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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: NO
Of Interest to other Judges: NO
Circulate to Magistrates: NO
CASE NO: 524/2020

In the matter between:

JACOBUS FREDERIK DE BEER N.O. Applicant
[In his capacity as Executor in the Estate
of the Late Elizabeth Jacoba Bekker,
Estate No. 744[…]]

And

EURICH RUWAYNE SMITH N.O. 1st Respondent

EUGENE JANUARIE N.O.

ELZANA LOURENS N.O.
[In their capacities as Trustees in the
Insolvent Estate of the Phillipus Andries
Olivier as well as of Olivier & Ackerman Partnership]

ELRICH RUWAYNE SMITH N.O. 2nd Respondent

DISLHAD ISMAIL N.O.
[In their capacities as Trustees in the

Insolvent Estate of Corne Ackerman, ID No: 7[…]]

JOHANNA JACOBA LOURENS	3rd Respondent
ELIZABETH JACOBA PRETORIUS	4th Respondent
LIZETTE VAN TONDER (néé Pretorius)	5th Respondent
ELIZABETH JACOLINE DE WET	6th Respondent
CORNELA (CORRIE) S.A. BEKKER	7th Respondent
S-BRO MEKELAARS/FINANSIëLE ADVISEURS (PTY) LTD	8th Respondent
THE MASTER OF THE FREE STATE HIGH COURT	9th Respondent
NICOLAAS MICHAEL SMITH N.O.	10th Respondent

HEARD ON: 23 November 2023

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: 09 May 2024

Introduction

[1] This is an application for the rescission of a default judgment and simultaneously the opposition of a Rule 46A application. For the sake of convenience (as also suggested in the applicant's founding affidavit[1]) the parties are

[1] Paragraph 3.4.

referred to as in the summons with the necessary modifications. The 1st respondents in this application are the 1st plaintiffs in the main application.

[2] On 21 September 2024, the court granted an order by agreement between the applicant (as the first interested party) and the 1st and 2nd respondents (as the 1st plaintiffs) that:

> *"1.1 The application in terms of Rule 46A is postponed to 23 November 2023 at 09h30 to the opposed motion court roll;*
>
> *1.2 The First Interested Party shall issue and serve an application for rescission of the default judgment that was granted against the Second and Third Defendants on 15 December 2022 by no later than close of business on Wednesday, 4 October 2023;*
>
> *1.3 The First Plaintiffs shall file their answering affidavit in the application for the rescission of judgment, if any, on or before 25 October 2023.*
>
> *1.4 The First Interested Party shall file its replying affidavit in the application to rescind the default judgment on or before 8 November 2023.*
>
> *1.5 The application for the rescission of the default judgment shall also be set down to be heard on 23 November 2023 at 09h30 on the opposed motion court roll.*
>
> *1.6 The First Interested Party shall file his answering affidavit in the Rule 46A application, if any, by close of business on Wednesday, 4 October 2023.*
>
> *1.7 The First Plaintiff's replying affidavit in the Rule 46A application shall be filed on or before 18 October 2023.*
>
> *1.8 the costs of the postponement of the Rule 46A application should*

stand over for later adjudication."

[3] On 15 December 2022, the court granted a default judgment against the second and third defendants for the payment of the amounts of R370 467.29 and R6 305 515.29 in terms of prayers 2 and 3 of the particulars of claim. It is this default judgment that the applicant wishes to rescind.

Brief background

[4] The first plaintiffs, as trustees of the insolvent estates of Olivier and the Olivier and Ackerman Partnership, obtained a default judgment on 15 December 2022 against Corné Ackerman N.O. and Gertina Susanna Rautenbach N.O. (being the second and third defendants in the main action) in their representative capacities as executors in the estate of the late Elizabeth Jacoba Bekker ("the Bekker Estate"). Elizabeth Jacoba Bekker died on 20 November 2023. These executors caused a bank account to be opened at Absa Bank in the name of that estate, ("the Bekker estate"), on 05 January 2004. They had access to and control over this account.

[5] Corné Ackerman practiced as an attorney in partnership with Phllipus Andries Olivier in the name and style of Olivier and Ackerman Attorneys from 04 January 2010 until the dissolution of the partnership on 26 July 2019. The partnership administered the Bekker estate through Ackerman who was the executor of the estate and the partner in the attorneys' firm.

[6] In the period between 14 November 2014 to 06 June 2019, an amount of R 6 305 515.22 was transferred from the trust account of the Olivier and Ackerman trust account to the Bekker Estate account. Between January 2016 to July 2019, a further amount of R 370 467.29 was paid to the creditors of the Bekker Estate out of the attorneys' trust account. At the time these payments were made, the Bekker Estate account did not have such an amount of money held in the trust account for its benefit. The executors knew that the Bekker Estate was neither entitled to receive the money from the attorneys' trust account nor to have payments made to its creditors with money from that trust account.

[7] A combined summons was issued on 7 February 2020 for the recovery of these monies. Copies of the summons were served on the 2nd defendant at his residence on 2 June 2022 and the third defendant on 1 June 2022 at her appointed attorney's firm. The default judgment was granted on 15 December 2022. An application to declare immovable property executable in terms of Rule 46A followed and was served, amongst others, on the applicant as the first interested party,

[8] The applicant was appointed as the executor of the Bekker Estate and letters of executorship were issued by the Master on 23 March 2023. On 4 October 2023, he filed a notice of substitution and replaced the 2nd and 3rd respondents as executors of the Bekker Estate.

The application for the rescission of the default judgment

[9] The applicant stated in the founding affidavit that he was approached by the 8th and 9th defendants for assistance whereupon he proceeded to apply for appointment as an executor. The estate file was opened on 03 March 2021 and the letters of appointment were issued on 23 March 2023. He has to date, save for peripheral files, been unable to secure the original file relating to the Bekker Estate from the offices of the Oliver and Ackerman attorneys. The attorneys' firm has since been closed down and both partners sequestrated. The applicant neither approached nor consulted the third defendant as she had no interest in the matter due to her age and mental state. According to the applicant, it was quite apparent that the third defendant never played any material role in the administration of the Bekker Estate.

[10] The applicant took issue with the respondents taking judgment against an estate that was *"effectively defenceless and without an Executor"* while the respondents' attorney was aware that the third defendant was no longer of sound mind and could not comply with her statutory obligations. A replacement executor was, at the time, not yet appointed.[2] The applicant was of the view that once the 2nd defendant was sequestrated, he would be removed from office by determination of

[2] Paragraph 9.9 of the founding affidavit.

statute.[3] Consequently, the judgment that was granted by default, was a nullity in its entirety.[4]

[11] The applicant required an opportunity to investigate whether the second defendant represented the estate in whatever action he was busy with as it was, in his view, clear that the second defendant was busy on a frolic of his own. The applicant had neither evidence nor consulted with witnesses and auditors.[5] The erstwhile clients that were affected by the dishonest conduct of the 2nd defendant, had since filed claims with the Legal Practitioners Fidelity Fund for reimbursement of the pecuniary loss they suffered due to the theft of the trust monies that were administered by the 2nd defendant's attorneys' firm. These developments had a material effect on the nature of the claims contained in the summons[6] in that the claims had either changed or settled.[7]

[12] The Rescission application is brought in terms of Uniform Rule 42(1)(a), alternatively, Rule 32(1)(b), alternatively section 173 of the Constitution, and alternatively, the common law.[8] Section 31(2)(b) provides that a defendant may, within 20 days after acquiring knowledge of such judgment, apply to the 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.

[13] Section 42(1) provides that:

> (1) 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;

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[3] Paragraph 5.6 of the founding affidavit.
[4] Paragraph 18.I of the founding affidavit.
[5] Paragraph 9.4 of the founding affidavit.
[6] Paragraph 9.5 of the founding affidavit.
[7] Paragraph 9.7 of the particulars of claim.
[8] Paragraph 4 of the applicant's heads of argument.

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

[14] Section 173 of the constitution states that the Constitutional Court, the Supreme Court of Appeal, and the High Court of South Africa each have the inherent power to protect and regulate their process, and to develop the common law, taking into account the interests of justice. I agree with the submission of the respondents' counsel that section 173 of the Constitution is not applicable in the present circumstances and any reliance thereon by the applicant is misplaced.

[15] In his heads of argument and oral address, the applicant contended that he had a good cause and a triable case with prima facie prospects of success in the main action based on the following:

15.1 He required an opportunity to investigate the capacity in which the 2nd defendant acted when he misappropriated the funds;

15.2 There was no amendment of the summons as the affected clients of the attorney's firm had filed their claims with the Legal Practice Fidelity Fund and these claims had either changed or been settled. The claims from these erstwhile clients were ceded to the Fidelity Fund and the first plaintiffs lost their locus standi as a result.

15.3 The default judgment was obtained against an unrepresented estate that had no executor.

[16] To succeed, an applicant for the rescission of a judgment taken against him by default must show good or sufficient cause. This generally entails that the

applicant must:[9]

(i) give a reasonable and acceptable explanation for his default;

(ii) show that his application is made bona fide; and

(iii) show that on the merits he has a bona fide defence which prima facie carries some prospect of success.

[17] On paper, it is clear that the applicant has no defence. The applicant seeks an opportunity to investigate the merits to ascertain whether the respondents have a claim or cause of action against the insolvent estate. This approach militates against the applicable legal principles. Rule 42(1), in which the applicant seeks solace in the alternative, does not come to his assistance. I was referred to a passage *in Lodhi 2 Properties Investments* CC *and Another v Bondev (Pty) Ltd*[10] which I found apt and quote here in full:

> *"[27] Similarly, in a case where a plaintiff* is *procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of* a *subsequently disclosed defence. A Court which grants* a *judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of* a *defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."*

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[9] RS 22, 2023, DI Rule 42-11; Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA I (SCA) at para 7.
[10] 2007 (6) SA 87 (SCA).

[18] The applicant's defences are all based on speculation as he had no evidence at all to substantiate his allegations. He speculated that the claims of the erstwhile attorneys' clients had been settled or honoured by the Legal Practice Fidelity Fund and that the latter had received cessions from such claimants.[11] This cession of claims affected the locus standi of the claimants in the summons.[12] He had no proof of the settlement of such claims as he stated that *"Although I have not had sight of these claims, I verily believe that these claims were honoured alternatively have been honoured."*[13]

[19] He contended that the judgment was a nullity as the plaintiffs did not wait for his appointment, but proceeded to obtain a default judgment against the estate that had no captain to steer the ship.[14] This approach is without merit as the third defendant was never removed as an executor of the deceased estate and remained in that position until her death on 13 June 2023. The respondents contended that the removal of the second defendant as an executor of all deceased estates by the court order of 12 March 2020, only came to their attention when it was disclosed by the applicant in his replying affidavit. The 2nd defendant's sequestration did not disqualify him from acting as an executor of a deceased estate. The application for the rescission of judgment stands to be dismissed.

The Rule 46A application

[20] Uniform Rule 46(1) provides that:

> (1)*(a)* Subject to the provisions of rule 46A, no writ of execution against the immovable property of any judgment debtor shall be issued unless –
>
> > (i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ; or

[11] Paragraph 11.2 of the founding affidavit.
[12] Paragraph 11.3 of the founding affidavit.
[13] Paragraph 11.2 of the founding affidavit.
[14] Paragraph 18.1 of the founding affidavit.

(ii) such immovable property has been declared to be specially executable by the court or where judgment is granted by the registrar under rule 31(5).

[21] Rule 46 deals with the execution against immovable property other than the residential immovable property of a judgment debtor, the underlying principle is that save where the immovable property has been specially declared executable, execution shall not be issued against the immovable property until the movable property has been excussed and, it appears that the movable property is insufficient to satisfy the writ. Rule 46A applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. Rule 46 does not lay down the procedure to be followed to have the immovable property of a judgment debtor (immovable property other than the residential immovable property or primary residence of the judgment debtor) declared to be specially executable in terms of this subrule. It is submitted that the court should, in the application of this subrule, consider all legally relevant factors, and be satisfied that good cause exists for making the order.

[22] The first plaintiffs sought, in their notice of motion, condonation for their failure to execute against the movables that might still vest in the Bekker Estate as the deceased had died on 20 November 2003. Movable assets consisting of old motor vehicles, a display cabinet, furniture, and jewellery with a value of R165 670.00 (estimated as of 14 April 2010) vested in the estate. It was established at an insolvency inquiry in March 2023 that no one knew the whereabouts of the movable assets.[15] Even if those assets were to be recovered, their value would not be sufficient to settle the default judgment debt.[16]

[24] The first plaintiffs pointed out that the provisions of Rule 46A were not applicable in this case as the judgment debtor was a deceased estate and the individuals cited as the Second Interested Parties, did not fall within the purview of Rule 46A. The latter were given notice of the application in terms of Rule 46A(3)(b) as they might be affected by the sale of the immovable property. The first interested

[15] Para 14.3.2 of the Founding Affidavit.
[16] Para 14.3.5 of the Founding Affidavit.

party did not dispute the above and raised no defence to the executability of the property save for the argument that, if the application for the rescission of the default judgment failed, there must be compliance with Rule 46A, which was not done. In the circumstances, the applicant cannot succeed with the opposition of the application, and the relief sought is denied.

[25] As regards costs, it is trite that the successful party is entitled to the costs.

[26] In the premises, I make the following order:

Order:

1. The application for the rescission of judgment is dismissed with costs.

2. The first plaintiff's failure to execute against the movables that may still vest in the Deceased Estate: Late EJ Bekker (ID: 1[…]); with Estate Number 744[…], who died on 20 November 2003, is condoned;

3. Pursuant to the Default Judgment granted on 15 December 2022 against the second and the third defendants in favour of the first plaintiff, the following immovable properties that vest in the estate referred to in paragraph 2 above, are declared executable in favour of the first plaintiff:

3.1 Eden Small Holding No. 41 [also known as Agricultural Holding Danzig No.41], district Bethlehem, Free State Province; and

3.2 Portion 0 (Remaining Extent) of Erf No. 4[…], Bethlehem, Free State Province, and

3.3 1st interested party and 2nd defendant to pay the costs of the Rule 46A application which shall include the costs of the postponement of 21 September 2023.

MHLAMBI, J

On behalf of Plaintiff:	Adv. N. Snellenburg SC, Adv. JG Gilliland
Instructed by:	Azar & Havenga INC 65 Park Road Willows Bloemfontein
On behalf of the Defendant:	Adv. Boonzaaier
Instructed by:	Callis Attorneys 12 Milner Road Bloemfontein