

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 6379/2022

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

Naude – Odendaal J

SIGNATURE

DATE

28/10/2024

In the matter between:

DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT
LIMPOPO

APPLICANT

and

SHERIFF POLOKWANE

1st RESPONDENTPUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL2nd RESPONDENT

MOHUBEDU SIMON RANTHO

3rd RESPONDENT

RESHOKETSOE REUBEN MAKINITA

4th RESPONDENT

ORDER

NAUDÉ-ODENAAL J:-

- [1] The Applicant brought an application in terms of Rule 42(1)(a) in terms whereof the Applicant applied for the rescission of the judgment and order granted against the Applicant on 24 January 2023, and leave to oppose the application and file an answering affidavit in respect of the reconsideration application. The 4th Respondent opposed the application.

BACKGROUND:-

- [2] On the 14th of June 2022 the Applicant obtained an order from this court in the following terms:-

- "1. The application is heard as one of urgency and that non-compliance with normal rules of this Honourable Court as prescribed in terms of rule 6(12) of the Uniform rules of this Honourable Court, with respect to time limit is condoned or be dispensed with;*
- 2. The First Respondent is ordered not to remove and sell any of the Applicants attached properties as listed in the attached notice of attachment in execution dated the 6th June 2022. Pending the outcome of a review application lodged by the Applicant herein."*

- [3] The application was never served on the 4th Respondent who only obtained knowledge of the court order subsequent to the order being granted. The 4th Respondent approached the court in terms of Uniform Rule 6(12)(c) of the Uniform Rules of Court, for a reconsideration of the order so granted on the 14th of June 2022, including a dismissal of the main application, being the interdictory relief sought.
- [4] The application for reconsideration was heard on the 24th of January 2023 and the following order was made:-
- "1. The application be dealt with in terms of Uniform Rule 6(12)(c).*
 - 2. The order granted on 14 June 2022, by the Honourable Judge Muller, acting under the abovementioned case number, be reconsidered in terms of the Uniform Rules of Court, Rule 6(12)(c).*
 - 3. The above court order be set aside and the main application be dismissed.*
 - 4. The Applicant is ordered to pay the costs of the application on party and party scale."*
- [5] It is this reconsideration order, the Applicant applies to have rescinded in terms of Rule 42(1)(a) of the Uniform Rules of Court.
- [6] The Applicant's grounds of rescission is that the Applicant became aware of the judgment on the 1st of March 2023 when the court order and a letter was served at Mokopane Hospital and forwarded on the same date to the office of the Legal Advisor per email.

- [7] It was submitted that the order was granted in default of the Applicant's, in that the Applicants failed to file a notice to oppose and an opposing affidavit.
- [8] The Applicant however confirms that the Notice of Reconsideration together with the Founding Affidavit in support of the application, was served on the Office of the State Attorney on 26 September 2022, which notice stated that the matter is set down for hearing on the 27th of September 2022. The Applicant submits that the notice was defective in that it stated as follows:-
- “(a) file its notice to oppose the application within 10 (ten) days of the service of the said intention.*
- (b) After you have so given notice of your intention to oppose the reconsideration of the order and within 5 days after you have so given notice of your intention to oppose, to file your replying affidavits, if any.”*
- [9] The Applicant submitted that the matter was set down for the 27th of September 2022, this, whilst the Applicant was afforded a period of 10 (ten) days within which to file its notice to oppose. The Applicant further submitted that the notice stated that the Applicant should file a replying affidavit to the founding affidavit, which is unheard of.
- [10] The Applicant further submitted that the matter did not appear on the court roll of 27 September 2022 and there was no appearance by the 4th Respondent.

- [11] On the 27th of September 2022, the same application was served on the Applicant, with the same notice, however stating that the 4th Respondent sets the matter down for reconsideration on the 24th of January 2023. The Applicant submitted that the founding affidavit and its facts remained the same, the 4th Respondent only changed the date of set down on the notice.
- [12] The Applicant submitted that it has been served with two applications pertaining to the same issues, which applications calls upon the Applicant/Respondent to file their "replying affidavit". The application served on 26 September 2022, still stands and has not been withdrawn by the Fourth Respondent.
- [13] The Applicant further submitted that the 4th Respondent mislead the Court in seeking an order to dismiss the main application, as the main application referred to herein is a review application which is pending in the Labour Court under case number JR1272/22.
- [14] The Applicant submitted that the Fourth Respondent has in the absence of the Applicant, obtained an order that is erroneous, in that they served two applications on the Applicant pertaining to the same issues, and which applications called upon the Applicant to file a replying affidavit. The 4th Respondent further sought an order that the Court should dismiss an application (review) which is not pending before this Court, but the Labour Court.

- [15] The Applicant further submitted that the 4th Respondent, having been served with a notice to oppose the application set down for the 27th of September 2022, should not have issued a similar application without withdrawing the former. It was submitted that upon issuing of the second application, the 4th Respondent knew that the Applicant is opposing the said application and should not have proceeded in setting this matter down on the unopposed roll.
- [16] The Applicant submitted that the judgment was erroneously sought and/or granted in the absence of the Applicant in that the 4th Respondent had issued and served two applications to the same matter with different dates, whilst the first application was opposed.
- [17] In respect of a reasonable prospect of success, the Applicant submitted that there is a pending review application in the Labour Court in which the issues between the parties shall be determined.
- [18] The 4th Respondent in opposition to the application for rescission of judgment submitted that the main contention advanced at the hearing of the reconsideration application was that this Court had no jurisdiction to have entertained the application and in respect of which the Labour Court had, and has, exclusive jurisdiction. It was submitted that it was further argued that in terms of the provisions of the Labour Relations Act, 66 of 1995, (LRA), the institution of a review application, in the Labour Court, does not suspend the enforcement of an arbitration award. It was accordingly

submitted that it was incompetent for the Court to have granted the order, and the main application therefore ought to have been dismissed.

[19] It needs to be noted that in the initial application that served before Muller J on the 14th of June 2022, the following relief was applied for:-

- "1. That this application be heard as one of urgency and that non-compliance with normal rules of this Honourable Court as prescribed in terms of rule 6(12) of the Uniform Rules of this Honourable Court, with respect to time limits be condoned or be dispensed with;*
- 2. That the First Respondent is ordered no to remove and or sell any of the Applicants attached properties as listed in the attached notice of attachment in execution dated the 6th June 2022, pending the outcome of a review application lodged by the Applicant herein.*
- 3. That the attachment notice dated 6th June 2022 by the First Respondent be declared null and void, and or that it be stayed pending the outcome of the above mentioned application.*
- 4. The costs of this application to be paid by any respondent who opposes this application.*
- 5. Further and/or alternative relief."*

[20] From a reading of the papers in the initial application it is clear that the review application was instituted in the Labour Court of South Africa under case number JR1272/2022, which application was attached to the initial application that served before Muller J.

- [21] It is clear that the main application referred to by the parties is in fact with reference to the review application pending in the Labour Court of South Africa.
- [22] **Rule 42(1)(a) of the Uniform Rules of Court** stipulates as follows:-
*“(1) 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.”*
- [23] The court has a discretion whether or not to grant an application for rescission under Subrule 42(1)(a) of the Uniform Rules of Court. The purpose of the rule is ‘*to correct expeditiously and obviously wrong judgment or order*’. It would, accordingly, be a proper exercise of the court’s discretion to say, that, even if the applicant for variation of an order of court proved that subrule (1) applied, he should not be heard to complain after the lapse of a reasonable time. What is a reasonable time depends upon the facts of each case.
- [24] The court does not, however, have a discretion to set aside an order in terms of the subrule where one of the jurisdictional facts contained in paragraphs (a) – (c) of the subrule does not exist.
- [25] However, before I enter into the realm of the requirements for a rescission of judgment application in terms Rule 42(1)(a) of the Uniform Rules of Court, I deem it

appropriate in the present matter to first deal with the issue of whether there was indeed a default judgment granted.

[26] In **Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm (HCA15/2017) [2017] ZALMPPHC 35 (7 November 2017)** at paragraphs 10 to 12 Mokgoba JP (**Kganyago J and Sikhwari AJ concurring**) held as follows:-

"[10] The Court a quo decided that the judgment was not a judgment taken on default of appearance by the Appellant. It did so on the basis that the Appellant's Counsel was present in Court when the Order was made. The Court a quo erred in this regard. This matter was an application and the presence or absence of a party can only be determined by whether that party has submitted affidavits or not. The presence of the actual party and / or Counsel in Court is irrelevant to that issue. In the absence of any affidavits (bearing in mind that there is no option available for the party to testify at such a hearing) it is logical to conclude that that party is in default of appearance when the Order was made notwithstanding that Counsel may have been in Court.

*[11] In my view where opposing papers have not been filed there is a "default" even if the Respondent in the matter or his legal representative is present in Court. See: **Morris v Autoquip (Pty) Ltd 1985 (4) SA 398 (WLD)**; **First National Bank of SA Ltd v Myburgh and Another 2002 (4) SA 176 (CPD)**.*

*[12] The question of what is meant by "default" was considered in **Katritsis v De Macedo 1966 (1) SA 613 (A)**. In this matter the Appellate Division (as it then was) held that "default" which then as is the case now is not defined in the Rules or the Act, meant a default in relation to filing the necessary documents required by the Rules in opposition to the claim. In casu the judgment was granted in the absence of an opposing affidavit by the Appellant and was therefore a "default judgment" even if it was not a default in the sense of the absence of the party.*

[13] . . .'

[27] In the present matter, the Applicants were in default in the sense that they failed to file an answering affidavit. Having regard to what was stated in **Rainbow Farms**

(Pty) Ltd v Crockery Gladstone Farm supra, it can therefore be found that the judgment and order by the court *a quo* constitutes a default judgment.

- [28] The Applicant stated that it only became aware of the court order on 1 March 2023 when a letter with the court order was served at Mokopane Hospital and forwarded the same date to the office of the Legal Advisor per e-mail. The Applicant served the notice of motion for rescission of judgment application on the 7th of March 2023. It is however not clear when the application was issued from court. The Respondents filed a notice to oppose on the 22nd of March 2023.
- [29] Having had regard to the above time frames, in my view, the application for rescission of judgment was brought within a reasonable time.
- [30] It is clear from what was already stated here above that the court *a quo* granted the order erroneously. The court *a quo* could not have dismissed the main application in this court and division, which was pending in the Labour Court of South Africa. In the result, in my view, the rescission of judgment application stands to succeed.
- [31] The general rule is that costs should follow the event. In the present matter there is no reason to deviate from the general rule. The Applicant only prayed for costs in the event of opposition against those parties opposing. In the result, the application stands to succeed with costs, which costs are to be paid by the 4th Respondent only.
- [32] In the circumstances the following order is made:-

1. The application for rescission of judgment is granted and the order granted on the 24th of January 2023 is rescinded in terms of Rule 42(1)(a) of the Uniform Rules of Court.
2. The Applicant is afforded an opportunity to enter a notice of intention to oppose and to file its answering affidavit in respect of the reconsideration application within 10 days from date of this order.
3. The 4th Respondent is ordered to pay the costs of this application on a party and party scale.



M. NAUDÉ-ODENDAAL
JUDGE OF THE HIGH COURT,
POLOKWANE

DATE OF HEARING: 24 JULY 2024

DELIVERY OF JUDGMENT: 28 OCTOBER 2024

APPEARANCES:

FOR THE APPLICANT: Adv. B. Madavha

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