

SOUTH AFRICA / JUDGMENT

Bozwana v Tshenolo Resources (2324 / 2017) [2021] ZANCHC 49 (3 September 2021) [2021] ZANCHC 49

COURT

Northern Cape High Court, Kimberley

BEFORE

Moses

CASE / FILE NUMBER

2324 / 2017

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHERN

CAPE DIVISION, KIMBERLEY

Case

No: 2324 / 2017

Heard:

27 / 08 / 2021

Delivered:

03 / 09 / 2021

Reportable: YES/NO

Circulate

to Judges: YES/NO

Circulate

to Magistrate: YES/NO

Circulate

to Regional Magistrates: YES/NO

In

the matter between:

BENEDICT

BOZWANA

Applicant

and

TSHENOLO

RESOURCES

Respondent

JUDGMENT

Moses AJ

INTRODUCTION

1. This is an application launched by the Applicant on or about 19 February 2021. Firstly for urgent Interdictory relief, seemingly

to interdict the Sheriff from attaching his property pursuant to a writ of execution following an Order by this Court, dated 12 October 2020, under Case No: 2324/17, against the Applicant, in the following terms:

"It is ordered:

1. Return of the Plaintiff's 2010 M 63 AMG Mercedes-Benz motor vehicle;
2. Payment of R325,500.00;
3. Interest on the said amount of 10,25 % from date of summons until date of payment;
4. Costs of suit.
5. Prayer 3 of the Particulars of Claim is postponed sine die, pending compliance with orders 1 and 2 above."
2. Secondly there is another application which was also launched on or about 18 February 2021, for hearing in this court on 5 March

2021, with the heading: "Application for Rescission of Judgment" wherein the following relief is/ was sought:

"i. That condonation be granted for the late filing of this application.

ii. That the judgment and order granted by the Honourable Court in case number 2324/17 on the 16th of OCTOBER 2020, be rescinded;

iii. That the execution of the warrant of attachment issued under the above case number be stayed pending the finalization of this application.

iv. No costs in the application.

v. Further and/or alternative relief"

3. The Respondent, who is/was the Plaintiff in the matter and in whose favour the above stated judgment was granted by this Court on 12 October 2020 duly gave notice of its intention to oppose the application(s) and the relief sought by/on behalf of the Applicant, on mainly three grounds:'

3.1. The first two in limine grounds namely 1: That the Applicant is/was precluded in terms of the provisions of section 133 of the Company's Act, 2008, to institute these proceedings against the Respondent, it being under business rescue, by virtue of the fact that it firstly does/ did not have the consent of the business practitioner to institute these proceedings against it, and secondly that it did not have the authorisation of the Court to institute these proceedings;

3.2. The second ground is that the Applicant did not bring a substantive application under its own case number, but under the same case number as the original/main case number 2324/17, and therefore as an interlocutory application, which renders the application fatally defective;

3.3. The third ground is that the Applicant did not show and/or establish a bona fide Defence to the claims of the Respondent/Plaintiff, wherefore that order/Judgment dated 12 October 2020 cannot, and ought not to be, rescinded by this Court.

4. The Applicant's case, with regards to Condonation is, as I understand it from the papers, as follows:

4.1. That he is a lay person;

4.2. That his erstwhile attorney of record withdrew as a result of a lack of financial instructions;

4.3. That that attorney never informed and/or advised him about the various requests and the need to attend to, the required Pre-trial

meetings in respect of the action under case number 2324/17, nor that the matter was to be heard on 12 October 2020;

4.4. That the said Court Order/Judgment was granted in his absence, although, on his own version, he was apparently at Court on the day,

yet he was never afforded an opportunity to state his case; and

4.5. That he has a bona fide defence to the claim(s) of the then Plaintiff, now the Respondent herein.

5. With regards to the merits of his application for rescission he alleged essentially in his founding papers, that:

5.1. His deceased brother, who was the founder of this Respondent company, borrowed money from him and hence owed him money to the tune

of approximately R5 million, in his life time;

5.2. As a result thereof, his late brother pledged the Mercedes-Benz vehicle, the subject matter of the writ of execution, dated 4 November 2020[1] to him, and hence that he has a valid title to the said vehicle;

5.3. That the movable property in his residential premises, which is the bulk of the furniture therein, belonged to his "estranged

wife" and

5.4. That he has lodged a claim against the estate of his deceased brother for the said money which he lent and advanced to the deceased

brother in/during the latter's lifetime.

6. In his replying papers he expanded upon this loan to his deceased brother, alleging essentially that inasmuch as the said deceased brother was the founder and shareholder of the Respondent company, this company owes him that money, hence he has a valid counterclaim against the said Respondent company for that money, of approximately R5 million. According to a document annexed as annexure 'B'[2] the alleged amount is R5,453,333.50. This document is dated "2016/02/25" and is addressed to one "Oliver Baipone Morare".
7. He also alleges that this counterclaim, being a set-off against the claim(s) that the Respondent company has against him, falls within the exceptions of section 133(1)(a) to (f) of the Company's Act, 2008, (No 71 of 2008) and hence he is/was not precluded from bringing this application against the Respondent.

Evaluation and Assessment

8. I shall first deal with the case history of this matter. As stated above, on 12 October 2020, there was a Court order by Chwaro AJ, under case number 2324/17, dated 12 October 2020, wherein Tshenolo Resources (Pty) Ltd was the Plaintiff and Benedict Bozwana was the Defendant (the Applicant herein). The order that was made is set out in paragraph 1 above.
9. A "Notice of Motion" dated and signed ("pp") 19 February 2021 under case number 2324/17, was filed wherein Benedict Bozwana is cited as Applicant, and Tshenolo Resources (Pty) Ltd as Respondent, giving notice of his intention to make application to this Court on 19 February 2021, for the following:

- "1. That the application be heard on Urgent basis Rule 6(12);
2. That the Respondent be interdicted from executing the warrant of execution under case number 2324/17 and dated 3 November 2020 pending finalisation of application of rescission of judgment to be heard by the Kimberley High Court on 5 March 2021.
3. Cost of the application.
4. Further/alternative relief"

Herein the Applicant also states that, and refers to, an application for rescission of judgment, which has been lodged with this Court on "...yesterday 18th February 2021."

He also refers to, and annexed, the warrant of execution annexed as "Annexure D" date stamped 4 November 2020.

10. It appears from this warrant also that the Sheriff is directed to attach the Mercedes-benz vehicle. It is not clear from this writ when and if it was served on the Defendant. As it turned out and based on

the submissions made by the Applicant's counsel in court on date of hearing, it was indeed served on the Applicant in November 2020, since this was what made him become aware of this judgment. I return to this later.

11. It is also not clear what happened with this "urgent application." During his oral submissions in court, Mr Jacobs, who appeared on behalf of the Applicant, stated, upon enquiry from this Court, that this application has been abandoned.
12. There is also an "Application for Rescission of Judgment" date stamped 18 February 2021, giving notice of such application to be brought on 5 March 2021, for the relief as set out in paragraph 2 above.
13. A Notice of Intention to Oppose was subsequently filed by Tshenolo Resources (Pty) Ltd, the Respondent, dated, signed and served on 24 February 2021.
14. This was followed by a Court Order by Eillert AJ on 5 March 2021, wherein, by agreement, the following order was made:

"1. Matter postponed to 23 April 2021.

2. Respondent is directed to file its answering affidavit on or before 26 March 2021.
3. The Applicant must file its replying affidavit, if any, on or before 16 April 2021.
4. Costs to be costs in the application."
15. Then, around 30 March 2021, GQADUSHE ATTORNEYS - the Applicant's Attorney of record at the time, filed a "Notice of Withdrawal as Defendant's/Applicant's attorneys ("Correspondent Attorney)", dated and signed 26 March 2021, which was served on the Respondent and received by it on 30 March 2021 at 11h25. It was also sent to the Applicant's/Defendant's address at 10 Hugo Street, Monument Heights, Kimberley, "Per registered mail."
16. On 1 April 2021, the Respondent filed its answering affidavit, which is dated and signed 26 March 2021, and was served on Applicant's then still attorney, Gqadushe Attorneys, on 31/03/2021 at 14h32, and received by them. This was therefore late, and not in accordance with Eillert AJ's Court Order of 5 March 2021[3], directing to file it "on or before 26 March 2021."
17. It is clear however that the Applicant also did not file and/or serve any replying affidavit, in accordance with paragraph 3 of the above-stated Court Order, which should have been filed "on or before 16 April 2021".

18. On 23 April 2021 there was a Court Order by Lever AJ, dated and signed 23/4/2021, ordering, by agreement between parties, that:

"1. Matter is postponed to the Opposed Roll to 27 August 2021;

2. Respondent's having filed its Answering Affidavit already (as above stated on or about 1 April 2021).

3. The Applicant MUST[4] file its replying Affidavit on or before 7 May 2021.

(This was NOT done. They only filed it on 19 August 2021).

4. The Applicant's Heads of Argument MUST[5] be filed on or before 28 May 2021. (This was also NOT done, it having been filed, also on 19 August 2021).

5. Respondent's Heads of Arguments MUST[6] be filed on or before 18 June 2021. (This was complied with as the Respondents filed their heads of Argument on 14 June 2021).

6. Costs to be costs in the application."[7]

Ad Condonation

19. The first hurdle for the Applicant to overcome is whether or not there was/is compliance with the requirements of Rule 27 of the Rules of Court, and thus whether the reasons he advanced as above stated are sufficient to establish good cause for this Court to overlook and/or condone his delay of approximately four (4) months in bringing

this application for rescission of the judgment of Chwara AJ dated 12 October 202. He was required to bring it within 20 days of date of that judgment and/or of acquiring knowledge thereof, which he failed to do.

20. In terms of Rule 27(1), the Court

20.1. "may upon application on Notice"; and

20.2. "On good cause shown,... grant condonation";

20.3. "upon such terms as to it seems meet."

The Court is therefore vested with a discretion whether or not to grant condonation, to be exercised judicially, taking into account the relevant facts and circumstances of the particular case.

21. It is trite that the enquiry of such an application entails two (2) principal requirements[8]:

21.1. First, the Applicant is to file an affidavit, SATISFACTORILY explaining the DELAY[9]. In such an affidavit, the following must be shown to exist:

- a. The defendant/Applicant must at least furnish an explanation of the default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives. The longer the delay the more difficult it becomes to be granted such an

indulgence. The general rule in such cases is that the applicant for such indulgence should pay all such costs as can reasonably be said to be wasted because of the application, such costs to include the costs of such opposition as it is in the circumstances reasonable, and if it is not vexatious or frivolous[10].

- b. The applicant must show good cause - i.e. there must not have been a reckless or intentional disregard of the rules, or the court

is convinced that the applicant does not seriously intend to proceed.

- c. The application must be BONA FIDE, and not made with the intentions of delaying the opposite party's claim.[11]

21.2. The second requirement is that the Applicant must SATISFY the court on oath that he/she has a BONA FIDE DEFENCE, or that his/her action is clearly not ill-founded i.e. set out facts, which, if proved, would constitute a defence.[12]

21.3. A third requirement, sometimes, is that the grant of the indulgence sought must not prejudice the plaintiff in any way that cannot be compensated for by a suitable order as to postponement and costs.

21.4. There may also be an interdependence of, on the one hand the reasons for the extent of the omissions, and, on the other hand, the merits of the case.[13]

- 22. It is strange, yet noteworthy that according to the Applicant he was indeed at Court on the day the matter was enrolled, and the judgment ultimately obtained and granted, yet he was not afforded an opportunity to state his case. If indeed he was at Court, as he alleges, that fact should have, and could have been brought to the attention of the presiding judicial officer, Chwaro AJ, at the time, which clearly did not happen. Moreover, nothing prevented the Applicant on his own version from making enquiries at Court, on the day and/or to bring his attendance to the attention of the presiding judicial officer at all relevant times. This, inexplicably, he clearly did not do.

- 23. Moreover, from the affidavit of an attorney, Ms Motshidi Veronica Galane[14], who is an officer of the Court, it is abundantly clear that the Applicant's attorney of record at the time had been notified on

numerous occasions by way of invitations and/or emails and/or notices regarding convening pre-trial conferences is that matter, which were at all relevant times received and acknowledged by the said attorney, but which were also never honoured. It is and remains inexplicable how and why such information was not brought to the attention of the Applicant - then the Defendant in that matter.

- 24. It must also be pointed out that, in this application the court order by Lever AJ, as he then was, dated 24 April 2021 stipulated clear time-lines for the filing of certain papers, and postponing the application until 27 August 2021, which order was made by agreement between the parties. In terms of that Order, the Applicant was required to file its Replying

Affidavit on or before 7 May 2021, and his Heads of Argument on or before 28 May 2021. The Applicant only filed both set of papers, and as late as a week before the hearing date, 19 August 2021. No explanation is/was given for such late

filing, in violation of an Order of Court. No Condonation was applied for such late filing. This alone demonstrates, to my mind, a total disregard for the Rules and process of court, and indeed Orders of Court.

25. The reasons advanced by and on behalf of the Applicant for his extremely late application for the rescission of the judgment of Chwaro AJ dated 12 October 2020, fall far short of the requirements referred to and set out above. The application is not bona fide and no good cause had been shown for this Court to grant condonation for

the late filing and bringing of this Application.

26. The Application therefore falls to be dismissed with costs. In the circumstances it is not necessary to deal with the in limine points of the Respondent.

27. I point out further that even if the application was successful in crossing this first hurdle (of condonation), no bona fide defence had been demonstrated to the claim of the Respondent justifying the rescission of the judgment of Chwaro AJ dated 12 October 2020.

28. On his own papers, the Applicant relies on an alleged indebtedness of his deceased brother to him, and based on that, he claims to have some claim, according to him, a counter-claim, against the Respondent. This was not pleaded and/or prayed for in any application before this Court.[15]

29. On his own version, if true, he had lodged a claim against the estate of his late brother. On his own version therefore no claim can lie against the Respondent. If reliance is/was placed on the afore-stated

document, annexure 'B', such reliance is misplaced, because ex facie that document, there is no nexus at all between the Applicant and the Respondent, which shows any liability and/or indebtedness by the Respondent to the Applicant herein.

30. In the circumstances, the following order is hereby made:

1. The Application is dismissed with costs.

JJ MOSES

ACTING JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

For the Applicant:

Adv. A. Jacobs

Instructed by:

Magoma Attorneys

For the Respondent:

Adv. L.K. van der Merwe

Instructed by:

Roux Welgemoed & Du Plooy Attorneys

[1] Annexure D, Record p. 20 - 21

[2] Record p. 16

[3] Para 2 thereof

[4] Emphasis added

[5] Emphasis added

[6] Emphasis added

[7] Emphasis, and inserts in brackets added

[8] See generally, Erasmus B1-171

[9] My emphasis

[10] Myers v Abrahamson 1951 (3) SA 438 (C) at 455 G; Erasmus B1-173

[11] My emphasis

[12] My emphasis

[13] Erasmus, supra B1-171

[14] Annexure W1, record p37 - 44

[15] See the Applicant's Prayers in both his "Notice of Motion" dated and signed 19 February 2020, and his 'Application for Rescission of Judgment' date stamped 18 February 2021 which was set down for hearing on 5 March 2021.

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