

SOUTH AFRICA / JUDGMENT

Le Roux v Bekker and Another (1445/2020) [2022] ZAMPMHC 21 (3 November 2022) [2022] ZAMPMHC 21

COURT

Middelburg High Court, Mpumalanga

BEFORE

Langa

CASE / FILE NUMBER

1445/2020

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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO:1445/2020

In the matter between:

FREDERICK JACOBUS LE ROUX

APPLICANT

AND

MARHINUS JACOBUS BEKKER FIRST

RESPONDENT

NANDA LE ROUX SECOND

APPLICANT

JUDGMENT:03 OCTOBER 2022

Langa J:

Introduction

and background

- [1] This is an opposed application brought in terms of Rule 41 (2) of the Uniform Rules of Court, alternatively under the common law for the rescission of a default judgment granted by this court on 17 August 2020 against the applicant and the second respondent. The latter has not entered appearance to defend this application.
- [2] On 13 February 2018 the first respondent was appointed as the Receiver and Liquidator of the accrued estates of the applicant and the second respondent pursuant to their divorce in the Middelburg Regional Court. It is common cause that the first respondent was entitled to remuneration and commission in terms of the said order appointing him as the receiver and liquidator. After discharging his duties as liquidator and after having provided the parties with an account, the first respondent's fees were calculated to be R531 521.26. When the fees were not paid, the first respondent approached court to enforce the payment.
- [3] It is further common cause that the applicant in casu failed to file papers before the hearing of the matter on 17 August 2020. On 17 August 2020 the court made an order against the applicant and the second respondent, who were previously married to each other, to pay the first respondent's fees as liquidator of their estates. In terms of the said order the applicant and the second respondent were ordered to pay the amount of R531 521.26 jointly and severally, the one paying the other to be absolved. The applicant disputes that he was liable to pay the whole amount jointly and severally with the second applicant. He however, conceded that he was only liable to pay half of this amount, (R265 760.63) as confirmed by the first respondent.
- [4] The applicant therefore does not per se deny that the first respondent is entitled to the amount of R531 521.26 as fees for his services but challenges the order on inter alia the basis that it was not competent for the court to order the applicant and the second respondent to pay the said amount jointly and severally. The applicant argued that he is not liable for the whole amount but for only 50% thereof and that the second respondent is liable for the payment the other 50%.

Issues for

determination

- [5] The issues raised by the applicant can be summed up as follows:
- [5.1] He complains of the granting of the judgment in his "absence" while he was present at court;
- [5.2] He challenges the order of joint and several liability;
- [5.3] He avers that the amount of fees was not taxed and therefore not a liquidated amount;
- [5.4] He further relies of the National Credit Act 34 of 2005 and contends that the process is fatally defective as the first respondent failed to first bring the default to the attention of the applicant;

[5.5] He further contended that the first respondent did not divide the assets of the accrued estate in accordance with the account.

[6] However, the main issues for determination in this matter are in my view whether the default judgment was obtained and granted properly, whether the applicant has shown reasonable cause and whether the applicant has established he has a bona fide defence. Although the first respondent also took issue with the delay in the launching of this application, I am however satisfied with the explanation for the delay. Furthermore, the contradictions which the first respondent seeks to rely on in resisting this application do not justify the dismissal of this application. However, before I deal with the issues highlighted above I will briefly traverse the some of the above defences to the extent that they are relevant to this application.

Legal principles and evaluation

- [7] Rule 42 (1) (a) provides that a Court may mero motu or upon application by any party affected, rescind or vary any order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. In terms of this rule judgment may be rescinded where there is a mistake or error either in the process of seeking the judgment or in the granting of the default judgment. See *Kgomo v Standard Bank of South Africa* 2016 (2) SA 184 (GP). The applicant does not have to show good cause for the rescission or variation to be granted under this rule. Where the applicant is able to show that there was an error the court may without further enquiry rescind or vary the default judgment.
- [8] Such a judgment granted in default may also be rescinded or varied in terms of common law if the applicant can show that there is a reasonable explanation for the default, that the application is bona fide and further that he has a bone fide defence with some prima facie prospects of success. See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 SCA at paragraph 11.
- [9] As indicated above, I do not intend dealing in detail with all the defences raised. It must be stated from the onset that concerning the application of the National Credit Act the contention that the amount owing as fees is an incidental credit agreement in terms of the National Credit Act defence is bad in law. There is no provision anywhere for the payment of any interest or fee should the amount owing not be paid on an agreed date. It therefore does not fall within the incidental credit agreement as envisaged in the National Credit Act. This defence is therefore dismissed.
- [10] Likewise, the defence that the amount of fees was not taxed and therefore not a liquidated amount also appears not to have any basis based on the interpretation of the appointment. Paragraph 2.17 states that the liquidator will be entitled to the remuneration and commission applicable to a trustee appointed in terms of the Insolvency Act 24 of 1936 as amended. I do not find any basis for the argument that the amount must be taxed and this defence too is rejected.

- [11] The next defence I deal with is that the first respondent failed to comply with the order appointing him as liquidator in that he failed to send his account by prepaid registered post or hand delivery to the parties. It is common cause that the first respondent mailed the documents to the applicant's attorneys although he did not deal with them as specified in the order, that is by registered post or hand delivery. This is a technical defence the order has not been complied with. The first respondent argued that the defence should not stand as the applicant does not deny having received the account. It is not clear to me what the basis of this defence is as the applicant does not deny receiving the account. It is therefore disingenuous for the applicant to raise this as a defence. There therefore no merit in the argument that the first respondent did not comply with the order and this therefore constitutes a bad defence.
- [12] However, the defence that the first respondent did not divide the assets of the accrued estate in accordance with the account the applicant appears to have merit if one considers the wording of the appointment. Although the first respondent contends that due to the applicable matrimonial regime he was not tasked to divide the assets but simply to determine the quantum, it is however, apparent from the appointment that one of the tasks is to divide the assets of the accrued estates in accordance with the account. Therefore, the contention by the first respondent that he was not expected to divide the assets of the estates cannot be correct and should be rejected. I therefore find that there is merit in this defence and consequently it constitutes a bona fide defence for the purposes of this application.
- [13] I now turn to what I consider to be the main defences in this application as stated above. I deal first with the contention that the granting of the judgment in his "absence" while he was present at court was erroneous. This concerns the question whether the judgment by default was correctly granted in these circumstances.
- [14] The first respondent contended that the applicant has failed to present a reasonable and acceptable explanation for his default. It is argued that he did not advance reasons why he failed to file a notice of intention to oppose the application despite having become aware of the application a week prior to the hearing.
- [15] The applicant Mr FJ Le Roux averred in his affidavit that he received the application for default judgment on 11 August 2020 after it was served on his son at his former home. He further states that he was present at court on 17 August 2020 when the judgment by default was granted against him and the second respondent for the payment of R531 521.26. Although the first respondent attempted to question whether the applicant was indeed in attendance at court this was not seriously challenged.
- [16] There also seems to be no dispute that the proceedings in question were held virtually as stated by the applicant. In any event this court can take judicial notice of the fact that this was in the middle of the Covid-19 lockdown and all civil proceedings were at that time conducted virtually in this court. This is important as the proceedings would have been held in chambers and not in physical court. Furthermore, the applicant's evidence is that the

presiding Judge was aware of his presence at court after the judge's clerk informed the Judge of his presence. The applicant stated further in his founding affidavit that although the judge's clerk informed him that he would be informed when the matter is called up, he was however, later informed that judgment by default had already been granted by court.

- [17] As stated above these assertions by the applicant were not seriously challenged by the first respondent. The first respondent could not deny that the applicant was present at court on the day in question and that the default judgment was granted in his "presence". All the first respondent could say in this regard is that the applicant should have obtained an affidavit from the judge's clerk to support his averment that he was at court on that day. Without any evidence to the contrary, I find that the evidence of the applicant that he was present at court remains uncontroverted. I therefore accept that the applicant was present at court on 17 August 2020 prior to and when the judgment was granted. Having accepted this, I must also accept that the judgment was granted in circumstances where the court was aware of his physical presence at court.
- [18] However, even though I accept that the applicant was present at court in person, it is nevertheless common cause that he had not filed any papers to oppose the application for default judgment when the matter came before court on 17 August
2020. Therefore, technically, the applicant was in default based on his failure to file opposing papers and the court would therefore have been entitled to proceed with the matter on an unopposed basis as it did. However, the problem is that the applicant was present when the judgment was granted. Before I deal with this issue I deal with the applicant's explanation for his default.
- [19] The applicant's explanation for not filing the opposing papers is relevant and important particularly as he was present at court. Unfortunately, he was not afforded an opportunity to address court before the judgment was granted even though he was at court. His explanation is *inter alia* that he had no money at the time to instruct a lawyer. Although the first respondent contended that this explanation should be rejected, the reasons advanced by the first respondent are in my view not sufficient to justify the rejection of the applicant's explanation.
- [20] The first respondent argued that the applicant cannot raise this explanation as he was living comfortably in KZN and globetrotting. This assertion seems to suggest that as the applicant travelled overseas at the time, it must therefore be concluded that he had money to pay for a lawyer. While it may be true that the applicant travelled overseas, that does not necessarily constitute evidence that he had money to instruct a lawyer when he received the papers on 11 August 2020. I am therefore not persuaded that this explanation should be rejected as without merit for that reason. It is well possible that it is true.
- [21] Another issue for consideration is the uncontroverted evidence that the application for default judgment was not served on the applicant personally and that he only received it on 11 August 2020. It is common cause, as confirmed in the return of service by the Sheriff, that

the application was served on his son and that the applicant no longer stays at the address of service. The first respondent correctly and understandably did not challenge this evidence. However, while accepting that the applicant probably received the papers on 11 August 2020 as he alleged, the first respondent still persisted with the argument that the applicant had sufficient time to instruct his lawyer to file a notice to defend and opposing affidavits. He contended that the applicant had approximately a week to file opposing papers. This argument seems not to properly take into account the number of days which were at the disposal of the applicant from 11 August 2020 until the date of hearing on 17 August

2020. A simple calculation shows that he had only 3 court days within which to file the papers inclusive of the 11 August 2020. The 15-16 August 2020 cannot be counted as these days fell on a weekend. The 11th should not be even be counted as it is the date the papers were received by the applicant. It can therefore safely be accepted that had 3 clear court days to work with.
- [22] The next question that should follow is whether the 3 days or even 4 days for that matter constituted sufficient time for the applicant to consult a lawyer and file opposing papers. Although this may be feasible in some circumstances, a period of 3 days would ordinarily be regarded as short. If one considers the days prescribed in terms of other rules, for instance Rules 31 (4) and (5) and 32 92) (c) amongst others, it can hardly be said that a period of 3 days in this case was sufficient as contended by the first respondent. Considering this aspect, it is in my view highly likely that the court would have dealt with the matter differently had it been aware of this fact. I nonetheless, find that the applicant did not have sufficient time to file the opposing papers and based on this fact alone the application for rescission should be granted.
- [23] The next question to be considered is whether the circumstances of this case justified the hearing of the application against the applicant to proceed in his presence as if he was absent without giving him a hearing. Unfortunately, the court order is not helpful in this regard as it does not say anything on this aspect. However, even if it is accepted that the court was entitled to proceed with the matter by default as the applicant had not filed the opposing papers, it is nonetheless, questionable whether it was entitled to do so in these circumstances where he was present, without at least giving him a hearing.
- [24] In the case where a party or his legal representative is absent and the opposing papers have not been filed, there should be no issues as to whether or not the default judgment should be granted. The situation is however different as in casu where the litigant has responded to the notice of motion by coming to court even though he has not filed the necessary papers. While I accept that the applicant was technically in default as he had not filed opposing papers, I am however of the considered view that his presence at court warranted a different approach, especially since the court was made aware that he was present. In order to promote the right of access to the courts and justice, the applicant should have at least been given an opportunity to address court before it with the matter. It is a fact that the majority of the citizens are lay person as far as the law, rules and litigation is concerned. It cannot be

ignored that lay litigants and impecunious litigants frequently come before our courts on the day of hearing in response papers served on them hoping to be able address court in respect of their situations. Should the court door be closed to such litigants simply because they have not filed the necessary legal papers or should they be allowed to address court even though technically not properly before court? I am of the view that such litigants should be given a hearing.

- [25] Justice must not only be done but it must manifestly be seen to be done. Sometimes it takes only a few minutes to hear such litigants or to explain to them their legal predicament based on the papers before court. In line with the right to access of courts, the applicant in this case should have at the most been given audience and the opportunity to state his case. The court was not compelled to accept his story and could have still proceeded to grant the order if not satisfied with the explanation. Alternatively, it could have postponed the matter and ordered him to pay the costs occasioned by the postponement. However, while nothing compelled the court from hearing viva voce submissions, the fact that he was present compelled the court to hear him out.
- [26] The rules of court must be weighed on the scale of the Constitution, in particular section 34 thereof dealing with access to courts which provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum. Ordinarily, a default judgment means a judgment granted in the absence of a party where such party has failed to file a notice of intention to defend or having filed such notice fails to file a plea and is barred in terms of the rules. In *Bhengu v Jasat and Others* 1949 (1) SA 462 (N) the court said that “It may very well be that when the legislature referred to judgments granted in the absence it had in mind default judgments properly so called, that is to say judgments entered in the absence of the other party concerned and of his representative.” Even where a defendant has never clearly consented to the plaintiff’s claim but persisted in disputing it, the court should be slow to refuse him entirely an opportunity to have his defence heard. *Naidoo v Cavendish Transport Company (Pty) Ltd* 1956 (3) SA 244 (D). See also *Joosub v Natal Bank*, 1980 TS 375.
- [27] Default judgment in itself is inherently contrary to the provisions of section 34 of the Constitution as it is granted in the absence of the defendant of respondent. See *RGS Properties (Pty) Ltd v Ethekewini Municipality* 2010 (6) SA 572 (KZD). However, the situation in casu is even worse in that the judgment by default was granted in the presence of the applicant. Strictly speaking it is not a default judgment granted in the absence of a party as envisaged in the rules. The court dealt with the matter as if the defendant was not there while he was present and this was incorrect. He was in my view denied his right to be heard. To ignore and dismiss such a litigant without at least hearing their story may result in irreversible injustice even if the court may have been procedurally entitled to proceed with the matter. My view is therefore that the applicant having presented himself to court should have at least been afforded a hearing or opportunity to explain his position and the court

erred by not doing so. It was an irregularity for the court not to grant the applicant a hearing. See *Morudi and Others v NC Housing Services and Development Co Limited and Others* [2018] ZACC 32. It follows that the order was granted erroneously as envisaged in rule 42(1)(a).

[28] One is not oblivious of the fact that the courts are generally under pressure, particularly, in the motion court where there is no time to waste because of the congested court rolls. Judges are forced to move as quickly as possible in dealing with the many matter placed on such rolls. While this is a reality, litigants and in particular the lay,

vulnerable and uninformed, should nevertheless accommodated. They should not be judged on the standard of the trained lawyer who is au fait with the complications and sophistication of the law and litigation. They must at least be afforded hearing if they are present court. The fact the proceedings are held virtually should not be an excuse either. The court must ensure that the litigants present can be connected and heard.

[29] “The Constitution and our law are about real justice, and not mere formalities. Importantly, the constitutional prescript of legality and the rule of law demand that nobody, not even a court of law, exercise powers they do not have.” See *City of Tshwane Metropolitan Municipality v AfriForum & Another*

[2016] ZACC 19. The formalistic application of rules should not be allowed to deny anyone the right to be heard. The rules can be relaxed to accommodate the hearing of such litigants where it is necessary and in the interest of justice to do so. Injustice is likely to result if they are not given a hearing than if they are. Based on the accepted evidence that the applicant was at court and his presence made known to the court, he should have been given audience before the judgment was granted. I consequently find that the judgment was wrongly granted should therefore be rescinded on this ground.

[30] I now turn to the question whether the applicant is bona fide and has established that he is has a bona fide defence. I have already found that his other defences do constitute bona fide defences as stated above. it is trite that a court should not scrutinize too closely whether the defence proffered is well founded. As long as prima facie there appears to be sufficient reasons for allowing the defendant to lay before court the facts he thinks necessary to meet the plaintiff's claim, the defence should be allowed. When assessing the requirement of reasonable cause, it must be mindful that while among others this requirement incorporates showing the existence of a bona fide defence, the court is however, not seized with the duty to evaluate the merits of such defence at this stage. Therefore, even if the court has some doubts about the prospects of the defence advanced, the application should not be refused based on that reason unless the defence is of such a nature that it prima facie amounts to nothing more than a delaying tactic on the part of the applicant.

[31] One of the grounds relied on by the applicant is that the judgment is wrong particularly in ordering the applicant and first respondent to pay the fees jointly and severally. It is trite that in contract joint and several liability exists if imposed by express words or necessary

implication (Tucker and Another v Carruthers 1915 AD 251). Regarding debts, the law pre-supposes a pre-existing underlying liability of all parties in respect of that debt. Christie The Law of Contract in South Africa 6ed. In the present matter no legal basis exists for holding the applicant and the second respondent jointly and severally liable for the payment of the first applicant's fees. The applicant's contention that the first respondent stated in writing that the applicant was obliged to pay only 50% of the fees and the other 50% to be paid by the second respondent was not denied by the first respondent. Although the first respondent, when applying for default judgment, persisted with requested for an order that the parties pay the whole amount jointly and severally, it is however clear from the first respondents own papers that the applicant and the second respondent were liable to pay only half each in respect of the fees claimed by the first respondent. The imposition of joint and several liability in this case is not supported by the established facts and evidence. I am accordingly persuaded that the order that the parties pay the fees jointly and severally is assailable and the defence by the applicant in this regard has prospects of success. For these reasons alone I find that the applicant has established a bona fide defence in this respect which should be sufficient for the granting of the application for rescission.

- [32] Furthermore, the court order in terms of which the first respondent was appointed does not contain a provision rendering the parties jointly and severally liable for the first respondent's costs. The interpretation suggested by the first respondent is in any case contrary to what the first respondent stated about each party's obligation in respect of the fees. In any event, as already indicated above it is not necessary for the court to go into the evaluation of the merits of the defence at this stage. The applicant has in my view raised a bona fide defence in this regard based on which the application should be granted.
- [33] It is trite that a court exercises a discretion when considering whether to rescind a judgment or order, either in terms of the common law or rule
42. The Court's discretion in deciding whether sufficient cause has been established must however, not be unduly restricted. In *Harris v Absa Bank Ltd t/a Volkskas* 2006
- (4) SA 527 (T) at 529-560, Moseneke J as he then was stated that: '[6]. ... an enquiry whether sufficient cause has been shown is inextricably linked to or dependent upon whether the applicant acted in wilful disregard of Court rules, processes and time limits.
- [34] In determining whether sufficient or good cause has been shown to exist, the court must consider inter alia whether or not the applicant was reckless or negligent. Based on the facts of this matter there is no basis to hold that the applicant

acted in wilful disregard of Court rules, processes and time limits. After considering the facts and circumstances of this case, I am satisfied that based on justice and fairness the applicant has shown good cause for the granting of the application for rescission under common law. *De Wet & others v Western Bank Ltd* 1979

- (2) SA 1031 (A) at 1042H.

Conclusion

[35] In conclusion I am satisfied that there was an irregularity in the proceedings as stated above in that the applicant was denied a hearing by the court. Therefore, based on Rule 42 (1) (a) the application for rescission should succeed. I further find that the applicant has under common law shown reasonable cause for the granting of the application and has also established the existence of a bona fide defence. The application for rescission therefore stands to be granted with costs.

Order

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

The application for the rescission of the judgment dated 17 August 2020 is hereby granted with costs on a party and party scale, inclusive of costs of counsel where so employed.

MBG LANGA

JUDGE OF THE HIGH COURT

Date of hearing:

04 October 2022

Date of delivered:

03 November 2022

Appearances:

For the Applicant;

Advocate

Scholtz

Instructed by:

GFT

Pistorius Inc

For the First Respondent:

Advocate Van der Merwe

Instructed by:

Delport

Van Den Berg Attorneys

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 03 November 2022 at 10h00.

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