

SOUTH AFRICA / JUDGMENT

Hartley and Another v Nedbank (28772/19) [2020] ZAGPPHC 69 (10 March 2020) [2020] ZAGPPHC 69

COURT

North Gauteng High Court, Pretoria

BEFORE

Neukircher

CASE / FILE NUMBER

28772/19

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: YES

Case number: 28772/19

10/3/2020

In the matter between:

DANE MICHAEL HARTLEY

First Applicant

JOHN COLIN HARTLEY

Second Applicant

And

NEDBANK LIMITED

Respondent

In re:

NEDBANK LIMITED

Plaintiff

and

DANE MICHAEL HARTLEY

First Defendant

JOHN COLIN HARTLEY

Second Defendant

NEUKIRCHER J:

1] On 22 May 2019 the registrar of this court granted default judgment against the present applicants for an amount of R710 421- 02 plus interest and costs.

2] On 10 June 2019 the present application was launched in which the applicants (the Hartleys) seek the following relief:

2.1 an immediate stay in suspension of proceedings of the default judgment granted on 22 May 2019;

2.2 to rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of the first and second respondents;

2.3 an order that the default judgment dismissed with costs de bonis propriis;

2.4 that the Hartleys be given leave to defend the action.

BACKGROUND

FACTS

3]

From the founding affidavit it appears that the following are the common cause facts upon which the Hartleys rely to found this application:

3.1 summons was served by Nedbank on the Hartleys on 2 May 2019[1];

3.2 a notice of intention to defend was emailed to Nedbank's attorneys on 15 May 2019 and attached to that document was a "Notice of Exception - Rule 23(1)". However, the email address to which the notice to defend was sent on 15 May 2019 was incorrect;

3.3 on 22 May 2019 the same notice was served on Nedbank's attorneys of record at 13h43 and it was filed at the registrar's office on 6 June 2019;

3.4 on 22 May 2019, the registrar of this court granted default judgment.

4] In their application, the Hartleys argument is that:

4.1 Nedbank had failed to serve a notice of set down as is required in Rule 31(5)(a) as, according to them, the notice of intention to defend was "delivered" on 14 May 2019;

4.2 Rule 17(3) requires every summons to be signed by an attorney acting for the plaintiff and that it must have an attorneys address within 15km of the office of the registrar, or it must be signed by the plaintiff. In the present matter, "no corresponding attorney has been appointed" (sic);

4.3 the suretyship which the Hartleys signed was signed prior to the principal obligation coming into existence and is therefore invalid;

4.4 that, despite the fact that they did not deliver their notice to defend timeously, they have not waived their rights to object to the jurisdiction of the court or to any irregularity or impropriety in the proceedings under Rule 19(4);

4.5 they are applying to set aside the default judgment under the provisions of Rule 31(5)(d).

5] It is immensely unfortunate that Nedbank's summons, the principal agreement, the suretyship and the returns of service were not placed in the court file. These, of course, are part of the essential documents for purposes of deciding whether or not the application for recession should be granted or refused.

6] Mr Marx submitted that it is Nedbank who should have seen to the filing of the summons in the court file, but given that the application must be seen as a whole, and given the points raised by the Hartleys, as set out supra, it is incumbent on them to ensure that all the relevant documents are placed before court so that the court can exercise Its mind (and where relevant a discretion) on whether or not to grant the application for recession.

7] This application was launched in June

2019. It was before court on 6 February 2020 when it was removed from the roll and the Hartleys ordered to pay the wasted costs.

8] I am mindful of the implications of a refusal of the application and I was asked by Mr Marx to allow a postponement so that they could put the papers in order. Nedbank opposed this application but there is no prejudice to Nedbank were a postponement to be granted with a concomitant costs order.

9] Given the further delay, which is occasioned solely by the Hartleys' conduct, I am of the view that an attorney and client costs order is warranted. I also intend to provide timelines in the order within which they are to file any supplementary papers.

THE ORDER

10] The order I thus make is the following:

10.1 the application is postponed sine die;

10.2 the applicants are to supplement their papers, if they which to do so, on/before 12h00 on 16 March 2020;

10.3 the respondent shall be entitled to respond to any supplementation by 12h00 on 24 March 2020;

10.4 the applicants (the Hartleys) are ordered to pay the opposed wasted costs of the postponement on the attorney and client scale.

NEUKIRCHER J

JUDGE OF THE HIGH COURT

Date of hearing: 9 March 2020

Date of judgment: 10 March 2020

Counsel for plaintiff: Mr Marx

Instructed by: C Economou Attorney

Counsel for defendant: Adv Steyn

Instructed by: Baloyi Swart & Associates Inc

[1] Service and receipt of the summons is admitted

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Prepared on 13 October 2026 · Esheria