

SOUTH AFRICA / JUDGMENT

Moneymorathoe v Body Corporate of Pontrailto (52676/2015) [2020] ZAGPPHC 483 (3 September 2020)

[2020] ZAGPPHC 483

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

52676/2015

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

CASE

NO: 52676/2015

In

the matter between:

MASELAELO

SHARLOTTE MONEYMORATHOE

APPLICANT

and

THE

BODY CORPORATE OF

PONTRIALTO

RESPONDENT

(Scheme

Number: 118/1981)

JUDGMENT

Van der Schyff J

Introduction

- [1] This application is considered during the National State of Disaster declared by the State President in terms of the Disaster Management Act, No 57 of 2002 and the ensuing extended Covid-19 national lockdown. A virtual platform was utilised for hearing argument.
- [2] The applicant seeks the rescission of a judgment granted by default by this court on 25 August 2015, and the costs of the application on an attorney and client scale.
- [3] The applicant contends that she was unaware of a summons being issued since she did not receive it, and that she only became aware of the existence of the judgment on 18 March 2019. The rescission application was filed with the respondent's attorneys of record on 25 April 2019. For the reasons set out below, it is not necessary to deal with the respondent's argument that the only logical inference that can be drawn from the facts is that the applicant had to have prior knowledge of the existence of the judgment and unduly delayed in approaching the court for the rescission thereof.
- [4] Rule 31(2) of the Uniform Rules of Court provides that a defendant may within 20 days after acquiring knowledge of a judgment granted by default apply to the court on notice to set aside the judgment and the court may, "upon good cause shown, set aside the judgment on such terms it deems fit." A default judgment may also be rescinded in terms of Rule 42 or the common law. Rule 42 provides that a court may rescind or vary any order erroneously sought or erroneously granted. Rule 42 is a procedural step designed to correct an irregularity and to restore the parties to the position they were in before the order was granted.[1]
- [5] There is no indication on the papers that the order under discussion was erroneously granted in that it was legally incompetent for the court to have made such an order. Although the respondent conceded that the applicant did not receive the summons that was served through affixing at her domicilium address, determined in terms of the then applicable Annexure 8 of the Regulations to the Sectional Titles Act, No. 95 of 1986 as amended, the granting of the default judgment did not constitute an error or mistake on the court's part. Service of the legal process occurred in terms of the applicable Rules of Court.
- [6] It is common cause between the parties that judgment was granted against the applicant in favour of the respondent in the amount of R114 333.20 on 25 August 2015. It is likewise common cause that the judgment debt erroneously included amounts in relation to which previous judgments were obtained. In those matters, judgments were respectively granted in January 2013 in the amount of R15 526.00 and in December 2014 in the amount of R 39,440.42. The respondent conceded that in addition to the previous judgment-amounts, the

judgment debt at issue, contains interest on the judgment amounts and untaxed legal costs. As a result, the respondent requested the court to deduct the amounts for which judgment was previously granted, as well as the interest on these amounts and the untaxed legal costs from the judgment debt and only to rescind that portion of the judgment that relates to the aforesaid. A reconciliation of the applicant's account was attached to the answering affidavit. The balance of the judgment debt that cannot, according to the respondent, be disputed, is the amount of R34 320.76.

- [7] It is trite that where default judgment was erroneously sought or erroneously granted that a court should without more, grant the order for rescission. Erasmus J explained that when Rule 42 applies it is not necessary for a party to show good cause:[2]

"In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence (Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd (supra at 578F-G); De Wet (2) at 777F-G; Tshabalala and Another v Peer 1979

- (4) SA 27 (T) at 30C-D). Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission. It is only when he cannot rely on an 'error' that he has to fall back on Rule 31(2)(b) (where he was in default of delivery of a notice of intention to defend or of a plea) or on the common law (in all other cases). In both latter instances he must show 'good cause'. This pattern emerges from the decided cases."
- [8] Courts have inter alia held that judgment was erroneously sought if there was no proper notice to the absent party, where the attorney failed to follow the client's instructions,[3] or where it was granted on a summons that did not disclose a cause of action.[4] In view of the respondent's concession that the judgment debt includes two amounts for which judgment was previously granted, as well as interest and legal costs in relation to the said amounts, I have no doubt that the judgment granted on 25 August 2015 falls within the category of judgments erroneously sought and it represents a classic example of plus petitio.
- [9] After considering all the facts, I am of the view that the appropriate order as to costs is that costs are costs in the action.

ORDER

As a result, the following order is made:

1. The judgment granted by default in the matter of The Body Corporate of Pontrialto v Maselaelo Sharlotte Moneyamorathoe under case number 52676/2015 is rescinded.
2. The applicant is given leave to defend the action.
3. The costs of this application shall be costs in the action.

E van der Schyff

Judge of the High Court

Counsel for the applicants:

Adv M Coetsee

Instructed by:

Elliot Attorneys

Counsel for the respondent:

Adv NG Louw

Instructed by:

Beyers Inc.

Date of the hearing:

1 September 2020

Delivered:

3 September 2020

- [1] Theron NO v United Democratic Front (Western Cape Region) and Others [1984] 2 All SA 12 (C) on 16.
- [2] Bakoven Ltd v GJ Howes (Pty) Ltd 1992
- (2) SA 466 (E) at 471G
- [3] Ex Parte Jooste en 'n Ander [1968] 4 All SA 201 (O).
- [4] Marais v Standard Credit Corporation Ltd 2002
- (4) SA 892 (W).

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