

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



Case number: 987/2011

Date: 03 March 2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

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In the matter between:

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Applicant

And

MINISTER OF JUSTICE

Respondent

JUDGMENT

PRETORIUS J.

- [1] The plaintiff requests an order whereby the court grants default judgment against the defendant for payment in the amount of R600 000, 00 with interest and costs. The defendant is seeking rescission of a judgment granted on 12 February 2014 in the absence of the defendant in which the striking out of the defendant's defence in the action was granted.
- [2] The application for rescission of the judgement has been consolidated with the application for the default judgment. These two applications are inextricably interwoven and therefor both applications will be argued and heard simultaneously. To prevent confusion the parties will be referred to as plaintiff and defendant respectively.

The facts:

- [3] On 27 August 2012 the plaintiff called upon the defendant in terms of Rule 35 of the Uniform Rules of Court to make discovery of documents in the main action. The defendant failed to make discovery and a court order was granted on 17 July 2013 to compel the defendant to make discovery of the requested documents.
- [4] On 10 October 2013 the plaintiff set down the application for striking out of the defendant's defence due to non-compliance by the defendant with the court order of 17 July 2013. The defendant served the discovery affidavit at court on 10 October 2013. The application for striking out the

defence was removed from the roll, as the defendant had complied with the order.

- [5] On 7 November 2013 the plaintiff once more served a notice in terms of Rule 35 requesting discovery of certain documents from the defendant. The defendant did not comply.

- [6] The plaintiff did not serve an application to compel the defendant to comply with the order in terms of Rule 35(7) which sets out:

"If any party fails to give discovery as aforesaid or, having been served with a notice under sub rule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that sub rule, **the party desiring discovery or inspection may apply to a court, which may order compliance with this rule.....**"

- [7] On 22 November 2013 the plaintiff served an application in terms of Rule 35(7) for striking out of the defendant's defence in the main action. The plaintiff set out in his founding affidavit that the defendant had

"failed to comply with applicant's request dated 7 November 2013 and court order dated 17 July 2013 in terms of Rule 35."

- [8] On 12 February 2014 the court granted the order for the striking out of the defendant's defence in the absence of the defendant.

- [9] On 3 July 2014 default judgment against the defendant was requested. The matter was postponed to 21 August 2014 on which date it was postponed *sine die* to enable the defendant to launch an application for

rescission of the previous order of 12 February 2014.

[10] The grounds the defendant relies on in the rescission application are that the court that struck out the defence was not aware that the defendant had complied with the previous order on 10 October 2013 and was therefore not in default regarding the order of 17 July 2013.

Rule 42(1)(a):

[11] Counsel for the defendant submits that the order should be set aside in terms of Rule 42(1) (a) which provides:

:" An order or judgment erroneously sought or erroneously granted, in the absence of any party affected thereby"

must be set aside.

Mr Bester, for the defendant, argued that if common law rules are applied the order should be rescinded, as defendant has a *bona fide* defence to the action and the defendant has satisfactorily explained the default of the order being granted in his absence.

[12] The defendant's argument is that had the court been aware of the fact that the defendant had complied with the order of 17 July 2013, albeit not to the satisfaction of the plaintiff, and that the matter for the striking out of the defendant's defence was subsequently removed from the roll on 10 October 2013 the court would not have ordered the striking out of

the defence of the defendant.

[13] The notice served on 7 November 2013 was a fresh notice requesting discovery of certain documents. It was not a revival of the application to compel removed from the roll on 10 October 2013. Therefore a fresh application in terms of Rule 35(7) should have been launched to compel the defendant to provide the documents requested. The plaintiff failed to do so and proceeded with an application to strike out the defendant's defence. The plaintiff could not rely on the previous court order as to all intents and purposes the defendant had complied with the previous court order.

[14] The plaintiff's assertion in his affidavit supporting the application to have the defence struck out that the defence had

"failed to comply with Applicant's request dated 7 November 2013"

must have been in support of an application in terms of Rule 35(7) to compel the defendant to comply with the notice. Only after such an order had been granted and the defendant had failed to adhere to such an order the plaintiff would have been entitled to apply to court to have the defence's defence struck out.

It is evident that if the court had knowledge of all the facts, the order would not have been granted.

Common Law:

[15] If I am wrong in finding for the defendant in terms of Rule 42(1) (a) I must consider the rescission of the judgment in terms of the common law.

The defendant has set out its' defence in the opposing affidavit which makes it clear that the defendant has a defence against plaintiff's action. The plaintiff's cause is that during 1997 the Clerk of the Magistrate's Court, Germiston falsely caused default judgment to be entered in favour of Nedcor Bank. This resulted in the sheriff selling the plaintiff's property situated at 13 Willow Street, Primrose, Germiston.

[16] The plaintiff is claiming R600 000, 00 from the defendant as damages that he had suffered as a result of the sale of his house after default judgment had been granted against him in the Magistrate's Court, Germiston. He submits that this amount is the difference between the value of the immovable property in 1997 and the current value of the property.

[17] The plaintiff does not place any evidence before the court to prove the computation of damages. According to the defendant default judgment was granted against the plaintiff in the Germiston Magistrate's Court on 2 October 1997. The plaintiff brought an application for rescission of judgment on 28 February 2001 which was dismissed with costs.

[18] Therefor I find that the defendant has a *bona fide* defence to the main action.

[19] The reasons for default judgment are set out in the opposing affidavit and it is clear that the application to strike out the defence was not due to any wilful default by the defendant. The default was due to the transfer of files between attorneys at the State Attorney's office which resulted in a systemic failure within the office of the State Attorney. I accept this explanation by the defendant as it was adequately explained as to how the files were transferred from Mr Matubatuba to Ms Nkosi.

[16] It is common cause that should the court grant the rescission application, the application for default judgment will have to be dismissed.

[17] I am of the opinion that the rescission of the judgment, striking out the defendant's defence should be rescinded both in terms of Rule 42(1) (a) of the Uniform Rules of Court, as well as common law grounds.

Therefor I make the following order:

1. The application for default judgment is dismissed;
2. The order granted on 12 February 2014 for the striking out of

the defence's defence in the action under case no. 987/2011 is rescinded and set aside;

3. The defendant is granted leave to defend the above action:
4. The costs of these applications will be costs in the action.

Judge C Pretorius

Case number : 987/2011

Heard on : 23 February 2015

For the Applicant : In person

Instructed by :

For the Respondent : Adv. Bester

Instructed by : THE STATE ATTORNEY

Date of Judgment : 03 March 2015