

SOUTH AFRICA / JUDGMENT

De Klerk v Law Society of the Northern Provinces (12910/2010) [2018] ZAGPPHC 574 (15 June 2018) [2018] ZAGPPHC 574

COURT

North Gauteng High Court, Pretoria

BEFORE

Strijdom, N V Khumalo

CASE / FILE NUMBER

12910/2010

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

Case

Number: 12910/2010

In

the matter between:

DE
KLERK, STEPHEN RANDALL
Applicant / Respondent
and
THE
LAW SOCIETY OF THE
NORTHERN
PROVINCES
Respondent/ Applicant

JUDGMENT**STRIJDOM AJ**

A.

Introduction

1. On 1 March 2010, the Law Society launched an urgent application for the applicant's suspension or striking from the roll of attorneys.
2. The application under case number 12910/2010 consisted of two parts. Part A provided for the urgent suspension of the applicant from practising as an attorney pending the finalization of part B of the application. The applicant opposed the application in respect of urgency and on the merits. The application was heard on 17 March 2010 and the applicant was represented by senior counsel, The court found that the application was urgent and that the applicant should be prevented from practising as an attorney for this own account pending the finalization of the Law Societies application for the striking of his name from the roll of attorneys.
3. In terms of part B of the notice of motion, the applicant was called upon to file a notice of intention to oppose and to file an answering affidavit within 15 days thereafter.
4. The applicant did not file a notice of intention to oppose, specifically relating part B of the application and he did not file an answering affidavit or a supplementary answering affidavit. Part B of the application was therefore unopposed.
5. A full bench of this court struck the applicant's name from the roll of attorneys on 1 April 2011. There was no appearance on behalf of the applicant.

The Common Law Rescission

6. This is. an application for an order:
 - 6.1 That in terms of the Common Law, the order granted on the 1st of April 2011 by default against the Applicant / Respondent together with the cost order be rescinded, and;
 - 6.2 That the Applicant / Respondent's name be immediately restored to the roll of attorneys pending the outcome of the main application as launched by the Law Society of the Northern Provinces under case number 1910/2010, and;
 - 6.3 That the Respondent pays the costs of this application.
7. The applicant's claim for rescission of the judgment must be considered in terms of the Common Law, which empowers the court to rescind a judgment obtained on default of appearance, provided sufficient cause therefore has been shown.

8. It is clear that in principle two essential elements of "sufficient cause for a rescission of a judgment by default are:
 - (i) that the party seeking relief must present a reasonable and acceptable explanation for his default, and;
 - (ii) that on the merits such party has a bone fide defence, which prima facie, carries some prospect of success[1]
9. It is not sufficient if only one of these two requirements is met, for obvious reasons, a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default.

Explanation for default

10. The notice of set down was served on the applicant (through his correspondent attorneys of record) on 7 May
2010. The applicant alleges that he was not aware of such service.[2]
11. On 10 February 2011 the applicant was further informed of the application proceedings on 1 April 2011.[3]
12. On 11 March 2011, in a letter addressed to the attorneys of record for the respondent, the applicant requested a postponement for the proceedings on 1 April 2011.[4]
13. On 28 March 2011 the applicant was informed that the respondent was not willing to agree to a postponement and that he ought to bring a substantive application for a postponement.[5]
14. It is common cause that there was no appearance for the applicant on 1 April 2011 and that the application was moved in default.
15. The order striking the applicant's name from the roll of attorneys was granted on 1 April 2011. It took the applicant six (6) years and eight (8) months to bring this application.
16. Applicant submitted that he was deliberately placed under the false impression that his request for a postponement was being considered. This submission is in contrast with the fact that on the 28th of March 2011, he was informed by Mr. Bloems' office that his request for postponement was not granted and that the applicant would have to bring a substantive application for postponement
17. It was submitted by the applicant that he tried to appoint a new attorney but due to the fact that he had no income, he could not timeously appoint a new attorney. He further submitted that he had no means to attend court on the 1st of April 2011. During the week after Friday, the 1st of April 2011, he attended to the High Court in order to ascertain as to whether the matter had been postponed. Applicant was however unable to find the court file. During May 2011 he once again attended to the High Court and could not find the court file.

18. On the 30th of August 2011 applicant received a fax from Mr. Bloems' office containing a taxed account together with an order as granted by default on the 1st of April 2011.
19. Applicant submitted that on the of January 2017, he was able to obtain a duplicate ease file under case number 12910/2010. The applicant then filed and served this rescission of judgment application on the 27th of February 2017.
20. In January 2017 the applicant notes that the application was moved on an unopposed basis and that judgment was taken in default, of which he has been aware since the 30th of August 2011, when he received a fax from Mr. Bloems' office.
21. The applicant appears to have recognised the need for some explanation, which he attempted to give in his founding affidavit, but very much more in general, rather than specific terms. There is no explanation why there was a delay of merely six (6) years and eight (8) months in attending to this application The applicant makes no Indication that at any stage prior to January 2017, that he was of the belief, that the order against him was incorrect. Instead of pursuing his readmission, he now pursues rescission of his previous order.
22. It appears to me that the most likely explanation of the applicant's otherwise inexplicable failure, from August 2011 to January 2017 in attending to this application, is that he was not constant in his resolve to oppose it.
23. It was clearly incumbent on the applicant to disclose with a degree of particularity what it was that prevented him from appearing in court on the 1st of April 2011 and why It took merely six (6) years and eight (8) months to bring this application. He was a practising attorney, not at all unfamiliar with the procedures in opposed and unopposed matters.
24. In my view the applicant has not presented a reasonable and acceptable explanation for his default.

The bona fide defence

25. The evidence placed before the court a quo revealed the following:

25.1 The applicant failed to, submit his Rule 70 auditor's report for the period ending 28 February 2009 to the respondent. The report was due on 31 August 2009;

25.2 The applicant was notified to appear before a disciplinary committee of the respondent on 18 November

2009. He failed to attend the proceedings. He was found guilty and a fine of R5 000.00 was imposed, R2 500.00 of which was suspended for three years. The applicant failed to pay the fine and persisted in his failure;

25.3 The applicant also failed to timeously submit his Rule 70 Audit Report for the period ending 29 February 2008, eventually submitting it on 12 March 2009;

25.4 The applicant has attached a Rule 70 Audit Report for the period ending 28 February 2009 to his rescission application that was submitted to, the respondent on 17 February 2010. The report is, however, qualified the trust account was not reconciled or accounted regularly;

25.5 On his own version the applicant only delivered his accounting records to his auditor in the first week of December 2009 (nine months after the financial year end and three months after the report was due;

25.6 Due to the applicants failure to submit his Rule 70 Auditors Report for the period ending 28 February 2009 to the respondent, the applicant was not Issued with a Fidelity Fund Certificate for 2010. The applicant nevertheless continued to practice as an attorney from 1 January 2010;

25.7 The applicant failed to co-operate with the curator in execution of the order of 17 March 2010 and persisted In his failure to comply. He frustrated the respondent's attempts to take possession of his client files and accounting records, 138 client files remained unaccounted for;

25.8 After the received of several complaints against the applicant relating to his failure to account for trust funds. the respondent instructed a legal official Geringer to visit the applicant and conduct an inspection of the firms , accounting records and practice affairs. Geringer was ,: informed by the applicant that the practice had moved from the address held in the respondent's records;

25.9 The applicant has admitted falling to keep his accounting records at his office and that he failed to keep the appointments with Mr. Geringer;

25.10 The applicant has not provided any information pertaining to the withdrawal of the funds from the Investment account. The investment plus interest ought to have been invested form 2 December 2.008 and remained on trust until 28 August 2009;

25.11 The applicant's Rule 70 Audit Report for the period ending 28 February 2010 reflects that no funds were held by the applicant in a Section 78 (2A) Investment as at 31 May 2009 and that the total trust liability was R29 000.00 as at 31 May 2009.

26. It was submitted by council for the respondent that the applicant has misappropriated trust funds, his Rule 70 Audit Reports were submitted late (on of which remained qualified), he failed to account to clients within a reasonable time and he has been dishonest under oath.

27. The applicant submitted that:

27.1 He did not practice as an attorney without a Fidelity Fund Certificate since January 2010:

27.2 He did not misappropriate trust funds;

27.3 There wasn't a substantial trust deficit in his bookkeeping;

27.4 He did not fail to account to clients in respect of trust funds;

27.5 He did not fall to co-operate with the respondent in an inspection of his accounting records and practice affairs:

27.6 The attorney's fidelity fund was not at risk.

28. In my view the applicant's version is inconsistent with the evidence placed before the court by the respondent and the objective evidence .

29. In the light of the finding that applicant's explanation is unsatisfactory and unacceptable, it is therefore strictly speaking, unnecessary to make findings or to consider the arguments relating to the applicant's prospect of success.

30. I am also not persuaded that the applicant has a bona fide defence, which prima facie, carries some prospect of success.

31. Even if it is reasonably possible that a court might consider that a less severe disciplinary measure than removal from the roll be taken, to that extent, the applicant might have satisfied the second of the two essential requisites for rescission, but this does not assist him in the final result, because of his failure to satisfy the other essential requisite.

32. In the result, the application is dismissed with costs.

J.J STIJDOM

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I CONCUR AND IT IS SO ORDERED

N V KHUMALO J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 16 March 2018

JUDGMENT

DELIVERED: 15 June 2018

APPEARANCE

FOR THE APPLICANT; In person

Stephen Randall De Klerk

FOR THE RESPONDENT: L Groome

INSTRUCTED BY:

Rooth & Wessels Inc, Pretoria

[1] De Wet and Others v Western Bank Ltd 1979 92) SA 1031 (A)

- [2] Record:Vol 4 ,page 394,par 56
- [3] Record :Vol 1,page 10 ,par 22
- [4] Record: Vol 1,page 10-11,par 23
- [5] Record:Vol 1,page 108
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Prepared on 13 October 2026 · Esheria