRICA / JUDGMENT

Bhembe and Another v Industrial Development Incorporation Of South Africa (17815/2020) [2023] ZAGPJHC 223 (22 February 2023)

[2023] ZAGPJHC 223**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Hopkins AJ

CASE / FILE NUMBER

17815/2020

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DEFAULT JUDGMENT AND NOTICE OF SET DOWN

CIVIL

PROCEDURE – Default judgment – Notice of set down –
Requirements of the Division's Practice

Directives 9.20(1)

and 9.14(1) – Requiring notice of set down to be served on
defendant where unopposed application

is made six months or longer

after the date on which the application or summons was served –

Application for default

judgment is an unopposed application –

Irregularity – Default judgment rescinded – Uniform

Rule 42(1)(a).

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

Case

No. 17815/2020

(1)

REPORTABLE: YES

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED: YES.

DATE:

22 February 2023

In

the matter between:

SAMUEL
BHEMBE
First Applicant
SAKHILE
MASUKU
Second Applicant
and
THE
INDUSTRIAL DEVELOPMENT INCORPORATION
OF
SOUTH AFRICA
Respondent

JUDGMENT

HOPKINS AJ

1. The applicants have approached this court to rescind an order granted against them in their absence.

2. The application has been made in terms of Uniform Rule 42(1)(a) which provides that:

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 an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

3. On 1 April 2021, the respondent obtained a default judgment against the applicants who were ordered to pay the respondent R75,571,519.02 with interest. For this amount they were jointly and severally liable. Additionally, the first applicant was ordered to pay the respondent a further amount of R24,438,715.61 with interest, and the second applicant was ordered to pay the respondent a further R32,584,954.14 with interest.

4. The applicants allege that the default judgment granted to the respondent on 1 April 2021 had been erroneously sought and/or erroneously granted.

5. The process by which the respondent obtained its default judgment requires further scrutiny.

1.

2.

3.

3.1. The respondent issued its summons out of this court on 21 July 2020.

3.2. The Sheriff served the summons on the applicants on 12 August 2020.

3.3. The summons called upon the applicants to deliver their notices of intention to defend within 10 days of receiving the summons.

3.4. It is common cause that the applicants received the summons but did not deliver any notices of intention to defend.

3.5. On 3 November 2020, the respondent applied to the Registrar of this court for default judgment against the applicants.

3.6. On 19 March 2021, the respondent filed a notice of set down with the Registrar.

3.7. Default judgment was granted against the applicants on 1 April 2021.

6. It is this judgment of 1 April 2021 that the applicants seek to have rescinded in terms of rule 42(1)(a).
7. In their founding affidavit, the applicants explained why it is that they did not enter an appearance to defend despite being served with the summons. They also provided the basis for what they claim is a bona fide defence to the respondent's claim. The respondent, for its part, denies the adequacy of the applicants' explanation for not defending the action. It also denies that they have a bona fide defence.
8. I was urged by the applicants' counsel, Mr Richard, to find that a procedural irregularity had occurred which, so he contended, rendered it unnecessary for the applicants to show good cause for a rescission. The existence of a procedural irregularity, so his argument went, was sufficient to justify rescission. His argued that if I am inclined to find that there was indeed an irregularity in the process followed by the respondent, the applicants need not establish that they have a reasonable explanation for not defending the action nor do they need to demonstrate that they have a bona fide defence to the respondents' claim.
9. In support of his argument that a procedural irregularity had occurred, Mr Richard referred me to the practice directives in chapter 9 of this court's Practice Manual, in particular practice directive 9.20 which is entitled "stale service".
10. Practice directive 9.20 (1) provides that:

Where any unopposed application is made six months or longer after the date on which the application or summons was served, a notice of set down must be served on the defendant or respondent.

11. Mr Richard, relying on practice directive 9.20 (1), submitted that an application for default judgment is an unopposed application and that, in this instance, the application for default judgment was made more than six months after the date on which the summons was served. For that reason, he contended, a notice of set down should have been served on the applicants. Taking his argument one step further, he then submitted that because the notice of set down was not served on the applicants, a procedural irregularity had occurred:

non-compliance with practice directive 9.20 (1). His argument concluded with a further submission that the procedural irregularity

is sufficient to justify a rescission of the order obtained by default judgment, thus rendering redundant the usual requirement of good cause.

12. Mr Mnyandu, who represented the respondent, argued that practice directive 9.20 (1) does not apply in these circumstances. He argued that practice directive 9.20 (1) only applies to unopposed applications. This is made clear in the text of the practice directive itself. Moreover, he pointed out that the Practice Manual itself defines an unopposed application in paragraph 9.9.1. For the sake of completeness, I quote the whole of paragraph 9.9.1 below:

1. For the purposes of this directive “unopposed motions” shall include:

1.1. For purpose of this directive: “unopposed motions” shall include all motions and applications in which the respondent has failed to deliver an answering affidavit and has not given any notice of an intention only to raise a question of law (rule 6(5)(d)(iii) or a point in limine; and unopposed summary judgment applications (not more than 30 per day);

1.2. Opposed summary judgment applications (not more than 5 per day are to be heard on a separate roll (the SJ)). The judge hearing these matters may roll over the hearing of the matter to another day of the week. Convenience of counsel will be considered; and

1.3. Unopposed and opposed rule 43 applications are to be heard on a separate roll with unopposed divorces (the divorce roll) the judge hearing these matters may roll over the hearing of a matter to another day in the week. Convenience of counsel will be considered; and

1.4. General opposed interlocutory applications, not more than three (excluding opposed exceptions, interlocutory interdicts, applications in terms of chapter 6.5.2 are to be heard in the unopposed motion roll; and

1.5. Reference below to unopposed motions refer to 1.1 to 1.4 above unless specifically referenced.

13. Mr Mnyandu, with reference to the definition in paragraph 9.9.1, submitted that an application for default judgment is not an unopposed application for the purposes of practice directive 9.20 (1) because it has not been specifically included in the list of unopposed motions set out in 1.1 to 1.4 in paragraph 9.9.1. This, he went on to submit, removes an application for default judgment from the ambit of practice directive 9.20 (1) because the practice directive is limited in its application to only those motions listed in 1.1 to 1.4 and no others. He therefore urged me to interpret the words “any unopposed application” as they appear in practice directive 9.20 (1) in a restrictive manner.

14. I accept that paragraph 9.9.1 provides that, for the purposes of the practice directive, a list of unopposed motions has been identified in 1.1 to 1.4. However, the purpose of including the list in paragraph 9.1.1 is to enlarge (not limit) the group of applications that the unopposed motion court must deal with on its roll. This is apparent from the list itself. Let me start with

1.1, its effect is to allow the unopposed motion court to deal with an opposed application if no answering affidavit has been delivered even though a notice of intention to oppose has been (subject to the exceptions

created in the text itself). Then I move to 1.2, its effect is to enable the unopposed motion court to deal with opposed summary judgment applications (subject to the limitation stipulated in the text itself). And then 1.3 which makes provision for how both unopposed and opposed rule 43 applications are to be dealt with. Finally, 1.4 has the effect of enabling the unopposed motion court to deal with general opposed interlocutory applications. Thus, the types of motions included in 1.1 to 1.4 in paragraph 9.9.1 are not typically unopposed applications. The purpose of paragraph 9.9.1 is plainly to enlarge the group of motions that must be dealt with in the unopposed motion court. The purpose of paragraph 9.9.1 is therefore not to define what an unopposed application is, but rather to inform practitioners about what types of matters they should place on the unopposed motion court roll. Understood in this way, paragraph 9.9.1 was not designed to restrict the interpretation of what an “unopposed application” is for the purposes of practice directive 9.20 (1).

15. I am fortified in my view by the introduction to paragraph 9.9.1 which expressly states that “for purposes of this practice directive an unopposed motion shall include...” and then it goes on to include a number of motions that are plainly not unopposed applications. The word “include” as it appears here, given the context, must mean “in addition to...” and not “restricted only to...”.
16. In my view, practice directive 9.20 (1) applies to “any unopposed application” as its first words tell us. An application for default judgment is an unopposed application. It is typically obtained by a plaintiff in the absence of a defendant without opposition.
17. Mr Mnyandu raised a second reason why, in his submission, applications for default judgment ought not to be considered under practice directive 9.20 (1). That is so, he argued, because the Practice Manual has a separate practice directive dedicated to applications for default judgment. He referred me to practice directive 9.14 (1) in the practice manual which reads as follows:

In addition to any requirement which the Registrar may impose, a notice of set down shall be served and filed in all cases where an intention to defend has been filed. In addition, if the service of a summons took place more than six months prior to the notice of set down, such notice shall be served on the defendant.

18. However, Mr Mnyandu argued that practice directive 9.14 (1) also does not apply. That is so, he submitted, because on a proper interpretation of practice directive 9.14 (1) a notice of set down only needs to be served on a defendant if the defendant has filed a notice of intention to defend. If no notice of intention to defend has been filed then, so his argument went, there is no obligation on the plaintiff to serve a notice of set down on the defendant even if the notice of set down is produced more than six months after the summons was served. This he contended is implicit in the wording of practice directive 9.14 (1).

19. It is correct that practice directive 9.14 (1) applies pertinently to applications for default judgment. However, it applies in particular to actions that have been defended. We see this from the first sentence which suggests that, at a minimum, a notice of set down shall be served and filed in all cases where an intention to defend has been filed. The second sentence in practice directive 9.14 (1) states that in addition to this, a notice of set down must be served on the defendant if more than six months has elapsed since the summons was served.
20. Mr Mnyandu argued that the words “in addition...” at the beginning of the second sentence indicates that the second sentence only applies if the defendant has entered a notice of intention to defend because that is a requirement in the first sentence, and the second sentence adds to what is already contained in the first. I disagree. I am of the view that the words “in addition...” in the beginning of the second sentence mean that in addition to the obligation that a plaintiff has to serve and file a notice of set down where the action is defended, he or she must also, additionally, serve a notice of set down on the defendant if the application for default judgment is made more than six months after the summons was served. I am therefore of the view that the

respondent in this case was obliged to serve the notice of set down on the applicants because it was applying for default judgment more than six months after the summons had been served.

21. Both practice directive 9.20 (1) and 9.14 (1) require that a plaintiff who has issued summons against a defendant must serve a notice of set down on the defendant before proceeding further with the litigation if a period of six months has elapsed. There seems to be good reason for this. Six months is a relatively long time for a case to lie dormant. There may be a number of reasons for the inactivity on the plaintiff's part. Whatever those reasons may be, the practice of this court requires that, if more than six months has elapsed, the plaintiff must give the defendant notice that he or she is reviving the case. The giving of notice may be regarded as a tap on the shoulder. The plaintiff effectively signals to the defendant that although nothing has happened for six months, he or she needs to be aware that something is about to happen imminently.
22. It is therefore my conclusion that, because more than six months had elapsed after the respondent served the summons, it was obliged to serve the notice of set down on the applicants. That obligation arises from both practice directives 9.20 and 9.14. They are, as Mr Richard submitted, provisions that are cable of co-existing.
23. The respondent acted in a procedurally irregular manner when it applied for default judgment after more than six months had elapsed after the summons was served by not serving the notice of set down on the applicants.
24. But what is the consequence of this procedural irregularity?
25. *Alkema J* held in *National Pride Trading 452 vs. Media 24 2010 (6) SA 587 (ECP)* at para 56 that:

Any order or judgment made against a party in his absence due to an error not attributable to him, is such a profound intervention in his right to a fair trial and right to be heard that, for this reason alone, the judgment or order should be set aside without further ado.

26. The Supreme Court of Appeal has had occasion to consider the effect of a procedural irregularity arising out of non-compliance with a practice directive of the KwaZulu Natal Division of the High Court which resulted in a default judgment being taken. *Rossitter and Others vs. Nedbank Ltd* (96/2014) [2015] ZASCA 196 (1 December 2015), like this case, concerned an application made under Uniform Rule 42(1)(a) for rescission on the basis that a default judgment had been erroneously sought and/or erroneously granted in the absence of the defendant. In *Rossitter* the defendant had entered an appearance to defend the action but had not delivered a plea. The plaintiff placed the defendant under bar, requiring that his plea be filed within 5 days. When it was not delivered within those 5 days, the plaintiff lodged an application for default judgment with the Registrar and default judgment was granted. The defendant subsequently brought an application to rescind it. In the founding affidavit to support the rescission application, the defendant's attorney confirmed having received the notice of bar but said that he had been too busy with other matters to attend to it. Apparently the defendant's attorney also blamed his support staff for not timeously attending to it. Although the Supreme Court of Appeal made the point that this explanation was far from satisfactory, it nevertheless held that it did not consider it necessary to decide whether or not good cause existed for the purposes of rescission. That is so, held the Supreme Court of Appeal, because the judgment had been erroneously sought and erroneously granted in circumstances where there was non-compliance with the practice directive in paragraph 2.3 of that court's Practice Manual. Paragraph 2.3 provided that in the KwaZulu Natal Division of the High Court "where an application for default judgment is made six months after the date of service of a summons it is both the practice of the Registrar's office and the court to require that a notice of set down is served on the defendant informing him/her that default judgment will be sought on a given date and time, such date and time being not less than 5 days from the notice". In *Rossitter* the plaintiff did give the defendant notice of default judgment but his notice failed to provide a date and time. The Supreme Court of Appeal held this to be a fatally defective procedural error which justified rescission on that basis alone, rendering it unnecessary for the defendant to show good cause.
27. I am guided in this case by the Supreme Court of Appeal's judgment in *Rossitter*. The applicants in this case are entitled to have the order granted against them on 1 April 2021 rescinded. Furthermore, considerations are good cause do not enter the equation.
28. I make the following order:
 1. The default judgment granted against the applicants on 1 April 2021 under Case No. 17815/2020 is rescinded.
 2. The respondent is ordered to pay for costs of the application.

DATE OF HEARING:

13 February 2023

DATE OF

JUDGMENT:

22 February 2023

Appearances

For the applicants: Adv.

C Richard

Instructed by: Weavind

& Weavind Attorneys Inc.

Pretoria

For the respondent: Adv.

Khaya Mnyandu

Instructed by: Mothle

Jooma Sabdia Inc.

BHEMBE & ANOTHER V INDUSTRIAL DEVELOPMENT INC. OF SOUTH AFRICA

SUMMARY

Procedure – Rescission of default judgment – Rule 42(1)(a) – judgment erroneously sought/ granted – procedural irregularity rendering it unnecessary to show good cause – interpretation of practice directive 9.20(1) and 9.14 of Practice Manual.

Practice directive 9.20(1) and 9.14(1) of this court's Practice Manual require that a plaintiff who has issued summons against a defendant must serve a notice of set down on the defendant before proceeding further with the litigation if a period of six months has elapsed. This is for good reason. Six months is a relatively long time for a case to lie dormant. Whatever the reason for the inactivity, the practice of this court requires that, if more than six months has elapsed, the plaintiff must give the defendant notice that s/he is reviving the case.

In casu, despite being served with summons, the applicants did not enter an appearance to defend. Default judgment was granted against them. They now seek to rescind the default judgment. It was argued on their behalf that a procedural irregularity occurred, rendering it unnecessary for them to show good cause for a rescission. The existence of this procedural irregularity, it was argued, was sufficient to justify this rescission. Relying on this court's Practice Manual, particularly practice directive 9.20(1) which requires a notice of set down to be served on

a defendant/respondent, where an unopposed application is made six months or longer after the date on which the application or summons was served, the applicants submit that an application for default judgment is an unopposed application as the default judgment against them falls in the category provided for in the directive. For this reason, they should have been served with a notice of set down. Therefore, a procedural irregularity (non-compliance with practice directive 9.20(1)) occurred.

Respondent's grounds of opposition

Practice directive 9.9.1

The respondent disagrees on two grounds. The first is that practice directive 9.20(1) only applies to unopposed applications as confined in practice directive 9.9.1. Therefore, so the argument for the respondent went, an application for default judgment is not an unopposed application for purposes of practice directive 9.20(1) because it has not been specifically included in the list of unopposed motions set out in paragraphs 1.1 to 1.4 of 9.9.1. Directive 9.9.1 states "for purposes of this directive 'unopposed motions' shall include...." and then goes on to include a number of motions. It was argued further that the court must interpret the words "any unopposed application" as they appear in practice directive 9.20(1) in a restrictive manner.

Despite paragraph 9.9.1 providing a list of unopposed motions, the court accepts that the purpose is to enlarge and not limit the group of applications that the unopposed motion court must deal with on its roll. This is apparent from the list itself. The types of motions included in 9.9.1 are not typically unopposed applications. The purpose of paragraph 9.9.1 is not to define what an unopposed application is, but rather to inform practitioners on the types of matters they should place on the unopposed motion court roll. Understood this way, directive 9.9.1 was not designed to restrict the interpretation of what an "unopposed application" is for the purposes of directive 9.20(1).

Further, the word "include" in directive 9.9.1, given the context, must mean "in addition to" and not "restricted only to". In the courts view, directive 9.20(1) applies to "any unopposed application". A default judgment application is an unopposed application since it is typically obtained by a plaintiff in the defendant's absence without opposition.

Practice directive 9.14(1)

The respondent's second reason why applications for default judgment ought not to be considered under practice directive 9.20(1) since the Practice Manual has dedicated a separate directive for default judgment applications, that is, practice directive 9.14(1), falls to be dismissed also. The further argument by the respondent that directive 9.14(1) also does not apply because on a proper interpretation of the directive, a notice of set down only need be served on a defendant if same has filed a notice of intention to defend must also fail. If no notice of intention to defend is filed, then, the respondent's argument went, there is no obligation on the plaintiff to serve a notice of set down on the defendant even if the notice of set down is produced more than six months after the summons was served. It was contended that this was implicit in the wording

of practice directive 9.14(1).

Held: the words “in addition” in directive 9.14(1) mean that in addition to the plaintiff’s obligation to serve and file a notice of set down where the action is defended, s/he must also, additionally, serve a notice of set down on the defendant if the application for default judgment is made more than six months after the summons was served. The respondent in casu was therefore obliged to serve the notice of set down on the applicants because it was applying for default judgment more than six months after the summons was served.

Found: more than six months had elapsed after the respondent served the summons, it was obliged to serve the notice of set down on the applicants. That obligation arises from both practice directives 9.20 and 9.14.

Further: the respondent acted in a procedurally irregular manner when it applied for default judgment after more than six months had elapsed after the summons was served by not serving the notice of set down on the applicants.

Further: the effect of this procedural irregularity is that the default judgment is rescinded.

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