IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA

REPORTABLE
CASE NO: 555/2020
DATE HEARD: 4 AUGUST 2022
DATE DELIVERED: 16 AUGUST 2022

In the matter between:

MEMBER OF THE EXECUTIVE COMMITTEE
DEPARTMENT OF EDUCATION **1ST APPLICANT**
HEAD OF DEPARTMENT, DEPARTMENT
OF EDUCATION **2ND APPLICANT**

and

BABALWA FAITH MAKAPELA **RESPONDENT**

JUDGMENT

NOTYESI AJ

INTRODUCTION

[1] This is an application for rescission of a default judgment granted by this Court on 10 August 2021 against the applicants in favour of the respondent. The application is brought in terms of rule 42(1)(a) of the uniform rules of court (*the rules*). In addition, to the rescission application, the applicants seek leave of this

court to file their plea in the main action. The leave to file a plea is sought under rule 27 of the rules.

[2] The applicants contend that the default judgment was erroneously sought and erroneously granted in their absence and they are affected by the order sought to be rescinded. The respondent has filed a 'conditional notice to oppose'. The main contention of the respondent is that the applicants have no defence to the claim and that their notice to defend was entered solely to delay.

BRIEF BACKGROUND

[3] The respondent instituted the main action against the applicants on 22 September 2020. Summons commencing the action was served upon the applicants on 30 September and 6 October 2020 respectively. The respondent set out the cause of action in the particulars of claim and I do not deem necessary to repeat the allegations contained therein, save to mention that the respondent has alleged in the particulars of claim that she has complied with the provisions regarding the institution of legal proceedings against certain organs of State. A letter of demand has been attached to the particulars of claim.

[4] The applicants, as defendants in the main action, filed their notice of appearance to defend the action on 26 October 2020. No plea was filed thereafter. On 2 December 2020, the respondent served the applicants with a notice of bar, which was also filed in court. Subsequent thereafter, several letters were addressed to the respondent's attorneys by the applicants' legal representatives in which settlement negotiations were proposed. For some reasons that are not immediately clear, the respondent's legal representatives served another notice of bar to the applicants' attorneys on 9 March 2021. There was no plea filed, instead, the

applicants, maintained their position that they will not be filing a plea as they seek to settle the matter.

[5] On 29 June 2021, the applicants made a direct payment in the sum of R43,047-14 to the respondent's banking account and according to the applicants, that amount was the only amount owed to the respondent in terms of the system calculations. Proof of this payment was forwarded by the acting director of the applicants' legal services to the respondent's attorneys. The payment was subsequent to the applicants' letter dated 12 March 2021. Below I quote from the aforesaid letter:

> "We refer to the above matter and in particular your notice of bar dated 9 March 2021.
>
> We confirm our instructions to engage in settlement negotiations with yourselves. As such we do not consider it necessary to file a plea.
>
> We are instructed to advise you as we hereby do that payment will be made in full and final settlement of outstanding moneys due to your client as a result of her performance of acting duties during the period(s) in question.
>
> To this end we attach hereto a BAS entity form and request that you cause it to be filled by your client and be returned to us for forward transmission to our client in order for payment to be processed.
>
> We propose engagements with one another after the system has calculated the total sum of moneys payable to your client.
>
> In view of your client still being in the employ of the Defendant department, we confirm that moneys due and payable will be paid directly into her banking account details.
>
> Our view is that the proposed settlement engagements after the system has calculated the total sum of moneys due and payable will serve the purpose *inter alia* of:
>
> > verifying whether or not the amount paid covers all the acting period(s) in question foreshadowed in the particulars of claim;
> >
> > to that end whether Plaintiff is satisfied that her claim has been liquidated in full; and
> >
> > whether a draft order cannot be taken by agreement for presentation to court as a full and final settlement of this matter."

[6] The respondent's attorneys proffered no response to the above letter, nor responded to the payment of the sum of R43 047.14. Instead of responding to the above correspondence and the payment aforesaid by the applicants, the respondent launched an application for default judgment on 3 August 2021 and sought an order by default in the following terms:

1. That the Defendants pay to the Plaintiff the sum of R443 770,36;
2. That the Defendants pay to the Plaintiff interest on the sum of R486 817,50 *a tempore morae*, to date of payment, less paid R43 047,14 on 24 June 2021;
3. That the Defendants pay the Plaintiff's costs.

[7] The application for default judgment was not served upon the applicants and the order was sought by the respondent and accordingly, the court granted the application for default judgment on 10 August 2021 in accordance with the terms set out above.

[8] The applicants are now seeking to rescind that order and that they be granted leave to file a plea to the main action and defend the action.

THE RESCISSION

[9] The applicants have premised their application for rescission in terms of rule 42(1)(a) which provides for variation and rescission of orders. In terms of sub-rule (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.

[10] The applicants for rescission of an order under rule 42(1)(a) should satisfy three requirements in order to succeed. Firstly, that the default judgment must have been erroneously sought or erroneously granted; secondly, that the judgment must have been granted in the absence of the applicant(s); and that the applicant(s)' rights or interest must be affected by the judgment.[1]

[11] In Mutebwa[2], the following was stated:

> "Although the language used in rule 42(1) indicates that the Court has a discretion to grant relief, such discretion is narrowly circumscribed. The use of the work 'may' in the opening paragraph of the rule tends to indicate circumstances under which the Court will consider a rescission or variation of judgment, namely that it may act *mero motu* or upon application by an affected party. The Rulemaker could not have intended to confer upon the Court a power to refuse rescission in spite of it being clearly established that the judgment was erroneously granted. The Rule should, therefore, be construed to mean that once it is established that the judgment was erroneously granted in the absence of a party affected thereby a rescission judgment of the judgment should be granted."

[12] Mr Poswa, counsel for the applicants, submitted that the default judgment was erroneously sought and erroneously granted considering that the respondent had failed to notify the applicants about their application for default judgment as is required to do so in terms of rule 31(5)(a) of the rules. The rule relied upon by Mr Poswa, provides:

> "Whenever a defendant is in default of delivery of a notice of intention to defend or of a plea, the plaintiff, who wishes to obtain a judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff

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[1] See Mutebwa v Mutebwa & Another 2001 (2) SA 193 Tk HC at p 198F

[2] *Supra*

> shall give such defendant not less than five days' notice of the intention to apply for default judgment."

[13] It is common cause that the applicants did enter an appearance to defend the main action, and as such, were entitled to a "not less than five days' notice of the intention to apply for default judgment". The respondent failed to comply with this rule as no prior notice of intention to apply for default judgment was given. In the answering affidavit of the respondent, this point is conceded and I quote the respondent's averments in this regard:

> "The Applicants have pointed out that the request for default judgment was not served on the Applicants in compliance with rule 31(5)(a). I have been advised that due to an oversight on the part of my attorneys of record, the request was not served as required. Accordingly, the order was indeed granted irregularly and I have been advised stands to be rescinded."

[14] Ms Burger, counsel for the respondent's alternative submission, in trying to overcome the respondent's difficulty was that the rescission should be refused on the grounds that the applicants have no defence to the claim and that the appearance to defend was solely to delay. This submission lacks merit and I therefore reject for the simple reason that – the applicants have placed their case in terms of rule 42(1)(a). In terms of this rule, once one of the grounds is established, in this case, that the judgment was erroneously sought and granted in the absence of a party affected thereby, the rescission of the judgment should be granted.

[15] The applicants have succeeded in satisfying the three requirements under rule 42(1)(a). The failure to serve a notice of set down for the default judgment by the respondent, is fatal to the subsequent order sought and granted in the absence of the applicants. It is self-evident that the order was erroneously granted and the rescission must succeed.

LEAVE TO DEFEND

[16] The next aspect is that the applicants seek leave of this court to file their plea in the main action. The request of the applicants for leave of the court to file a plea, is based on the fact that a notice of bar was served and the plea was not filed in response thereto. The notice of bar was filed on 9 March 2021. In response to the notice of bar, the applicants' legal representatives had written a letter dated 12 March 2021. In the letter of 12 March 2021, which I have quoted above, the applicants' legal representatives unequivocally records that they have been instructed to engage in settlement negotiations and as such, they do not consider it necessary to file a plea.

[17] In pursuit of the instructions to settle the legal dispute between the parties, further letters were addressed by the applicants' attorneys to the respondent's legal representatives. A payment was effected directly to the respondent's account. Proof of payment was furnished to the respondent's legal representatives on 1 July 2021. The details on the banking account of the respondent had been furnished by his attorneys to the applicants.

[18] In view of the above steps taken by the applicants, it was rather disingenuous for the respondent to proceed with an application for a default judgment without notice to the applicants. At the very least, the respondent ought to have advised the applicants that the payment made was not sufficient to satisfy the claim and that the respondent was proceeding with litigation or opting out of settlement negotiations. It was not unreasonable for the applicants to adopt a stance that the plea would not be filed pending settlement negotiations.

[19] I do make this remark, litigants have a duty to consider genuine efforts and endeavours which are aimed at quick resolutions of legal disputes. There is an inherent duty of collegiality amongst practitioners to respond to correspondences in order to indicate their attitude or position regarding proposals put forward by their colleagues regarding the conduct of litigation. The approach adopted by the respondent's legal representatives in this matter, is a far cry on this obligation. This court takes a dim view in this regard.

[20] This court is enjoyed by the provisions of rule 27 to condone any non-compliance with the rules. Rule 27(3) provides:

> "The court may, on good cause shown, condone any non-compliance with the rules."

[21] The subrule requires 'good cause to be shown'. This gives the court a wide discretion which must, in principle, be exercised with regard also to the merits of the matter - seen as a whole. This approach applies to all applications which may be brought under the subrule. The court must consider two principal requirements for the favourable exercise of the court's discretion. The first is that the applicant should file an affidavit to satisfactorily explain the delay. In this regard, the applicants must at least furnish an explanation of the default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives. Second, the application must be *bona fide* and the application must not be made with the intention of delaying the respondent's claim. In other words, the applicant must show that his defence is not patently unfounded and that it is based upon facts which, if proved, would constitute a defence.[3]

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[3] Du Plooy v Anwes Motors (Edms) Bpk, 1984 (4) SA 213(O) at 216H – 217D. Erasmus Superior Court Practice, second edition Van Loggerenberg Volume 2 at D1-322 – D1-323 See also the authorities cited therein by the authors

[22] In this case, the applicants informed the respondent's legal representatives that they intend to settle the matter. The applicants pointed out that the payments due to the respondent would be calculated through the BAS system, whereafter payment would be made to the respondent. This was done by the applicants. In their letter, the applicants made a commitment that once calculations and payment has been done, the parties would again engage to determine whether the payment was acceptable to the respondent and if agreement is reached, then parties would enter a consent order disposing of the matter. This was a wise approach which should have been embraced by the respondent. I do take into account in my exercise of discretion on whether to grant the leave for the applicants to file their plea.

CONCLUSIONS

[23] Taking into account all the factors that I have pointed out, I am satisfied that the applicants have made out a case for both the grant of the rescission of the judgment and the grant of the leave to file their plea to the main action.

COSTS

[24] In their notice of motion, the applicants have asked for costs of the application against the respondent. The trite legal principle on costs is that they generally follow the event. This means that the successful party must be awarded costs. This is the basic rule on which the court exercises its discretion in adjudicating the issue of costs.

[25] The principle that costs should follow the event could only be departed on good cause shown. In circumstances where the applicant seeks the indulgence of

the court, the applicant who seeks indulgence of the court, should pay all such costs, including the costs of opposition to the application, provided that such opposition was not vexatious or frivolous.

[26] In certain circumstances relating to the application for the indulgence of the court, the respondent may be ordered to pay his own costs or the costs of occasioned by his opposition unless he has placed facts before the court which could reasonably be expected to affect the court's discretion in regard to the granting of such relief.

[27] In relation to the rescission application, the respondent filed what she termed 'respondent's notice of conditional opposition'. The respondent then went on to file a substantive answering affidavit. The answering affidavit was ill-conceived in that the respondent made a concession that she committed an error by seeking default judgment without prior notice to the applicants. The alternative submission of the respondent that the applicants have no *bona fide* defence, but entered an appearance to defend purely to delay, was not an answer to rule 42(1)(a) rescission.

[28] In relation to the leave sought by the applicants to file a plea, the respondent made no response to the allegations contained in the letter dated 12 March 2021. This letter, in its concluding remarks, records the following:

> Our view is that the proposed settlement engagements after the system has calculated the total sum of moneys due and payable will serve the purpose *inter alia* of:
>
> > verifying whether or not the amount paid covers all the acting period(s) in question foreshadowed in the particulars of claim;
> >
> > to that end whether Plaintiff is satisfied that her claim has been liquidated in full; and
> >
> > whether a draft order cannot be taken by agreement for presentation to court as a full and final settlement of this matter.

[29] In view of the contents of this letter, the respondent was obliged to first engage with the applicants before taking further steps. However, the applicants fail to give an explanation regarding the period between 26 October 2020, which is the date of the appearance to defend, and 2 December 2020, which is the date of the first notice of bar. There is another notice of bar of 9 March 2021. In my view, the applicants would have experienced some difficulties in explaining the delay from December 2020 to March 2021 regarding the failure to file a plea. These considerations are independent to the consideration of the reasonableness for the request of a default judgment by the respondent.

[30] Despite all shortcomings on the part of the respondent, I am of the view that the applicants would have been liable for the costs regarding the indulgence for leave to file a plea. The applicants would have been entitled for the costs of the rescission. I do consider the fact that the applicants accept that their calculations for the monies payable to the respondent may not have been accurate and that casts doubts upon their defence on the merits.

[31] In all the circumstances of this case, and considering that the respondent, prior to instituting the main action, had issued a letter of demand of which the department has an obligation to investigate the allegations made therein, and it failed to do so. The dispute in the main action concerns payment of the plaintiff for acting allowances, which in my view, should not present any difficulty to determine by the department.

[32] On the basis of the above, costs should not follow the event, but rather each party should pay its own costs.

ORDER

[33] In the result, it is ordered that:

1. The application for rescission of judgment is granted;

2. The judgment order granted on 10 August 2021 (incorrectly recorded by the applicants in their notice of motion as 10 August 2020), is hereby rescinded and set aside;

3. The notices of bar dated 2 December 2020 and 9 March 2021, are hereby uplifted and the applicants are granted leave to file their plea in the main action within a period of 15 (fifteen) days of the date of this order, should they be so inclined or advised; and

4. Each party to pay its own costs.

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M NOTYESI
ACTING JUDGE OF THE HIGH COURT

Appearances

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