

SOUTH AFRICA / JUDGMENT

Borene v SA Taxi Impact Fund (RF) (Pty) Ltd and Another (6989/2022) [2025] ZALMPPHC 43 (13 March 2025)

[2025] ZALMPPHC 43

COURT

Limpopo High Court, Polokwane

BEFORE

Diamond

CASE / FILE NUMBER

6989/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

No: 6989/2022

(1) REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

SIGNATURE:

DIAMOND AJ

DATE:

13/03/2025

In

the matter between: BORENE
 EZEKIEL GEZANNE
 APPLICANT
 and
 SA
 TAXI IMPACT FUND (RF)(PTY) LTD
 1st RESPONDENT
 ACTING
 SHERIFF LEBOWAKGOMO
 2nd RESPONDENT

JUDGMENT

DIAMOND AJ:

- [1] The First Respondent provided finance to the Applicant to buy a vehicle that could serve as a minibus - taxi.
- [2] It is common cause that the Applicant fell in arrears with the payments in terms of the contract.
- [3] It is also common cause that the Applicant applied to have himself declared as over indebted in terms of the National Credit Act, 2005 (Act 34 of 2005) (the Act), on 12 November 2021.
- [4] Neither the debt counsellor took any further steps as is contemplated by sections 86(7) or (8) of the Act.
- [5] The first respondent by way of a notice in terms of section 86(10), and that took place on 22 April 2022.
- [6] At that stage the Applicant remained in arrears with an amount of R 91 987.37
- [7] the first respondent issued summons on 28 June 2022 and it was served on the Applicant on 13 October 2022.
- [8] The Applicant entered an appearance to defend the action 1 November 2022 and the dies to file a plea expired on 29 November 2022.
- [9] The first respondent filed a Notice of Bar on the Applicant's attorneys on 2 December 2022 and the dies for the filing of the plea expired on 9 December 2022.
- [10] The First Respondent applied for default judgement in terms of Rule 31(5) of the uniform rules and judgement was eventually granted on 25 April 2023.
- [11] The Applicant now approached this court in terms of the stipulations of rule 42(1)(a) to rescind the judgement on the basis that the order was sought and granted erroneously and in the absence of the Applicant.

[12] The basis for the application was that the first respondent's attorneys committed fraud, by presenting to the court that it gave notice, as it was required to do in terms of rule 31(5) of the application for default judgement, by serving or copy of the application on the attorneys of the Applicant.

[13] The Applicant states in its founding affidavit:

"The first respondent obtained an order without serving me with a default judgement and falsified the signature of receipt of my attorneys of record on the day, on which the default judgement application was purportedly served, my attorney's office were closed."

[14] The allegation of fraud is conspicuous.

[15] It is trite that a party wishing to rely on fraud was not only pleaded but also prove it clearly and distinctly. Although the onus in the instance of fraud is the ordinary civil onus, fraud is not easily inferred.[1]

[16] the statement "... and falsified the signature of receipt of my attorneys ..." is stated you to be inferred from the statement that "... my attorneys' office were closed'.

[17] The statement in the founding affidavit is hearsay and it is not supported by any explanation by the attorney on record substantiating the statement that the offices were closed.

[18] In the answering affidavit the first respondent attaches the supporting affidavit by its attorneys testifying that on 14 December 2022 it did attend at the offices of the attorneys of the Applicant.

[19] In the replying affidavit, the Applicant simply denies the answer given in the answering affidavit, with the following paragraph:

"The contents are denied and I attached(sic) here to prove that, my attorney of record was already on recess in Cape Town, when the application will purportedly served, the proof is attached hereto marked Annexure "BEG5".

[20] It is startling once again that a full explanation, under oath, by the attorney explaining all the details regarding the alleged closure of the office, is lacking. Annexure "BEG5" is a copy of an Airlink Air ticket, once again attached to the papers without any explanation as to the exact nature and context of the ait ticket.

[21] In my view, the Applicant failed to prove the allegation of fraud, and consequently failed to prove that the application was erroneously applied for and granted.

[22] Furthermore, the judgement of Valditime (Pty) Ltd and another v ABSA Bank[2] provides a very handy synopsis of the essential elements involved in the adjudication of an application of Rule 42(1)(a).

- [23] Amongst others, while it is not necessary for an Applicant under this rule to convince the court of a bona fide defence, an Applicant should provide sufficient evidence to enable the court to exercise a discretion in favour of the Applicant.
- [24] In my view the Applicant also failed to do that since it is clear in my view that the Applicant is still indebted to the first respondent. There are several other reasons, such as a neglect to follow through on processes which it initiated to regularise its position and several unexplained the last minute the delaying steps, why the discretion should be exercised against the Applicant, but I do not elaborate on these aspects in the light of the conclusion that I came to above.

[25] I consequently make the following order:

[25.1] The Application is dismissed with costs.

G DIAMOND AJ

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION: POLOKWANE

APPEARANCES:

FOR THE APPLICANT : ADV. K. MOKWENA

INSTRUCTED BY

: MOTOTOLA TSELENG ATTORNEYS

FOR THE RESPONDENT : ADV. J.H. MOLLENTZE

INSTRUCTED BY

: MARIE-LOU BESTER INCORPORATED

[1] P. 206 under the heading 'Fraud'.

[2] [I] Ltd [2023] JOL 58629 (GJ).

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