

SOUTH AFRICA / JUDGMENT

Moletsane v Hepburn (5479/2014) [2017] ZAFSHC 15 (2 February 2017)

[2017] ZAFSHC 15

COURT

Free State High Court, Bloemfontein

BEFORE

C Reinders

CASE / FILE NUMBER

5479/2014

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No: 5479/2014

In

the application between:

KETSO

BERNARD MOLETSANE

Applicant

and

WESSELS

PETRUS HEPBURN

Respondent

JUDGMENT

BY: C REINDERS, J

DELIVERED ON: 2 FEBRUARY 2017

- [1] The applicant, Mr Ketso Bernard Moletsane (Mr Moletsane) moves firstly for condonation for the late filing of the application for rescission of a judgment entered against him, and secondly for rescission of the said judgment with leave thereafter to file further pleadings. The application is opposed by the respondent, Mr Wessels Petrus Hepburn (Mr Hepburn).

- [2] It is common cause that a contract of sale was concluded on 15 August 2014 between Mr Hepburn as seller and Mr Moletsane and Mr Manuel Jose Serguro Aldeia as buyers. In terms of the contract Messrs Aldeia and Moletsane purchased an enterprise which manufactures and sells clothing. The purchase price was R 650 000.00, payable by means of a deposit of R 100 000.00 (paid by Mr Moletsane on date of signing the agreement), and thereafter the remaining purchase price had to be paid in three instalments.
- [3] On the 1st of October 2015 judgment by default was granted against Mr Moletsane (as second defendant) and he was ordered amongst others to pay the plaintiff, Mr Hepburn, R550 000,00 together with interest. Further orders were granted by Moloi J and applicant moves for rescission of the whole of the judgment.
- [4] As to the reasons for his failure to defend the matter, the applicant avers that he was totally unaware of the action until after judgment had been granted. The summons was served at the domicilium of his co-defendant Mr Aldeia and the court order came to the spouse of Mr Moletsane's attention for the first time on 15th November 2015. Mr Moletsane hereupon contacted his attorney Mr Phalatsi. The application for rescission was eventually issued on 2nd August 2016.
- [5] Correspondence was exchanged between Mr Moletsane's attorneys and that of Mr Hepburn, but the attempts by Mr Moletsane's attorney to persuade Mr Hepburn to rescind the judgment was without success. Some of the correspondence, so Mr Moletsane alleges, was not attended to immediately as his attorney acted as a judge of the High Court during that period.
- [6] It would suffice to say that Mr Moletsane's explanation for his failure to defend the matter and, having taken notice of the judgment, his reaction thereafter is not seriously disputed. Ms Olivier on behalf of Mr Hepburn did however take issue with the explanation by Mr Moletsane for the delay between 18 February and 18 May 2016 being that his attorney was acting as a judge in this division, describing it as "highly unsatisfactory" as there should have been reaction by the said attorney. However, it is not disputed that Mr Moletsane did react swiftly by approaching his attorney within 4 days after the default judgment came to his attention (via his spouse) in order to attend to the matter. Hereafter correspondence was exchanged between the attorneys. On the explanation tendered by Mr Moletsane I am not of the view that he was in wilful default.
- [7] Mr Moletsane avers that he has a bona fide defence on the merits. It is not necessary to deal with the defences listed. Suffice it to say that he avers that some of the equipment were not in a working condition and that Mr Hepburn breached various terms of the agreement. It is not appropriate (nor can I) adjudicate upon the merits of these defences. That has to be done at the main trial.

- [8] The minimum that an applicant must show is that his defence is not patently unfounded and that it is based upon facts which, if proved at the main trial, would constitute a defence (as per Brink, J)

Vide: Grant v Plumbers (Pty) Ltd 1949

- (2) SA 470 (O) at 476-7.

- [9] It has been held that the tendency of the court is to grant relief where an applicant:

- (i) Has given a reasonable explanation for his delay;
- (ii) The application is not made with the object of delaying the claim;
- (iii) There has not been reckless or intentional disregard for the court rules;
- (iv) The application is clearly not ill founded and prejudice could be compensated by an appropriate order as to costs.

Vide: Smith, N.O. v Brummer, N.O. 1954

- (3) SA 352 (O) at 358 A.

Furthermore, such explanation for delay must be explained sufficiently in order for the court to comprehend how the default really came about and to assess the applicant's conduct and motives.

Vide: Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre As Amicus Curiae) [2007] ZACC 24; 2008 (2) SA 472 (CC) at par [22];

Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353 A.

- [10] In light of the above facts I am satisfied that Mr Moletsane has met the requirements for both the condonation for the late filing of this application as well as the setting aside of the judgment granted by default. Mr Williams on behalf of Mr Moletsane submitted that the dispute between the parties should be ventilated fully. I am in agreement with him. It would be inappropriate not to allow the applicant to have his version ventilated in a court of law. Refusing rescission is final for Mr Moletsane. However, should I grant the application, Mr Hepburn would have the full opportunity of proving his case at the trial.

- [11] Regarding costs, I am not of the view that opposition was unreasonable. The applicant asks for an indulgence and in the exercise of my discretion regarding an appropriate cost order I am satisfied that he should bear the costs of the application.

- [12] Accordingly the following orders will issue:

1. Condonation is granted for the late filing of the rescission application.
2. The default judgment granted on 1 October 2015 under case number 5479/2014 is set aside in its entirety.

3. The applicant to file a notice to defend under case number 5479/2014 within 7 (seven) days of this order, where after the further exchange of pleadings are to be done in terms of the Rules of Court.
4. The applicant to pay the costs of the application.

C. REINDERS, J

On behalf of the applicant: Adv. A. Williams

Instructed by:

N.W. Phalatsi & Partners

BLOEMFONTEIN

On behalf of the respondent: Adv. I. Olivier

Leon Marais Attorneys

c/o Kramer Weihmann & Joubert Inc

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