

SOUTH AFRICA / JUDGMENT

Webb v Fourie and Another (3571/2018) [2020] ZAMPMHC 36 (30 January 2020)

[2020] ZAMPMHC 36

COURT

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

3571/2018

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IN THE HIGH COURT OF
SOUTH AFRICA,
MPUMALANGA DIVISION,
MIDDELBURG (LOCAL SEAT)
CASE
NO: 3571/2018

In the matter between:

EDWARD
COTTINGTON
WEBB
APPLICANT
and
WILLEM
LODEWIKUS
FOURIE
FIRST RESPONDENT
(Identity Number: 540[...])
COMMISSIONER OF
SOUTH
AFRICAN REVENUE SERVICES
SECOND RESPONDENT

JUDGMENT

BRAUCKMANN AJ

INTRODUCTION

[1] This is an application to vary/amend an order handed down by me on 9 September 2019 (“The Order”) as well as an application for leave to appeal my judgment and the order by the first respondent (Mr Fourie) in the main application.

[2]

The parties’ legal representatives agreed that I should first hear the opposed application for variation (“The Interlocutory

Application”). Should I find in favour of the applicant (“Mr Webb”) therein, and vary my order to become a provisional

sequestration order, the application for leave to appeal will only become relevant at a later stage. If I do not grant the variation, I indicated that I will then be inclined to grant leave to appeal to Mr Fourie which appeal will be to the full bench of this court.

[3]

In my judgment in the main application, which was an application for the provisional sequestration of Mr Fourie’s estate, the following paragraphs are of importance:

“[66] I am not of the opinion that any of the defences raised by the applicant is reasonable or bona fide as provided for in the

Badenhorst judgment.

[67] I accept therefore that:

[67.1] The Respondent committed a deed of insolvency;

[67.2] The applicant has a claim for R 200.00 which is liquidated as provided for in the Insolvency Act;

[67.3] That it is obvious that the respondent would not disclose his assets and/or indebtedness under these circumstances”.

[4]

Having concluded that Mr Webb complied with the requirements of section 10 of the Insolvency Act[1], I made the following order:

“The estate of Willem Lodewikus Fourie (ID 54[...]) is hereby sequestrated and placed in the hands of the Master of the High

Court.”

[5]

The relief sought by Mr Webb in the main application, and in his notice of motion was:

“That the Estate of the first respondent be provisionally sequestrated with a suitable return date;”.

The relief granted by me, therefor apart from not being competent, is not a relief sought by Mr Webb in the main application.

[6]

Mr Fourie, in his application for leave to appeal, states that the order, if it is to be interpreted as a final sequestration order, is legally untenable as it disregards the clear language of the legislative regime regulating applications for sequestration of debtors estates[2].

[7]

Mr Webb then filed the application for the variation of the order. He bases his application on Rule 42(1) (b) of the Uniform Rules of this court[3].

[8]

In the interlocutory application Mr Webb states that the purpose of the application is to rescind/ vary or rectify a part of the order contained in paragraph 68.1 of the judgment. Mr Webb wants this court to amend the order to read:

“[68.1] The estate of Willem Lodewikus Fourie (ID 54[...]) is hereby provisionally sequestrated and placed in the hands of the Master of the High Court with a return date on 31 January 2020.” Mr Webb further states that the order contained in paragraph 68.1 was made in error alternatively constitute a nullity.

[9]

The application is aimed at only removing the possible doubt contained in the current paragraph 68.1 of the judgment.

[10]

The order contained in paragraph 68.1, according to Mr Webb, resulted after several findings were made by me in paragraph 67.1 to 67.4 of the order.

[11]

In terms of section 10 of the Insolvency Act, a court may make an order for the sequestration of the estate of the debtor provided that all the requisites are complied with and only a provisional order can be made. The reason why a provisional order is initially made is for other creditors of the debtor to possibly intervene or oppose the sequestration application.

[12] In terms of section 11 of the insolvency Act[4] when the court sequester the estate of a debtor, the court must simultaneously grant a rule nisi calling upon the debtor upon a day mentioned in the rule to appear and show cause why his/her estate should not be finally sequestered. In terms of section 11(2)(A) compulsory service requirements of the rule nisi is determined before a debtors' estate can be finally sequestered.

[13]

It is further Mr Webb's case that the order granted by me without including the compulsory rule nisi constitutes a patent error and the failure to include such in the order constitutes a simple omission. The Identity number of the respondent is also incorrectly typed in the order.

[14]

Respondent's opposition to the application is simple. Respondent says that Rule 42(1) (b) of the Uniform Rules does not apply to the facts of the matter. Mr Fourie states that the order is a nullity and is unambiguous. According to the Mr Fourie I cannot amend the order as once a judgment has been pronounced the court cannot alter, supplement or amend or correct his own order. As the order is a nullity, according to the Mr Fourie, only a court of appeal can interfere in the said order.

[15]

Mr Klopper on behalf of Mr Webb admitted that the order that was issued does not reflect the court's intention. Referring to paragraphs 67.1 to 67.3 of my judgment it is clear, according to Mr Klopper, that I found that the requirements as set out in section 10 of the Insolvency Act was met and no defence was disclosed and therefor all that could follow was what the applicant sought and that is a provisional sequestration order with a return date. The fact that I did make the incorrect order which, according to Mr Klopper, also contains an ambiguity is a patent error which may be rectified. On a reading of paragraph 68.1 it cannot be concluded whether the order is a final or provisional. That is an ambiguity, which according to Mr Klopper I can rectify.

[16] Mr Kellerman (SC), on behalf of Mr Fourie is of the opinion that I cannot do so and in this regard refers to the well-known judgment by Trollip JA in *Firestone South African (Pty) Ltd v Genticuro AG*[5] where it was stated:

"The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased."

There are some exceptions to this rule according to Mr Kellerman. The closes it might come to applying the in casu is the second exception that a court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter the "sense and substance" of the judgment or order.

[17] Mr Kellerman SC also submitted, referring to the Master of the High Court (North Gauteng High Court Pretoria) v Motala N.O and Others [6] that where a judgment is a nullity a court cannot amend it at all. He also referred to the Department of Transport and Others v Tasima (Pty) Ltd[7] that:

“As explained in Tsoga, Motala is only authority for the proposition that if a court ‘is able to conclude that what the court [that made the original decision] has ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded.”

He also stated that if on a reading the meaning of the judgment order is clear and unambiguous, no additional facts or evidence is admissible to contradict, vary, qualify or supplement it. Not even the court that gave the judgment or order can be asked to state what is its subjective intention was in giving it.

[18]

Mr Webb’s representative however indicated that it is clear from the order and the preceding paragraph that an ambiguity exists, as the order does not state whether it is a final or a provisional sequestration order. The effect of the order, whether its final or provisional, is disabling on the first respondent, Mr Fourie, it matters not whether its final or provisional and therefore the sense and substance of the order is not altered at all if I amend the order.

[19] Having concluded that all the requirements for a provisional sequestration have been complied with by Mr Webb, I had no other choice but to issue a provisional order which did not happen. It is an obvious wrong order that contains an ambiguity, an omission and an error that can be varied expeditiously and without wasting costs. Mr Webb is not asking this court to amend any factual findings and conclusions and to rectify same. It is clear that the order pend (paragraph 68.1) is incorrect and does not reflect my intention. The relief was not even sought by Mr Webb. This is the kind of error and omission that can be rectified. See in this regard Colyn v Tiger Foods Industries t/a Meadow Feed Mills (Cape)[8]:

“As I shall try to explain in due course, the common law before the introduction of rules to regulate the practice of superior courts in South Africa is the proper context for the interpretation of the rule. The guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the judge who delivered it. He becomes functus officio and may not ordinarily vary or rescind his own judgment (Firestone SA (Pty) Ltd v Genticuro AG). That is the function of a Court of appeal. There are exceptions. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, justus error. Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause. There are also, thirdly, exceptions which do not relate to rescission but to the correction, alteration and supplementation of a judgment or order. These are for the most part conveniently summarised in the headnote of Firestone SA (Pty) Ltd v Genticuro AG (supra) as follows:

- '1. The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, that the Court overlooked or inadvertently omitted to grant.
2. The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, D provided it does not thereby alter "the sense and substance" of the judgment or order.(My Emphasis)
3. The Court may correct a clerical, arithmetical, or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance.
4. Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.'

In the *Gentiruco A.G.* case Trollip JA left open whether or not this list is exhaustive. The authorities also refer to an exceptional procedure under the common law in terms of which a court may recall its order immediately after having given it, or within a reasonable time thereof, either *meru motu* or on the application of a party, which need not be a formal application (*De Wet and others v Western Bank Ltd supra*; *First national Bank of SA Ltd v Jurgens*; *Tom v Minister of Safety and Security*. This procedure has no bearing on this case.

- [5] It is against this common law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. The rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The rule gives the courts a discretion to order it, which must be exercised judicially (*Theron NO v*

United Democratic Front (Western Cape Region) and others) and *Tshivhase Royal Council and another v Tshivhase and another*; *Tshivhase and another v Tshivhase and another*.

- [6] Not every mistake or irregularity may be corrected in terms of the rule. It is, for the most part at any rate, a restatement of the

common law. It does not purport to amend or extend the common law. That is why the common law is the proper context for its interpretation. Because it is a rule of court its ambit is entirely procedural.

[7] Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission (rule 42(1)(b)); or an order resulting from a mistake common to the parties (rule 42(1)(c); or 'an order erroneously sought or erroneously granted in the absence of a party affected thereby' (rule 42(1)(a)). In the present case

the application was, as far the rule is concerned, only based on rule 42(1)(a) and the crisp question is whether the judgment was erroneously granted.

8] The trend of the courts over the years is not to give a more extended application to the rule to include all kinds of mistakes or irregularities. This is illustrated by the facts of *De Wet and Others v Western Bank Ltd* which is a decision of this court. I shall confine my consideration of this judgment to the appeal of the 2nd, 3rd, 4th and 5th appellants in so far as it relates to rescission under rule 42(1)(a). These appellants were in default of appearance at the resumed hearing of their trial. This was because their attorney had withdrawn (but not in terms of the rules) without informing them directly of his withdrawal or of the date of the resumed hearing. He had sent a message to their agent (a former co-litigant in the same proceedings whom they had appointed to deal with the attorney on their behalf) that he had withdrawn and giving the new trial date, but the agent had not passed it on to them. Counsel for the respondent sought and was granted an order in terms of rules 39(1),

(3) and (4) for dismissal of their claims in convention and judgment against them by default on the counterclaim. The appellants applied for rescission of these orders. Their applications were dismissed. They appealed to the full bench of the Transvaal Provincial Division. Their appeals were dismissed. In a further appeal to this court Trengrove AJA had this to say during the course of dismissing the appeals and rejecting an argument that the judgment against them had been erroneously sought or granted under rule 42(1)(a):

'Firstly [counsel] contended that the Court of first instance should have rescinded the judgments and orders in question under the provisions of Rule 42(1)(a) as being judgments and orders "erroneously sought and erroneously granted" against the appellants, in their absence. A number of arguments were advanced in support of this proposition. Counsel for the appellants referred, in the first instance, to the fact that, in withdrawing as attorney for the appellants, Lebos had failed to comply with the provisions of Rule 16

(4) in at least two respects. This is common cause. The formal notification to the Registrar did not specify the date when, the parties to whom, and the manner in which notification was sent to all parties concerned, and it was not accompanied by a copy of last-mentioned notification. It was, accordingly, contended that the proceedings before VAN REENEN J were irregular and that the judgments against the appellants had been erroneously sought and granted. In my view there is no substance whatever in this contention. The appellants cannot avail themselves of the fact that their attorney had not complied with all the requirements of Rule 16 (4). There is no question of any irregularity on the part of the

respondent. At the stage when Lebos withdrew as the appellants' attorney, the case had already been set down for hearing on 16 August 1976 in accordance with the Rules of Court, and there was no need for the respondent to serve any further notices or documents on the appellants in connection with the resumed hearing. As far as the trial Court was concerned the Rules of Court had been fully complied with and the notice of trial had been duly given. When the case was called before VAN REENEN J neither the appellants nor their legal representative were present in Court, and, in the circumstances, the respondent's counsel was fully entitled to apply for an order of absolution from the instance with costs in terms of Rule 39

- (3) in respect of the appellants' claims and to move for judgment against the appellants under Rule 39 (1) on the counterclaim. The fact that the appellants had not been advised timeously of the withdrawal of their attorney is, of course, a factor to be taken into account in considering whether good cause has been shown for the rescission of the judgments under the common law, but it is not a circumstance on which the appellants can effectively rely for the purpose of an application under the provisions of Rule 42(1)(a).'

- [9] The same reasoning applies in this case. The defendant describes what happened as a filing error in the office of his Cape Town attorneys. That is not a mistake in the proceedings. However one describes what occurred at the defendant's attorneys'

offices which resulted in the defendant's failure to oppose summary judgment, it was not a procedural irregularity or mistake in respect of the issue of the order. It is not possible to conclude that the order was erroneously sought by the plaintiff or erroneously granted by the judge. In the absence of an opposing affidavit from the defendant there was no good reason for Desai J not to order summary judgment against him.

- [10] During the course of argument counsel drew our attention to conflicting approaches of the courts to the

proper application of rule 42(1)(a). *Bakoven Ltd v GJ Howes (Pty) Ltd*, and *Tom v Minister of Safety and Security* hold that the 'error' must be patent from the record of proceedings and that the court is confined to the four corners of the record to determine whether or not rule 42(1)(a) is applicable. *Stander v ABSA Bank Bpk* on the other hand permits external evidence of the 'error'. The conflict seems to me to obscure the real issue, which is to determine the nature of the error in question. This judgment concludes that what happened in this case did not amount to an error in terms of the rule, regardless of whether or not it manifested itself in the record of proceedings. It is consequently unnecessary for present purposes to say anything more about the conflict.

- [11] I turn now to the relief under the common law. In order to succeed an applicant for rescission of a judgment taken against him by default must show good cause (*De Wet and others v Western Bank Ltd supra*).¹⁸ The authorities emphasize that it is unwise to give a precise meaning to the term good cause. As Smalberger J put it in *HDS Construction (Pty) Ltd v Wait*:

‘When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words

(Cairns' Executors v Gaarn 1912 AD 181 at 186; Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352-3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.’

With that as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation

of his default; (b) by showing that his application is made bona fide; and

(c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success (Grant v Plumbers (Pty) Ltd²⁰, HDS Construction (Pty) Ltd v Wait supra, Chetty v Law Society, Transvaal.)”(Own Emphasis)

[20] I am of the opinion that the error in the present matter did not follow as a result of any conduct or lack of conduct of any party to the application but that of the judge himself. There is no requirement for any explanation regarding the conduct of the applicant or first respondent to the matter that caused the ambiguity, omission and error contained paragraph 68.1 of the order. The court is also not requested not to revisit the whole of the judgment but only to remove the ambiguity and omission that causes a patent error. I agree with Mr Klopper on behalf of Mr Webb. The bona fide error occurred causing the wording in paragraph 68.1 of my judgment to be penned in an ambiguous manner and an omission occurred in that I failed to grant a provisional order, and the registrar was not requested to provide a suitable return date for a

Rule Nisi. Such error can be rectified. The court order must be read in context of the judgment as a whole and particularly in the light of the court’s reasons for that order[9].

[21] In SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Ltd and Others [10] the Constitutional Court confirming its own judgment in Eke v Parsons, explained the principle of interpretation of a judgment as follows:

“[52] Court orders are intended to provide effective relief and must be capable of achieving their intended purpose. That must be the starting point in interpreting a court order. The well-established principles governing the interpretation of a court order were expounded in Firestone and more recently endorsed in Eke:

“The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.”[11]

[22] The judgment is instructive and clear. Based on above, I therefore make the following order:

1. The order of this court, dated 9 September 2019 is amended to read:

1.1 That the estate of Willem Lodewikus Fourie (ID 54[...]) is hereby provisionally sequestrated and placed in the hands of the Master of the High Court.

1.2 That the first respondent, and any interested party, is called upon to appear in this court on 14 April 2020 at 10H00 to give reasons why the order in 1.1 above should not be confirmed.

1.3 That the costs of this application shall be costs in the administration of the insolvent estate.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPLICANT: ADVOCATE KLOPPER INSTRUCTED BY:

LOUIS BENN ATTORNEY

REPRESENTATIVE FOR THE RESPONDENT: ADVOCATE KELLERMAN INSTRUCTED BY:

CLARKE N VAN ECK ATTORNEYS

DATE OF HEARING:

22 JANUARY 2020

DATE OF JUDGMENT:

30 JANUARY 2020

[1] Act 24 of 1936

[2] Moch v Net Travel (Pty) Ltd t/a American Express Travel Service 1996(3) SA 1(A) at page 9E.

[3] 42 Variation and Rescission of Orders (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 erroneously granted in the absence of any party affected thereby; (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission; (c) an order or judgment granted as the result of a mistake common to the parties.

[3] 42 Variation and Rescission of Orders

(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 erroneously granted in the absence of any party affected thereby;

- (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) an order or judgment granted as the result of a mistake common to the parties.
- [4] The Insolvency Act 24 of 1936.
- [5] 1977(4) SA 298(A).
- [6] 2012(3) SA 325 (SCA) at par 12 – 15
- [7] 2017(2) SA 622 (CC).
- [8] 2003
- (6) SA 1(SCA).
- [9] See Newlands Surgical Clinic (Pty) Ltd vs Peninsula Eye Clinic (Pty) Ltd 2015(4) SA 34 (SCA) and Natal Joint Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA).
- [10] 2018(12) BCLR 1553 (CC)
- [11] Eke v Parsons 2016 (3) SA 37 (CC) at par 29.

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