

SOUTH AFRICA / JUDGMENT

Jansen Van Vuuren v Reinecke (703/2012) [2014] ZAFSHC 109 (24 July 2014)

[2014] ZAFSHC 109**COURT**

Free State High Court, Bloemfontein

BEFORE

C. H. G. Van Der Merwe

CASE / FILE NUMBER

703/2012

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 703/2012

In the matter between:-

R P JANSEN VAN VUURENPlaintiff

and

H C REINECKEDefendant

JUDGMENT

BY: VAN DER MERWE, J

HEARD ON: 22 MAY 2014

DELIVERED ON: 24 JULY 2014

INTRODUCTION

[1] This matter concerns the ambit of rule 31(5)(d), which provides:

“Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 twenty days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.”

[2] The combined summons issued by the plaintiff against the defendant was properly served on the defendant on 22 February 2012. In terms of the summons the plaintiff claimed payment of the amount of R220 122,30 from the defendant. However, on 17th February 2012,

the North Gauteng High Court, Pretoria had accepted the voluntary surrender of the estate of the defendant. As a result the plaintiff's action was stayed. The plaintiff however launched an application for an order setting aside the acceptance of the voluntary surrender. This application was served on the defendant and she gave instructions to an attorney to oppose it. The application was successful and an order setting aside the acceptance of the voluntary surrender was granted on 27 June 2013. As the defendant did not deliver a notice of intention to defend the action, the plaintiff applied in terms of rule 31(5) for default judgment in terms of the summons. The default judgment was granted by the registrar of this court on 26 November 2013. It is undisputed that despite several enquiries made by her, the defendant was informed only on 26 February 2014 that the acceptance of the voluntary surrender of her estate been set aside and that default judgment had been granted in terms of the summons.

- [3] Within 20 days thereafter the defendant set the matter down by notice supported by an affidavit by the defendant. In terms of the notice the matter was set down for reconsideration in terms of the rule 31(5)(d) and the defendant asked for an order that the default judgment be set aside, that leave be granted to her to file a plea within 20 days and that the plaintiff be ordered to pay the costs of the reconsideration proceedings. In her affidavit the defendant relied thereon that it was not legally competent for the registrar to grant the default judgment. She did not disclose any defence on the merits to the plaintiff's claims, but made it clear that she was advised by her legal representatives that it was not necessary to do so in the circumstances. Answering and replying affidavits were subsequently delivered. The main ground of opposition of the plaintiff is that the defendant failed to show good cause for setting aside the default judgment, as she did not disclose any defence on the merits to the plaintiff's claims.
- [4] It is clear that rule 31(5)(d) provides a remedy to a plaintiff who was unable to obtain judgment from the registrar or who obtained judgment for less and what the plaintiff believes should have been granted. Save in exceptional circumstances, reconsideration at the instance of the plaintiff will take place on the same documentation that served before the registrar. These proceedings raise the questions whether rule 31(5)(d) may also be invoked by a defendant and, if so, whether the reconsideration is limited to the documentation placed before the registrar by the plaintiff in order to obtain default judgment.
- [5] The words "any party" provide strong indication that a defendant may also make use of rule 31(5)(d). Had the intention been to provide the remedy only to a plaintiff, the rule could simply have said so. In addition, rule 31(2)(a) provides for default judgment by a court in respect of claims other than for a debt or liquidated demand. Rule 31(2)(b) provides that a defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside that judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet. A dissatisfied defendant will necessarily intend to oppose all or some of the plaintiff's claims. The drafters

of rule 31(5) must be taken to have been aware of a need to also provide in suitable cases for rescission of default judgment granted by a registrar. Although such default judgment could clearly be set aside in terms of the common law[1], the absence of a provision similar to rule 31(2)(b) in respect of a default judgment granted by the registrar, does indicate that it was intended that rescission of a default judgment may be obtained by a defendant in terms of rule 31(5)(d).

- [6] Rescission of default judgment in terms of rule 31(5)(d) at the instance of a defendant will only be granted on good cause shown.

This much is clear from what is stated in *Lazarus v Nedcor Bank Ltd*; *Lazarus v Absa Bank Ltd*[2] and *Pansolutions Holdings Ltd v P & G General Dealers and Repairers CC*[3]. In order to show good cause a defendant will generally have to adduce evidence. It follows that in my judgment the defendant may in terms of rule 31(5)(d) place evidence before the court in order to obtain the rescission of a judgment granted by the registrar.[4]

- [7] I regard it necessary to say something about the nature of the enquiry in terms of rule 31(5)(d). In *Bloemfontein Board Nominees Ltd v Benbrook*[5], Hancke J said that a reconsideration of a default judgment granted by the registrar in terms of rule 31(5) does not mean that the court substitutes its discretion for that of the registrar, but that the court will interfere with a judgment or direction given by the registrar only if it is of the opinion that the registrar has erred. In *Pansolutions*, Swain J disagreed and stated that the power accorded to the court is precisely that of substituting its discretion for that of the registrar. Consequently it has been said that *Benbrook* and *Pansolutions* are conflicting decisions.[6] I believe, to borrow the phrase from Swain J, that the conflict is more apparent than real. The statement in *Benbrook* must be seen in proper context. Hancke J dealt with reconsideration of a default judgment at the behest of the plaintiff on the same papers that served before the registrar. The plaintiff contended that the registrar erred in not granting costs on the

attorney and client scale. The court held that in the circumstances of the matter the registrar in fact had no discretion

and was obliged in terms of rule 31(5)(e) to make the cost order. The registrar therefor did not err. In my view the statement in *Benbrook* was not intended and should not be understood to be applicable to cases other than reconsideration at the instance of the plaintiff on the same papers. In such cases the question is whether the registrar has erred. When the reconsideration is at the behest of the defendant and/or entails evidentiary material that was not before the registrar, as was the case in *Pansolutions*, the court must clearly exercise its own discretion and I do not believe that Hancke J intended to say otherwise.

[8] In respect of rescission of a default judgment, good cause (or sufficient cause) generally includes at least both a reasonable and acceptable explanation for the default and a bona fide defence on the merits which prima facie carries some prospect of success.[7] But the courts have consistently refrained from attempting to frame an exhaustive definition of what would constitute good or sufficient

cause for such attempt would hamper the exercise of the wide discretion of the courts. Many and varied factors need to be considered and each case must be decided on its own facts and circumstances.[8]

[9] In terms of rule 31(5)(a) a registrar is only competent to grant default judgment in respect of a debt or liquidated demand. In terms rule 31(5)(b) a registrar is for instance also not empowered to make an order declaring residential property specially executable. The principle of legality lays down that no public official may exercise a power or function beyond that conferred upon him/her by law.[9] It therefore goes without saying that it would at least constitute a weighty factor in favour of the defendant if the registrar granted default judgment that was not competent.

[10] The defendant contends that the majority of the plaintiff's claims were not for debts or liquidated demands. I agree. According to the particulars of claim the plaintiff and the defendant entered into two agreements. In terms of each agreement the defendant rented a number of motor vehicles from the plaintiff. The material obligations of the defendant in terms of the agreements relied upon were to pay the agreed monthly rental as well as the annual licence fee in respect of each motor vehicle and to return the motor vehicle upon termination of the relevant agreement to the plaintiff in undamaged and roadworthy condition, fair wear and tear excluded. The plaintiff alleged that the defendant breached both agreements by inter alia failing to pay the monthly rental and annual licence fees in respect of several motor vehicles, as a result of which the plaintiff cancelled both agreements on or about 26 November 2011. The plaintiff alleged that four of the motor vehicles were returned in damaged condition. In respect of each of these motor vehicles the plaintiff claimed damages for breach of contract on the basis that the damaged vehicles had to be repaired and could during the period of repair not be rented to others. The plaintiff claimed damages in respect of each vehicle consisting of the costs of repair and loss of rental income in respect thereof as well as an amount representing licence fees. The amounts claimed for repair costs and loss of income are clearly unliquidated and not capable of speeding and prompt determination. The quantum of these claims depend on evidence of the extent of the

damage to each vehicle and the fair and reasonable costs of repair thereof as well as the net rental that would probably have been

obtained in the market during the periods concerned. A licence fees in respect of each vehicle is also claimed as damages resulting from breach of contract. Presumably these are claims for wasted expenses during the periods of repair, but that is not clear from the particulars of claim. It is unnecessary to go further into this. Even if these claims are liquidated they represent only the amount of R3 376,60 of the total claims of R220 122,30 and should not justify the exercise of a discretion against the defendant.

[11] The defendant has provided a reasonable and undisputed explanation for her default, there is no reason to doubt her bona fides and the default judgment granted against her was incompetent. In the circumstances of this matter, these factors constitute good cause for rescission of the default judgment despite the absence of evidence of a defence on the merits.

[12] The defendant in essence seeks an indulgence from this court. The plaintiff's opposition thereto was not unreasonable and the defendant should be ordered to pay the costs of the reconsideration proceedings, including the costs of opposition thereto.

[13] In the result the following order is issued:

1. The default judgment granted by the registrar of this court on 26 November 2013 in case 703/2012, is set aside;
2. The defendant is granted leave to deliver a plea within 20 days from date of this judgment;
3. The defendant is ordered to pay the costs of the reconsideration proceedings, including the costs of opposition thereof.

C. H. G. VAN DER MERWE, J

On behalf of plaintiff: Adv. L. le Roux

Instructed by:

Bezuidenhouts Inc

BLOEMFONTEIN

On behalf of defendant: Adv. S. Grobler

with D. de Kock

Instructed by:

Honey Attorneys

[1] See *Chetty v Law Society*, Transvaal 1985 (2) SA 756 (AD) at 764J.

[2] 1999 (2) SA 782 (W) at 785.

- [3] 2011 (5) SA 608 (KZD) paras [13] – [15].
- [4] This conclusion was accepted, at least by implication, in *Lazarus and Pansolutions*. It follows that I respectfully disagree with judgment in *Ramolibe and Another v Nusun Development (Pty) Ltd and Another* (4882/2011) [2012] ZAFSHC 102 (24 May 2012).
- [5] 1996 (1) SA 631 (O).
- [6] See i.e. Erasmus, Superior Court Practice, B1-204D-1.
- [7] See *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 – 477; *Chetty v Law Society Transvaal*, supra at 765B – E.
- [8] See *Cairns' Executors v Gaarn* 1912 AD 181 at 186 (per Innes J) and 189 – 190 (per Solomon J); *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H – 353A; *Wahl v Prinswil Beleggings (Edms) Bpk* 1984 (1) SA 457 (T); *Chetty v Law Society Transvaal*, supra at 765A; *Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para [11].
- [9] See Pharmaceutical Manufacturers Association of SA, in re ex parte President of the Republic of South Africa and Others
- [2000] ZACC 1; 2000 (2) SA 674 (CC) at 687.

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Prepared on 12 October 2026 · Esheria