

SOUTH AFRICA / JUDGMENT

Mboso v Standard Bank of South Africa (19416/2016) [2018] ZAWCHC 20 (19 February 2018) [2018] ZAWCHC 20

COURT

Western Cape High Court, Cape Town

BEFORE

Andrews

CASE / FILE NUMBER

19416/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case

Number: 19416/2016

In

the matter between:

NONGANGAPHILA

EUNICE

MBOSO Applicant

and

THE

STANDARD BANK OF SOUTH

AFRICA Respondent

JUDGMENT

DELIVERED 19 FEBRUARY 2018

Andrews AJ

Introduction

- [1] This is an opposed rescission of judgment application pursuant to an order purported to have been taken by agreement between the parties and granted on 10 November 2015. The application was argued on 12 February 2018. Adv T A Pharoah Appeared for the Applicant and Adv FSG Sievers appeared for the Respondent.
- [2] Applicant requested that the court condones the late filing of Applicant's replying affidavit and heads of argument. Respondent had no objection to condonation being granted for the late filing of the replying affidavit and heads of argument; however,

Respondent opposed the granting of condonation in relation to the late filing of Applicants main application. I will deal first with certain points in limine raised by the parties.

Points in limine

1. Condonation

- [3] Applicant requested that the court condones her late filing of this application and in particular her late filing of the replying

affidavit and heads of argument for the following reasons:

- (a) Applicant was unrepresented and was waiting for pro bono legal assistance for which she applied through the Law Society;
- (b) Applicant's attorneys were appointed in December 2017 and pro bono Counsel was appointed on 31 January 2018.
- [4] Additionally, Applicant, after being informed of the order on 10 November 2015, contends that she had fallen ill and left for the Eastern Cape where she sought treatment. Furthermore, Applicant, being retired and unable to afford legal assistance was at a loss as to how to proceed with this matter as her resources were depleted which caused the delays in bringing the application for rescission timeously in terms of the rules. Applicant also argued that the prospects of success were not inordinate or unarguable. It was further contended that the application was brought within a reasonable time. It was submitted that Applicant had good reasons for the delay.
- [5] Respondent contends that Applicant failed to give any reasonable explanation as to why almost a year had elapsed before launching the application for rescission. It was argued that this application was launched shortly before Respondent became entitled in terms of the

order, to execute against the property for the full amount of the order and costs and as such, undermined the bona fides of the application. Respondent submitted that Applicant has set out no satisfactory basis for condonation to be granted for the delay in launching the present application.

Legal Principles pertaining to condonation

[6] In essence, there are three aspects which an Applicant should address in applying for condonation, namely, the adequacy of the explanation, which includes the reasonableness thereof; the question of prejudice as well as the prospects of success. It is an accepted legal principle that when applying for condonation, a full explanation for the entire period of the delay should be encapsulated in the application and that a superficial and unconvincing explanation would not be sufficient to overcome the non-compliance.[1]

[7] Also trite is the notion that public interest dictates that there is finality in litigation, which is the reason why time limits are set. In determining what constitutes good cause, a court is obliged to take all the relevant facts and circumstances of a case into consideration when exercising its judicial discretion. Each case must be assessed on its own merits when deciding on what would constitute a reasonable period.

[8] In the *General Accident Insurance Co South Africa Ltd v Zampelli*[2] case, the learned Tebbutt J acknowledges that courts have expressed the need for strict compliance with the rules and recognised that:

‘...occasions may arise when, due to the circumstances of the particular case, such strict compliance may not have been possible, the framers of the Rules have allowed for condonation of non-compliance on “good cause shown”...’

[9] The learned Judge went on to say that the party seeking the court’s indulgence should not only give a reasonable and acceptable explanation for his failure to comply with the Rules but should also:

‘...show that he has what Berman J in *Ajam v Franke*[3]...has described as “fair prospects of success”...’[4]

[10] Inasmuch as Respondent argued that Applicant has set out no satisfactory basis for condonation to be granted, it is clear that Applicant has expressed her desire to challenge the judgment and has put forward a convincing explanation in this regard. I am satisfied with the adequacy of Applicant’s explanation and the reasonableness thereof as it appears that the Law Society appointed pro bono Counsel on 31 January 2018, which was approximately two weeks prior to arguing this application. Applicant had no control over that process and as such, it would be unfair towards Applicant who would no doubt be prejudiced as a result, bearing in mind that Applicant has in terms of Section 9 (1) of the Constitution[5] the right to equality before the law. Without legal representation, she would have been at a distinct disadvantage. My prima facie view about Applicant’s prospects of success during this application for condonation is that it should not be approached with

rigidity. In light hereof, I am satisfied that Applicant has made out a bona fide defence which will be further ventilated when considering the rescission of judgment application.

2. Changes to Applicant's founding affidavit

- [11] Respondent brought it to the attention of the court that there was a numbering change in the index. It would appear that Applicant's founding affidavit now contains two extra pages and that additional paragraphs were inserted. From the commissioning and signatures that appear at the base of every page, it is clear that pages 10 and 11 are different to the original in that the two pages are not commissioned and bears only the initials and not a signature. Nothing however turns on this, although Respondent mooted that it affects the bona fides of this application. I deal with this point further in this judgment.

Factual Background

- [12] Applicant contends that in 2003, at the suggestion of her employer, she bought a property situated at [...] S. Close, Khanya Park, Gugulethu for R170 000.00. According to Applicant, she applied for a loan of R133 000.00 from Respondent which was registered as a mortgage bond against the property. She also used R70 000.00 from her occupational pension fund as a deposit.
- [13] In 2004, a further payment of R100 000.00 was made by Applicant to offset the balance, which Applicant contends, reduced the outstanding balance to R31 000.00. Furthermore, Applicant avers that she paid an increased monthly instalment of R1 500.00 as opposed to R400.00 to service the outstanding bond. In 2006, Applicant applied to Respondent, and was granted a second loan to the value of R60 000.00 to enable her to effect renovations to her property. Applicant contends that she regularly paid her monthly instalments by debit order from 2003 until February 2009 and was of the view that her liability to the Respondent had been extinguished. In 2009, Applicant made enquiries with regards to the outstanding balance on her account and discovered that the balance outstanding was in the amount of R203 364.76.
- [14] Respondent issued summons under case number 23273/09 for the outstanding amount together with inter alia, interest on the sum claimed at the rate of 10% per annum from 1 October 2009 to date of payment together with an order declaring the property executable. The matter was set down for trial on 10 November 2015. Prior to the commencement of proceedings, settlement negotiations were encouraged. Applicant contends that she was not happy about the proposals made to her and submitted that she rejected any form of settlement and refused to agree to the terms of the proposed order and expressed her desire to defend the action.
- [15] According to Applicant, she was asked to return to her home and wait for her legal representative to contact her. Later that day, she was presented with a signed copy of the order which she had earlier rejected.

Applicant's Principle Submissions

- [16] Applicant contends that the order was obtained without her consent despite her strong opposition to settling the matter. The Applicant, claims that she did not receive any statements for her bond account and was unaware that between the periods November 2005 and July 2006, a total amount of R158 000.00 had been transferred from her account in varying amounts which transfers she had not authorised. She also contends that when she applied for the second bond, the unauthorised transactions were not brought to her attention.
- [17] Applicant believed that she had already settled the outstanding bond and that the debt was caused by fraudulent transactions from her bond account. Applicant argued that the prospect of success is good. Applicant contends that she has a bona fide defence and asked for an order as prayed for.

Respondent's Principle Submissions

- [18] Respondent submitted that the order was obtained by agreement. Applicant was represented by a senior attorney and experienced counsel at the trial. Referring to the stated authority outlined in *Dlamini v Minister of Law and Order and Another*[6] it was argued that counsel when properly instructed to appear on behalf of a litigant has implied authority to conclude a settlement

of the litigation on behalf of his or her client on the proviso that he or she acts bona fide and in the interests of the client.

- [19] It was also argued that Applicant has failed to provide a reasonable explanation for the circumstances in which the consent came to be entered. In this regard, it was argued that Applicant's explanation of returning home made no sense. The matter was not settled and the order was not granted at the time nor was the trial proceedings concluded. Respondent highlighted the contradictions in Applicant's version in relation to the events that occurred on the day when the order was obtained. What is certain is that Applicant was aware of the order as she received the said order on 10 November 2015. It was submitted that it took Applicant 8 months after she became aware of the order to apply for pro bono assistance. Additionally, it was argued that Applicant did nothing until shortly before the moratorium was due to expire on 10 November 2016. According to Respondent Applicant signed the notice of motion on 19 October 2016, being the date when she launched the present application.
- [20] Respondent contends that Applicant has failed to set out a credible basis for the settlement agreement embodied in the order to be set aside. Additionally, Respondent argued that the Applicant's reason for convalescing in the Eastern Cape was not satisfactory. Respondent furthermore contended that the delays, contradictions and alternations to the Applicant's founding affidavit affects the bona fides of the application and argued that the application should be dismissed with costs on the attorney client scale as provided for in the mortgage

bond agreement.

Legal Principles

- [21] It is trite that a court order is enforceable until set aside by a court of competent jurisdiction[7]. Until that is done, the court order must be complied with even if it may be wrong;[8] there is a presumption that the judgment is correct. At common law, a court's order becomes final and unalterable by that court at the moment of its pronouncement by the Judicial Officer, who thereafter becomes *functus officio*. Save in exceptional circumstances it cannot thereafter be varied or rescinded.
- [22] It is trite that once a court has pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. In *Firestone South Africa (Pty) Ltd v Gentiruco AG*[9], it was held that the reason for this is that, once the court pronounced a final judgment, it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised its authority over the subject –matter has ceased.
- [23] It is trite that a consent judgment cannot arbitrarily be repudiated or withdrawn. 'A judgment given by consent may be set aside on "good and sufficient cause", an enquiry to be determined in accordance

with the same principles as are applicable to the rescission of default judgment in terms of rule 31 (2) (b)'. [10] It is settled that generally, an Applicant is to give a reasonable and acceptable explanation for his or her default; that that application is made in good faith and that on the merits Applicant has a bona fide defence which *prima facie* carries some prospect of success. [11]

- [24] The matter of *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others*[12] sets out the approach to an application for rescission of a consent judgment. Wallis JA held that:

'The issue is far more nuanced than the arguments suggest. The approach differs depending on whether the judgment is a default judgment or one given in the course of contested proceedings. In the former case it may be rescinded in terms of either rule 31(2)(b) or rule 42 of the Uniform Rules, or under the common law on good cause shown. In contested proceedings the test is more stringent. A judgment can be rescinded at the instance of an innocent party if it was induced by fraud on the part of the successful litigant, or fraud to which the successful litigant was party. As the cases show, it is only where the fraud – usually in the form of perjured evidence or concealed documents – can be brought home to the successful party that *restitutio in integrum* is granted and the judgment is set aside. The mere fact that a wrong judgment has been given on the basis of perjured evidence is not a sufficient basis for setting aside the judgment. That is a clear indication that once a judgment has been given it is not lightly set aside, and De Villiers JA said as much in *Schierhout*.

Apart from fraud the only other basis recognised in our case law as empowering a court to set aside its own order is *justus error*. In *Childerley*, where this was discussed in detail, De Villiers JP said that 'non-fraudulent misrepresentation is not a ground for setting aside a judgment' and that

its only relevance might be to explain how an alleged error came about. Although a non-fraudulent misrepresentation, if material, might provide a ground for avoiding a contract, it does not provide a ground for rescission of a judgment. The scope for error as a ground for vitiating a contract is narrow and the position is the same in regard to setting aside a court order. Cases of justus error were said to be ‘relatively rare and exceptional’. Childerley was considered and discussed by this court in *De Wet* without any suggestion that the principles it laid down were incorrect.’

[25] Further in the judgment Wallis JA stated that the principle that a court can only grant a consent judgment if the parties to the litigation consented to the court granting such an order. If not, then the judgment must be set aside.

‘..This is that the court can only grant a consent judgment if the parties to the litigation consented to the court granting it. If they did not do so, but the court is misled into thinking that they did, the judgment must be set aside. This is something different from avoiding a contract on the grounds of fraud, duress, misrepresentation or the like. In those cases the injured party has an election to abide by the agreement. When one is concerned with an absence of authority to conclude the agreement in the first place, that is not a matter of avoiding the agreement, but of advancing a contention that no agreement came into existence.’[13]

[26] Wallis JA further deals with the requirement of a reasonable explanation.

‘A gloss has subsequently been placed upon this proposition that, while lack of authority is the preponderant factor, on its own it may not suffice unless there is a reasonable explanation for the circumstances in which the consent judgment came to be entered.[14] There is merit in this because the court is being asked to set aside its decision in circumstances where it is functus officio. However, in the light of my conclusion on the facts it is unnecessary to express a final view on this. The case can be disposed of in relation to Mr Moraitis’ authority to represent the Moraitis Trust and Moraitis Investments on the basis that the central proposition that a court may not grant an order making a settlement agreement an order of court, unless the parties to the agreement consent thereto, is correct.’[15]

[27] In *MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizenga and Another*

[16] it was stated that:

‘It is settled law that a client’s instruction to an attorney to sue or to defend a claim does not generally include the authority to settle or compromise a claim or defence without the client’s approval. The rule has been applied to a judgment consented to by an attorney without his client’s authority and also when the attorney did so in the mistaken belief that his client had authorised him to do so. This principle accords with the rule in the law of agency that where an agent exceeds the express or implied authority in transacting, the principal is not bound by the transaction.’

Discussion

[28] Respondent invited Applicant to produce oral evidence to clarify the position in relation to the circumstances under which the order was taken, failing which, the court should make an adverse inference. Applicant indicated that there is acrimony between Applicant and her erstwhile attorneys and that it will be unlikely that the attorney would give an objective account of the day in question. Applicant has asked that the court not make a negative inference given the circumstance in which Applicant finds herself with her erstwhile attorneys.

Conclusion

- [29] Applicant is an elderly, lay person who has acquired the immovable property in Gugulethu with her earnings and with the guidance and assistance of her former employer. She also acquired a loan from Respondent. It is common cause that Applicant diligently honoured her commitment to Respondent until she allegedly defaulted with the instalments in 2009. Applicant believed then as she still believes now that she settled her indebtedness to Respondent. What transpired on the day when the order was obtained remains a mystery. Jurisprudence leans towards the legal principles of agency between attorney and client in this regard. Applicant contends that her erstwhile attorney did not carry out her instructions as her express instructions were that she was not interested in the settlement and wanted to oppose the matter, which was her desire since the inception of the action. Thus, the question which remains unanswered is whether Applicant's erstwhile attorneys exceeded their express or implied authority. Of course, this could have been cleared up if the attorney was called to give oral evidence in this regard. Given the arguments raised in this regard, I am not persuaded that a negative inference should be drawn in relation to Applicant's bona fides.
- [30] Additionally, I am not persuaded that a negative inference should be drawn in relation to the contradictory information encapsulated in the pleadings and changes affected to the pleadings as it should be born in mind that Applicant has had challenges with regards to her legal representation. Applicant is a lay person who should not be prejudiced by the conduct of her erstwhile legal representatives.
- [31] It is trite that each case must be adjudicated on its own merits and this case is no different. The veracity of the defences raised by Applicant can be further ventilated at the trial. I am of the view that a rigid approach to disregard Applicant's version as improbable would be prejudicial to her.

[32] In relation to the application for rescission of judgment, I am satisfied that Applicant has given a reasonable and acceptable explanation for her default, namely that she did not agree to the order and that she does not owe Respondent the amount being claimed. Even if there was a balance owing, Applicant is entitled to challenge the discrepancy particularly in light of the allegation of the unauthorised fraudulent withdrawals from the Applicant's bond account. I am furthermore satisfied that the Applicant

has launched this application in good faith and that on the merits Applicant has a bona fide defence which prima facie carries some prospect of success.

[33] I am of the view that Applicant should be afforded the opportunity to have her day in court; proverbially speaking. Applicant has a vested interest and a constitutionally entrenched right to housing and should be afforded an opportunity to achieve the progressive realisation of that right through the legislative measures which we are enjoined to give credence to through entrenched constitutional imperatives.[17] It is common cause that the property concerned is Applicant's primary residence, and that she is an elderly retired woman.

Applicant should, at the very least, be afforded the opportunity to challenge and protect the interest which she has in her primary residence situated in Gugulethu. To question Applicant's bona fides in challenging same would be tantamount to denying Applicant her constitutionally protected right to housing which she has worked hard to acquire. To close the door to Applicant to defend the action would additionally be tantamount to this court denying her the right to challenge and adduce evidence.[18] These are all issues that should in my view be ventilated at the hearing of the matter.

[34] In the result, after considering the submissions made by Counsel on behalf of both the parties and after considering the documents filed on record, the following orders are made:

- (a) Applicant's failure to comply with the provisions of the Rules of court relating to time periods is hereby condoned;
- (b) The judgment granted in this matter against applicant on 10 November 2015 under case no: 23273/09 is set aside and applicant is given leave to defend the matter.
- (c) Costs are to stand over for later determination.

P ANDREWS, AJ

Acting Judge of the High Court

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no:19416/2016

NONGANAPHILA EUNICE MBOSO Applicant

THE STANDARD BANK OF SOUTH AFRICA Respondent

RESCISSION OF JUDGMENT

JUDGE: Andrews AJ

JUGDMENT DELIVERED BY: Andrews AJ

FOR APPLICANT: Adv. TA Pharoah (Pro Bono)

INSTRUCTED BY: Ingrid Broodryk

Broodryk Attorneys (Pro Bono)

FOR RESPONDENT: Adv. FSG Sievers

INSTRUCTED BY: William Inglis Inc.

DATES OF HEARING: 12 FEBRUARY 2018

DATE OF JUDGMENT: 19 FEBRUARY 2018

[1] Premier Western Cape v Lakay 2012 (2) SA 1 (SCA) para 17; Van Wyk v Unitas Hospital & Another

[2007] ZACC 24; 2008 (2) SA 472 (CC) para 22.

[2] 1988 (4) SA 407 (C).410H-I

[3] 1988 CPD, delivered on 18 April 1988 (unreported decision).

[4] At 411D-E supra

[5] Section 9(1) of Constitution of the Republic of South Africa, 1996 provides 'Everyone is equal before the law and has the right to equal protection and benefit of the law'; See also Carvey v Carvey where the learned Judge Donen AJ stated that '...Applicant will not enjoy equal protection unless she is equally empowered with the "sinews of war"....'

[6] 1986 (4) SA 342 (DCLD).

[7] Bezuidenhout v Patensie Sitrus Beherend Bpk 2001

(2) SA 224 (E) at 229B-C; MEC for Economic Affairs, Environment and Tourism v Kruisenga 2008

(6) SA 264 (CKHC) at 277C; Jacobs v Baumann NO 2009 (5) SA 432 (SCA) at 439G-H.

[8] Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue And Another

[2008] ZAGPHC 275; 2009 (1) SA 470 (W) at 473C; Culverwell v Beira 1992 (4) SA 490 (WLD) 494A-C.

[9] 1977 (4) SA 298 (A); See also Erasmus Superior Court Practice, Vol 2, D1-561.

[10] Erasmus Superior Court Practise D1-565.

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- [11] Scholtz and Another v Merryweather and Others 2014 (6) SA 90 (WCC) at 93D-96C.
- [12] (799/2016) [2017] ZASCA 54; [2017] 3 All SA 485 (SCA); 2017 (5) SA 508 (SCA) (18 May 2017) at Paragraphs 12, 13 and 17.
- [13] Ibid paragraph 17.
- [14] Georgias and Another v Standard Chartered Finance Zimbabwe Ltd 2000
- (1) SA 126 (ZSC) at 132B-D; Ntlabezo and Others v MEC for Education, Culture and Sport, Eastern Cape 2001
- (2) SA 1073 (Tk HC) at 1081B-E.
- [15] At para 20.
- [16] (169/09) [2010] ZASCA 58; 2010 (4) SA 122 (SCA) ; [2010] 4 All SA 23 (SCA) (1 April 2010) MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizenga and Another (169/09) [2010] ZASCA 58; 2010 (4) SA 122 (SCA) ; [2010] 4 All SA 23 (SCA) (1 April 2010) para 7
- [17] Section 26 (1) and (2) of Act 108 of 1996.
- [18] Section 35 (3) (i) of Act 108 of 1996.
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