IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case №: 70343/2020

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

Signature

08/11/2021
Date

In the matter between:

ADV HUMBULANI ROBERT LIPHOSA Applicant

and

FIRST RAND BANK LTD t/a WESTBANK Respondent

JUDGMENT

KOOVERJIE AJ:

[1] The applicant instituted this rescission application in respect of the

summary judgment granted by the court on 4 April 2021. The rescission application was in terms of rule 42(1)(a) of the High Court Rules and/or the common law.

[2] The nub of the applicant's case is that the court granted summary judgment in favour of the respondent in circumstances where he was not present and the fact that the court failed to give consideration to his affidavit resisting summary judgment.

[3] The salient background to the matter is that in September 2019, the respondent issued summons against the applicant for the cancellation of the agreement of a sale of a motor vehicle. The applicant opposed the action proceedings by filing a notice of intention to defend. Shortly thereafter, the respondent instituted summary judgment proceedings. Such proceedings were set down for 18 February 2021, but did not proceed.

[4] At the time, the applicant's affidavit resisting summary judgment was before the court. The matter was once again enrolled on 14 April 2021 for the hearing and was conducted virtually. The applicant claimed that he was not aware that when the matter was to be heard, causing it to be heard in his absence and judgment granted against him.

[5] The applicant proffers an explanation as to why he was absent. On the said day, 14 April 2021 the applicant waited for a notification of the details in which court he was to appear in, and/or an invitation to the

virtual proceedings. However, he never received such notice. The applicant explained that usually he would receive emails informing him of the date of court proceedings and if they are held virtually. He could therefore not be faulted for failing to attend court. He also advised that he assessed the Pretoria Bar website. He was under the impression that it was going to be an open court hearing.

[6] The applicant contends that the judgment was granted by default, hence the judgment was erroneously sought and erroneously granted by the court. It was submitted that the court could not have granted summary judgment in that he had filed an affidavit resisting summary judgment, which the court was required to take into consideration.

[7] Further grounds for rescission were that the court could not have granted summary judgment where special points of law were raised and that the rescission application is *bona fide* and that the applicant has a *bona fide* defence.

[8] The applicant submits that if he was present, the court would have considered the matter differently as he would have had the opportunity to make submissions in his defence.

[9] Apart from the ground that judgment was granted in his absence, the applicant submitted that a court could not have granted summary judgment in that the applicant raised points of law, particularly special

pleas of jurisdiction, non-compliance with the National Credit Act as well as rule 18 of the High Court Rules.

[10] On the other hand, the respondent argued that there is no merit in this application. More particularly, it was contended that: the applicant's lax attitude already caused a delay in the proceedings. At the first hearing, a postponement was granted at his request. The applicant could have made contact with his opponent to ascertain the details of the hearing or his instructing attorney.

[11] The points *in limine* raised in the summary judgment application had no merit. Insofar as compliance with the National Credit Act is concerned, the respondent maintains that the section 129 notice was in fact delivered to the defendant (being the plaintiff) on 22 August 2019.

[12] The applicant relied on rule 42(1)(a) which provides 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."*

[13] This court had regard to the authority of **Hollandia Reinasance Co. Ltd**

v Nedcor Bank Ltd 1993 (3) SA 574 W at 576 G – H, relied upon by the applicant, contending that where there is an arguable point of law, summary judgment is not the procedure to follow. This matter is authority for proposition that questions of law are raised, they should be raised in an exception. The **Tesven**[1] matter reinforces the proposition that the court has a discretion to refuse summary judgment in certain cases, particularly if the issues raised were bad in law. On the understanding of the dispute between the parties, I find that the aforesaid authorities do not assist the applicant and for the reasons set out below.

[14] The respondent in argument, submitted that the premise upon which the applicant has based his rescission application is incorrect. The judgment was not erroneously granted. The applicant has failed to establish the jurisdictional factors namely that: no case was made out, there was either an irregularity in the proceedings, a mistake was made, the court was not legally competent to have granted summary judgment or the court at the time of granting the summary judgement was unaware of certain facts that it should have been made aware of.

[15] The applicant was well aware of the hearing date of his summary judgment application. He was served with the notice of set down and was invited to Caselines. In any event the applicant, a party to the proceedings thus *dominus litis* was required to make the necessary

[1] Tesven and Another v South African Bank of Athens 2000(1) SA 268 SCA

enquiries from the Registrar as well. It was not the respondent's responsibility even if the respondent set the matter down. Consequently the ground that the order was granted in his absence is not a justified ground.

[16] The applicant erred in drawing the conclusion that the court failed to consider his response as well as the legal points raised. This assumption that the court granted the judgment by default has no merit.

[17] The applicant could only have drawn such conclusions if he had the benefit of the court's reasons. It would have been procedurally proper for the applicant to have requested reasons from the said court. Only upon receipt of the court's reasons, could one evaluate whether the court failed to consider the respondent's defence.

[18] The rules are clear. A court may only grant summary judgment if a case has been made on the part of the applicant. The court at the time was in possession of the applicant's affidavit and was judicially required to consider same.

[19] This court has a discretion to grant rescission. Generally the fact that this application is brought under rule 42(1)(a) does not mean that it cannot be entertained under rule 31(2)(b), or common law, provided jurisdictional factors are met.

[20] In these circumstances, rescission in terms of rule 31(2)(b) is not applicable as judgment was not granted in circumstances in which the defendant did not deliver a notice of intention to defend, or is in default of a delivery of a plea.[2]

[21] The purpose of rule 42 is to correct expeditiously an obviously wrong judgment or order.[3] It is common cause that the jurisdictional factor relied upon by the applicant was:

> "*(a) an order or judgment erroneously granted or erroneously granted in the absence of any party affected thereby."*

[22] As alluded to above, it must be emphasized that the court is not in a position to determine if the judgment was granted in "*error*" as it does not have the reasons of that court. Simply put, whether there was an irregularity in the proceedings or whether a mistake was made or the fact that the court was not aware of certain facts that it should have been aware of.

[23] In light of the analysis above, I find no basis for the rescission of the summary judgment.

[24] The applicant was required to demonstrate in what way the judgment

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2 Louis Joss Motors (Pty) Ltd v Rholm 1971 (3) SA 452 T at 454 I - G
3 Bakhoven Ltd v GJ Haves (Pty) Ltd 1992 (2) SA 466 E at 471 E

was erroneously granted. There is nothing before this court which shows that the court failed to consider his answering affidavit and consider his defences. It is trite that one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a *bona fide* defence.[4]

[25] The following order is made:

(1) The application for rescission is dismissed with costs.

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KOOVERJIE A.J.
JUDGE FOR THE HIGH COURT

Date of hearing: 18 October 2021
Date of judgment: 08 November 2021
Attorney for applicant: Kunene N Attorneys
Counsel for applicant: Adv HR Liphosa

Attorney for respondent: Bezuidenhout Van Zyl & Associates Inc.
Counsel for respondent: Adv I Oschman

[4] Maharaj v Barclays National Bank Ltd 1976(1) SA 418 A at 423 F - G