



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date: 04 November 2022 Signature: 

CASE NO: 90644/2019

In the matter between:

MASHUDU DAVID NETSHITUNGULU

Applicant

And

CHANGING TIDES17 (PTY) LTD

Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

- [1] This application is a quest by the Applicant to have an order granted by default on 2 June 2021 rescinded. In actual fact the order in question was granted on the 23 April 2021. The application is opposed.
- [2] Additionally, the Applicant seeks an order that the writ of execution be stayed pending finalization of the rescission application. The Applicant fails to state in terms of which provision this further application is brought.
- [3] Applicant has premised his application in totality on alleged error in obtaining of the judgment. In his founding affidavit, he states that the court order was granted in error without following proper procedure. Premised on this approach adopted by the Applicant, it is evident that the application is brought in terms of the provisions of Rule 42(1).
- [4] In terms of the said rule, Applicant needs to show that the order was granted erroneously in his absence. What is further evident is the fact that Applicant was served personally with both the summons and the rule 46A application; as such the provisions of rule 31(2)(b) cannot apply. Applicant did not make any allegations of any fraud, *justus error* or any of the other grounds applicable under common law.

BACKGROUND

- [5] Summons was served personally on the Applicant on 11 December 2019.
- [6] The Rule 46A application was then served personally and the Applicant was informed by the Sheriff that, in the absence of a notice of intention to defend, the application will be heard on 18 January 2021. Applicant delivered a notice of intention to defend the application on 15 December 2020.
- [7] No answering affidavit was forthcoming from the Applicant, and a further Rule 46A application was served personally on 25 February 2021. Applicant was informed that the set down date will be 23 April 2021.
- [8] Applicant failed to respond and on 23 April 2021 the order was granted.
- [9] On 24 June 2021 the Applicant delivered his answering affidavit (styled by him as a replying affidavit). This affidavit was evidently delivered 2 (two) months after the judgment was granted and 5 (five) months after it was due (premised on the initial notice of intention to defend filed by him on 15 December 2020: Applicant had 15 (fifteen) days until 26 January 2021 to deliver an answering affidavit).
- [10] As at date of the Rule 46A application, the arrears were an amount of R119 361.32 which represented 12 months of missed instalments.

APPLICANT'S CASE

[11] From a perusal of the Applicant's papers it appears that it is the Applicant's case that:

- 11.1 He was served with the summons but did not defend same due to financial constraints.
- 11.2 During October 2020 he was served with the Rule 46A application and on 15 December 2020 he delivered a notice of intention to defend.
- 11.3 On 24 June 2021 he delivered his replying affidavit.
- 11.4 Respondent proceeded to apply for execution without serving the Applicant with an application for default judgment.
- 11.5 In his notice of intention to oppose he provided an email address. Respondent also had his physical address. Despite having these addresses no notice was served on him.
- 11.6 Respondent did not serve Applicant with a notice of bar subsequent to the delivery of his notice of intention to oppose.
- 11.7 Respondent further failed to serve him with a compliance directive affidavit, in light of all of the above, it is difficult for Applicant to understand how a Judge or Registrar could have granted the order.

RESPONDENT'S CASE

[12] The Respondent points out that the Applicants elected not to disclose to this Court that on 25 June 2018, the Rule 46A application was served **personally** on the First Applicant.

[13] Regarding the merits, the Respondent submits that the default judgment (incorporating the Rule 46A) granted on 23 April 2021, was obtained after due process was followed.

[14] The Applicant makes no mention of the arrears he owed at all in his application.

THE PROVISIONS OF RULE 42 (1)

[15] Rule 42 (1) provides for three distinct rescission or variation procedures, the first refers to instances in which a judgment was erroneously sought or erroneously granted in the absence of any party affected thereby (my own emphasis). For example, a judgment will have been erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which fact would have dissuaded the court from granting the judgment. The second aspect is where the judgment was sought or granted in the absence of the party who is affected thereby.

ANALYSIS AND CONCLUSION

[16] In this matter summons was served personally and was not defended.

[17] The initial Rule 46A application was served personally. A notice of intention to defend was delivered but the Applicant then failed to deliver an answering affidavit within the 15 (fifteen) day period directed in terms of the Rules. Same was only delivered subsequent to the judgment being granted.

[18] A further Rule 46A application, with set down date 23 April 2021, was served personally on 25 February 2021: no notice of intention to defend in response hereto was delivered. In the replying affidavit the Applicant states that he did not defend same as he did defend the initial application. Having been served personally with a fresh application would have necessitated that a fresh notice of intention to defend should be served.

[19] The Respondent has no obligation to serve the Applicant with a compliance directive affidavit as alleged by the Applicant.

[20] Service of an answering affidavit subsequent to the order being granted, renders such answering affidavit a nullity.

[21] The property was regarded as being a primary residence, hence a reserve price in the amount of R720 000.00 was set.

[22] Counsel for the Respondent submitted that the Court was aware of all the relevant facts (**and of the Applicant's defence¹**) at the time of granting the judgment.

[23] The judgment was thus validly sought and granted.

B. COSTS

[24] Ordinarily, this would be a matter wherein costs could justifiably be granted against the Applicant on a punitive basis. I have however, taken a considered view to defer to the *Biowatch* principle and award costs at an ordinary scale.

C. ORDER

[25] In the circumstances the following order is made.

The Applicants' application for rescission is dismissed with costs.



J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

¹ Emphasis added.

Date of Judgment: 03 November 2022

Date of hearing: 24 October 2022

Appearances

On behalf of the Appellant: Mr. M.D. Netshitungulu (in person)

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On behalf of the First Respondent: Adv. J. Minnaar

Instructed by:

H P NDLOVU INC

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 03 November 2022.