



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

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: 24 October 2024

SIGNATURE: [REDACTED]

Case No. 2023-033981

In the matter between:

UNIVERSITY OF SOUTH AFRICA

APPLICANT

And

ALBERTS ATTORNEYS

FIRST RESPONDENT

PRISM KSM ARCHITECTS

SECOND RESPONDENT

NYELETI CONSULTING (PTY) LTD

THIRD RESPEONDENT

N MIKOSI & ASSOCIATES

FOURTH RESPONDENT

MC MAIWASHE & ASSOCIATES

FIFTH RESPONDENT

Coram: Millar J

Heard on: 22 October 2024

Delivered: 24 October 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 12H15 on 24 October 2024.

ORDER

It is Ordered:

- [1] The application is dismissed.
- [2] The applicant is ordered to pay the costs of the application as between party and party, which costs are to include the costs of counsel on scale C.

JUDGMENT

MILLAR J

- [1] The applicant (UNISA) has applied in the urgent court for an order interdicting the first respondent (Alberts) from acting on the instructions of the second to fifth

respondents (Respondents) with regard to the disposition of funds presently held by Alberts in his trust account on their behalf. The sum concerned is R10 243 354.60. UNISA seeks an order interdicting any disposition of the funds pending the determination of an application for the rescission of a judgment obtained by the Respondents against it.

- [2] UNISA argued that given the circumstances of the matter, it had acted expeditiously in bringing the present application. The Respondents for their part argued that the conduct of UNISA in both the action and subsequent thereto until the bringing of this application had been dilatory and lackadaisical. Save to say that I did not find the timeline of events to be flattering of the manner in which UNISA has dealt with the matter, I deemed it appropriate to hear the matter given its importance to the parties.
- [3] This application finds its genesis in a default judgment granted by this court against UNISA and in favour of the Respondents on 16 October 2023. The sum held in the trust account of Alberts was obtained pursuant to execution of that judgment and the attachment of funds in the bank accounts of UNISA.
- [4] The requirements for the granting of an interim interdict are succinctly set out in *Setlogelo v Setlogelo*¹ in which it was held that:

"The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

and

¹ 1914 AD 221 at 227.

"The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in a well-known passage in Van Der Linden's Institutes where he enumerates the essentials for such an application. The first, he says, is a clear right; the second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt."

- [5] I propose dealing with each of the four requirements set out in *Setlogelo* in turn.

- [6] It is not in issue that UNISA does not have a clear right. Its claimed right is predicated upon the successful prosecution of its application for the rescission of the judgment granted against it. *It is in consequence of this, that the right which it asserts in these proceedings, is a prima facie right, which may be open to some doubt and engages the fourth requirement of Setlogelo.*

- [7] It was argued for UNISA that it bore *"significantly high prospects of success"* in obtaining an order for the rescission of the judgment. This submission was advanced on two legs. The first was that the judgement had been erroneously sought and granted within the bounds of Rule 42(1)(a) of the Uniform Rules and for that reason was susceptible to rescission and the second that it had *"put forward a reasonable explanation for its default."*

- [8] The argument that the judgement had been erroneously sought and erroneously granted was predicated on the assertion that had UNISA defended the action. It would have raised a special plea of prescription and in consequence judgment would not have been granted or put differently, had the Court hearing the application for default judgment been precognized that the amounts claimed in the action had become prescribed, it would not have granted the judgment.

- [9] In regard to prescription, this was raised by virtue of the Respondents having pleaded that the contract in terms of which the debt claimed had been entered into, was entered into in 2008 (a date more than 3 years before summons was served). UNISA grasped this single date and placed it at the fulcrum of the entirety of its defence.
- [10] It bears mention that the amounts claimed were predicated upon certificates of completion signed off by an independent quantity surveyor, all of which were attached to the summons.
- [11] There is no merit in the argument that the judgment was erroneously sought or granted. Save for the reference to the date, UNISA has pointed to no other basis upon which the grant of the default judgment should have been refused.² The only basis for impeaching the judgment, is the claim of prescription but in terms of section 17(1) of the Prescription Act³ which provides that “*A court shall not of its own motion take notice of prescription.*”
- [12] Prescription is to be raised by a party and if that party is not before the court,⁴ the subsequent decision to enter the fray and raise it does not impeach the granting of the judgment or render it susceptible to rescission in terms of Rule 42(1)(a).
- [13] Turning now to the argument that the explanation given by UNISA for its default was a reasonable one. The summons was served on 9 May 2023. In this regard, in its founding affidavit UNISA asserted that:

² *Williams v Shackleton Credit Management* 2024 (3) SA 234 (WCC).

³ 68 of 1969

⁴ *Bechan and Another v SARS Customs Investigations Unit and Others* 2024 (5) SA 1 (SCA) at para [22] referring to *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd and Others* 1992 (2) SA 469 (A) at 507C-D.

"Barring a single employee from the Legal Services Department, Mr. Tumisang Moremane, who took delivery of the summons served, UNISA was not aware of the action proceedings or the application for default judgment until the Sheriff served the Writ of Execution in November 2023."

and

"Following investigations, it was established that Mr. Moremane, who had received service of the summons, had since ceased his employment at UNISA, without having instructed attorneys to defend the claim. Mr. Moremane had also failed to advise anyone of this issue, at the time of their [sic] departure."

- [14] Th Respondents placed the correctness of this explanation in issue. They pointed to the Sheriff's Return of Service which reflected that the summons had in fact been served on Ms. Ringane who had deposed to an affidavit confirming the correctness of UNISA's explanation. In reply UNISA, did not deal with this issue squarely but sought to justify its explanation by admitting Ms. Ringane had received service but that:

"Following receipt of service of summons, she forwarded the summons to Mr. Moremane, in his capacity as the Head of Litigation. Once he was seized with the matter, it was his responsibility to instruct attorneys to defend the action. Unfortunately, this did not take place."

- [15] The explanation is unpersuasive and does not address the fact that the case as initially formulated was that only Mr. Moremane had seen the summons. This was clearly not correct. Ms. Ringane in the affidavit filed by her is described as a "Legal Advisor". She is employed by a learning institution of international renown, and it is not explained why she deposed to an affidavit confirming the correctness of the allegations relating to UNISA's default in the founding papers when these were not correct. The veracity of the return of service was admitted but

inexplicably other than to shift the blame to Mr. Moremane no other explanation was given.

- [16] In the face of clear and unequivocal evidence that it was not only Mr. Moremane who knew of the Respondents summons, there is to all intents and purposes no satisfactory explanation at all for the default on the part of UNISA. For this reason, I find that UNISA has not established any *prima facie* right, on the bases advanced, whether open to some doubt or not, to impeach the judgment granted by default.
- [17] In regard to the remaining requirements set out in *Setlogelo*, I find that UNISA has also failed to establish these.
- [18] In regard to the apprehension of harm, UNISA says no more than *ipso facto* the failure of the Respondents to agree to hold the funds in trust pending the bringing of a rescission application, they will suffer harm. There is no basis whatsoever laid for this assertion.
- [19] In regard to the balance of convenience and the absence of an alternative remedy, UNISA asserts that if Alberts were, acting on the instructions of the Respondents, which he is obliged to do, to disburse the funds according to their instructions, UNISA may never recoup those funds if they succeed in obtaining an order for rescission and upholding the plea of prescription.
- [20] The high-water mark in this regard is a plea *ad miseracordium* that the granting of an order would be for the purposes “of protecting the public interest and the protection of the funds of a public higher education institution.” It is insufficient to simply make allegations. These must be substantiated. In the present matter they are not.

[21] For the reasons set out above, I intend to make the order that I do. The costs will follow the result. The Respondents sought that the costs of counsel be awarded on scale C. Given the nature and importance of the matter and the seniority of the Respondents counsel, I agree that scale C is appropriate.

[22] It is ordered:

[22.1] The application is dismissed.

[22.2] The applicant is ordered to pay the costs of the application as between party and party which costs are to include the costs of counsel on scale C.


A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 22 OCTOBER 2024

JUDGMENT DELIVERED ON: 24 OCTOBER 2024

COUNSEL FOR THE APPLICANT: ADV. C GEORGIADES SC
ADV. N KAKAZA
ADV. T MONERI

INSTRUCTED BY: S PEARL NDABA ATTORNEYS
REFERENCE: MS. SP NDABA

COUNSEL FOR THE RESPONDENTS:

ADV. AJ VENTER

INSTRUCTED BY:

ALBERTS ATTORNEYS

REFERENCE:

MR. LF ALBERTS

THE FIRST RESPONDENT FILED A NOTICE TO ABIDE.