

SOUTH AFRICA / JUDGMENT

Makhurumola Itlhabanele Holdings (Pty) Ltd v De Vos (2887/2019) [2022] ZANWHC 10 (17 March 2022) [2022] ZANWHC 10

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

2887/2019

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IN THE NORTH WEST HIGH

COURT, MAFIKENG

CASE NO: 2887/2019

Reportable: YES / NO

Circulate to Judges: YES

/ NO

Circulate to Magistrates: YES / NO
Circulate to Regional
Magistrates: YES / NO

In the matter between: MAKHURUMOLA
ITLHABANELE
HOLDINGS
(PTY) LTD
Applicant
and
AMANDA
LINDE DE VOS
Respondent
DATE
OF HEARING
:
04 MARCH 2022
DATE
OF JUDGMENT
:
17 MARCH 2022
FOR

THE APPLICANT
:
ADV. FERRIS
FOR
THE RESPONDENT
:
ADV. GRUNDLINGH

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 17 MARCH 2022.

ORDER

Consequently, the following order is made:

- (i) The application for rescission of the default judgment granted on 17th September 2020 is dismissed.
- (ii) The applicant is ordered to pay the costs of the rescission application on an attorney and client scale.

HENDRICKS DJP

- [1] The applicant duly represented entered into a written sale agreement to purchase the business of the respondent known as Mandies Sports for an amount of R 1 150 000.00 (one million one hundred and fifty thousand rand) on 11th July 2018 as a going concern. This amount is exclusive of the stock in trade, which needed to be valued at costs price and to be agreed upon by the parties. The completion date hereof were to be 01st September 2018. It is contended on behalf of the applicant that the respondent unilaterally conducted the stocktaking and valued the stock in trade at R726 240.00 (seven hundred and twenty six thousand rand). Demand was made for payment of this amount as well as two (2) months salary amounting to R30 000.00 (thirty thousand rand), plus interest. Summons was issued on 18th September 2019 for payment of the aforementioned amounts as claim 1 and claim 2 respectively. Service of the summons was duly effected on 16th October 2019.
- [2] A notice of intention to defend the action was served and filed on 25th October 2019. On 27th November 2019 a notice of bar was issued and served. On 04th December 2019 the applicant as defendant served a notice in terms of Rule 35 (12) and (14) requesting the respondent (as plaintiff) to produce for inspection a schedule reflecting the stock produce by the business accounting system referred to in the particulars of claim. This the respondent failed to do. The applicant (defendant) served and filed a Rule 30 and Rule 30 A notice on the 24th February 2020. After a passage of time of interaction between the parties' legal representatives, a notice of bar was again served and filed on 30th June

2020. This culminated in an application be made for default judgment to be granted against the applicant (defendant). Default judgment was granted on 17th September 2020 in the aforementioned amounts, plus interest and costs.

[3] On 14th April 2021 an application for rescission of the default judgment was issued and served. This was followed by a notice of intention to oppose filed and served on 19th April 2021. The answering affidavit was served and filed on 07th May 2021. No replying affidavit was filed. The matter was set down for 02nd December 2021, on which date this Court granted an order in the following terms:

“1. The rescission application is postponed to the opposed motion court roll of 4 March 2022.

2. The Applicant shall deliver its replying affidavit and application for condonation for the non-compliance with the Rules of Court relating to the late filing of its replying affidavit and Directives of this Court relating to the filing of its heads of argument and practice note by no later than 15 December 2021.
 3. The Respondent shall deliver any opposing affidavit in the condonation application by no later than 31 January 2022.
 4. The Applicant shall deliver any replying affidavit in the condonation application by no later than 4 February 2022.
 5. The Applicant shall deliver its heads of argument by no later than 11 February 2022.
 6. The Respondent shall deliver its supplemented heads of argument by no later than 18 February 2022.
 7. The Applicant is ordered to pay the wasted costs of the opposed application of 2 December 2021 on an attorneys and clients scale.”
- [4] On 04th March 2022, the date to which the matter was postponed, there was still no replying affidavit filed by the applicant as well as heads of argument. Adv. N. Ferris who represented the applicant, indicated that despite the failure to file a replying affidavit and heads of argument as ordered in terms of the aforementioned court order, he was ready to proceed. The matter was argued and judgment was reserved.
- [5] The rescission is premised on Rule 31 (2) (b) and not Rule 42 (1) (a) of the Uniform Rules of Court or the common law. Rule 31 (2) (b) require that an applicant must give a reasonable explanation for its default; the application must be bona fide made and not made with the intention of merely delaying the plaintiff’s claim; and the applicant must show that it has a bona fide defence to the plaintiff’s claim.

See: Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape) 2003 (6) SA a (SCA).

Ferris and Another v Firststrand Bank Limited 2014 (3) SA 39 (CC).

- [6] In *Cary Lawrence Praetor v Geothermal Energy Systems (Pty) Ltd & Another* ZAWCHC 162/2016 15 Feb 2017 at para [6] it was noted that:

“It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”

The applicant is accordingly required to furnish both a reasonable explanation for its default as well as a bona fide defence to the respondent's claims before this application can succeed.

- [7] The application for rescission is opposed on the following basis:

- (a) there is no reasonable explanation for the applicant's default;
- (b) the application is not bona fide and the applicant has no bona fide defence to the respondent's claims.

- [8] The applicant was aware of the summons issued against it and instructed attorneys to defend the matter on its behalf. According to the applicant, it was not made aware of the notice of bar that had been served on its former attorneys. According to the applicant it was also not made aware of the respondent's response to its notice in terms of Rule 35(12).

- [9] However, on the applicant's own version it did not have regular contact with its attorneys during the course of 2020, but only spoke to its attorney about other legal proceedings. It must accordingly be accepted that the applicant did not follow up on the progress of this matter with its attorneys during 2020. Had it done so, it would no doubt have been informed of the notice of bar and the response to the notice in terms of Rule 35(12). This constitutes gross negligence on the part of the applicant itself. The applicant is not willing to accept any responsibility and placed the blame solely on its former attorney. It is established law that there is a limit beyond which a party cannot escape the negligence of his/her/its legal representative. In *Kirsten v Strydom* NO 2020 JDR 0870 (GP) at para (15) the following is stated:

“Ineptitude conduct of a legal representative in general does not serve as a rational reason for granting rescission of a judgment.”

- [10] There was an appearance on behalf of the applicant by counsel on 20 August 2020, when the matter first came before Court for default judgment. The Court granted a postponement to the applicant to apply for an upliftment of the notice of bar. The applicant has failed to apply for upliftment of the notice of bar and has also not done so in the present application, despite it being aware of same. This leaves the applicant in a predicament as it will still be barred even if the default judgment is rescinded. The respondent will then be able to once again apply for default judgment. The rescission of the judgment applied for in this

application will accordingly have no practical effect. The applicant accordingly failed to provide a reasonable and acceptable explanation for its default.

- [11] Insofar as a bona fide defence is concerned, the following. It was contended that the applicant was not represented during the stocktaking, as agreed upon. This is gainsaid by the respondent who states that three (3) people represented the applicant and even name them, nl. Mr. Thapelo (applicant's accountant), Mr. Apolus (the applicant's Manager) and Mr. Seleka (the Division Director of the applicant). This statement stands uncontested as no replying affidavit was filed to dispute it. On the probabilities, the applicant was represented during the stocktaking. The amount is also not an estimate but an exact amount. This eliminate the probability of an estimate and lends credence to the contention that a stocktake actually took place.
- [12] According to the applicant the value placed on the stock by it was an estimate of R300 000.00. The amount of R326 240.00 was paid in the trust account of its former attorneys. The offer of such amount in full and final settlement was rejected by the respondent.
- [13] It is noteworthy that the applicant has nowhere provided any calculation or factual basis for its estimate of R300 000.00 and it is also not explained why an amount of R326 240.00 (as opposed to the amount of R300 000.00) was tendered. The applicant, despite being placed in possession of a schedule of the stocktaking, provided under cover of the answer to its notice in terms of Rule 35(12) on 12 December 2019, never disclosed which item or value of any item is disputed. The Applicant also never attempted to meet again and also never produced a list of the items disputed by it. This version is not disputed by the applicant in a replying affidavit.
- [14] It is noteworthy that the applicant has also not attached a list of the disputed itemsto this application. The applicant also never declared a dispute in terms of clause 6.1.4 of the sale of business agreement regarding stock, that should allegedly have been excluded from the valuation of the stock. This version is also not disputed by the applicant in a replying affidavit.
- [15] If the amount was estimated by the applicant, than it is surprizing that it is not R300 000.00 that was paid into trust but R326 240.00. Why the amount of R26 240.00 was paid as an extra on top of the estimated amount of R300 000.00 as the value of the stock in trade defies logic. It however lends credence to the respondent's version that a stocktake did take place and the stock in trade was valued at R726 240.00. That is where the amount of R26 240.00 comes from. It seems that the applicant wants to have a discount of R400 000.00, which the respondent refused.
- [16] The second claim is for respondents' salary in the amount of R30 000.00. The applicant contended that this amount was paid on 18th January 2019. The respondent denies that it was her salary and submitted that it was the salary of the staff members for January

2019. A schedule to this effect is attached. Once again, it defies logic that the applicant would pay the salary of the respondent for the months of January and February already on the 18th January 2019. Why would it pay the respondent in advance for February 2019? Furthermore, why pay an extra amount of R460.00? Where does it come from? On the probabilities, it is more probable that the amount of R30 460.00 was in actual fact the salary of the staff members than being the respondents' salary. This contention is also not gainsaid, as no replying affidavit was filed and it therefore stands undisputed.
- [17] Adv. Grundlingh on behalf of the respondent submitted that there is another aspect that also need to be taken into account and that is that the applicant never complained about the value of the stock prior to receiving the letter of demand. The stocktaking took place on 18th and 19th September 2018 and the complaint was only raised on 29th June 2019, more than nine (9) months later. The respondent instituted the action on 18th September
2019. If the applicant was of the view that the stock in trade was over-valued, it would have complained earlier and attempt to resolve the impasse. This, it did not do. On the probabilities, this is nothing but a belated attempt to frustrate the payment of the default judgment amounts, since the applicant has no bona fide defence. I am in full agreement with this contention.
- [18] It would be remiss of me not to express my disquiet about the manner in which the applicant conducted itself with regard to this matter. The applicant displayed a lackadaisical attitude towards this matter. It never seriously attempted to bring this matter to finality. The respondent is the one who was the driving force to bring this matter to finality. The matter was enrolled for the 02nd December 2021 at the instance of the respondent. On that day the applicant, duly represented by Adv. N Ferris, applied informally for a postponement. The postponement was granted. The order as contained in paragraph [3], supra was granted. Needless to say, no replying affidavit was filed. This despite the fact that it was submitted as reason for the informal request for a postponement of the matter. One can only infer that this was nothing more than a delaying tactic employed not to pay the amounts ordered in terms of the default judgment order.
- [19] Adv. N Ferris was also supposed to file heads of argument on behalf of the applicant, which he never did. Perhaps he did not receive instructions to do so, even in the face of a court order to that effect. This is not in compliance with the Practice Directives of this Court. The respondent is severely prejudiced by this conduct of the applicant. A punitive costs order is warranted under these circumstances.

Order

[20] Consequently, the following order is made:

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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