

SOUTH AFRICA / JUDGMENT

Kirsten v Strydom N.O and Others (41045/2017) [2020] ZAGPPHC 151 (14 May 2020) [2020] ZAGPPHC 151

COURT

North Gauteng High Court, Pretoria

BEFORE

P.H. Kirstein

CASE / FILE NUMBER

41045/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

Case

number: 41045/2017

14/5/2929

In the

matter between: CATHERINA
HELENA KIRSTEN
Applicant
and
PIETER
HENDRIK STRYDOM N.O.
First Respondent
DEON
MARAIS BOTHA N.O.
Second Respondent
CAROLINE MMAKGOKOLO
LEDWABA N.O.
Third Respondent
In

re the action between : PH STRYDOM AND 2
OTHERS v UNIGRAIN (PTY) LTD AND 10 OTHERS

JUDGMENT

(APPLICATION FOR RESCISSION)

KIRSTEIN, AJ

1. The applicant asked in this application that the default judgment granted against the applicant on 28 November 2018 under Case No 41045/2017, be rescinded.
2. Condonation applications for the late delivery of the rescission application, the answering affidavit and the replying affidavit, form part of the papers in this application. None of the condonation applications are opposed. Having considered the basis for the condonation application, condonation is granted for the late delivery of the rescission application, answering affidavit and replying affidavit.
3. The applicant utilised Form 2 of the Uniform Rules of the Court rather than Form 2(a). The applicant attempted to justify the use of Form 2 with reference to case law. The respondents raised the issue but do not claim that the notice of motion is fatally defective for the application. Form 2(a) was the appropriate notice to use. However, Form 2 used by the applicant, should not be regarded as a nullity in the circumstances where proper service was effected.
4. The respondent raised the issue of failure of service of this application on the eighth defendant (D J J van Staden), ninth defendant (F C Delwery (Pty) Ltd) and the eleventh defendant (Standard Bank of South Africa Limited) in the main action. At commencement of argument counsel for the applicant submitted an affidavit confirming service on the eighth defendant. The applicant and the eighth defendant are directors of the ninth defendant. No real issue was made of non-service on the eleventh defendant. The eleventh

defendant is a creditor in the insolvent estate of whom the respondents are the appointed liquidators. Therefore the respondents should concern them with the interest of the eleventh defendant. The failure to serve this application on the ninth defendant and the eleventh defendant, is not fatally defective for this application.

5. The rescission application is inter alia delivered in terms of Rule 31 of the rules of this Court. It is essentially required in terms of Rule 31 of the applicant to show good cause why the rescission application should be granted.
6. The applicant must therefore show :
 - an absence of wilful ness;
 - that there is a reasonable explanation for the default;
 - that the application is bona fide and not made with the intention to delay the plaintiff's claim;
 - that the applicant has a bona fide defence to the plaintiff's claim.
7. The default judgment was not erroneously granted in terms of Rule 42 of the rules of this Court.
8. The summons in the main action was served on the applicant on 20 June 2017.
9. On 26 June 2017 the applicant's then attorney (Van Wyk) addressed a letter to the respondent's attorney of record stating inter alia the following :

" Daar was ooreengekom met Mnr Strydom dat die verwisseling van pleitstukke en verdere litigasie stappe eers oorgehou word tot na die afhandeling van die veiling sodat 'n globale en omvattende skikkingsaanbod en wat aanvaarbaar is deur krediteure, bewerkstellig kan word.

In die vooropstelling ontvang ons graag dringend u bevestiging dat die inhoud van hierdie skrywe inderdaad in orde is en in ooreenstemming

is met die Kurator se instruksies en dat dit gevolglik nie nodig sat wees vir enige van die Verweerders om op hierdie stadium formeel

Verskyning tot Verdediging aan te teken nie.

Ons het egter reeds namens ons kliente wat die dagvaarding ontvang het 'n pro forma Verskyning tot Verdediging opgestel en wat ons vir u nou stuur per die reeling dat pleitstukke ook elektronies beteken kan word."

10. On 18 January 2018 the respondents' attorney of record addressed a letter to Van Wyk stating inter alia the following :

" We refer to the above matter in which the summons was duly served on all the Defendants during June 2017. Our records indicate that no formal notices to defend were served on our offices.

In the circumstances where the negotiations between the parties have now broken down we have instructions to proceed to judgment.

You are hereby notified to serve your Notice of Intention to Defend, if any, within 10 (ten) days from date hereof, failing which an application for judgment by default will be lodged."

11. On 11 May 2018 the summons in the main action was again served on the applicant.
12. On 28 November 2018 default judgment was granted in the main action against inter alia the applicant.
13. During January 2019 the applicant became aware of the default judgment and delivered the rescission application on 19 February 2019.
14. The applicant intended to oppose the summons that was delivered during June 2017. There was an understanding that pleadings will not be exchanged pending settlement negotiations. Settlement negotiations broke down and it was required of the applicant to deliver a notice of intention to defend. The proforma notice of intention to defend delivered by Van Wyk is not in compliance with the Rules of this Court. The applicant received the letter dated 18 January 2018 of the respondent's attorneys from Van Wyk during January 2019. There is no explanation for the applicant for the period from May 2018 when the second summons was served on the applicant, until January 2019.
15. Ineptitude conduct of a legal representative in general does not serve as a rational reason for granting rescission of a judgment. The explanation provided by the applicant lacked clarity and detail. The applicant however did rely on Van Wyk, as per legal representative. It cannot be determined in the circumstances that the applicant's failure to defend the main action was wilful. Although the explanation of the applicant is not satisfactory, it cannot be regarded as unreasonable.
16. The default judgment the applicant seeks to rescind, was granted on the *condictio furtiva*. The default judgment the applicant seeks to rescind, was granted on the basis of the *condictio furtiva*. It is trite that the defence raised in an application for rescission should not be scrutinised closely. The requirement is to determine if the defence *bona fide*.
17. The respondent's claim in the main action is based on the following :

"12. During or about September 2016, the insolvent, with the assistance of Carien Kirsten, Van Staden and FC Delwery, appointed Hendrik Bester and Uys Bester :

12.1. to harvest the maize as yet unharvested on the farm Dowwespruit;

12.2. to cause the said maize to be delivered to Suidwes Landbou on the name of Hendrik Bester, trading as Zethen Boerdery, with member number 928705 ; and

12.3. to pay the proceeds thereof to the bank account of FC Delwery held at First National Bank with account number [...].

13. The said Hendrik Bester and Uys Bester harvested 332.728 tons of maize and delivered the maize to Suidwes Landbou as instructed.

14. Suidwes Landbou paid the amount of R987,9044.06 to Hendrik Bester who, pursuant to his instructions, paid an amount of R193,800.00 to Uys Bester in respect of harvesting costs and paid the balance of the proceeds in the amount of R794,194.06 into the bank account of FC Delwery during the period 14 September 2016 to 22 September 2016.

15. The insolvent, Carien Kirsten, Van Staden and FC Delwery :

15.1. were not the owners of the 332.728 tons of maize and had no entitlement whatsoever thereto or to the proceeds thereof;

15.2. wrongfully and intentionally misappropriated the 332.728 tons of maize from the plaintiffs, sold the maize to Suidwes Landbou and appropriated the proceeds thereof.

16. The plaintiffs accordingly suffered damages in the amount of R987,994.06 being the market value of the 332.728 tons of maize at the time of the theft thereof.

17. Carien Kirsten, Van Staden and FC Delwery are accordingly jointly and severally liable to the plaintiffs in the aforesaid amount of R987,994.06."

18. The applicant's defence is that she did not steal the maize or misappropriated the money paid into the account of the ninth defendant in the main action.

19. The respondents rely on the affidavit of Bester and evidence presented at an

insolvency investigation, to show the requirements of the *condictio furtiva*. The affidavit of Bester does not implicate the applicant in theft or misappropriation of funds. The proceeds referred to by Bester in his affidavit being paid into the account of the ninth defendant in the main action, does not correspond with the amount in paragraph 4 of the default judgment. The applicant *inter alia* transacted on the account of the ninth defendant in the main action.

The extent of the benefit accrued to the applicant in person has not been established.

20. Conflicting legal argument was presented on the requirements of the *condictio furtiva* and more specifically so in relation on the determination of damages.

21. The costs order granted in the default judgment is ambiguous and creates the

impression that the applicant and the ninth defendant are required to pay the costs of the main action.

22. The indication is that the application was not delivered simply to delay the respondents' claim in the main action. The respondents can proceed with execution against a number of defendants in the main action. The applicant has a bona fide defence in the main action. The default judgment is rescinded only to the extent it is applicable to the applicant. It follows that the warrant of execution be set aside.

23. Accordingly the following order is made :

23.1. Condonation is granted for the late delivery of the rescission application, the answering affidavit and the replying affidavit;

23.2. The default judgment dated 28 November 2018 under Case No 41045/17 is rescinded as far as it refers to the applicant as the seventh defendant in the main action;

23.3. The warrant of execution dated 14 January 2019 in relation to the applicant is set aside;

23.4. Costs of this application will follow the costs in the main action.

P.H. KIRSTEIN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date heard :

18 March 2020

Date of judgment :

14 May 2020

Representation for the applicant : Adv Eugene Janse van Rensburg

Instructed by Baartman & du Plessis

Attorneys

Representation for the respondent : Adv H R Fourie SC

Instructed by Loubser & Loubser Inc.

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