

SOUTH AFRICA / JUDGMENT

Interactive Trading 115 CC and Another v South African Securitisation Programme and Others (2119/2017) [2019] ZALMPPHC 10; 2019 (5) SA 174 (LP) (29 March 2019)

[2019] ZALMPPHC 10

COURT

Limpopo High Court, Polokwane

BEFORE

Mangena

CASE / FILE NUMBER

2119/2017

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REPUBLIC OF
SOUTH AFRICA
IN

THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO
DIVISION, POLOKWANE)
(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

CASE NO: 2119/2017

In

the matter between:

INTERACTIVE
TRADING 115 CC
1ST APPLICANT
BAREND
STEPHANUS SCHEMPERS
2ND APPLICANT
And
SOUTH
AFRICAN SECURITISATION
PROGRAMME
1ST RESPONDENT
SASFIN
BANK LIMITED
2ND RESPONDENT
SUNLYN
(PTY) LTD
3RD RESPONDENT

JUDGMENT

MANGENA AJ

- [1] This is an application for rescission of judgment granted against the applicants on 21 December 2017. The order was varied on 05 June 2018.
- [2] Both the main judgment and variation order were granted in the absence of the applicants.
- [3] The applicants rely on the provisions of rule 42 (1) (a) of the Uniform Rules for their application. Rule 42 (1) (a) provides that:
- “(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”.
- [4] There is no dispute that the applicants are affected by the judgment(s) granted and that same were granted in their absence.
- [5] Mr Gaisa, counsel for the applicants, argued that the judgments were granted erroneously in that the proceedings were not brought to the attention of the applicants. In support of this argument, he found authority in *Lodhi 2 Properties Investments CC v Bondev Development (PTY) Ltd*[1] where the court held that:
- “Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such*

record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the Rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgement is granted in the absence of the party concerned the judgment is granted erroneously".

- [6] Mr. Cothill, counsel for the Respondents submitted that the return of service has been effected in terms of the rules and in the absence of a demonstrable error on the part of the court which granted the judgments, the application should fail. He contended on behalf of the respondents that service was given or done at the chosen domicilium and it is not a legal requirement that service should be effected upon a person. According to him, it does not matter whether the applicants were aware of the proceedings or not; in which event they could have chosen either to defend or consent to judgment.
- [7] The submission by Mr. Cothill may appear convincing at first blush but may disappear into nothingness upon scrutiny. As a matter of principle the applicants were entitled to be served with summons and defend the action or consent to judgment if so advised. The Respondents have conceded that the applicants were not in willful default in that the summons were not served upon them. Once it is accepted that the applicants were not served, it follows that the judgment granted in their absence is liable to be set aside on the basis that it was erroneously granted. It is a fundamental principle of our law that a court will not make a final order that may prejudice the rights of a person without notice to him. See *Fraind v Nothmann*[2].
- [8] It follows that the default judgment granted against the applicants should be rescinded and leave be granted upon the applicants to defend the proceedings if so advised.
- [9] There is however one matter that calls for a comment. The matter relates to the purpose of the rules and the duty the sheriff owes to the court in so far as service of court documents is concerned. A sheriff is an officer of court who is required to perform his duties honestly and diligently. The code of conduct for sheriffs states clearly that sheriffs are an integral part of the justice system. As a judicial officer, each sheriff is responsible for the effective service and execution of court processes. This is an important function in the administration of justice machinery where disputes among members of the society are required to be adjudicated fairly. In *Steinberg v Cosmopolitan National Bank of Chigago*[3] the court said that it is a cornerstone of our legal system that a person is entitled to notice of legal proceedings against such a person. The rules have reserved this job to a sheriff and rely on the return of service prepared by him that the defendant has been notified of the proceedings. If no appearance to defend or notice to oppose is filed, the court can upon satisfying itself that the service was effected properly, grant a default judgment as it happened in this case.

- [10] This court is inundated with applications for rescission of judgment where in the majority of cases, summons or application commencing proceedings have been served purportedly on the gate or door by affixation with an accompanying note that attempts have been made and no person found. Instead of making an effort to find the party, the sheriff simply drops the court documents and records that he has complied with Rule 4, only for the party to come to court and state that what is recorded in the return is not correct.
- [11] In casu, the first applicant operates a business of a fueling station on a 24-hour basis. At any given time, there are petrol attendants and cashiers on site performing their respective duties. A sheriff of this court, entrusted with an important responsibility of ensuring that the legal proceedings are brought to the notice of the defendants stated in his return that service was done by “affixing a copy thereof to the principal gate of the residence as the premises remained locked and nobody was present on the premises”.
- [12] Regarding the second applicant the sheriff’s return of service states that it was done at the chosen domicilium citandi et executandi address by handing a copy thereof to Freddy Shai ostensibly responsible and in control of the second defendant after exhibiting the original and explaining the nature and exigency of the said process. 2nd defendant has moved from the given address-current address unknown”.
- [13] The second applicant disputes the correctness of the information recorded on the returns of service and state as a matter of fact that he still resides at his chosen address and does not know Freddy Shai. Consequently, he did not become aware of the process.
- [14] What emerges from the above is that the sheriff who prepared the returns of service did not perform his duties honestly and diligently in fulfillment of his obligations to this court. The essence of the applicant’s submissions is that return of service should not be relied upon as it contains an incorrect information. These are serious allegations being made against an officer of court. The court relies on the office of the sheriff as one mechanism in the administration of justice to ensure that the process leading up to the granting of a judgment is fair and that the legal proceedings have been brought to the attention of the other party. Sheriffs like attorneys are required to be honest in their dealings with the court. The court should upon mere production of the return of service accept as correct the information contained therein.
- [15] In the circumstances of this case, I am unable to avoid making an adverse remark against the sheriff who was entrusted with the service of documents. He failed to do his job and this failure has caused some considerable inconvenience to the court and to the litigants. Three judges had to sit in adjudication of this matter and the litigants incurred substantial amounts of money. All of which could have been avoided.
- [16] One further aspect which deserves comment relates to the manner in which the sheriff who was entrusted with the writ of execution handled this matter. The applicant states the following in his affidavit:

“On the 3rd of August 2018, a notice was left at the principal place of business of the 1st applicant at 343 De Wet Drive, Polokwane by Deputy Sheriff of Polokwane, Gerhard Greef, and upon gaining possession of the notice

on the same date, I forthwith caused a telephone call to be directed to the sheriff’s office in order to enquire about the contents of the said notice. The personnel at the sheriff’s office advised that there is a judgment that was noted against me and the 1st applicant and that they have instructions to execute a writ against our property and as such they require our attendance at no 66 Platinum street, Polokwane, in order for us [to] arrange for settlement of the judgment debt”.

[17] Any person familiar with the court process will know that a sheriff’s job is to serve the documents and execute the warrants issued. It is not his business to arrange for settlement of judgment debts on behalf of creditors or plaintiffs. In my experience I have not come across a situation where a sheriff had called a person to his or her office for the purpose of arranging settlement. What happened in this case clearly shows that the office of the sheriff treats judgment debtors differently based on their social, economic or racial classification. This is certainly unacceptable as the law requires people to be treated the same by an officer of court. A sheriff’s office is not a negotiating forum where the rich and classy are called to hammer deals and subvert court processes whilst the poor are subjected to an unkind treatment where their goods get removed in the dead of the night and at times sold below market value for no reason other than that they are poor and often times Black.

[18] I have directed the Registrar of the court to make available a copy of this judgment to the Board of sheriff’s for noting and taking of appropriate steps to ensure that things like these do not happen. What happened in this case is a general dereliction of duty on the part of the sheriff who was entrusted with the service of summons.

[19] Consequently, it is ordered that:

1. Default judgment granted on 21 December 2017 is hereby rescinded and set aside.
2. The Respondents are ordered to pay the costs of the application on a party and party scale, jointly and severally, the one paying the other to be absolved.

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

For Applicants

: Mr. Gaisa

Instructed by

: Espag Magwai Attorneys

For Respondents : Mr. Cothill

Instructed by

: Smit Jones & Pratt

Date of Hearing

: 25 March 2019

Date of

Judgment

: 29 March 2019

[1] 2007 (6) SA 87 (SCA)

[2] 1991 (3) SA 837 at P839 H-I

[3] 1973 (3) SA 885 (RA)

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