

SOUTH AFRICA / JUDGMENT

Makokotlela v Khumalo and Others (100047/2015) [2020] ZAGPPHC 465 (28 February 2020)

[2020] ZAGPPHC 465

COURT

North Gauteng High Court, Pretoria

BEFORE

G.T. Avvakoumides

CASE / FILE NUMBER

100047/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE

NUMBER: 100047/2015

28/2/2020

In

the matter between:

LIONEL
MAKOKOTLELA
Applicant/ 1st
Defendant
and
AMOS
KHUMALO
1st
Respondent / Plaintiff
THE
SHERIFF OF THE HIGH COURT
PRETORIA
CENTRAL
2nd
Respondent / Defendant
COMPANIES
AND INTELLECTUAL PROPERTY
COMMISSION
3rd
Respondent / Defendant
THE
REGISTRAR OF DEEDS
4th
Respondent I
Defendant
SEVIPIX
11
CC
5th
Respondent / Defendant
IN

RE:

AMOS
KHUMALO
Plaintiff
LIONEL
MAKOKOTLELA
First Defendant
THE
SHERIFF OF THE HIGH COURT PRETORIA
CENTRAL
Second Defendant
COMMISSION
Third Defendant
THE
REGISTRAR OF DEEDS
Fourth Defendant
SEVIPIX
11
CC
Fifth Defendant

JUDGMENT

AVVAKOUMIDES, AJ

1. This is an application for the rescission of a default judgment granted on 11 March 2016. The application is brought in terms of Rule 31(2)(b) of the Uniform Rules of Court, alternatively, under the common law.
2. The chronology of events is important. The summons in the main action and in respect of a previous action under case number 81878/2014 was served upon the Applicant's erstwhile attorneys of record on 22 January 2016. There was some correspondence between the respective attorneys prior to the main action being instituted and regarding a previous action under case number 81878/2014. The applicant states that the service of the summons was served upon the applicant's erstwhile attorneys after they withdrew on behalf of the Applicant. However, the same attorneys addressed an email to the Applicant advising him of the summons. In addition, the applicant had secured the pro bono services from the Law Society of the Northern Provinces on 13 November 2014. This appears at pages 188 and 189 of the papers.
3. Despite being aware of the action, the Applicant failed to file a notice of intention to defend the main action and the First Respondent applied for and obtained default judgment on 11 March 2016. The Applicant alleges that he only became aware of the default judgment on 8 April 2016 when an eviction application was served upon him at the apartment forming part of the subject matter in the litigation.
4. In the rescission application which was filed on 7 September 2017, the Applicant describes himself as an articled clerk, employed at a Pretoria law firm. The applicant states that the apartment was sold and transferred to an entity pursuant to the default judgment.
5. The Applicant states that the application for default judgment was not served upon him and the application in the court file does not reflect any form of service of the application for default judgment.
6. The Applicant does not deal fully with the delay in bringing the application timeously and after he became aware of the judgment, save to allege that he dealt with several attorneys who had assisted him and sets out the details of the various attorneys and the dates during which they assisted him. It would appear that the Applicant's office file was passed on from attorney to attorney.
7. The Applicant bears the onus to furnish a reasonable and acceptable explanation for his default in not entering an appearance to defend the main action; he must show that the application for rescission is brought bona fide and further show that he has a bona fide defence to the Plaintiff's claim. Prior to dealing with the requirements to be met by the applicant, it appears that the Applicant has also sought, in the rescission application, substantive relief to the effect that a company known as K2016312397 (South Africa) (Pty) Ltd

be joined as a Sixth Respondent in the rescission application. I will deal with the joinder application more fully hereunder.

8. A court hearing the rescission application must consider the wilful or negligent nature of the applicant's default in the exercise of discretion in order to determine whether or not good cause is shown. See *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 530-531. It follows that the Applicant must set out the reasons for his/her absence or default in order to consider whether the default was

wilful. In *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A it was held at the explanation for the default must be sufficiently full to enable the court to understand how it came about and to assess the Applicant's conduct and motives.

9. In this case the Applicant alleges that he never received the summons which was served upon the firm Mavhungu-Masigibiri. The Applicant submits that these attorneys were not on record on his behalf at the time and that he did not consent to the service of any legal proceedings on the said attorneys. The fact remains that service of the summons was accepted by the aforesaid attorneys on behalf of the Applicant and no explanation is proffered by the Applicant why the firm would have accepted the summons in the absence of the requisite authority on the Applicant's behalf.
10. Annexure "LLM16" shows that the said attorneys had assumed the role of mediator between the parties and the Applicant had requested the First Respondent to liaise with the relevant parties (Ms Mpho Masibigiri) "as per our agreement, given that she is our mediator ... ". The Applicant submits however that he cannot recall when the attorneys had advised him of the summons however, on 27 January 2016, the attorneys communicated with the applicant and alerted him to the summons. Again the Applicant simply states that he does not recall having received the email as opposed to stating that he did not receive the email.
11. The papers contain a copy of an email dated 25 January 2016 wherein the Applicant himself communicated with Ms Mpho Masibigiri referring to the case between him and the First Respondent and stating that "the application process has taken place and I am currently awaiting for feedback. Thank you once again for the support in this regard". Two days later, on 27 January 2015 Ms Masibigiri wrote to the Applicant alerting him that she had received more documents on his behalf from Amos Khumalo Incorporated, the First Respondent.
12. It is thus inexplicable why the Applicant alleges not to recall having received any communication from the attorneys. Furthermore on 8 April 2016 the Applicant wrote to the First Respondent stating therein that he, the Applicant, is of the opinion that the First Respondent is not following the right protocol in this regard and calling upon the First Respondent to liaise with Ms Masibigiri and Mr Christo Bester, the attorney appointed for the Applicant by the Law Society.
13. In my view it would seem that the Applicant was aware of the documents (the summons and particulars of claim) and failed to take any necessary steps to defend the action.

14. In respect of a bona fide defence the Applicant refers to an affidavit found at page 170 of the founding affidavit wherein he purportedly provided a record of an arrangement concluded between the First Respondent and the Applicant pertaining to the members' interest in Servipix 11 CC and Unit 23 of Eifel Towers. In such affidavit the Applicant appears to confirm the purchase of Unit 23 of Eifel Towers, acting as agent for and on behalf of the First Respondent. There is confirmation that the First Respondent paid the full purchase price for the said unit in his capacity as the real owner of such unit. The Applicant appears to have agreed to hold the unit on behalf of the First Respondent in trust and as nominee for the First Respondent. In return, the Applicant states that he would be entitled to reside in the unit without having to pay any rental other than utilities for which he shall be liable.
15. In respect of the close corporation known as Servipix 11 CC, confirmation is given that at the request of the First Respondent the Applicant would hold 40% of the members' interest in and to such close corporation and the balance would be held by the First Respondent's accountant. The close corporation would be used as the entity to acquire property from time to time. The Applicant agreed to exercise all voting rights in respect of the members' interest held by him in such manner as the First Respondent may from time to time direct.
16. In the founding affidavit the Applicant denies having deposed to such affidavit and as a result instructed on Lieutenant Colonel Landman to examine the affidavit and to file a report regarding the authenticity of signatures thereon. Having regard to the report it is firstly not clear who the author of such report is because the report is signed by two different persons. Notwithstanding the point having been made in the answering affidavit, the Applicant failed to address this issue in his reply which is ominous to say the least.
17. The First Respondent also employed a graphologist who prepared a report in direct contrast to the findings of the Applicant's graphologist report. Furthermore the First Respondent procured a confirmatory affidavit from Detective Warrant Officer Joel Rachoene which is annexed to the answering affidavit and in which affidavit the detective warrant officer confirms that the Applicant signed the affidavit before him on 14 July 2009. The Applicant in reply simply ignored the confirmatory affidavit and did not make any submissions surrounding the confirmatory affidavit. Consequently, the Applicant has failed to set out a bona fide defence as is required in terms of Rule 31(2)(b).
18. Insofar as the application for rescission is brought under the common law as an alternative, the Applicant has also failed to satisfy the requirements under the common law. In *Pro Media Drukkers & Uitgewers (Edms) Beperk v Kaimowitz and Others* 1966 (4) SA 411 at page 417, Van Reenen J held the following:

"In terms of common law, the court has discretion to grant rescission of judgment if sufficient or good cause has been shown. But it is clear that in principle and in the long-standing practice of our Courts, two essential elements of 'sufficient cause' for rescission of judgment by default are:

1 that the party seeking relief must present a reasonable and acceptable explanation for his/her default;

2 that on merits such party has a bona fide defence, which prima facie, carries some prospect of success".

19. I am of the view that the Applicant has also failed to meet the requirements for rescission under the common law.
20. Insofar as the Applicant seeks condonation for the late bringing of the common law either in terms of Rule 31(2)(b) alternatively the common law, I have considered the facts set out by the Applicant with reference to the judgment in *Turnbull- Jackson v Hibiscus Coast Municipality* 2014 (11) BCLR 1310 (CC), in which the following was stated:

"In this Court the test for determining whether condonation should be granted or refused is the interests of justice. Factors that the court weighs in that inquiry include: the length of the delay; the explanation for, or cause of, the delay; the prospect of success for the party seeking condonation; the importance of the issues that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice ..."

21. The Applicant has simply failed to adequately inform his attorney of the default judgment, which attorney was on record for him from 8 February 2016 to 26 August
2016. The Applicant also similarly failed to inform his subsequent attorneys of the default judgment. Only during March 2017 when the company, sought to be joined, namely K2016312397 (South Africa) (Pty) Ltd, brought an application for the eviction of the Applicant, did the Applicant undertake to launch the rescission application within 15 days from 27 July
2017. No explanation is given for the delay from March 2017 to July 2017, and there appears to be a period of approximately 15 months which is completely unaccounted for. Furthermore, notwithstanding the Applicant's undertaking to launch the rescission application within 15 days from 27 July 2017, the application was launched on 7 September 2017. The Applicant explains the further delay by stating that he was awaiting the graphologist's report from Lieutenant Colonel Landman. This explanation is insufficient.
22. Insofar as the purported joinder application is concerned the Applicant bases the joinder application on the fact that the property in issue had been sold to such company. The test in joinder applications is whether the claim against the party sought to be joined is dependent upon the determination of substantially the same questions of law or fact. This is not the case in this application.
23. Consequently, I am of the view that the Applicant has failed to make out a case for the rescission of the judgment in issue and the application is accordingly dismissed with costs.

G.T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Representation for Applicant: J A van Wyk

Instructed by:

William Tintinger Attorneys

Representation for First and

Fifth Respondents:

Jenneke de Swardt

Instructed by:

Amos Khumalo Incorporated

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