

SOUTH AFRICA / JUDGMENT

FMS Developers CC and Another v African Contractors Finance Corporation (Pty) Ltd (11260/03) [2005] ZAGPHC 65 (10 June 2005)

[2005] ZAGPHC 65

COURT
High Courts - Gauteng

BEFORE
Daniels

CASE / FILE NUMBER
11260/03

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/BBIN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION) DATE 10 JUNE 2005 CASE NO: 11260/2003 IN THE MATTER BETWEEN: F.M.S. DEVELOPERS CC FIRST APPLICANT/DEFENDANT FAROUK VALJIE SECOND APPLICANT/DEFENDANT AND AFRICAN CONTRACTORS FINANCE CORPORATION (PTY) LTD RESPONDENT/PLAINTIFF JUDGMENT DANIELS, J

The respondent instituted action against the first applicant (as principal debtor) and the second defendant (as surety) in respect of monies lent and advanced to the first applicant in terms of a written loan agreement. This loan was intended to provide bridging finance to enable the first applicant to perform in terms of a contract concluded by it with the Northern Province Housing Development Board to build certain houses (and, in particular, 400 houses forming part of the Bergneck flood relief project.) The applicants filed a plea but thereafter failed to make discovery as required in terms of Rule 35(1). The respondent brought an application to compel discovery and such an order was granted on 3 August 2004. The applicants failed to comply with this order and the respondent accordingly, in terms of Rule 35(7), brought an application to strike out the applicants' defence and for judgment. On 14 September 2004 judgment was granted against the applicants, jointly and severally for:

- 3.1 Payment of the amount of R909 016,46;
- 3.2 Interest on this amount calculated at the rate of 2,5% per month, compounded daily, from 28 October 2002 until date of payment; and
- 3.3 Costs of suit on the scale as between attorney and client.

On 19 November 2004 the applicants delivered an application for the rescission of this judgment. After delivery of the respondent's answering affidavit in this application, the applicants did not deliver a replying affidavit. They also failed to set the application down for hearing. The application was set down by the respondent. In order to obtain a rescission of judgment the applicants must show sufficient cause which means, a reasonable and acceptable explanation

for their default; and that on the merits they have abona fidedefence which,prima facie,carries some prospect of success. (SeeChetty v Law Society, Transvaal1985 (2) 756 A at 764J-765E.)As regards the explanation for their default, the applicants are required to provide an explanation as to enable the court to understand

how it came about and to assess both their conduct and motives. (SeeSilber v Ozen Wholesalers (Pty) Ltd1954 (2) SA 345A at 353 A).If it appears that their default was wilful or due to gross negligence, the court will not come to their assistance.Such wilful default will be present if it appears that the applicants knew that judgment was to be taken against them, but did not

demur and allowed the plaintiff to take its course.(SeeMaujean t/a Audio Video Agencies v Standard Bank of SA Ltd1994 (3) SA 801C at 804C-805H.)The applicants advance two reasons why they did not timeously file their discovery affidavits (and, presumably, why they did not

timeously seek an extension of time within which to do so or appear at the hearing on14 September 2004):(a)All of the documents which the applicants “shall need during the trial” are in the possession of a Mr. Steyn and he has

been uncooperative in supplying same.(b)After the order to compel was granted, the applicants’ attorney of record could not reach them. The attorney left several messages on the voice mail of the second applicant’s son, but the latter “did not realise

how urgent it was.” On10 September 2004the attorney got hold of the second applicant through a mutual acquaintance. He explains that: “I was however not in Polokwane

and was the first date that I could see my attorney of record regarding the discovery affidavit on21 September 2004”. The applicants then make the submission thatthey were not in wilful default since “I was not aware of the application which was brought on14 September 2004and/or the court order which was granted during August 2004.It is submitted that the first explanation can be simply disregarded. The applicants were obliged to discover such documents as were, or had been, in their possession or under their control and the fact that documents which they intend utilising at the trial were

in the possession of a third party clearly did not relieve them of the obligation to file a discovery affidavit.As regards the second explanation, the following appears –The applicants do not contend that they were unaware of the fact that an application to compel them to file their discovery affidavits

had been launched – they contend that only after the order had been granted their attorney could not get hold of them. That

being so, it was incumbent on the applicants to keep in contact with their attorney as to the outcome of this application.It is noteworthy that the applicants do not disclose what the content of the “several messages” were which the attorney

left for the second applicant’s son. No affidavitbythe sonwasproduced to support the (hearsay) allegation that he did not realise how urgent the matter was and the issue as to whether the son communicated any of these messages to the second applicant is conveniently skirted.One would have expected the attorney to attempt to communicate with the applicants in writing once his telephone messages bore not

fruit (bearing in mind that he had previously sent a fax confirming the close of pleadings). The applicants do not state that no

such written communication was addressed and, if so, why not.On the applicants’ own version, the attorney did make contact with the second applicant on10 September 2004– i.e. before the judgment was granted. The only explanation advanced as to why the applicants did not, in the three days

before

the application for judgment was due to be heard, comply with the compelling order, or take steps to obtain an extension of time,

is that the second applicant “was not in Polokwane” and could only see his attorney on 21 September 2004. Where he was,

and why he could not see the attorney before this date, is simply not explained. The second applicant’s statement, in paragraph 5.7 of the founding affidavit, that he was unaware of the application on 14 September 2004, is contradicted by his statements in paragraph 5.6 thereof. It is submitted that the applicants’ explanation is needlessly vague and is unsatisfactory in many respects. More importantly, however, on the applicants’ own version, they were, by no later than 10 September 2004, aware that an application for judgment was due to be heard on 14 September 2004. They elected to take no further steps, but to allow the judgment to be entered against them. I am satisfied that the applicants have not advanced a reasonable and sufficient explanation for their default and that the explanation

advanced in fact demonstrates that the default was wilful. As set out above, the applicants were aware of the pending application for judgment by no later than 10 September 2004. On their version, they only consulted with their attorney of record on 21 September 2004 and this application was delivered only some two months later, on 19 November 2004. No explanation for this delay is offered. Having launched the application, the applicants then failed to set it down. The unexplained delay in bringing the application is,

in itself, a bar to relief, and the delay in bringing, and prosecuting, the application, indicate that the applicants are not bona fide in advancing their defence, but are simply seeking to delay the finalisation of the matter for as long as possible. Having reached the conclusions set out above, I suggest that I need not even consider the defences raised by the applicants since they failed to pass the first test. Suffice it to say, however, that the defences raised are spurious, and do not bear scrutiny. The application is dismissed with costs. H DANIELS JUDGE OF THE HIGH COURT

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10 JUNE 2005
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IN THE MATTER BETWEEN: F.M.S. DEVELOPERS CC
FIRST APPLICANT/DEFENDANT FAROUK VALJIE
SECOND APPLICANT/DEFENDANT AFRICAN CONTRACTORS FINANCE
CORPORATION (PTY) LTD
RESPONDENT/PLAINTIFF

IN THE MATTER
BETWEEN:

F.M.S. DEVELOPERS CC
FIRST APPLICANT/DEFENDANT
FAROUK VALJIE
SECOND APPLICANT/DEFENDANT
AND AFRICAN CONTRACTORS FINANCE
CORPORATION (PTY) LTD
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JUDGMENT

DANIELS, J

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The respondent instituted action against the first applicant (as principal debtor) and the second defendant (as surety) in respect of monies lent and advanced to the first applicant in terms of a written loan agreement. This loan was intended to provide bridging finance to enable the first applicant to perform in terms of a contract concluded by it with the Northern Province Housing Development Board to build certain houses (and, in particular, 400 houses forming part of the Bergneck flood relief project.) The applicants filed a plea but thereafter failed to make discovery as required in terms of Rule 35(1). The respondent brought an application to compel discovery and such an order was granted on 3 August 2004. The applicants failed to comply with this order and the respondent accordingly, in terms of Rule 35(7), brought an application to strike out the applicants' defence and for judgment. On 14 September 2004 judgment was granted against the applicants, jointly and severally for: 3.1

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The applicants filed a plea but thereafter failed to make discovery as required in terms of Rule 35(1). The respondent brought an application to compel discovery and such an order was granted on

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judgment was granted against the applicants, jointly and severally for:

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Payment of the amount of R909 016,46;

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3.3

Costs of suit on the scale as between attorney and client.

On 19 November 2004 the applicants delivered an application for the rescission of this judgment. After delivery of the respondent's answering affidavit in this application, the applicants did not deliver a replying affidavit. They also failed to set the application down for hearing. The application was set down by the respondent. In order to obtain a rescission of judgment the applicants must show sufficient cause which means, a reasonable and acceptable explanation for their default; and that on the merits they have a bona fide defence which, prima facie, carries some prospect of success. (See *Chetty v Law Society, Transvaal* 1985 (2) 756 A at 764J-765E.) As regards the explanation for their default, the applicants are required to provide an explanation as to enable the court to understand how it came about and to assess both their conduct and motives. (See *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345A at 353 A). If it appears that their default was wilful or due to gross negligence, the court will not come to their assistance. Such wilful default will be present if it appears that the applicants knew that judgment was to be taken against them, but did not demur and allowed the plaintiff to take its course. (See *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801C at 804C-805H.) The applicants advance two reasons why they did not timeously file their discovery affidavits (and, presumably, why they did not timeously seek an extension of time within which to do so or appear at the hearing on 14 September 2004): (a)

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(a)

All of the documents which the applicants “shall need during the trial” are in the possession of a Mr. Steyn and he has been uncooperative in supplying same.

(b)

After the order to compel was granted, the applicants’ attorney of record could not reach them. The attorney left several messages on the voice mail of the second applicant’s son, but the latter “did not realise how urgent it was.” On 10 September 2004 the attorney got hold of the second applicant through a mutual acquaintance. He explains that: “I was however not in Polokwane and was the first date that I could see my attorney of record regarding the discovery affidavit on 21 September 2004”. The applicants then make the submission that they were not in wilful default since “I was not aware of the application which was brought on 14 September 2004 and/or the court order which was granted during August 2004.

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It is submitted that the first explanation can be simply disregarded. The applicants were obliged to discover such documents as were, or had been, in their possession or under their control and the fact that documents which they intend utilising at the trial were in the possession of a third party clearly did not relieve them of the obligation to file a discovery affidavit. As regards the second explanation, the following appears – The applicants do not contend that they were unaware of the fact that an application to compel them to file their discovery affidavits had been launched – they contend that only after the order had been granted their attorney could not get hold of them. That being so, it was incumbent on the applicants to keep in contact with their attorney as to the outcome of this application. It is noteworthy that the applicants do not disclose what the content of the “several messages” were which the attorney left for the second applicant’s son. No affidavit by the son was produced to support the (hearsay) allegation that he did not realise

how urgent the matter was and the issue as to whether the son communicated any of these messages to the second applicant is conveniently skirted. One would have expected the attorney to attempt to communicate with the applicants in writing once his telephone messages bore not fruit (bearing in mind that he had previously sent a fax confirming the close of pleadings). The applicants do not state that no such written communication was addressed and, if so, why not. On the applicants' own version, the attorney did make contact with the second applicant on 10 September 2004 – i.e. before the judgment was granted. The only explanation advanced as to why the applicants did not, in the three days before the application for judgment was due to be heard, comply with the compelling order, or take steps to obtain an extension of time, is that the second applicant “was not in Polokwane” and could only see his attorney on 21 September 2004. Where he was, and why he could not see the attorney before this date, is simply not explained. The second applicant's statement, in paragraph 5.7 of the founding affidavit, that he was unaware of the application on 14 September 2004, is contradicted by his statements in paragraph 5.6 thereof. It is submitted that the applicants' explanation is needlessly vague and is unsatisfactory in many respects. More importantly, however, on the applicants' own version, they were, by no later than 10 September 2004, aware that an application for judgment was due to be heard on 14 September 2004. They elected to take no further steps, but to allow the judgment to be entered against them. I am satisfied that the applicants have not advanced a reasonable and sufficient explanation for their default and that the explanation advanced in fact demonstrates that the default was wilful. As set out above, the applicants were aware of the pending application for judgment by no later than 10 September 2004. On their version, they only consulted with their attorney of record on 21 September 2004 and this application was delivered only some two months later, on 19 November 2004. No explanation for this delay is offered.

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