

SOUTH AFRICA / JUDGMENT

HM Watch Distributors v Weisz-Vurwerken (15737/2021) [2023] ZAGPPHC 2054 (30 November 2023)

[2023] ZAGPPHC 2054

COURT

North Gauteng High Court, Pretoria

BEFORE

Y Carrim

CASE / FILE NUMBER

15737/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 15737/2021

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE:

1 December 2023

SIGNATURE

In

the matter between:

HM
WATCH
DISTRIBUTORS
Applicant
and
S
WEISZ-VURWERKEN
Respondent

Delivered:

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines.
The date for hand-down is deemed to be 30 November 2023.

JUDGMENT

CARRIM, AJ

- [1] This is an application brought by the applicant for the rescission of a default judgment in which a foreign judgment granted by the District Court in Amsterdam, Netherlands, was confirmed by this court on 23 August 2022.
- [2] The applicant is a private company incorporated in accordance with the laws of the Republic of South Africa, with registered address at Ground Floor Autoparks, House 1[...], C[...] Road, Glenhazel, Gauteng, South Africa.
- [3] The respondent is S WEISZ-VURWERKEN B.V. t/a WEISZ GROUP (registration number 33184494), a company registered in The Kingdom of the Netherlands, with principal place of business situated at Jan Luikenstraat 92 P/R (1071 Cf) Amsterdam, The Kingdom of the Netherlands.
- [4] The applicant is an importer and distributor of high value watches for on sale to retail stores. The respondent supplied the applicant with stock. A dispute arose between the parties as to unpaid invoices during 2018/2019.
- [5] On 10 October 2022 the applicant was served with a writ of execution allegedly at the home of its director, Mr Hilton Freinkel. It then ascertained that the respondent had obtained judgment against it in the District Court of Amsterdam. ("Amsterdam order") That judgment was then enforced in this court by Potterill J on 23 August 2022.[1]
- [6] Judgment was granted against the applicant for payment of the amount of US\$ 21 820 85 (together with interest thereon), EUR 1 720.00 (together with interest), EUR 2 639.83; EUR 163.00; EUR 85.00 and costs of suit.

- [7] The grounds on which the applicant seeks rescission are numerous, including that it had not been served with the summons issued by the Amsterdam District Court, that it had not been made aware of the summons in South Africa because it had been served on the registered address of its Chartered Accountant, it had never consented to the jurisdiction of the court in Amsterdam, that there were several disputed invoices between the parties, that some of the claims by the respondent had prescribed, that the Minister's consent was required in terms of the Protection of Business Act.[2]
- [8] The respondent opposes the application on several grounds and raises several points in limine. It has also brought an application to strike out aspects of the applicant's replying affidavit and has filed an additional affidavit.
- [9] Both parties seek condonation, the applicant for the late filing of the rescission application and the respondent, for the late filing of its opposing affidavit.
- [10] During the hearing, the parties conceded some of the procedural disputes between them. The respondent had initially raised the late filing of the rescission application as a point in limine but no longer persists with it. The applicant did not oppose the respondent's condonation application for the late filing of its opposing affidavit. Accordingly, I do not deal further with these

issues.

- [11] In relation to the striking out and the additional affidavit, I did not grant leave to consider these without a proper application placed before me.
- [12] The only point in limine the respondent persisted with was what it called the lack of jurisdiction point. It argued that this court lacked jurisdiction to consider the rescission application because the applicant had formulated its grounds of rescission as if it was attacking the findings of the foreign judgment. In other words, it was raising defences to the merits of the main matter in the Amsterdam court. This raised a jurisdictional issue because the applicant should have attacked the requirements of enforceability as set out in *Jones v Krok*. [3] On this basis, the application should be dismissed.
- [13] It soon became clear that the applicant's arguments were directed at the enforceability proceedings in this court. The grounds it was putting up related to the enforceability of the foreign judgment and not to the findings of the Amsterdam court. In other words, it was saying that had it been present at the hearing where default judgement was given against it by this court, it would have raised all these arguments in that hearing to persuade the judge not to enforce the foreign judgment.
- [14] I am of the view that the respondent's point in limine is equivalent to grounds of opposition to the application and will likely be resolved in the consideration of the merits of the rescission application which I now turn to consider.

[15] While the Notice of Motion does not specify this, I assume from the contents of the founding affidavit that the application has been brought in terms of Rule 42(1)(a) and/or the common law and/or Rule 31(2).

[16] Uniform Rule 31(2)(b) provides as follows:

“A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside

such judgment and the court may upon good cause shown set aside the default judgment on such terms as it deems fit.”

[17] Uniform Rule 42(1)(a) provides as follows:

"The court may, in addition to any 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."

[18] An application for rescission of a judgment in terms of Rule 42(1)(a) must be brought within a reasonable period, and any delay must be explained fully. The applicants must show good cause justifying an order for condonation. The party seeking such condonation should satisfy the court that the relief sought should be granted, especially where the applicant is dominus litis.[4]

[19] At common law, the court is entitled to rescind a judgment obtained in default of appearance provided sufficient cause is shown. Sufficient cause has been equated with good cause. This includes a reasonable and acceptable explanation for the default and that a party on the merits has a bona fide defence.[5]

[20] Under the common law a court has a wide discretion to grant or refuse rescission. As it was put in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*:[6]

“..the courts generally expect an applicant to show good cause: (a) by giving a reasonable explanation for the default; (b) by showing that the application is made bona fide; and (c) by showing a bona fide defence to the plaintiff's claim which prima facie has some prospect of success (Grant v Plumbers (Pty) Ltd, HDS Construction (Pty) Ltd v Wait supra, Chetty v Law Society, Transvaal).”(Footnotes omitted)

[21] A court may have regard to issues of prejudice. Good cause means that the defendant has a reasonable explanation for the default.[7] Wilful default is normally fatal but gross negligence may be condoned.[8]

[22] It is important to note that the judgment sought to be rescinded in this matter is a unique one. It is not a judgment on the merits of the dispute between the parties, but a judgment enforcing a judgment of a foreign court.[9]

- [23] It is trite that a local court may not investigate the merits of a case determined in a foreign court. A party aggrieved by a decision of a foreign court must resort to the appellate or review proceedings available in the foreign country.
- [24] While a High Court cannot rescind the order of a foreign court, it may, in appropriate circumstances, refuse to recognise it or enforce it.[10]
- [25] There are six jurisdictional requirements for enforcement of a foreign judgment as set out in *Jones v Krok*.^[11] In South Africa a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our courts

provided –

- 24.1 that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts;
- 24.2 that the judgment is final and conclusive in its effect and has not become superannuated;
- 24.3 that the recognition and enforcement of the judgment by our courts would not be contrary to public policy;
- 24.4 that the judgment was not obtained by fraudulent means;
- 24.5 that the judgment does not involve the enforcement of a penal or revenue law of a foreign state; and
- 24.6 that the enforcement of the judgement is not precluded by the provisions of the Protection of Business Act.^[12]
- [26] The jurisdictional requirements for the enforcement of foreign orders were reiterated in *Purser v Sales*.^[13]
- [27] The applicant has raised several grounds relating to the merits of the matter, including that it had not consented to the jurisdiction of the Dutch court, some claims were prescribed, some invoices were incorrect, and that the respondent had cited the incorrect entity.
- [28] The applicant also argued that the enforcement of the foreign judgement is precluded by s1(1) of the Protection of Business Act. This argument holds no water because the court in *Chinatex Oriental Trading Co v Erskine*^[14] made it abundantly clear that that section applies to raw materials and matter and not to goods such as watches. While watches may consist of raw materials and matter, these are put together in a manufactured complete product.
- [29] Nevertheless, in my view, there are two grounds raised by the applicant that might have some merit for the purposes of this application. I discuss these in order of their occurrence.

[30] The first of these relates to the service of the Amsterdam summons on the applicant. The applicant alleges that it had received a letter of demand via email on 10 March 2020. The title of the email was “Final Summons Weisz Group B.V. (please respond immediately)” from an individual alleging that he was the attorney for the respondent. The email demanded that the applicant pay USD \$33 384.43 within 14 days, failing which the respondent would issue a summons. A draft summons in Dutch was attached to the email.[15] The applicant did not accede to the demand but passed it on to his erstwhile attorneys. On Mr Freinkel’s version, he was

subsequently called by a Mr Bredell Ferreira, purporting to be the respondent’s debt collector and attorney who called both the applicant and his wife regarding the amount owing. He heard nothing more from the respondent until 10 October 2022 when the Sheriff served a Writ of Execution at his house.[16]

[31] The respondent confirms that its legal representatives sent a final demand on 10 March 2022 wherein the applicant was informed that the respondent would issue summons if the applicant did not settle its debt within 14 days. It also admits that Mr Ferreira, a debt collector had contacted the Mr Freinkel. Thereafter, however, there is a dispute between the parties as to what transpired between the applicant and Mr Ferreira. Mr Freinkel alleges that he made a without prejudice settlement offer of USD\$ 3000.00. The respondent alleges that he acknowledged liability.[17] What appears to be common cause is that this engagement did not result in any settlement of the dispute.

[32] The respondent then proceeded to issue summons. The Dutch attorney sent a copy of the summons to the Ministry of Foreign Affairs which is tasked with the duty to on-forward the summons to the authorities in South Africa.[18] On the respondent’s version, as shown by a Netherlands postal server report annexure FSW9, a copy of the summons was sent by registered airmail directly to the applicant.[19]

[33] Nothing more is said in the opposing affidavit and no translation of annexure FSW9 is provided. However, a cursory reading of page 2 of the document - some of which is cut off - shows that it was to be sent by registered mail and addressed to HM Watch Distributors at Ground Floor Autoparks, House 1[...] C[...] Road Glenhazel, Johannesburg 2192 South Africa. Page 3 of the document records under the heading “Verzendstatusinformatie” that on 31 March 2021, the “Zending verzondent naar land van bestemming”. Loosely translated it states, under the heading “Dispatch Status Information” that on 31 March 2021, the “Shipment was sent to country of destination”. [20]

[34] The applicant, in its replying affidavit, avers that the summons was reported as “undeliverable” on annexure FSW9.[21] No explanation is given where on FSW9 such a statement can be found. It is further alleged that the confirmatory affidavit of Mr Grawitzky confirms that the Dutch summons was not received. But this is a misleading statement. In their confirmatory affidavits, discussed below, Ms Mofokeng and Mr Grawitzky say nothing about the Dutch summons that had allegedly been sent by registered post to the IAPA

offices.

- [35] From the respondent's perspective, it complied with the requirements of Dutch law and the Amsterdam court was satisfied that service had been duly effected. That may be so, but the concern that arises from this state of affairs is that the summons was supposed to be delivered to the IAPA offices, a street address, by the South African post office.[22] The South African postal service is notoriously dysfunctional, and it is not known whether street deliveries were in fact being effected to the IAPA offices by the post office at that time. The second is that it is common knowledge that a firm of accountants would likely serve as registered addresses for many companies. A summons issued against one of many clients of the accountants, and where time is of the essence, might easily fall between the cracks. As it seems to have happened in this case.
- [36] The respondent does not explain why it elected to serve only on the registered address of the applicant when it had previously served the draft summons on the applicant via email. Given that the address on the invoices was different to the registered address of the applicant, and that the summons was being sent across oceans, one would think that the respondent would have sent a copy to the applicant's director via email.
- [37] The respondent has not provided this court with a sworn translation of annexures FSW 8 and 9 or a guide on how to read the report on FSW9. I can only surmise *ex facie* FSW9, by utilising a free dictionary on Google, that the Dutch summons left the shores of Netherlands towards South Africa. No track and trace reports have been put up by the respondent that the summons arrived on the other side and was in fact delivered to the IAPA offices.
- [38] The fact that the Dutch summons was not received by the applicant would certainly constitute a *bona fide* defence in a rescission application in the Amsterdam court. But would it constitute a *bona fide* defence in enforcement proceedings?

In the enforcement proceedings, the proper enquiry would be what factors a court would have regard to for not enforcing a foreign judgment.[23] In other words, would the fact that the applicant did not receive the Dutch summons constitute a *bona fide* defence against enforcement of the foreign judgment? In accordance with the principle of legality, I would think that the non-receipt of the Dutch summons, is certainly a factor that would weigh heavily against the granting of an enforcement order.

- [39] .The summons in the enforcement proceedings issued out of this court ("enforcement proceedings") was also served on the IAPA offices by the Sheriff.
- [40] In relation to this summons, the applicant concedes that the summons was served on IAPA but avers that it was not made aware of the enforcement proceedings.

- [41] The applicant has filed a confirmatory affidavit by an employee of IAPA, Ms Mofokeng, that she was served with the summons and scanned it to Mr David Grawitzky to send to the client, but “cannot find proof that the copy was sent to the client, or the client was called to be advised of the summons”.[24] Mr Grawitzky in his confirmatory affidavit simply affirms that he did not bring the summons to the attention of the applicant.[25]
- [42] Curiously, the writ of attachment was then served on the director’s home. This suggests that the respondent was aware that no movables belonging to the applicant could be found at the IAPA offices.
- [43] While the applicant does not dispute the issue of service, it submits that it was not in wilful default of non-appearance in the enforcement proceedings. Due to no fault of its own, the applicant was not made aware of the enforcement proceedings in South Africa.
- [44] A third ground that may have relevance to the enforcement proceedings is that there is a dispute between the parties as to the amount owed. The applicant has acknowledged liability to the respondent in an email,[26] but a dispute exists as to the extent of that liability. The respondent submits that this must be raised in the Amsterdam court because it deals with the merits of the matter. I agree. However, I am of the view that it might still have some relevance as a factor in enforcement proceedings because the outcome of the Amsterdam order is being questioned.
- [45] In assessing these grounds under rule 42(1) one must consider whether the judgement was “erroneously” granted by Potterrill J. In *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*[27] the SCA assessed several judgments in its inquiry as to whether in a case where a plaintiff is procedurally entitled to a judgment in the absence of a defendant the judgment granted can be said to be erroneously granted. In that case the court held that a court which grants a judgment by default does not grant the judgment on the basis that the defendant has no defence. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed cannot transform a validly obtained judgment into an erroneous judgment.[28]
- [46] On the facts of this case, the applicant does not allege that the proceedings before Potterill J were procedurally defective. Hence it cannot be said that the judgment was granted erroneously.
- [47] However, the applicant submits that it had not been made aware of the summons in the enforcement proceedings due to no fault on its part. The summons was not brought to its attention and its non-appearance was not wilful.

- [48] An application for rescission of judgment is not an inquiry to penalise a party for failure to follow the rules and procedures of the court. The question is always whether the explanation for the default gives rise to a probable inference that there is no bona fide defence.[29]
- [49] In my view the applicant has provided a reasonable explanation for its non-appearance when default judgment was given and for the delay in bringing this application (which delay is no longer an issue between the parties).The applicant has demonstrated that it has a bona fide defence vis-à-vis the enforcement proceedings namely that it had not received the Dutch summons. In other words, it has shown good cause.
- [50] I emphasise here that rescinding the Potterill J order would not result in a rescission of the Amsterdam order but would merely result in the applicant gaining some time to either challenge the Amsterdam order in that court or to defend another enforceability action brought against it by the respondent.
- [51] As to the issue of prejudice, I am of the view that there would be no prejudice to the respondent if rescission were granted. It is already in possession of a judgment in its favour and may, on notice, proceed to seek enforcement again. However, the applicant will be prejudiced because it would be deprived of an opportunity to be heard and to challenge the Amsterdam order.
- [52] Considering my findings above, there is no need for me to decide on the remaining grounds raised by the applicant.
- [53] I now deal with the issue of costs. The general principle is that costs should follow the suit. However, the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer.[30] In this case, both parties were remiss in filing their papers. In the circumstances, I find that a costs order against either party would be inappropriate.
- [54] Accordingly, the application is granted, and I make the following order:

50.1 Condonation is granted, to the extent required, for the late filing of the applicant's application and the late filing of the respondent's opposing affidavit.

50.2 The respondent's point in limine is dismissed.

50.3 The order granted by Potterill J on 23 August 2022 is hereby rescinded.

50.4 There is no order as to costs.

Y CARRIM

ACTING JUDGE OF THE HIGH COURT

PRETORIA DIVISION

For the Applicant: Adv M Amojee instructed by Rosseau Incorporated For the Respondent: Adv R Van Keik instructed by Coetzer & Partners Date of hearing: 21 November 2023 Date of judgment: 30 November 2023

[1] Annexure FA2 at CL 00-1.

[2] Act 99 of 1978.

[3]

[1994] ZASCA 177; 1995 (1) SA 677 (AD).

[4] Standard General Insurance Co Limited v Eversafe (Pty) Ltd and Others 2000

(3) SA 87 (W) at 93G.

[5] Harms Civil Procedure in the Superior Courts B-307.

[6] 2003

(6) SA 1 (SCA) at para 11.

[7] Harms B-206(2) and see the cases cited at footnote 2.

[8] Vhembe District Municipality v Stewarts And Lloyds Trading (Booysens) (Pty) Limited and Another (397/13) [2014] ZASCA 93; [2014] 3 All SA 675 (SCA) (26 June 2014)

[9] CL 00-1.

[10] Harms B-304 and the cases listed at footnote 19 B-305.

[11]

[1994] ZASCA 177; 1995

(1) SA 677 (A) at 685B-E.

[12] Harms Civil Procedure in the Superior Courts at B-308(B).

[13] 2001

(3) SA 445 (SCA).

[14] 1998

(4) SA 1087.

[15] Annexure FA5.

[16] Para 16-25 of the Founding Affidavit.

[17] Apparently, the telephone discussions between the applicant and Mr Ferreira were recorded.

- [18] Para 23 of the Opposing Affidavit.
- [19] CL 016-104 and 105 FSW 9.
- [20] PONS Online Dictionary <https://en.pons.com/text-translation/dutch-english>.
- [21] Para 47 CL 017-12.
- [22] I assume this because it wasn't clear from the papers who was entrusted with delivery on the South African side.
- [23] See *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC).
- [24] CL 013-42.
- [25] CL 013-44.
- [26] Annexure FSW7 CL 016-101
- [27] (128/06) [2007] ZASCA 85; [2007] SCA 85 (RSA) ; 2007 (6) SA 87 (SCA) (1 June 2007)
- [28] Para 27
- [29] Harms B-206(2)
- [30] *Ferreira v Levin NO & Others; Vryenhoek and Others v Powell NO & Others* [1996] ZACC 27; 1996 (2) SA 621 (CC)

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