

SOUTH AFRICA / JUDGMENT

Labstix Diagnostics (Pty) Ltd and Another v SDV South Africa (Pty) Ltd (91624/2016) [2018] ZAGPPHC 380 (17 May 2018)

[2018] ZAGPPHC 380

COURT

North Gauteng High Court, Pretoria

BEFORE

G Nel

CASE / FILE NUMBER

91624/2016

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IN THE HIGH COURT OF SOUTH
AFRICA

GAUTENG DIVISION, PRETORIA

(1)

NOT REPORABLE

(2)

NOT OF INTEREST TO OTHER
JUDGES

(3)

REVISED.

CASE NO: 91624/2016

17/5/2018

In

the matter between:

LABSTIX
DIAGNOSTICS (PTY)
LTD
First Applicant
JACOBUS
GROBLER
Second Applicant
and
SDV
SOUTH AFRICA (PTY)
LTD
Respondent

JUDGMENT

NEL AJ

- [1] The applicants have launched an application for the rescission of a summary judgment granted by His Lordship Mr Acting Justice Van der Westhuizen (as he then was), on 26 April 2017.
- [2] The applicants have launched the application for rescission of the summary judgment, in reliance on rule 31(2)(b), alternatively rule 42(1)(a) of the Uniform Rules of Court, and further alternatively, in terms of the common law.
- [3] The applicants seek an order in the following terms:
 - [3.1] that the summary judgment granted as against the applicants (as defendants) on 26 April 2017 be rescinded and set aside; and
 - [3.2] that the respondent pays the costs of the rescission application.
- [4] On 23 November 2016 the respondent issued summons against the applicants in terms of which the respondent sought payment of the amount of R 268 318.22 together with interest thereon, based on a claim, as against the first applicant, for the rendering of freight handling and customs clearing services, and as against the second applicant, based on the provision of a suretyship undertaking.
- [5] The applicants defended the action and on 5 January 2017 filed a notice in terms of Rule 23, seeking the striking out of the plaintiffs particulars of claim, on the basis that the amount claimed falls within the jurisdiction of the Regional Court.
- [6] On 11 January 2017 the respondent launched an application for summary judgment as against the applicants.
- [7] On 13 January 2017 the applicants filed a notice of intention to oppose the summary judgment and filed their affidavits resisting summary judgment.
- [8] The application for summary judgment was set down for hearing on 26 April 2017. On such date there was no appearance on behalf of the applicants, and summary judgment was granted against the applicants, as sought by the respondent.
- [9] The application for rescission launched by the applicants is undated, and there is no court stamp on the application, but it appears that the application was launched during June 2017.

- [10] In the founding affidavit filed in support of the rescission application, and as expanded on in the applicants' heads of argument, the reason why there was no appearance on behalf of the applicants at the application for summary judgment on 26 April 2017 was that the applicants were advised by their attorneys that the summary judgment application had been stayed by the applicants' application notice in terms of rule 23, and despite instructing their attorneys to attend at the summary judgment application, the applicants' attorneys did not do so.
- [11] In the founding affidavit the applicants alleged that the summary judgment granted on 26 April 2017 was a default judgment, on the basis that the applicants did not attend at court, and the court was not informed of the applicants' opposition to the application.
- [12] The applicants alleged in the founding affidavit that on inspection of the court file, which appears from the applicants' heads of argument to have taken place on 4 May 2017, that neither their notice of Intention to oppose the summary judgment application nor the affidavits resisting summary judgment were on the court file.
- [13] The applicants also alleged that it appeared from the respondent's index dated 11 January 2017 that the respondent did not include the notice of intention to oppose the summary judgment and the affidavits resisting summary judgment in the court papers.
- [14] The applicants contend that on such basis, the granting of the summary judgment was irregular, and should be set aside.
- [15] It is alleged in the respondent's answering affidavit, and expanded on in the confirmatory affidavit attached thereto, that the notice of intention to oppose the summary judgment and the affidavits resisting summary judgment formed part of the summary judgment application bundle. In support of such allegations the respondent referred to a final index dated 11 April 2017, which index reflects the inclusion of the applicants' notice of intention to oppose the summary judgment application and the applicants' affidavits resisting summary judgment.
- [16] It was also set out in the answering affidavit that the respondent made the court hearing the summary judgment application aware of all of the pleadings and processes exchanged before the summary judgment application was granted.
- [17] It was alleged in the confirmatory affidavit deposed to by the respondent's Pretoria correspondent attorney that the applicants' notice of intention to oppose the summary judgment, the applicants' affidavits resisting summary judgment, and the applicants' notice in terms of rule 23 was presented to the court, and was dealt with by respondent's counsel, whereafter His Lordship Mr Acting Judge Van der Westhuizen (as he then was) granted judgment in favour of the respondent "taking into consideration the opposing papers".

- [18] The applicants did not file a replying affidavit. I enquired from applicants counsel during the hearing of the application on 7 May 2018, whether there was any reason not to accept the respondent's version as to the presence of the affidavits resisting summary judgment, and the other documents, at the hearing of the summary judgment application, and she conceded, correctly in my view, that there was no basis not to.
- [19] Having regard to the allegations as set out in the answering affidavit, which were not disputed, insofar as the affidavits resisting summary judgment were before the court hearing the application for summary judgment, it is necessary to determine whether an application for rescission of judgment was the appropriate remedy to pursue. This issue was not pertinently dealt with by either counsel, and was not raised in the application papers, or the heads of argument.
- [20] In the matter of *Morris v Autoquip (Pty) Ltd*[1] it was held, in dealing with an application for rescission of summary judgment that where a court is faced with an application for summary judgment, in which there is no appearance for a defendant, the court is not entitled to ignore the affidavit
- resisting summary judgment, and must consider the affidavit resisting summary judgment in order to determine whether or not to grant summary judgment.[2]
- [21] It was also held in the same matter that because of such obligation on the court hearing an application resisting summary judgment, it cannot be said that a defendant is in default when he submits an affidavit opposing summary judgment, even though there is no appearance on his behalf at the application for summary judgment, and that in such circumstances an application for a rescission of judgment is an incorrect procedure.[3]
- [22] During the hearing of the application respondent's counsel made reference to the unreported matter of *De Beer v ABSA Bank Ltd*[4], which was heard by a Full Bench of this Division.
- [23] In the *De Beer* matter, His Lordship Mr Justice Meyer with whom his Lordships Mr Justice Prinsloo and Louw concurred, held that it cannot be said that summary judgment was granted in the absence of a defendant when the defendant submitted an affidavit opposing summary judgment but where neither the defendant nor his legal representative appeared in court.[5]
- [24] It was held that summary judgment granted against a defendant in such circumstances is final and res judicata, and that an application for the rescission of summary judgment in such circumstances is the wrong procedure.[6]
- [25] In the unreported matter of *Ncube and Another v ABSA Bank Ltd*[7] Her Ladyship Ms Justice Weiner, who appears not to have been made aware of the *De Beer v ABSA* matter, held[8] that where summary judgment is granted in circumstances where the defendant has filed an affidavit resisting summary judgment, but there is no appearance for the defendant on the

day of the hearing of the summary judgment application, there is no default and the defendant cannot apply for rescission of judgment. It was held[9] that the only remedy open to such a defendant is to ask for leave to appeal and condonation for the late filing of the appeal.

[26] Not only am I in agreement with the judgment of Her Ladyship Ms Justice Weiner in the Ncube matter, and with the Full Bench of this Division in the matter of De Beer v ABSA Bank Ltd, I am also obliged to follow such latter judgment.

[27] In the application for summary judgment in this matter, the applicants' affidavit resisting summary judgment was before the court hearing the application for summary judgment, and despite there being no appearance for the applicants, the granting of the summary judgment was not a default judgment.

[28] In the circumstances, the seeking of a rescission of the summary judgment is an inappropriate course of action, and the improper procedure, and I accordingly must dismiss the application.

[29] In the circumstances, I make the following order:

[38.1] The application is dismissed;

[38.2] The applicants, jointly and severally, are to pay the costs of the application.

G NEL

[Acting Judge of the High Court,

Gauteng Division,

Pretoria]

Date of Hearing: 7 May 2018

Date of Judgment: 17 May 2018

APPEARANCES

For the Applicants: Adv

Instructed by:

For the Respondent: Adv B Hitchings

Instructed by: Breytenbach Mostert Skosana

c/o Van Stade Van der Ende

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[1] 1985 (4) SA 398 [WLD].

[2] At 400E- F.

[3] At 400F-H.

[4]

[2016] ZAGPPHC 325 (6 May 2016).

[5] At para 14.

[6] At para 14.

[7]

[2016] ZAGPJHC 364 (25 November 2016).

[8] At para 3.

[9] At para 4.

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