

SOUTH AFRICA / JUDGMENT

Alexandra Forbes v Cingo (A94/2022)

[2023] ZAGPPHC 1833 (24 October 2023)

[2023] ZAGPPHC 1833**COURT**

North Gauteng High Court, Pretoria

BEFORE

Botsi-Thulare, Collis, Lenyai

CASE / FILE NUMBER

A94/2022

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****REPUBLIC****OF SOUTH AFRICA****Case****No: A94/2022****1.****REPORTABLE: YES / NO****2.****OF INTEREST TO OTHER JUDGES: YES / NO****3.****REVISED.****DATE:**

24/10/2023

In

the matter between:

ALEXANDRA

FORBES Appellant

and

LUVI

CINGO Respondent

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 24 October 2023

JUDGMENT

BOTSI-THULARE AJ (COLLIS J AND LENYAI J CONCURRING)

Introduction

[1] This is an appeal before the full Court, in which leave to appeal was granted by the Supreme Court of Appeal against rescission of a default judgement granted by Mkansi AJ, as well as the order effected on the 14 June 2021. The appellant is Alexandra Forbes Insurance Company Limited, a company duly registered as such in terms of company laws of the Republic of South Africa. The respondent is Mr. Luvi Cingo, a male in his capacity.

Factual

background

[2] On 19 August 2020, the respondent lodged a claim for damages with the appellant for an amount of R728,816,00. the claim resulted from a motor vehicle collision that occurred on 22 May 2020. The claim for damages was repudiated by the appellant on the following grounds:

2.1 the respondent failed to give a complete and truthful information; and

2.2 the respondent failed to take reasonable care to prevent loss, damage and the accident.

[3] Dissatisfied with the outcome, the respondent directed a complaint to the Ombudsman for Short-Term Insurance (OSTI), which then finalised the investigation and confirmed the applicant's repudiation of the claim.

- [5] On 29 January 2021, the appellant became aware of the default judgement. Dissatisfied by the default judgement the appellant brought a rescission application wherein it sought to set aside the order handed down by Tlhapi J. The rescission application was brought in terms of rule 31(2)(d) of the Uniform Rules of Court, however, the appellant (the applicant in the court a quo) amended its notice of motion to bring the rescission in terms of rule 31(2)(b) and it was subsequently granted.
- [6] The appellant argued that the summons never reached their office as a result they failed to defend the claim. The respondent opposed the application for a rescission of the default judgement on grounds that it is misguided, it should have been brought in terms of rule 42(1), and that the evidence given by the applicant with regards to the repudiation of the claim was false.
- [7] The High Court proceeded to consider whether it could rescind the order in terms of rule 42, with rule 42(1)(a) empowering the Court to vary or rescind a judgement erroneously sought or erroneously granted in the absence of any party affected thereby. Thereafter, the High Court considered whether rescission may be possible under the common law. It stated that at common law, a judgement may only be rescinded on very limited grounds, which grounds include a judgement obtained by fraud or as a result of an error. The High Court concluded that neither were applicable and that there were no grounds for rescission. Therefore, the rescission application was dismissed.

Issues

for determination

- [8] 8.1. Whether the appellant has shown good cause for the rescission of a judgement in terms of rule 31(2) (b) of the Uniform Rules of Court?
- 8.2. Whether the respondent breached the terms of the insurance contract which warrants repudiation?
- 8.3 Whether the respondent has concealed some material facts of the case?

The findings of the court a quo forming the basis of the ground of appeal

- [9] The court a quo found that the applicant lacked sufficient cause for rescission of the judgment to be granted on the grounds that:
- 9.1. the applicant did not present a reasonable and acceptable explanation for its default,
- 9.2 that the applicant was wilful and did not intent to defend proceedings instituted by the respondent, that the applicant was grossly negligent in handling the summons;

9.3.that the applicant's defence did not carry prospects of success and thereby applying incorrect test in determining whether the applicant

has shown that it has bona fide defence to the respondent's claim;

9.4.that the applicant failed to show that it has a bona fide defence;

9.5.that the applicant failed to show that it had prima facie defence in setting out the averments, which if established at trial would

entitle it the relief it seeks; and

9.6.that the applicant failed to discharge its onus cast upon it by the rules relating to a rescission of a default judgment.

Law applicable to the facts

[10] The main issue before this court is whether the appellant has made out a case for the relief sought and has established sufficient or good cause to succeed in rescission of a default judgement in terms of rule 31(2)(b)? This rule provides a defendant with grounds to remedy its default to defend, given that the defendant has established good cause for its default.

The Test

[11] The powers of an appeal court to interfere with the exercise of a discretion is limited unless it is shown that the trial court had failed to exercise its discretion judicially or that it had been influenced by wrong principles or a misdirection on the facts[1]. In fact, in this regard, the following has been stated:

"The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The Court of appeal cannot interfere merely on the ground that it would itself have made a different order."[2]

Application of the law

Whether the appellant has shown good cause for the rescission of a default judgement?

[12] The appellant submits that the court a quo erred in holding that it sought leave to amend the application from an application brought in terms of 31(2)(b) to one under rule 42(1) of the Uniform Rules of Court and tendered all costs for the amendment. The appellant submits that it never sought an application to rescind in terms of rule 42(1)(a), it is the court a quo that tendered to consider the application in terms of common law, by virtue of the fact that the test in common law is similar to rule 31(2)(b) of the Uniform Rules of Court the requirements are the same. Therefore, it matters not whether the court considered common law or rule 31(2)(b), the rules are similar.

[13] The circumstances of the case before the court indicate that the appellant has sought relief in terms of rule 31(2)(b) to rescind a default judgement. It must be noted that the appellant is not relying on an error of judgment, but on the fact that it had defaulted to defend the claims against it, due to reasons that will be elaborated below. It is trite that the applicant must show good cause[3] in an application to set aside a default judgement.

[14] Similarly, common law requires that the defendant shows good cause to find a rescission of a default judgment, the court in *Grant v Plumbers (Pty) Ltd*[4] held that whether a sufficient or good cause exists in an application for a rescission of a default judgement, the applicant must present the following:

"(a) reasonable and acceptable explanation of his or her default; and if it appears that the default is wilful or that it was due to gross negligence, the court should not come to his assistance.

(b) the application must be bona fide and not be made in an intention to delay the plaintiff's claim;

(b)has shown the existence of a bona fide defence, that has some prospect or probability of success."

[15] In *Chetty v Law Society*[5] the court further elaborated on the onus to be discharged by the applicant, and held that:

"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the rules was nevertheless permitted to have a

judgment

against him rescinded on the ground that he had reasonable prospects of success on the merits."[6]

(a) Reasonable explanation

[16] In *Kajee and others v G and G Investment and Finance Corporation*[7] the court held the following on reasonable explanation:

"...there are words which appear to equate the phrase "sufficient cause" with reasonable explanation for his default", but the case really was decided on the ground that the applicant had failed to say that he had a bona fide defence to the action and, in any case, Rose's case was not referred to. It seems to me that what is required in a case such as this is that the applicant must explain his default. He cannot simply claim the Court's indulgence without giving an

explanation The explanation must be reasonable in the sense that it must not show that his default was wilful or was due to gross

negligence on his part. If the explanation passes that test, then the Court will consider all the circumstances of the case, including the explanation, and will then decide whether it is a proper case for the grant of indulgence..."[8]

[17] I proceed now to consider the circumstances of this case on the basis of *Kajee and Others supra*. The appellant submits that it had every intention to defend the claim, however it did not defend the action by virtue of the reasons that, it was undergoing merger and acquisition by Momentum and at that time the appellant's claims handler's email address had changed. Upon investigations and the receipt of a default judgment granted on the 29 January 2021, it was ascertained that Ms Hlalele's email had changed.

(b) The default due to wilfulness and gross negligence

[18] It is trite that a party who receives summons must deliver a notice of intention to defend, within the *dies induciae* set out in the summons.[9] In this case the appellant defaulted to defend. An enquiry into good cause is linked to whether the default on the part of the defendant

was wilful and due to gross negligence.[10] If it appears that the applicant's default was wilful due to gross negligence, then the court should not come to the applicant's assistance.[11]

[19] In *Hendricks v Allen*[12] Gardiner JP determined the test for the requirement of wilful default and held that:

"If he knows that a case is coming on, and whatever his motive, deliberately refrains from entering appearance, then it seems to me there is wilful default. His reason need not be, to my mind, that he knows he has no defence; he may have some other motive, but, knowing that he is summoned to appear, if he deliberately fails to enter an appearance, from whatever motive, it seems to me there is wilful default."[13]

[20] The court in *Harris v ABSA Bank Ltd t/a Volkskas*[14] confirmed the decided cases on the mental state of mind of a defendant regarding the requirement of willful default held that:

"Decided case law indicates that a "wilful default" demonstrates a party's indifference as to the consequences of his/her actions. For a party to be in "wilful default" he/she must have knowledge of the action against him/her and of the steps required to avoid the default and appreciates the legal consequences that emanates from such an omission, then he/she is guilty of "wilful default"."[15]

[21] Due to the change in emails as a result of the merger and acquisition process it resulted in not receiving the summons. Consequently, the appellant was not aware of the action instituted against it. The appellant only became aware that there was a pending action upon being furnished with a default

judgment

order by the Sheriff of Court, thereafter, took steps to rescind the judgment against it.

(c) Bona fide defence

- [22] As set out above, the test for good cause as provided in Grant, further requires that an applicant must show that the application was brought bona fide with no intention to delay the plaintiff's claim. The case in *Standard Bank of SA Ltd v EI-Naddaf and Another* [16] held that it is sufficient if the applicant sets out "averments which, if established at the trial would entitle him to the relief asked for" and that the question of whether the applicant has shown that he has a bona fide defence must be decided against the background of the full context of the case.
- [23] The appellant argues that the application for rescission was brought on the basis that it believes in its bona fide defence and always intended to defend an action against it, on the basis that prior to the summons, the appellant rejected the respondent's claim, and when the respondent referred the matter to the OSTI, the appellant defended the referral. The defences raised in the appellant's affidavit, if given a chance to be properly pleaded, would disclose a defence to the respondent's action. The respondent breached its terms of insurance by being destructive and unwilling to provide true and correct information and failing to prevent damage, including driving under excessive influence of alcohol. The appellant argues that its conduct prior to the respondent issuing summons indicated its intention to reject the respondent's claim and proved its seriousness to dispute the claim.
- [24] The appellant argues that it intends to raise defences if afforded an opportunity to do so, with reference to the repudiation of the claims and reasons thereof.
- [25] In the light of the circumstances before the court, the appellant therefore fulfilled the requirements for a good cause in that the summons were not received and ignored or tossed to the side, the summons did not reach the appellant, a bona fide administrative process was taking place during the period of the issue of summons, thus, the element of reasonable explanation is fulfilled. Based on the same reasons there is an absence of wilfulness and gross negligence on the part of the appellant. Wilfulness and gross negligence requires the party to be aware of the action against him or her. There needs to be a deliberate ignorance to defend the action while being appreciative of the consequences of defaulting. There is no evidence that indicates that the appellant was wilful and negligent.
- [26] The defences given by the appellant are bona fide, and they entitle the appellant to be given a chance to prove them in court. The averments alone have a prima facie basis to grant the appellant a chance to be heard in court.
- [27] In my view, a good ground has been advanced for interfering with the court a quo's decision, therefore this court is duty bound to interfere with the court a quo's findings.

Costs

[28] Therefore the general rule, that costs should follow the result, must apply. I see no reason to depart therefrom.

Order

[29] It is hereby ordered that:

29.1. The appeal is upheld with cost

29.2.

Judgement

entered under case number 40210/2020 on 21 January 2021 is rescinded.

OM BOTSI-THULARE

Acting Judge of the High Court Gauteng division Pretoria

I agree.

C COLLIS J

Judge of the High Court Gauteng Division Pretoria

MMD LENYAI J

JUDGE OF THE HIGH COURT

PRETORIA

Appearances

For the Applicant: Adv L Kotze

Instructed by: Ruhann

Kebd

For the respondent: L Mgwetyana

Instructed by: Cingo Attorneys

Date of Hearing: 19 July 2023

Date of Judgment: 24 October 2023

[1] Santam Versekeringsmaatskappy Beperk v Strydom 1977 (4) SA 899 (SCA)

[2] Attorney-General. Eastern Cape v Blom and Others 1988 (4) SA 645 (A) at 670D-F

[3] Rule 31(2)(b) of the Uniform Rules of Court.

[4] 1949

- (2) SA 470 (0).
- [5] [1985] 2 All SA 76 (A).
- [6] Ibid at p79.
- [7] (Pty) Ltd 1962 (1) SA 575 (D).
- [8] Ibid on para p298
- [9] Vincolette v Calvert 1974 (4) SA 275 (E) at p726C.
- [10] Harris v ABSA Bank Ltd t/a Volkskas [2002] 3 All SA 215 (T) at p216.
- [11] See Grant at P346.
- [12] 1928 CPD 519.
- [13] Ibid at p521.
- [14] [2002] 3 All SA 215 (T).
- [15] Ibid at p216.
- [16] 1999
- (4) SA 779 (W) at p10.
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