REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 40024/2018

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

Date: 29 August 2023 E van der Schyff

In the matter between:

BOTLHALE MOLEMA	FIRST APPLICANT
LESEDING ACCOUNT SERVICES CC	SECOND APPLICANT
and	
LETHAMAKGA BUSINESS ENTERPRISE CC	RESPONDENT

JUDGMENT

Van der Schyff J

Introduction and Background

[1] This is an application for rescission of summary judgment granted against the applicant on 20 May 2021. The application is dated 16 August 2021 and was served on the respondent's attorneys of record on 17 September 2021. The court is not provided with an explanation for why the matter was only set down for hearing on 21 August 2023.

[2] The applicants submit that the summary judgment was granted 'in default in the absence and without the knowledge of the applicant.' The application is consequently brought in terms of rule 42 of the Uniform Rules of Court.

[3] It is common cause that the notice of set down pertaining to the summary judgment application was served by email on the applicant's attorneys of record. The first applicant contends that it was his understanding that papers would only be filed at his attorneys of record's address as indicated in the notice of intention to defend the action and in no other way.

[4] The first applicant explains that he was initially represented by Morare Thobejane Inc., who filed a notice of intention to defend. A summary judgment application was then served on his attorneys by hand. The summary judgment application was set down for hearing on 4 October 2018. Morare Thobejane Attorneys filed a notice of withdrawal of attorneys of record on 4 October 2018. The application for summary judgment was, however, not entertained. The respondent explains that this application was removed from the roll for non-compliance with the judge's directive.

[5] The application was again set down for hearing on 22 January 2019. On 17 January 2019, the applicant caused a notice to be filed to record that Mthembu Sibiya Attorneys entered the proceedings as his attorneys of record. The 'notice of entry as attorneys of record' indicates that 'the Defendants will use the mentioned address as address for service of documents for the proceedings'. The attorney's email address appears below the physical address, telephone and fax number.

[6] It is not evident why the summary judgment application did not proceed on 22 January 2019.

[7] The summary judgment application was again set down for hearing on 30 April 2019. The notice of set down was served by hand on the applicant's attorneys. The applicant filed an opposing affidavit on 26 April 2019. Again, the application for summary judgment did not proceed.

[8] The application was then set down for hearing on 13 January 2020. It is not apparent from the founding or answering affidavit why the application did not proceed on this date. From the answering affidavit, it is apparent that the summary judgment application was also set down for hearing on 28 April 2020 – but it was removed due to the Covid-19 pandemic. It was again set down for hearing on 10 September 2020 but was struck from the roll because the practice note did not comply with the judge's directive.

[9] The notice of set down for the proceedings of 20 May 2021, was then served on the applicant by email. The respondent contends that the applicant's attorneys of record consented to service by email. In substantiation of this averment, the respondent refers to a service affidavit wherein an attorney employed by the respondent's attorneys of record states the following under oath:

> 'On the 13th August 2020 our firm's messenger attempted to serve the Notice of Set Down for the 10th of September on the Defendant's Attorneys offices. He was told to serve the Notice of Set Down by email as the Defendant's Attorney was not going in to the office and was working from home. The Notice of Set Down was therefore served electronically.
>
> Due to the fact that the Defendant's Attorney has therefore consented to electronic service, the Notice of Set Down for the 20th of May 2021 was served electronically on the 9th of October 2020.'

[10] No confirmatory affidavit by the unnamed messenger is attached to the attorney's service affidavit.

The respondent's case

[11] The respondent raised several points *in limine*. The respondent avers that the application is based on hearsay, in that the applicant avers his attorneys of record were not aware of the hearing date, but he failed to attach a confirmatory affidavit to support this contention. The confirmatory affidavit was only attached to the replying affidavit. The respondent contends this should not be condoned because the applicant had to make out his case in the founding papers.

[12] The respondent also avers that the application for rescission is the wrong procedure. Since the applicant filed an affidavit opposing the application for summary judgment, it was not granted by default. The order cannot be rescinded. The respondent relies on *De Beer v ABSA Bank Ltd,*[1] where a Full Court of this Division found that rescission of a summary judgment cannot be claimed under Rule 42(1)(a) of the Uniform Rules of Court when neither a defendant nor his legal representative appeared at the hearing but had submitted an affidavit opposing summary judgment.

Discussion

[13] Rule 4A of the Uniform Rules of Court stipulates that the service of subsequent documents and notices, after the service of process as provided for in Rule 4(1)(a) in any proceedings, may be sent by facsimile or electronic mail to the addresses provided. The Rule contemplates that a litigant may, in terms of Rules 6(5)(b), 6(5)(d), 6(5)(i), 17(3), 19(3) and 34(8), furnish an address at which service may take place in one or more of the following:

i. by hand at the physical address provided;
ii. by registered post to the address provided; and
iii. by facsimile or electronic mail to the respective addresses provided.

[1] (25071/2012) [2016] ZAGPPHC 325.

[14] Rule 4A(3) provides that:

'Chapter III, Part 2 of the Electronic Communications and Transactions Act, 2002 (Act 25 of 2002) (the ECTA) is applicable to service by facsimile or electronic mail.'

[15] It is apposite to note that s 26 of the ECTA determines that an acknowledgement of receipt of a data message is not necessary to give legal effect to that message.

[16] Rule 4A corresponds with s 44(1)(a) of the Superior Courts Act, 10 of 2013. This section provides as follows:

> 'In any civil proceedings, any summons, writ, warrant, rule, order, notice, document or other process of a Superior Court, or any other communication which by any law, rule or agreement of parties is required or directed to be served or executed upon any person, who lived at the house or place of a boat or business of any person, in order that such person may be affected thereby, may be transmitted by facsimile, or by means of any other electronic medium, to the person who must serve or execute such process or communication.'

[17] By including a fax number and an email address in the notice of entry of attorneys of record, the defendant provided the e-mail address as an address where he would receive service of documents.

[18] The judge considering the summary judgment application, was aware of the fact that the notice of set down was served by email to the respondent's attorney of record. It can thus not be found that the judge was unaware of the position when he considered the summary judgment application.

[19] I am of the view that the issue at hand was definitively dealt with and decided on in *De Beer v ABSA Bank, supra.* Meyer J, as he then was, explained that where an opposing affidavit was filed in a summary judgment application, the mere fact that a defendant/respondent and his legal representative were absent when a summary

judgment application was heard, does not mean that the application was granted 'in the absence of the appellant' within the meaning of Rule 42.[2]

[20] The court considering the application for summary judgment was obligated to consider the opposing affidavit filed on the applicant's behalf in considering whether to grant summary judgment.[3] In *Morris v Autoquip (Pty) Ltd,*[4] Le Roux J said:

> 'What is more, a court is not entitled, on the authorities quoted, to ignore an affidavit submitted by a defendant in opposition to an application for summary judgment. Because of this fact it cannot, in my view, be said that the defendant is in default when he submitted an affidavit opposing summary judgment although ideally, he would have wished to have been represented by counsel. It may even be that council could have swayed the judge to make a different order had he appeared on behalf of the defendant, but this is not the test. There is no "default" in the sense in which the word is used in the *Katritsis* case. The matter differs *toto caelo* from that of a trial action. I therefore hold that there was no default and that the application brought for a rescission of the judgment is the wrong procedure.'

[21] In *De Beer*, Meyer JA concluded:

> 'It can also, in my view, not be said that summary judgment was granted in the absence of a defendant when he submitted an affidavit opposing summary judgment. In this instance the appellant opposed the summary judgment application by way of an affidavit submitted to the court on the merits of the matter. The summary judgment granted against the defendant is consequently final and *res judicata*. The application brought for the rescission of the summary judgment is, therefore, the wrong procedure. My conclusion would have been

[2] *Supra*, para [12].

[3] *Ibid*.

[4] 1985 (4) SA 398 (W) 400.

different had the appellant not filed an affidavit opposing the summary judgment application. In that event he could have applied for the rescission of the judgment under rule 42, but he would have been limited to the grounds stated in sub-rule (1).'

[22] *In casu*, the applicants have already, through its opposing affidavit, placed the facts they wanted the court to consider before the court considering the summary judgment application. In circumstances where the notice of set down was served by email to the address provided by the current applicant's then-attorneys of record, Rule 42 does not find application. This court cannot sit as a court of appeal. The application stands to be dismissed.

[23] The applicants also brought the application in terms of the common law. On the papers as it stands, no case is made out for rescission in terms of the common law. The applicants do not disclose a *bona fide* defence.

ORDER

In the result, the following order is granted:

1. The application is dismissed with costs.

_____

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant:	Adv. O. Lekete
Instructed by:	KBT INCORPORATED
For the respondent:	Adv. F. F. Müller
Instructed by:	HACK, STUPEL AND ROSS ATTORNEYS
Date of the hearing:	23 August 2023
Date of judgment:	29 August 2023