

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO: 953/2021

In the matter between:

BLUE CRANE ROUTE MUNICIPALITY

Respondent/Plaintiff

and

SOUTH AFRICAN NATIONAL PARKS BOARD

Applicant/Defendant

JUDGMENT

BLOEM J:

1. On 5 April 2021 the sheriff served a summons on the South African National Parks Board, the defendant in the action and the applicant herein, wherein the Blue Crane Route Municipality, the plaintiff in the action and the respondent herein, claimed an order that the defendant should pay to it the amount of R4 198 191.09, interest thereon and costs. The defendant did not deliver a notice of intention to defend. On 24 August 2021 this court granted an order by default that the defendant should pay to the plaintiff the above amount claimed together with interest and costs (the order). On 27 September 2021 the defendant launched this application for an order that the default judgment be set aside. Although this is an application, I shall refer to the parties as they have been cited in the action.

2. In its particulars of claim the plaintiff alleged that the defendant is the owner of two farms, farm 410 and farm 244 (the farms or the property), which are within its area of jurisdiction. It alleged that, by virtue of the provisions of the Local Government:

Municipal Property Rates Act¹ (the Municipal Property Rates Act), it levied rates on the property, that the defendant failed to pay those rates in the sum of R3 365 460.59 in respect of farm 410 and R832 730.50 in respect of farm 244, the total being R4 198 191.09. Since the defendant did not deliver a notice of intention to defend, the plaintiff set the matter down for and obtained default judgment on 24 August 2021.

3. The defendant seeks to have the default judgment rescinded on the basis of rule 42(1)(a), alternatively, rule 31(2)(b). Rule 42 provides for the variation and rescission of orders. Rule 42(1)(a) reads 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 judgment erroneously sought or erroneously granted in the absence of any party affected thereby...”

4. According to the affidavit which was filed in support of the application for the rescission of the order, one of the defendant’s defences seems to be based on section 17(1)(e) of the Municipal Property Rates Act. Section 17 makes the levying of rates on certain property impermissible. Section 17(1)(e) provides that a municipality may not levy a rate:

“(e) on those parts of a special nature reserve, national park or nature reserve within the meaning of the National Environmental Management: Protected Areas Act, 2003 or of a national botanical garden within the meaning of the National Environmental Management: Biodiversity Act, 2004 which are not developed or used for commercial, business, agricultural or residential purposes.”

5. The defendant contends that the plaintiff does not have the power to levy a rate on the entire property, which forms part of a national park, but only those parts which are developed or used for commercial, business, agricultural or residential purposes. The defendant alleged that the property has housing structures which are being used

¹ Local Government: Municipal Property Rates Act, 2004 (Act 6 of 2004).

for storage purposes and housing of the defendant's staff working in the area. Those structures were not developed by the defendant, but were "*inherited*" when it acquired the property in 2001 and 2003 respectively. The defendant alleges that the property is not used for commercial, business, agricultural or residential purposes "*in the context of a national park*" or "*in the context of the Municipal Property Rates Act*". Despite the structures being used to house its staff, on the defendant's own version, it nevertheless denies that the property is used for residential purposes.

6. It is the defendant's case that the plaintiff is not entitled to the judgment because the rates that it levied on the property is based not only on those parts of the property which are found to be used for commercial, business, agricultural or residential purposes, but that the rate is levied on the entire property. By doing so, the plaintiff misconceived its powers, it was submitted. It was also submitted that had the court been aware that the plaintiff misconceived its powers when it granted the order, it would not have granted it. It was accordingly submitted that the order was erroneously granted.

7. It is apparent from the above, that the defendant does not attack the procedure that was followed when the plaintiff obtained the order. The case that the plaintiff set out in its particulars of claim is that it levied a rate on the property in terms of the Municipal Property Rates Act, that the defendant failed to pay the levied rate and that it was entitled to judgment in the amount claimed. The defence now raised by the defendant (which was not before the court when the order was granted) is that the plaintiff was not entitled to levy the rate in the amount claimed.

8. A judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge, who granted the default judgment, was unaware.² That is the case even where a defendant wanted to defend an action but did not do so because an application for summary judgment was brought to the attention of such defendant's attorney of record but not the instructing

² *Lodhi 2 Properties Investments CC and another v Bondev Development (Pty) Ltd* 2007 (6) SA 87 (SCA) at 94E-F.

attorney. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*³ both attorneys formed part of the same firm, but were stationed in Cape Town and Bellville respectively.

9. The fact that the present defendant may not have been in wilful default of the delivery of a notice of intention to defend cannot transform an order to which the plaintiff was procedurally entitled into an erroneous order. In the circumstances, the defendant is not entitled to the rescission of the order on the basis of rule 42(1)(a).

10. I now consider whether or not the order should be rescinded on the basis of rule 31(2)(b). That subrule reads as follows:

“(a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.

(b) A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.”

11. Rule 31(2)(b) gives the court a discretion to set aside a default judgment upon good cause shown. In order to show good cause an applicant for rescission of a default judgment should: (i) give a reasonable explanation for his or her default; (ii) make a *bona fide* application; and (iii) show that he or she has a *bona fide* defence to the plaintiff's claim.⁴

³ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at paras 9 and 10.

⁴ *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300E-301C.

12. All the facts relevant to each of the above factors must be balanced in the exercise of the court's discretion. A slight delay and a good explanation therefor may help to compensate for prospects of success which are not strong, or an apparently good defence may compensate for a poor explanation.⁵ On behalf of the plaintiff it was submitted that the defendant has failed to make out a case for rescission of the order in terms of rule 31(2)(b).

13. Regarding the explanation for the defendant's failure to deliver a notice of intention to defend, the facts are that the defendant's legal advisor, Fahlaza Monaledi, requested the plaintiff's attorney, Zanele George, to communicate with the plaintiff to hold the litigation in abeyance, the summons having been served on the defendant on 6 April 2021. In a meeting that was held on 30 April 2021, Ms. George informed those in attendance on behalf of the defendant, including Ms. Monaledi, that she will take instructions from the plaintiff to proceed with the litigation "*if they do not get any feedback from SanParks*". On 13 May 2021 Ms. George informed Ms. Monaledi that the plaintiff had agreed not to proceed with the action until 7 June 2021.

14. On 7 June 2021 Ms. Monaledi informed Ms. George that the defendant was unable to make a financial offer to the plaintiff and requested the plaintiff to hold the litigation in abeyance "*until Government provide a solution to the matter*". In her email of 8 June 2021 Ms. George informed Ms. Monaledi that her instructions were to proceed with the litigation, but that the plaintiff was prepared to further delay the litigation only upon receipt of a proposed initial payment. There was no response to that email from the defendant or Ms. Monaledi. Although the application for default judgment was issued on 15 June 2021, it was only on 12 August 2021 that it was set down for hearing on 24 August 2021. Ms. Monaledi stated that she became aware on 6 September 2021, when Ms. George telephoned her, that default judgment had been granted against the defendant on 24 August 2021. She instructed the defendant's attorneys to institute the present application, which was done on 27 September 2021, three weeks after 6 September 2021.

⁵ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C – F and *Zealand v Milborough* 1991 (4) SA 836 (SECLD) at 837F-838E.

15. In her affidavit Ms. Monaledi alleged that the defendant did not expect the plaintiff to take default judgment when “*the summons [was the] subject of discussion and [there was] exchange of correspondence for more than two months*”. It is correct that the parties corresponded for about two months until 7 June 2021. After Ms. George’s email of 8 June 2021 there could have been no doubt that, insofar as the plaintiff was concerned, the time for correspondence was over unless the plaintiff received the proposed initial payment. There is no basis for the defendant’s contention that it laboured under the belief that, if the plaintiff was going to continue with the litigation, it would alert the defendant that it would apply for default judgment. In my view, in the light of the email of 8 June 2021, there were no grounds upon which such a belief could have been based.

16. The defendant’s explanation for its inactivity after 8 June 2021 and its failure to deliver a notice of intention to defend after it was informed on 8 June 2021 that the plaintiff would proceed with the litigation is poor, almost non-existent.

17. An application for rescission of a judgment cannot be dismissed merely because an applicant has failed to give a reasonable or no explanation for the delay, because the defendant might have put up a *bona fide* defence with good prospects of success. Such a defence might make up for the lack of explanation for the delay. The defendant alleges that it has two defences. The first is that the plaintiff misconceived its powers to levy a rate on the entire property, when it is entitled to do so only on those parts which are developed or used for commercial, business, agricultural or residential purposes. Secondly, it alleges that, because the plaintiff failed to comply with the provisions of the Intergovernmental Relations Framework Act,⁶ it was prohibited from instituting the present legal proceedings against it.

18. It is common cause that the plaintiff has levied rates in respect of the entire property. The issue to be determined is whether the plaintiff was permitted to do so or whether it could levy rates only on those parts of the property which are used for commercial, business or residential purposes. Mr. Buchanan, counsel for the plaintiff, submitted that the plaintiff was entitled to levy a rate in respect of the two farms which

⁶ Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005).

form part of the national park. Because it is common cause that there are houses on those farms which are used to accommodate the defendant's staff, those farms are used for residential purposes. The exclusionary effect of section 17(1)(e) does therefore not apply to the farms. Mr. Beyleveld submitted that, if it is found that the houses on the property are used for residential purposes, the plaintiff would be entitled to levy a rate only in respect of the land on which the houses are built. He also submitted that, insofar as visitors to the property pay an entrance fee and if it is found that the property is therefore used for commercial or business purposes, the plaintiff would be entitled to levy a rate only in respect of those parts of the property that are being used for such purposes, for example the land on which restaurants and hotels are built or the roads that are used by visitors.

19. The power of a municipality to levy a rate on property in its area is derived from section 2 of the Municipal Property Rates Act. That section reads as follows:

“Power to levy rates

- (1) A metropolitan or local municipality may levy a rate on property in its area.
- (2)
- (3) A municipality must exercise its power to levy a rate on property subject to-
 - (a) section 229 and any other applicable provisions of the Constitution;
 - (b) the provisions of this Act; and
 - (c) the rates policy it must adopt in terms of section 3.”

20. As it apparent from section 2(3)(b), the power of a municipality to levy a rate is subject to the provisions of the Municipal Property Rates Act. Section 7(1) provides that the power of a municipality to levy rates is limited to rateable property in its area. Rateable property is defined in section 1 to mean “*property on which a municipality may in terms of section 2 levy a rate, excluding property fully excluded from the levying of rates in terms of section 17*”.

21. It appears to me that section 17(1)(e) of the Municipal Property Rates Act gives the plaintiff the power to levy rates only on those parts of the property which are used for commercial, business or residential purposes. The defendant's interpretation of that

subsection seems to me to be reasonable, when applied to the facts contained in the parties' affidavits. That being the case, it appears that the defendant has a reasonably good defence to the plaintiff's claim, because if the plaintiff is permitted to levy a rate on only those parts which are found to be used for commercial, business or residential purposes, as submitted by Mr. Beyleveld, the plaintiff would be entitled to a much lesser amount than the R4 198 191.09 in respect whereof it obtained default judgment on 24 August 2021.

22. When regard is had to the fact that the defendant has a very poor explanation for its failure to enter an appearance to defend, a reasonably good defence and that it cannot be said that the application is not *bona fide*, it would not be in the interest of justice to deny the defendant the opportunity to place its defence before the court. I am of the view that, on the basis of rule 31(2)(b), the defendant has succeeded in making out a case for the rescission of the default judgment that was granted against it on 24 August 2021. It is accordingly unnecessary to deal with the defendant's second defence.

23. Had it not been for the defendant's failure to enter an appearance to defend, this application would not have been necessary. It cannot be said that the plaintiff's opposition to the application was unreasonable. In my view, despite the fact that the defendant was successful, the facts of this case justify an order that it should pay the costs of this application.

24. Section 17 makes the levying of rates on certain property impermissible. Section 17(1)(e) provides that a municipality may not levy a rate:

“(e) on those parts of a special nature reserve, national park or nature reserve within the meaning of the National Environmental Management: Protected Areas Act, 2003 or of a national botanical garden within the meaning of the National Environmental Management: Biodiversity Act, 2004 which are not developed or used for commercial, business, agricultural or residential purposes.”

25. In the result, it is ordered that:

1. The default judgment granted on 24 August 2021 be and is hereby rescinded.
2. The defendant shall deliver a notice of its intention to defend within five days from the date of this order.
3. The defendant shall deliver its plea within ten days from the date of delivery of the notice referred to in paragraph 2 above.
4. The defendant shall pay the costs of the application for the rescission of the judgment that was granted on 24 August 2021.

G.H. Bloem

JUDGE OF THE HIGH COURT

For the applicant/defendant: Mr. A. Beyleveld SC, instructed by Jooste and Adams Inc, Pretoria and Whitesides Attorneys, Grahamstown.

For the respondent/plaintiff: Mr. R.G. Buchanan SC, instructed by Smith Tabata Attorneys, East London and Cloete and Co, Grahamstown.

Date of hearing: 26 May 2022.

Date of delivery of judgment: 31 May 2022.