IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 1878-2022
1879-2022
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

MPHO JONATHAN MADZIBADELA	Applicant in case no 1878/2022 and first applicant in case no 1879/2022
PALESA MOSIA	Second applicant in Case no 1879/2022

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED	Respondent
CYMBOL CONSULTING (PTY) LTD	Third Party

HEARD ON: 9 JUNE 2023

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 19 JUNE 2023. The date and time for hand-down is deemed to be 19 JUNE 2023 at 11:00

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[1] This is an application for leave to appeal against the judgement of this court dismissing the applications launched by the two applicants to have the default judgement by Van Zyl, J under the above two case numbers rescinded.

[2] The default judgements were handed down by Van Zyl, J on an unopposed basis on 7 July 2022. In case no 1878/2022 she granted default judgement against the applicant in the amount of R10 946 735.32 plus interest in favour of the respondent. In case 1879/2022 she granted default judgement on the same day against the first applicant in the amount of R8 218 476.10 plus interest in favour of the respondent. Under the same case number she also gave default judgement against the second applicant to pay, jointly and severally with the first applicant, the amount of R5 500 000.00 plus interest to the bank.

[3] In both the main actions from which the default judgements arose, the claims of Standard Bank were founded on a settlement agreement entered into between the bank, Cymbol Consulting and mr. Madzibadela in his personal capacity. The second applicant in case no. 1879/2022 had signed a suretyship for the indebtedness of Cymbol. It was common cause between the parties that Standard Bank had issued summons against both the applicants in both applications on 21 April 2022. Mr. Madzibadela filed notice of intention to defend on 10 May 2022, while Palesa Mosia filed such notice the following day. On 8 June 2022 a notice of bar was filed in respect of mr. Madzibadela, and on 9 June 2022 a notice of bar was filed in respect of Palesa Mosia. On 14 June 2022 the attorneys representing the applicants requested an extension of time to file their pleas, which request was refused by the attorneys representing Standard Bank.

[4] On 20 June 2022 the bank filed a notice in terms of rule 31(5)(a) in both the actions pertaining to its intention to obtain default judgement. On 22 June 2022 the attorneys for the applicants served notices in terms of rule 35(12) and (14). On 6 July

the applicants filed their pleas and a third-party notice by way of e-mail. On 7 July the default judgements were granted.

[5] The applicants then sought a rescission of these judgements on a number of grounds, which rescission was refused by this court on 22 February 2023. It is against this refusal that the applicants now seek leave to appeal.

[6] The rescission of the default judgements were sought in terms of Rule 31(2)(b), which provides that the court may, upon good cause shown, set aside the default judgement, and in terms of Rule 42, which provides *inter alia* that the court may rescind a judgement erroneously sought or erroneously granted in the absence of a party affected thereby. On behalf of the applicants it was contended that, were the court privy to their defences raised in their plea of 6 July 2022, the court would not have granted the default judgements. In its judgement, this court referred to the effect of a notice of bar, namely that, in terms of Rule 26, a party who fails to file a plea inside the time frame provided in the notice of bar, will be *ipso facto* barred. The applicants were therefore not entitled to serve their pleas on 6 July 2022, and it could therefore not have any effect on the granting of the default judgements. The default judgements were therefore not erroneously sought or granted, this court found.

[7] It was further contended by the applicants in the rescission application that the applicants ought to have been notified beforehand of the date on which the default judgements would be sought. This contention was not correct, since Rule 31(5)(a) provides that an applicant for default judgement, where the defendant is in default of delivery of a plea, must give such defendant not less than 5 days' notice of his intention to apply for default judgement. In the present case, this was done by the bank, and the notice was duly received by the applicants' attorneys. According to the applicants, the bank should have gone further to notify them of the date when the application would be made.

[8] In its judgement, this court found these contentions to be without any merit. In this application for leave, the applicants again raised the same arguments to persuade the court that another court would uphold their contentions. At the hearing of the application for leave, mr. Mtsweni appearing for the applicants, relied on a judgement by the Full Bench of the Gauteng Division in Pretoria under case no. A390/2019,

namely **Rezaei and Others v Adinolfi and Others** (unreported). That case dealt with the application of Rules 31(5)(a) and 42, *inter alia*. Unfortunately, that case does not assist the present applicants at all, since the respondent in that case had failed to give notice to the appellants of intention to apply for default judgement. In the present case, such notice was indeed given.

[9] To make things worse for the present applicants, the court in the Rezaei case made the following remark: "When an affected party invokes Rule 42(1)(a) for rescission of a default judgment, as is done by the appellants in this appeal, the question arises whether the party that obtained the order was procedurally entitled thereto, in order to decide whether the order was erroneously sought or granted, or not. If the party seeking the order was procedurally entitled to do so, …. it cannot be said that the order was erroneously granted. The first respondent did not give notice as required to the appellants that he intends to apply for default judgement, accordingly did not meet the requirements for such a default judgement to be sought, and the order was erroneously sought and erroneously granted in the absence of the parties."

[10] I consequently find that there is no reasonable prospect that another court would come to a different conclusion in this matter.

[11] The application for leave to appeal is dismissed with costs.

P. J. LOUBSER, J

For the applicants:	Adv. D. Mtsweni with adv. S. Maelane
Instructed by:	Mabotja Attorneys, Pretoria
	c/o Van Wyk & Preller Attorneys, Bloemfontein
For the respondent:	Adv. J. Els
Instructed by:	E. G. Cooper Majiedt Inc. Bloemfontein

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