
SOUTH AFRICA / JUDGMENT

Mavundla v Telkom SA Limited (8230/2013) [2015] ZAGPPHC 731 (16 October 2015) [2015] ZAGPPHC 731

COURT

North Gauteng High Court, Pretoria

BEFORE

H R Fourie

CASE / FILE NUMBER

8230/2013

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REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF JUSTICE

(GAUTENG DIVISION, PRETORIA)

CASE NO: 8230/2013

16/10/2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between

PENELOPE SHADIGOLO MAVUNDLA

APPLICANT

and

TELKOM SA LIMITED

RESPONDENT

JUDGMENT

FOURIE AJ

1.

During April 2009, the applicant and the respondent concluded a written Retention and Restraint Agreement, in terms of which the applicant would be employed by the respondent for 36 months against payment of R913,998.00. On the first day of what is referred to as the retention period, R685,499.00 was paid to the applicant, the balance being payable at the end thereof. When the applicant resigned prior to the end of the retention period, the respondent claimed repayment of the amount it had paid the applicant.

2.

On 19 November 2013, the respondent's summons for payment of R685,499.00 was served. The applicant was placed under bar to file a plea on 5 February 2014. The applicant's attorneys delivered the plea on 19 February 2014, evidently while being under bar to do so. The respondent's attorneys objected to the late filing of the plea, and when they received no response, applied for default judgment. Default judgment was granted by the Registrar on 3 June 2014.

3.

The applicant says that the default judgment came to her notice on 7 August 2014 when she printed her ITC record. She was unable to locate the attorney handling her matter but subsequently ascertained from the senior partner in the firm that the attorney had "since left the firm " and although "everyone at the firm " was under the impression that everything was in order as far as the applicant's matter was concerned, certain notices and correspondence from the respondent's attorneys remained unanswered. Although this senior partner undertook to bring a rescission application, he did not do so, and during the first week of December 2014 the applicant decided to terminate her erstwhile attorney's mandate and instruct her present attorneys to advance the matter.

4.

On 8 December 2014 the applicant's present attorneys requested the respondent's attorneys to abandon the judgment "based on various irregularities in the prelude to the granting of the default judgment" . This request was refused on 15 January 2015 and accordingly on 29 January 2015 this application was issued.

5.

The application is brought in terms of Rule 31(5)(d) of the Uniform Rules of Court, which provides that any party dissatisfied with a judgment granted by the Registrar may within 20 days after he has acquired knowledge of such judgment, set the matter down for reconsideration by the Court.

6.

In limine, the applicant argued that the deponent to the opposing affidavit, one Vivian Brikkels, employed by the respondent as a Specialist:

Remuneration and Benefits, is not competent under the respondent's delegation of authority to defend litigious matters and /or to depose to affidavits pursuant thereto, nor did he have personal knowledge of the agreement in question.

7.

In my view, it is irrelevant whether Mr Brikkels had been authorised to depose to the opposing affidavit. The deponent to an affidavit in motion proceedings is merely a witness and need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof, or as in this case, its opposition, which must be authorised. In this case the proceedings were opposed by an attorney purporting to act on behalf of the respondent and who by signing the notice to oppose and delivering the opposing papers, signified that he had been authorised to oppose the application on behalf of the respondent. Rule 7 which provides the procedure to be followed by a party who wishes to challenge the authority of an attorney prosecuting or resisting motion proceedings on behalf of the other party, and the applicant did not avail herself of this remedy. *Ganes & Another v Telecom Namibia, Ltd* 2004 (3) SA 615 (SCA); *ANC Umvoti Council Caucus and Others v Umvoti Municipality*, 2010 (3) SA 31 (KZP).

8.

Mr Brikkels stated that he had personal knowledge of the facts deposed to. The letter of demand was signed by Mr Brikkels. This suggests that he was informed of the facts and circumstances that entitled the respondent to claim repayment of the monies. The applicant contends that Mr Brikkels could not have personal knowledge of the "operational, technical and legal mechanisms" of the agreement, or the implementation thereof. However, he was not called upon to address any such mechanisms or the implementation thereof.

9.

Accordingly, in my view there is no merit in the objections in limine and the objections are not upheld. The following issue that requires attention is whether the application is correctly brought in terms of Rule 31(5)(d).

10.

Mr Tshabalala, for the applicant, contended that the application was properly brought in terms of rule 31(5)(d). Counsel for the

respondent, Ms Kollapen, however argued that the applicant had no remedy in terms of Rule 31(5) and that the Court has no inherent

jurisdiction to come to her assistance in this regard, for which she relied on *Swart v ABSA Bank Ltd*, 2009 (5) SA 219 (C). She also argued, relying on the commentary to Erasmus, Superior Court Practice at B1-204C, that the Court will only interfere with the judgment of the Registrar if it is of the opinion that the Registrar erred, and that the applicant has not stated why the Registrar erred.

11.

I agree with Ms Kollapen that there is no case to be made that the Registrar erred. It is clear that the Registrar was fully appraised

by the respondent of the facts set out in paragraph 2 above. There is no question of "a myriad of irregularities" preceding the grant of the default judgment. For the reasons that follow, I do not however agree that the applicant has no remedy in terms of Rule 31(5).

12.

Where default judgment is granted by the Court in terms of Rule 31(2)(a), rescission may be sought in terms of Rule 31(2)(b). There is however no corresponding provision for setting aside default judgment granted by the Registrar in terms of sub- rule 31(5)(a). There are conflicting views as to whether the judgment debtor has a remedy.

13.

Ms Kollapen's argument finds support in *Bloemfontein Board Nominees Ltd v Benbrook*, 1996 (1) SA 631 (0). However, according to the learned authors Cilliers et al (*Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa*, p 713) there does not seem to be any logical motivation for an exclusion of such default judgments. They suggest that the exclusion is due to an oversight and that the Court may set aside such default judgments by virtue of the common law or in the exercise of their inherent jurisdiction. In *Pansolutions Holdings Ltd v P&G General Dealers & Repairers CC*, 2011 (5) SA 608 (D), the Court compared the meaning of "reconsideration" in Rule 31(5)(d) to the same term in Rule 6(12)(c) and concluded that the power accorded to the Court is that of substituting its discretion for that of the Registrar. While the Registrar may not have erred in granting judgment on the information before him at the time, information now provided by the applicant may indicate that the judgment cannot stand. The judgment may then be set aside on "good cause" shown. Finally, in *Gundwana v Steko Development & Others*, 2011(3) SA 608 (CC), the Constitutional Court accepted without more that debtors against whom default judgments and execution orders had been granted by the Registrar, may apply to Court for the rescission of those orders, subject to the applicant showing that a Court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would have refused leave to execute. The same seems to have occurred in *Nedbank v Mortenson*, [2005] ZAGPHC 85; 2005 (6) SA 462 (W).

14.

It seems to me that the appropriate and in fact only course for a judgment debtor who wishes to have the default judgment granted by the Registrar set aside, is an application in terms of Rule 31(5)(d).

15.

The requirements for rescission of a judgment taken default are trite - the applicant must show good cause. See *De Wet and Others v Western Bank Ltd*, 1979 (2) SA 1031 (A) at 1042. Good cause is demonstrated by showing that:

15.1. She has a reasonable and acceptable explanation for her default; and

15.2. On the merits, she has a bona fide defence which, prima facie, carries some prospect or probability of success. *Chetty v Law Society, Transvaal*, 1985

(2) SA 756 (A) at 765.

16.

The applicant's explanation for her default leaves much to be desired. The time lapse between the date upon which she obtained knowledge of the judgment and this application was issued, is substantial and moreover poorly explained. Much was made of the fact that she is an admitted attorney and should have been aware of the time constraints pertaining to rescission applications. It may be so that the applicant is a qualified attorney, but there was no evidence in respect of her experience and practice. Theoretical knowledge seldom equates to an understanding of the exigencies of practice. It was, however, disconcerting that while she baldly alleged that she had been unable to reach her attorney, the respondent provided an email that demonstrated conclusively that the same attorney had been unable to reach the applicant.

17.

Where an applicant has provided a poor explanation for her default, a good defence may compensate and in such circumstances, the applicant must furnish sufficient particularity and detail of her defence. *Creative Car Sound & Another v Automobile Radio Dealers Association 1989 {Pty} Ltd*, 2007 (4) SA 546 (D).

18.

19.1. The applicant's defence was summarised by her counsel as follows:

19.1.1. The provisions of the agreement upon which the respondent's claim for repayment of the monies paid to the applicant, was based, are unenforceable on the basis that they are unfair.

19.1.2. The provisions of the agreement are unenforceable on the basis that they are vague, confusing and contradictory to the extent that they are prejudicial to the applicant.

19.1.3. The applicant gave fair value to the respondent in exchange for the retention amount and as such the respondent is not entitled to recover any amount without restitution.

19.1.4. The respondent approaches the agreement on an all or nothing basis, despite the fact that it paid the applicant 75% of the retainer only.

19.1.5. The respondent has dealt with the applicant unfairly compared to other employees who had resigned prior to the lapse of their retention

period under more or less similar circumstances.

19.2. Mr Tshabalala submitted that the applicant had good prospects of success if given an opportunity to defend herself on trial; only a trial Court can decide if she was entitled to terminate the agreement, having had the opportunity to consider all conduct having a bearing on her right to do so. The principles of justice and fairness had not been considered by the Registrar.

20.

Ms Kollapen contended that the applicant had simply made bald statements as to why the agreement is vague, unenforceable and contradictory.

She had failed to highlight any specific provisions or to place any evidence in substantiation of these bald allegations. The plea that had been filed, was in contradiction of the defence now pleaded. This did not meet the requirements of a bona fide defence, which cannot be demonstrated at the hand of bald averments lacking necessary detail. She argued that it is not possible to assess the prospects of the applicant's success due to the uncertainty what the applicant's defence actually is.

21.

I find myself in agreement with the respondent's counsel. Mr Tshabalala referred me to *Williams v Trifecta 165 (Pty) Ltd & Others* (13960/2009) [2011] ZAWCHC 319 (26 August 2011). In this matter, also an application in terms of Rule 31(5)(d), the Court had been confronted with competing versions as to the interpretation of the contract in dispute and its substance. Davis J found that two issues appeared which would require serious determination on the basis of evidence and granted the rescission. However, in that matter the underlying facts and legal contentions had been thoroughly ventilated and debated by counsel for both parties. That is not what happened here.

22.

This defence is based on conclusions of law that are almost entirely devoid of supporting facts. By way of example, I am left in the dark as to which clauses of the agreement the applicant attaches a different interpretation, which provisions are unfair and in what respects they are unfair, which provisions are vague, confusing or contradictory. I am also not apprised of any evidence that she intends leading at the trial, in support of these contentions. The respondent, as it was entitled to do, answered the allegations in an equally vague manner.

23.

In the premises, I am of the view that the applicant has not demonstrated that she has a bona fide defence which, prima facie, carries some prospect or probability of success and accordingly I am not satisfied that good cause exists for the rescission of the default judgment. The application is dismissed with costs.

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H R FOURIE

ACTING JUDGE OF THE HIGH COURT

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