

SOUTH AFRICA / JUDGMENT

Komani Discount Centre (Pty) Ltd v Schoultz and Others (4954/2016) [2017] ZAECGHC 81 (20 June 2017) [2017] ZAECGHC 81

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe

CASE / FILE NUMBER

4954/2016

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THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO.: 4954/2016

In

the matter between:

KOMANI
DISCOUNT CENTRE (PTY)
LTD Plaintiff
And
PIETER
SCHOULTZ First
Defendant
ZELDA DOREEN
SCHOULTZ Second
Defendant
TRIOSAFE TRANSPORT
CC Third
Defendant

JUDGMENT

BESHE J:

- [1] This is an unopposed application for default judgment wherein the following order is sought against the three defendants:
- (a) An order declaring the defendants liable to the plaintiff in terms of Section 64 of Act 69 of 1984, for recklessly, alternatively, grossly negligently, carrying on the business of Triosafe Transport CC;
 - (b) An order declaring the defendants liable to plaintiff for the debts incurred by Triosafe Transport CC in the amount of R468 825.00 together with interest at the rate of 10.25% per annum computed ex tempore morae to date of final payment;
 - (c) Alternative relief;
 - (d) Costs of suit with interest thereon, calculated at the legal rate from allocator to date of payment.
- [2] The defendants had entered an appearance to defend but failed to deliver a plea. Having been served with the requisite notice of bar, they were ipso facto barred, hence the application for judgment by default.
- [3] According to plaintiff's particulars of claim:

Plaintiff is a company with limited liability, carries on business as a trader of large containers for purposes of transport. Third defendant is a close corporation with first and second defendants being members thereof. First and second defendants or one of them controlled the third defendant, conducted the business of the third defendant. Third defendant employed first and second defendants' son to manage the affairs of third defendant – Juan Schoultz. During period December 2014 – August 2015 the said employee entered into lease agreement in terms of which third defendant rented 146 containers valued at R5 448 950.00 to various business entities which included Nova Group (Pty) Ltd. The employee disposed of containers by selling them off to third parties amongst whom was the plaintiff. Having purchased a number of containers from third defendant, plaintiff in turn sold those containers to S and W Cooling (Pty) Ltd. Nova Group subsequently claimed ownership of the aforesaid containers alleging that they had been stolen by third defendant. As a result of the stolen containers plaintiff suffered damages in the sum of R468 825.00.

- [4] It also emerges from plaintiff's particulars of claim that the said employee was convicted of theft of the said containers in the Regional Court, Port Elizabeth. That during February 2015 to 15 August 2016 and at all times thereafter, the defendants were a party to the carrying on of the business of third defendant. The business of third defendant knowingly, recklessly, carried on (alternatively, knowingly carried on with gross negligence) by some or all of the defendants.
- [5] The particulars enumerate a number of ways in which it is alleged the defendants recklessly or negligently carried on the business of the third defendant.
- [6] Rule 31 (2) (a) governs the granting of judgments by default. It provides thus:

"Whenever in an action, the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided 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." (my emphasis)

- [7] Even though the application for default judgment was not opposed, I expressed my misgivings about granting the application in the absence of any evidence being led by the plaintiff in view, especially of the fact that at least one of the claims, claim (a) is clearly not for a liquidated claim or debt.
- [8] The need for evidence to be heard in such cases was also emphasised in *Herbstein and Van Winsen – The Civil Practice of the High Court of South Africa* by Cilliers et al 5th Edition[1] where the authors state:

"Where a claim or any claim in an action is not for a debt or in respect of a liquidated demand, an application for default judgment must be brought in terms of Rule 31

- (2) (a) and must be set down for hearing before the court. The court is required to hear evidence where the application for default judgment in respect of a claim is not for a debt or liquidated demand, but the enquiry would inevitably not be as detailed or controversial as it would if the matter were to be defended."
- [9] Claim (a) is based on Section 64 of the Close Corporations Act[2] whose provisions are identical to those of Section 424 (1) of the Companies Act[3]. Section 64 (1) of the Act 69 of 1984 provides that:

"If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability."

[10] The Supreme Court of Appeal had occasion to deal with a matter concerning Section 424(1) of the Companies Act in *Minnaar v Van Rooyen* NO[4]. At paragraph [19] of the judgment the court made the following pronouncement:

“[19] In this matter, in my view, the liquidators were not entitled procedurally to default judgment against Minnaar without leading

evidence. By its very nature, the right to the relief sought under s 424(1) of the Companies Act had to be proved on a balance of probabilities. The liquidators were not entitled to rely on allegations made in the particulars of claim and denied in the defendants’ joint plea. At the very least they should have lead witnesses to show that the directors had acted recklessly or with intent to defraud creditors. The order in terms of s 424(1) was thus erroneously sought, and, as a result, erroneously granted. It must accordingly be rescinded in terms of rule 42(10(a).”

[11] No evidence having been led to show on a balance of probabilities that the defendants or some of them were negligent or reckless in running the business of third defendant, I am unable to grant default judgment against them as sought by the plaintiff.

[12] Accordingly the application for default judgment is dismissed with costs.

NG BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard : 22 March 2017

Date Reserved : 22 March 2017

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[1] Page 709.

[2] Act 69 of 1984.

[3] Act 61 of 1973.

[4] 2016 (1) SA 117.

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