IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

CASE NO: 2572/2015

In the matter between:

DR E. MOLOI APPLICANT

and

MACHABALALA ALICE TAU FIRST RESPONDENT

MEDI-CLINIC (PTY) LTD SECOND RESPONDENT

HEARD ON: 26 October 2023

CORAM: JORDAAN, AJ

DELIVERED ON: 25 April 2024

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[1] This is an opposed application brought in terms of Rule 42(1)(a) of the Uniform Rules of Court, for rescission of the judgment granted by default by this Honourable Court on the 22nd of September 2022 in the following terms:[1]

> *"The Defendant shall pay to the Plaintiff the following amount in respect of damages suffered by the said Plaintiff as Follows:*

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[1] Paginated Bundle: Founding Affidavit – Court Order pages 19 to 20

1.1 Past medical expenses in the amount of R43 069.95;

1.2 Future medical treatment R563 907.00;

1.3 General damages in the amount of RI50 000.00.

2. Interest on the said amounts at a rate OF 10% per annum a tempore one mora to date of final payment.

3. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs for the Instructing attorney and correspondent attorneys which costs shall include but not be limited to the following:

3.1 All reserved costs will be unreserved, if any;

3.2 The costs of obtaining all expert medical , actuary and other reports of on expert nature;

3.3 The reasonable qualifying) preparation and reservation Fee of all experts, including the costs of consultation fees with the legal team, if any

3.4 The reasonable travel and accommodation costs incurred in transporting the Plaintiff to all medico-legal appointments;

3.5 The costs of an interpreters attendance at the medico-legal appointments of translation of information and during consultations with legal teams if any;

4. Costs of suit including costs of this application."

[2] It is apposite to have a pithy background of the events that led to the Applicant currently having a default judgment of the nature registered against him.

[3] The First Respondent was with child when she, on the 26th of April 2013, consulted the medical practice of the Applicant, a gynaecologist, who informed her she was suffering from high blood pressure. The Applicant advised her to attend the premises of the Second Respondent in order to be admitted, which she did.

[4] On the 28th of April 2013, the First Respondent's condition deteriorated as she started bleeding.

[5] The Applicant, at the premises of the Second Respondent, on the 29th of April 2013 performed an emergency caesarean section on the First Respondent, alas her baby was stillborn.

[6] The First Respondent alleged that it was due to the negligence of the Applicant that her baby was stillborn on the 29th of April 2013.

[7] As a consequence of the Applicant and Second Respondent's negligence, alternatively as a result of the breach of their duty of care, the First Respondent issued summons for damages against both the Applicant and the Second Respondent on the 02nd of June 2015.

[8] This summons was served on the Second Respondent on the 14th of July 2015[2] which action was opposed by the Second Respondent.

[9] On the 21st of April 2016 the Court granted default judgment on the merits 100% in favour of the First Respondent against the Applicant and ordered separation of the adjudication of the quantum of damages which was postponed *sine dies*.

[10] On the 21st of October 2016 the First Respondent withdrew the action against the Second Respondent.

[11] On the 03rd of November 2015[3] the First Respondent re-issued Summons which was served on the Applicant on the 07th of December 2015.[4]

[12] Evident from the 22nd of September 2022 default judgment bundle on file, the Court considered the documents before it with the affidavits filed in terms of Rule 38(2) of the Rules of Court as well as having heard the submissions of the legal

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[2] Paginated Bundle: Founding Affidavit Annexure "JE3" page 61
[3] Paginated Bundle: Opposing Affidavit- Combined Summons page 180
[4] Paginated Bundle: Opposing Affidavit – Return of Service page 151

practitioners, proceeded to grant default judgment against the Applicant on the 22nd of September 2022.

[13] The provisions of Rule 42(1) reads 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;*
>
> *(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
>
> *(c) an order or judgment granted as the result of a mistake common to the parties."*

[14] Where an application is brought in terms of Rule 42(1)(a) the Defendant should show that the judgment was erroneously sought and erroneously granted in his absence.

[15] In Kgomo v Standard Bank of South Africa[5] Dobson J, held that the following principles govern rescission under Rule 42(1)(a):

> *"13.1 the rule must be understood against its common-law background;*
>
> *13.2 the basic principle at common law is that once a judgment has been granted, the judge becomes functus officio, but subject to certain exceptions of which rule 42(1)(a) is one;*
>
> *13.3 the rule caters for a mistake in the proceedings;*
>
> *13.4 the mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;*
>
> *13.5 a judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;*

[5] 2016 (2) SA184 (GP)

13.6 the error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and

13.7 the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b)."

[16] A judgment is erroneously granted if there existed at the time of its issue, a fact of which the Court was unaware, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment.[6]

[17] In the case of Ferris and Another v FirstRand Bank Ltd[7] it was held:

"...good cause(including a bona fide defence) is not required for rescission under Rule 42(1)(a)"

[18] Under the common law, a Court is empowered to rescind a judgment obtained on default of appearance provided that sufficient cause is shown. The requirement for good cause in Rule 31(2)(b) and for sufficient cause under the common law is the same. In Chetty v Law Society, Transvaal[8] the court held:

"Although the term 'sufficient cause' or 'good cause' defies precise or comprehensive definition, two essential elements of sufficient cause for rescission of a judgment by default are that:

(a) the applicant for rescission presents a reasonable and acceptable explanation for his or her initial default; and

(b) on the merits the applicant has a bona fide defence which prima facie carries some prospect of success.

It is not sufficient if only one of these two requirements is met, for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a

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[6] Rositer v Nedbank Ltd unreported SCA case96/2014 delivered 01 December 2015
[7] 2014 (3) SA 39 (CC)
[8] 1985 (2) SA 756 (A) at 746,756A-C

default judgment against him, no matter how reasonable and convincing the explanation of his default."

[19] It is the Applicant's case that judgment was erroneously sought and erroneously granted as no notice of the action was received by the Applicant because no summons commencing action in June 2015 was served on the Applicant by the sheriff and this is borne out by the First Respondent's Application for Default Judgment.[9] That summons was only served on the Second Respondent.

[20] The First Respondent submitted that the Applicant was indeed served referring the Court to "C2" as the relevant return of service.[10] This return of service is for service of a summons and particulars of claim on the 07th of December 2015. There was no notice of intention to defend filed.

[21] It must be borne in mind that there was a merit judgment granted on the 21st of April 2016 against the Applicant based on a summons which was issued on the 02nd of June 2015 and served on the Second Respondent on 14 July 2015. This summons was re-issued on the 03rd of November 2015 and served on the Applicant on the 07th of December 2015[11], to which there was no notice of intention to defend filed.

[22] The Applicant contended that the service was not in compliance with Rule 4 of the Uniform Rules of Court.

[23] The First Respondent submitted that a Windeed Search was conducted to trace the Applicant who was then served with the summons in terms of Rule 4 of the Uniform Rules of Court on his gardener, Mr. Letsoera, on the 07th of December 2015. In terms of the case of Barens v Lottering 2000 (3) SA 305 (C) it was held:

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[9] Paginated Bundle: Founding Affidavit Annexure "JE3" page 61 and First Respondent's Application for Default Judgment Bundle page 28 Annexure "B" return of service
[10] Paginated Bundle: Opposing Affidavit -Return of Service page 151
[11] Paginated Bundle: Opposing Affidavit -Return of Service page 151

"... when a person may have more than one residence or place of business, service at any one would be good"

[24] The Applicant at no stage denied ownership of the residential addresses or claimed alienation of the addresses, in fact from 03 October 2015 his address was indicated as [redacted] Street [redacted] Welkom, where the sheriff served Mr. Letsoera on 07 December 2015. The only change in address on Windeed is from after the 07th of December 2015, on 20 December 2015 when the postal address change, not the residential address.

[25] A judgment is erroneously granted if there existed at the time of its issue a fact of which the Court was unaware, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment- this Court finds that there was no fact in existence at the time of the issue of judgment such which had the court been aware would have precluded the granting of the judgment and which would have induced the Court to not grant the judgment had it been aware of it.

[25] The Applicant's seemed to raise as a defence his protracted legal battle with the Second Respondent that resulted in him being barred from the premises and the eventual termination of his lease sometime in February 2013 prior to the 29th of April 2013 preventing his consultation and treatment of patients. The Applicant's actions of booking the First Respondent into the very same facility at the Second Respondent on the 26th of April 2013 would then be actions contrary to that of a reasonable man in the circumstances as the First Respondent was recommended to be booked into that facility by the Applicant. His actions also further belie his submissions as the Applicant indeed performed the caesarean section on the First Respondent on the 29th of April 2013.

[26] On the Applicants own submissions and affidavit it is shown that on the merits, the Applicant does not have a *bona fide* defence which *prima facie* carries some prospect of success.

[27] The Applicant's explanation that he was residing in Kroonstad when the summons was served on Mr. Letsoera is contrary to the Windeed search which shows that the only residential address the Applicant has from 25 January 2015 until 17 September 2017, is [redacted] Street, Welkom. It is only the Applicant's postal address that changed 13 days after service on Mr. Letsoera at the residential address. There is also no denial of any knowledge of Mr. Letsoera and there is a return to the same residential address during February 2018. The Applicant was rather evasive in this regard and did not present a reasonable and acceptable explanation for his initial default.

ORDER

[28] Consequently, it follows that the application for rescission falls to be dismissed with costs.

[redacted]

M. T. Jordaan
Acting Judge of the High Court,
Free State Division, Bloemfontein

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