

SOUTH AFRICA / JUDGMENT

De Waal v Astfin Gauteng (Pty) Ltd t/a Assetfin (59994/2016) [2017] ZAGPPHC 976 (13 December 2017) [2017] ZAGPPHC 976

COURT

North Gauteng High Court, Pretoria

BEFORE

Du Plessis

CASE / FILE NUMBER

59994/2016

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG LOCAL DIVISION,
JOHANNESBURG)

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO

REVISED: YES
13
December 2017
CASE
NO. 59994/2016
In

the matter between: MARIUS
DE
WAAL
Applicant
and
ASTFIN
GAUTENG (PTY) LTD t/a
ASSETFIN
Respondent

JUDGMENT

DU PLESSIS AJ:

1. In this matter the applicant applies for the rescission of a default judgment granted in his absence on the basis that it was granted erroneously. The respondent consents to the rescission and launched a counter-application for the rescission of the remainder of the order.
2. The respondent issued a summons against the applicant for judgment on two written rental agreements entered into between the parties. The first agreement was entered into on 25 May 2012 and the second on 21 February 2014. It claimed R10 645.71 plus interest on the first claim and R256 210.82 on the second.
3. Default judgment was granted on 9 September 2016 in respect of both claims. The applicant only applied for the rescission of the judgment on claim 2, as it alleged that the judgment could never have been granted on the second agreement. He showed that, on a simple calculation of the rentals to be paid in terms of the said agreement, he could never have owed an amount of R256 210.82 to the respondent.
4. The applicant went further and tendered payment in respect of claim
 1. Such tender was rejected by the respondent and the payment was returned.
5. At some stage the respondent realised that the particulars of claim was wrong as the amounts claimed were swapped around , i.e. the claim for R256 210.82 should have been in respect of claim 1 and the claim for R10 645.71 in respect of claim 2. It is for that reason that it conceded that the applicant was entitled to an order rescinding the judgment on the second claim, but brought an application for the rescission also of the judgment for the first claim.
6. It is in my view clear that judgment in respect of both claims were erroneously sought. Mr McTurk, who appeared for the applicant, argued however that the respondent was not entitled to the rescission of the judgment on the first claim as it obtained exactly what it sought. There was, for that reason, no error in the judgment as the Registrar was procedurally entitled to grant the order.
7. The applicant submitted that a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the judge who granted the judgment, as he was entitled to do, was unaware. Similarly, a judgment to which a plaintiff is procedurally entitled in the absence of the defendant cannot be said to have been 'granted erroneously' in light of a subsequent disclosed defence.[1]

8. It should be pointed out that the cases dealing with the erroneous granting of judgment should be read with care, as the granting of a judgment is not the same as the erroneous seeking thereof. This distinction was made clear by the SCA in the Lodhi 2- matter, where the following was said (in para 20, with reference to the matter of Frenkel, Wise & Co (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd[2]):

"Frenkel was a case in which a default judgment was rescinded on the basis that it had been granted under a misapprehension. The misapprehension would seem to have been that the legal representatives wrongly assumed that the capital sum claimed had not been paid. It was, therefore, not a case of a judgment having been granted erroneously but a case of a judgment having been sought erroneously."

9. In the matter of First National Bank of South Africa Ltd v Jurgens and others[3] the court held as follows:

"I consider that the Rule only has operation where the applicant has sought an order different from that to which it was entitled under its cause of action as pleaded. Failure to mention a form of relief which would otherwise be included in the relief granted is not in my opinion such an error."

10. If regard is had to the cause of action as pleaded, it would have been obvious that the copies of the agreements and certificates of balance attached thereto were at odds with the allegations. In fact, that is what the applicant complains about in its application for the rescission of the judgment in respect of claim 2. The same can be said of the judgment in respect of claim 1.
11. I am therefore of the view that the judgment in respect of both the claims were erroneously sought by the respondent, albeit that the judgment on claim 1 may not have been erroneously granted. That distinction does not assist the applicant in opposing the relief sought by the respondent in the counter- application. In fact, in my view the applicant opportunistically sought to obtain an unfair advantage by making payment in respect of claim 1 and then arguing that claim 2 should have been for the same (lesser) amount.
12. I find that the respondent has made out a case that the judgment in respect of claim 1 was erroneously sought in terms of the provisions of Rule 42(1). Once it is held that the judgment was erroneously sought or granted, it is not necessary for the applicant to show 'good cause' in the context of an explanation for the default and a bona fide defence.[4] It follows that both parties are entitled to the relief sought.
13. The application was only argued on the respondent's counter-application and it was successful therewith. Under normal circumstances it should be entitled to the costs of the application. However, it was the author of the mistake which caused the necessity for both applications to be launched and it sought an indulgence to remedy the mistake. In my view it would therefore be fair and equitable if the parties are ordered to each pay their own costs of the application.

14. In the result I make the following order:

14.1 The default judgment granted on 9 September 2016 in respect of both claims, is hereby rescinded and set aside;

14.2 Each party is ordered to pay its own costs.

D T v R DU PLESSIS

ACTING JUDGE OF HIGH COURT

JOHANNESBURG

DATE OF HEARING: 1 December 2017

DATE OF JUDGMENT: 13 December 2017

COUNSEL FOR APPLICANT: Adv S McTurk

INSTRUCTED BY: Otto Krause Incorporated

COUNSEL FOR RESPONDENT: Adv J H Wildenboer

INSTRUCTED BY: Van der Westhuizen Attorneys

- [1] Lodhi 2 Properties Investments CC and another v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) at paras 25 & 27
- [2] 1947 (4) SA 234 (C)
- [3] 1993 (1) SA 245 (W), confirmed on appeal 1994 (1) SA 677 (T)
- [4] Bakoven Limited v J G Howse 1992 (2) SA 466 (E)

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