

SOUTH AFRICA / JUDGMENT

Ross v Novikova (16015/20) [2020] ZAWCHC 178 (11 December 2020)

[2020] ZAWCHC 178

COURT

Western Cape High Court, Cape Town

BEFORE

Papier

CASE / FILE NUMBER

16015/20

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case 16015/20

In the matter between:

BERNINE KIM ROSS

PLAINTIFF

and

DR N NOVIKOVA

DEFENDANT

REASONS

AND ORDER

HANDED DOWN ELECTRONICALLY BY TRANSMITTING IT TO THE PLAINTIFF'S LEGAL REPRESENTATIVES ON THE 11TH OF DECEMBER 2020

PAPIER J

Introduction:

- [1] This was an application for default judgment, in a medical negligence claim for damages. In essence the claim was for judgement on the merits and for damages , where the quantum sought in the summons was R7 377 037. 68.

- [2] The plaintiff was duly represented by Mr Murray Van Heerden SC, from the Cape Bar.
- [3] The matter was set down on the 3rd of December 2020 in third division, and on the 2nd of December, Mr van Heerden enquired whether the court required evidence to be led on an application for "default judgement for damages", or whether I was prepared to hear the matter on the basis of the affidavits filed.

The Facts Briefly Stated:

- [4] The defendant was a practising specialist General and Aesthetic Gynaecologist and Endoscopic Surgeon, who had previously treated the plaintiff.
- [5] The summons was apparently served on the 18th of June 2020 on a certain Ms Sabeegah Abrahams, a receptionist at the place of employment of the defendant, who according to the return of service, was temporally absent.
- [6] The court also noted that the summons was served by way of urgency, as the sheriff debited, amongst others, an "urgency fee" of R 450.00 for services. The plaintiff made out no case in the particulars of claim for urgency.
- [7] The matter was undefended.
- [8] Mr Van Heerden was informed through my registrar, that evidence will have to be led to prove the damages of the plaintiff; that he should obtain a date in fourth division for that purpose; and that the notice of set down should be served personally on the defendant.
- [9] On the 3rd of December 2020, when the matter was called in third division, Mr Van Heerden referred to the Notice of Motion (As Amended), and moved for an order in terms of a draft order, handed up by him.
- [10] The particulars of claim was not formerly amended, even though a lesser amount in quantum was sought.
- [11] The draft order provided for the matter to be removed from third division, and entered into the fourth division. That the matter be set down for default judgment on the 10th of February 2021, and that costs be costs in the cause.
- [12] The court indicated to Mr Van Heerden that personal service of the order is required, but Mr Van Heerden contended that the Rules of Court does not provide for personal service in these circumstances, that it would be incumbent on the trial Judge, to determine whether or not personal service should be effected, and that I should not concern myself with the matter at this stage.
- [13] I stood the matter down for consideration of Mr van Heerden's submissions, which I have now done.

Discussion:

[14] This is a court of justice, fairness and equity. A court does not apply the rules in a formalistic, dogmatic or unconscionable manner, but must ensure a just and fair process and outcome.

[15] On the face of these proceedings, and on a balance of probabilities, the defendant is probably unaware of the summons. She would probably be insured, and would have probably handed the summons to her insurers, to deal with the matter on her behalf had it been brought to her attention, which in all probability was not done.

[16] This postponement would be a reasonable and appropriate opportunity, to bring the proceedings to the personal attention of the defendant, as the order sought in the matter, could adversely affect the status of the defendant.

[17] On the basis of fairness, the defendant should be made aware of the allegations against her.

[18] In the unreported judgement of Firststrand Bank LTD f/k/a First National Bank of Southern Africa LTD v Essack Eusuf-Moosa and Another, Case No. 11820/2014 WCD, Pg 4 para 5, Dolamo J stated that:

"The obligation ..., remains on the plaintiff to ensure that the summons comes to the notice of the defendant and the mere fact that a domicilium has been chosen does not preclude effective service through one of the other methods prescribed in Rule 4."

[19] This court has inherent power to regulate its own process, and also constitutionally mandated to develop the common law taking into account the interest of justice.

[20] In my view it is in the interest of justice to bring to the notice of the defendant personally, the nature and extent of the proceedings instituted against her in this matter.

[21] To allow this matter of notice to and personal service on the defendant to stand over for determination by the trial judge, would in my view, unduly curtail the proceedings, and potentially lead to a waste of time, costs, and resources.

[22] This in my view, would be grossly unfair and unjust to allow this matter, to simply slip through, despite the glaring probabilities in these circumstances.

[23] I have also noted the following apparent inconsistencies in the court file:

23.1 The summons was issued with Case Number: 6101/2020

23.2 The affidavit of Willem Hendrik Boshoff was apparently filed in the matter of the Plaintiff and "The Road Accident Fund", under the same case number-6101/20.

23.3 The affidavit of Dr Stephen Jeffrey dated 12 November 2020, reflects Case Number 4775/2020.

23.4 The Notice of Motion for default judgment dated 2 July 2020 was issued under Case number 16015/2020, purporting to rely on the affidavits of Dr Michael Wright and Willem Hendrik Boshoff;

23.5 A practice note dated 30 November 2020 was filed under Case Number 4775/2020; and

23.6 The draft order handed in by Mr Van Heerden reflects the Case Number 16824/2014.

[24] The papers were clearly not in order.

Conclusion:

[25] I am of the view, that where it becomes apparent to a judicial officer, that an injustice may result from a probable glaring

oversight, or lack of knowledge of pending proceedings, reasonable steps should be taken, to avoid the consequences of an injustice from becoming a reality.

[26] In the circumstances, the plaintiff should be ordered to serve the notice of set down, together with a copy of the full set of the

papers, on the defendant personally, forthwith after the date of this order, in terms of Rule 4(1)(a) (i), read in conjunction with Rule 4(1)(d) of the Uniform Rules of Court.

Order:

[27] In the result, the following order is made:

[a] The plaintiff is ordered to serve all the papers together with the reasons and order in this matter, on the Defendant personally, and forthwith, upon receipt hereof.

[b] The application for default judgment is removed from the third division and entered into the fourth division.

[c] The matter is set down for compliance and hearing on the 10th of February 2021.

[d] The costs occasioned by this postponement is to stand over for later determination.

JUDGE OF THE HIGH COURT

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