
SOUTH AFRICA / JUDGMENT

Limbada and Another v Aurora Empowerment Systems (Pty) Ltd and Others; In re: Aurora Empowerment Systems (Pty) Ltd v Limbada and Others (50016/2012) [2015] ZAGPPHC 652 (8 September 2015)

[2015] ZAGPPHC 652

COURT

North Gauteng High Court, Pretoria

BEFORE

E Bertelsmann

CASE / FILE NUMBER

50016/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

NORTH DIVISION, PRETORIA

Case

No.: 50016/2012

Date:

8/9/2015

In

the matter between: MOHAMED
FIROZE
LIMBADA
First
Applicant
ZEENAT
EBRAHIM LAHER
Second
Applicant
and
AURORA
EMPOWERMENT SYSTEMS (PTY) LTD
(in
liquidation)
First
Respondent
FAIZEL
BHANA
Second Respondent
SULLIMAN
BHANA
Third
Respondent
In

re: (in
liquidation)
Applicant
MOHAMED
FIROZE
LIMBADA
First Respondent
ZEENBAT
EBRAHIM
LAHER
Second Respondent
FAIZEL
BHANA
Third Respondent
SULLIMAN
BHANA
Fourth
Respondent

JUDGMENT

1. On the 26th August 2014 the Court granted an order against the present first and second applicants and the second and third respondents setting aside payments made to the first and second applicants, alternatively the applicants and second and third respondents from bank accounts held by the first respondent company in the total sum of R 8 100 000,
00. The payments were set aside as:
 - a) Dispositions without value as contemplated in section 26 of the Insolvency Act 24 of 1936 (as amended), read with section 340 of the (old) Companies Act 51 of 1873 and section 9 of Schedule 5 to the Companies Act 71 of 2008; alternatively as:
 - b) Undue preferences in terms of section 30 (1) of the Insolvency Act read with section 540 of the (old) Companies Act and read with section 9 of Schedule 5 of the Companies Act 51 of 2008. As a further alternative the payments were set aside as:
 - c) Collusive dealings contemplated in section 31 of the Insolvency Act read with the same statutory provisions referred to already.
 - d) Another alternative upon which judgment was granted against the first and second applicants, alternatively first and second applicants and second and third respondents jointly and severally, the one to pay, the other to be absolved, was common law fraud upon the creditors of the first respondent, which payments fell to be set aside in terms of the common law.
- 2.

Judgment

was consequently granted against the first applicant, alternatively the applicants and second and third respondents jointly and severally, the one to pay, the other to be absolved, in the sum of R 1 million with interest thereon at 15.5% pa calculated from the date of each and every unlawful payment received to date of payment of the judgment debt.

3.

Judgment

was further granted against the second applicant, alternatively the applicants and the second and third respondents jointly and severally, the one to pay, the other to be absolved, for the sum of R 7 100 000, 00 with interest thereon at the rate of 15,5% pa from the date of each and every unlawful payment received to date of payment of the judgment debt.

4. Costs were awarded against the applicants and the second and third respondents in similar measure as payment of the unlawful payments

received.

5. It should be added that the amounts received by the applicants and the second and third respondents were set out in a schedule annexed to the draft order handed up by Aurora's counsel. No objection was raised on behalf of the applicants or the second and third

respondents against the annexure being included in the order, nor were the contents thereof disputed. The schedule sets out the bank accounts from which the payments were made as Aurora Empowerment systems and Aurora Primrose. It discloses that the first applicant received R 1 million in two tranches of R 500 000, 00 each during December 2009 and February 2010; drawn on Aurora Primrose and Aurora Empowerment Systems respectively. The second applicant received R 8 100 000, 00 in two payments of R 50 000, 00 and R 7 050 000, 00 respectively, paid in March and May 2010 from the Aurora Primrose account.

6. The above action was instituted against the applicants and the second and third respondents as part of the litigation that followed the collapse of the applicant in the principal action, Aurora Empowerment Systems (Pty) Ltd ("Aurora"), after the ill-fated

acquisition of the Pamodzi East Rand Mines and the insolvency enquiry launched in the mines' insolvent estates. Aurora's

liquidators alleged that the payments made to the applicants and the second and third respondents were made to them when Aurora was insolvent.

7. The granting of the judgment against the respondent parties in the principal action was preceded by forensic skirmishes prior to the enrolment of the application. On the morning the matter was called the present applicants then attorneys of record instructed counsel to apply for the postponement of the matter in the light of the fact that they had failed to file any answering affidavits. They sought condonation for this failure on the basis that they had not been able to put their original attorneys in funds, who withdrew when the date upon which answering affidavits had to be filed loomed. New attorneys were appointed who, according to Aurora's deponents, first threatened to raise certain points in limine before seeking an extension of the proceedings to give them an opportunity to file their clients' answers.
8. This application was refused as the reasons advanced for the failure to file affidavits timeously were palpably insufficient to constitute a basis upon which the indulgence belatedly sought could be granted. Neither the counsel nor the attorneys for the respondents In the principal matter withdrew when the application for condonation and a postponement was dismissed. They were not in the position to advance any grounds upon which judgment against their clients must be refused. The judgment referred to above was granted as a consequence.

9. Counsel for the respondents in the principal application then rose to apply for leave to appeal against the judgment granted in the absence of any opposing papers or argument. The application was refused. The present application for the rescission of the judgment followed. Following the pattern of the previous litigation it was only enrolled for hearing after a considerable lapse of time.
10. This application is brought by Mahomed Firoze Limbada, an adult male who describes himself as a businessman residing at [.....], Befordview, Johannesburg. He was the first respondent in the principal application.
11. His wife, Zeenat Ebrahim Laher, is the second applicant, and was the second respondent in the principal application. Both applicants

allege that she played a minor role in the transactions that underlie the present dispute, having been represented by her husband.

12. The second and third respondents are described as businessmen residing at [.....], [.....], Houghton, Johannesburg.
13. The applicants and the second and third respondents were joined in the principal action. Aurora's liquidators proceeded by way of application when they sought the impeachment of payments effected to the applicants. It is not suggested that the applicants did not have an opportunity to fully acquaint themselves with the contents of the affidavits that were filed in support of the relief claimed by the liquidators. It is also not denied by the first applicant, who swears to the affidavits on behalf of himself and his wife that they received payments to the tune of R 8 100 000, 00. No cause for these payments is advanced in the founding affidavit. They assert, however, that they made a payment of R1 million each on 10 June 2010 as partial repayment of the funds received. These payments were allegedly made into the Aurora Primrose account.
14. The applicants through the first applicant allege that, once the proceedings to recover the monies paid to them commenced, the second

and third respondents suggested to them that their attorneys should also represent them given their intimate knowledge of the matters

affecting Aurora. The first applicant had a brief meeting with these attorneys after agreeing to this proposal. The suggestion made on the applicants' behalf that they were not represented at the hearing of the application is therefore incorrect, even though the attorney of record had changed between the service of the application and the hearing thereof: *De Allende v Baraldi t/a Embassy Drive Medical Centre 2000*

- (1) SA 390 (T), which is instructive even though it concerns a rescission application in the Magistrates' Court.

15. It must also be underlined that the attorney and counsel who appeared on behalf of the other respondents in the principal application

expressly asserted that they appeared on behalf of all respondents, including the present applicants. After the judgment was granted – whether it was a judgment by default need not be debated further – counsel applied for leave to appeal also on the applicants' behalf. It is therefore self-evident that the judgment granted against the applicants was not granted in their absence.

16. It follows that neither Rule 31 (2) (b) nor Rule 42 (1) (a) can be relied upon by the applicants to support an application for rescission of the judgment against them.
17. The applicants assert that they left the defence of the claims against them to the second respondent and were re-assured by him that matters were under control, even when a new attorney was appointed and there was talk of a postponement. This evidence is based on hearsay, there being no supporting affidavit of the second respondent or any of the attorneys involved. Given the history of the matter, the considerable sum of money involved, the fact that the applicants had each repaid R 1 million to Aurora for reasons that have not been explained, and given the indisputable fact that the Aurora affairs enjoyed considerable publicity prior to the judgments being granted, it is difficult to accept that a businessman would approach a claim in excess of R 8 million against him and his wife with such sanguinity. At best it could be suggested that the person or persons tasked with attending to his affairs in this matter were gravely remiss in their duty to keep him abreast of events.
18. This version does not constitute good cause for the rescission of judgment; see: *Minister of Safety and Security v George* Case No 305/12 ECDG, *Isserie and others v SANTA* (2015) ZAGPJHC 27 (6th February 2015). Also at common law there is thus no basis upon which the applicants could succeed in having the judgment set aside.
19. The applicants contend that the order was erroneously granted because it is defective. The wording of the order is attacked because it decrees payment by the parties affected thereby in the alternative. This argument is unpersuasive, particularly in the light of the fact that they admit the payments they received. In addition there is a table of payments made by Aurora annexed to the judgment, the correctness of which is not assailed. At worst the judgment may have to be explained or amended, but that will not allow the applicants to avoid payment.
20. The further points raised relate to the bank accounts from and into which payments were made. The account that is relied upon as proof of the fact that Aurora did not effect the payments to the applicants is named 'Aurora Primrose'. This fact is elevated to the point of averring that there was another company involved in the transactions apart from Aurora. The respondents explain that the account was held by Aurora, which allegation is not refuted and must therefore be accepted as correct. But the final nail in the coffin of this defence is the absence of any documentation obtained from the Companies and Intellectual Property Commission (CIPRO) confirming the existence of a company other than Aurora. The applicants do not attempt to explain why the simple exercise of consulting CIPRO's

records was not embarked upon. The logical explanation is that they or their legal representatives knew that no such company would be found.

21. The applicants have no bona fide defence other than the fact that they effected repayment of the sum of R 2 million on the 6th July 2010. These payments were not disclosed in the liquidators' affidavits, whose deponent concedes that they may have failed to properly reconcile Aurora's books of account. The applicants' averments are therefore undisputed on this point. They claim that the entire judgment should be rescinded as it was granted in error and on incorrect facts. The mistake does not affect the entire judgment granted against them, though. They are entitled to rescission of the judgment to the extent of a reduction of R1 million each: *Joseph Landman and Others v Absa bank Limited and others* Case No 3300/2012 ECLD. A partial rescission of a judgment is possible and permissible: *SOS Kinderdorf International v Effie Lentin Architects* 1993
- (2) SA 481 (Nm SC); *Silky Touch International (Pty) Ltd and Another v Small Business Development Corporation* [1997] 3 All SA 439 (W); *Conekt Business Group (Pty) Ltd v Navigator Computer Consultants CC* 2015
- (4) SA 103 (W).
22. All the aforementioned judgments relate to either the Magistrates' Court Rules or to Rule 31 (2) (b), but by a parity of reasoning a partial rescission should be permissible under the common law once it is clear that the judgment was granted in excess of the amount actually due. In the present instance the parties were clearly under the mistaken impression that Aurora was claiming only amounts that were actually due. The applicants' legal representatives were patently unaware of the defence of partial repayment when the application for condonation and postponement was argued, and so was the Court.
23. The court is therefore at liberty to exercise its discretion to reduce the amounts the judgment was granted for. A failure to do so would lead to an injustice to the applicants if the application were to be refused in its entirety; or an injustice to Aurora's liquidators if the entire judgment were to be set aside. Further litigation would be almost inevitable at considerable cost to the parties. Failure to intervene on the part of the Court would be irrational and not in the interests of justice.
24. Once the judgment must be partially rescinded the rate of interest awarded must be adapted as well.
25. As both parties have achieved some success it appears to be fair not to make a costs order against any party but to order each party to pay his, her or its costs of this application.

The following order is thus made:

1. The judgment granted on the 26th August 2014 against the applicants and second and third respondents is rescinded to the extent that all the words in paragraph 1 thereof after ‘... the sum of R 1 million with interest thereon ...’ are deleted and substituted with the following: ‘...interest on the sum of R 1 000 000, 00 at the rate of 15.5% per annum until the 31st July 2014 and 9% per annum from the 1st August 2014 from dates of payment to the first respondent as listed in Schedule A’;
2. By substituting the figure of R 7 100 000, 00 in the third line of paragraph 3 of the order and substituting therefor R 6 100 000, 00;
3. By adding the words ‘... until the 31st July 2014 and from 1 August 2014 at 9% per annum...’;
4. Each party is ordered to pay his, her or its costs of this application.

Signed at Pretoria on this day of August 2015.

E BERTELSMANN

Judge of the High Court

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Prepared on 10 October 2026 · Esheria