

SOUTH AFRICA / JUDGMENT

Gangat v Akoon (A5044/2019) [2021] ZAGPJHC 828 (21 December 2021)

[2021] ZAGPJHC 828**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Mia, Khumalo, Cajee

CASE / FILE NUMBER

A5044/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****APPEAL****CASE NO: A5044/2019****COURT****A QUO CASE NO: 3751/2007****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: YES

REVISED:

NO

Date:

21 December 2021

In

the matter between:**GANGAT:**

NAZIR HUSSEIN ISMAIL

APPELLANT

and

AKOON,

AHMED

RESPONDENT

Coram:

Mia J, Khumalo AJ, Cajee AJ

Heard:

27 October 2021

Delivered: 21 December 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, and by being uploaded to the CaseLines digital system of the GLD. The date and time for hand-down is deemed to be 12:00 on 21 December 2021

JUDGMENT

Cajee AJ (Mia J and Khumalo AJ concurring):

- [1] This is an appeal against the judgment of Crutchfield AJ (as she then was) dated the 18th of April 2019 wherein she dismissed an application by the Appellant for a rescission of a default judgment granted against him by Mojapelo DJP on the 3rd of March 2011.
- [2] Crutchfield AJ, on the 29th of August 2019, granted the Appellant leave to appeal, readily conceding, correctly so, that the Plascon-Evans test^[1] which she had used in reaching her finding was not the appropriate test in an application for rescission of judgment.
- [3] This matter has a long and chequered history going back many years when the Respondent brought an application on the 22nd of February 2007 (“2007 application”) for the repayment of money allegedly owed to him by the Appellant and three other persons, one being a juristic entity. At all material times hereto the Appellant was represented by Mohamed Randera & Associates and the Respondent by Sadlers Attorneys.
- [4] The 2007 application was in turn referred to trial only as against the Appellant and the 2nd Respondent, one Aston Terry, by Sapire AJ on the 7th of July 2009 on the unopposed application of the Respondent (who was the applicant in the 2007 application) after the Appellant filed his answering affidavit and raised a number of defences and disputes of fact. The 2nd Respondent also filed an answering affidavit.
- [5] The Respondent allegedly obtained default judgment jointly and severally against the 3rd Respondent, one Goodwin Wade and the 4th Respondent, a close corporation named Goldenspot Trading 823 CC, on the strength of the aforesaid application, however only a court order against the 3rd Respondent by Hartford AJ dated the 8th of December 2008 has been filed.
- [6] Pleadings were subsequently exchanged between the Appellant and the Respondent where after the Respondent’s attorneys applied for a trial date from the Registrar of the High Court on the 16th of February 2010.

- [7] The basis of the claim, as set out in the declaration and as amplified in the founding affidavit dated the 15th of February 2007 was that the Appellant and the 2nd and 3rd Respondents were liable to the Respondent for inducing him by misrepresentation to enter into an agreement to pay over the sum of R940 000-00 to buy shares in an entity called Gizallo Investments Holdings (Pty) Ltd (“Gizallo”), which was never actually registered as a company.
- [8] The basis of the Appellant’s defence was that the Respondent was at all times aware that Gizallo did not exist, and that it would only later be brought into existence by the renaming of a shelf company, and was subject to the signing of a shareholders’ agreement. According to the Appellant both he and the Respondent were brought under the impression by the 2nd and/or 3rd Respondents that the necessary paperwork was being attended to by a firm of attorneys Bowman Gilfillan, which never materialised and the agreement was abandoned. He further denied that any money was paid over by the Respondent in terms the agreement.
- [9] In his answering affidavit in one of the few portions of objective evidence we have the Appellant attached the contents of an SMS dated the 1st of March 2007 sent to him by the Respondent which reads as follows:
- “Salaams. Call me will explain. As I told you when we met i (sic) had to act against the company and it implicated you. I am not acting against you but require answers to my money from tesna (sic). I believe you had nothing to do with the loss and I take your word for it”*
- [10] Thereafter, on the 7th of December 2010, a Notice of Set Down was served by the Respondent’s attorneys on the Appellant’s attorneys of record informing them that the matter had been set down for trial for the 3rd of March 2011. This notice effectively gave the Appellant’s attorneys less than three months to prepare for trial, with at least four weeks of this period falling within the dies non period, at a time when most attorneys’ firms are closed from mid-December until mid-January for the festive season.
- [11] It is uncertain if there was compliance with the requirements of Transvaal Rule 7[2] pertaining to matters set down for trial, as there is no notice in the plethora of notices and pleadings filed on record, of any notice from the Registrar to the respective attorneys in terms of Transvaal Rule 7(3) advising them of the date of trial. In terms of Transvaal Rule 7(5) the respective attorneys were required, within 7 days of receiving the aforesaid notice, to inform each other of the trial date. It is improbable that the Registrar would have only allocated a trial date almost ten months after having received an application to do so, and then only less than three months from the date of notification having regard to the heavy court rolls. I however hasten to add that none of the parties raised this issue in their affidavits or their heads of argument, either before us or before Crutchfield AJ.
- [12] Be that as it may, in the first two months of 2011 there was a flurry of activity between the respective attorneys in an attempt to get the matter ready for trial, including notices to make discovery.

- [13] Thereafter on the 14th of February 2011 the Appellant's attorneys withdrew as attorneys of record for the Appellant, citing as the reason that they had lost contact with the Appellant. In his affidavit in support of the application for rescission the Appellant alleged that sometime in 2008 he had vacated the flat in Crown Heights in Fordsburg where he lived and had moved to Crosby. His only means of contact with his attorneys was by telephone. To some extent this is borne out by the fact that when the Sheriff at the request of the Respondent's attorneys attempted to serve a Notice to Attend a Pre-Trial Conference on the Appellant at the address in Fordsburg on the 18th of February 2011, the Sheriff found no-one there. The rest of the allegations appear less plausible; an aspect I will revert to later.
- [14] On the 7th of March 2011, there being no appearance by the Appellant, Mojapelo DJP granted default judgment against him as the 1st Defendant for the full amount of R940 000-00 claimed. At this juncture it must be noted that Mojapelo DJP also granted judgment against the 2nd Respondent, following a settlement agreement between the latter and the Respondent. As stated above, default judgment was granted previously against the 3rd Respondent on the 8th of December 2008 by Hartford AJ. All these judgments were based on the joint and several liabilities of the respondents in the 2007 application.
- [15] The Appellant only brought an application for rescission of judgment on the 12th of October 2017, under the circumstances described below. A notable feature of this case is that there is little objective evidence to support the case of either party.
- [16] According to the Appellant he vacated the flat he had been residing in, namely Flat 603, 69 On Crown, in Fordsburg in August 2008 and moved to 68 California Street, Crosby. The only contact he had with his attorneys thereafter was through telephone calls and occasional visits to their offices, during the consultations it never occurred to him to inform his attorneys of his change of address. He also alleges that his cell phone number had changed. Since nothing happened after the filing of his plea in November 2009, he says that he assumed that the trial against him had been abandoned by the Respondent, who had obtained judgment against some of the other respondents (presumably the 3rd and 4th Respondents).
- [17] According to the Appellant he only became aware of the default judgment against him on the 19th of September 2017, as set out above. He cites the fact that he had always been desirous of defending the matter and regarded the claim against him as spurious as set out in his opposition to the initial application brought in 2007, as well as his plea filed in 2009. At this juncture it should be noted that the plea, wherein an admission is made that the Appellant was still residing at the address in Fordsburg, was filed after he had allegedly vacated his flat in Fordsburg.
- [18] The Appellant further alleges that starting in 2010 and during 2011 he was suffering from mental health issues which resulted in him vacating the flat in Fordsburg in 2008. The Appellant does not provide details of the illness, nor the reason why he vacated the flat in Fordsburg in 2008 when these issues only manifested themselves in 2010.

- [19] On the 7th of September 2017 the Appellant, desirous of selling his property in Mayfair West, alleges that he had a Windeed search conducted, which showed that an interdict had been entered against the said property. He thereafter contacted his attorney. Mr. Randerer, who then determined after investigations that a default judgment had indeed been granted against the Appellant in favour of the Respondent on the 3rd of March 2011.
- [20] This is in essence what is contained in the founding affidavit in the rescission application. No mention is made therein of any further contact the Appellant had with the Respondent.
- [21] The answering affidavit to the rescission application is far more comprehensive. In it the Respondent alleges that on the on the 10th of March 2011, a week after default judgment was granted against the Appellant, he allegedly called the Appellant to inform him of the default judgment. The Appellant does not deny the phone call, but denies that he was informed of the default judgment. The Appellant contends that Crutchfield AJ placed much emphasis on this phone call, finding that on the probabilities it supported the Respondent's version.
- [22] The next notable event was in the second quarter of 2016 when the Respondent alleges that he met the Appellant for coffee to discuss how he was going to make payment of the default judgment debt as well as a tyre deal in Cuba. Further phone calls and meetings were allegedly held at the Appellant's attorney's offices to discuss same. These calls were made to the same number the Appellant had always been using. The Appellant does not deny the calls or the meetings, but denies that the default judgment was ever discussed. It is notable that these calls and meetings were never referred to in the founding affidavit. It is only in his replying affidavit, supported by a confirmatory affidavit, that the Appellant states that in a conversation between the Appellant and his attorney Mr. Randerer, that the Appellant allegedly told Mr. Randerer that the dispute between the parties had been "sorted out". Even if this were true, it is unclear what the precise meaning to be attached to these words should be, as they are capable of several meanings and scenarios, as pointed out to counsel at the hearing of this Appeal.
- [23] According to the Respondent, on the 14th of September 2017, the Appellant sent him an SMS telling him he had learned about default judgment and if this was true. A copy of the message is attached to the answering affidavit, one of the very few pieces of objective evidence we have. The Respondent only responded on the 20th of September 2017 to inform the Appellant to contact the Respondent's attorney of record Mr. Sader. It is notable once again that these messages are attached to the answering affidavit, and not the founding affidavit. Be that as it may, one would have expected the Respondent, based on his version of events, to immediately inform the Appellant that they had discussed the issue and he had informed him (in 2011 and again in 2016) that he had obtained judgment against him. These messages are more supportive of the version of the Appellant that he only found out about the default judgement on the 19th of September 2017 rather than the version of the Respondent.

[24] As stated above the Appellant alleges that his attorney, Mr. Randera could not contact him because of his change of address and change of phone number. The Respondent claims that the Appellant always had same phone number, as indicated by the sms conversations and phone records. In his reply the Appellant admits he had same phone number from 2004 to 2014, but states there were periods when the number was suspended. He however does not provide proof of the periods that the number was suspended.

[25] These then are the salient features of this case. As pointed out above Crutchfield AJ readily conceded that the Plascon-Evans test was the inappropriate test to apply in the circumstances of this case. It follows that the question posed is: what is the proper test, and what outcome does it yield?

[26] The Plascon Evans test applies to applications in which final relief is sought. Having regard to the requirements of Uniform Rule 31(2)(b) which place the onus on the party applying for rescission to satisfy the requirements set out therein, it seems to me that the Plascon Evans Rule cannot apply as a party applying for rescission is not seeking final relief but merely seeks an order setting aside a default judgment so that he can be allowed to defend the action. In *Storti v Nugent and others* 2001 (3) SA 783 (W) at 806G – J Gautschi AJ said:

“In Ex parte Van der Merwe (supra at 72E – H) certain other general principles are enunciated. The first deals with notice to interested parties. I have not repeated that principle because it is of course fundamental to all applications. The second is that there should be no dispute on the facts. I do not agree with this unqualified statement. If the application involves a rescission of an order which should not have been granted, an applicant for a rescission under the common law need only make out a prima facie case (I deal more fully with this below). The effect of the order is interim only, and not final, and therefore factual disputes are ordinarily not a bar to success. If on the other hand the order was correctly made, but is to be set aside (permanently) because of, for instance, a composition with creditors, the order of setting aside is expected to have final effect and factual disputes would then become an obstacle to the applicant (Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E – 635C.”

(own emphasis)

[27] In *Government of the Republic of Zimbabwe v Fick* 2013

(5) SA 325 (CC) at para 85, the Court stated as follows:

“the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.”

[28] In *Chetty v Law Soc, Tvl* 1985 (2) SA 756 (A) at 765, Miller JA formulated the test in these terms:

'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. An 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. The reason for my saying that the appellant's application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, or elsewhere in the papers, any reasonable or satisfactory explanation of his default and total failure to offer any opposition whatever to the confirmation on 16 September 1980 of the rule nisi issued on 22 April 1980.' "

and further at 767J to 768B:

"As I have pointed out, however, the circumstance that there may be reasonable or even good prospects of success on the merits would

satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. (Cf *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532.) But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default."

[29] In *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) paragraph [54] it was stated as follows:

"[54] It is significant that the dictum of Schreiner JA, at the place mentioned, was uttered with reference to the observations of Van Blerk J (as he then was, Brink J, as he then was, concurring) in Du Plessis v Tager 1953 (2) SA 275 (O) at 278. In Du Plessis's case the Court was satisfied that the appellant, who had been the unsuccessful applicant for rescission in the magistrate's court, had shown, at least prima facie, that he had a good defence to the action. The Court was of the view, however, that the appellant had not been bona fide and that his behaviour had been characterised by a policy of seeking to achieve delay. The appellant in that case was found to have insufficiently explained his failure to defend the action and his appeal against the refusal of the magistrate to rescind the default judgment granted against him was refused, notwithstanding his having shown, in the sense required by Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O), that he had a defence to the action."

[30] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003 (6) SA 1 (SCA) at paragraph [12] the Court held as follows:

“[12] Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success (Melane v Santam Insurance Co Ltd).”

[31] On the basis of the little objective evidence at hand, and despite the paucity and even contradictory nature of the allegations in his founding affidavit for rescission, there is nothing to gainsay the Appellant's version that he only became aware of the default judgment on the 19th of August 2017. The SMS he sent to the Respondent on the 7th of September 2017 and the response thereto bear this out.

[32] On the face of it this appears to be a classic case of a client who failed to maintain contact with his attorney. See for example the case of *Bristow v Hill* 1975 (2) SA 505 (N) at 507 E –G where it was held as follows:

“He explains his delay in advising his attorney of his new address on the basis that

"it normally takes a long time before a case of this nature comes before the Court",

*that there was consequently no urgent necessity to stay in contact with his attorney, and that he was ignorant of the summary judgment procedure. It appears from his affidavit, however, that when he initially instructed his attorney he had already left the address mentioned in the summons and that he did not give his attorney any other address in Durban. Furthermore, he left Durban shortly afterwards, and did not endeavour to contact his attorney until after he became aware of a warrant of execution which had been issued pursuant to the judgment. He was, in my view, clearly negligent in failing to maintain contact with his attorney, and this fact precludes relief being granted on the ground of justus error (cf. *S. A. Clay Industries Ltd. v Katzenellenbogen, N. O. and Another*, 1957 (1) SA 220 (W) at p. 225). Consequently, even if the applicant's averments I have mentioned were intended to show justus error (which in their context they were not), they fail to do so.”*

[33] In addition, due consideration must also be given to the fact that the Appellant's attorney was only given three months' notice to prepare for a High Court trial (two if one considers that at least one month coincided with the festive season when most attorneys firms are closed). It is irrelevant when the Appellant vacated his flat in Fordsburg. The fact is that the Appellant was not there when the Sheriff attempted to serve the notice to attend a pre-trial conference on him on the 21st of February 2011 as he found the flat empty. It is entirely conceivable that had he been given a sufficient notification of the pre-trial conference he would have attended same. Moreover, had he received longer notification of the trial date, the Appellant's attorney may have been able to re-establish contact with him.

[34] The fact that the default judgment was not served on the Appellant's attorneys after it was granted in 2011 or anytime thereafter lends some credence to the Appellant's version that he was not aware of it until September 2017. So too the fact that: (i) the default judgment was never served on the Appellant personally in 2016 when he re-established contact with the

Respondent and (ii) no attempt was made by the Respondent to execute the default judgment at any stage from March 2007 until September 2017. I am therefore satisfied that the Appellant has proffered a reasonable explanation for his default.

[35] The bona fide defence has been disclosed in the plea. Furthermore, from the contents of the SMS sent to the Appellant by the Respondent on the 1st of March 2007 it would appear that the Appellant has not only some prospect but a good prospect of success in the trial.

[36] In the circumstances I propose that the following order be made:

[36.1] The appeal is upheld with costs including the costs of two counsel where so employed.[3]

[36.2] The default judgment granted on the 3rd of March 2011 is rescinded, and the Respondent is ordered to pay the costs of the application for rescission.

A. I. Cajee

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

I agree, and it is so ordered.

SC Mia

Judge of the High Court

I agree

S. Khumalo

APPEARANCES:

Heard on:

27 October 2021

Delivered On:

21 December 2021

Counsel for the Appellant: M. Baslian SC

Attorneys for the Appellant: Mohamed Randera and Associates

Counsel for the Respondent: S. D. Maritz (heads of argument by Subel SC and Maritz)

Attorneys for the Respondent: Sader Attorneys

[1] See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

[2] 7

- (1) When the pleadings in any trial action have been closed the plaintiff or, if he fails to do so within six weeks after the close of pleadings, the defendant may set down the case on the roll by entering the required particulars in the register kept by the registrar in the form set out in Schedule D (1), and such a plaintiff or defendant or his attorney shall forthwith give the other party written notice that this has been done. If the party concerned is represented by an attorney, the entry shall be effected by such attorney or a candidate attorney of such attorney.
- (2) The registrar shall set down as many cases for hearing on any court day as he considers can be tried on that day, in the chronological order in which the entries are made in terms of subrule (1). (3) The registrar shall notify each party or his attorney of the date on which the action is set down for hearing. Notice shall be given by registered post dispatched to the address given as the address for service of pleadings. If a party or his attorney gave a telefax number the notice may be sent by telefax, provided that the telefax equipment used for the purpose indicates that the notice was received.
- (4) The registrar may set down further cases for hearing on any court day if so authorised by the Judge President or a deputy judge president, or if he deems it advisable owing to the withdrawal or postponements of cases which have already been set down. (5) Every party to an action who receives notice of the trial date shall forthwith, and in any event not later than seven days after receipt of such a notice, give notice in writing to every other party or his or her attorney of the date which was allocated by the registrar for the hearing: Provided that the party receiving notice from the registrar need not give such notice to a party who is represented by the same attorney as the party who is obliged to give notice. [Sub-r.
- (5) substituted by GN R191 of 2002.]

[2] 7

- (1) When the pleadings in any trial action have been closed the plaintiff or, if he fails to do so within six weeks after the close of pleadings, the defendant may set down the case on the roll by entering the required particulars in the register kept by the registrar in the form set out in Schedule D (1), and such a plaintiff or defendant or his attorney shall forthwith give the other party written notice that this has been done. If the party concerned is represented by an attorney, the entry shall be effected by such attorney or a candidate attorney of such attorney.
- (2) The registrar shall set down as many cases for hearing on any court day as he considers can be tried on that day, in the chronological order in which the entries are made in terms of subrule (1).

- (3) The registrar shall notify each party or his attorney of the date on which the action is set down for hearing. Notice shall be given by registered post dispatched to the address given as the address for service of pleadings. If a party or his attorney gave a telefax number the notice may be sent by telefax, provided that the telefax equipment used for the purpose indicates that the notice was received.
- (4) The registrar may set down further cases for hearing on any court day if so authorised by the Judge President or a deputy judge president, or if he deems it advisable owing to the withdrawal or postponements of cases which have already been set down.
- (5) Every party to an action who receives notice of the trial date shall forthwith, and in any event not later than seven days after receipt of such a notice, give notice in writing to every other party or his or her attorney of the date which was allocated by the registrar for the hearing: Provided that the party receiving notice from the registrar need not give such notice to a party who is represented by the same attorney as the party who is obliged to give notice.

[Sub-r.

(5) substituted by GN R191 of 2002.]

- [3] Advocate Maritz argued the appeal before us but pointed out that the heads of argument were prepared by himself and Subel SC and at all times two counsel were briefed in the matter.

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