

SOUTH AFRICA / JUDGMENT

**EM & S Property Development t/a EM
& S Property Development v Toyota
Financial Services Ltd (598581/2015;
59582/2015; 59583/2015; 59565/2015)
[2017] ZAGPPHC 449 (28 March 2017)**
[2017] ZAGPPHC 449

COURT

North Gauteng High Court, Pretoria

BEFORE

AC Basson

CASE / FILE NUMBER

59581/2015; 59582/2015; 59583/2015; 59565/2015

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBERS: 59581/2015; 59582/2015;
59583/2015; 59565/2015

DATE:

2017-03-28

Reportable: NO

Of interest to

other judges: NO

Revised.

In the matter between:

EM & S PROPERTY DEVELOPMENT

t/a

EM & S PROPERTY

DEVELOPMENT Applicant/Defendant

and

TOYOTA FINANCIAL SERVICES

LTD Respondent/Plaintiff

JUDGMENT

AC BASSON, J

- [1] The defendant/respondent in this action is EM & S Property Development t/a EM & S Property Development (hereinafter referred to as "the defendant"). The plaintiff/respondent is Toyota Financial Services SA Ltd (hereinafter referred to as "the plaintiff").
- [2] There are four matters before this court all dealing with the same parties and the same issues. One set of heads of argument has also been filed on behalf of both parties in all the matters. In light of this, I intend to deal with all four matters in one

judgment.

- [3] The defendant (under case numbers: 59581/2015; 59582/2015; 59583/2015 and 59565/2015) failed to enter any appearance to defend and on 10 September 2015 the Registrar granted default judgment against the defendant, in its absence.
- [4] The defendant now approaches this court for an order rescinding and setting aside the (four) default judgments granted in favour of the plaintiff against the defendant, by the Registrar. The defendant further prays for leave to defend the plaintiff's actions, under the respective case numbers.
- [5] The application appears to be brought squarely in terms of Rule 42 of the Uniform Rules in that it was contended that the default judgment was erroneously sought and granted in the absence of the defendant.

Particulars of Claim

- [6] In the Particulars of Claim the plaintiff claims that on 28 February 2013, the plaintiff, represented by a one Louis Ehlers (sic) entered into a written Instalment Sale Agreement with the defendant, represented by a one Louis Ehlers in terms of which the plaintiff sold to the defendant the following motor vehicles:

1. Case number 59582/2015: Toyota Hilux 3.0 Raider Extra Cab 4x4 with engine number: 1IK5979225 and chassis number: AHRHZ295302201838.

2. Case number 59582/2015: Toyota Hilux 2.0 D-4D S RX R/B P/ U S/C with engine number: 2KDA31503 1 and chassis number: AHTCR32G408023445.

3. Case number 59583/2015: Toyota Hilux 2.5 D-4D S RX RIB P/U S/C with engine number: 2KDA006315 and chassis number: AHTCR32GX080200064.

4. Case number 59565/2015: Toyota Hilux 2.5 D-4D S RX R/B P/ U S/C

With engine number: 2KDA284475 and chassis number: AHTCR32G008023037.

- [7] The Instalment Sale Agreement ("the agreement") is annexed to the papers as "Annexure A". I will return to the dispute about the validity of this agreement. It is further claimed that, despite the fact that the plaintiff has performed all of its obligations in terms of the agreement, the defendant has breached the agreement by failing to pay the required instalment payments in terms of the agreement. The plaintiff claims that despite delivery of the vehicle to the defendant, the ownership of the vehicles remained vested in the plaintiff. On 27 July 2014 the plaintiff was in arrears in respect of all four vehicles.
- [8] The summons was served on the chosen domicilium address as was stated in the agreement between the parties, being 107 Van Tonder Street, Sutherland Ridge. I will return to the submissions in respect of the validity of the agreement herein below.
- [9] The despondent (Mr Ehlers) on behalf of the defendant states in the Founding Affidavit that it only came to its notice during 2015 that the plaintiff's agents were looking for the vehicle referred to in the order. It is further stated that he then contacted the plaintiff's agents directly in an attempt to settle the dispute. On 26 January 2016 the defendant's attorneys then made a settlement proposal to the plaintiff's attorneys. The matter could not be settled.
- [10] The defendant essentially raises four issues as to why the default judgment was erroneously sought and granted in the absence of the defendant.

The citation of the defendant

- [11] The defendant firstly takes issue with the citation of the defendant in the Particulars of Claim in that it is cited as a "private" company instead of it having been cited as a "public" company. In this regard it is submitted that this allegation is "false" and that Registrar should never have granted the default judgment in circumstances where a party is incorrectly cited.
- [12] In the answering affidavit, the plaintiff explains that this is a typing error and that the word "private" should have read "public".
- [13] There is no merit in the defendant's complaint: It is accepted that an error in the name under which a party has been cited in the summons will not necessarily constitute a good ground for a rescission, if it is clear from the summons that the correct party had been cited. See in this regard: *Dawson & Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd*. [1]

"It is clear that the relief sought by the respondent goes no further than that granted in the *Mutsi v Santam Versekeringsmaatskappy Bpk en 'n Ander* case supra. There is no substitution of the actual defendant, merely a correction of the citation and, in my view, it falls well within the ambit of the principles in the *Firestone South Africa (Pty) Ltd v Genticuro A G* case supra. It remains to deal with the applicant's submission that the mere error in the citation of the summons entitles them to rescission. As previously mentioned, they rely on the judgment of *Bakoven Ltd v G J Howes* supra). I am not convinced that the learned Judge, in saying 'once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission', intended it to include the type of situation which has arisen in this case. His use of the word 'proceedings' leaves me in some doubt as to whether he meant an obvious error in a citation to be part of the

'proceedings'. However, if that was indeed the meaning, then I must respectfully disagree with him."

- [14] I am further also of the view that the citation of the defendant as a "private" company as opposed to a "public" company is clearly a typing error and one which cannot in any way prejudice the defendant. Moreover, if regard is had to the summons it is clear who the plaintiff intended to sue.

The citation of "Ehlers" as the plaintiff's representative

- [15] In the Particulars of Claim it is stated that a certain "Louis Ehlers" was the individual duly authorised to enter into a written Instalment Sale Agreement with the defendant on behalf of the plaintiff. The defendant contends that it is "impossible" to determine from the Particulars of Claim who acted on behalf of the plaintiff and therefore the plaintiff's papers did not justify the granting of default judgment.
- [16] This complaint which is purely technical has, in my view, no merit: If regard is had to the Particulars of Claim it is patently clear that the reference to "Ehlers" as the person who represented the plaintiff during the negotiations with the defendant (Mr Louis Ehlers) is a mere misnomer. From a plain reading of the Particulars of Claim and the relevant annexures thereto, it is clear that Louis Ehlers represented the defendant and not the plaintiff. In any event, there is no suggestion that this misnomer in any way prejudiced the defendant.

The Payment Schedule

- [17] The defendant also takes issue with the payment schedule referred to by the plaintiff with reference to the account numbers and submitted that it "seems that the records of the Plaintiff are confused". This allegation is denied by the plaintiff: The plaintiff simply changed the current account numbers and generated them to new numbers. In its replying affidavit, the defendant merely states that the plaintiff ought to have disclosed this in the Particulars of Claim.
- [18] This complaint against the Particulars of Claim has no merit: If regard is had to the papers it is clear that the payment schedule is irrelevant to the claim as set out in the Particulars of Claim, particularly if regard is had to the fact that it is not the defendant's contention that any payments that have been made had not been taken into account by the plaintiff.

The contract

- [19] It is common cause that the agreement attached to the Particulars of Claim is unsigned. In the regard it was submitted on behalf of the defendant that, because no signed agreement is attached to the Particulars of Claim, no agreement came into being between the plaintiff and the defendant and consequently the Registrar could not have granted the default

judgment.

[20] In its answering affidavit the plaintiff maintains that the agreement attached to the papers constitute a valid written agreement between the parties: The agreement was transmitted through electronic means between the parties and as such no copy of the agreement that was physically signed, exists. As further proof that the agreement attached to the Particulars of Claim is in fact the signed written agreement referred to in the Particular of Claims, the court was referred to the defendant's own Round Robin Resolution where the following is recorded:

"That the corporation acknowledges and accepts the terms and provisions of the relevant Agreement/s of the Bank referred to in 1 above [Standard With or Without Recourse Discounting and/or Provisional and Agency and/or Lease and/or Instalment Sale and/or Rental and/or Loan and/or Purchase and Sale and/or Sale and Lease Back and/or Full Maintenance Rental and/or Full Maintenance Operating Rental and/or Card Agreement/s and/or Electronic Agreement through the Bank's website]."

[21] It is further pointed out by the plaintiff that the defendant in fact took possession of the vehicles which was sold in terms of this written agreement as far back as 2014 and had not once raised any issues in regard to the validity of the agreements.

[22] In *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another*[2] the SCA, with reference to the Electronic Communications and Transactions Act[3] and more specifically section 13 thereof, held that the formal requirement of writing and signature imposed by statute or the parties can generally be satisfied through electronic transmission:

"[15] The Act's main objective is to 'enable and facilitate electronic communications and transactions in the public interest'. 'Electronic communication' is defined as 'communication by means of data messages; ..'Transaction' is defined to include 'a transaction of either a commercial or non-commercial nature ...'. An email means 'electronic mail, a data message used or intended to be used as a mail message between the originator and addressee in an electronic communication...' It is thus common ground that the email exchange between the parties is governed by the Act.

[16] One of the Act's aims is to promote legal certainty and confidence in respect of electronic communications and transactions. So when interpreting the Act the courts are enjoined to recognise and accommodate electronic transactions and data messages in the application of any statutory law or the common law. Thus, when there are formal requirements of writing and signature imposed by statute or the parties to a transaction, these can generally be satisfied through electronic transactions. There are, however, exceptions where agreements may not be generated electronically. These are the agreements for the sale of immovable property, wills, bills of exchange and stamp duties."

[23] See also an earlier judgment where the Labour Court followed a similar approach: *Jafta v Ezemvelo KZN Wildlife*[4]

"[98] The significance of that dictum for this case is that electronic communications systems are now standard forms of transacting in the information age. Anyone seeking to exclude particular forms of communication must expressly contract out of them, or else the provisions of s 23 of the ECT Act are triggered as default rules, that is, rules that apply when the parties have not agreed otherwise. When they do agree on the mode of communication, they must abide by it. Furthermore, when time is of the essence and the communication system used accelerates the speed of communication, contracting parties should be especially vigilant about sending and receiving offers and acceptances electronically."

[24] The defendant's reliance on the common cause fact that the copy of the contract attached to the particulars of claim, is invalid, is therefore misplaced in light of the case law.

Rescission in terms of rule 42(1) of the Uniform Rules of Court

[25] The defendants have founded their case squarely on the provisions of Rule 42(1)(a) of the Uniform Rules:

"42 Variation and Rescission of

Orders

- (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;"

[26] The purpose of Rule 42 is to correct expeditiously an obvious wrong judgment or order. In this regard the Court in *Bakoven Ltd v G J Howes* explained:[5]

"Rule 42(1)(a), it seems to me, is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of a 'mistake in a matter of law (or fact) appearing on the proceedings of a Court of record' (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 (2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence (*Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* (supra at 578F-G); *De Wet (2)* at 777F-G; *Tshaba/ala and Another v Peer* 1979

- (4) SA 27 (T) at 30C-D). Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission. It

is only when he cannot rely on an 'error' that he has to fall back on Rule 31(2)(b) (where he was in default of delivery of a notice of intention to defend or of a plea) or on the common law (in all other cases). In both latter instances he must show 'good cause'. This pattern emerges from the decided cases."

[27] Rule 42 is thus aimed at correcting a mistake. See in this regard: *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*: [6]

"[5] It is against this common-law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. Rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The Rule gives the courts a discretion to order it, which must be exercised judicially (*Theron NO v United Democratic Front (Western Cape Region) and Others*) and *Tshivhase Royal Council and Another v Tshivhase and Another*; *Tshivhase and Another v Tshivhase and Another*.

[6] Not every mistake or irregularity may be corrected in terms of the Rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law. That is why the common law is the proper context for its interpretation. Because it is a Rule of Court its ambit is entirely procedural.

[7] Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission (Rule 42(1)(b)); or an order resulting from a mistake common to the parties (Rule 42(1)(c)); or 'an order erroneously sought or erroneously granted in the absence of a party affected thereby' (Rule 42(1)(a)). In the present case the application was, as far the Rule is concerned, only based on Rule 42(1)(a) and the crisp question is whether the judgment was erroneously granted."

[28] Typically a judgment is erroneously granted "if there existed at the time of its issue a fact of which the judge was unaware which could have precluded the granting of the judgment and would have induced the judge, if aware thereof not to grant the judgment."

(See in this regard: *Nyingwa v Moo/man NO*. [7])

[29] I am not persuaded that there was an irregularity in the proceedings nor that the Registrar lacked competence to make the orders. No persuasive facts (apart from technical complaints regarding citation of parties and a groundless submission regarding the validity of the Instalment Sale Agreement) were placed before the Registrar that would have precluded it, at the time the order was made, had it been aware of these facts, would have precluded the granting of the order.

[30] Lastly, the defendant denies the existence of the written agreement as pleaded by the plaintiff in the Particulars of Claim but nonetheless took possession of the vehicles in circumstances where it is common cause that the plaintiff is the owner of the vehicles. Yet the defendant does not plead any other contract that would entitle it to remain in possession of the vehicles. Furthermore, although the defendant does not deny that it had received the vehicles from the plaintiff and that it took possession of the four vehicles, no defence is put

up - apart from boldly stating that it has a bona tide defence - against the latest statement of accounts attached to the plaintiff's papers setting out the arrears on the account in respect of each of the vehicles.

[31] In the event it is concluded that the defendant has not made out a case for the order sought in the Notice of Motion.

Order

[32] In the event the following order is made in respect of case numbers: 59581/2015; 59582/2015; 59583/2015; 59565/2015:

The application to rescind and set aside the default judgment granted in favour of the plaintiff against the defendant by the Registrar in the absence of the defendant on 10 September 2015 is dismissed with costs

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the applicant/defendant: BP Geach, SC

Instructed by: Rina Rheeders Attorneys

For the respondent: Adv CJ Welgemoed

Instructed by: Strauss Daly Inc.

[1] 1993

(3) SA 397 (BG) at 402I – 403B.

[2] 2015

(2) SA 118 (SCA)

[3] Act 25 of 2002

[4] (2009) 30 ILJ 131 (LC)

[5] 1992

(2) SA 466E at 471E-H

[6] 2003(6) SA 1 (SCA) at paragraph [5].

[7] 1993

(2) SA 508 (TK) at 510D-G

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