

SOUTH AFRICA / JUDGMENT

Mkhondo Municipality v Voster and Another (354/2019) [2020] ZAMPMBHC 10 (14 April 2020)

[2020] ZAMPMBHC 10

COURT

Mbombela High Court, Mpumalanga

BEFORE

TV Ratshibvumo

CASE / FILE NUMBER

354/2019

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THE

HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MBOMBELA MAIN SEAT

CASE

NO: 354 / 2019

In

the matter between:

MKHONDO

MUNICIPALITY APPLICANT

and

ROELOF

THEUNIS JOHANNES VOSTER 1ST

RESPONDENT

MARCHE

URSULA VOSTER 2ND

RESPONDENT

J

U D G M E N T

RATSHIBVUMO AJ:

[1]

Introduction.

This is an application for rescission of judgment granted by the honourable Senyatsi AJ (as he then was) on 15 April 2019. The application is sought in terms of Rule 42(1)(a) of the Uniform Rules (the Rules). The Applicant alleges that the judgment was erroneously sought and erroneously granted in that it was not served with the notice of motion. The Applicant claims that the order was granted without the Sheriff's return of service. In the alternative, the application is sought in terms of Rule 31(2)(b) of the Rules.

[2]

Background.

In the main application brought by the Respondents, the Applicant was the fourth respondent. Johannes Petrus Joubert, PPCF Boerdery CC and KDH Bricks CC were the first, second and third respondents respectively (hereinafter referred to as Joubert and companies). The Respondent sought the relief only against the fourth respondent (the current Applicant) seeking that it should be "compelled to comply with procedures provided for in section 178 of the Spatial Planning and Land Use Management by-law and enforce non-compliance with the notices it issued against the first, second and third respondents to cease their business activities on the property described as Portion 61, Farm Welgekozen 514, Mkhondo, Mpumalanga (the property)."

[3]

It is worth noting that Joubert and companies occupy a farm neighbouring that of the Respondents. Initially, the Respondents had lodged a complaint with the Applicant against Joubert and companies in that they were using the property for industrial purpose while it was zoned for farming and residential purposes. In so doing, Joubert and companies did not have the permission to rezone the property. As a result of that industrial work, there is constant dust in the Respondents' property which poses a health hazard to them and other family members.

[4]

Pursuant to this complaint, the Applicant issued two Compliance Notices against Joubert and companies; one dated 13 September 2016

and another dated 21 July 2017. It is common cause that despite these notices, Joubert and companies did not cease their industrial operations in the property. It is against this background that the Respondents sought an order against the Applicant which was granted unopposed.

[5]

In support of the application, the Applicant avers that had it known of the application, it would have opposed the application on the basis that there are other avenues open and available to the Respondents other than the relief they sought in the notice of motion. I will revert to deal with this later.

[6]

The applicable law:

Rule 42 provides, “42 Variation and rescission of orders (1) The court may, in addition to any other powers it may have, mero motu or upon the

application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;”

[7]

In their answering affidavit, the Respondents dispute that the judgment was granted with no return of service. A copy of the return of service was also attached to the affidavit.[1]

In its replying affidavit, the Applicant does not deal with the averments made by the Respondents, choosing to rather attack the validity of the copy of the return of service attached in the answering affidavit in that it was not signed by the Sheriff.[2]

While the copy attached to the answering affidavit does not have a signature – in fact the bottom half thereof is blank, the

original return of service filed with the application for default judgment was signed by the Sheriff.[3]

Counsel for the Applicant conceded that this could have been the result of the Applicant preparing this application without accessing the court file where the return of service would have been located.

It is therefore not true that the court granted the order without the

return of service. Perhaps the relevant question to answer is whether the notice of motion was properly served by the Sheriff.

[8]

The return of service reflects that the notice of motion was served on Ms. Mathebula

working at the Legal Department of the Applicant.

It is the same

person to whom the court order was also served by the Sheriff once it was granted. The deponent to the Applicant's

affidavit, the

municipal manager, claims that the notice of motion was not served on him. It was only the court order that was served on him.

[9]

It

was finally submitted in support of the argument that the judgment was erroneously sought and erroneously granted; that the service by

the Sheriff was not in accordance with the Local Government:

Municipal Systems Act 32 of 2000[4]

and Rule 4 of the Rules.[5] In

making this submission, the Applicants relied on a decision by the North West Division of the High Court of Rustenburg

Local Municipality v Renaissance Security and Cleaning Services CC.[6]

In

this decision Hendricks J (as he then was) found that the service of summons on the archives administration clerk was not a proper service

on the municipality. Rescission of judgment was for this reason allowed.

[10]

The facts in this case

can however be distinguished from those in Rustenburg

Local Municipality v Renaissance Security and Cleaning Services CC in that in casu,

the notice of motion was not served on "the archives administration employee of the municipality" who in all probability

would not have an idea on what to do with the summons or the application so served as her work has nothing to do with legal documents.

The notice was served on an employee in the legal department of the municipality. This is the department with the responsibility

to litigate on behalf of the Applicant.

[11]

As an employee in the

legal department, Ms. Mathebula is presumed to be working with legal documents daily and would know what should

be done when a notice of

motion is served on her. The Applicant does not explain who Ms.

Mathebula is nor does it dispute that

she is an employee working in

its legal department. It also does not dispute that the court order was served on the same person

as reflected in the Sheriff's
return of service.

[12]

In

Vhembe

District Municipality v Stewarts & Lloyds Trading (Booysens)
(Pty) Ltd and Another,[7]

the Supreme Court of Appeal (the SCA) had to decide if the service
executed by the Sheriff in the same fashion complied with the
Local

Government: Municipal Systems Act 32 of 2000. Just like in this case,
the municipality only took steps to rescind the judgment after
receiving a writ of execution that was
served on the same legal

advisor in the employ of the municipality. The court a
quo

had held that service was proper and dismissed the rescission
application. It also held that the applicant did not have a bona
fide

defence to the claim.

[13]

On appeal, the SCA

confirmed the High Court's finding that the service on the
legal adviser of the municipality was a proper
service in compliance

with the Local Government: Municipal Systems Act 32 of 2000. For
these reasons, the argument that service on Ms. Mathebula of the
Applicant's legal department was improper has to fail.

[14]

It was submitted in the

alternative that the application should be granted based on Rule
31(2)(b) of the Rules. Rule 31(2)(b) provides,

“(b)

A defendant may within 20 days after acquiring

knowledge of such judgment apply to court upon notice to the
plaintiff to set aside

such judgment and the court may, upon good

cause shown, set aside the default judgment on such terms as it deems
fit.

[15]

While good cause is not

defined, the common law position has always been that the courts may
rescind a judgment upon the applicant
showing a good cause

a)

by giving a reasonable explanation of his
default,

b)

by showing that his application is made
bona fide,

c)

and

by showing that he has a bona fide defence to the claim which prima facie has reasonable prospects of success.[8]

[16]

The first requirement

is easily met when the service of the notice of motion was not personal as is the case here. The deponent to the affidavit in

support of the Applicant's application alleges that he was simply unaware of the motion proceedings as he was not given the

notice thereof. The Respondents cannot dispute this contention except to cast doubt in that the person to

whom the notice was served is the

same person to whom the court order was served. That court order finally reached the attention

of the municipal manager. This doubt is

not sufficient for the court to reject the Applicant's contention. The court would

as such be willing to accept that there

is a reasonable explanation for this default.

[17]

The second and the

third requirements proved to be a hurdle for the Applicant. The question as to whether the application is made

bona

fide overlaps with

whether there is a bona

fide defence to the

application. In the absence of a bona

fide defence, the

Applicant would find it difficult to show that the application is made bona fide.

In its founding affidavit, the Applicant concedes that in terms of sections 175 & 178 of the Spatial Planning and Land Use

Management by-law for Mkhondo Local Municipality (proclamation 8 of 2016), once there was

non-compliance by Joubert and companies, it

could have brought an application in court to enforce compliance with its notices.

It however failed to do so because of financial

constraints and the need to channel the funds into other essential services the

municipality had to deliver.

[18]

As if foreseeing that

lack of funds cannot stand as a valid defence, the Applicant avers

that the Respondents could also have applied

in court to enforce

compliance by Joubert and companies, as opposed to enforcing that through the municipality. The Applicant does

not point to any authority in support of that assumption. The Applicant's by-laws mandate it to take such action and not the clients/citizens it serves. The argument to the effect that the Respondents can afford litigation as they were able to litigate against the municipality is absurd to say the least. The Applicant does not know of any contract between the Respondents and their legal representatives to make any contention about their ability to financially litigate.

[19]

The Applicant failed dismally to demonstrate how a legal obligation that falls squarely on its shoulders can be shared with its clients/citizens while its own statutes does not provide for such. It also failed to demonstrate how the Respondents would then access the records in its possession to prove to the court that there was non-compliance with its directives. I am as such not persuaded that the Applicant has a bona fide defence to the Respondents' application.

[20]

As a result, I am also of a view that this application is not made bona fide. The first notice that the Applicant issued against Joubert and companies was on 13 September 2016. In terms of this notice, Joubert and companies were given 28 days to comply. It was only on 04 February 2019, more than two years later, that the Respondents approached the court seeking the relief to compel the Applicant to enforce its directives in the notices. The time that lapsed without any action by the Applicant to enforce its directives leaves some doubt on the motive for this application which may as well be to prolong and delay the enforcement of the directives which the Respondents have all along been entitled to. I cannot as such find that this application is brought bona fide.

[21]

For the reasons stated

above, the following order
is made:

The
application is dismissed with costs.

TV
RATSHIBVUMO
ACTING
JUDGE OF THE HIGH COURT
FOR
THE APPLICANTS : ADV. TS NGWENYA
INSTRUCTED
BY : MADONSELA MTHUNZI INC ATTORNEYS
MBOMBELA
FOR
THE RESPONDENT: ADV W BOTHA
:
BARNARD INC ATTORNEYS
C/O
VAN SCHALKWYK DIRK ATTORNEYS
DATE
HEARD: 12 MARCH 2020

JUDGMENT

DELIVERED: 14 APRIL 2020

(Electronically transmitted via email)

- [1] See paginated bundle p.29.36.
- [2] See paginated bundle p.50 para 8.
- [3] See p.39 of the paginated bundle of the application brought by the Respondents.
- [4] Sec 115(3) of provides, “Any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a person in attendance at the municipal manager’s office.”

- [4] Sec 115(3) of provides,

“Any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a

person in attendance at the municipal manager’s office.”

- [5] Rule 4(1)(a) provides, “(1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners: ... (viii) where a local authority or statutory body is to be served, service shall be effected by delivering a copy to the municipal manager or a person in attendance at the municipal manager’s office

of such local authority or to the secretary or similar officer or member of the board or committee of such body, or in any manner provided by law;

[5] Rule 4(1)(a) provides,

“(1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:

...

(viii) where a local authority or statutory body is to be served, service shall be effected by delivering a copy to the municipal manager or a person in attendance at the municipal manager's office of such local authority or to the secretary or similar officer or member of the board or committee of such body, or in any manner provided by law;

[6] (1854/07)

[2008] ZANWHC 36 (25 September 2008).

[7] [2014] 3 All SA 675 (SCA).

[8] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003

(6) SA 1 (SCA) at 9F.

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