

SOUTH AFRICA / JUDGMENT

Naidoo v Standard Bank of South Africa (18307/2010) [2017]

ZAGPPHC 780 (24 November 2017)

[2017] ZAGPPHC 780

COURT

North Gauteng High Court, Pretoria

BEFORE

Murphy

CASE / FILE NUMBER

18307/2010

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

CASE NUMBER: 18307/2010

In the matter between

NAVIN NAIDOO Applicant

And

THE STANDARD BANK OF SOUTH AFRICA Respondent

JUDGMENT

Murphy J

1. This is an application for the rescission of a default judgment granted by Louw J on 6 March 2012. The application is brought in terms of the provisions of Rule 42(1)(a) of the Uniform Rules of Court, which provides that a court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. The applicant contends that the judgment was erroneously sought or erroneously granted. Generally, an order will be erroneously granted if there existed at the time of its issue, a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment;^[1] or if there was an irregularity in the proceedings.^[2]

2. The matter has a long history which deserves some examination. Some years ago the respondent, the Standard Bank of South Africa,

instituted proceedings against the applicant in terms of a mortgage bond registered over his property as security for a loan advanced to him by the respondent. The applicant, Dr Navin Naidoo, is a medical doctor who works mainly in Australia. He was also a practising advocate at the Pretoria Bar until December 2011.

3. The matter was set down for trial below Louw J on 6 March 2013. It is common cause that the applicant owes the respondent a substantial sum of money and has not made any repayments on the loan for the past 8 years since 2009. He however raised two special pleas on the pleadings. The first special plea alleged that the notice required by section 129 of the National Credit Act[3] ("the NCA") was not sent to the correct chosen domicile, though it was not denied in the plea that the notice came to the applicant's notice.[4] The second special plea was that the grant of the loan amounted to reckless credit prohibited by the NCA. In addition, the applicant in his plea denied that the certificate certifying the outstanding balance owing was a proper certificate.
4. When the matter came before Louw J, the applicant applied for a postponement on the basis that the applicant had not had adequate

time to prepare for trial. Louw J dismissed the application on the basis that the points in issue were crisp and would have required

little preparation or evidence. The relevant notice had come to the applicant's attention; the reckless credit defence was not available because the credit had been extended to the applicant before the NCA became applicable; and any defect in the balance certificate could have been cured by the handing up of a correct certificate during the trial. Being a practising advocate, the applicant would have known that the issues were crisp and would have required little pre-trial preparation for a trial lasting at most a day or two.

5. After Louw J refused the application for a postponement, counsel acting for the applicant then requested -to be excused as she

indicated that she had no further instructions from the applicant to proceed on trial. Louw J then granted judgment against the applicant ordering him inter alia to pay the outstanding debt of R3 412 946, 69 together with interest at the rate of 8,45% per annum from 20 January 2010 to date of payment. The learned judge also issued an order declaring the relevant immovable property executable for the said capital, interest, insurance premiums and costs.

6. The applicant thereafter applied for leave to appeal against the judgment of Louw J. The grounds in the application for leave to appeal were essentially the same as the grounds upon which the present rescission application is premised. Louw J dismissed the application for leave to appeal with costs on 1 August 2012. The applicant thereafter applied for leave to appeal to the Supreme Court of Appeal ("the SCA") and was granted leave to appeal to a full court of this division. The full court dismissed the appeal with costs on 13 June 2014.
7. Masipa J, writing for the full court, dealt with all the issues meticulously and comprehensively. The full court held: i) the court a quo had exercised its discretion to refuse a postponement judiciously; ii) the applicant had in fact admitted on the pleadings that the section 129 notice had come to his attention, on his own version had responded to it, and could not seek to withdraw the

admission on appeal,¹ especially after instructing his counsel to withdraw from the trial, being knowledgeable as an advocate of the likely consequences.; iii) Part D of Chapter 4 of the NCA dealing with remedies for the granting of reckless credit became effective on 1 June 2007, six months after the loan was granted to the applicant, and thus was not applicable; and iv) the loan agreement and mortgage bond provide that a certificate of balance signed by any of the respondent's managers, on its mere production will be sufficient proof, unless the contrary is proved, of the amount due - in short, any defect could be dealt with at trial. It accordingly dismissed the appeal with costs.

8. The applicant thereafter applied to the SCA for special leave to appeal against the judgment of the full court. Special leave was granted to appeal but only in relation to the special plea based on section 129 of the NCA.
9. The appeal came before the SCA in February 2016 and was dismissed with costs on 9 March 2016. The SCA held that the ultimate purpose of section 129 is to ensure that a consumer is notified of his or her default and of the various options available to him or her. All that is required in this regard, the SCA held, is for the credit provider to satisfy the court from which enforcement is sought that the notice, on a balance of probabilities, reached the consumer.^[5] Ultimately, the question is whether delivery as envisaged in the NCA has been effected.^[6] It was essentially common cause in this instance that it had been. The SCA also refused to entertain an argument that the respondent had failed to properly consider the applicant's response to the notice. The new point was raised for the first time on appeal before the SCA, did not fall within the ambit of the special leave, and had not been considered by the full court since it was not a ground of appeal before it.
10. Majiedt JA criticised the applicant's conduct of the litigation in the following terms:

"The manner in which the appellant conducted his litigation must be strongly deprecated. Not only is he a qualified medical doctor (practising in Australia), but he practised as an advocate at the Pretoria Bar until December 2011. He is therefore not only a well-educated man, but also schooled in the law. His fanciful reliance on a technical argument regarding a strict mechanical

compliance with section 129(1) in the face of an admitted receipt of and response to the notice, strikes me as rather cynical. His defence amounts to an abuse of section 129(1) and the application for postponement followed by the withdrawal of his counsel immediately thereafter, appears to be an ill-conceived stratagem. After a protracted exercise in futility through three courts, it is time that he meets his obligations to the bank."

11. Notwithstanding the SCA's criticism, the applicant applied for leave to appeal to the Constitutional Court. On 25 October 2016 the Constitutional Court held that the application for leave to appeal lacked prospects of success and dismissed it with costs. Undaunted, the applicant brings the present application essentially traversing the same issues which have been considered and dismissed by no less than four courts: the trial court, a full appeal court, the SCA and the Constitutional Court.

12. In his founding affidavit, the applicant avers that he seeks rescission of the judgment of Louw J as he has reasonable prospects

of success. He claims that the matter is of significant importance because: i) it involves a breach of his constitutional right to a fair trial; ii) default judgment was given even though the respondent had not set the matter down properly, and after a substantive

application was brought for a postponement; iii) the respondent had not served a section 129 notice prior to the service of summons; and iv) the respondent's attorney, Ms T de Jager had misrepresented her position as being a legal manager of the respondent, when she is in fact a practising attorney. After briefly analysing the judgment of Louw J the applicant concludes:

"It is my submission that another court could reasonably have come to another conclusion on any of these points, in which case default judgment would not have been an appropriate finding."

13. The applicant goes on in the founding affidavit to argue the merits of the decision to refuse the postponement claiming it ought not properly to have been granted. He then makes submissions with regard to the special plea based on section 129(1) of the NGA, disputes the balance owing and alleges that the advances were reckless credit. The applicant makes no mention in the founding affidavit that he had appealed the judgment of Louw J and that these issues had been considered by the full court, the SCA and the Constitutional Court. The respondent contends that he has deliberately failed to disclose this information, which, if true, amounts to an attempt to mislead the court, and that the application for rescission is an attempt to frustrate the respondent's execution proceedings. The applicant unconvincingly maintains that the appeals are matters of record and that he is entitled to raise the issues again because the appeal to the SCA was restricted to the special plea based on section 129(1).

14. The applicant contends that the order was granted erroneously because the judge should not have granted a postponement of the trial; the section 129 notice was not served on him; he was granted reckless credit; the certificate of balance was not correct; and the certificate of compliance was deposed to by Ms de Jager, who purported to be a legal manager of the respondent whilst she was in fact the attorney acting on behalf of the respondent.
15. The first point is easily disposed of. The applicant was represented by counsel when the application for a postponement was argued. The order dismissing the application for a postponement was not granted by default. The applicant is accordingly not entitled to rely on the provisions of Rule 42 as the judgment was not granted in his absence. In any event, the merits of this order have been determined on appeal and are *res judicata*. Although the other points pertain to the merits of the default judgment, they were raised on the pleadings and were the subject-matter of the applicant's various appeals which were dismissed. The applicant has not pointed to any fact of which the judge or appeal judges was unaware which would have precluded the granting of the order or which would have induced the judges not to grant or affirm it.
16. Counsel for the applicant wisely conceded in argument that there was no merit in all but one point by reason of all the issues having been disposed of on appeal. He persisted however with the point that the respondent's attorney had misrepresented her position in the certificate of compliance. This, he argued, is the salient issue due to the fact that the signatory to the certificate of compliance misrepresented herself renders the judgement incompetent and subject to rescission. The applicant raised the issue somewhat obliquely in paragraph 4.22 of the founding affidavit and claims that the certification amounts to a misrepresentation and possibly an offence.
17. The certificate in question states that Ms de Jager in her capacity as "Legal Manager" of a division of the respondent

certifies that prior to the institution of legal proceedings: i) the applicant had defaulted on his loan repayments; ii) a notice in terms of section 129(1) of the NCA had been despatched; iii) at least ten days had elapsed since the despatch of the notice; and iv) the applicant had not responded to the notice. All of these facts were found to be true and correct by the full court and the SCA. The only misrepresentation in the certificate is the incorrect designation of Ms de Jager as "a Legal Manager" of Standard Bank, which misrepresentation is revealed on the face of the certificate by virtue of Ms de Jager having signed the certificate above her typed name and a description of her position as "Attorney, Hack, Stupel & Ross". Her correct designation is thus disclosed in the certificate under her signature.

18. The respondent did not deal with the applicant's allegations on this issue in its answering affidavit. However it is safe to assume that Ms de Jager probably used an existing standard form or template of the certificate and neglected to alter the opening paragraph to record that she was the respondent's attorney.

19. But whatever the true explanation, a misrepresentation of this kind, be it innocent or otherwise, is, in the final analysis,

inconsequential. Such is by no means a fact or irregularity that would have precluded the judge from granting the default judgment had he been aware of it. As the SCA definitively pronounced, in the circumstances of this case, the purpose of section 129(1) of the NCA was fulfilled by virtue of the applicant having received the notice. Moreover, the certificate of compliance is not an essential procedural safeguard. It serves merely as an evidentiary means for certifying the existence of certain facts. If all the evidence shows that the facts did indeed occur, a misstatement in the certificate usually will be of no consequence.

20. In the premises the application for rescission of judgment is wholly without merit and most likely is another fanciful and ill-conceived

stratagem in defiance of the SCA's direction to the applicant to meet his obligations. The abuse is undoubtedly aggravated by the fact that the applicant is or was a practising advocate. Despite the criticism levelled against his behaviour by the SCA, he has continued to conduct himself in the same manner. Such persistence in futility by an advocate, an officer of the court, is deserving of censure.

21. Moreover, the applicant did not prosecute the application expeditiously. The application was set down for hearing by the respondent's attorney of record. And the applicant, contrary to the rules, did not file heads of argument until the matter was called in court. He furthermore failed to put before the court the history of unsuccessful appeals and sought to argue the same issues without disclosing that they had been disposed of by the higher courts. His approach falls below what might be expected of a member of the legal profession. His conduct at the very least warrants a rebuke from this court in the form of a punitive costs order.
22. In the result, the application is dismissed with costs on an attorney and own- client scale.

JR MURPHY

JUDGE OF THE HIGH COURT

Date Heard: 16 November 2017

Counsel for the applicant: Adv CJ Marneweck

Instructed by: Spies Bester Potgieter Attorneys

Counsel for the respondent: Adv H Fourie

Instructed by: Hack Stupel & Ross Attorneys

[1] Nyingwa v Moolman NO, 1993 (2) SA 508 (TKGD) at 510

[2] De Wet v Western Bank Ltd, 1979 (2) SA 1031 (A) at 1038

- [3] Act 34 of 2005
- [4] The relevant part of section 129 provides that if a consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing and propose various options to resolve the problem and may not commence any legal proceedings to enforce agreement without first providing that notice
- [5] *Sebola & another v Standard Bank of South Africa Limited & another* 2012 (5) SA 142 (CC) para 74
- [6] *Kubyana v Standard Bank of South Africa Limited & another* 2014 (3) SA 56 (CC) paras 31, 36, 39, 52 and 53
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