

SOUTH AFRICA / JUDGMENT

# Lemottee v Marais [2007] ZAGPHC 378; 59/06/01 (28 February 2007)

**[2007] ZAGPHC 378****COURT**

High Courts - Gauteng

**BEFORE**

Willis

**CASE / FILE NUMBER**

3859/06

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 3859/06

DATE:2007/02/28

In the matter between

LEMOTTEE AGNEW..... Applicant

and

MARAIS W..... Respondent

**JUDGMENT**

WILLIS J: On Monday 26 February 2007, I dismissed with costs an application for a rescission of summary judgment granted by my sister Masipha J on 4 October 2006. During the course of the week, Mr Dlamini who appears for the applicant and the application for rescission of the judgment informed the court that he was not present on Monday due to a misunderstanding.

I shall accept that this is so. I let counsel re-argue the matter on the assumption that I would have the power to set aside that order granted on Monday, 26 February 2007 by reason by this misunderstanding that could have arisen relating to Mr Dlamini's

non-appearance on Monday. The fact of the matter is that where summary judgment is granted the proper course for a party, who believes that it was wrongly granted, is ordinarily to seek leave to appeal from the judge who granted such order.

See *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T). There are the following exceptions which would arise, these being that the application to set aside the judgment is brought in terms of Rule 42 (1), namely that the judgment: - (a) was erroneously sought for or erroneously granted in the absence of any party thereby effected; or

(b) was granted as a result of a mistake common to the parties.

I also accept, as was argued by Mr Dlamini, that a summary judgment can be set aside on common law grounds of fraud, a Justus error and in certain very exceptional cases. See *Nyingwa v Moolman* NO 1993 (2) SA 508 (TK). The application before me does not satisfy me, that the application for summary judgment was obtained by a reason of fraud,

Justus error or the exceptional circumstances referred to in the *Nyingwa v Moolman* NO case.

I am also not satisfied that the judgment was granted as a result of a mistake "common to the parties". As was said by White J in the *Nyingwa v Moolman* N case, revision on the ground that the judgment was erroneously granted, means that at the time of the issue of the judgment there existed a fact of which the judge was unaware and which could have precluded the granting of the judgment if the judge had been aware of it.

I am unable, on the papers before me, to decide that my sister Masipha J granted the summary judgment on the basis of facts of which she was unaware and which may have influence her differently. Accordingly and assuming that I have the power to set aside the order which I granted on 26 February 2007, I see no basis to reverse the judgment out dismissing the application for rescission of the summary judgment.

I wish to emphasise that this judgment does not preclude the applicant in this application from seeking leave to appeal from my sister Masipha J, nor I would venture to suggest that it precludes the applicant from seeking to persuade Masipha J that the judgment was "erroneously sought or erroneously granted" in terms of Rule 42.

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