

SOUTH AFRICA / JUDGMENT

Ranyane v Collateral Trading 125 CC t/a Watsonia Projects (CAMG 09/2012) [2013] ZANWHC 46 (16 May 2013)

[2013] ZANWHC 46

COURT

North West High Court, Mafikeng

BEFORE

N. Gutta, A.A. Landman

CASE / FILE NUMBER

CAMG 09/2012

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

NORTH WEST HIGH COURT, MAFIKENG

CASE NO. CAMG 09/2012

In the matter between:

JULIET RANYANEAPPELLANT

and

COLLATERAL TRADING 125 CC

t/a WATSONIA PROJECTSRESPONDENT

Landman J. and Gutta J.

CIVIL APPEAL JUDGMENT

GUTTA J.

A.

INTRODUCTION

- [1] The appellant appeals against the dismissal of an application for the rescission of a summary judgment granted against her in the Magistrates' Court for the District of Rustenburg, under case number 14031/2010, on 29 September 2010.

- [2] On 13 July 2010, the respondent issued summons against the appellant, cited as Juliet Ranyane t/a MGL Projects & Contractors, a company with limited liability registered in terms of the Companies Act, with its registered address situated at 2 Maroela Avenue, Protea Park, Rustenburg for payment in a sum of R100 000.00 for the delivery of building material and the rendering of building services, interest at the rate of 15.5%, calculated as from date of invoice until date of payment thereof and costs of suit.
- [3] Service of the summons was effected by the Sheriff on 27 July 2010 at 2 Maroela Avenue, Protea Park, Rustenburg, “the registered address of the appellant by affixing a copy thereof at the principal door of the registered office or principal place of business”.
- [4] The appellant gave notice of her intention to defend on 13 August 2010 and gave 2 Maroela Avenue, Protea Park, Rustenburg as the address where she would accept service of process, notices or documents.
- [5] The respondent filed an application for summary judgment on 24 August 2010 and service of the summary judgment was effected at 2 Maroela Avenue, Protea Park, Rustenburg by affixing a copy to the principal door. No opposition was filed and the summary judgment was granted against the appellant on 29 September 2010.
- [6] On 10 August 2011, the appellant lodged an application for the rescission of the summary judgment, which application was opposed and the learned Magistrate dismissed the application for rescission on 14 March 2012.
- [7] The appellant appeals the order of 14 March 2012.

B. MERITS

- [8] The application for the rescission of the summary judgment was made in terms of section 36(1)(b) of the Magistrates’ Court Act 32 of 1944 on the grounds that it is void ab origine alternatively in terms of Rule 49(1) and (2) of the Magistrates’ Court Rules.

Void ab origine

- [9] The appellant contended that:

9.1. the citation of the defendant is both flawed and legally impermissible in that:

- a) a natural person had been cited as trading as a juristic person in the form of a company duly incorporated in terms of the company law of South Africa with a registered address.

9.2. in the particulars of claim, the word ‘defendant’ refers to the appellant, while in paragraph 4, it refers to the company as a juristic person;

9.3. MGL Projects & Contractors is a non-existing entity. There is no registered company with such a name;

9.4. the respondent first relied on an oral agreement for his claim for payment for building material delivered and services rendered, and then relied on an undertaking given in the appellant's personal capacity to pay the amount claimed;

9.5. service of the summons was materially defective in that service was effected at 2 Maroela Avenue, Protea Park, Rustenburg as the registered address of MGL Projects & Contractors. The said address is neither the residential address nor the appellant's

domicilium. Further, the address is not the registered address of MGL Projects & Contractors.

[10] Counsel for the respondent, Mr Van der Nest, submitted that the summons was bad drafting, but not a nullity. That the summons was duly served on the appellant at an address which she provided and she duly entered an appearance to defend.

Analysis

[11] The appellant was cited in her personal capacity as a natural person and not a juristic person. It is the description of the appellant that speaks of a juristic person.

[12] Although the description of the plaintiff is clearly wrong and does not comply with the Rules of Court and the particulars of claim have been drafted in a very clumsy manner, I am of the view that it did not render the summary judgment fatally defective.

[13] As regards service, it is apparent that the Sheriff relied on Rule 9(6) of the Magistrates' Court Rules, which provides that:

"Where the sheriff is unable after diligent search to find at the residence or domicilium citandi of the person to be served either that person or the person referred to in subrule (3)(b) (a person apparently not less than 16 years of age and apparently residing or employed there), or in the case of a body corporate referred to in subrule 3(e), a responsible employee, it shall be sufficient service to affix a copy of the process to the outer principal door of such residence, local office or principal place of business or to leave a copy of the process at such domicilium."

[14] The summons was served. It came to the attention of the appellant, as she entered an appearance to defend and in the appearance chose the same address as the address where she will accept notice and service of all documents. In her replying affidavit in the rescission application, she also admitted that Annexure B contains her details, which is the same address at which the summons was served. The application for summary judgment was served at the appellant's chosen address.

[15] Neither the summons nor the summary judgment was void ab origine because of defective service.

[16] Accordingly, I am of the view that the judgment granted against the appellant was not void ab origine.

Rule 49(1) and 49(2)

- [17] In terms of Rule 49(1), a party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to Court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the Court may, upon good cause shown or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it may deem fit.
- [18] Rule 49(2) of the Rules provides that it will be presumed that the applicant had knowledge of the default judgment 10 days after the date on which it was granted, unless the applicant proves otherwise.
- [19] Although our Courts have shown some reluctance to provide an exhaustive definition of the concept 'good cause' in a context of the rescission of judgments (See *Silber v Ozen Wholesalers (Pty) Ltd* 1954
- (2) SA 345 (A) at 352G–H), it is generally accepted that for it to be present, the applicant must provide a reasonable explanation for his or her default, must show that he or she has a bona fide defence, and that the application is made bona fide. See *Grant v Plumbers (Pty) Ltd* 1949
- (2) SA 470 (O) at 476; *Galp v Tansley NO & Another* 1966
- (4) SA 555 (C) at 560; *HDS Construction (Pty) Ltd v Wait* 1979
- (2) SA 298 (E) at 300F–301C; *Kritzinger v Northern Natal Implement Co Ltd* 1973
- (4) SA 542 (N) at 546B–C; *Mercedes Benz v Mdyogolo* 1997
- (2) SA 748 (E) at 751E–I; *Phillips Cross Optical v SA Vision Care (Pty) Ltd* 2002
- (2) SA 1007 (C) at 1012H–I.
- [20] Counsel for the appellant submitted that the Magistrate misdirected herself in refusing the application for rescission of the judgment on the ground that the appellant was in willful default and that she did not raise a bona fide defence.
- [21] The Magistrate, in her reasons for judgment stated that because the appellant was in willful default, she dismissed the application for rescission. However, on perusal of the record of proceedings and the order, it is apparent that the Magistrate was of the view that the appellant was both in willful default and had no bona fide defence.
- [22] Accordingly, it is necessary to consider both the requirements of willful default and bona fides.

Willful Default

- [23] The appellant said she did not enter an appearance to oppose the application for summary judgment for the following reasons:

23.1. She only learnt of the summary judgment from the respondent's attorney on 22 July 2001 at their offices.

23.2. Her fiancé resided at 2 Maroela Avenue, Protea Park and not her. She only visited him there and did not stay there.

23.3 Her fiancé left the address and there were new occupants.

23.4. She used the address in her appearance to defend because it was illegally allocated to her by the respondent.

23.5. The residence at Maroela Avenue has a big gate before you can reach the door, so it is not clear how the Sheriff entered the yard and left the application on the door. It is questionable whether the application for summary judgment was served on the principal door.

23.6. The address is not the appellant's residential address.

[24] Counsel for the respondent submitted that the Magistrate was correct in her finding that the appellant was in willful default as the appellant's disclosed no reasonable explanation for her default and that the appeal should be dismissed on this ground alone. He referred the Court to the case of *Colyn v Tiger Food Industries t/a Meadow Feed Mills* (Cape) 2003

(6) SA 1 SCA.

[25] He submitted that the appellant personally signed and served the notice to defend on 13 August 2010 and notified the respondent that she will receive all notices, documents and processes at the address. The appellant failed to inform the respondent of her change of address and failed to follow up on her request for further particulars.

[26] Willful default is not a substantive or compulsory ground for the refusal of an application for rescission or variation of a default judgment made. See *Phillips t/a Southern Cross Optical v SA Vision (Pty) Ltd* 2000

(2) SA 1007 (C) at 1013H.

[27] However, if it appears that the default of the applicant was willful or that it was due to gross negligence, a Court may decline to rescind or vary the default judgment on the basis that the applicant has not shown good cause. It will necessarily weigh heavily against the applicant. See *Wright v Westelike Provinsie Kelders Bpk* 2001

(4) SA 1165 (C).

[28] I am of the view that the appellant was remiss after she entered an appearance to defend. She had a duty to provide the respondent with an address where she will receive notices, documents and processes. She was aware that there is litigation pending against her as she not only entered an appearance to defend, but also requested further particulars. But notwithstanding this, she elected not to make enquiries and in fact took no further steps, which is indicative of the willful disregard of the proceedings.

[29] Having said that, it is common cause that the application for summary judgment was not served personally on the appellant, but affixed at 2 Maroela Avenue, Protea Park. Hence, if this Court accepts that 2 Maroela Avenue, Protea Park is not her residential address but that of her boyfriend who had in fact moved from the address, then there is, in my view, an explanation for her failure to oppose the application for summary judgment, albeit a poor explanation when one considers her willful conduct as stated supra.

[30] Where the applicant has provided a poor explanation for default, a good defence may compensate. See *Creative Car Sound v Automobile Radio Dealers Association* 1989 (Pty) Ltd 2007

(4) SA 546 (D) at 555C–D.

Bona Fide Defence

[31] The next question for consideration is whether the appellant's grounds of defence in the affidavit in support of the application for the rescission of summary judgment constitutes a valid and bona fide defence.

[32] The appellant denies any liability to the respondent and alleges the following:

32.1. that she has never had any dealings with the respondent and does not owe the respondent any money. In her replying affidavit, she avers that she denies that she made any undertaking to pay the outstanding debt of MGL Projects & Contractors and avers that the invoice that the respondent relies on was issued to Sekano Distribution Services CC ("Sekano"), that the respondent's

dealings had been with Sekano and not her;

32.2. that during December 2009, the father of the deponent to the affidavit supporting the application for summary judgment met with Mike Tsimela, her boyfriend, at 2 Maroela Avenue, Protea Park to discuss the matter. Their conversation became heated and she mediated the dispute until they agreed on some figures and scribbled it on Annexure C. She alleged that she is an innocent third party.

[33] Counsel for the respondent submitted that the appellant relies on bald allegations that she did not have business dealings with the respondent, which is belied by the respondent's opposing affidavit and annexures.

[34] It is trite law that an applicant in an application for rescission need not show a probability of success on the merits. It suffices if she shows a prima facie case in the sense of setting out averments which, if established at the trial, would entitle her to the relief asked for. It is not necessary for such applicant to deal fully with the merits of the case, but the grounds of the defence must set forth with sufficient detail to enable the Court to conclude that there is a bona fide and valid defence or exception and that the application is not made merely for the purpose of harassing the respondent. See *De Vos v Copper & Ferreira* 1999 (4) SA 1290 (SCA) at 1303A–C and 1304B–G.

- [35] I am of the view when considering the pleadings, the affidavits and annexures filed, that the defence raised by the appellant that she did not derive any benefit from the building material and the building services and that she did not enter into an undertaking with the respondent to pay the amount of R110 377.28, constitutes a prima facie case, which if established at the trial would exonerate her. Accordingly, the appellant has raised a bona fide defence to the respondent's claim.
- [36] It is unfortunate that neither the order nor the reasons for judgment are clear on how the learned Magistrate exercised her discretion in refusing the summary judgment. It must be stressed that it is in the interests of justice and fairness to litigants that a presiding officer should clearly and concisely deal with all the issues in relation to fact and law and provide full and comprehensive reasons for judgment.

C. COSTS

- [37] The respondent is seeking a cost order against the appellant for the following reasons:

37.1. at the time the respondent drafted its heads of argument, the appellant had not filed its heads of argument;

37.2. the bound volume of the record of proceedings in the Magistrates' Court had not, apart from the transcription of the mechanically recorded portion, been paginated or indexed;

37.3. the respondent's counsel paginated the record, prepared an index and requested his instructing attorney to paginate the Court's record;

37.4. various important documents and notices were not incorporated in the record and the respondent paginated same and indexed the documents in the index.

- [38] It is common cause that the appellant, in addition to the foregoing, filed the heads of argument late.

- [39] The appellant has not complied with the Rules of this Court and this Court's practice directions. This notwithstanding, the appellant failed to apply for condonation for its failure.

- [40] Accordingly, I am of the view that in the circumstances, the appellant should be ordered to pay the costs of the appeal.

D. ORDER

- [41] I accordingly make the following order:

- a) The appeal is upheld.
- b) The order of the Court a quo is set aside and altered to read:

"The application for rescission of the summary judgment is granted with costs."

- c) The appellant is ordered to pay the costs of the appeal.

N. GUTTA

JUDGE OF THE HIGH COURT

I agree

A.A. LANDMAN

APPEARANCES

DATE OF HEARING : 26 APRIL 2013

DATE OF JUDGMENT : 16 MAY 2013

COUNSEL FOR APPELLANT : ADV C. ZWIEGELAAR

COUNSEL FOR RESPONDENT : ADV VAN DER NEST

ATTORNEYS FOR APPELLANT : VAN ROOYEN TLHAPI WESSELS INC.

(Instructed by MOREBODI-PAUL INC.)

ATTORNEYS FOR RESPONDENT : MAREE & MAREE ATTORNEYS

(Instructed by DAUW LABUSCHAGNE ATTORNEYS)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2013/46.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ranyane-v-collateral-unknown-topic-anwhc-2013>

Prepared on 11 October 2026 · Esheria