

SOUTH AFRICA / JUDGMENT

Kayula NO and Others v Quality Plumbers and Hardware Contractors (Pty) Ltd and Another (942/2019) [2020] ZAECMHC 42 (18 August 2020)

[2020] ZAECMHC 42

COURT
Eastern Cape High Court, Mthatha

BEFORE
Somacala

CASE / FILE NUMBER
942/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE LOCAL
DIVISION: MTHATHA
CASE
NO. 942/2019

In the matter between:

VUYOKAZI KAYULA
N.O
1ST APPLICANT
KOLISWA LUCKY PEARL
NTOBONGWANA N.O
2ND APPLICANT
PRIMROSE NTOMBIZODUMO
PASIYA N.O
3RD APPLICANT
BUYISWA GRACE PASIYA
N.O
4TH APPLICANT
CANCA KEELY
N.O
5TH APPLICANT
And
QUALITY PLUMBERS AND
HARDWARE
1ST RESPONDENT
CONTRACTORS (PTY) LTD
THE SHERIFF OF THE
HIGH COURT

2ND RESPONDENT
MTHATHA/NGQELENI

JUDGMENT

SOMACALA AJ

1. The applicants brought this application on an urgent basis, on two fronts, being PART A and B of the notice of motion.
2. Under Part A the applicants sought to stay the execution of the order granted by default, by this court, on the 07th day of May 2019, and setting aside any writ of execution pursuant thereto pending the finalization of an application for rescission of the said default judgment.
3. In Part B of the notice of motion, the applicants sought an order, that;
 - 3.1. the default judgment granted in the main action under case number 942/2019, against the applicant, on the 07th May 2019, be and hereby rescinded and set aside
 - 3.2. the applicants be granted leave to file their notice of intention to defend within 7 days of this order and thereafter, within 10 days to file their plea.
 - 3.3. the respondent to pay costs of this application.
4. The orders sought under Part A of the notice of motion was disposed off on the 16th July 2019, and is no longer relevant for purposes of this application.
5. The only issues left for determination by this court relates to prayers sought in Part B of the notice of motion.
6. This is an application for rescission of default judgment granted by this court against the five applicants, who are all the defendants in the main action, and which judgment was granted on the 07th may 2019.
7. The applicants rely on the provisions of Rule 31(2)(b) alternatively Rule 41(1)(a) of the Uniform Rules of Court, alternatively under common law.
8. Rule 31(2)(a) of the Uniform Rules of Court provides “whenever in an action the claim or, if there is more than one claim, any of the claims is for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or a plea, the plaintiff may set the action down as provided for in subrule (4) for default judgment and the court may after hearing evidence, grant judgment against the defendant or make such order as to it seems meet”. Sub-rule (4) states that, “the proceedings referred to in subrules (2) and (3) shall be set down for hearing upon not less than five days’ notice to the party in default: Provided that no notice of set down need be given to any party in default of delivery of notice of intention to defend.”

9. Rule 31(2)(b) provides that “a defendant may within twenty days after he or she has 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 to it seems meet.” (my own underlining).
10. It is common cause that none of the applicants herein filed and/or delivered their notice of intention to defend after the summons in the main action had been served by the Sheriff of the court. It follows therefore, that the first respondent was not under any obligation to give them a notice of set down for default judgment as provided for in sub-rule (4) of the Uniform Rules.
11. The crisp facts leading to the granting of default judgment against the applicants in this matter are that;
 - 11.1. The first respondent, being the plaintiff in the main action, instituted action against the applicants, for goods sold and delivered, to Dan’s Country Lodge and Events Centre, over a period of time spanning between 2012 and 2017 respectively.
 - 11.2. All the five applicants, and at all material times during that period, were the trustees of Kopano Trust t/a Dan’s Country Lodge and Events Centre, and as a result thereof the first respondent sued them in their representative capacities as such trustees.
 - 11.3. On Wednesday, 13th March 2019, and at Dan’s Country Lodge and Events Centre, the Sheriff of the court served summons, against the applicants, upon one ANGA PASIYA, who is described by the Sheriff on the return of service as an adult male person who is a Finance Manager at the said Dan’s Country Lodge.
 - 11.4. The dies for the filing and delivery by the applicants of notice of intention to defend having expired, the first respondent applied, to court, for default judgment against all the applicants and same was duly granted.
12. It is my considered view that Rule 42 of the Uniform Rules of Court does not apply in this matter as the default judgment was neither granted erroneously or by mistake, or is there any ambiguity in the order of court. The purpose of Rule 42 is to correct a wrong judgment or order. (*Bakoven Ltd v L JHowes (Pty) Ltd* 1992 (2) SA 466(E)).
13. There are certain requirements which have to be met by the applicant in an application for rescission in terms of Rule 31(2)(b) as it was set out by the court in *Colyn v Tiger Food Industries LTD t/a Meadow Feed Mills (Cape)*[1], that, “the applicant must show cause why the remedy should be granted. That entails; (a) giving a reasonable explanation of the default; (b) showing that the application is made bona fide; and; (c) showing that there is a bona fide defence to the plaintiff’s claim which prima facie has some prospects of success.”

14. In *Wahl v Prinswil Beleggings (Edms) Bpk*[2] it was held that “the court has wide discretion in evaluating ‘good cause’ in order to ensure that justice is done”. The court is thus accorded a wide discretion to evaluate all the relevant facts, including the circumstances which led to the granting

of a default judgment, as well as the conduct of the applicant.

15. It is, therefore, upon the applicant to give full explanation which is sufficiently enough to satisfy the court, for it to understand, how the default came about. (*Silber v Ozen Wholesalers (PTY) Ltd* 1953(2) SA 345 (A)). Importantly, the applicant has to show that it was by no fault on his part that the judgment against him was obtained whilst he was in default. Failure to do so will undoubtedly jeopardize any possible chance of a successful application for rescission.

16. In an application for rescission, the applicant has a duty to show the existence of an issue which is fit for trial, and that being a prima facie case against the plaintiff’s claim. In *Sanderson Technitool (PTY) Ltd v Intermenua (PTY) Ltd*[3] it was held that, the fact that the applicant must show the existence of a substantial defence does not mean that he must show the probability of success.

17. In *RGS Properties (PTY) Ltd v Ethekweni Municipality*[4], the court held, “...judgment by default is inherently contrary to the provisions of s34 of the Constitution. The section provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum...the fact that the court may be in doubt about the prospects of the defence to be advanced, is not a good reason why the application should not be granted”.

18. Before a person can be said to be in willful default, the following elements must be shown:

- a) Knowledge that the action is being brought against him;
- b) A deliberate refraining from entering appearance, though free to do so; and;
- c) A certain mental attitude towards the consequences of the default.[5]

19. The applicants herein, have shown to the court that they were not in willful default, in that they were not aware of the existence of any summons which had been served on them by the Sheriff of the court. As it has been stated that it is common cause that summons was served upon Anga Pasiya, who is not part of these proceedings. I have no doubt in my mind that Anga Pasiya was grossly negligent in the manner in which he dealt with the summons served upon him. The said Anga Pasiya was further negligent by his failure to immediately advise any of the applicants about the service of the summons which he had received and misplaced. His conduct was unbecoming of a person holding the rank of a financial manager. However, the gross negligence of Anga Pasiya cannot be carried by the applicants who have showed no fault on their part.

20. In a bid to show the existence of a bona fide defence, the applicants deny being indebted to the first respondent as alleged in the summons. Their denial is premised on the fact that they never had a credit agreement with the first respondent as they were dealing with him on a cash on delivery basis. The applicants allege that before the initiation of the main action by the first respondent, there had been oral demands for payment, but the first respondent could not provide any proof that there were any invoices which had not been paid.
21. The first respondent does not deny some the averments by the applicants, in their entirety, instead he brings in somebody else who he claims to have been the person with whom some negotiations were made around the credit facilities for Dan's Country Lodge. There is no dispute that the first respondent never entered into any agreement for the provision of the supply of goods on credit with any of the applicants.
22. It is by no imagination therefore, that none of the applicants know about the provision of the supply of goods on credit to Dan's Country Lodge and Events Centre.
23. In the circumstances, I find that the applicants have shown satisfactorily, that a prima facie case exists which shows substantial defence to the plaintiff's claim.
24. Furthermore, I am satisfied that the application for rescission of default judgment has not been brought by the applicants merely to frustrate the plaintiff's claim and the execution of judgment. Therefore, the applicants' application for rescission of default judgment must succeed.
25. Counsel for the first respondent, Mr Botma, has strongly argued that the costs occasioned by this application should be costs in the main action. He bases his argument, amongst others, that the prospects of success of the applicants' defence during trial is subject to some serious doubt. He further contended that the degree of gross negligence displayed by the applicants' employee on how he dealt with the summons calls for censure.
26. The awarding of costs to a litigant is subject to the discretion of the court. In my view, the applicants had made their case clear from the initiation of this application, and a careful examination thereof displayed the possibility of them succeeding. I am very mindful of the fact that it was within the first respondent's right to oppose this application. However, doing so when he might have foreseen the applicants succeeding was taking a gamble around the issue of costs.
27. Having said so, I cannot find any reason why the applicants should not be awarded costs for this application.
28. In the result, the following order will issue:
 - 28.1. default judgment granted by this court against the applicants on the 07th May 2019, be and is hereby rescinded and set aside;

28.2. the applicants are hereby granted leave to defend the main action;

28.3. the applicants are hereby ordered to enter appearance to defend within 10 days of this order;

28.4. the normal rules of court relating to filing of pleadings shall apply;

28.5. the first respondent is ordered to pay costs of this application.

BI SOMACALA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Adv N Mxotwa

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MTHATHA

For the defendants: Adv D C BOTMA

Instructed by: J.A. Le Roux Attorneys

56 Leeds Road

Date heard:

13 August 2020

Date of delivery of the judgment:

18 August 2020

[1] 2003(6)SA 1 (SCA) (2003)2 ALL SA 113

[2] 1984(1) SA 457 (T)

[3] 1980(4) SA 573 (W)

[4] 2010(6) SA 572 (KZD)

[5] Superior Court Practice – Erasmus – D1-367

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