

SOUTH AFRICA / JUDGMENT

## Sapphire Lounge CC and Another v Firststrand Bank Ltd (45848/2014) [2015] ZAGPPHC 670 (25 September 2015) [2015] ZAGPPHC 670

COURT

North Gauteng High Court, Pretoria

BEFORE

J W Louw

CASE / FILE NUMBER

45848/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

CASE

NO: 45848/2014

DATE:

25/9/2015

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

SAPPHIRE

LOUNGE CC

First Applicant

PANAYIOTIS

GERMENIS

Second Applicant

and

FIRSTRAND

BANK LIMITED t/a WESBANK

Respondent

## JUDGMENT

J W LOUW, J

- [1] This is an application in terms of rule 42(1)(a) of the Uniform Rules of Court for the rescission of a judgment granted by default against the applicants on 19 September 2014. Rule 42(1)(a) provides the following.
- (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 granted in the absence of any party affected thereby.”
- [2] The respondent issued summons against the first applicant as first defendant for payment of the outstanding balance in terms of an instalment sale agreement in respect of furniture and equipment which the respondent had concluded with the first applicant and which respondent alleged it had cancelled due to the first applicant’s failure to pay the agreed monthly instalments. The second applicant was sued as second defendant by virtue of a deed of suretyship which he had signed in favour of the respondent. In terms of the instalment sale agreement, the first applicant chose the business address where it was trading as a Rhapsody’s restaurant at the time as its *domicilium citandi*. The second applicant chose what appears to be a residential address as his *domicilium* in the deed of suretyship. The summons was served on the first and second applicants at their chosen domiciles. The returns of the sheriff indicate that in both instances the summons was served by affixing to the principal door as no other manner of service was possible.
- [3] The applicants allege that the first applicant was no longer trading at the address where the summons was served and that the second applicant was overseas at the time when the summons was served on him. The respondent did not dispute that the default judgment was therefore granted in their absence. The issue was whether the judgment had been granted erroneously.
- [4] The applicants allege in their founding affidavit, deposed to by the second applicant, that the first applicant was ejected from its premises in terms of a warrant of eviction obtained by the landlord against the franchisor of Rhapsody’s who was the lessee of the premises. The first applicant occupied the premises in terms of its franchise agreement with the franchisor. The applicants allege that during this time the second applicant and the applicants’ attorney advised the respondent in writing that the first and second applicants were no longer at their chosen *domicilium* address. The attorney’s letter is dated 25 April 2014 and is addressed “To Whom It May Concern”. The letter states the following:

*“We are instructed by and act for Panayiotis Germenis.*

*“Our instructions are as follows: that;*

· our client previously conducted business as Rhapsody's at Shop G151, Ground Floor, Parkview Lifestyle Centre, situated at Erf 7345, Cnr Garsfontein and Netcare Roads, Moreleta Park Extension 80, Pretoria.[1]

· In terms of a Judgment obtained against our client's Landlord Mixhalis Xekalos our client's movable property was attached by the Deputy Sheriff and was also ejected from the premises on or about August 2014."

The letter proceeds to refer to an interpleader affidavit which has been filed and states that the attachment has lapsed and that the client is accordingly entitled to remove the property. A request is then made that "you allow our client to remove their property". It is not clear at all that this letter was addressed to the respondent.

[5] The written notice which the second applicant alleges was sent by him was an e-mail sent to the e-mail address of an employee of the respondent on 13 January 2014. The first two paragraphs thereof read as follows:

*"We are instructed by and act for Panayiotis Germenis previously conducting business as Sapphire Lounge CC T/A Rhapsody's Woodhill.*

Our instructions are that our client's erstwhile landlord incorrectly attached all our client's furnisher (sic) and equipment in lieu of alleged arrear rental by the tenant of the premis (sic) (who was not our client).

The letter then also refers to the interpleader affidavit and states that "we" are in the process of finalising the release of the client's property and requests that legal action in regard to any arrears due on some of the equipment financed by the respondent be suspended. The letter ends with an undertaking to pay the arrears once the client has obtained possession of the goods.

[6] In response to the respondent's answering affidavit where it is pointed out that both the instalment sale agreement and the deed of suretyship contain non-variation clauses requiring any amendment to be in writing and signed by the parties, it is alleged in the applicants' replying affidavit that the respondent was fully aware, "as previously addressed", of the change of domicilium address and that the applicants' attorneys were instructed to advise the respondent of the change of domicilium address. This evidence can only refer to the letter and e-mail dealt with above. The letter and e-mail do not deal with a change of address neither do they comply with the requirement that it be in writing and be signed by the parties. There has clearly not been an amendment to the applicants' domiciles as chosen in the instalment sale agreement and in the deed of suretyship. It was also not contended by Adv. Ayayee, who appeared for the applicants, that there had been any such change

[7] The case for rescission made out in the applicants' founding affidavit is that, had the judge hearing the application for default judgment been aware of the following, he would not have granted the

**judgment:**

- That the loan amount was never received. This refers to the allegation in the founding affidavit that the respondent paid the capital amount in respect of the furniture and equipment to the franchisor and not to the first applicant. It is clear, however, from the answering affidavit that the applicants were aware of this and consented thereto after discussing the matter with the franchisor.
- The fraud of which the first applicant was a victim of. This refers to the allegation that the applicants later discovered that the franchisor's Rhapsody's franchise was a pyramid scheme.
- That the summons was not properly served on the applicants.
- That the respondent was aware that neither the first or second applicant was present at the property when it caused the summons to be served.
- That there had been various attempts by the second applicant and his then attorneys of record to negotiate with the respondent.

[8] There is no merit in this contention. The applicants have to show that the judgment was erroneously granted. A judgment or order is erroneously granted when the court commits an error in the sense of a mistake in a matter of law or fact appearing on the proceedings of a court record. None of what is set out in the previous paragraph appears on the court record. It was not submitted that the service of the summons was irregular in any manner. In this regard, I point out in passing that service of the summons on the second applicant was effected at a different domicile address than that of the first applicant. Whatever was said in the above mentioned letter and e-mail therefore does not apply to the second applicant.

[9] It therefore follows that the respondent was procedurally entitled to default judgment against the applicants. In as much as the applicants, by their allegations referred to in paragraph [7] above, contend that they have a defence to the respondent's claim, it was held in *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*[3] that a judgment granted against a defendant cannot be considered to have been erroneously granted because of the existence of such a defence which was not disclosed to the judge who granted the judgment. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgement.

[10] Adv. Ayayee submitted that the default judgment should be rescinded as a matter of fairness. He relied in this regard on the decision in *Firstrand Bank Ltd v Gazu*[4] in which an application for default judgement was refused in circumstances where the summons was served on the defendant by placing it under a rock because the chosen domicile was vacant land and where the court was of the view that the plaintiff bank inevitably would have a great deal of information concerning the defendant. The court referred to the judgment of the Appellate Division in *Amcoal Collieries Ltd v Truter*[5] in which it was held that it is a

well-established practice that, if a defendant has chosen a domicilium citandi, service at such a place will be good, even though it be a vacant piece of ground. Notwithstanding that judgment, the court held that it had a discretion with regard to the provision of service and that it would be unfair that the bank made no further effort to contact the defendant.

- [11] In my respectful view, the judgment in Gazu was clearly wrong in view of the judgment of the Appellate Division in Amcoal and of the SCA in Lodhi, to which the court was apparently not referred.
- [12] In view thereof that the applicants have failed to show that the default judgment was erroneously granted, the application must fail. It is accordingly dismissed with costs.

Counsel for applicants: Adv. A Ayayee

Instructed by Phillip Silver & Schwartz Inc c/o Andrea Rae Attorney

Counsel for respondent: Adv H P van Nieuwenhuizen

Instructed by: Rossouws Lesie Inc c/o Bornman Inc

- [1] This was the first applicant's chosen domicile.
- [2] See Bakoven Ltd v G J Howes (Pty) Ltd 1992
- (2) SA 466 (E) 472D
- [3] 2007 (6) SA 87 (SCA) paras [17] and [27]
- [4] 2011 (1) SA 45 (KZP)
- [5] 1990 (1) SA 1 (A)

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