

SOUTH AFRICA / JUDGMENT

Biyana v Nedbank Limited (46214/2018) [2021] ZAGPPHC 628 (20 September 2021) [2021] ZAGPPHC 628

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi VV

CASE / FILE NUMBER

46214/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE
NUMBER: 46214/2018
20
SEPTEMBER 2021
In

the matter between:

LUDWE MBASA
BIYANA APPLICANT
and
NEDBANK
LIMITED RESPONDENT

JUDGMENT

TLHAPI J

- [1] This is an application to rescind a Summary Judgement granted on 3 September 2019, which the applicant states was erroneously granted in his absence and, he seeks that leave be granted to the defend the action.

- [2] The application relates to an action instituted by the respondent for the payment of R686 178.50 plus interest and that an order be granted to declare the immovable property executable at a reserve price. The applicant had breached the loan and debt restructuring agreements. After filing an intention to defend an application for Summary Judgement was launched which he opposed and filed an opposing affidavit.
- [3] On 18 December 2018 the applicant received the respondent's heads of argument, and practice note in which the respondent advised that it had not complied with section 129 of the National Credit Act and would seek a postponement of the application for Summary Judgment and, also sought leave to file a supplementary affidavit to prove compliance. On 10 June 2019 the applicant was served with a notice of enrolment of the application for Summary Judgement, a letter in terms of section 129 and return of service as well as an application in terms of Rule 46(1) (a)(ii) and 46A(8)(e). The applicant responded by serving his supplementary answering affidavit to his opposing affidavit to the Summary Judgement application, a notice in terms of Rule 30 and his heads of argument. The applicant failed to attend the hearing on 3 September 2019.
- [4] The applicant contends that his supplementary affidavit addressed the Respondent's non-compliance with regulation 2 of the Regulations governing the administration of an Oath or Affirmation and, section 7 of the Justices of Peace and Commissioners of Oaths Act. He contended that it was irregular to place before the court information which it was not supposed to have sight of and, he therefore objected to the simultaneous hearing of the Summary Judgement application and the Rule 46 (1)(a)(1) and 46A
- (e) application. The applicant obtained the record of the proceedings and he contended that the respondent did not inform the court of the content of his supplementary affidavit, which addressed the irregularities he complained about, among then being that he disputed having received or served with the section 129 letter.
- [5] Instead, the court was informed of his unemployment which was portrayed in a negative light. The court was not informed of his Rule 30(2)(b) notice which was not considered by the court. The court when dealing with the Summary Judgment application took into account information filed with the Rule 46 application. It is on these grounds that he contends the judgment was erroneously granted in his absence.
- [6] In answer the respondent contended that it was entitled to the summary judgement and that it could not be contended by the applicant that it had been erroneously granted in his absence as required by Rule 42(1)(a), nor could it be said that the order was void ab initio because it was obtained by fraud or mistake common to both parties.

- [7] The respondent raised two points in limine. In the first the respondent contended that the notice was defective. The grant of the Summary Judgment was final, that the grant thereof in the absence of the applicant could not be rescinded under rule 31(2)(b) but was a subject of appeal. The respondent contended that the only basis upon which Summary Judgement could be rescinded was under the common law or if there is compliance with Rule 42(1)(a).
- [8] Although the respondent maintained its stance that Rule 31(2)(b) was not applicable, in the second point in limine it contended that the application for rescission according to its calculations was brought 64 days out of time. The days were calculated from the day it was expected the applicant came to the knowledge of the summary judgement order. The applicant failed to apply for condonation for the late filing of this application. The said order was forwarded to the applicant at his request on 9 September
2019. This was followed by a letter of the 19 September 2019 in which the applicant requested that the sale in execution to held off, and thereafter he undertook to continue with regular payments and that he would settle the arrears
- [9] The respondent conceded that it was served with the applicant's opposing papers, including the supplementary affidavit. However, it stated that the applicant failed to comply with the Rules and practice manuals relating to the filing of his papers with the court timeously. At the court at the hearing the court confirmed that same had not been filed. The respondent appraised the court of them. The court was therefore, aware of the applicant's opposition and considered same before granting the summary judgement application.
- [10] In reply the applicant disputed the validity of the points in limine raised and contended that they must fail. He contended that the application was not brought in terms of Rule 31 (2)(b). He stated

that on a reading of the papers it was evident that his application for rescission was based on Rule 42(1)(a) and no condonation application was required.

[11] It is important to reflect briefly on the principles entailed in rescission applications:

11.1 In a Rule 31(2)(b) rescission the application must be delivered within 20 days of the applicant having knowledge of the order or judgment. In order to succeed the applicant must show good cause; the application must be based on bona fide reasons and must have a bona fide defence; and the applicant must give a reasonable explanation for his default. If the application is brought outside of the period prescribed, the applicant is to apply for condonation. The applicant would be required to address the degree and reasons for lateness; the prospect of success on merits and the aspect prejudice.

11.2 In terms of Rule 42(1)(a) a rescission will be granted where the order or judgment was erroneously sought or granted in the absence of a party affected thereby. The judgment would be erroneously granted if there were facts which existed which the court was unaware of and which would have induced the court not to grant the order or judgement. The applicant in this instance is not required to show good cause.

11.3 A rescission in terms of the common law will be granted if the order or judgment was granted due to fraud or an error in law and in this regard the applicant is required to show good cause why the rescission should be granted.

- [12] Before dealing with the issues, it is common cause that the application was initiated by the applicant, he failed to comply with the filing on case lines of all the pleadings necessary for consideration. It is my view that in an application such as this one, the pleadings on case lines should mirror what should have been in the court file when the application was considered by Maumela J. From correspondence attached to the founding affidavit in this application, I gain the impression that the applicant, who dealt with the matter in person, was served with all pleadings. In fact, he has not complained that he was not in possession of them.
- [13] That is why he was in a position to file the main affidavit opposing summary judgment. It is common cause therefore that in this application his submissions and argument, as seen from his heads of argument are centred around issues raised in his supplementary affidavit. On 10 July 2019 the applicant was given notice of the date of hearing of 3 September 2019. The only explanation he gives is that he did not or could not attend. No other explanation was given for his non-attendance. The applicant complied with all that was necessary to oppose the application for summary judgment before he was notified that the application would be postponed sine die on 18 December 2018. It was common cause that as at that point he had already set out what his opposition to the application for summary judgment was and, the respondent had conceded that it had not complied with section 129 hence the reason for the postponement sine die. Gathering from the comments of Maumela J in the transcript he was in possession of the pleadings necessary to consider the application except for the pleadings served on the respondents two days prior to the hearing which were not in the court file.
- [14] Given this background the only conclusion I arrive at is, that it is the applicant's case that an order or judgment was erroneously granted in his absence even though he did not mention Rule 42(1)(a) in particular. I am in agreement with counsel for the respondent that the summary judgment cannot be rescinded given the facts of this case and that it is appealable. By the 18 December 2018 the only outstanding issue was that relating to compliance with the section 129 letter. The applicant did not object to such postponement sine die nor did the applicant insist that the application for summary judgment be finalized at that stage. It is not clear from the transcript if the court in addition to the pleadings before it also considered the supplementary affidavit. What is clear is that Maumela J was made aware of its existence and, it appears that he considered the content of the file before him because he made

comments on the reserve price and of his notes. Now, instead of speculating on what transpired at the hearing from a reading of the transcript, the applicant should have requested reasons for the judgment and launched its application for leave to appeal.

[16] In *Labstix Diagnostics (Pty) Ltd and Another v SDV South Africa Ltd* Case No: 91624/2016 (17 May 2018) the following was stated:

"[20] In the matter of *Morris v Autoquip (Pty) Ltd* 1985 (4) SA 398 [WLD] it was held, in dealing with an application for rescission of summary judgment, that where a court is faced with an application for summary judgment, in which there is no appearance for a defendant, the court is not entitled to ignore the affidavit resisting summary judgment, and must consider the affidavit resisting summary judgment in order to determine whether or not to grant summary

judgment.

[21] It was also held in the same matter that because of such obligation on the court hearing an application resisting summary judgment, it cannot be said that a defendant is in default when he submits an affidavit opposing summary judgment, even though there is no appearance on his behalf at the application for summary judgment, and that in such circumstances an application for rescission of judgment is an incorrect procedure.

[23] In the *De Beer v ABSA Bank Ltd* [2016] ZAGPJHC 364 (25 November 2016) His Lordship Mr Meyer with whom his Lordships Mr Justice Prinsloo and Lauw concurred, held that it cannot be said that summary judgment was granted in the absence of a defendant when the defendant submitted an affidavit opposing summary judgment but where neither the defendant nor his legal representative appeared in court.

[24] It was held that summary judgment granted against a defendant in such circumstances is final and res judicata, and that an application for rescission of summary judgment in such circumstances is the wrong procedure.

[25] In the unreported matter of *Ncube and Another v Absa Bank Ltd* [2016] ZAGPHC 364 (25 November 2016) Her Ladyship Ms Justice Weiner, who appears not to have been made aware of the *De Beer v Absa* matter, held that where summary judgment is granted in circumstances where the defendant has filed an affidavit resisting summary judgment, but there is no appearance for the defendant on the day of the hearing of the summary judgment application, there is no default and the defendant cannot apply for rescission of judgment. It was held that the only remedy open to such a defendant is to ask for leave to appeal and condonation for late filing of the appeal."

[17] It is for the above reasons and case law that the application must fail.

[18] In the result the following order is made:

1. The application for rescission is dismissed.

2. The Applicant is ordered to pay the Respondent's costs occasioned by the Application.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON 25

& 29 JANUARY 2021

JUDGMENT

RESERVED ON 29

JANUARY 2021

ATTORNEYS FOR THE APPLICANTS HACK, STUPPEL & ROOS ATT.

ATTORNEYS FOR THE RESPONDENTS APPEARED IN PERSON

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