

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 18387/2022

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

30 October 2023

SIGNATURE

In the matter between:

DR. JAMES BLAIR MWESIGWA

Applicant

and

PL SAMUELS INCORPORATED ATTORNEYS

First Respondent

**THE SHERIFF OF COURT
(PALM RIDGE/ ALBERTON NORTH)**

Second Respondent

ORDER

[1] The application for rescission is dismissed.

[2] The applicant for rescission must pay the costs of the first respondent.

JUDGMENT

Fisher J

Introduction

- [1] This is an application for rescission in terms of rule 42(1)(a). The applicant also asks for the execution processes – including an application to declare an immovable property executable in terms of rule 46A be stayed. The execution application has been opposed.
- [2] The applicant raises a point of mis-joinder. He alleges that he is married in community of property to Elizabeth Morane Mwesigwa and that the immovable property sought to be executed against is owned jointly by them. The respondent denies this to be the case. It seeks to rely on records which show the property to be registered in the applicant's name only.
- [3] This dispute need not be determined in that the execution process is not dealt with here. As I have said, such process has been defended and to the extent necessary, this point can be raised in that process. It may be prudent however to deliver notice of any set down of the rule 46A application to Ms Mwesigwa in due course.
- [4] In essence, the applicant alleges that the court failed to take cognizance of the fact that a notice of intention to defend the action had been delivered. The respondent denies that there was any such delivery of a notice of intention to defend. This is the central dispute in the matter.

Legal principles

- [5] A court is empowered to set aside a judgment obtained in an application in terms of rule 42 or under the common law. If, as the applicant contends here, there has not been proper service of procedurally acceptable process under rule 42(1)(a) it is not necessary for the applicant to show good cause.
- [6] The rule caters for a mistake in the proceedings. 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.

- [7] 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.
- [8] Once the court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order, and it is not necessary for a party to show good cause for the subrule to apply.¹

Material facts

- [9] The applicant, a medical doctor alleges that he instructed attorney, Paul Lepekola Samuels, of the first respondent (whom I shall refer to as the “respondent”) to represent him in an appeal before the SCA.
- [10] He confirms that on or about 5 June 2022 he was served with the summons in the action in which the respondent claimed R 513 795 together with interest and costs in respect of fees and disbursements.
- [11] The applicant alleges as follows in relation to the notice of intention to defend:
- “On the 6th June 2022 I effectively delivered a Notice of Intention to Defend on the First Respondent, which notice was served on the First Respondent in terms of Rule 4A(1)(C) together with the proof of email service. I attach annexures ‘JBM1’ and ‘JMB2’ being the notice of intention to defend and proof of service thereof by email respectively.”
- [12] The annexure “JMB 1” purports to be a notice of intention to defend the action. It states that it appoints TJP Attorneys who are erroneously described therein to as “Plaintiff’s Attorneys” and reflects a signature on behalf of such attorneys with reference “TJP/Mwesigwa- 01/050622” which signature is dated 06 June 2022. It is common cause that this document was not physically delivered.

¹ *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA).

[13] Annexure “JMB 2” appears on its face to be a covering email sent by TJP Attorneys from email address tjpattoorneys@gmail.com to the respondent at plsamuels@mweb.co.za. There is also an email address info@tjplaw.co.za mentioned. The email reads as follows:

“Good day,

Please find attached hereto for your attention; Notice of Intention to Defend served on yourselves in terms of Rule 4A(1)(c).

A hard copy will be served and/or delivered to your office in due course.

Thank you.”

[14] The applicant makes reference to a criminal case and the suspension of his practicing license which meant he could not earn an income. This, he says, delayed his prosecution of the action any further. He says that his suspension was lifted on 15 December 2022 whereafter he managed to find employment so that he could pay a deposit to his current attorneys, TJP Attorneys.

[15] He indicates that by virtue of the fact that he had delivered a notice of intention to defend the action, he was surprised to receive the rule 46A application which bears a court stamp of 24 November 2022. This, he says, is the first time he gained any knowledge of the fact that the judgment in issue had been granted against him on 24 August 2022.

[16] The submission of the applicant is that because of the delivery of the notice of intention to defend, the applicant was obliged to deliver a notice of bar and a notice of set down of the application for judgment by default.

[17] Mr Lepekola made the answering affidavit for the respondent. He states that he and the applicant had a good attorney-and-client relationship which commenced in 2015. He confirms that he terminated his relationship with the applicant because the applicant failed to pay the outstanding fees in issue. It is not in dispute that the fees so charged have not been made by the applicant.

- [18] Mr Lepekola makes mention of twelve matters handled by him for the applicant over the approximately seven-year relationship, including a criminal matter, arbitration proceedings, a review in the Labour Court, disciplinary hearings, a petition for leave to appeal to the SCA, other proceedings in the SCA, bail proceedings and a Maintenance Court matter.
- [19] The applicant is clearly an unusually litigious person. The fees were charged on the same basis throughout the parties' relationship, being the respondents normal rate.
- [20] The applicant paid all fees charged without demur, save the fees in issue in the action which arose from the final invoices.
- [21] Mr Lepekola says that, before and after he had withdrawn as the applicant's attorney, he sent numerous demands for payment of the outstanding fees. He states further that the applicant did not seek to engage with him as to the reasonableness of the fees.
- [22] He thus issued summons for the unpaid fees on 24 May 2022.
- [23] As I have said, the applicant admits that he received the summons. The basis for the rescission is that he received no set down of the hearing date of the application for default judgment.
- [24] The respondent denies that there was any appearance to defend received either by way of email or otherwise. Mr Lepekola states that he has searched his email database but has been unable to find the alleged email.
- [25] It is admitted that there was never any physical delivery of the notice and that it was not filed.
- [26] On 06 September 2022 Mr Lepekola issued a writ of attachment against the applicant's movables in execution of the judgment.
- [27] The sheriff's return of service reads as follows:

"On this 10th day of October 2022 at 18:50 I served the WRIT OF EXECUTION AGAINST PROPERTY in this matter Upon Mrs. Mwesigwa, wife

apparently a responsible person and apparently not less than 16 years of age, of and in control of and at the place of residence of JAMES BLAIR MWESIGWA at [...] B[...] EXT 2 ALBERTON, the DEFENDANT being temporarily absent, and handing to the PARTY SERVED a copy thereof after explaining the nature and exigency of the said process, RULE 4(1)(a)(ii).

This is to certify that payment of the judgment debt plus costs has been demanded from Mrs Mwesigwa. As the PARTY SERVED was unable to pay the judgment debt and costs in full or in part on behalf of debtor, the goods described in the inventory contained in the attached Notice of Attachment, was (sic) judicially attached.

IMPORTANT NOTICE: Kindly furnish me immediately with your further instructions as to whether the goods under attachment must be removed to a place of safety. A sale date and sale requirements will only be supplied after removal.

Attempt: 03.10.22 at 18:50 – Premises locked, Letter Left

The original return is ready for collection at our office.”

- [28] The sheriff furthermore produced an inventory of household appliances and items under attachment. The value attributed to the attached items was insufficient to extinguish the judgment debt.
- [29] On 24 November 2022 the respondent issued the rule 46A application and after some unsuccessful attempts at service, the notice was served by affixing at the applicant’s residence. This was not in accordance with the practice in this court which requires personal service.
- [30] The matter was, however, set down for hearing on the unopposed roll of 06 March 2023. This process obviously came to the attention of the applicant because on 27 February 2023, 5 days before the hearing, the applicant sent a notice of intention to oppose the rule 46A application.
- [31] On the day following this notice of opposition (28 February 2023), the applicant filed this rescission application. This led to the postponement of the rule 46A application on 06 March 2023. It remains an opposed process.

[32] Mr Lepekola confirms that he has established by way of a deeds search that the residence in issue is held only in the name of the applicant. The title deed reflects the names of the applicant and Eunice Anyonje Mwesigwa from whom the applicant is divorced.

[33] As to physical delivery of the notice, the applicant states that he personally attended on the offices of the respondent on 06 June 2023. He does not state the time that he attended. He says that he found the offices locked and deserted. He says: "I was advised by my attorney to retry after two days with no success [sic] all".

Evaluation of the evidence

[34] The concerns that I have with the version of the applicant are as follows: The parties had a long relationship where the applicant instructed the respondent and specifically Mr Lepekola to deal with matters both civil and criminal over approximately seven years. There is no indication of any dissatisfaction on the part of the applicant as to fees or service until he filed this application.

[35] The sheriff's return of service as to the writ of execution is *prima facie* proof of its contents.

[36] The applicant's response to the detailed return is a bare denial. There is no confirmatory affidavit from his alleged spouse as to the return. This part of the case is important in that it refers to delivery of legal process which would have given some indication that a judgment had been taken.

[37] It is unlikely that the writing up of the household goods and the service of the warrant would not have come to the attention of the applicant. On his version he and Elizabeth Mwesigwa live together in the property in question.

[38] The applicant is a seasoned litigant and an educated person. It is unlikely that he would not have understood then that an attachment of his movables was in execution of a judgment debt.

[39] He does not seriously deny the accounting and demand for payment by his long serving attorney.

- [40] It seems that it was only when faced with a threat of execution against his residential property that he has sought to take action in relation to the rescission of the judgment.
- [41] The fulcrum in this rescission is the email delivery of the notice of intention to defend. If this case is not made out then the application must fail.
- [42] An examination of the applicant's version as to the furnishing of the notice of intention to defend raises important questions.
- [43] The service of this notice was clearly placed in dispute. The only manner in which this dispute could be properly dealt with was by a confirmation by the attorney of the applicant, TJP Attorneys.
- [44] It would have been a simple matter for the attorney dealing with the matter to have confirmed service of the notice at least by way of the sending of the email notice on the instruction of the appellant.
- [45] However, such confirmation was not forthcoming. The matter was made more perplexing by the fact that the applicant's attorney, who argued the matter before me declined to associate himself with the alleged sending of the email comprising the alleged notice of intention to defend.
- [46] He could have confirmed that the email and notice of intention to defend purporting, as they do, to emanate from his firm, were indeed attended to by him in some manner. He did not do so, either on the papers or during his address.
- [47] He could at least have suggested that he was able and willing to provide further information as to this crucial aspect of the case. He did not do so. On the contrary, he made no comment.
- [48] These aspects are of concern to me in relation to the probabilities in this matter.
- [49] However, it is not necessary for me to make any determination of the probabilities or the credibility of the parties. The fact is that, even on the

version of the applicant, the service is not proper service under the rules of court. This is not related to the lack of agreement to receive service by way of email, which is relied on by the respondent. In terms of the rules of court delivery entails service and filing.² It is not disputed that there was no filing of the notice.

- [50] There is some vague suggestion from the applicant that this was due to lockdown which brought about an inability to access Caselines for the purpose of completing delivery. There is no factual basis laid for this assertion and again it is not confirmed by the applicant's attorney.
- [51] The heads were filed by a BT Nqgwangele who described himself therein as an advocate. The joint practice note is also attended to by this person.
- [52] When I made inquiries during argument as to the failure by the attorney to identify himself or provide the evidence needed, the person arguing the matter confessed from the bar that he was "the attorney". He gave no further information as to his engagement with the matter and neither would this have been permitted in that it does not appear from the papers.
- [53] Whist writing this judgment, I hoped to find some reference in the papers filed to the identity of the attorney. However, all signatures on behalf of the firm are signed under the designation TJP Attorneys and no reference to the attorney dealing with the matter is provided. This is irregular in itself.
- [54] It may be that the person arguing the matter and Advocate BT Nqgwangele are the same person. However, this was not made clear and I only have the heads of argument and the joint practice note to go on. One cannot be both an advocate and an attorney.
- [55] This failure of the attorney to properly engage with his identity suggests a reluctance on the part of the legal practitioner in question to explain his attendances to the notice of intention to defend, if any.

² In terms of the definition in rule 1 "**deliver**" means to serve copies on all parties and file the original with the registrar.

Conclusion

- [56] The applicant has failed to make out a case to the effect that he indicated his intention to defend the action. In the circumstances I cannot find that the judgment was either taken or granted in error.
- [57] Regrettably, it must be stated that I am left with the firm impression that the applicant has failed to engage with the accounts setting out amounts due to his attorney with whom he has had a long and settled attorney client relationship. It seems thus that it would not, in any event, be possible for a bona fide defence to be shown even if this were required.
- [58] It seems that even from a technical application of the rules of court, to which I choose to have to resort to here, there was no appearance to defend entered.
- [59] The applicant's attorney has distanced himself from his part in the proceedings.
- [60] In the circumstances the applicant has not made out a case for a rescission based on rule 42(1)(a). I accept that the summons was served and came to the attention of the applicant. He did not properly defend the matter despite being legally represented until execution was sought against his immovable property.

Order

- [61] I thus order as follows:
- [1] The application for rescission is dismissed.
- [2] The applicant for rescission must pay the costs of the first respondent.

D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 30 October 2023

Heard: 16 October 2023

Delivered: 30 October 2023

APPEARANCES:

For the applicant: The applicant's legal representative is described on the joint practice note as Adv BT Nqgwangele.

Instructed by: TJP Attorneys

For the second respondent: Adv. O Leketi

Instructed by: PL Samuels Inc.