

SOUTH AFRICA / JUDGMENT

Twala and Another v Standard Bank of South Africa Limited (40281/2012) [2021] ZAGPPHC 537 (18 August 2021) [2021] ZAGPPHC 537

COURT

North Gauteng High Court, Pretoria

BEFORE

Nochumsohn

CASE / FILE NUMBER

40281/2012

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

CASE NO. 40281/2012

In the matter between:

TWALA, SOLOMON

First Applicant

MBESE, NONKANYISO OCTAVIA

Second Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

REASONS

FOR JUDGEMENT / COURT ORDER

HANDED DOWN ON 18 AUGUST 2021

NOCHUMSOHN (AJ)

1. This matter was on my Opposed Motion Roll for hearing on 18 August 2021.
2. After argument and submissions made by Counsel for both parties, I made the following Order:
 - 2.1. The Application for Rescission of Judgment was dismissed;
 - 2.2. The First Applicant's instructing attorney, Mr Antonio Ledwaba was ordered to pay the wasted costs of 18 August 2021 de bonis propriis, on an attorney and client scale, with such costs not be billed by him to his client, the First Applicant, or to the Second Applicant;
 - 2.3. No order of costs was granted against the Second Applicant;
 - 2.4. The First Applicant was ordered to pay the costs of the Application, on the scale as between attorney and client, barring the aforesaid wasted costs which are to be paid by attorney Ledwaba personally;
3. Without having been called upon by either party to furnish these reasons for judgment, I have nevertheless elected to furnish same in this written format.
4. Advocate Mello appeared on behalf of the First Applicant on instructions by Attorneys Shapiro & Ledwaba, represented by Attorney Antonio Ledwaba.
5. There was no appearance for the Second Applicant.
6. Advocate Kubeka-Manyelo appeared on behalf of the Respondent.
7. The hearing was heard digitally via a Microsoft Teams platform.
8. Advocate Mello appeared in a vehicle. When I inquired as to why he was appearing in a vehicle, he advised that he had insufficient time to return to his chambers, having gone out to purchase lunch. I immediately offered to postpone the matter for a few minutes to afford Advocate Mello the opportunity of arriving at his destination and appearing in an office, rather than in a vehicle. This invitation was declined.
9. Whilst I can take this aspect of the matter no further, I would point out that every attempt should be made by counsel to be as respectful in on-line court appearances, as they would be in an open court. This should include but not be limited to counsel being based in an office, where they have access to CaseLines, a computer, their files, and are able to present argument in a professional manner.
10. At the commencement of the proceedings, Advocate Mello sought a postponement of the Application, on the basis that he had been briefed by Attorney Ledwaba, only that morning. The basis of his brief was to seek a postponement. He submitted that he was incapable of arguing the Application, was not familiar with the facts and had not been briefed with the papers. In advancing an argument for a postponement, Mr Mello submitted that another advocate had been briefed Attorney Ledwaba to appear on 16 August 2021, as the other advocate had been under the impression that the Application was enrolled for hearing on 16

August

2021. The other advocate was apparently unavailable on the date of the hearing, Wednesday 18 August 2021. The First Applicant had not filed a Practice Note, or Heads of Argument.
11. Mr Mello could not advance reasons as to why “the other advocate” was unavailable for the hearing on 18 August 2021, neither could he explain the failure on the part of counsel to have filed Heads of Argument or a Practice Note, or to have met any form of compliance with the Consolidated Practice Directive of the Honourable Judge President, dated 11 June 2021.
12. Mr Mello could not explain why his unnamed colleague, who had been briefed for 16 August 2021, would have assumed that the hearing was to be heard on 16 August 2021, well-knowing that the Roll for the week had been published, at least one week prior to 16 August
2021. In the result, the whole Bar was aware, or ought reasonably to have been aware, which matters were to be heard on what date and at what times, in respect of the opposed motions which had been set down for the week commencing 16 August 2021.
13. Ms Kubeka-Manyelo, who appeared for the Respondent, vehemently opposed the application for a postponement. She addressed me on the still-born nature of the application, the lack of merit, (the details of which will appear below) and how the Respondent would remain prejudiced, were I to grant the postponement.
14. Having heard counsel for the Respondent, I immediately dismissed the Application for a postponement and called upon Advocate Mello to present his case for the First Applicant. At this point the digital connection failed, Advocate Mello’s image on my screen froze and he went off-line.
15. I called upon my Registrar as well as Ms Kubeka-Manyelo to telephone Advocate Mello and insist upon him re-joining the digital platform so as to pursue the matter. Court stood down for approximately fifteen minutes for this purpose.
16. Upon re-joining, Advocate Mello again repeated his inability to argue the matter, and whilst still appearing in a motor vehicle, continued to repeat that his brief and instructions from Attorney Ledwaba were merely to seek a postponement, and failing the grant thereof, he would be unable to advance any argument.
17. Postponements are not there for the taking, merely because they are sought by counsel. Counsel who accepts a brief to appear in an opposed motion, must surely be in a position to present an argument based on the relief sought by their client, to the extent that the postponement sought by them may not be granted. It must surely be upon this basis that counsel accepts a brief, or not at all.
18. Before dealing with the merits of the matter, from a procedural perspective, it is to be noted from the documents filed upon CaseLines that:

18.1. The Notice of Set Down in respect of the Application was served by the Respondent's attorney, Findlay & Niemeyer Inc, upon the attorneys for the First Applicant, Shapiro & Ledwaba Inc, physically at their office and signed for by them on 23 June 2021. Such Notice of Set Down was dated 21 June 2021 and clearly states that the Application has been set down on the Opposed Motion Roll for the week of 16 August 2021. Such Notice of Set Down appears in Section B at page B1 and B2 of CaseLines;

18.2. An Invitation List, dispatched by the Respondent's legal representative, reflecting the identity of the parties who ought to be invited on to CaseLines was uploaded on to CaseLines at Section 02, page 02-1, on 6 August 2021. From such Invitation List, it is clear that the attorney for the First Applicant, Shapiro & Ledwaba Inc is cited, as is their telephone number and the email address of Attorney A Ledwaba;

18.3. At Section 03 of Caselines at page 03-4, an e-mail dispatched by one Annalien Kok of the firm Findlay & Niemeyer Inc to Antonio Ledwaba, on 6 August 2021 at 12h52, appears, which reads:

"Good day, the telephone conversation held this morning between your Gontse and our Annalien refers. Please find herewith a Joint Practice Note for your attention and perusal."

18.4. Attached to the aforesaid email was the Practice Note of the Respondent's counsel, Advocate Kubeka-Manyelo, from which Practice Note at the very first item it is spelled out that the Application is enrolled for hearing during the week of {my emphasis} 16 August 2021.

19. Attorney Ledwaba had adequate prior knowledge of the hearing, and was duty bound to have ensured that his client's Practice Note and Heads of Argument were filed, so as to comply with the Consolidated Practice Directive of 11 June 2021, for opposed motions.
20. It is to be noted on CaseLines in Section A: 9: A44, constituting Annexure "G" to the First Applicant's Founding Affidavit, that the then Law Society of the Northern Provinces on 2 September 2016 addressed a letter, in relation to their Pro Bono Scheme Referral, under which this matter had been referred to Mr Ledwaba of the firm Shapiro & Ledwaba Inc. Whilst it is commendable for Mr Ledwaba to have accepted a mandate to act pro bono, his service to his own client has been more of a disservice by his conduct. It remains unanswered why Mr Ledwaba failed to

personally appear, alternatively arrange for an attorney or candidate attorney from his office to so appear, together with counsel, which is a requirement, especially in circumstances where his counsel was instructed at the last minute and was unable to speak to the facts. It is for the above reasons that Attorney Ledwaba has been visited with the *de boniis propriis* costs order, which was handed down against him. Such order should serve to discourage attorneys from demonstrating cavalier

conduct towards their duties, and disrespect towards the court.

21. On the merits of the matter, the initial Judgment sought to be rescinded was granted on 29 January 2015, by the Honourable Madam Justice Potterill. Her Court Order in respect of the grant of such Judgment appears at Section A:8:A43. From the papers presented, it is clear that the Honourable Potterill J granted such Judgment pursuant to an opposed Summary

Judgment

hearing, at which the First Applicant was present.

22. The second Judgment sought to be rescinded in the Application was the Order declaring the immovable property referred to in the first Order, specially executable.
23. In relation to the first Judgment, the launching of an Application for Rescission finds no application in law. The effect of the grant of a Summary Judgment, after an opposed hearing is such that if the Defendant is left seeking legal redress to such Judgment, the step to have taken would have been the noting of an appeal against such Judgment. Rescission procedure should

not be conflated with appeal procedure, both of which are present for their own respective uses and application, which should not be confused.

24. There was no evidence anywhere in the papers to support either of the two established grounds for rescission in relation to the Order declaring the immovable property specially executable. In this regard, there was no evidence of non-service, neither was there any evidence of a valid or bona fide defence to such Order.
25. From paragraph 1.3 of the Founding Affidavit to be found on CaseLines in A:4:A26, the First Applicant says:

“The 2nd Applicant is a co-applicant who applied with me when we initially obtained the mortgage bond for the financing of the property, 24 Buffelspoort Street, Brackendowns Ext 5. Her whereabouts are to me unknown. I site herein these papers as a co-applicant purely on the basis that she has an interest in these proceedings. She is also the 2nd Defendant in the main action instituted by the Plaintiff.”

26. Thus, on the First Applicant's own evidence, he does not know where the Second Applicant is to be found. The Second Applicant has not signed a Confirmatory Affidavit. It is clear that the Second Applicant does not have any knowledge of the Application, and as such, cannot be a co-applicant in these proceedings, at the instance and say so of the First Applicant. For this reason alone, the Application is stillborn. It is simply not competent to present an application on behalf of two applicants, jointly, when from the evidence, it is clear that one of the two applicants is not even aware of the application and has had no knowledge of the proceedings since its inception.

27. Accordingly, in the context of the above reasons, no purpose would have been served in granting the postponement, or in removing the matter from the roll, other than to frustrate and prejudice the Respondent further by indulging the First Applicant, where the reasons advanced for such postponement were without merit, and a substantive application on notice of motion for a postponement

was not filed. In addition, the court cannot close its eyes to the non-existent merit in the relief sought in the Application before it, or the continued prejudice which the Respondent would continue to suffer, in an inability to enforce its judgements, were I to have merely removed the matter from the roll. Hence, the Order, as reflected above, was granted.

NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

On behalf of Applicants: Advocate Mello

Instructed by:

Shapiro & Ledwaba Inc

On behalf of the Respondent: Advocate B Kubeka-Manyelo

Instructed by:

Findlay & Niemeyer Inc

Date of Hearing:

18 August 2021

Date of Judgment:

18 August 2021

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Prepared on 10 October 2026 · Esheria