

SOUTH AFRICA / JUDGMENT

Janse van Rensburg v Massmart Wholesale (Pty) Ltd t/a Shield Buying and Distribution (2903/2022) [2024] ZAMPMBHC 87 (27 December 2024) [2024] ZAMPMBHC 87

COURT

Mbombela High Court, Mpumalanga

BEFORE

TV Ratshibvumo

CASE / FILE NUMBER

2903/2022

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THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 2903 / 2022

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

27 December 2024

SIGNATURE

In the matter between:

MARTHA JANSE VAN RENSBURG

APPLICANT

And

MASSMART WHOLESALE (PTY) LTD RESPONDENT

t/a SHIELD BUYING AND DISTRIBUTION

In re:

MASSMART WHOLESALE (PTY) LTD

PLAINTIFF

ALSISCAN (PTY) LTD

FIRST

DEFENDANT

IAN ALEXANDER PACE N.O. SECOND

DEFENDANT

MARTHA JANSE VAN RENSBURG THIRD

DEFENDANT

J U D G M E N T

RATSHIBVUMO DJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 12H00 on 27 December 2024.

[1]

Introduction.

This is an application for the rescission of judgment that was granted against the Applicant on 05 December 2022, in favour of the

Respondent (Plaintiff in the main action), under the same case number as this application. On that date, default judgment was granted

against Alsiscan (Pty) Ltd, trading as Saverite Machado (first defendant in the main action – the first defendant), Ian Alexander Pace N.O. (in his capacity as Executor of the deceased's estate of the Applicant's deceased's husband) and the Applicant. The Applicant and her deceased husband had signed deeds of suretyships in respect of the first defendant's debt. The default judgment is in the amount of R1 105 171.23, with interest charged by ABSA Bank Limited, plus 2.5% per annum and costs; to be paid jointly and severally, in solidum, the one paying, the other to be absolved. The Applicant was involved because she and her deceased husband had signed deeds of suretyships in respect of the first defendant's debt.

[2] The application is premised on Rule 31(2)(b) of the Uniform Rules. Heads of argument prepared for the Applicant suggests though that the application is also based on common law. Rule 31(2)(b) provides,

“[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.”

[3] It is trite that in showing good cause, an applicant for rescission of judgment must not only show absence of wilful default, but reasonable prospects of success in the main action. As for absence of wilful default, the Applicant asserts that she was unaware of the judgment as it was granted in her absence. At the time the application was launched, she did not know the date, place and time of service of the summons. Although she requested these details from the Respondent several times, it refused to provide her with a copy of the return of service. When it was finally disclosed as an annexure to the Respondent's answering affidavit, it turned out that summons was served at her erstwhile residential address which she had not been occupying after she relocated to Australia in August 2020 following the death of her husband. She avers that had she received the summons; she would have served a notice to defend as she has bona fide defences against the claims lodged against her in the main action.

[4] Bona fide defence.

In this application, several defences were raised against the Respondent's claim which were presented as bona fide defence in an attempt to show good cause. These can be summarised as follows: First, the amount claimed by the Respondent is inaccurate for the following

reasons.

4.1 Respondent failed to furnish the Applicant with signed proof of delivery of certain goods ordered by the first defendant. The Applicant had asked for this information in an email dated 07 July 2021[1] and this information was not furnished to her. The Applicant submits therefore that the amount in respect of the invoices not accounted

for should be subtracted from the total amount claimed as it should be deemed as goods not delivered to the first defendant.

4.2 Claims were submitted to Shield for credit notes in respect of goods that were damaged or goods that exceeded their expiry dates. The Respondent failed to issue credit notes and as a result, the Applicant submits that the amount claimed should be credited against

the first defendant's account and thereby subtracted from the total amount claimed by the Respondent.[2]

4.3 Certain payments made by the first defendant in respect of its account held with Shield are not reflected in the account presented by the Respondent. The Applicant attached Annexures FA5.1 to FA5.9 as proof of payments totalling R556 000.00. This amount too, submits the Applicant, should be debited from the total amount claimed against the first defendant and thereby, against her.

4.4 Further remittances were submitted to Shield indicating the amounts for claims that were submitted and request for proof of delivery which was never made available.[3] The Applicant submits that these amounts too, should be subtracted from the total figure claimed against the first defendant.

- [5] The second bona fide defence raised by the Applicant pertains to the Respondent's failure to claim the debt due from the first defendant's liquidators. This comes after the first defendant was placed under voluntary liquidation following the death of the Applicant's husband who was directly involved in its day-to-day management. The Applicant discovered that the Respondent's claim was not included in the liquidator's liquidation and distribution account. She now avers that since the deed of suretyship she signed did not expressly renounce the benefit of excussion, she is therefore entitled to rely on it.
- [6] Lastly, the Applicant claims that Shield, of whom the first defendant was a member, could not have lawfully sold or merged its business to Massmart Wholesale (Pty) Ltd as the first defendant was unaware of that merger. According to the Applicant, Shield had a duty to notify the first defendant of its intention to merge its business with Massmart Wholesale (Pty) Ltd. Had this been done, she and/or the first defendant would have raised an objection to prevent that merger.
- [7] The Respondent opposes the application for rescission. It avers that the Applicant was in wilful default. It further denies that the Applicant has any bona fide defence to the claim against her. In response to each of the alleged bona fide defences, the Respondent answered them as follows. The first defence relating to in accurate amount having been claimed, Anthea Holland, the deponent to the Respondent's answering affidavit responded under oath saying, "I am unable to admit or deny the contents of this paragraph, accordingly, the Applicant is put to the proof thereof." [4]
- [8] As for the Applicant's request for proof of delivery, the Respondent attached documents to the answering affidavit which it alleges to be proof of delivery and/or credit notes for the invoices. There are those invoices and/or credit notes which the Respondent admits to having not credited in favour of the first defendant. The Respondent however alluded this to the discrepancies on the side of the first defendant's records. Some of the invoices are said to be simply illegible by the Respondent.
- [9] In her replying affidavit, the Applicant attributed the illegibility of the invoices to the fact that the originals were sent to the Respondent while she took pictures for the sake of record keeping. She denied that invoice S10340 was credited on the Respondent's

statement, in favour of the first defendant, as alleged. To this, the Respondent's allegation was denied. Several other invoices

totalling more than R80 000.00 remain unaccounted for as per replying affidavit.[5] While this dispute over the wrong amount being claimed suffices in my view, to be regarded as bona fide defence, or raising triable issues, I shall proceed and deal with the other defences raised, for the sake of completeness.

[10] The second defence raised by the Applicant is the one in which she laments being prejudiced when the Respondent failed to claim the amount due by the first defendant from its liquidators. The Respondent referred the court to a clause in the deed of suretyship in which the parties agreed to,

“[T]he suretyship being bound also as co-principal debtor may not require the creditor to look to the principal debtor before claiming from him/it, and the creditor may hold any one or more of the sureties liable for the whole debt.

It shall be in the discretion of the creditor to determine the extent, nature and duration of the facilities (if any) to be allowed to the debtor.”[6]

[11] The Respondent asserts that on a proper construction of the clauses above, the Applicant agreed that she has no right to demand from it to first attempt to claim from the principal debtor before lodging a claim against her as surety. The Respondent submits therefore, that the Applicant waived her right to demand the beneficium ordinis seu excussionis et divisionis. Without further evidence to the contrary, I find no fault in the Respondent’s interpretation of the clauses referred to above.

[12] The last defence is the one in which the Applicant challenges the merger of the Respondent and Shield claiming, it prejudiced her. The Respondent denies the Applicant’s claims by referring to the agreement on purchase and sale forming the basis of the claims against the Applicant. The Respondent thereby disputes that the first defendant was a member of Shield.

[13] It is noteworthy that the summons containing the particulars of claim are not part of the bundle that served before this court, and same is not in the file. The agreement forming the basis of the claims and/or particulars of claim do not appear from the Applicant and Respondent’s affidavits before the court although they may have been part of the summons. None of the parties to this application deemed it necessary for this court to have sight of the same. I am therefore unable to assess if this claim is a bona fide defence.

[14] The importance of an applicant in a rescission of judgment, to show bona fide defence is not for the court to evaluate and made a finding on it, but to consider if triable issues have been raised to the extent of raising reasonable prospects of success, in the main action. Good cause has been interpreted by the Supreme Court of Appeal in the context of condonation, in *Madinda v Minister of Safety and Security*[7] to entail,

“a consideration of all of those factors which had a bearing on the fairness of granting condonation and affecting the proper administration of justice. Relevant factors might include (i) the prospects of success in the proposed action, (ii) the reasons for the delay, (iii) the sufficiency of the explanation offered, (iv) the bona fides of the applicant, and (v) any contribution by other persons or parties to the delay and the applicant's responsibility therefor.”

- [15] The fact that the amount claimed against the Applicant is disputed, and the Respondent cannot counter that dispute, stating rather that it cannot deny or confirm the Applicant's assertion, is good enough to hold that there is a triable issue. If requested, the court can allow the default judgment to stand but amount granted therein to be varied, deducting only the figures that are in dispute so the same could be referred for trial, if there would be any surplus remaining in favour of the Respondent. This was however not requested by any of the parties, and no clear calculation of the balance was presented to the court as the undisputed claimed figure.

- [16] Wilful default.

The Respondent went to a great length to demonstrate that the Applicant must have been in wilful default, when she failed to deliver a notice to defend the action. What remains undisputed, is that the summons was not served on the Applicant personally. All that the Respondent could do was to create doubt on whether the summons did not reach her attention. The Respondent's basis in creating that doubt is the fact that the Applicant knew that her domicillium citandi as it appears in the deed of suretyship, remained unchanged in the records held by Shield and/or the Respondent.

- [17] The Respondent rightly submitted that the Applicant had a duty to have the deed of suretyship amended to reflect her current address, or to notify Shield and/or Respondent of that change, the moment she relocated from the known address. The Respondent also referred to the efforts by the Applicant's relatives in advising her to notify Shield and/or the Respondent of her change of address. This was seemingly went unheeded.
- [18] The Respondent also argued that it was very unlikely that McGavie & Associates, did not tell her about the summons. McGavie & Associates are the attorneys who initially acted as agent for Mr. Pace, who was nominated and later appointed, an executor of the estate of the Applicant's deceased's husband. This, after the Respondent's attorneys, on 10 February 2022, informed McGavie & Associates that they wanted to lodge a claim against the Applicant's late husband estate. Mr. Pace later renounced his executorship after he was served with the summons. The Respondent finds it unfathomable that McGavie & Associates would not have contacted the Applicant and advised her of the renunciation of the executorship by Mr. Pace, and about the summons which appear to have caused Mr. Pace to renounce his appointment as an executor in the first place.

- [19] This sequence of events is however denied by the Applicant. According to the Applicant, she indeed learned about the summons from the erstwhile attorneys acting as agents for Mr. Pace. This was however in January 2023, while the default judgment had already been handed down in December 2022. At that stage, the time to deliver a notice to defend the action had already lapsed.
- [20] All that one can make from the Respondent's submissions above is a good case to support the notion that the Applicant was negligent in not giving a notification of a change of address to the Respondent. This resulted in her not receiving the summons personally. Furthermore, without a confirmation from McGavie & Associates to the effect that they notified her of the summons against her and the deceased's estate, and the date of such notification, the court cannot find as a fact that she was indeed notified as claimed. To suggest that the Applicant was aware of the summons does not even find support from the return of service from the Sheriff. The Respondent can therefore only claim that service of the summons was valid albeit not personal.
- [21] The fact that service of the summons was valid appears to be common cause. It is for this reason that the judgment's validity is not challenged. The uphill battle for the Respondent is to show that the Applicant was in wilful default to defend the action, without first proving that she was aware of the summons's existence. The obvious way to prove that a party is aware of the

pending action, is through the Sheriff's personal service of the summons. Without this, evidence must be presented before the court to prove that she was aware of its existence. Unfortunately for the Respondent, more is required than the assumptions of what may have happened between the Applicant and the attorneys acting as agents for Mr. Pace. There is therefore no basis to reject the Applicant's submission to the effect that she was not in wilful default as she was not aware of the existence of the summons.

[22] Condonation.

The last aspect to be considered is the condonation for late filing of this application. As highlighted above, rule 31(2)(b) requires that the application should be brought within 20 days after the applicant became aware of the default judgment. If one looks at the pace at which the Applicant brought this application, she seemed to have had no sense of urgency. The application was so delayed that the Applicant's counsel in his heads of argument, argued that it should be considered under common law where there is no time limit to bring it. Under common law, the Applicant only has to show good cause, which includes, bringing the application within a reasonable time.[8]

- [23] Whether the application is considered under rule 31(2)(b) or under common law, the court is bound to consider the explanation for the period that lapsed before the application for rescission was lodged. This is because the Applicant brought a condonation for the court to still consider the application under rule 31(2)(b) even beyond the 20 days period. It is trite that with condonation, the court can extend the time limits set out in the rules. Everything

boils down to whether there is a reasonable explanation for the delay, which is one of the aspects to be considered even under common law.

- [24] The Applicant took 15 months to bring the application from the time she became aware of its existence. There is no doubt that the court has to frown at the Applicant's display of lack of urgency even after she was made aware of the time limits by her own legal representative. I am however of a view that condonation should be allowed or that the explanation should be considered as demonstrating good cause for the following reasons. I have already indicated above that the Applicant has a bona fide defence to the claims against her. I am of a view that even if there is some unexplained delay, the reasonable prospects of success should compensate for that. In *Melane v Santam Insurance Co Ltd*[9], Holmes JA said,

"Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay." [My emphasis].

- [25] However, the Applicant has some explanation for her delay. Even though she learned of the default judgment in January 2023, it was not until August 2023, that she came back into the country. During the same month of January 2023, she requested her uncle to secure the services of the attorneys to help bring the application for rescission. She also gave a full account of how the delay came about which includes her sending documents using Dropbox app which the attorneys could not open, and a very long delay at the hands of her attorneys and the counsel that was briefed.
- [26] The Respondent is not without a blame in the whole debacle. On more than one occasion, the Applicant asked, through her attorneys for the Respondent to furnish her with the Sheriff's return of service of the summons, before finalising her founding affidavit. This was not forthcoming and there was no explanation for not availing it. The first time the Applicant saw the return of service was when it was attached to the Respondent's answering affidavit as an annexure.
- [27] The court therefore considers the interests of justice, the amount involved in the claim, the prejudice that may be suffered by each of the parties if the judgment is or is not rescinded and the importance of the case to them, that it come to a

conclusion

that a good cause has been shown for the default judgment to be rescinded.

- [28] Costs.

As indicated above, the lackadaisical approach displayed by the Applicant in bringing about this application should be frowned at. This coupled with the fact that had she been negligent in not furnishing her new domicillium address to the Respondent, is a reason for her to be ordered to pay costs. I therefore do not see any reason why the Respondent should pay the costs of this application even though the Applicant has scored some success.

[29] Order.

For the aforesaid reasons, I make the following order.

[29.1] Condonation for late filing of the rescission application is granted.

[29.2] The default judgment granted against the Applicant under case no. 2903/2022 on 05 December 2022 is rescinded and set aside.

[29.3] The Applicant is ordered to pay the costs on party and party scale A.

TV RATSHIBVUMO

DEPUTY JUDGE PRESIDENT

MPUMALANGA

FOR THE APPLICANT; ADV. C DAMES

INSTRUCTED BY: CLOETE

ATTORNEYS

C/O: WDT ATTORNEYS

MBOMBELA

FOR THE RESPONDENT: ADV. TJ LINDHOUT

INSTRUCTED BY: GJERSÖE INCORPORATED

C/O STEGMANNS INC

NELSPRUIT

DATE HEARD:

31 OCTOBER 2024

JUDGMENT DELIVERED: 27 DECEMBER 2024

[1] See Annexure FA2 attached to the founding affidavit on p.25 of the paginated bundle.

[2] See Annexure FA3 attached to the founding affidavit on p.26 of the paginated bundle.

[3] See Annexure FA6 & FA7 attached to the founding affidavit on p.92-94 of the paginated bundle.

[4] See paragraph 14 of the answering affidavit on p. 143 of the paginated bundle where the deponent was responding to allegations

forming part of Annexure FA3.

[5] See paragraph 5.7 of the replying affidavit on p. 290 of the paginated bundle.

[6] See clauses 1.3 & 2 of the deed of suretyship attached to the replying affidavit as Annexure AA4 on p. 158 of the paginated

bundle.

[7]

[2008] ZASCA 34; 2008

(4) SA 312 (SCA). See also Minister of Safety and Security v De Witt 2009 (1) SA 457 (SCA).

[8] See Chetty v Law Society, Transvaal 1985 (2) SA 756 at 761C-G.

[9] 1962 (4) SA 531 (A) at 532C-E.

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