

SOUTH AFRICA / JUDGMENT

Construction Education and Training Authority v Dela Casa Trading 660 (Pty) Ltd and Others (1617/2020) [2021] ZAFSHC 267 (4 November 2021) [2021] ZAFSHC 267

COURT

Free State High Court, Bloemfontein

BEFORE

Matshaya

CASE / FILE NUMBER

1617/2020

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

CASE NO. 1617/2020

In the matter between:

CONSTRUCTION EDUCATION AND

APPLICANT

TRAINING AUTHORITY

and

DELA CASA TRADING 660 (PTY) LTD

FIRST RESPONDENT

T/A INGOMSO-LWETHU RESOURCE CENTRE

DISTANT STAR TRADING CC

SECOND RESPONDENT

RAMAKGOWA AND THE T-BUILDERS

THIRD RESPONDENT

CONTRACTORS

STANDARD BANK OF SOUTH AFRICA

FOURTH RESPONDENT

LIMITED

SHERIFF HALFWAY HOUSE-ALEXANDRA FIFTH RESPONDENT

JUDGMENT BY: MATSHAYA AJ

HEARD ON: 28 OCTOBER 2021

DELIVERED ON: 4 NOVEMBER 2021

INTRODUCTION

[1] This is an application in terms of Uniform Rule 42(1)(a)[1] alternatively, common law for rescission of a garnishee order and warrant of execution wherein the Applicant seeks an order in the following terms:

1. “Rescission of the garnishee order against the Applicant dated 13th of May 2021;
2. Directing the Fifth Respondent to pay over the monies attached from the Applicant’s Standard Bank account in full immediately into the same account which was attached;
3. Directing the costs of this application to be paid by the First Respondent;...”

[2] The application is opposed by the First Respondent only. The other Respondents neither filed notices of intention to oppose nor to abide.

THE PARTIES

[3] The Applicant is Construction Education and Training Authority (CETA), a statutory body established in terms of the laws of South Africa, with its main address at 52 CETA Building, 14th Road, Noordwyk, Midrand, Johannesburg. The First Respondent (judgment creditor) is Dela Casa Trading 660 (Pty) Ltd t/a Ingomso Lwethu Resource Centre (Dela Casa), a company duly registered in terms of the company laws of South Africa, with its registered address at 101 Olympus Drive, Helicon Heights, Bloemfontein. The Second Respondent (judgment debtor) is Distant Star Trading (Pty) Ltd (Distant Star).

[4] The Third Respondent is Ramakgowa and T Builders Contractor (Ramakgowa), a company duly registered in terms of the company laws

of South Africa. The Fourth Respondent is Standard Bank of South Africa Limited (Standard Bank) a company with limited liability

incorporated in accordance with the laws of South Africa. The Applicant has an account with the Fourth Respondent in which the

judgment debt has been attached by the Fifth Respondent in his capacity as the Sheriff of court.

BACKGROUND

- [5] On 27 August 2020 the First Respondent obtained default judgment before this court against the Third Respondent in the amount of R1 210 300 plus interest at 10% per annum. On 31 March 2021, one Mr Xuma who is the sole director of the Third Respondent deposed to an affidavit wherein he confirmed that the Applicant is indebted to the Third Respondent in the amount of R1 210 300 for professional services it received.
- [6] Pursuant thereto, on 15 April 2021 the First Respondent moved an ex parte application for a garnishee order which was granted against the Applicant (garnishee) in the amount R1 365 910 with the

return date of 13 May 2021. On the said garnishee order, the Second Respondent is cited as a judgment debtor. The interim order was served on the Applicant's offices to one Mr Tandani on 29 April

2021. On the return date the Applicant did not appear in court and the interim order was confirmed which is the subject of this application. On 6 July 2021 the Applicant was served with a warrant of execution in the amount of R1 365 910 and on 30 July 2021 the Applicant was served with a Rule 45(12)[2] notice by the Fifth Respondent.

THE APPLICANT'S CASE

- [7] The Applicant contends that the said garnishee order was granted in error against it because there is no nexus between the Second respondent who is cited as the judgment debtor and it. It denies any liability either to the Second or Third Respondents. The Applicant further contends that Mr Xuma did not even mention the nature of the services that the Third Respondent allegedly rendered to the Applicant. It further contends that the garnishee order was obtained in its absence. Lastly, the Applicant contends that the warrant of execution is prejudicial to it as those funds have been moved and paid over to the Fifth Respondent.

THE FIRST RESPONDENT'S CASE

[8] The First Respondent raised the following points in limine:

8.1 That the deponent to the Applicant's founding affidavit has no locus standi; and

8.2 That the Applicant proffered hearsay evidence in its founding affidavit as the deponent has no personal knowledge of the averments.

- [9] The First Respondent conceded that the garnishee order erroneously cites the Second Respondent as a judgment debtor instead of the Third Respondent. However, it is its contention that this is a mere misnomer. The First Respondent further averred that the Applicant was indeed indebted to the Third Respondent for services rendered whereby the First Respondent was the sub-contractor to the Third Respondent who in turn did not pay it which then led to the First Respondent obtaining a judgment against the Third Respondent. The First Respondent also contended that the Applicant ought to have lodged this

application in terms of Uniform Rule 31 instead of 42. Lastly, it submitted that there's no good cause for the Applicant's case and the subsequent delay.

THE

ISSUES

[10] At the heart of this application is whether the Applicant has made out a good case for rescission.

LEGAL PRINCIPLES PERTAINING TO RESCISSION APPLICATIONS

[11] Uniform Rule 42 states 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 or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;”

[12] The purpose of Uniform Rule 42 is ‘to correct expeditiously an obviously wrong judgment or order’.[3]

[13] In *Kgomo v Standard Bank*[4]Dodson J aptly put the approach to a rescission application in the following terms:

“Based inter alia on the judgments of the Supreme Court of Appeal in Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) and Lodhi 2 Properties Investments CC

& *Ano v Bonde Developments (Pty) Ltd*, the following principles govern rescission under rule 42(1)(a):

[11.1] the rule must be understood against its common law background;

[11.2] 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;

[11.3] the rule caters for a mistake in the proceedings;

[11.4] 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 rescission

of judgment;

[11.5] a judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;

[11.6] 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 default judgment on the part of the court; and

[11.7] the applicant for 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).”

[14] The Applicant has founded its case mainly on Uniform Rule 42(1)(a) and it is against the backdrop of these principles that the present application must be considered.

THE POINTS IN LIMINE

Ad locus standi

[15] The First Respondent challenged the locus standi of the deponent (Mr Voyi) to the Applicant’s founding affidavit. In essence, it submitted that Mr Voyi has not been authorised by the administrator of CETA to depose to the founding affidavit and that it is only the administrator who has the powers to do so. In my view, Mr Voyi satisfactorily addressed this aspect in his replying affidavit in that he was duly authorised by the administrator to engage in all legal matters affecting the Applicant. A copy of his delegation to that effect was also attached. Therefore, this argument by the First Respondent cannot succeed.

Ad hearsay

[16] The First Respondent also objected to the averments by Mr Voyi as hearsay. To me, there is no merit in this submission. It is clear from Mr Voyi’s affidavit that he deposed to facts that are within his personal knowledge and where reference was made to a certain Mr Tandani, the latter deposed to a confirmatory affidavit. Therefore, this argument by the First Respondent cannot be sustained.

ANALYSIS

[17] I now turn to examine if the Applicant has succeeded to prove its case to succeed on the rescission application. The prerequisite factors for granting rescission under this Rule are the following: Firstly, the judgment must have been erroneously sought or erroneously granted; secondly, such judgment must have been granted in the absence of the Applicant; and, lastly, the Applicant’s rights or interest must be affected by the

judgment.[5]

[18] The Applicant contended that the garnishee order was erroneously granted. The First Respondent conceded to the error but downplayed it to be a mere misnomer. It is important to examine the background facts to determine if indeed this was a misnomer or not. The

Applicant submitted that there is no underlying causa for the issuing of a garnishee against it. It is its case that it last had business dealings with the Second Respondent in 2015 and such services were paid. Reference was made to a memorandum dated 27 August 2015 which Applicant submitted that it signifies their last business dealings. Applicant even attached remittance advices for the last payments they made.

[19] It is difficult to understand what Mr Grobblers, counsel for the First Respondent, envisaged the Applicant would do more to prove that it was not indebted to the Second Respondent. This should be viewed against the backdrop that the First Respondent did not even attach an invoice as proof of Applicant's indebtedness when the First Respondent applied for a garnishee order. In my view, the Applicant has succeeded to prove that there was no underlying causa for the garnishee order and consequently, there was no basis for it to be granted.

[20] It is evident that there was a patent error on the proceedings or processes that led to the granting of the garnishee order to cite the Second Respondent as the judgment debtor instead of the Third Respondent. This means that its factual basis was wrong. It follows logic that the subsequent warrant of execution that was authorised based on this erroneous garnishee order is bound to collapse as well. This cannot be a misnomer as the First Respondent wants this court to find. The submission by Applicant that the admitted error by the First Respondent is fatal to its case, has to prevail.

[21] In an attempt to counter the above reasoning, Mr Grobblers submitted that, at best, the Applicant may have proved that it has a defence to the First Respondent's claim. He referred me to Freedom Stationery (Pty) Ltd and Others v Hassan and Others[6], where the court stated the following:

"...the phrase 'erroneously granted' relates to the procedure followed to obtain a judgment in the absence of another party and not the existence of a defence to the claim. Thus a judgment to which a party was procedurally entitled cannot be said to have been erroneously granted in the absence of another party."

[22] This argument cannot be sustained for various reasons inter alia:

22.1 It has already been admitted that the court that granted the garnishee order was presented with erroneous facts;

22.2 Furthermore, it would be absurd for this court to acknowledge the said error but turn a blind eye to it and not grant appropriate

relief to the Applicant;

22.3 These are public funds that have been unjustifiably attached to the prejudice of the Applicant as a state institution hence the need to restore the status quo.

[23] Mr Grobblers also unconvincingly submitted that I should dismiss the application because the Applicant still has recourse to sue the Third Respondent for unjustified enrichment. This is where the lack of causa for the Applicant's indebtedness either to the Second or Third Respondent finds relevance because the First Respondent cannot be allowed to enrich himself with public funds that are not due to him. The other problem with that proposition is that it would defeat the whole purpose of Rule 42 proceedings which is to 'correct expeditiously an incorrect judgment or order'.

[24] Counsel for the Applicant, Ms Mutenga, submitted that the First Respondent did not disclose during the ex parte application for the garnishee order that the Third Respondent last had business dealings with the Applicant in 2015 and that such

services were paid in full. She argued that this constituted a material fact which had it been disclosed, would have induced the

judge not to grant the said order. She referred me to Naidoo and Another v Matlala NO and Others[7], where the court found that:

"In general terms, a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was

unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment."

[25] In casu, I find it to be a material non-disclosure on the part of the Third Respondent not to disclose to the court during the ex parte application for a garnishee order that it last had business dealings with the Applicant in 2015 and that such services were paid in full. Had this been disclosed to the court, it would have induced the judge not to grant the garnishee order. Furthermore, I find some merit on Ms Mutenga's submission that had it been disclosed that the Applicant's alleged indebtedness relates to 2015 services, the court would have in all probability realised that the said alleged debt must have prescribed and not grant the garnishee order.

[26] It is common cause that the garnishee order was obtained by the First Respondent in the absence of the Applicant on 15 April 2021 which was subsequently confirmed on 13 May. From the reasons submitted by the Applicant, I accept that it was not wilful default on its part not to attend court and defend the confirmation of the interim order.

[27] The Applicant also submitted that the fact that the said funds have been transferred to the Fifth Respondent's account is prejudicial to it as it does not have access to them. The First Respondent did not gainsay this. Indeed, the Applicant's interests are affected and appropriate redress is necessary in the circumstances.

[28] Mr Grobbler also submitted albeit unconvincingly, that the Applicant should have approached this court under Uniform Rule 31 even though it was going to have a problem with the prescribed timeframe on the said Rule. In Mutebwa[8], Jafta J (as he then was) stated that:

“...the fact that an application is specifically brought in terms of one Rule does not mean it cannot be entertained in terms of another Rule or under common law provided the requirements thereof are met. Under common law as well, the applicant for rescission must show good cause before a judgment can be rescinded.”

[29] In my view, the Applicant has fulfilled all the requirements of Uniform Rule 42 and there is no need to consider the matter from the perspective of common law. Therefore, the submission by Mr Grobbler in this regard stands to be rejected.

CONCLUSION

[30] I am satisfied that the Applicant has succeeded to prove its case on a balance of probabilities to secure the relief sought. The next aspect is costs. It is trite that costs are in the discretion of the court even though ordinarily, they follow the victor. Mr Grobbler submitted that in the event the Applicant is successful, the First Respondent should not be burdened with costs because the court would have granted indulgence to the Applicant. Ms Mutenga, counsel for the Applicant disagreed with that proposition.

[31] I have noted the strides that the Applicant embarked upon including writing letters to the First Respondent's legal representatives seeking to resolve the matter amicably which landed on deaf ears. This litigation would have been avoided if the First Respondent had handled the matter differently and regrettably, the Applicant resorted to this process to assert its rights. Therefore, the

Applicant should succeed with costs.

ORDER

1. The garnishee order dated 13 May 2021 is hereby rescinded.
2. The warrant of execution is set aside.
3. The Fifth Respondent is ordered to pay over the monies attached from the Applicant's Standard Bank account in full immediately to the same account which was attached.
4. The First Respondent is ordered to pay the Applicant's costs of this application.

MATSHAYA, AJ

Appearances:

For the Applicant: Adv H. Mutenga

Instructed by : Morata Mogokare Incorporated

Bluehills

For the First Respondent: Adv S. Grobblers SC

Instructed by : Kruger Venter Attorneys

Bloemfontein

[1] Uniform Rules of the Superior Courts.

[2] Uniform Rules of this court.

[3] Bakoven Ltd v G J Howes (Pty) Ltd 1992 (2) SA 466 E, at 471E-F.

[4] 2016 (2) SA 184 (GP), para 11.

[5] Mutebwa v Mutebwa and Another 2001 (2) SA 193 Tk HC at 199F.

[6] 2019

(4) SA 459 (SCA).

[7] (67502/2010)

[2011] ZAGPPHC 165; 2012 (1) SA 143 (GNP) (20 September 2011) at para 6. See also Nyingwa v Moolman NO 1993 (2) SA 508 (Tk GD) AT 510D-G and Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348E-349B.

[8] Para 12G, Mutebwa, supra.

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Prepared on 13 October 2026 · Esheria