

SOUTH AFRICA / JUDGMENT

Nienaber v Du Preez (CIVAPPMG03/2020) [2021] ZANWHC 36 (1 February 2021)

[2021] ZANWHC 36**COURT**

North West High Court, Mafikeng

BEFORE

A.M. Mtembu, R. Hendricks

CASE / FILE NUMBER

CIVAPPMG03/2020

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST PROVINCIAL DIVISION, MAHIKENG****Reportable:**

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Case
No.: CIVAPPMG03/2020
In

the matter between:

RUAN
NIENABER
Appellant
And
JOHANNES
JACOBUS DU
PREEZ
Respondent
CIVIL
APPEAL
HENDRICKS
DJP & MTEMBU AJ

JUDGMENT

MTEMBU AJ

INTRODUCTION

- [1] This appeal concerns a refusal by an Acting Magistrate of the Magistrate's Court for the District of Naledi held at Vryburg to rescind a default judgment obtained against the appellant by the respondent arising from the appellant's failure to attend trial on 29 August 2019.
- [2] The appeal also lies against an order, by the Acting Magistrate, striking out paragraphs 10 and 11 of the appellant's replying affidavit which, in respondent's view, contain new facts that should have been conversed in the appellant's founding affidavit. These are the two issues that this Court has to determine in the appeal.

THE FACTS

- [3] I will deal with the refusal to rescind the default judgment first. The facts are not complicated. The appellant was the defendant in an action instituted by the respondent in which the respondent claimed an amount of R80, 000.00 against the appellant, being the balance of the purchase price as per the oral agreement regarding the purchase of roans. The appellant refused to pay the balance for the purchase of roans on the basis, he says, the animals, in question, had latent defects and/or a misrepresentation by the respondent caused the appellant to suffer damages in the amount of R80,000,00, in respect of the female roans that were not in gestation. This defence is contained both in the appellant's plea as well as in the appellant's application for rescission.
- [4] The respondent applied for summary judgment against the appellant. The appellant successfully resisted the summary judgment application. In consequence, a plea was filed. The respondent's attorney set the case down for trial, which culminated into an order granting default judgment on 29 August 2019, due to failure to attend trial.
- [5] The appellant contends that his attorney was not aware of the trial date due to the fact the notice of setdown was served on 27 May 2019, during a period where the attorney dealing with the matter had left the employment with appellant's attorneys of record.

The appellant further contends that another attorney was appointed on 6 June 2019 to handle the matter. As a result, or due to an oversight, the matter was on the roll of 29 August 2019 without the appellant and his attorney being aware of its enrolment. It was as a result of this that the appellant was unable to attend trial.

- [6] It is clear that the appellant and the respondent were embroiled in a dispute about the outstanding balance of the contract price. The appellant persisted in his denial of liability on account of certain defects subsequently found in the roans. The court a quo concluded that the appellant had not satisfied the requirements for the granting of rescission of judgment and dismissed the appellant's

application with costs. Aggrieved by that decision, the appellant applied for leave to appeal against the whole judgment of the court a quo. This appeal is with leave of that court.

LEGAL PRINCIPLES

- [7] The application for rescission does not expressly state whether it was founded upon Rule 49 or the common law. However, from the structure and content of the founding affidavit, the application appears to be framed as one falling under Rule 49(3) or alternatively under the common law.
- [8] The principles applicable to the adjudication of rescission applications based on the common law have become settled and trite, and require no exclusive exposition for present purposes. There is also abundant authority for the proposition that in matters of this nature, the terms "sufficient cause" and "good cause", are almost identical or used interchangeably. See inter alia, *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003
- (6) SA 1 (SCA) at 9C.
- [9] Generally speaking, the applicant for rescission at common law is expected to show "good cause" for the rescission which includes (a) giving a reasonable explanation for his default; (b) showing that his application was made bona fide; and (c) showing that he had a bona fide defence to the respondent's claim which prima facie has some prospects of success. See *Colyn v Tiger Food Industries t/a Meadow Feed Mills* (Cape).[1] The Supreme Court of Appeal has long laid down that at common law, 'it is clear that in principle and in the long-standing

practice of our courts' that there are two 'essential elements of "sufficient cause" for rescission of a judgment by default'. [2] These are –

"(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits (i.e. of the action) such party has a bona fide defence which, prima facie, carries some prospect of success.

Both these elements must be present." [My Emphasis]

- [10] An applicant is not necessarily barred once found to be in wilful default, and the enquiry whether sufficient cause has been established must not be unduly restricted. *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co. Ltd* 1994 (4) SA 705 (E) at 709G; *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300G – 301E.

- [11] As stated by Jones J in *De Witts Auto Body Repairs (supra)*, and endorsed by Moseneke J in *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T), “an application for rescission is never simply an enquiry whether or not to penalise a party for failure to follow the rules and procedures laid down for civil proceeding in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide. The decision to rescind the judgment of this court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties, he should also do his best to advance the good administration of justice”.
- [12] The Full Court in *Harris* proceeded to find that even in the face of a finding of wilful default, the court is enjoined to examine whether the defence raised by the person who seeks the relief shows the existence of an issue which is fit for trial. *Harris v ABSA Bank (supra)* at par 16); *Sanderson Techni Tool (Pty) Ltd v Inermenua (Pty) Ltd* 1980 (4) SA 573 at 576A-C; *Revelas and Another v Tobias* 1992 (2) SA 440.
- [13] It is also settled law that a good defence can compensate for a poor explanation and vice versa: *Zealand v Milborough* 1991
- (4) SA 836 (SE) at 838 C-E; *Carolus and Another v Saambou Bank Ltd* 2002 (6) SA 346 SE at 349B-E.

APPLICATION OF LEGAL PRINCIPLES

- [14] In applying the above legal principles to the facts of the instant appeal, firstly, it is common cause that the court a quo did not deal with the appellant’s bona fide defence in refusing to grant the rescission application. The Acting Magistrate only dealt with the first enquiry, which is a ‘wilful default’.
- [15] The Acting Magistrate rejected the explanation proffered by the appellant that due to an oversight, the appellant and his attorney were not aware that the matter was on the roll of 29 August 2019. The court a quo based its reasoning on the undisputed facts that a notice of removal from the roll of a rule 60(2) application made a specific reference to the trial date, which was served on the appellant on 20 August 2019. The second document is the email which was sent to the appellant’s attorneys on 20 August 2019. Both, these documents made specific reference to the trial date. Of significance, the appellant’s attorneys responded to the said email on the same day of receipt. Obviously, one would assume that a reply comes after a recipient has read the contents of the email. In rejecting the proffered explanation, I agree, with the court a quo in this regard. The appellant’s explanation is unacceptable.

[16] However, the Acting Magistrate ought to have proceeded and deal with the second requirement for a rescission but failed. An applicant is not necessarily barred once found to be in wilful default, and the enquiry whether sufficient cause has been established must not be unduly restricted,[3] since it is a settled law that a good defence can compensate for a poor explanation and vice versa[4]. Even in the face of a finding of wilful default, the court is enjoined to examine whether the defence raised by the person who

seeks the relief shows the existence of an issue which is fit for trial.[5]

[17] I agree with the appellant in this regard, that the Acting Magistrate ought to have considered the existence of the appellant's bona fide defence, and thereafter make a determination after having considered all issues apropos to the claim, holistically. Before this Court, the appellant's counsel, Mr Scholtz, contended that the appellant had shown that it had a bona fide defence against the respondent's claim.

[18] What the court a quo failed to do is to consider whether the appellant succeeded to make out a bona fide defence which has prospects of success. A failure by the court a quo to consider the existence of a bona fide defence was on account of a wrong appreciation of the facts and legal principles. Its discretion was therefore not judicially exercised. In my view, the appellant has necessarily established that the judgment of Court a quo is assailable on the basis of an error or misdirection.

[19] Therefore, this Court may interfere, as the Acting Magistrate's discretion was not judicially exercised. The court a quo, acknowledged that the appellant resisted the summary judgment, meaning that during the summary judgment proceedings, the appellant

demonstrated that he has a bona fide defence, as required by Rule 14 of the Magistrates' Court Rules. The Acting Magistrate nonetheless turned a blind eye to these factors, which were also relevant for determination of the appellant's bona fide defence.

[20] It is clear that the appellant and the respondent were embroiled in a dispute about the outstanding balance of the contract price. The appellant contends that the respondent made a guarantee that five (5) of the purchased female roans were in gestation, and based on the assurance, the appellant agreed to pay R60, 000.00 each. The appellant contends that it subsequently became clear that four (4) out of five (5) female roans were not in gestation, and as a result, he would not have paid R60,000,00 in respect of each roan, if he knew that these roans were not in gestation, as promised. This defence is contained both in the appellant's plea as well as in the appellant's application for rescission. In my view, these are triable issues. These triable issues, which are relied upon by the appellant flowing from the alleged breach of the oral contract on which the respondent's claim is based, are necessarily germane to the claim. It is trite law that an applicant for rescission of judgment is not required to illustrate a probability of success, but rather the existence of an issue fit for trial. *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (W) at 575H-576A.

- [21] The Court a quo concluded that the appellant had not satisfied the requirements for the granting of rescission of judgment and dismissed the appellant's application, yet it did not even bother to consider the appellant's defence so as to make a determination encompassing all issues germane to the claim. It is evident from the bulk of pleadings, notices and correspondence exchanged between the parties that the appellant has unequivocally displayed a firm intention to defend any court action instituted by the respondent in relation to this matter. I am therefore satisfied that the appellant's application for rescission of judgment was bona fide and not merely intended as a delaying tactic.
- [22] In *De Witts Auto Body Repairs*[6], when the full bench was seized with a similar situation such as this, Jones J held that:
- "a magistrate is bound to exercise his discretion judicially in the light of considerations referred to above, and any other considerations which might be relevant. In my view, the magistrate in this matter misdirected himself on the facts by considering the question of the explanation for the defendant's default in a vacuum, as it were, thereby failing to make an assessment of that explanation in the light of the nature of the defence on the merits and the defendant's bona fides in its desire to raise that defence at the trial. Had the magistrate adopted the proper approach by looking at the total picture presented by all the facts, and had*
- he not considered the explanation and the defence piecemeal, he would inevitably have come to the conclusion that the judgment should have been rescinded."
- [23] I am therefore satisfied that the Acting Magistrate failed to exercise his discretion judicially in light of the considerations, I have already referred to in this judgment. Had he done so, he would have come to the conclusion that the judgment should be rescinded.
- [24] The Court, in *De Witts Auto Body Repairs*[7] case, found that this is one of those cases where, regrettably, the fault lies almost completely with the defendant's attorneys and that such conduct was grossly negligent. The Court, notwithstanding the defendant's attorneys' gross negligence, granted the appeal. This is exactly, in my view, the situation that this Court is faced with.
- [25] The Acting Magistrate correctly found that the explanation proffered by the appellant was unconvincing, but it does not end there. The correct approach is not only to look at the adequacy or otherwise of the explanation, but the explanation must also be considered in the light of the nature of the defence and in the light of all the facts and circumstances of the case as a whole. The court a quo's discretion was therefore not judicially exercised. It follows that the appeal must succeed.
- [26] Accordingly, based on my findings above, there is no need to make a determination on the issue of striking out paragraphs 10 and 11 of the appellant's replying affidavit in the rescission application. The determination thereof becomes academic.

[27] What remains is the question of costs. The general rule is that costs must follow the result. Nothing emerges from this matter warranting a deviation from this principle.

Order

[28] Therefore, I grant the following order:

- (i) The appeal succeeds with costs.
- (ii) The order of the Court a quo is set aside and replaced with the following order: 'The application for rescission of judgment is granted. Costs to be costs in the cause.'

A.M. MTEMBU

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

R. HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 22 JANUARY 2021

DATE OF JUDGMENT

: 01 FEBRUARY 2021

COUNSEL FOR THE APPELLANT : ADV. H SCHOLTZ

COUNSEL FOR THE RESPONDENT : ADV ACKERMAN

[1] 2003

(6) SA 1 (SCA); see also Hassim Hardware v Fab Tanks (1129/2016)

[2017] ZASCA 145 (13 October 2017)

[2] Vilvanathan and Another v Louw NO 2010

(5) SA 17 (WCC) at 22; See also Chetty v Law Society Transvaal 1985 (2) SA 756 (A)

[3] De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co. Ltd 1994

(4) SA 705 (E) at 709G; HDS Construction (Pty) Ltd v Wait 1979 (2) SA 298 (E) at 300G – 301E.

[4] Zealand v Milborough 1991 (4) SA 836 (SE) at 838 C-E; Carolus and Another v Saambou Bank Ltd 2002 (6) SA 346 SE at 349B-E.

- [5] Harris v ABSA Bank (supra) at par 16); Sanderson Techni Tool (Pty) Ltd v Inermenua (Pty) Ltd 1980 (4) SA 573 at 576A-C; Revelas and Another v Tobias 1992 (2) SA 440.
- [6] De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co. Ltd 1994
- (4) SA 705 (E) at 709F- H
- [7] Ibid, p 709H-I
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