

SOUTH AFRICA / JUDGMENT

Draht and Others v Manqele and Others (2014/29501) [2017] ZAGPPHC 44 (14 February 2017) [2017] ZAGPPHC 44

COURT

North Gauteng High Court, Pretoria

BEFORE

Kennedy Tsatsawane

CASE / FILE NUMBER

29501/2014

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IN

THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA, PRETORIA
CASE

NO: 29501/2014

DATE:

14/2/2017
REPORTABLE
OF
INTEREST TO OTHER JUDGES
NOT
REVISED
In

the matter between:

HEIKO
DRAHT
N.O. FIRST
APPLICANT
MARC
BRADLEY BEGINSEL
N.O. SECOND
APPLICANT
DONOVAN
THEODORE MAJIEDT
N.O. THIRD
APPLICANT
And
THULANI
JOSEPH
MANQELE FIRST

RESPONDENT
STANDARD
BANK OF SOUTH AFRICA LIMITED SECOND
RESPONDENT
MASTER
OF THE HIGH
COURT THIRD
RESPONDENT

JUDGMENT

TSATSAWANE AJ

Introduction

1. This is an application for default judgment against the first respondent.
2. The applicants are the trustees of the insolvent estates of Mbongiseni Isaac Manqele and Lindiwe Grace Manqele ("the insolvents").
3. The first respondent is the joint owner of what is described in the papers as "one half undivided share of the property described in paragraph 2 of the Notice of Motion" as – "Section No. 11 as shown and more fully described on Sectional Plan No SS000158/07 in the scheme known as VILLA DANIELLA in respect of the land and building or buildings situated at MEYERSDAL EXTENSION 12 TOWNSHIP ... " ("the property").
4. The property is registered in the names of the first respondent and the insolvents. In their notice of motion, the applicants seek an order in terms of which this joint ownership is terminated and certain consequential relief relevant to the termination and the disposal of the property.

The main application

5. The main application was instituted in April 2014. The first respondent delivered his answering affidavit in May 2014 to oppose
the relief sought by the applicants. The applicants replied to the first respondent's answering affidavit in September 2014, clearly out of time.
6. On 30 April 2015, the main application was called before Her Ladyship Madam Justice Neukircher, who after hearing the parties, ordered that the matter be referred to trial and that the applicants file a declaration within 20 days from the date of the order.
7. In terms of the aforesaid order, the applicants ought to have filed their declaration by no later than 5 June 2015 at the latest. They didn't.

8. The applicants only delivered their declaration in February 2016, way out of time. They did so without seeking the leave of the Court.

9. The first respondent did not deliver a plea to the applicants' declaration as a result of which the applicants delivered a notice of bar on 3 March 2016. The first respondent objected to this and delivered a notice in terms of Rule 30A(l). The first respondent

objected to the notice of bar on the ground that the applicants themselves were in fact ipso facto barred from delivering their declaration due to the fact that they failed to deliver it within the 20 days prescribed in the Court order of 30 April 2015 in terms of which the matter was referred to trial. For this reason, the first respondent contended that it was not competent for the applicants to deliver a notice of bar and called upon the applicants to withdraw it.

10. The applicants did not withdraw the notice of bar and proceeded to bring this application for default judgment.

The present application for default judgment

11. The applicants now seek default judgment on the basis that the first respondent has failed to deliver a plea (having been barred from doing so). The application is opposed by the first respondent on the following basis set out in the notice of opposition –

"AND KINDLY TAKE NOTE THAT the Applicants are prohibited in law and in terms of the Uniforms Rules of Court to bring an application for Default Judgment in terms of Rule 31(2)(a) of the Uniform Rules of Court as they were in the first place barred from delivering their declaration after twenty (20) Court days from 30 April 2015. The Applicants only delivered their Declaration almost nine (9) months after the 30 April 2015. The Applicants have failed to comply with Rule 27 of the Uniform Rules of Court ..."

12. Before me the applicants were represented by Mr. Raubenheimer and the first respondent was represented by Mr. Sebola. Both filed practice notes in which they summarised their points of contention. They both agree that the issue which requires determination is whether the applicants were automatically barred when they failed to deliver their declaration within the 20 days' period prescribed in the Court order of 30 April 2015. It is common cause that the declaration was filed outside the period prescribed in the Court

order of 30 April 2015 and no order was sought (and granted) condoning such late delivery.

13. Mr. Raubenheimer contended that the applicants were not automatically barred from delivering their declaration despite the fact that they delivered their declaration way out of time. He further contended that the first defendant ought to have delivered a notice of bar to bar the applicants from delivering their declaration if they did not do so within the time period which would have been given in the notice of bar.

14. In support of his submissions, Mr. Raubenheimer referred me to *Woolf v Zeenex Oil (Pty) Ltd 1999 (1) SA 652 (W)*. In this case, Joffe J was dealing with a matter where the Court, as in this case, had previously referred the matter to trial and

fixed a date for the delivery of a declaration and the declaration was not delivered within the prescribed date. On the basis of this failure, the applicant then applied for an order to dismiss the plaintiff's action.

15. In *Woolf*, the respondent contended that the applicant was obliged first to have filed a notice of bar in terms of Rule 26. The Court upheld this argument and Mr. Raubenheimer says that I should do the same in this application.
16. On the other hand, Mr. Sebola urged me to find that the applicants were automatically barred from delivering their declaration when they failed to deliver it within the timeframe prescribed in the Court order of 30 April 2015. He further contended that the applicants were obliged first to uplift the bar pursuant to an application in terms of Rule 27.
17. When the Court granted the order of 30 April 2015, it did so in terms of Rule 6(5)(g) which provides that where an application cannot properly be decided on affidavits, the Court "may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise." The Court gave "directions as to pleadings" and said that the applicants are "to file a declaration within twenty (20) days of date of this order" and that the "filing of further pleadings and conduct of trial is to be done in accordance with the provisions of the Uniform Rules of Court."
18. In *Woolf*, the Court ordered that the declaration "is to be delivered within one month of today's date" and did not give further directions. It, however, followed that the Uniform Rules of Court would apply.
19. At issue in this application is whether the applicants were automatically barred from delivering their declaration upon the

expiry of the time period for doing so prescribed in the Court order of 30 April 2015. If so, it would mean that the first respondent did not have to first deliver a notice of bar before the applicants became barred. In *Woolf*, the Court held that a notice of bar in terms of Rule 26 was required to bar the plaintiff in that case from delivering a declaration

- in other words, there was no automatic barring from delivering a declaration without a notice of bar in terms of Rule 26 having been delivered first.

20. Rule 26 deals with the failure to deliver pleadings and barring. It provides that –

"Any party who fails to deliver a replication or subsequent pleading within the time stated in Rule 25 shall be ipso facto barred. If any party fails to deliver any other pleading within the time laid down in these Rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within 5 days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice

within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and ipso facto barred ..." (my emphasis).

21. On a proper reading of Rule 26, it is clear that it refers to two instances in which a party may be barred. The first instances to which it applies is where a party has failed to deliver a replication or subsequent pleading within the time stated in Rule
25. In that event, such a failure result in such party being ipso facto barred without the need to deliver a notice of bar. The second instance to which the rule applies is where a party has failed to deliver any other pleading "within the time laid down in these Rules or within any extended time allowed in terms thereof." In that event, a notice of bar is required before the party concerned is barred from delivering the pleading in issue.
22. It is clear that in the second instance to which Rule 26 applies, one is concerned with a failure to deliver a pleading within the time period prescribed in the Rules or within an extended time "allowed in terms" of the Rules. In my view, the Rule does not apply to the time periods prescribed in a Court order.
23. In addition, the reference to a failure to deliver any other pleading is a reference to a failure to do so "within the time laid down in these rules" and clearly not within the time laid down in a Court order. The reference to "or within any extended time allowed in terms thereof" is again a reference to the "extended time allowed in terms" of the Rules and not in terms of a Court order.
24. Rule 20 deals with the delivery of a declaration "within fifteen days after" receipt of a notice of intention to defend. In this case, the Rule itself prescribes the period within which a declaration must be delivered and Rule 26 applies to it in the event of a failure to deliver the declaration "within the time laid down in these rules", i.e. Rule 20 in this regard. In that event, there is no automatic barring - a notice of bar ought first to be delivered for the recipient thereof to be barred from delivering the pleading which such a party is called upon to deliver in terms of the notice of bar.
25. In the premises, I am of the view that the decision of the Court in Woolf is clearly wrong insofar as it held that a notice of bar in terms of Rule 26 is required before a party is barred from delivering a declaration within the time period prescribed by a Court order. This is so due to the fact that Rule 26 does not apply to a failure to deliver a pleading within the time period prescribed by a Court order, it applies to a failure to deliver a pleading "within the time laid down in these rules" or within any extended time allowed in terms of the Rules and not the time period prescribed by a Court order.
26. Rule 27 which deals with the extension of timeframes, the removal of bar and condonation makes it clear that there are two categories of timeframes relevant to court proceedings, i.e. "the time prescribed by these rules or by an order of Court." It provides that the "time prescribed by these rules or by an order of Court" may be extended by the Court upon application on notice and on good cause shown.

27. In this case, the Court order of 30 April 2015 does not say that a failure to deliver the declaration within .the 20 days' period

provided for therein shall result in the applicants being automatically barred from delivering it. Even if it did, the applicants would have been entitled to apply for the removal of the bar in terms of Rule 27.

28. The first respondent takes issue with the late delivery of the applicants' declaration and Mr. Sebola contended that the present application is not properly before the Court due to the fact that the applicants failed to deliver the declaration within the time period prescribed in the Court order of 30 April 2015 and did not seek an order in terms of which the time period in issue was extended in terms of Rule 27.

29. There is no dispute that the applicants delivered their declaration out of time and that they did not seek an order condoning such late delivery or for an extension of the time period prescribed in the Court order of 30 April 2015 as contemplated in Rule 27.

30. In the circumstances, I am of the view that the present application for default judgment is not properly before the Court due to the fact that the applicants' declaration on which it is founded was delivered after the expiry of the time period prescribed for its delivery and the applicants did not seek an order to extend that time period. I accordingly make the following order –

30.1. the applicants' notice of bar dated 2 March 2016 is set aside;

30.2. the application for default judgment is dismissed;

30.3. the first respondent's costs shall be paid by the applicants;

30.4. the applicants are granted leave, if so advised, to bring an application for an order contemplated in Rule 27 insofar as the late delivery of their declaration is concerned;

30.5. the applicants are ordered to bring the aforesaid application within 15 days from the date of this order failing which, and if so advised, they shall seek an order condoning the late filing of such an application.

Kennedy Tsatsawane

Acting Judge of the Gauteng Division of the High Court of South Africa, Pretoria.

For the applicants: R

Raubenheimer

Vezi de Beer Inc., Pretoria.

For the first respondent: MS Sebola

Nchupetsang Attorneys, Johannesburg, Noko Phago Inc., Pretoria

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