
SOUTH AFRICA / JUDGMENT

Simpson v Beaton NO and Others; In Re: Beaton NO and Another v Simpson and Others (32481/2015) [2018] ZAGPJHC 461 (5 July 2018) [2018] ZAGPJHC 461

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

32481/2015

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH
COURT OF SOUTH AFRICA
(GAUTENG
LOCAL DIVISION, JOHANNESBURG)
Case
Number: 32481/2015
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
5/7/2018
In

the matter between:

STUART
MICHAEL
SIMPSON Applicant
and
PAMELA
ANNE BEATON
N.O. First
Respondent
PAMELA
ANNE
BEATON Second
Respondent
LYNRAY
ENGINEERING CC (IN
LIQUIDATION) Third
Respondent
HENDRIK
ERNEST JANSE VAN
VUUREN Fourth
Respondent
in

re:

PAMELA
ANNE BEATON
N.O. First
Applicant
PAMELA
ANNE BEATON
Second
Applicant
STUART
MICHAEL
SIMPSON First
Respondent
HENDRIK
ERNEST JANSE VAN
VUUREN Second
Respondent

JUDGMENT

FISHER J:

Introduction

- [1] The applicant, Mr Simpson seeks rescission of two judgments, primarily in terms of rule 42 (1) (a) of the Uniform Rules and, to the extent necessary, under the common law. The first is a money judgment granted against Mr Simpson in favour of Mrs Beaton in her capacity as executor of the estate of her late husband and in her personal capacity. The second is an order declaring that the residence of Mr Simpson be declared executable for the payment of this money judgment.
- [2] This matter is somewhat unique in that it is not in dispute that the money judgment was taken in error. The defence raised by respondents is that the applicant has not made out a case which explains the fact that he waited more than 20 months to bring the application for rescission. This matter thus brings into stark relief a consideration of circumstances under which delay is to be considered in the context that success in relation to the merits of the application is a given.

Background facts

- [3] The background facts of this matter span some 4 ½ years. The second respondent is now 80 years old. She is the executor of the estate of her late husband who died on 4 September 2014. During their marriage Mrs Beaton and her husband Mr Beaton established and built-up an electrical engineering business which was conducted through a close corporation, Lynray Engineering CC (“the close corporation”). Mr and Mrs Beaton each held 50% of the members interest in this close corporation.
- [4] The debt in respect of which judgment was taken related to the sale of the Beaton's members interest in the close corporation. Negotiations for the purchase of the members interest commenced between Mr Beaton, Mr Simpson, and the fourth respondent, Mr Janse van Vuuren during early 2013.
- [5] During May 2013, Mr Beaton fell ill with diabetes related illnesses. Around mid-June 2013, Mr Simpson and Mr Janse van Vuuren began to be integrally involved in the conduct of the business with a view to the purchase of the members interest. During this stage Mr Beaton was hospitalized often and for significant periods and this and his physical condition meant that he was unable to conduct the business.
- [6] On 13 December 2013 and after they had been involved in the business for some months, Mr Simpson and Mr Janse van Vuuren concluded a written sale agreement with the Beatons in terms of which the members interest in the close corporation as well as certain related claims were purchased for a price of 11 million Rand.
- [7] Around the time that the negotiations relating to the purchase of the members interest began, Mr Simpson suffered the loss of his brother and his son in quick succession. The events were tragic: in March 2013 Mr Simpson's brother died after suffering from cancer. Whilst travelling home from the funeral, Mr Simpson's son, his daughter, and his son's girlfriend were involved in a motor vehicle accident. His son and his girlfriend died in the

accident and his daughter was critically injured. These events are relevant because they are relied upon by Mr Simpson to explain the delay in bringing these proceedings.

- [8] In essence Mr Simpson alleges that he failed to take reasonable steps to rescind the judgment notwithstanding that he knew about it, because he was unable to function normally due to the grief and related depression which he suffered as a result of his son's death in these tragic circumstances.
- [9] Subsequent to the signature of the sale agreement in December 2013, Mr Simpson and Mr Janse van Vuuren continued conducting the business, now pursuant to the sale agreement and solely for their own account. They commenced paying the consideration due under the agreement and in this regard paid a deposit of R112, 250. The balance of the purchase price was to be paid in instalments of R250, 000 per month.
- [10] Mr Beaton died on 4 September 2014. Unfortunately, by this date Messrs. Simpson and Janse van Vuuren were substantially in arrears with their payments, having paid only a total of R437 500 when, by this date they should have made payments totaling more than R2 million. The non-payment under the agreement could not but have been a source of great anxiety for Mrs Beaton at this time.
- [11] By September 2015, more than a year after the death of Mr Beaton and despite running the business for their own benefit, Messrs. Simpson and Janse van Vuuren had made no further payments. Neither had they sought to take any steps of their own pursuant to the agreement. The application for the money judgment was then issued against Messrs. Simpson and Janse van Vuuren by Mrs Beaton on her own behalf and on behalf of her husband's estate. The claim was for the amount of R10 562 500 being the amount then owing under the sale agreement.
- [12] On 17 September 2015 the application was served on Messrs. Simpson and Janse van Vuuren. Both entered appearance to defend. No answering affidavits were however delivered. On 9 November 2015 the matter was enrolled on the unopposed motion roll and judgment by default was taken against both Mr Simpson and Mr Janse van Vuuren. The court was informed that there had been no notice of intention to oppose delivered by Mr Simpson and thus it was accepted that there was no need for the notice of set down to have been served on him. This was false and the judgment was thus taken in error. Judgment was however properly taken against Mr Janse van Vuuren, the notice of set down having been served on him.
- [13] I must add at this juncture that I see no basis to find that there was any fraud in the taking of the judgment and I accept that it occurred as a result of an administrative error in the office of the respondents' correspondent attorneys.
- [14] On 10 December 2015 a warrant was executed in respect of movable property of Mr Simpson. This warrant was served on Mr Simpson personally. Thus, by at least 10 December 2015, Mr Simpson had knowledge of the judgment. Mr Simpson did nothing in relation to

the rescission of the judgment at this stage. On 5 April 2016 Messrs. Simpson and Janse van Vuuren put the close corporation into voluntary liquidation by special resolution. They did this with knowledge of the judgment. On 4 May 2016 the application to declare Mr Simpson's immovable property executable was issued. The application was served on Mr Simpson personally.

- [15] Despite the knowledge that judgment had been taken against him and that execution was being pursued, Mr Simpson continued to do nothing in relation to the judgment. He did not even seek to defend the application to have his immovable property declared executable. On 25 July 2016, the order was granted declaring Mr Simpson's property executable and on 31 August 2016 the sheriff attached the property. This was more than 8 months after Mr Simpson had gained knowledge of the money judgment.
- [16] Thus, in sum: Mr Simpson brought this application more than 20 months after the judgment first came to his knowledge, notwithstanding that, during this period, execution processes relating to his property were served on him personally.
- [17] In essence Mr Simpson seeks that his inaction and the attendant delay be explained and excused on the basis that he was so grief stricken and traumatized by the events which led to the death of his son that he was unable to cope with his personal affairs. He states that he was so depressed that he could not think properly and that this was exacerbated by alcohol abuse.
- [18] Mr Simpson relies on the report of a psychiatrist, Dr Franco Colin who assessed him on 21 August 2017 for the purposes of obtaining his opinion in relation to these proceedings. Dr Colin's report describes Mr Simpson as a 55-year-old businessman who is married with two living children his son having died. The report reflects that Mr Simpson stated that the traumatic incident had brought his family closer together, despite his depression. He stated that for a period of a year after the death of his son, he did not want to do anything although he carried on working. He expressed also to Dr Colin that during this period he drank more over weekends - approximately 10 beers a day 4 to 5 double whiskeys a day. Dr Colin expresses the opinion that Mr Simpson developed a post-traumatic stress disorder and a major depressive disorder. Mr Simpson takes anti-depressant medication for these conditions.
- [19] Dr Colin is however circumspect when expressing his opinion in relation to the effect that these conditions would have had on Mr Simpson in relation to these proceedings. His view is that the psychiatric disorders did not induce impairment of cognitive functioning to such an extent that Mr Simpson was completely unaware of what he was doing. Importantly, in relation to the effects that the conditions had on Mr Simpson's failure to properly defend the applications against him Dr Colin stated the following: "The presence of the post-traumatic stress disorder and major depressive disorder complicated by alcohol abuse, as stated above, reduced the patient's cognitive clarity and cognitive functioning. This would have lessened his drive and would have contributed, to a moderate extent, to act appropriately

and vigorously defend himself against the said legal actions. " (sic)

[20] Although Rule 42(1) does not specify a time limit, relief thereunder must be sought within a reasonable period (see *First National Bank of Southern Africa Ltd v Van Rensburg NO: In re First National Bank of southern Africa Ltd v Jurgens* 1994

(1) SA 677 (T) at 681B-G). The same applies to rescission at common law (see *Roopnarain v Kamalapathy & Another* 1971

(3) SA 387 (D) at 391B-D).

[21] The importance of compliance with time frames set out in the rules was dealt with by the Constitutional Court in *Mohlomi v Minister of Defence*,

[1996] ZACC 20; 1997 (1) SA 124 (CC), as follows at [11]:

‘Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice... such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.’

[22] Rule 31(2)(b) sets the time bar at 20 days. As a basic premise, there is no reason in principle why a litigant should have more time under rule 42(1) than under rule 31(2)(b). What is reasonable in all instances will, however, depend on the circumstances of the case (*Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz & Others* 1996

(4) SA 411 (C) at 421F-H).

[23] It is now trite that the standard for considering an application for condonation is the interests of justice. Zondo J, as he then was, set out the approach succinctly thus in *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at [50] and [51] in which he wrote a separate judgment:

“[50] In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.

Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

[51] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation

for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”

[24] In eThekweni Municipality v Ingonyama Trust, 2013

(5) BCLR 497 (CC) at [32], the Constitutional Court held that:

“An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.”

[25] In Gqwetha v Transkei Development Corporation Ltd 2006 (2) SA 603 (SCA), the majority of the Court held that, when considering a plea of undue delay, the Court should assess:

- (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of “all the relevant circumstances”); and if so (2) whether the court’s discretion should be exercised to overlook the delay and nevertheless

entertain the application.

[26] Thus, whether the interests of justice require the granting of condonation entails the exercise by the court of a discretion and the factors to be considered in that enquiry will depend on the nature of each case. (see also Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2010

- (1) SA 333 (SCA) at para 82; City of Cape Town v South African National Roads Agency Ltd and Others (2165/2013) [2015] ZAWCHC 135 (30 September 2015) at paras [21] and [22]).

Discussion

[27] The focus cannot be entirely on the rights and circumstances of Mr Simpson. Mrs Beaton has her own predicament which is caused by the delay. It is not in dispute that she is elderly and that she has had to manage the estate of Mr Beaton for some years. The close corporation conducted by her late husband was sold more than 4 ½ years ago and at a time when her husband was desperately ill. By the time of the sale of the members interest, Mr Simpson and his partner Mr Janse van Vuuren had already been involved in the conduct of the business for some months. They ran the business for more than two years all in all and

then placed it in liquidation at a time when they knew that judgment had been granted against them in respect of the amount outstanding under

the sale agreement and that execution was being levied.

[28] It was more than a year after the attachment of the immovable property and nearly 6 months after Mr Simpson first approached his attorney that this application was launched. It is only now that the defence of misrepresentation is raised in relation to the merits. Mr Simpson states that the sale agreement was induced by fraudulent misrepresentations made by Mr Beaton in relation to the value of the business. Interestingly, Mr Janse van Vuuren has given an affidavit to say that there was no misrepresentation. This is not entirely without relevance in that it shows that there is a version at odds with that of Mr Simpson. He raises the fact that Mrs Beaton was not involved in the business or the negotiations and that her version is of no value.

[29] What weighs with me is that Mrs Beaton as widow and executor relied on the certainty that the judgment brought. The failure of Mr Simpson seek to set aside the judgment has clearly influenced the manner in which his estate is being wound up and the liquidation of the close corporation has been dealt with. It is relevant in this regard that Mrs Beaton agreed that the liquidators of the close corporation accept an offer of R2 000 000 for the assets of the close corporation in the liquidation. This

occurred nearly a year before this application was issued. Now, more than a year after the liquidation, Mr Simpson, would have the judgment undone. This would obviously affect the liquidation and any claims therein.

[30] There is no doubt that Mr Simpson has suffered massive personal loss and this has had a profound effect on his life. I do not however believe that the effects of this trauma are such that they serve to render his inaction over nearly two years entirely explicable or excusable. This is especially the case when the relative of prejudice of Mrs Beaton and the estate is considered along with the ultimate prospects of success on the merits in due course.

[31] I thus make the following order:

1. The application for condonation for the late bringing of the application is refused.
2. The applicant is to pay the costs of the application.

FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION

Date of Hearing: 5 June 2018

Judgment

Delivered: 5 July 2018

APPEARANCES:

For the Applicants: Adv J Myburgh.

Instructed by: Errol Goss Attorneys.

For the 1st and 2nd Second Respondent: Adv C J Nel.

Instructed by: Malherbe Rigg & Ranwell Inc.

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