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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2024-010120

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

In the rescission application between:

MAKGOLELA LILLIAN MOKGALAKANE

(Identity Number: 7[...])

Applicant

and

LOMBARDY HOME OWNERS ASSOCIATION NPC t/a

LOMBARDY HOME OWNERS ASSOCIATION

Respondent

In re the main action between:

LOMBARDY HOME OWNERS ASSOCIATION NPC t/a

LOMBARDY HOME OWNERS ASSOCIATION

(Registration Number: 2007/013652/08)

Plaintiff

and

MAKGOLELA LILLIAN MOKGALAKANE

(Identity Number: 7[...])

First Defendant

ORDER

1. The application for rescission is dismissed.
 2. The applicant is to pay the costs on the attorney and client scale.
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JUDGEMENT

INTRODUCTION

[1] This is an application for rescission of a default judgement in terms of Rule 42(1)(a). The default judgement was granted in the main action in favour of the plaintiff. The applicant in the rescission application is the first defendant in the main action. The second defendant has not been joined as a party in the rescission application.

[2] The applicant applies for the rescission of the default judgement which was granted on 14 March 2024.

[3] The respondent opposes this application on various grounds, which includes that the applicant has not made out a case that the default judgement was sought or granted erroneously in the absence of the two defendants, as provided for in Rule 42(1)(a).

[4] The respondent raised various defences which were referred to as *points-in-limine*. The defences in fact addressed various defects in the application and will be dealt with below.

RELEVANT BACKGROUND FACTS

[5] The plaintiff in the main action is the home owners association of a residential estate where the first and second defendants reside and where they have chosen their *domicilium* for purposes of their dealings with the plaintiff.

[6] On 1 February 2024 the plaintiff issued summons against the two defendants for payment of an amount of R333 294-39 plus interest and costs.

[7] The summons was served on the defendants' *domicilium* address on 7 February 2024. The defendants were aware of service of the summons as the applicant annexed the return of service to her application for rescission.

[8] The applicant alleges that she entered a notice to defend the action on 7 March 2024. This is not correct as the evidence of the respondent is that the notice of intention to defend the action was served on the respondent's attorneys, but it was never "delivered" on the same day. "Deliver" is defined in Rule 1 as to "serve copies on all parties and file the original with the registrar". Rule 19(1)(a) requires that such notice be delivered in accordance with the said definition.

[9] Since the Court Online platform came into use, the registrar's original of any document has to be uploaded on Court Online.¹ It is common cause that the applicant's notice of intention to defend was only "delivered", by filing thereof on the Court Online system, on 5 April 2024², despite the fact that her attorneys have had access thereto since 7 March 2024 when the attorneys for the respondent invited the applicant's attorneys to Court Online.

[10] After service of the summons on the defendants, the *dies induciae* expired on 21 February 2024. Having not received a notice of intention to

¹ Consolidated Practice Directive 1 of 2024, section 6.2, read with section 6.7.

² Caselines 02-275 to 02-278.

defend by that date, the respondent lodged an application for default judgement with the registrar on 22 February 2024.³

[11] The registrar allocated a hearing date for the application for default judgement on 6 March 2024, which hearing would take place on 7 March 2024.

[12] On 7 March 2024 the applicant served the notice of intention to defend on the respondent, but it was not filed with the registrar by uploading onto Court Online as already set out.

[13] Judgement by default was granted on 14 March 2024.⁴

APPLICATION FOR RESCISSION

[14] On 5 April 2024 the applicant served the application for rescission of the judgement, which was granted on 14 March 2024, by electronic mail on the respondent. She relied only on Rule 42(1)(a) which provides that the court can rescind or vary any judgement granted by it if such order or judgement was erroneously sought or granted in the absence of any party affected thereby. The applicant became aware of the judgement upon presentation thereof to her attorneys of record on 15 March 2024.

[15] In dealing with the reasons for the default, the applicant admits that her attorneys made a mistake by not uploading the notice of intention to defend on the Court Online system.⁵ She states that the uploading of the notice of intention to defend would have prevented the registrar from granting the order, according to the advice of her legal representatives.⁶

[16] The explanation for the default to deliver timely notice of intention to defend by the applicant is not acceptable. If the notice of intention to defend

3 Caselines 02-41, para 35.3.

4 Caselines 02-19 to 02-21.

5 Caselines 02-10, para 5.1.

6 Caselines, 02-10, para 5.2.

was uploaded onto Court Online on 7 March 2024, when it was served on the respondent, the registrar would have taken note thereof. As it was only uploaded after judgement was granted, the registrar granted default judgement correctly.

[17] The applicant argued that the respondent's attorneys had a legal duty to bring to the attention of the registrar that the action had been defended and they had to withdraw the application for default judgement.⁷ No authority was relied upon for these submissions. They are in any event not tenable in view thereof that the applicant's attorneys made a mistake by not "delivering" the notice as envisaged in the definition of "delivery" in Rule 1 and in accordance with Rule 19(1)(a).

[18] The applicant also submitted in her founding affidavit that once the notice of intention to defend was served, the respondent lacked the "jurisdictional requirements" (*sic*) to proceed with the default judgement and the registrar lacked the "jurisdictional requirements" (*sic*) to grant default judgement. These submissions were repeated in the applicant's heads of argument,⁸ but no authority was cited for the submissions. These submissions are legally untenable and seems to be based on an incorrect understanding of what a jurisdictional fact is.⁹

[19] To establish the allegation of an error on the part of the registrar, the applicant's case is that once the file is allocated to the Registrar for adjudication, the filing/uploading of the notice of intention to defend would not have formed part of the file before the Registrar. This submission is clearly wrong. The documents uploaded onto the court Online system would have included such notice, had it been filed or uploaded timeously viz on 7 March 2024. The registrar committed no error as the notice was only uploaded after judgement was granted.

7 Caselines, 02-11, para 5.3.

8 Caselines 19-21, para 3.4.

9 See: **Hoexter & Penfold, Administrative Law in South Africa** (3ed), p402-p403 and the reference hereunder to the *Lodhi-2*-judgement.

[20] Having based the application for rescission on only one ground, the applicant argued that it was not necessary for her to show, over and above the error, that there is good cause for the rescission. These are the absence of wilful default and the existence of a *bona fide* defence. No evidence was presented in this regard by the applicant and these aspects can therefore not be considered.

[21] The applicant also did not file a replying affidavit. The respondent's answering affidavit therefor stands uncontested.

RESPONDENT'S CASE

[22] The respondent raised a number of defences, the first of which was that the applicant failed to serve the application for rescission, which is an application "initiating proceedings" as set out in Rule 4(1)(a), by the Sheriff. Reliance for this point of opposition was based on the *Okafor*¹⁰-judgement by Crutchfield J. In this judgement it was held that a failure to serve a rescission application by sheriff is fatal to the rescission application, as a notice of motion is a "document initiating application proceedings."

[23] I am not convinced that the said judgement is flawed or erroneous and it is therefore authority that the application for rescission in this matter is fatally flawed, having only been served on the respondent's attorneys by electronic mail.

[24] I will, nevertheless, deal with the other important submissions of the respondent that the judgement was not erroneously sought or erroneously granted.

10 **Gabriel Nwanne Okafor v Jan van den Bos**, Case No.: 2020/28938, Unreported, paras [12]-[17].

[25] It is clear on the undisputed facts that the registrar did not err when the judgement was granted as the notice of intention was only uploaded on Court Online 13 days after the judgement was granted, on 5 April 2024. This was when the delivery requirement was met.¹¹

[26] The next question is whether the default judgement was erroneously sought. Taking into account the chronology of the facts in the matter as set out above, the respondent was procedurally entitled to judgement when it applied for it and therefore it cannot be said that judgement was sought and granted erroneously.¹² Or, otherwise stated, was the party who obtained the order, procedurally entitled thereto. The respondent was entitled to default judgement on 14 March 2024 when it was granted.

[27] The applicant has therefore not made out a case for rescission in terms of Rule 42(1)(a) and the application stands to be dismissed.

COSTS

[28] In terms of the memorandum of incorporation of the respondent it is entitled to attorney and client costs in proceedings against its members who are liable to the respondent for levies, consumption charges and ancillary amounts due. The respondent is a non-profit company who is reliant on its members to pay their dues and the compliant members should not have to “subsidise” the applicant while she enjoys the benefits of membership.¹³

[29] There respondent is therefore entitled to its costs on an attorney and client scale. It has presented a strong argument that the applicant’s attorneys should pay the costs *de bonis propriis* due to their gross misconduct and failure to properly represent their client. In exercising its discretion as to costs *de bonis propriis*, it has been taken into account that the applicant refers in her founding

11 **Wahl v Prinswill Beleggings (Edms) Bpk** [1984] 1 All SA 24 (T) at pages 28 and 29.

12 **Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd** 2007 (6) SA 87 (SCA) at 94 E and at 95 D-F; **Freedom Stationery (Pty) Ltd v Hassam** 2019 (4) SA 459 (SCA) at 465 G-H and 467 G-H.

13 Caselines 19-73.

affidavit to insurance by Hollard. I leave it up to the applicant to take steps against her attorneys as she has a remedy to pursue. The argument that the judgement was allegedly erroneously granted is solely premised upon the applicant's attorneys' failure to timeously deliver a notice of intention to defend as stipulated by Rule 19(1)(a).

THE ORDER

[30] Accordingly, I make the order as set out above.

LM du Plessis

Acting Judge of the High Court

Gauteng Division

Johannesburg

APPEARANCES

For the applicant:

K Ralikhuvana

(Heads of Argument by V Nyokane)

Attorneys:

Katlego Ralikhuvhana Mokgola Inc.

For the respondent:

Adv Robin Smith

Attorneys:

Schũler Heerschop Pienaar Inc.

Date of Hearing:

21 January 2025

Date of Judgement:

20 May 2025