



24/05/16

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

CASE NO: 71321/2016

In the matter between:

FIRSTRAND BANK LIMITED T/A WESBANK

Applicant

and

BUSISIWE NTOMBITIKHONA GOODNESS MADUNA

Respondent

JUDGMENT

Introduction and background facts

[1] The applicant, who I shall henceforth refer to as 'Wesbank', instituted action proceedings against the respondent during August 2016 wherein it sought, amongst other relief, an order to cancel an instalment sale agreement and return of a 2012 Volkswagen Caddy Maxi motor vehicle.

[2] The respondent, who I shall henceforth refer to as 'Ms Maduna' failed to enter appearance to defend the action, whereafter Wesbank applied for and obtained default judgment in terms of Rule 31(5) on 01 November 2016. According to the court order, Wesbank was also granted leave to apply for "damages, if any, in an amount to be calculated in accordance with section 127(5) – (9) of the NCA"

[3] Ms Maduna filed an application during February 2018 to rescind the judgment and order of 01 November 2018. Wesbank opposed this application. A notice to oppose was served on Ms Maduna by electronic mail on 26 February 2018 and filed in court on 27 February 2018. Ms Maduna acknowledge receipt on the same day she received the email.

[4] The answering affidavit was served by electronic mail on 20 March 2018 and filed in court on the same day. Ms Maduna served her replying affidavit and an index on 22 May 2018.

[5] Her rescission application served before Acting Judge Strydom (Strydom AJ) in the unopposed roll of 30 May 2018. The following order was issued;

" Having read the documents filed of record, heard counsel and considered the matter:

IT IS ORDERED THAT

The default judgment granted against the applicant on the 1st of November 2016 under case number 7132/16 is hereby set aside."

[6] It is important to note that Ms Maduna did not immediately disclose the fact that she had obtained her order on 30 May 2018. She continued to accept service of documents and also filed hers as if the matter was still going to be heard.

[7] On 01 June 2018 Wesbank filed a further and second answering affidavit, as well as an index. It subsequently served heads of argument on Ms Maduna by electronic mail on 19 June 2018 . This was filed on 20 June 2018.

[8] Ms Maduna only disclosed the existence of the order that she obtained before Strydom AJ on 22 June 2018 when she replied to Wesbank's email of 19 June 2018. The email response, with the court order, is directed at one Nadine Du Toit, identified in the record as a candidate attorney at offices of the applicant's attorneys of record. The email states, amongst other things, as follows;

"In terms of Rule 4A(1)(c) of the Uniform Rules of Court, which provides for the service of documents and notices to be effected by electronic mail, I hereby serve and attach a copy of the court ruling on the matter. I would also like to enter into a payment arrangement for the vehicle in question."

[9] Ms Du Toit replied to the sudden revelation of the court order of 30 May 2018 by email dated 26 June 2018. She reminded Ms Maduna that the matter was opposed and that she (Ms Maduna) was *"not allowed to proceed on an unopposed basis on 30 May 2018"*.

She also requested Ms Maduna to abandon the judgment for the matter to be argued in the opposed motion roll and that should she fail to do so within three days, Wesbank would proceed *'with an application in terms of Rule 42 to set aside the judgment'* and also seek a punitive cost order against her.

[10] In this application, Wesbank seeks an order in terms of the provisions of Rule 42 (1)(a) to rescind the order granted by Strydom AJ on 30 May 2018 on the basis that it was erroneously sought.

[11] Ms Maduna is opposing the relief sought and has filed three (3) answering affidavits. Wesbank has also filed a second replying affidavit.

[12] None of the parties has sought leave to file further affidavits, in the papers before me or during oral argument. In any event, Ms Maduna's second and third affidavits in the main deal with what she perceives to be unprofessional conduct on the part of Wesbank's legal representatives. She went as far as to write what I would call a 'mini thesis', with dictionary references of meaning of words and extracts from what she referred to as 'Rules for the attorneys profession'. She also accused Wesbank's legal representatives of defeating the ends of justice, crimen iniuria, contempt of court and perjury. This mini thesis and research appears to have been triggered by a dispute with regard to whether she has served the notice of setdown for 30 May 2018.

I will address this issue when I deal with the procedures for setdown of motion applications.

Rule 42

[13] Rule 42(1)(a) reads as follows:

'The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;'

[14] The purpose, historical background and application of rule 42(1)(a) was considered by the Supreme Court of Appeal in the matter of Pieter Westerman Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape 2003 (6) SA 1 SCA.

[15] although the court, per Jones AJA did not accept that on the facts, the error fell within the intended meaning of rule 42(1)(a), the general principle is that the mistake must be such that the judgment would not have been granted if it was discovered at the time application for default judgment was made.

[16] On the issue of whether the mistake should be clear from the record of proceedings, the court said the following at paragraph [10]¹

[10] During the course of argument counsel drew our attention to conflicting approaches of the courts to the proper application of rule 42(1)(a). Bakoven Ltd v GJ Howes (Pty) Ltd,¹⁵ and Tom v Minister of Safety and Security¹⁶ hold that the 'error' must be patent from the record of proceedings and that the court is confined to the four corners of the record to determine whether or not rule 42(1)(a) is applicable. Stander v ABSA Bank Bpk¹⁷ on the other hand permits external evidence of the 'error'. The conflict seems to me to obscure the real issue, which is to determine the nature of the error in question. This judgment concludes that what happened in this case did not amount to an error in terms of the rule, regardless of whether or not it manifested itself in the record of proceedings. It is consequently unnecessary for present purposes to say anything more about the conflict.

¹ Footnotes in the judgment omitted

[17] In the matter before me, as I have already indicated, there is no record of proceedings, save for what Ms Maduna has submitted, which in my view appear to be highly improbable. I will deal with her submissions later on.

[18] On the consequences or effect of failure to give a required notice, Streicher JA had this to say in the matter of Lodhi 2 Properties v Bondev 2007(6) SA 87 (SCA) at paragraph [24]²

[24] I agree that Erasmus J in *Bakoven* adopted too narrow an interpretation of the words 'erroneously granted'. Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously.¹⁴ See in this regard *Fraind v Nothmann* 1991 (3) SA 837 (W) where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant's residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously.¹⁵

² Footnotes in the judgment omitted

**Opposition and enrollment of motion applications: rule 6(5)(d),(e) and (f)
read with the Practice Directives**

[19] Rule 6(5)(d) reads as follows;

" Any person opposing the grant of an order sought in the notice of motion shall-

(i) within the time stated in the said notice, give applicant notice, in writing, that he intends to oppose the application, and in such notice appoint an address within eight kilometers of the office of the registrar, at which he will accept notice and service of all documents;

(ii) within fifteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit, if any, together with any relevant documents; and

(iii) if he intends to raise any question of law only he shall deliver notice of his intention to do so, within the time stated in the preceding sub- paragraph, setting forth such question.

[20] Rule 6(5) (e) reads as follows;

" Within 10 days of the service upon him of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of subrule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits. "

[21] It is common cause that Wesbank served and filed the notice to oppose Ms Maduna's rescission application as well as the answering affidavit as contemplated in Rule 6(5)(d) and(e) within the stipulated time periods.

[22] Rule 6(5)(f) reads as follows;

" Where no answering affidavit, or notice in terms of sub-paragraph (iii) of paragraph (d), is delivered within the period referred to in sub-paragraph (ii) of paragraph (d) the applicant may within five days of the

expiry thereof apply to the registrar to allocate a date for the hearing of the application. Where an answering affidavit is delivered the applicant may apply for such allocation within five days of the delivery of his replying affidavit or, if no replying affidavit is delivered, within five days of the expiry of the period referred to in paragraph (e) and where such notice is delivered the applicant may apply for such allocation within five days after delivery of such notice. If the applicant fails so to apply within the appropriate period aforesaid, the respondent may do so immediately upon the expiry thereof. Notice in writing of the date allocated by the registrar shall forthwith be given by applicant or respondent, as the case may be, to the opposite party. "

[23] The answering and replying papers having been filed, the application for rescission of the Wesbank's judgment and order of 01 November 2016 could only have been heard if anyone of the parties complied with the highlighted portions of this rule.

[24] It is also important to note that the application for a hearing date of an opposed motion application is made in writing and directed to the Registrar.

[25] The Judge President has issued directives that litigants are compelled to comply with before applying for a hearing date .

[26] Paragraph 13.9.2 deals with enrolment of opposed motions. A party to an opposed motion may only apply for allocation of a date for hearing in terms of rule 6(5)(f) if the papers have been indexed and paginated and heads of argument served and filed.

[27] It is therefore highly unlikely that the Registrar would have allocated a date of hearing of this matter in the unopposed roll, knowing, or with information that it is opposed. Anyway, there is no evidence to suggest that this is what happened.

[28] The date of 30 May 2018 is clearly, as it appears from that document, an allocation in the unopposed roll and from the date indicated therein it was

given before the notice to oppose was filed. This is a common practice in the Division to indicate a date on which the matter will be heard in the event of non-opposition. It is therefore not surprising that Ms Maduna was given the date of 30 May 2018 when she issued her application for rescission of Wesbank's judgment and order of 01 November 2018. The form that she refers to as a notice of a court date clearly state that the matter is enrolled in the unopposed roll of 30 May 2018. It is however incumbent upon an applicant to remove the matter from the unopposed roll once it becomes clear that the matter is being opposed.

Submissions and discussion

[28] In the first place, Wesbank relies on the common cause facts that I have highlighted above for the contention that Ms Maduna was aware that her application to rescind the order of 01 November 2016 was being opposed and as such it should not have served before Strydom AJ on 30 May 2018. It is also not clear why Ms Maduna or her attorney or counsel proceeded to move for an order for rescission on an unopposed basis.

[29] There is a lot of speculation in the founding affidavit of Wesbank with regard to what could have happened to its notice to oppose, answering affidavit, index and heads of argument. One such speculation is that there could be *'foul play on the part of the respondent'* or that its papers *"were removed from the court file"*.

[30] Ms Maduna appeared in person before me and was adamant that she was capable of representing herself. According to her, she followed the correct procedures in terms of the rules when she obtained the order to rescind Wesbank's default judgment of 01 November 2016. She was adamant that she did nothing wrong and that she *'cannot speak for the reason the high court put the matter on the unopposed roll'* because she *"did sign for the case on the opposed court register"*.

[31] Ms Maduna also alleged that the judge who heard the matter called for Wesbank's counsel and when there was no response, he (the judge) proceeded to grant her the relief that she was seeking. She denied having

removed the applicant's answering affidavit from the court file. According to her, the judge did see Wesbank's notice of intention to oppose.

[32] The notice of setdown that she alleges was served on Wesbank is actually the form for application of enrolment in the unopposed roll for 30 May 2018. This date, as I have already explained above, is the date on which the matter would have been heard, in the event of non opposition. It is a standard form titled "Application for unopposed motion date". From a reading of the emails exchanged, Ms Mabuza forwarded this form to various recipients with email addresses of Wesbank and the applicant's attorneys of record on 23 February 2018. The email is directed to Muriel Wathekga, indicated as "Secretary, Litigation & Commercial" at the offices of the Wesbank's attorneys of record. It reads as follows;

"Dear Muriel,

Please find attached notice of court date. I have filed a motion of rescission with the Pretoria High Court. The court documents served and signed for at your offices in Randburg on the 21st of February 2018. I trust that you will advise your client to the legal implications of this period until the matter is heard in court".

[33] The date of 30 May 2018 was clearly no longer a proper setdown once the Wesbank had indicated its notice to oppose the application and also filed an answering affidavit.

[34] None of the parties has made available the record of proceedings of 30 May 2018 before Strydom AJ. Ms Maduna does not deny that on the date the matter came before Strydom AJ she had already been served served with the notice to oppose as well as an opposing affidavit.

[35] During oral argument Ms Maduna however sought to deny that Wesbank's answering affidavit and heads of argument were filed in court. This argument does not make sense because there is evidence that she received these documents. That these documents were filed is evidenced by the Registrar's stamp.

Costs

[36] Ms Maduna represented herself when she appeared before me. Though she is not legally qualified, she is definitely literate because, as I have stated above, two of her answering affidavits contain impressive research on various issues that are not relevant for purposes of the relief sought, with references to the dictionary meaning of words, the law regulating conduct of attorneys, what constitute perjury and contempt of court.

[37] She was adamant that she knows the court rules and has acted properly in setting the matter down and in the manner in which she obtained the court order before Strydom AJ on 30 May 2018.

[38] I cannot penalize her for misreading the law and the rules, however, her refusal to make concessions and accept the obvious facts is what bothers me. I took time to go through the documents with her, pointing out the basics as I have outlined above. I even stood the matter down to allow her to reflect on the issues. She admitted that she had no defence on the merits of the default judgment that was obtained against her which she rescinded under questionable circumstances. She wants to defend the action anyway because returning the vehicle would cause her to suffer in her business ventures as she uses it as a mode of transport. This can clearly be seen from her emails attached to documents filed where she is pleading with Wesbank to enter into a payment arrangement with her.

[39] Most importantly, I also explained to her that the order that the applicant was seeking was not going to have an effect on her application to rescind the judgment and order that was obtained in 2016 which caused her so much grief because according to her it was obtained without her knowledge.

[40] I even requested counsel for Wesbank to sit down with her and explain how the court matters (her rescission and the main action) would unfold once this application is granted. That the order in this matter was simply intended to restore the status quo and that they were going to ventilate the rescission application that she has filed and if she succeed, then they will proceed with

the main action against her in terms of which Wesbank seeks cancellation of the sale agreement and return of the vehicle. She appeared to understand, but the next day she insisted that she wanted to argue the matter.

[41] Everyone has a right of access to courts and to have their matters properly ventilated in court. This right is enshrined in Section 34 of the Constitution of the Republic of South Africa which reads as follows;

“Anyone has the right to have any dispute resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent impartial tribunal or forum.”

[42] Our courts often encounter lay litigants, and Judges do take time to explain the procedures and do afford them an opportunity to obtain legal representation or an opportunity to consider their options. Rescission of judgments obtained under circumstances where a party was not afforded a right of hearing is one mechanism of enforcing this right. Ms Maduna has already filed a rescission application, and if there is merit in it, she is going to succeed. Equally, any litigant, including the applicant in this matter is entitled to the same protection.

[43] The problem is the question of costs that are incurred by the opponents, whilst matters stand down or get postponed to allow the lay litigant an opportunity to level the litigation field by trying to obtain legal advice, services or even to comprehend the nature of the proceedings.

[44] Before burdening any litigant with costs, one obviously has to take into account the peculiar circumstances of each case.

[45] Ms Maduna knew exactly what she was expected to do to prosecute her application for rescission of the default order that was obtained by Wesbank against her in 2016. The forms that she was supposed to fill to obtain a hearing date in the opposed motion roll clearly give an indication of the documents that are required. There is no indication that the Registrar allocated any hearing date. In any event, the only box that she has ticked is her application for rescission. She did not check (tick off) the boxes indicated for notice to oppose, answering affidavit and replying affidavit.

[46] I have already indicated that in terms of current practice directives the Registrar is required to ensure that there has been compliance with the relevant directives, such as filing of an index and heads of argument before a matter is allocated a date in the opposed roll.

[47] Even if her allegation that Wesbank's papers were not in the court file could be true, Ms Mabuza had an obligation to inform the presiding judge that the matter was opposed and to indicate the status of filing of the documents in that regard.

[48] It appears from the court order that was issued by Strydom AJ that Ms Mabuza was represented by counsel. She did not disclose this fact in her answering papers in the matter before me, and particularly the nature of the submissions that were made on her behalf, as well as her instructions and the documents that she provided to her counsel.

[49] It is common cause, and by her own admission, that she was served with Wesbank's notice to oppose, answering affidavit and that she also served her replying affidavit some few days before the matter came before Strydom AJ.

[50] Under these circumstances, there is no reason why Wesbank should bear the costs of this application, and two days' court appearance which was totally unnecessary because it is clear from the facts that the order that was issued by Strydom AJ should not have been sought as the matter was opposed and actually ready for allocation in the opposed motion court roll. Her conduct of proceeding to attend the unopposed court and failing to alert the judge at least that other than the notice to oppose which she says was in the court file, Wesbank has served her with an answering affidavit and and that she has served her replying affidavit.

[51] Her conduct deserves a punitive cost order.

[52] Under the circumstances, I make the following order,

[52.1] The order granted by Strydom AJ on 30 May 2018 is rescinded and set aside,

[52.2] The respondent is ordered to pay the costs of this application, which include costs of two day's attendance in the opposed motion court, on a scale as between attorney and client.



TAN Makhuvele

Judge of the High Court

Appearances

Applicant:

Adv. I Oschman

Instructed by:

Bezuidenhout Van Zyl & Associates INC.

C/O Petzer, Du Toit & Ramulifho Attorneys

Hatfield

Pretoria

Respondent:

In person

Date heard: 11 & 12 March 2019.

Judgment delivered on: 21 May 2019.