

**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 3546/2019

(1) REPORTABLE: YES/NO

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

(3) REVISED.

In the matter between:

MORULENG DEVELOPMENT CONSULTANCY

AND CONSTRUCTION CC

KWENA JOHANNES MOHOLOLA

MAFOLO MAPHILE SANDRIES

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

And

UNICIP TRANSPORT CC

RESPONDENT

JUDGEMENT

KGANYAGO J

[1] The applicant has brought a rescission of judgment application against the respondent, whilst the first and second intervening parties (intervening parties) have brought an application to intervene in the proceedings. Both applications were heard simultaneously.

[2] In the rescission application, the applicant in its founding affidavit has stated that on 10th June 2019 the respondent had instituted liquidation proceedings

(main application) against it. On receipt of the respondent's application, the applicant instructed Noko Maimela Incorporated to file opposing papers in the main application. The applicant submit that the application for liquidation was set down for the 16th September 2020, but its former attorneys did not inform it of the date of hearing and also did not attend court on its behalf despite been fully instructed.

[3] The applicant has stated that the respondent in its founding affidavit in the main application has stated incorrect and untrue facts knowingly and with the deliberate intention to gain sympathy from court and also to discredit the applicant. It is the applicant's contention that the respondent had approached the court by way of liquidation application fully aware that it had entered into a settlement agreement with the applicant, and that the amount due and payable at the time of issuing of the main application was far less than the amount alleged to be owing in the main application. The applicant further submitted that the respondent approached the court in the main application without putting it on terms and later cancelling the settlement agreement.

[4] With regard to the intervening application, the intervening parties have stated that they are employees of the applicant, and that the respondent did not serve the main application on them and other employees of the applicant. According to the intervening parties, they became aware of the final liquidation of the applicant on 14th June 2021 when they overheard a conversation between Mr Makgoga a member of the applicant and the respondent's attorneys. The intervening parties submit that the liquidation of the applicant will bring hardship on them and other employees. It is the intervening parties' contention that the liquidation of the applicant will not be in the best interest of the employees taking

into consideration the number of families that are supported by them through been employed by the applicant.

[5] The respondent is opposing both applications. The respondent has filed a Rule 6(5)(d)(iii) notice. In that notice the respondent has stated that its liquidation application was premised on a liquidated demand that remained unsatisfied resulting therein in the applicant been considered to be unable to pay its debts as they became due rendering it to be wound up. It is the respondent's contention that the applicant has failed to put any evidence to show why they allege that the default order was erroneously granted.

[6] The applicant in its founding affidavit has stated that default order was erroneously granted in their absentia and further that it had made a good cause to sustain orders prayed for in the notice of motion. That entails that the applicant's rescission application has been brought in terms of Rule 42(1) of the Uniform Rules of Court (Rules) and common law.

[7] In *Rossitter and Others v Nedbank Ltd*¹ Mbha JA said:

"The law governing an application for rescission under Uniform Rule 42(1)(a) is trite. The applicant must show that the default judgment or order had been erroneously sought or granted. If the default judgment was erroneously sought or granted, a court should, without more, grant the order for rescission. It is not necessary for a party to show good cause under sub-rule. Generally, a judgment is erroneously granted if there existed at the time of its issue a fact which the court was unaware of, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment."

[8] It is the applicant's contention that on receipt of the respondent's liquidation application, it had instructed Noko Maimela Attorneys to oppose the

¹ [2015] ZASCA 196 (1 December 2015) at para 16

respondent's application. However Noko Maimela Attorneys did not act in accordance with the applicant's instructions and also did not attend court or notify the applicant of the date of hearing. Had the court which granted the default order made aware that the applicant's intention was to oppose the respondent's main application, and that the attorneys instructed by the applicant did not act in accordance with their mandate, and further that the applicant was not aware of the date of hearing, I doubt whether a default order would have been granted without the set down been served directly on the applicant.

[9] The applicant alleges that it and the respondent had signed a settlement agreement, and that the amount due and payable at the time of the issuing of the main application was far less than the amount alleged in the respondent's main application. The applicant therefore dispute the amount which the respondent has based its liquidation application on. That in itself create a dispute of fact which if the court that granted the default order was aware of, would not have granted the default order on the papers as they stand. In my view, the default order granted on 16th September 2020 was erroneously granted.

[10] Turning to the intervening application, the test for joinder requires that a litigant must have substantial interest in the subject matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the court, and whether it is in the interest of justice for a party to intervene in litigation. (See *Pheko and Others v Ekurhuleni Metropolitan*

*Municipality (No 2)*² and *International Trade Administration Commission v SCAW SA*³).

[11] The intervening parties are employees of the applicant, and it is also a procedural requirement that they should be served with the liquidation application before a final order is granted. The liquidation of the applicant is going to affect their employment contract and their livelihood. I am therefore satisfied that the intervening parties have a direct and substantial interest in the liquidation application of the applicant and that if the applicant is finally wound up, it will have an effect on them, and that they should be joined to the proceedings as second and third respondents respectively.

[12] In the result I make the following order

12.1 The default order granted on 16th September 2020 is hereby set aside and rescinded.

12.2 The intervening parties are joined to the proceedings as second and third respondents respectively.

12.3 The respondent is ordered to pay the costs of the two applications on party and party scale.

KGANYAGO J

² [2015] ZACC 10

³ 2012 (4) SA 618 (CC) at 625A

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

Counsel for the applicants	: Thobejane LE
Instructed by	: Botha Massyn & Thobejane Associated
Counsel for the respondent	: Adv J van Rooyen
Instructed by	: Donn E Bruwer Attorneys
Date heard	: 19th August 2021
Electronically delivered on	: 4th October 2021