

SOUTH AFRICA / JUDGMENT

Selma Daude Da Cunha (Pty) Ltd v First Rand Bank Ltd t/a Wesbank (1562/2022)

[2023] ZAMPMHC 35 (17 October 2023)

[2023] ZAMPMHC 35

COURT

Middelburg High Court, Mpumalanga

BEFORE

MBG Langa

CASE / FILE NUMBER

1562/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION (MIDDELBURG LOCAL SEAT)

CASE

NO: 1562/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE:

17/10/2023

SIGNATURE

In

the matter between: SELMA
 DAUDE DA CUNHA (PTY)
 LTD
 APPELLANT
And
 FIRST
 RAND BANK LTD T/A
 WESBANK
 RESPONDENT
In

re: FIRST
 RAND BANK LTD T/A WESBANK
 PLAINTIFF
 SELMA
 DAUDE DA CUNHA (PTY)
 LTD
 DEFENDANT

JUDGMENT

LANGA J:

Introduction and Facts

[1] This is an opposed application in which the applicant, Selma Dauda Da Cunha (Pty) (“Da Cuhna”), the defendant in the main action, seeks an order for the rescission of the judgment granted against it on 25 August 2021 in favour of the respondent. The judgment was granted pursuant an action brought by the respondent, (“the First Rand Bank Ltd or Wesbank”), also the plaintiff in the main action, on the 13th of May 2021.

[2] According to the Sheriff’s return of service on 01 June 2021, the summons was served at 3[...] C[...] street, Witbank, the applicant’s chosen domicilium address, on one Mr Fahd, apparently the son of the owner and ostensibly in control at the address. When the applicant failed to file a notice to defend the action, the respondent obtained judgment on 25 August 2021. It was only on the 02 August 2022, almost a year that the applicant launched an application to rescind and set aside the order of the 25th of August 2021.

[3 In the opposing affidavit the respondent raised a number of points in limine. Firstly, the respondent contended that the applicant failed to specify the grounds and/or failed to identify the basis of its application. Secondly, the respondent contended that the deponent to the applicant’s affidavit further failed to prove that she has the necessary authority to depose to the affidavit on behalf of and to act on behalf of the applicant. On the merits the respondent contended that the applicant has failed to sufficiently explain the default and further that the application lacked merit as the

applicant has not demonstrated that it has a bona fide defence with prospects of success.

[4] The applicant on the other hand argued that the respondent's averment that the deponent, on behalf of the applicant has no authorisation to depose to the affidavit and to launch the application is wrong and without merit. The applicant argued that a deponent to the affidavit need not be authorized by the party concerned to depose thereto and that it is the institution of the proceedings and the prosecution thereof which must be authorized. The applicant relied in this respect on the judgment by the Supreme Court of Appeal in *Ganes v Telecom Namibia Ltd.* 2004

(3) SA 615 (SCA) at 624G–I.

[5] The applicant argued further that the respondent did not adopt the correct procedure to challenge the authority of the deponent to act on behalf of the applicant in this application and contended that for the respondent to succeed in disputing authority, it ought to have resorted to Rule 7 of the Uniform Rules of Court. The applicant relied in this regard on the decision in the unreported KZD matter of *North Global Properties (Pty) Ltd v Body Corporate of the Sunrise Beach Scheme Case 12465/2011 – 17 August 2012* where the court stated that "Case law confirms that rule 7 is the prescribed procedure for challenging the authority of the party to act. In the unanimous decision of this division in *ANC Umvoti Council* the full bench observed that the legislature intended the authority of "anyone" who claimed proceedings, and not only attorneys, to be dealt with under rule 7(1) ..." The applicant argued therefore that the respondent failed to challenge the deponent's authority to act on behalf of the applicant in terms of the rules. On the merits the applicant contended that it has a bona fide defence with prospects of success. It contended in this regard that the respondent to demonstrate that it is relying on a valid agreement and further that the agreement does not bind it in terms of the NCA.

[6] Before I deal with these arguments, I will quickly deal with the issue of the condonation of the late filing of the answering affidavit and replying affidavit. There was essentially no strong opposition by either party for the condonation of their respective affidavits to be granted. Although the replying affidavit was filed very late and the counsel for the respondent did not even have it when he argued the matter, he nevertheless indicated that he will accept that it should be admitted by court. I therefore proceeded with the matter by admitting these affidavits as evidence before court.

Authority to act

[7] As was correctly contended by the respondent, a deponent to the affidavit need not be authorized by the party concerned to depose thereto and that it is the institution of the proceedings and the prosecution thereof which must be authorized. See *Ganes v Telecom Namibia Ltd*, supra. It is also correct that party wishing to challenge someone's authority to act can do so on the basis of Rule 7 which provides as follows:

“Subject to the provisions of sub rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgement, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.”

- [8] Based on the reading of this rule is it clear that a party may on the basis thereof challenge another person's authority to act on behalf of another as stated in *North Global Properties (Pty) Ltd v Body Corporate of the Sunrise Beach Scheme*, supra, and many others. The rule, interpreted correctly, should include the authority of anyone, and not only attorneys, who claims

to be representing another in proceedings.

- [9] In this case based on the basis of the authority referred to above, the respondent's attempt to challenge the authority of the deponent to the applicant's affidavit should fail. I accept that the deponent Ms Da Cunha was entitled to make the affidavit and needed no authority to do so. However, the position is not the same as regards the institution of the proceeding and the prosecution thereof which the respondent has also challenged. The applicant contended that the respondent did not use the correct procedure to dispute the authority.
- [10] It is, however, common cause that the respondent raised this issue in the opposing/ answering affidavit as the first point in limine and it is therefore a fact that Ms Da Cunha's authority is disputed. Although the applicant seems to suggest that the correct procedure was not followed, it however appears from case law that the rule does not lay down any procedure to be followed by the party challenging the authority of a person acting for a party. It would seem that such a challenge may be raised for example by notice, with or without supporting evidence (See *SA Allied Workers' Union v De Klerk* NO 1990 (3) SA 425 (E) at 437), in the defendant's plea or special plea (See *Foreign Traders Co Inc v Castle Wine & Brandy Co Ltd* 1921 CPD 541), in an answering affidavit or orally at the trial provided that prior notice has been given (See *Ravden v Beeten* 1935 CPD 269).
- [11] It is trite that such a challenge may also be brought in interlocutory proceedings such as an application for summary judgment, or in an application for rescission of a summary judgment. See *Creative Car Sound v Automobile Radio Dealers Association* 1989 (Pty) Ltd 2007 (4) SA 546 (D) at 553I–554D) where it was held that the challenge should not be raised for the first time as a technical point in heads of argument and that it should be raised in terms of this subrule and, if necessary, in the answering affidavit. In *Erasmus* the authors state that subrule 7 does not lay down the procedure to be followed by the party challenging the authority of a person acting for a party. They make a point that based on case law authority, such a challenge, which may be brought at any time before

judgment, may be raised by notice, with or without supporting evidence, in the defendant's plea or special plea, in an answering affidavit and even orally at the trial.

- [12] In this case the respondent impugned the applicant's authority to institute the proceedings in the answering affidavit and in no uncertain terms even though no reference was made specifically to Rule 7. In my view the fact that the rule is not mentioned does not detract from the fact that the issue has been properly and sufficiently raised to be understood and dealt with by the applicant. The challenge to Ms Da Cunha's authority to bring this application was in my view properly done. To say the it should have been brought strictly in terms of Rule 7 would amount to elevating form over substance. The authority to act was impugned in such a way that no prejudice will be suffered by the applicant.
- [13] Although still raising this point in limine, Mr Muller on behalf of the respondent indicated that he was prepared to abandon this point in limine provided the applicant has filed, together with the replying affidavit, a ratified resolution to act on behalf of the company. However, despite this clear challenge to her authority, in her replying affidavit Ms Da Cunha still insisted that she has the authority to institute the application as she is the director of the applicant. She stated that it was therefore not necessary for her to attach a resolution when she is the sole director of the company and that it is nonsensical for her to sign a resolution by herself for herself to act on behalf a company of which she is the sole director.
- [14] In a case such as this one there was clearly a need to prove the authority to act especially where same has been challenged. Ms Da Cunha has unfortunately conflated the authority to depose to an affidavit and the authority to act on behalf of a juristic or another person. It is important to note that in her founding affidavit Ms Da Cunha does not even allege in her affidavits that she has the necessary authority to act on behalf of the applicant. What she says is that she is acting on behalf of the applicant and she has been authorised to depose to the affidavit. She failed to make the crucial averment that she is authorised to institute the application on behalf of the applicant. While the applicant contended in her replying affidavit that the respondent was ill advised on the authorisation to depose to an affidavit, it is equally clear that she has got it wrong regarding the authority to institute proceedings on behalf of the applicant. The applicant's case has to stand on the pleadings, in this case the founding as well as the replying affidavits. As stated in *Business Partners Ltd v World Focus* 754 CC 2015 (5) SA 525 (KZD) in application proceedings the affidavits constitute not only the pleadings but also the evidence. An applicant must therefore make out his case in his founding affidavit and that he must stand or fall by the allegations contained therein. It follows therefore that the applicant must set out sufficient facts in his founding affidavit which will entitle him to the relief sought. (my emphasis).
- [15] In these circumstances, where the applicant chose to deal with the issue raised in

relation to authority as she did, and is resolute that it was not necessary to file the company resolution authorizing Ms Da Cunha to act on its behalf, I am of the considered view that the applicant has failed to prove that Ms Da Cunha is properly authorized to act on its behalf. The institution of these proceedings have been shown not to be authorized by the applicant and as such on the basis of this finding alone, the application ought to be dismissed. However, notwithstanding this finding I will still proceed to deal with the merits of the application.

Grounds for rescission and the merits

[16] Notwithstanding my finding on authority as stated above, I will turn to deal with the merits of the application. But it must first be stated here that there are generally three ways in which a judgement taken in the absence of one of the parties may be set aside. This can be done in terms of Rule 31(2)(b), Rule 42(1)(a), or in terms of the common Law. In terms of Rule 42(1)(a) The 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 Judgement erroneously sought or erroneously granted in the absence of any party affected thereby. In the terms of the common law, the applicant must show that it was not in wilful default and that it has a good and bona fide defence to the claim against them.

[17] The respondent's second point in limine relates to the merits of the application. It is contended in this instance that in the affidavit the applicant does not specify the basis of the application with sufficient particularity and does not indicate on what basis the rescission application is launched save to say that it is "based on Rule 42(1)(a) alternatively Rule 31(2)(b) alternatively common law, further alternatively all of the above". The respondent contends that this is a shotgun approach which leaves the court and the respondent to speculate what the actual grounds of rescission are. The respondent contended that because of this failure to specify the basis of the application the application

should be dismissed.

[18] The applicant, however, argued that there is no requirement in terms of the Uniform Rules to state on which ground an application for rescission is launched and that is simply a matter of courtesy to the court and the opponents. The contention continues that if a rescission application is launched and it falls within the ambit of Rule 42 such application should be granted if it complies with requirements of Rule 42. The applicant therefore contended in essence that it is entitled to launch a rescission application under all grounds.

[19] It indeed becomes clearer when one reads the applicant's papers, including the heads of argument, that the basis of the application is not clear and it is difficult to determine with certainty whether the applicant relies on Rules 42 and 32 or the common law. What the applicant argued is that it has demonstrated that it has a good cause a bona fide defence to the action instituted by the applicant. The applicant then proceeds to deal with the merits of the matter without setting forth the reasonable explanation for the default and that it has bona fide defence.

[20] Nevertheless, what is clear from the papers and submissions made by the applicant, is that it is nowhere alleged that the impugned judgment was erroneously sought or granted erroneously in the absence of the applicant. The applicant failed to satisfy the requirements for a rescission under Rule 42(1). It did not establish that the judgment was erroneously granted in its absence. For instance, there is no allegation that the judgment was granted erroneously because of an irregularity in the proceedings or because it was not competent for the court to make such an order etc. From this alone it can be concluded safely that Rule 42(1)(a), which requires that the judgment in question must have been erroneously granted in the absence of the

applicant, is not applicable in this case. Good cause is not a requirement in the case where the application is anchored on this

rule. See *Mutebwa v Mutebwa* 2001 (2) SA 193 at 194.

[21] Having eliminated Rule 42(1)(a), what remains is Rule 31(2), alternatively, the common law. In terms of Rule 31(2)(b), which deals with judgement on confession and by default, the defendant may within twenty days after he/she has knowledge of such Judgment apply to Court upon notice to the plaintiff to set aside such Judgments and the Court may, upon good cause shown, set aside the default Judgment on such terms as it deems fit. In terms of the common law, a party seeking rescission must show sufficient or good cause, which means that the applicant must give a reasonable explanation for his/her default and that he/she has a bona fide defence with prospects of success. See *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) 20. (my emphasis).

[22] It is trite that whether it relies on Rule 31(2) or the common law, the applicant must explain the default and show good cause. See *De Wet v Wesbank Ltd* 1979 (2) SA 1031 (A). Therefore, in order to succeed in an application, the applicant must be set out the reasons for his default as well as the grounds for his/her defence. In terms of the common law, a Court had discretion to grant rescission of judgement where sufficient or good cause has been shown. In other words, the applicant must present a reasonable and acceptable explanation for his default and that it has a bona fide defence on the merits, with some prospect of success. *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B. *Grant v Plumbers*, supra.

[23] It is clear from the applicant's founding affidavit that the main explanation for the default is that the summons was not served on the applicant personally and further that it could not have been served at its address as it is impossible to enter the estate without the approval of the owner. The applicant essentially contended that it has not been established that it had knowledge of the action brought against it and that it deliberately refrained from entering appearance to defend. in this regard The deponent to the applicant's affidavit Ms Da Cunha stated in her affidavit that she only learnt of the summons on or about 23 March 2022 and immediately informed her attorneys who filed the notice to defend. She further stated in this affidavit that she never had any sight of the alleged return of service by the sheriff in terms of which service would have been effected.

[24] It is however important to note that nowhere in her affidavit does Ms Da Cunha explain how she came to know of the summons save to say that she became aware thereof on 23 March 2022. This is a very important aspect, particularly where it is averred by the sheriff in the return of service that the summons was served on her son. This aspect was also not sufficiently dealt with in replying affidavit. What the applicant stated in the replying affidavit is a bare denial of the service notwithstanding the fact that there is a proper return of service by the Sheriff. In the replying affidavit and heads of argument the Ms Da Cunha simply stated that she does not have a person named by the Sheriff employed by the company. However, very strangely, despite this denial, Ms Da Cunha did not deny, in her founding affidavit that she has any son by the said name. There is no doubt that in order to give a reasonable explanation of the default, the applicant should have sufficiently and comprehensively dealt with

how it came to know of the summons and from whom. The failure to explain this in my view constitutes a serious and fatal defect in the applicant's case. If the applicant cannot properly explain this aspect, any attempt to explain the default is still- born and on this aspect alone the application stands to fail.

[25] As stated above the applicant has to demonstrate that it has a bona fide defence. On the merits the applicant's defence is that the credit agreement on which the action by the respondent is based was not signed by the applicant. It relies on the provisions of the Electronic Communications and Transaction Act, 25 of 2002 in this regard. It argued that the respondent needed to prove that the parties entered into an agreement at the time when the default judgement was granted. For that purpose, the respondent had the obligation to prove and clearly establish that a signed agreement, alternatively, the agreement entered into as supported by the Electronic Communications and Transactions Act 25 of 2002 (ECTA) at the time when the default judgement was entered into. Although this is not picked up in the applicant's submission, it is clear from the papers that the applicant is also raising a defence based on the provisions of the National Credit Act, 34 of 2005, ("the NCA").

[26] Regarding the challenge to the validity of the agreement, it is clear that the agreement or the copies thereof were electronically signed, entered into and produced in the normal course of business of the Applicant in accordance with the ECTA. The applicant's contention that the agreement is blank and not signed does not get support from the evidence. The applicant has not disputed that the copies of the agreements were printed from respondent's computer system as data messaged as defined in the ECTA.

[27] On the aspect of arrears, it is clear that the amount owing may be proved by the respondent's manager by way of a certificate and this was done. The applicant has not in any meaningful way challenged the aspect of arrears and from the evidence presented it is a fact that the applicant was and is still is in arrears. This half-hearted defence therefore has to be rejected.

- [28] Concerning the reliance on the NCA Ms Da Cunha simply stated that as the applicant is her alter ego, the NCA should apply in this matter. She stated that according to her understanding of the NCA the applicant is not excluded from the exceptions in the NCA. It is very difficult to understand the argument of the applicant in this respect as the applicant does not advance further reasons and particulars or facts in support of the allegation that the NCA is applicable to the agreement. A party who raises a defence premised on the NCA must at least plead and prove that the agreement is subject to the provisions of the NCA. In this case where the applicant is obviously a juristic entity, and the agreement cannot be subject to the NCA despite the contention that the applicant is Ms Da Cunha's alter ego. See *SA Taxi Securitization v Mbatha* 2011 (1) SA 310 (GSJ) at 315. This defence too stands to be dismissed as unmeritorious.
- [29] It is clear that the applicant has not raised a proper and bona fide defence with prospects of success on the merits. The contentions made by the applicant do not justify the granting of the rescission of judgement as the applicant has failed to set out a bona fide defence.

Conclusion

- [30] The Applicant has failed to show good cause to rescind the default judgement granted against it. The applicant has failed demonstrate that it has a bona fide defence with a prima facie prospect of success. It is in my view fair to conclude in this matter that the application was just a stratagem to delay the inevitable.

The respondent has made out a case for the dismissal of the application with costs. As regards the costs it is clear that this

application was made with the aim of frustrating the respondent in implementing a court order. As stated above this application had no merits and the applicants conduct warrants a costs order on an attorney and client scale.

Order

- [31] In the result I make the following order:

The application for rescission of the judgment is dismissed with costs on attorney and client scale.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant/Defendant: Advocate SJ Van Rensburg, SC For the Respondent/Plaintiff:
Advocate FF Muller Date heard: 10 August 2023 Date of judgment: 17 October 2023

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