

SOUTH AFRICA / JUDGMENT

Tshabalala v Minister of Police (77421/2014) [2017] ZAGPPHC 331 (8 June 2017) [2017] ZAGPPHC 331

COURT

North Gauteng High Court, Pretoria

BEFORE

Mothle

CASE / FILE NUMBER

77421/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 77421/2014

DATE:

8/6/17

In

the

matter

between:

N

E

TSHABALALA

Applicant

and

MINISTER

OF

POLICE

Respondent

JUDGMENT

MOTHLE J

1. This is an application for default judgment on the award of damages (quantum).
2. The Applicant, N E Tshabalala, acting in her personal capacity as well as on behalf of her minor children, instituted action against the Respondent, the Minister of Police, for loss of consortium and support respectively consequent to the death of her husband in police custody.
3. On 27 November 2013 the Respondent, as Defendant in the main case, entered appearance to defend. On 15 February 2016, the Respondent delivered a discovery affidavit after the close of pleadings. This was then followed by a notice in terms of Rule 35(3) issued by the Applicant's attorneys on 25 February 2016. In terms of this notice, the Respondent was required to discover certain specified documentation alternatively state under oath that such documents were not in its possession. The Respondent failed to respond timeously to this notice.
4. The Applicant approached Court for an order to compel discovery of such documents, which order was granted on 17 May 2016. In terms of the order, the Respondent was given 10 days within which to file a response to the notice. Again the Respondent failed to comply with the Court order as well as to the subsequent correspondence directed to its attorneys (the Office of the State Attorney). On 22 August 2016, the Applicant again approached Court for an order to strike out and dismiss the Respondent's plea and defence as well as uphold the Applicant's merits on the claim. The application to strike out and dismiss the Respondent's defence was granted on 22 August 2016 and the prayer to uphold the merits was postponed to 2 November 2016. On that date, the Court granted default judgment in favour of the Applicant on the merits and postponed the issue of damages.
5. Upon being notified of the judgment by the Court, the Respondent's attorneys brought an application for rescission of the default judgment, which rescission application is currently pending. In the meantime, the Applicant enrolled the matter for the hearing of quantum which came before me on 18 May 2017 in the unopposed motion court.
6. On 18 May I requested the Applicant's counsel to file heads and additional affidavits if need be, specifically on the question whether the matter should proceed in spite of the pending application for rescission of the judgment on the merits. The application stood down to 23 May 2017 to allow counsel to file the necessary heads.
7. On 23 May 2017, counsel made submissions on the heads of argument and in court, that the repeal of Rule 49 of the Uniform Rules of Court by the provisions of section 18 of the Superior Court Act, 10 of 2013, permits the court, notwithstanding the pending rescission application, to consider the Applicant's application in respect of quantum. In support of this contention, Applicant's counsel referred this Court to the judgment in *Erstwhile Tenants of*

Wilstone Court and Others v Lewray Investments (Pty) Ltd and Another 2016 (6) SA 466 (GJ) where the Court stated thus:

"I am of the view that had it been the intention of the legislature for the operation and execution of a decision which is the subject of an application for rescission also to be automatically suspended, then such decision would have been expressly included in Section 18(1)."

8. In making this remark, the Court was interpreting Section 18 of the Superior Court's Act which repealed Rule 49 of the Uniform Rules of Court. Prior to its repeal, Rule 49 had provided that where an appeal or application for leave to appeal is pending before Court, the execution of the judgment is automatically suspended. The application of the Rule also extended to rescissions of judgment. The Court in *Erstwhile Tenants* therefore interpreted the provisions of section 18(1) of the Superior Court's Act to mean that an application for rescission of judgment does not suspend the execution of a judgment or order. Hence the Applicant proceeded in this case to approach Court, seeking an order for the award of damages.
9. There appears to be a divergence of views on the impact of section 18(1) of the Superior Courts Act, concerning rescissions of judgments. The section deals with instances of appeals and applications for leave to appeal. Purely from a point of practicality, it would not have made sense for the legislature to deal with the subject of rescission of judgments under the heading of appeals. In addition, I refer to the following decisions on the subject:
 - 9.1 *United reflective Converters (Pty) Ltd v Levin* 1988 (4) SA 460 (WLD);
 - 9.2 *Khoza v Body Corporate of Ella Court* 2014 (2) SA 112 (GSJ);
 - 9.3 *Peniel Development (Pty) Ltd and Another v Pieterse and Others* 2014 (2) SA 503 (GSJ).
10. In view of the decision I intend to take in regard to this application and for reasons that follow hereunder, it is now unnecessary to deal with the Applicant's submission on this question of law as it has now become somewhat moot. I shall therefore refrain from making a ruling as to the correctness of the contention that it is permissible to entertain this application while a rescission application is still pending before this court, nor will I express a view in this regard.
11. It is common cause that the damages sought by the Applicant are unliquidated claims. Ordinarily in such instance, it would be necessary for oral evidence to be presented to court in support of such claim for damages. However, in *Havenga v Parker* 1993 (3) SA 724 (TPA), the Court held that it would be permissible in this Division, that in case of an application for default judgment arising out of an action for unliquidated claims for damages, evidence may be placed before Court by way of affidavits. This would include the evidence of experts, such as for example medical practitioners, mechanics, valuers and others. It is now trite that this practice is followed in this Division.

12. On perusal of the documents in the file, the affidavits filed by the Applicant's attorney refer mainly to instances of default on the part of the Defendant. In particular, the affidavit delivered in support for award of damages, has attached to it, several notices and correspondence concerning the various steps leading to the default judgment. In regard to the claim for damages, reference is made only to an attached report by Quantum Actuarial Services CC, which is a four-page report that presents two scenarios for the calculation of the loss of support.
13. In *Havenga supra*, the court on page 726H stated as follows:

"Uiteraard sal die eedsverklarings die kwalifikasies van die deskundige moet bevat, waarvan die Hof kan aflei dat dit werklik menings is waaraan waarde geheg kan word en sal die beskuldigdes se bevindings en die redes daarvoor duidelik en volledig uiteengesit moet word...."
14. The report of the Quantum Actuarial Services CC is not on oath in the form of an affidavit. In addition, it does not contain the curriculum vitae of the author/s so as to evaluate their qualifications and level of expertise. Further, it concludes by stating that "these calculations are based on the instructions and/or opinions of the relevant parties involved, and do not necessarily reflect our view. Should additional or more accurate information become available, we reserve the right to amend our figures."
15. Accordingly, the supporting affidavit and the annexed documents are not in accordance with the practice in this Division. In their current form in this application, they provide insufficient evidence for the purposes of supporting an application for the consideration and award for damages in this case.
16. I am thus of the view that under the circumstances, this application should be removed from the roll. Should the Applicant choose to re-enrol the application, she must prepare a proper and well-motivated application for damages in particular on consortium. Such evidence on affidavit should have attached thereto affidavit/s from the experts stating their qualifications and indicating to the Court what their opinions are in respect of the amounts claimed and the basis of such opinions. The alternative is to set the matter down in the trial roll in consultation with the Deputy Judge President and request a presentation and hearing of oral evidence. In either instance, a proper notice and documents must be served on the Respondent.
17. In the premises I make the following order:
 1. This application is removed from the roll.
 2. The application shall not be re-enrolled in its current form and without service to the Respondent.
 3. Costs are reserved.

SP MOTHLE

Judge of the High Court.

Gauteng Division, Pretoria.

8 June 2017

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Prepared on 10 October 2026 · Esheria