

SOUTH AFRICA / JUDGMENT

Kondile and Others v The Body Corporate of Aminie (41101/2014) [2015] ZAGPPHC 845 (11 November 2015) [2015] ZAGPPHC 845

COURT

North Gauteng High Court, Pretoria

BEFORE

Kganyago

CASE / FILE NUMBER

41101/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

DATE:

11/11/2015

CASE

NO: 41101/2014

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In the

matter between:

NCEBA ELLIOT
KONDILE 1st
Applicant
LINDIWE GLEND
DHLADHLA 2nd
Applicant
CONASEELAN
NAICKER 3rd
Applicant
DITABENG
JOHANNES
MOKOENA 4th
Applicant
and
THE
BODY CORPORATE OF
AMINIE Respondent

JUDGMENT

KGANYAGO, AJ

[1] The applicants have launched an application for rescission of the order of 21 October 2014. The applicants' application was launched two days outside the prescribed time limits. As their application was launched out of time, the applicants are also applying for condonation for late filing of their application. The respondent is opposing the applicant's application.

[2] The default order obtained on 21 October 2014 read as follows:

"It is ordered:

2.1. That Mr Kondile is not a trustee and have not been a duly elected trustee on 10 December 2012.

2.2. That all the decisions and/or resolutions taken by Mr Kondile are declared null and void and has no bearing on the applicant or its contractors, and/or residents.

2.3. That any round robin resolution which does not contain the signatures of all trustees present in the republic be declared null and void and specifically the following, but not limited:

2.3.1. The round robin dated the 4th September 2013, with the heading Better Control over expenditure due to deficit;

2.3.2. The round robin dated the 10th September 2013, with reference to termination notice: Management Agent -Aminie Body Corporate;

2.3.3. The round robins dated 22nd September 2013.

2.4. That the meetings held on the 22nd of July 2013 and the 5th of August 2013 be declared null and void and that the resolutions passed at the said meeting be declared null and void.

2.5. That Fitzannes Estate (Pty) Ltd is to pay all the levies, received from the members of the applicant back to the members, within 3 days of granting of this order.

2.6. That the meeting held on the 1st July 2013, 22 November 2013 and 9 January 2014 be declared a valid and legal meeting and that the decision taken at the said meeting be valid, binding and enforceable.

2.7. That the first to fifth respondents be interdicted to act contrary to the best interest of the applicant and to interfere with the managing agents and/or duly elected trustees' and/or persons appointed by the trustees and/or disrupt the functioning of the applicant and any projects.

2.8. That the first to fifth respondents pay for the cost of this application the one to pay the other to be absolved. "

[3] According to the applicants the reasons why they are out of time is that the default order of 21 October 2014 was sent to the first applicant by e- mail on 23 October 2014. When he received that e-mail on that date, he was in the Eastern Cape busy preparing the funeral of his aunt. At that time he was also attending to another matter wherein he was been evicted.

[4] When the first applicant returned from the Eastern Cape, he had to consult with other applicants and there was a delay in raising funds. The rescission application was drafted and finalized on 20 November

2014. However, there was a further delay caused by the other applicant's confirmatory affidavits as they were not readily available.

[5] With regard to the rescission application, the applicants submit that after they were served with the respondent's notice of motion, they appointed the firm Thesigan Pillay attorneys to oppose the respondent's application. They contend that they were never notified by the erstwhile attorneys that their matter was set down for 21 October 2014. According to them, the only time they were updated was when the matter was removed from the roll of 28 July 2014.

[6] Thereafter, they heard nothing from their attorneys. It came as a shock to them when they were notified that a default order has been obtained against them.

[7] The respondents have initially launched an application against the applicants under case number 59282/2013. On 18 November 2013 the parties signed a settlement agreement which was made an order of court on 19 November 2013.

[8] The deed of settlement which was made an order of court on 19 November 2013 read as follows:

"NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

The purported Annual General Meeting of the First Respondent held on 18 September 2013 is void and that any and all decisions taken at such meeting are void.

2.

That an Annual General Meeting of the First Respondent's members shall take place on a date to be determined by a majority of trustees that held office prior to the purported meeting of 18 September 2013.

3.

The First Respondent's members will receive due notice of such Annual General Meeting from the Management Agent in the manner prescribed by Management Rule 39(3) of Annexure 8 the Sectional Title Act, 1986.

4.

The First Respondent shall be liable to pay taxed and/or agreed costs on a scale as between attorney and client, with 7 (seven) days from taxation and/or agreement thereto.

5.

The parties agree that this settlement agreement shall be noted as court order of the above Honourable Court."

[9] The applicants in the present case are of the view that had the court been made aware of the order of 19 November 2013, it would not have granted the default order. The applicant contends that since the meeting of 18 September 2013 was declared void, the respondent has fraudulently obtained the default order of 21 October 2014.

[10] The applicants' attorney submits that in an application for rescission it is not necessary to specify the rule under which the application is brought. She relies on the case of *Mutebwa v Mutebwa and Another* 2001 (2) SA 193 (TKH).

[11] The respondent has raised a point in limine contending that the applicants have failed to indicate in terms of which rule and/or law their application is been launched.

[12] Counsel for the respondent has submitted that they have disclosed all the facts to the Honourable Court before they obtained the order of 21 October 2014. The respondent denies that the order of 21 October 2014 was erroneously sought. According to the counsel for the respondent the applicants have received a proper notice of set down. They were also granted the opportunity on two occasions to file their opposing affidavit, yet they failed to do so. According to the respondent the notice of set down for the hearing of 11 September 2014 was served on the applicants' attorney on 25 July 2014. On 10 September 2014 the applicants' attorney requested a postponement and by agreement the matter was postponed to 21 October 2014.

- [13] The respondent contends that the applicant failed to comply with the court order of 19 November 2013 in that they failed to arrange the Annual General Meeting. According to the respondent, the managing company of the Body Corporate arranged the Annual General Meeting for 9 January 2014. The applicants were notified of that meeting and they did not raise any objection. New trustees were appointed at the Annual General Meeting of 9 January 2014 and the applicants did not launch an application to declare that Annual General Meeting null and void like they did with the outcome of the Annual General Meeting of 18 September 2013. The respondent therefore contend that the applicants by way of their conduct has accepted the Annual General Meeting and the new board of trustees.
- [14] The respondent submits that if the order of 21 October 2013 is rescinded there will be chaos in that there will now be two managing agents. They therefore, further submit that it will not be in the best interest of the Body Corporate if the order is set aside.
- [15] I will first deal with the applicants' application for condonation. It is trite that in an application for condonation the facts usually taken into consideration are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. [Melane v Sanlam Insurance Co Ltd 1962 (4) SA 531 (AD)]
- [16] Rule 271(1) of the Uniform Rules of Court provides that the court may on good cause shown make an order extending or abridging any time prescribed by these rule.
- [17] It has not been disputed that the applicants' application is two days late and in my view that is not excessive. The first applicant alleges that the default order was sent to his e-mail whilst he was in the Eastern Cape busy arranging the funeral for his aunt. The order was not sent to other applicants and they could not have been aware of it until they were informed by the first applicant. When he returned and informed other applicants, they had to arrange funding of their intended rescission application which further delayed the matter.
- [18] Under the circumstances, I am satisfied that the applicants have shown good cause why condonation for late filing of the application
- for rescission should be granted.
- [19] The applicants' application for rescission is brought under common law where a judgment may be set aside on various grounds, including fraud. According to the applicants the respondent has fraudulently obtained the default order of 21 October 2015 by concealing to the court that the meeting of 18 September 2013 was declared void, and that there was a court order of 19 November 2013 which entrenched them as trustees of the Body Corporate of Aminie. Even though the applicants did not indicate the specific rule under which the application is been brought, from the papers it is clear that it is brought under common law. Therefore, the respondent point in limine has no merits.

- [20] In order to succeed in an application for rescission of judgment brought under common law, the applicant must show good cause. The courts generally expect an applicant to show good cause by giving a reasonable explanation by showing that his application is made bona fide and showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospects of success (*Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (0), *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E), *Chetty v Law Society of Transvaal* 185 (2) SA 756 (A).
- [21] In order to succeed on a claim that the judgment must be set aside on a ground of fraud, the applicant must allege and prove that the successful litigant was a party to the fraud, that the evidence was in fact incorrect, that it was made fraudulently and with the intent to mislead and that if the true facts were placed before the court, the court would have given another judgment other than that which was induced by the incorrect evidence.
- [22] In *Ramodike v Moketsi Trading Store* 1955 (2) SA 169 (T) 171F-G, the court stated:
- "If fraud or mutual mistake is alleged to have vitiated the judgment, obviously these matters require full investigation and proof of the necessary facts. Equally the defendant if asserting that without proper citation he has been cast in a judgment must allege and prove these facts. "
- [23] In *Makings v Makings* 1958 (1) SA 338 (A) 344G-H the court said:
- "It is not clear that *Rex v Sheriff* can be said to have decided, as part of its ratio decidendi, that a judgment will not be set aside on the ground of fraud unless it is shown that the successful litigant was a party to the fraud. But the question was under consideration and, as I read the judgments, the view of the members of the Court was that the litigant must have been a party to the fraud if the judgment is to be open to attack."
- [24] The applicants' contention is that the respondent has concealed a court order of 19 November 2013 that declared the Annual General Meeting (AGM) at 18 September 2013 void. This Annual General Meeting of 18 September 2013, that is where the new trustees were appointed. After that meeting was declared null and void the status quo remained and the applicants were reinstated as trustees. This order of 19 November 2013 was obtained by way of a settlement agreement which was made an order of court.
- [25] In terms of paragraph 2 of the settlement agreement, another Annual General Meeting was supposed to take place on a date to be determined by a majority of trustees that held office prior to the purported Annual General Meeting of 18 September 2013. Pursuant to the order of the 19 November 2013, the Body Corporate of Aminie and not the majority of trustees that held office prior 18 September 2013, issued notices for another Annual General Meeting. The applicants were also served with the said notices. The Annual General Meeting was ultimately held on 9 January 2014.

- [26] The applicants at no stage objected to the Annual General Meeting of 9 January 2014 been held despite been aware that it was going to take place. The Annual General Meeting of 9 January 2014 was at no stage declared null and void. The applicants did not take any steps to declare that Annual General Meeting null and void or to institute contempt proceedings against the people of called the Annual General Meeting. As of now the results of the Annual General Meeting of 9 January 2014 still stand.
- [27] The application that led to the order of 21 October 2014 was served on the applicants and the applicants were aware of the relief that the respondent was seeking. The applicants filed their notice to oppose but failed to file their opposing affidavit. In paragraph 15 of the respondent opposing affidavit, they state that they have granted the applicants an opportunity on two occasions to file their opposing affidavits, but they failed to do so. The applicants in their replying affidavit does not dispute that. They merely state that they have instructed their attorney to oppose the matter, and their attorney did not give them proper information.
- [28] In paragraph 19.2.4 the respondent state that the matter was by agreement postponed in the presence of the first applicant's attorney of record on 11 September 2014 to 21 October 2014 and a court order substantiating their submission is attached. The applicants in reply to this paragraph admit its contents and state that they were misled by their attorneys of record. What is interesting on the same paragraph they went on to state that their present attorneys of record advised them that the order was however, still by default because apparently their erstwhile attorney of record Mr Pillay did not attend court on 21 October 2014. In my view what they are basically saying in this paragraph is that the default order was erroneously granted in their absence which now contradicts their assertion that the order was obtained by fraud.
- [29] The applicants does not dispute that despite been given two opportunities to file their opposing affidavit they have failed to do so. Even if Mr Pillay did attend court on 21 October 2014 without the opposing affidavit he would have done nothing. The respondent would still have obtained the order they were seeking as their application would still have been unopposed.
- [30] Mr Pillay was not called served with the papers to defend himself. In *Motswai v Road Accident Fund* 2014 (6) SA 360 (SCA) at para 22 the court stated that judges must be astute not to pontificate or to be judgmental about persons who have not been called upon to defend themselves. Therefore in my view it will be improper of me to blame Mr Pillay of all the applicants mishaps without him been given an opportunity to defend himself.
- [31] In my view the applicants were given ample opportunity to file their opposing affidavit where they could have set out their defence in details. The date of 21 October 2014 was an agreed date between the attorneys of the two parties. In my view the applicants have realized that they did not have any ground to rescind the order of 21 October 2014 and the only option available to them was to bring their application under common law where a

judgment can be set aside on various grounds. However, they have failed to prove any fraud committed by respondent or that the respondent was a party to the alleged fraud. They failed to give a reasonable explanation for their default except to blame Mr Pillay who was not given an opportunity to defend himself.

[32] The applicants were served with the notice of the Annual General Meeting which ultimately took place on 9 January 2014. They never took any steps to stop that meeting despite been aware of when it was going to take place. They never took any steps to declare that Annual General Meeting null and void. In my view the applicants have no prospects to success in the main application should the order of 21 October 2015 be rescinded.

[33] Body Corporates are supposed to hold their Annual General Meetings annually. In other words by 9 January 2015 they should have held another Annual General Meeting. The applicants are still fighting for a 2013 Annual General Meeting which in my view has been bypassed by events. New managing companies have been appointed. If rescission is granted it means the status quo that prevailed during 2013 should stand. That in my view that is going to affect the smooth running of the Body Corporate and cause chaos. That will not be in the best interest of everyone. The applicants have not been barred from taking part in future elections. If they are having enough support, they could still reclaim their positions in the next elections.

[34] Under the circumstances, in my view the applicants have not shown good cause for a rescission order under common law.

[35] In the result I make the following order:

35.1. The applicants' condonation application is granted.

35.2. The respondent's point in limine is dismissed.

35.3. The applicants' application for rescission of the order of 21 October 2014 is dismissed with costs.

KGANYAGO A J

ACTING JUDGE OF THE HIGH COURT

Heard on: 08 October 2015

Date of Judgment:

For the Applicants: Ms. L Mbanjwa

Instructed by: L. Mbanjwa Incorporated, Pretoria

For the Respondent: Adv. M Coetzee

Instructed by: Kleynhans & Swanepoel Incorporated, Pretoria

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