

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO: 632/2019

Matter heard on: 11/03/2021

Judgment delivered on: 23/03/2021

In the matter between:

PYTHAGOROS VUYISILE MAGQABI

Applicant

and

BABALO METU

Respondent

JUDGMENT

SMITH J:

[1] The applicant applies for the rescission of a judgment granted by Toni AJ on 10 December 2019, in terms of which he was ordered to pay the sum of R287 143 (and costs of the suit) to the respondent. The respondent's claim related to fees which were allegedly due to him in respect of several matters in which he was instructed as counsel by the applicant, a practising attorney.

[2] When the matter was set down for the hearing of the respondent's application for default judgment, the applicant was given due notice and he filed a substantive application opposing the granting of the order. In his supporting affidavit in that application, the applicant explained the circumstances in which he failed to file his plea timeously and also purported to proffer a defence to the plaintiff's claim.

[3] Both parties were represented by counsel at the hearing. After hearing argument, Toni AJ dismissed the applicant's objection to the granting of default judgment and granted judgment in favour of the respondent.

[4] The rescission application is brought in terms of rule 31 of the Uniform Rules of Court. The question accordingly arises as to whether the applicant was entitled to challenge the default judgment by way of rescission application or if it was incumbent on him to lodge an appeal against that judgment. Mr. *Matanda*, who appeared for the respondent, argued that since the applicant's objection to the application for default judgment had been fully argued before Toni AJ and the latter had pronounced on the merits of that objection, it was not open to the applicant to seek a rescission of that judgment. He should instead have appealed the judgment and Toni AJ's ruling, or so he argued.

[5] There is indeed great merit in this submission. First, the default judgment was not granted in the absence of the applicant, and second, the merits of the applicant's explanation for his default and the issue as to whether he had established a bona fide defence to the plaintiff's claim, had been fully ventilated before Toni AJ. It seems to me that in the circumstances the application for rescission will require me effectively to sit on appeal of Toni AJ's judgment. It is trite that I am not at liberty to do so where proper procedures have not been followed and a court of appeal has not been properly constituted in terms of the court rules.

[6] In the event, in my view the applicant has failed to establish one of the crucial grounds for rescission, namely a bona fides defence to the plaintiff's claim. In fairness to the applicant, I shall quote his contentions in this regard in full.

[7] In paragraph 4.4 of his affidavit he states the following:

“(a) At all times I have been acting as agent on behalf of clients.

(b) When the respondent was briefed, the plan was an express (though verbal) understanding that these are contingency fee agreement matters and will be attended only upon successful completion thereof.

(c) That the fees are exorbitant so as to amount to an overreach and have been referred to the LPC for determination.

(d) The respondent himself terminated the briefs unilaterally without reason.”

[8] The applicant's contention that because he was acting as agent on behalf of his clients he is somehow absolved him from his responsibility to pay the fees of the advocate whom he

had instructed to represent his clients, is untenable. Mr *Ntlokwana*, who appeared for the applicant, has conceded that by instructing the respondent as counsel, the former had assumed responsibility for the fees in his capacity as instructing attorney.

[9] And the fact that he may have acted in terms of contingency fee agreements with his clients also does not absolve the applicant of the legal responsibility to pay the respondent's fees. He does not assert that he had reached agreement with the respondent that he would act on a contingency basis and would require payment only once the matters had been successfully concluded. His assertions in this regard can at best for him be interpreted as meaning that there was "a plan" for him to enter into such an agreement with the respondent. In addition, apart from bald and vague assertions in this regard, he has not provided any details of such agreements.

[10] The averments regarding the contingency fee agreements are also incompatible with the applicant's assertion that the fees were exorbitant and had been referred to the Legal Practise Counsel for taxation. This of course begs the question as to why it was necessary for him to refer the fees for taxation when he was of the view that at that stage he was not liable to pay the respondent. In the event, the referral of the fees for taxation would at best be a dilatory defence, which would mean that the applicant accepts that he owes the respondent some fees in respect of the matters. In addition, it is instructive that the founding affidavit was attested to in December 2019, and more than a year later he still has not produced any evidence of such a referral or the outcome of the taxation. I am accordingly of the view that this assertion does also not avail the applicant in establishing a defence to the respondent's claim.

[11] Regarding the assertion that he is somehow absolved from paying the respondent because the latter has terminated the briefs unilaterally and without reason, Mr. *Ntlokwana* was constrained to concede that this cannot constitute a defence to the applicant's claim.

[12] The applicant's explanation for his failure to file a plea timeously was also singularly unsatisfactory. However, I need say no more about that issue since his failure to establish a bona fide defence to the applicant's claim is in any event fatal to his application.

[13] Mr *Matanda* has argued that the applicant's conduct in unduly delaying the execution of the default judgment warrants a punitive costs order. He was, however, unable to provide compelling grounds for this assertion. In my view costs should be awarded on the ordinary scale.

[14] In the result the following order issues:

- a) The application for rescission is dismissed with costs.

J.E. SMITH

JUDGE OF THE HIGH COURT

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