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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 4175/2020
NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

In the matter between:

ANNELINE ADAMS

Applicant

and

SUNNIDHEW SOOKAI JUGWANTH

Respondent

t/a SS JUGWANTH ATTORNEYS

In re:

SUNNIDHEW SOOKAI JUDWANTH

Plaintiff

t/a SS JUGWANTH ATTORNEYS

ANNELINE ADAMS

Defendant

KHUMHOLD WHOLESALE FOODS & COMMODITIES CC

Respondent

ORDER

- [1] The application for rescission is dismissed with costs on the scale between attorney and client.
- [2] The allegations in the founding affidavit pertaining to the alleged financial misconduct and sexual harassment on the part of the respondent are struck out, again with costs on the scale as between attorney and client

JUDGMENT

FISHER J

Introduction

- [1] The applicant seeks a rescission of a judgment obtained against her by default. The applicant and the respondent were in an attorney-client relationship and the summons in issue was in respect of unpaid fees.
- [2] The applicant's case on affidavit is confused. She seems to suggest that she is bringing the application under rule 31(2)(b) in that she makes reference to having to establish a *bona fide* defence. Rule 42(1)(a) on the other hand does not provide for a *bona fide* defence to be shown, a rescission under that rule is procedural.
- [3] The applicant's counsel, however, expressly confirmed that no reliance was placed on rule 31(2)(b). In any event, there was no application for condonation as would have been required had the applicant wished to place reliance on this rule. Furthermore, there is no defence made out.

- [4] The applicant denies that service of the summons took place whilst the sheriff's return of service evidences service at the applicant's residence. This is the central dispute.
- [5] The applicant was represented by counsel and the respondent argued the matter on behalf of his firm. He has however been represented by attorneys throughout this application.

Material facts

- [6] On 4 August 2018 the applicant engaged the professional legal services of the respondent to assist with an employment dispute with her erstwhile employer, MTN. In pursuance of this engagement the applicant signed a written client mandate.
- [7] The mandate set out the respondents hourly rate (R 1 800 per hour and R 2 600 for work attended to after hours) and other general aspects of the relationship including that the respondent would be entitled to render interim monthly accounts and would render a final account at the conclusion of the matter; that, if the applicant did not object in writing to an account within forty eight hours of receipt, she would be deemed to have accepted such account; that all accounts received were payable on receipt and the respondent would furnish the applicant with a monthly report or feedback relating to the progress made in the case.
- [8] The applicant also furnished her residential address as her domicilium address for service of process.
- [9] The applicant complains in this application that she was not provided with interim monthly invoices and updates. She complains also that she obtained no success in the matter on which she had instructed the respondent.
- [10] The respondent withdrew as the applicant's attorney in April 2019 on the basis that she had not paid the outstanding fees.
- [11] The respondent attaches WhatsApp messages between himself and the applicant in April 2019. These messages pertain relate to an agreement that

the applicant would pay the amount claimed by the respondent in instalments of R 50 000 per month. It seems that these payments were not forthcoming.

- [12] On 17 October 2019 the respondent sent a detailed itemized invoice in respect of his fees (totaling R 549 225). The applicant admits receipt of this invoice.
- [13] The applicant did not employ the objection mechanisms in the client mandate agreement.
- [14] The parties arranged for a meeting to take place at the offices of the respondent on 14 November 2019 so that the fees could be discussed with reference to the respondent's files and items which the applicant wished to debate.
- [15] The applicant did not keep the appointment. She then asked that a virtual meeting take place. The respondent was loath to do this as, to his mind, the discussion had to take place with reference to the physical files.
- [16] The respondent however spoke to the applicant telephonically for about 17 minutes on the day in question. He states that during this conversation the applicant admitted that she could not afford to pay the fees. She was also not able, when asked, to identify any fee item/s that she sought to place in dispute.
- [17] Approximately two weeks after this failed attempt at discussing the payment due and on 02 December 2019, the applicant laid a complaint with the Legal Practice Council ("LPC").
- [18] In this complaint the applicant alleged for the first time that the respondent had charged exorbitant fees, failed to carry out instructions, failed to provide feedback and failed to provide her with monthly statements.
- [19] She went further and made the following serious allegations:
 - [13.1] That the respondent misused her cash and trust funds,

- [13.2] That the respondent threatened and harassed her during an emotional and medical breakdown,
- [13.3] That the respondent had sexually harassed her.
- [20] On receipt of the complaint the LPC recommended that the parties attend a meeting to discuss the matter in terms of rule 40.2.3 of the Legal Practice rules.
- [21] The respondent issued summons on 10 February 2020.
- [22] The applicant expresses in her founding affidavit that she is aggrieved by this issuing of the summons at a time when the parties were to meet under the auspices of the LPC.
- [23] She appears to have been under the impression that this complaint would stay the proceedings. It is now conceded that the respondent was not precluded from issuing summons but she still alleges that he “acted in bad faith” in so doing.
- [24] This allegation is relevant to further communications between the applicant and the LPC. I will come to these communications later.
- [25] The respondent's legal representatives Scheffler Attorneys, contacted the applicant on 16 September 2022 to inform her that the default judgment had been taken.
- [26] The applicant alleges that this was the first indication that she had of the judgment. She says that she subsequently found out that the notice of set down had been delivered to an email address which had been suspended due to her non-payment.
- [27] The applicant then approached her current firm of attorneys ENSafrica which in brought this application for rescission on her behalf.
- [28] The sheriff has produced a return of service which reads as follows in relevant part:

“..on 17 February 2020 at 09h31 at [...] , LONEHILL being the place of residence of MS ANNELINE ADAMS and during his temporary absence a copy of the Combined Summons and Particulars of Claim, Annexures “A”, “B”, “C” was served to Ms S Ncube, Domestic Worker, a person apparently not less than sixteen years of age and apparently in the employee the premises at the time of delivery, after the original document was displayed and the nature and contents thereof was explained to her. Rule 4(1)(a)(ii).

ATTEMPT(S)

11 February 2020 at 08h02 – No one found.

14 February 2020 at 09h31 – No one found.”

- [29] Thus, there were two attempts made to serve at the applicant’s residence without success. It bears mention that the sheriff could, on the basis of a *domicilium* provision in the client mandate, have simply left the application at the address. Thus, on the version of the respondent, he went beyond his obligations by delivering the summons to a person at the applicant’s residence.
- [30] The applicant admits that she resides at the address mentioned in the return. It is also not in dispute that this address is her chosen *domicilium* address under the client mandate. She denies however that she employs a domestic worker. The inference she seeks to have drawn is that no service took place.
- [31] The applicant goes as far as to accuse the respondent of deliberately misleading the court as to the service.
- [32] I come back to the LPC complaint. On 04 March 2020 the respondent filed a comprehensive response to the complaint.
- [33] On 27 July 2020 the LPC forwarded the applicant’s answer to this response which answer was responded to by the applicant on 14 August 2020.
- [34] The respondent correctly points out that it is regrettable that the LPC complaint process has been raised in these proceedings in that they are irrelevant. He seeks that any reference to his alleged sexual misconduct and

misuse of trust monies be struck out for being scurrilous and vexatious and for their irrelevance. I will deal with this application to strike out later.

[35] The applicant's reply in the LPC proceedings is pivotal to her application. Recall, the sole dispute is whether she received knowledge of the summons before judgment.

[36] The applicant in her reply in the LPC proceedings dated 08 July 2020 states the following:

“Over and above the foregoing, the Applicant in her reply dated 8th July 2020 to the Legal Practice Council to my response to her complaint (See attached hereto as Annexure SJ11, page 2 under RE 5) *Ad para* 1.4, 2nd para thereto, where the Applicant states:

‘His bill.....for a few meetings attended. He chose to rack up a bill without informing me and even when I referred the matter to the Law Society and he was informed of this he still proceeded to serve summons which is unlawful until this investigation is complete.’ (emphasis added)

[37] The respondent makes the point that this indicates unequivocally that the applicant was aware of the summons as far back as July 2020.

[38] The applicant opted not to file a replying affidavit and thus this and other allegations of the respondent stands unchallenged.

Applicable legal principles

Rescission under rule 42(1)(a)

[39] If, as the applicant contends here, there has not been proper service of procedurally acceptable process the judgement can be rescinded under subrule 42(1)(a).

[40] This subrule caters for a mistake in the proceedings. The mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in the application for rescission of judgment. The mistake may arise either in the

process of seeking the judgment on the part of the applicant or in the process of granting default judgment on the part of the court.

- [41] Once a mistake vitiating the proceedings is established the judgment must be set aside. It is not necessary for good cause to be shown.¹

Application to strike out

- [42] Uniform rule 6(15) provides as follows:

“The Court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious, or irrelevant with an appropriate order as to costs, including costs as between attorney and client. The Court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it is not granted.”

- [43] In *Beinash v Wixley*,² the court held that what is clear from rule 6(15) is that two requirements must be satisfied before an application to strike out matter from any affidavit can succeed. First, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. Secondly, the court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced.

Discussion

- [44] The applicant failed to file a replying affidavit. She thus failed to explain why she would inform the LPC in July 2020 of a summons which she now tells this court that she first had knowledge of in September 2022.
- [45] She failed also to deal with the contents of the sheriff's return, which I must accept as *prima facie* evidence of its contents. Furthermore, she fails to explain why she would enter into a payment arrangement to pay a debt that she disputed.

¹ *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA).

² *Beinash v Wixley* 1997 (3) SA 721 SCA page 24 – 25.

[46] On the probabilities, there was proper service of the summons. The court made no error in that the sheriff's return was before it.

[47] As far as the scurrilous allegations raised as to the respondent's alleged misappropriation of the applicant's funds including trust funds, there is no foundation laid therefor. The allegations of sexual misconduct are likewise not established and neither are they relevant.

[48] The prejudice to the respondent, a professional man and an officer of this court is self-evident.

Costs

[49] Regrettably I cannot conclude other than that the applicant has been dishonest and vexatious in the bringing of these proceedings. In the circumstances she must pay the costs on a punitive scale.

Order

[50] In the circumstances, I make the following order:

[1] The application for rescission is dismissed with costs on the scale as between attorney and client.

[2] The allegations in the founding affidavit pertaining to the alleged financial misconduct and sexual harassment on the part of the respondent are struck out, again with costs on the scale as between attorney and client.

D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 07 November 2023

Heard: 16 October 2023

Delivered: 07 November 2023

APPEARANCES:

For the applicant: Adv MN Ndlovu

Instructed by: ENSafrica

For the respondent: Respondent and attorney with right of appearance: Mr Sunnidhew Sookai Jugwanth

Instructed by: Scheffler Attorneys