

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 51401/2010

DATE OF HEARING: 11 MAY 2015

DATE: 12 MAY 2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

LEON GERHARDUS SAAIMAN

Applicant

Identity Number: [...]

and

CHANGING TIDES 17 (PTY) LTD

Respondent

REASONS FOR JUDGMENT

AVVAKOUMIDES, AJ

1. The applicant is the defendant in the main action between the parties, against whom default judgment was granted on 26 May 2014 in the sum of R745 298.09 plus interest and costs, and an order that the applicant's immovable property be declared specially executable.

2. When the summons was initially served upon the applicant, an appearance to defend was filed and pursuant thereto, negotiations took place resulting in the conclusion of a settlement agreement embodying, inter alia, consent to judgment.

3. The applicant made several payments in terms of the settlement agreement. The applicant was also, in terms thereof, liable to make payment of an initial amount of R20 000.00. This, the applicant did not do, but made up the amount by making higher payments over a period of time over and above the monthly instalments. The respondent did not initially react to the failure of the applicant to make payment of the sum of R20 000.00 but chose, despite this amount (having been made up) and several other payments having been made by the applicant, to apply for default judgment against the applicant on the basis that no appearance to defend had been filed. The respondent ignored the payments made by the applicant and applied for judgment in the original sum of R745 298.09.

4. During argument the respondent abandoned reliance upon the absence of a condonation application. Clearly the application was based not on the provisions of rule 31 (2) (b) and so admitted by the applicant, but on rule 42 (1) (a). A court is entitled to entertain an application ostensibly brought under rule 31 (2) (b), under any other applicable rule, providing the other formalities have been met. (See *Mutebwa v Mutebwa* 2001 (2) SA 193 (Tk) at 198 C-E).

5. The fact that the respondent applied for default judgment on the basis set out in the notice of motion is misleading, to say the least, coupled with the fact that judgment was sought without regard to the payments already made by the applicant. Once this has been established, my view is that the court should without further enquiry rescind the order. (See *Tshabalala v Peer* 1979 (4) SA 27 (T) and *Mutebwa* above at 199 E-H)).

6. Of greater concern is that the applicant appeared in person on the date that the default judgment was obtained (having filed a notice of his intention to oppose the default judgment application) but stated that he could not hear the case being called out in court and thus was only afterwards advised to apply for rescission. On the papers before me it appears that the respondent's attorneys were aware that the applicant would be at court on that day and did not draw this fact to the attention of the court.

7. The respondents counsel argued that despite the notice of motion having been framed along the lines of a default judgment application based on the failure of the applicant to file an appearance to defend, the affidavit dealt with the applicant's so called breach of the settlement agreement. Even if this is so, in my view, the respondent was not entitled to apply for judgment on this basis. For this reason, I am of the view that the respondent should be ordered to pay the costs of this application.

8. In the circumstances I make the following order:

8.1 The default judgment granted against the applicant under case number 51401/2010 dated 26 May 2010 is hereby rescinded.

8.2 All warrants issued pursuant to the judgment are hereby set aside.

8.3 The respondent is ordered to pay the costs of this application.

AVVAKOUMIDES, AJ JUDGE OF THE HIGH COURT

Representation for the Applicant:

Counsel Adv: K. Fitzroy

Instructed by: Jordaan & Smit Inc.

Representation for Respondent:

Counsel Adv: W. J. Roos

Instructed by: Velile Tinto & Associates Inc.