√√25/01/2018

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

25/1/18.
DATE

SIGNATURE

CASE NUMBER: **55407/15**

In the application between:

FATIMA BIBI FARBAROOK JEEWA	**First Applicant**
AMJAD MAHMOOD	**Second Applicant**
and	
PIETER H STRYDOM N.O.	**First Respondent**
JOHN RG POLSON N.O.	**Second Respondent**
LOUIS STRYOM N.O. (In their capacities as the curators of Corporate Money Managers (Pty) Ltd)	**Third Respondent**

In Re the matter between:

PH STRYDOM N.O	**First Applicant**
JOHN REDERICK GRAEME POLSEN N.O.	**Second Applicant**
LOUIS STRYDOM N.O	**Third Applicant**

And

FATIMA BIBI FARBAROOK JEEWA **First Respondent**

MOHAMED FAROOK JEEWA **Second Respondent**

JUDGEMENT

NAIR AJ:

[1] This is an application for the rescission of a final order of sequestration granted on 27 October 2016. The parties will be referred to as cited in the main application for sequestration. A provisional order was granted against the applicants (respondents in the main application) on 8 September 2016. On the return date there was no appearance for the respondents and the rule nisi was confirmed.

[2] The first and second applicants are attorneys and joint curators of Corporate Money Managers (Pty) Ltd (CMM). The third applicant is a chartered accountant and was also acting as a joint curator of CMM. The respondents are husband and wife who are married in community of property.

[3] CMM was an authorized agent in terms of the Collective Investment Schemes Control Act 45 of 2002 and owned investments worth R1.2 billion. CMM attracted investors because it offered very attractive interest rates.

[4] The applicants based their application for the sequestration on the basis of the following facts: Approximately R500 million was made available from investor

funding to the Regent Group of Companies (Regent) to provide bridging finance and short term loans.

[5] Regent was an intermediary through which investment funds in Corporate Money Managers flowed. Regent consisted of the following companies, Regent Motor Finance (RMF), Regent Bond Discounting (Regent Bond) and Regent (Pty) Ltd. RMF changed its name to Resource Motor Finance (Pty) Ltd (Resource) on or about 25th September 2007. Resource provided bridging finance to third parties including MRZ Autohaus (Pty) Ltd (in liquidation).

[6] A short term loan was provided by Resource to Fajita Cars in respect of which the first respondent stood surety. On 10 September 2008, Resource obtained judgment against MRZ, jointly and severally, the one paying the other to be absolved, with Fajita and the first respondent in their capacities as sureties of MRZ for payment of R 5 954 934.

[7] On or about the 3 August 2009, Resource duly represented by Mr Ryan Botha became indebted to the applicants by virtue of a cession in terms of which Resource ceded its claims against its debtors as security for its obligations against CMM. The cession includes the claim of Resource against MRZ and Fajita Cars (Pty) Ltd. Based on the judgement in favour of RMF, which debt was ceded by RMF to CMM, the applicant sought and obtained the final order of sequestration.

[8] The applicant maintains that the RMF cession included the claim which RMF had against Fajita, and hence the first respondent in her capacity as surety. The applicant further contends that all cessions by RMF, Regent Bond and Regent Factors were done simultaneously and signed on or about 03 August 2009, this was set out in Annexure P5.

[9] The application for sequestration is based on a court order granted on 10 September 2009 against the applicant. A copy of the judgment was attached to the applicants opposing papers. The order was granted on account of the applicant having bound herself as surety for the debts of MR 2 Autohaus (Pty) Ltd in liquidation for the benefit of Regent Motor Finance. The correct deed of cession and surety was attached to the answering affidavit.

[10] The respondents opposed the application for rescission on the basis that the deed of cession attached to the founding affidavit in the main application was not a cession by Regent Motor Finance as alleged in the founding papers but a cession by Regent Bond. This point is conceded by the applicants who admit that it was mistakenly attached.

[11] The first respondent contends that Regent Bond Discounting (Pty) Ltd does not have a judgment against her or the second respondent. She states that the applicants are not the curators of the company that was a party to the Deed of Cession nor is the judgment which the applicant relied on in favour of Regent Bond Discounting (Pty) Ltd.

[12] A sequestration order may be set aside at common law if the applicant satisfies the common law requirements. These are encapsulated in the requirement that 'sufficient cause' for rescission must be shown. This involves three essential elements: the applicant must (1) give a reasonable (and obviously acceptable) explanation for his default; (2) show that his application is made *bona fide*, and (3) show that on the merits he has a *bona fide* defence which, *prima facie*, carries some prospect of success – see *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* **2003 (6) SA 1** (SCA) para 11.

[13] Rule 42(1) of the Uniform Rules of Court read as follows:" 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 judgement erroneously sought or erroneously granted in the absence of any party affected thereby;" Once those three requirements are established, the applicant would ordinarily be entitled to succeed. He is not required to show good cause in addition thereto. See Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd 1977 (2) SA 576 (W) at 578G

[14] In general terms 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 judgement. See *Nyingwa v Moolman NO* 1993 (2) SA 508 Tk at 510 D-G.

> "It follows that if material facts are not disclosed in an ex parte application or if fraud is committed (I e the facts are deliberately misrepresented to the court) the order will be erroneously granted."

[15] In *Kgomo v Standard bank of South Africa* the applicants sought rescission of a judgment under this sub rule based on the fact that the bank did not comply with the notice requirements of s 129(1) and the relevant provisions of s 130 of the National Credit Act 34 of 2005. The bank's non –compliance was plainly an error which was apparent from the particulars of claim and the annexures to it on the basis of which the judgment was granted". In granting the application and setting aside the judgments, Dodson J, with reference to *Colyn v Tiger food Industries Ltd t/a Meadow Feed Mills (Cape)* and *Lodhi 2 Properties Investments CC v Bondev*

Developments (Pty) Ltd held that the following principles govern rescission under rule 42(1)(a):

> (a) the rule must be understood against its common-law background; (b) 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; (c) the rule caters for a mistake in the proceedings; (d) 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; (e) 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 defaults judgement;(f) 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 (g) 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] In respect of sub-rule (1) (a), it was held in *Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 (GNP):

> "In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment ...
>
> It follows that if material facts are not disclosed in an ex parte application ... or if fraud is committed (i.e. the facts are deliberately misrepresented to the court) the order will be erroneously granted."

[17] In Mercedes Benz v Mdyogolo 1997 1 All SA 154 (F); 1997 (2) SA748 (E) 'it was held that judgement granted by default may be set aside if good cause is shown which requires that the applicant must prove that (a) he has a reasonable

explanation for his default,(b) the application is bona fide and (c) he has a bona fide defence to the plaintiff's claim'.

[18] The respondent contends that In order to obtain a rescission under this sub rule the applicant must show that the prior order was 'erroneously sought or erroneously granted in the absence of any party affected thereby. Once the court holds that and 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 sub rule to apply.

[19] In *Leo Manufacturing CC v Robor Industrial (Pty) Ltd t/a Robor Stewarts & Lloyds 2007 (2) SA 1 (SCA)* it was held:

> 'Now, following the rationale of those two decisions, it is totally unnecessary for the Court to rule whether the default judgment was void ab origine or not. The fact of the matter is, and this point has been taken by the respondent, that there is absolutely no mention of a defence set out in the initial affidavit and there is the mere mention of a possible defence in the replying affidavit. It certainly does not comply with the requirements that it be set out with sufficient particularity so as to enable the court to determine whether or not there is a valid and bona fide defence.'

[20] The respondents opposed the application for provisional sequestration on the basis that they were married in community of property and on the fact that the surety was not signed by both parties to the marriage in community of property. On the return date there was no appearance on behalf of the applicants and the final sequestration order was granted.

[21] It is not in dispute that Resource ceded it claim against the first respondent to CMM and that Resource obtained judgment against the first respondent. The

question is whether the court would have granted the provisional order had it been aware or made aware that the incorrect cession was attached.

[22] It is common cause that the incorrect deed of cession was attached to the applicants founding affidavit in the application for provisional sequestration. It is also common cause that there exists a judgement against the first respondent in favour of RMF which ceded its rights in that regard to CMM.

[23] It is also common cause that the final order of sequestration was granted in the absence of the first respondent.

[24] The applicants admit the mistake but allege that it was a bona fide administrative mistake. The first respondent argues that the applicants were the authors of their own misfortune.

[25] The Resource (RMF) cession was done simultaneously with the Regent Bond and Regent Factor cessions. The opposition to the application for provisional sequestration was based on the defence that the respondents were married in community of property and that the surety was not signed by both parties and the mis-joinder of the respondent's brother instead of her husband. This error was subsequently amended in a separate application.

[26] In this application, the respondent raises the locus standi defence and an additional defence that the respondents are married out of community of property contrary to the defence raised in opposing the application for provisional sequestration.

[27] The first respondent does not deny that she is indebted to CMM based on the RMF cession. Neither does she state that the order would not have been granted even if the RMF cession had been annexed to the sequestration application.

[28] It is trite that where a judgment was granted on the basis of a technicality, the respondent cannot rely on same without setting out a bona fide defence which the applicant has failed to do in this matter. An applicant for rescission of a default judgment will not be successful in his application if he does not set out the grounds of his defence to the respondent's claim in the summons, even where the default judgment was void ab origine. (See *Leo Manufacturing CC* Paragraph [6].)

[29] It is a basic principle of our law that an order of court or judgment stands until set aside by a court of competent jurisdiction. Even in the event of such order or judgment being wrong it is presumed until the contrary is proven that the judgment is correct.

[30] Rule 42(1)(a) provides one of the remedies to rescind an order or judgment erroneously granted. Whilst a court of competent jurisdiction is afforded a discretion whether or not to grant an application in terms of this sub-rule, the common law remedy is not excluded by the sub-rule. Rule 42(1) is unambiguous in this regard in the words "...in addition to any other powers it may have...".

[31] The difference between the sub-rule and the common law is that a finding that a judgment or order has been granted erroneously should as a matter of cause lead to the rescinding of the judgment without any further enquiry needed. In terms of the common law, the applicant is required to show good cause.

[32] The applicant has not averred that had the correct cession been attached that she has a defence to the application. The respondent was represented at the hearing of the provisional application for sequestration but did not raise the incorrect cession attachment as a defence.

[33] The applicant has failed to show good cause for the rescission by virtue of the fact that no good defence is raised. The applicant raised another defence during the opposing of the application for provisional sequestration and yet another in this application.

[34] With regard to having a bona fide defence, the first respondent states that her attorney instructed counsel to appear on the 27 October 2016 to hand to the applicant's representatives a copy of the affidavit and to provide the court with same. Unfortunately when the matter was called by counsel for the respondents, he was informed that the matter was disposed of and that a final order was granted.

[35] She submits that the failure to appear timeously was not due to intentional delay or disregard for the court but the fact that various matters are heard simultaneously in three different courts and counsel appearing on her behalf had mistakenly not called the matter to have it stand down until the representatives of the applicant appeared in court.

[36] The applicant has not been bona fide in the manner she has demonstrated the regime of marriage to the second applicant. The respondent has conceded to the granting of the rescission against the second applicant as it is common cause now that the applicants were married out of community of property.

[37] In the result I find that the applicant has not shown good cause for the rescission of the judgement.

ORDER

[38]

[38.1] In respect of the First Applicant herein, this application is dismissed with costs including costs of counsel;

[38.2] In respect of the Second Applicant herein, the application is granted and the sequestration order granted on the 27 October 2016 as against the Second Applicant only is hereby rescinded.

NAIR AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing:

Date of Judgment:

ATTORNEYS FOR THE APPLICANTS	:	**ROESTOFF AND KRUSE**
COUNSEL FOR THE APPLICANTS	:	**S J VAN RENSBURG**
ATTORNEY FOR THE RESPONDENTS	;	**APHANE ATTORNEYS**
COUNSEL FOR RESPONDENTS	:	**J E SMIT**