

SOUTH AFRICA / JUDGMENT

Mamabolo and Another v Morema (2354/2016) [2018] ZALMPPHC 49 (23 August 2018)

[2018] ZALMPPHC 49

COURT

Limpopo High Court, Polokwane

BEFORE

MF. Kganyago

CASE / FILE NUMBER

2354/2016

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE

CASE
NUMBER: 2354/2016

Not
reportable
Not
of interest to other judges
Revised.
In

the matter between:

LAZI
MAMABOLO FIRST
APPLICANT
MINISTER
OF SAFETY AND SECURITY SECOND
APPLICANT
And
MPHO
MOREMA RESPONDENT

JUDGEMENT

KGANYAGO J

[1] The Respondent who is the Plaintiff in the main action has issued summons against Applicants who are Defendants in the main action claiming R2 500 000-00 for alleged emotional shock and loss of income. The combined summons was duly served on the

Applicants. The Applicants served and filed their notice of intention to defend the respondent's action. However, the applicants' failed to file their plea to the respondent's particulars of claim. Thereafter the respondent's served the applicants with a notice of bar, and still the applicants failed to file their plea. The respondent proceeded to obtain a default judgment against the applicants for R2 500 000-00. After that the respondent issued a warrant of execution against the applicants.

[2] On receipt of the warrant of execution, the applicants launched an application seeking an order condoning the applicants' failure to file their plea and removing and/or uplifting the notice of bar. They are also seeking an order rescinding the default judgment that was granted on the 14 February 2017 in their absentia.

[3] The grounds of their application are that after the combined summons were served on the applicants, the file was allocated to Mr Ntuli who is the Assistant State Attorney. He entered notice of intention to defend, however, due to work pressure he forgot to brief counsel to draft a plea and he also failed to draft and file a plea on his own.

[4] According to the applicants, Mr Ntuli remembers seeing the notice of bar but misfiled it in his office and also forgot about the file. They only became aware of the default order when it was served on them together with the warrant of execution.

[5] The applicants contends that the respondent's default order is void as the respondent has failed to prove its damages as required by the rules. They concedes that Mr Ntuli was negligent in handling the applicants matter. They submits that the applicants have a strong bona fide defence to the respondent's claim. According to the applicants the respondent has failed to lead evidence in relation to his income when obtaining a default order, and that the respondent's notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002 is defective. The applicants submits further that the respondent's particulars of claim are expiable as no fault is alleged against any of the department's employees to establish delictual culpability.

[6] The respondent is opposing the applicants' application. The respondent submits that Mr Ntuli was negligent in handling the applicants matter. The applicants were served with a notice of bar but failed to respond. An email was also sent to the applicants' attorneys informing them of the date on which the default judgment was set down and requesting them to file their plea, but hey failed to do so. According to the respondent, he had served a proper notice in terms of section 3 and 4 of the Institution of Legal Proceedings Against

Certain Organs of State Act 40 of 2002. The respondent contends that the default judgment of the 14th February 2017 was properly granted after the court was satisfied that he had made up a case for a default order on the papers filed.

[7] The applicants' application has been brought in terms of rule 42 (1) of the Uniform Rules of Courts ("the Rules"). Rule 42 (1) provides that the High Court may, in addition to any other powers it may have, mero mutuo or upon application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. (See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA)).

[8] In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765 B-D Miller JA said:

"But it is clear that in principles and in the long-standing practice of our Courts two essential elements of 'sufficient cause' for rescission of a judgment by default are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on the merits such party has a bona fide defence which, prima facie carries some prospects of success. (*De Wet's case supra* at 1042, *PE Bosman Transport works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A), *Smith NO V Brummer No and Another, Smith No Brummer* 1954 (3) SA 352 (O) at 357 -8)

It is not sufficient if only one of the two requirements is met, for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default"

[9] The applicants were duly served with the combined summons. The combined summons was duly handed over to the office of the State Attorney for them to attend to the matter on behalf of the applicants. Mr Ntuli from the office of the State

Attorney failed to give the matter a proper attention and that led to a judgment by default been granted against the applicants. The applicants concedes that Mr Ntuli was negligent in the manner in which he handled the applicants' matter. The question to be determined is whether negligence by a legal representative is a ground to grant a rescission of a judgment obtained by default.

[10] Mr Ntuli had a legal duty to execute the applicants mandate with the necessary diligence, skill and care required of a reasonable attorney under the circumstances. In *Webster and Another v Santam Insurance* 1977 (2) SA 874 (A) at 883g-884 A Kotze JA said:

"A lay client, like each of the appellants, is ordinarily entitled to regard an attorney duly admitted to the practice of the law as a skilled professional practitioner. Ordinarily he places considerable reliance upon the competence, skill and knowledge of an attorney and he trust that he will fulfil professional responsibility. It is of course not unknown for an attorney or his firm to be negligent in carrying out professional duties, but that is not usual, and a fortiori to the lay client it would be a most unusual and

expected occurrence. Consequently, in considering whether the neglect of an attorney constitute a special circumstance within the meaning of that phrase in sec.24 (2) (a) of the Act, the correct approach should always be to regard it as a relevant factor and to recognize that such neglect by an attorney may frequently be a special circumstance on its own vis-à-vis his client. To hold, without qualification as was done in Snyman's case, supra at p.194 A-B, that a client is bound by the negligence of his legal adviser is, in my view wrong"

[11] While courts are slow to penalize a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys. (See Salojee & Another v Minister of Community Development 1965 (2) SA 135 (A))

[12] The applicants' intention from the beginning was to defend the respondent's action, hence they gave the State Attorney

instructions to enter an appearance to defend. In their view they were relying upon the competence, skill and knowledge of their attorney. They have trusted that their attorney will fulfil his professional responsibility. In my view, the negligence of their attorney cannot be imposed on them. The applicants could not have foreseen that their attorney would act negligently in attending to their matter. The applicants have given a reasonable explanation for their failure to file their plea despite a notice of bar and an email informing them of the date of the judgment by default.

[13] The respondents claim against the applicants includes a claim for loss of income. The respondent's counsel has conceded that when they apply for a default order, they have failed to present the court with the respondent's proof of income. In my view, without proof of income, the respondent will not be able to sustain his claim for loss of earnings. If the respondent is unable to proof his claim for loss of earnings, the applicants will therefore have good prospects of success on that part of respondents claim. Therefore, in my view judgment by default was erroneously granted without the respondent substantiating his claim for loss of earnings. Here we are dealing with public funds and a claim of this nature should not be easily granted without the court having verified whether indeed a party seeking a default order has substantiated his/her claim. In my view, the applicants have therefore shown good cause for the relief they are seeking.

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

14.1 Judgment by default granted on the 14th February 2017 is hereby rescinded.

14.2 Applicants failure to uplift the bar and file their answering affidavit is condoned.

14.3 The applicants to file their plea with five days of this order.

14.4 The respondent's to pay the applicants' costs.

MF. KGANYAGO J

JUDGE OF THE HIGH COURT POLOKWANE, LIMPOPO DIVISION

APPEARANCE:

COUNSEL FOR THE APPLICANT: ADV: M NGOETJANA

INSTRUCTED BY

: STATE ATTORNEY POLOKWANE

COUNSEL FOR RESPONDENT : MR MOHOTO

INSTRUCTED BY

: PMK TLADI & ASSOCIATES

DATE OF HEARING

: 06 AUGUST 2018

DATE OF JUDGEMENT : 23rd AUGUST 2018

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Prepared on 9 October 2026 · Esheria