

SOUTH AFRICA / JUDGMENT

Kroezen v Coetzee (3461/2021)

[2022] ZAFSHC 308 (24 October 2022)

[2022] ZAFSHC 308**COURT**

Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

3461/2021

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION. BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case number: 3461/2021

In the application between:

DOMINIC KROEZEN Applicant/Defendant

and

GERTRUIDA HENDRIKA COETZEE N.O. Respondent\Plaintiff

CORAM: VANZYL, J

HEARD ON: 21 JULY 2022

DELIVERED ON: 21 OCTOBER 2022; 24 OCTOBER 2022

[1] This is an application for rescission of a default judgment granted by the Registrar on 2 December 2021, which judgment was granted in favour of the respondent against the applicant in the following terms:

1.1 Payment of the amount of R295 706.76.

1.2 Interest on the aforesaid sum of R295 706.76 calculated at the rate of 9.5% a tempora morae to date of final payment.

1.3 Costs of R353.50 plus Sheriff's fees.

Background:

[2] The respondent, as plaintiff, issued summons against the applicant, as defendant, on 28 July 2021.

[3] For the sake of ease I will refer to the parties as in the main action, except for in the eventual order.

[4] In terms of the particulars of claim the following allegations are made:

[4.1] The plaintiff is cited in her capacity as the Trustee for the time being of the Grenada Trust. It is further alleged that at all relevant times the plaintiff was the owner of a Mercedes-Benz GL500 motor vehicle with registration number [...] ("the plaintiff's vehicle").

[4.2] The defendant is cited as an adult male residing at Plot 18, Riviere, Moedersdeel.

[4.3] On or about 4 April 2021 the defendant unlawfully and whilst being under the influence of alcohol, beat the plaintiff's vehicle with a baseball bat.

[4.4] Due to the unlawful attack on the plaintiffs vehicle by the defendant, the plaintiff's vehicle was severely damaged, as a result of which the plaintiff suffered damages in the amount of R295 706.76, being the "reasonable costs to repair the plaintiff's vehicle", as reflected in the "bill of costs" attached to the particulars of claim as Annexure "GT1".

[4.5] Notwithstanding demand, the defendant failed and/or refused to pay the aforesaid amount of R295 706.76 or any portion thereof to the plaintiff.

[5] The Sheriff's return of service pertaining to the combined summons reflects the address of the defendant to be "Plot 18, Riviere, Heilbron". It is indicated on the said return of service that on 18 October 2021 at 17:45 the Sheriff served the combined summons in terms of Rule "41A" "by affixing at the chosen domicilium citandi et executandi at Plot 18, Riviere, Heilbron by leaving a copy there, affixing a copy to the outside or principal door, security gate or main entrance, after I got no response by knocking at the principal gate and/or ringing the door bell, and after a diligent search was done. The door was locked."

Underneath the aforesaid the following is also indicated:

"Return of service at place of residence by affixing:

Rule 4 (1)(a)(iv)

Attempts on 28/9/2021 at 14:38 farm Riviera of Mr Niccy Oosthuizen - defendant unknown."

[6] Although it is alleged in the founding affidavit that it is unknown when the default judgment was granted, it is evident from the Registrar's

stamp on the original Court Order in the court file that it was granted on 2 December 2021.

The founding affidavit:

[7] The defendant personally deposed to the founding affidavit. His permanent residence is indicated as 238 Cornelis Street, Fairland, Gauteng.

[8] On 17 March 2022 the plaintiff's attorneys of record contacted the defendant and informed him that they have obtained judgment against him and demanded payment in terms thereof.

[9] As a result of having been advised as such, the defendant contacted his attorney of first instance, Mr du Tait, who then contacted the plaintiff's attorneys to obtain the necessary information regarding the matter. He also requested the plaintiff's attorneys to send him the pleadings, which they failed to do. The defendant's attorney of first instance subsequently instructed his correspondent in Bloemfontein to attend court on 24 March 2022 in order to obtain copies of the pleadings in the matter.

[10] A confirmatory affidavit of Mr du Tait is attached to the founding affidavit as Annexure "X3".

[11] With regard to the defendant's failure to have defended the action, the defendant states that he had no knowledge of the summons since it was served at a property where he did not reside, nor did he have any interest whatsoever in the said property. He further avers that no domicilium address was applicable in the circumstances and that the summons had not been served in terms of the Rules of court.

[12] Insofar as a bona fide defence is a concerned, the defendant denies that he was the cause of the damage to the plaintiff's vehicle as alleged. According to the defendant the sole cause of the damage was the negligence of the plaintiff's driver in that:

"27.1.1 The respondent-driver (whom will be joined to the proceedings):

27.1.1.1 drove under the influence of alcohol;

27.1.1.2 failed to keep a proper look-out;

27.1.1.3 failed to adhere to the rules and regulations of the road;

27.1.1.4 failed to avoid a collision where in the circumstances he should have and could have done so;

27.1.1.5 failed to apply his brakes timeously or at all;

27.1.1.6 trespassed."

[13] The defendant consequently requests that the default judgment be rescinded and that he be granted leave to defend the action against him.

[14] In terms of the notice of motion the defendant only sought costs should the application be opposed.

Answering affidavit:

[15] The plaintiff's attorney of first instance, Ms Buys (nee Scheepers), deposed to the answering affidavit. It appears from the application papers that she practises under her maiden name and I will consequently refer to her as Ms Scheepers.

[16] According to Ms Scheepers their office drafted a letter of demand in the present matter for damages suffered in the amount of R126 628.23. Since they could not obtain direct contact details of the defendant, it was their instruction that Dr. Coetzee, who is married to the trustee of the plaintiff, will attend to the hand delivery of the letter of demand. According to Ms Scheepers it was further their instruction that the defendant received the letter of demand during or about the end of April/ beginning of May 2021 and that he acknowledged receipt thereof with his signature on each of the two pages, as is evident, according to Ms Scheepers, from the attached "CTZ1".

[17] The defendant failed and/or neglected to respond to the letter of demand and summons was subsequently issued on 28 July 2021.

[18] Ms Scheepers further avers as follows in the answering affidavit:

"2.4 It was our instruction from our correspondent that initially the Sheriff was not able to locate the exact address, as there is [sic] apparently twenty houses on the farm ('... blykbaar twintig huisies op die plaas...'). On instruction from the respondent, we provided a contact detail for an employee of the respondent that resides on the property adjacent to the building that the applicant resided during that time. It was the instruction that the Sheriff should contact Donald so that he could indicate the correct house to the Sheriff. This is confirmed in the attached e-mail correspondence marked as "CTZ3" and the photos identifying the property, marked "CTZ4".

2.5 It is our instruction that the Sheriff received the pictures per Whatsapp and accordingly, service of the summons was effected during November 2021".

[19] Since the defendant failed to defend the action, default judgment was applied for, which was granted on 2 December 2021.

[20] Ms Scheepers avers that the defendant was in wilful default, considering that:

[20.1] The defendant failed to inform the court that he received the letter of demand as early as April 2021.

[20.2] He failed to attend to the matter after receipt of the letter of demand.

[20.3] "His failure to timeously, after the receipt of the letter of demand, to enter an appearance to defend the matter."

[21] Ms Scheepers further avers that the defendant is merely delaying the enforcement of the

judgment.

- [22] With regard to the requirement of a bona fide defence, Ms Scheepers avers that the defendant failed to provide the court with a "proper picture of all events", which should be regarded as "an attempt of misleading this court and delaying tactics".
- [23] In paragraph 10 of the answering affidavit Ms Scheepers denies the version of the defendant insofar as it does not coincide with the plaintiff's version, she criticises the manner in which the defendant set out his allegations pertaining to the cause of the damages and she further denies that the driver of the plaintiffs vehicle drove under the influence of alcohol.
- [24] Ms Scheepers consequently submitted that the defendant failed to make out a proper case for rescission of the default judgment and requested that the application be dismissed.
- [25] No confirmatory or other affidavit of Dr. Coetzee, who was allegedly the driver of the plaintiff's vehicle at the time of the incident, and who apparently gave the instruction regarding the manner in which the Sheriff was to be informed where to serve the summons, is attached to the answering affidavit.

The replying affidavit:

- [26] I do not intend to deal with the allegations in the replying affidavit at this stage. I will, however, refer to same when considering the merits of the application. I do wish to mention that a confirmatory affidavit of Mr Du Tait was also attached to the replying affidavit.

Legal principles:

- [27] It is trite that there are three ways in which a judgment taken in the absence of one of the parties may be set aside, namely in terms of Rule 42(1)(a), or in terms of Rule 31(2)(b) or at common law.
- [28] Rule 42(1)(a) determines as follows:

"(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;"

- [29] In *Kgomo v Standard Bank of South Africa* 2016 (2) SA 184 (GP) 187 F to 188 C Dodson J, with reference to, inter alia, *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003 (6) SA 1 (SCA) and *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) 87 (SCA), held that the following principles govern rescission under Rule 42(1)(a):

"[11.1]...

[11.2]

[11.3] the rule caters for a mistake in the proceedings;

[11.4] the mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;

[11.5]....

[11.6] the error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and

[11.7] the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b)."

[30] In the Lodhi-judgment, supra, the court, in dealing with Rule 42(1)(a), held as follows at para [24]:

"[24] I agree that Erasmus J in Bakoven adopted too narrow an interpretation of the words 'erroneously granted'. Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the Sheriff's return of service wrongly indicates that the relevant document has been served as required by the Rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted

erroneously. See in this regard *Fraind v Nothmann* 1991 (3) SA 837 (W) where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant's residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously."

[31] Although the return of service makes mention of "place of residence", it is evident from the defendant's founding affidavit and his replying affidavit that he does not reside at the said address and that he has no connection thereto.

[32] From the totality of the contents of the return of service it appears that according to the Sheriff, he/she served the summons in terms of Rule 4(1)(a)(iv) by having affixed a copy thereof at the defendant's alleged domicilium citandi et executandi. However, in order to constitute a domicilium address, proof must be presented of the fact that the relevant party, in this instance the defendant, did in fact choose that address as the domicilium citandi. In the present matter it is evident that no such nomination occurred, nor is it the plaintiffs case in her particulars of claim that such a nomination was made by the defendant.

- [33] In the circumstances and based on the Lodhi-judgment, the non- service or at least the defective service of the summons is an error as contemplated in Rule 42(1)(a). It is patently clear that due to the said error the defendant did not receive the summons. This error in itself constitutes a basis for the rescission of the default judgment.
- [34] In addition to the aforesaid, it is evident that the Registrar granted the default judgment in terms of Rule 31(5)(b). However, default judgment in terms of the said rule can only be granted where the claim is for a debt or liquidated demand. The term 'debt or liquidated demand' can be equated with a claim for a fixed, certain or ascertained amount or thing, and includes a liquidated claim as known at common law. See *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 739 G.
- [35] In the present matter the plaintiffs claim is based on delictual damages, being the "reasonable costs to repair the plaintiff's vehicle". Such damages do not constitute a debt or liquidated demand. It was consequently not legally competent for the Registrar to have granted default judgment. This constitutes a further reason or basis upon which the defendant is entitled to rescission of the judgment in terms of Rule 42(1)(a).
- [36] If the application is to be adjudicated on the basis of Rule 31(2)(b), the rescission is to be granted "on good cause shown", as provided in the said rule:
- "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."
- [37] The requirements for "good cause" are trite. In *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 - 477 they are set out as follows:
- "(a) He (the applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance.
- (b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.
- (c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."
- [38] In the present matter it is abundantly clear that the summons was not properly served upon the defendant and that it did not come to his notice. The defendant subsequently only became aware of the judgment on 17 March 2022 after being contacted by the plaintiff's attorney and the application was launched shortly thereafter within the 20-day period contemplated in Rule 31(2)(b).

- [39] I am consequently satisfied that the defendant gave a reasonable explanation for his default and that he was not in wilful default.
- [40] With regard to the defendant's defence, it is evident that the defendant denies that he caused the damage to the plaintiff's vehicle. The defendant furthermore averred that the damage to the plaintiff's vehicle was caused by the negligent driving of the driver thereof, who was under the influence of alcohol and involved in a collision. These averments, in my view, make out a prima facie case which, if proved at the trial, would constitute a proper defence to the plaintiff's claim. It consequently constitutes a bona fide defence.
- [41] Considering the totality of the facts and circumstances of this matter, I am satisfied that the defendant's application for rescission of the default judgment is bona fide and not made with the intention of merely delaying the plaintiff's claim.
- [42] The defendant is consequently also in terms of Rule 31(2)(b) entitled to rescission of the default judgment.

Costs:

- [43] Since an applicant in an application for rescission of a default judgment is, depending on the circumstances, often considered to be seeking an indulgence from court, such an applicant is generally ordered to pay the costs of the application, especially in the absence of opposition thereto by the particular respondent.
- [44] In circumstances where a respondent does oppose an application for rescission of a judgment, the court usually determines whether the opposition is reasonable or not in the particular circumstances and depending on such finding, decides whether an applicant should also be ordered to pay the opposition of the application, or not.
- [45] A further possibility which is also quite frequently present in an opposed application for rescission of a default judgment, is where the court hearing the application is of the view that the court who will eventually deal with the trial, will be in a better position to determine an appropriate order as to costs after having determined the merits of the action. In such an instance the costs of the application for rescission will stand over for later adjudication.
- [46] In my view, the present matter presents facts and circumstances which necessitate a deviation from the aforesaid three scenarios. In this regard I deem it necessary to refer, inter alia, to the following issues, which the defendant also raised in his replying affidavit:
1. The letter of demand, dated 24 April 2021, demanded payment of damages in an amount of R123 328.23, based on an "estimate as provided by Silverlakes Accident Repair Centre", which was allegedly attached to the letter of demand. However, no such document is attached to the letter of demand which is attached to the answering affidavit filed on behalf of the plaintiff. In the summons the amount of damages increased to an amount of R295 706.76. Not only is this amount also based on an assessment by the very same Silverlakes

Accident Repair Centre, but it further appears that the last mentioned calculation was made on 7 May 2021; hence, only about two weeks after the date of the letter of demand. Despite this, the plaintiff did not even attempt to provide an explanation for this radical increase in the amount of damages claimed from the defendant.

2. The defendant was criticized for not having entered an appearance to defend after having received the letter of demand. Leaving aside for the moment the defendant's denial that he received the letter of demand, the mentioned criticism is obviously completely unfounded, since no such procedure exists in our civil procedure.
3. From the e-mails attached to the answering affidavit, it is evident that the plaintiff's attorneys of record in Bloemfontein requested the plaintiff's attorney of first instance to provide the defendant's contact number in order to enable the Sheriff to properly serve the summons upon the defendant. Instead of providing same, the contact number of an employee of the plaintiff was provided with the arrangement that he will point out the property of the defendant to the Sheriff. The plaintiff's attorney of first instance must have had the defendant's contact number at that stage, considering that she contacted the defendant after the default judgment was granted, which fact she actually confirmed in the answering affidavit. This begs the question why the plaintiff gave the instruction that her employee should point out the house to the Sheriff for purposes of service instead of the Sheriff making contact with the defendant.
4. In addition to the aforesaid, no explanation was provided in the answering affidavit as to how the alleged address of the defendant had been obtained and on what basis it was at the time considered to be the correct address, considering the defendant's version in his founding affidavit that he is resident in Gauteng and did not have any connection to the alleged address.
5. After the Sheriff's return of service was received, it must have been evident that proper service had not taken place; yet, the plaintiff continued with an application for default judgment.
6. In the answering affidavit the plaintiff's attorney of first instance not only criticised and questioned the defendant's version of the events when the incident occurred, but went as far as to deny that the driver of the plaintiff's vehicle was under the influence of alcohol. It is evident that the said attorney has no personal knowledge of what occurred during the incident. The opposition to the defendant's version consequently constitutes inadmissible hearsay evidence.
7. Default judgment was requested from the Registrar in terms of Rule 31(5)(b) in circumstances where it must have been evident to the plaintiff's attorneys that the plaintiff's claim was not for a debt or liquidated amount.

[47] In the circumstances the plaintiff should not have approached the Registrar for default judgment. However, having done so, when the application for rescission was filed, the plaintiff ought to have immediately conceded to the granting of a rescission order. Instead, the plaintiff persisted with her unfounded opposition to the application.

[48] During the hearing of the application, Mr Carstens, who appeared on behalf of the defendant, requested that the plaintiff be ordered to pay the costs of the rescission application and that such order be made on a punitive scale. In the circumstances mentioned above, I consider it appropriate, in the exercise of my discretion, that the plaintiff indeed be ordered to pay the costs of the application. I have considered granting a punitive costs order on an attorney and client against the plaintiff. However, since a costs order against a respondent in an application for rescission of default judgment is in itself already punitive in nature, I decided against an order on an attorney and client scale.

Order:

[49] I consequently make the following order:

1. The default judgment granted on 2 December 2021 under case number 3461/2021, is rescinded.
2. Leave is granted to the applicant to defend the main action.
3. The respondent is ordered to pay the costs of the application for rescission.

C. VAN ZYL, J

On behalf of the applicant/defendant: Adv W.C. Carstens

Instructed by:

Symington De Kok Attorneys

BLOEMFONTEIN

On behalf of the respondent/plaintiff: Adv I. Sander

Instructed by:

EG Cooper Majiedt Inc.

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