

SOUTH AFRICA / JUDGMENT

Matjokana v Reit Investments (Pty) Ltd (66439/2017) [2020] ZAGPPHC 630 (23 October 2020)

[2020] ZAGPPHC 630

COURT

North Gauteng High Court, Pretoria

BEFORE

De Vos

CASE / FILE NUMBER

66439/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHERS

JUDGES: YES/NO

(3)

REVISED

CASE

NO: 66439/2017

In

the matter between:

NYIKO

REGINALD BENADID

MATJOKANA

First Applicant

and

REIT

INVESTMENTS (PTY)

LTD

Respondent

JUDGMENT**DE VOS J**

[1] In this application the applicant (previously the respondent) seeks a rescission of a default judgment granted in his absence on or about the 2nd of February 2018 in the Gauteng Division, Pretoria.

[2] The factual background concerning this application is the following:

2.1 On or about the 1st of June 2014, National Garnishee Assist (“NGA”) (the respondent in this application) and the applicant concluded a written lease agreement for the lease of a property situated at 748 Richards Drive, Midrand, 1682. The lease was concluded for a period of 2 years effective from 1st of June 2014 until the 30th of June 2016. According to the first respondent’s version the written lease agreement (annexure AS to the respondent’s papers) was signed on 9th of December 2014.

2.2 Pursuant to the conclusion of the said lease agreement the applicant concluded a suretyship agreement with the respondent in terms of which the applicant would stand as surety for the debts of NGA. The suretyship agreement was also signed on the 9th of December 2014.

2.3 The applicant in terms of the suretyship agreement chose his domicilium citandi et executandi to be the leased premises described above. Subsequent thereto, during or about November 2014 NGA breached the lease agreement by failing to pay the rental and associated costs. Subsequently NGA was liquidated. Reit, the respondent, as applicant instituted action against Matjokana, the applicant, previously the respondent in his capacity as surety for NGA pursuant to which an order was taken by default against Matjokana. On the 31st of October 2019, the applicant brought an application for the rescission of this judgment. This was almost a year and a half after the said judgment was granted.

2.4 In support of this application Matjokana, the applicant contends that:

2.4.1 service was improper because it was not served at his chosen domicilium citandi et executandi;

2.4.2 the lease agreement was properly cancelled under section 14 of the Consumer Protection Act, 2008 (“the CPA”);

2.4.3 the main application was *lis pendens* when the order was granted; and

2.4.4 as a point in limine the deponent to Reit’s answering affidavit was not authorised to depose to it;

THE POINT IN LIMINE

[3] As a point in limine the applicant, Matjokana contends that “there is no averment in the respondent’s answering affidavit nor any evidence that deponent was duly authorised to depose to the affidavit and oppose the application on behalf of the respondents”. Based

on this allegation the applicant contends that Reit’s answering affidavit is fatally flawed. There is no merit in this allegation. As found by Justice Streicher in *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624G-H: “the deponent to the affidavit in motion proceedings need not be authorised by the party concerned to depose

thereto. It is the institutional proceedings and the prosecution thereof which must be authorised”.

Accordingly, this allegation is without merit.

LIS PENDENS

[4] It is trite law that in order to succeed with a prayer of lis pendens 4 requirements must be complied with, namely: -

4.1 pending litigations;

4.2 between the same parties or their privies;

4.3 based on the same cause of action and

4.4 in respect of the same subject matter.

[5] Matjokana contends that the High Court action upon which default judgment was granted was lis pendens when the order was granted in the high court because at that stage the respondent, Reit, has already issued a summons in the magistrates’ court on the same cause of action which has not yet been withdrawn. This is not disputed by the respondent, it is therefore common cause that there was a pending matter in the magistrates’ court between the applicant and respondent involving the same subject matter, based on the same cause of action as the main action before the high court. The respondent contends that the summons was not served on the applicant, therefore the action was not alive between the parties. The applicant contends that the requirements for lis pendens do not state that there should be service of the process, and submits that once a process is instituted then there is a lis between the parties. It is further contended by the applicant that the mere fact that the respondent deemed it fit to withdraw the matter from the magistrates court after obtaining default judgment in the High Court, the respondent by withdrawing the action conceded that there existed a lis between the parties. The applicant contends that it amounts to a concession that lis pendens was in existence at the time of the granting of the order. Therefore, the applicant submits that the application should be granted on this ground alone.

- [6] The respondent relies on the provisions of section 15 of the Prescription Act, 1969. The Act provides that prescription is only interrupted once service takes place on the debtor. Therefore, where a summons is not served, prescription is not interrupted. Accordingly, it is submitted that the allegation of *lis pendens* cannot be sustained. The respondent further contends that Matjokana did not defend the magistrates court summons simply because there was no summons to defend. Similarly, Reit did not prosecute the action.
- [7] There can be very little doubt that the cause of action instituted in the magistrate's court and the high court respectively, are exactly the same. It is a claim based on arrear rentals in terms of the written contract for which the applicant stood surety. It is also common cause that the magistrate's court summons although issued was never served on the applicant.
- [8] Section 4 of the Magistrates Court Act 32 of 1944 provides in subsection (3): "every process issued out of court shall be of force throughout the Republic." Subsection
- (4) provides "any process issued out of any court may be served... by the messenger of the court appointed..."
- [9] It is further common cause that this summons was not withdrawn when plaintiff decided to institute the same action in the high court- nor was it removed from the magistrate's court roll. The respondent explains in his opposing papers that the summons was issued in the high court after it was unable to serve the summons on the applicant. The domicilium address chosen by the applicant became non-sensical as NGA seized business from the address chosen by the applicant chosen as his domicilium citandi. In the meantime the monthly arrear rental increased on a month to month basis. Eventually the total outstanding amount exceeded the jurisdiction of the magistrates' court and therefore a new summons was issued in the high court.
- [10] A plea of *lis pendens* is based on a factual presumption that the second proceedings (ie the summons issued in the high court), is *prima facie* vexatious. I am satisfied on the facts that the respondent, despite the fact that all the required elements are present has satisfied this court that on a balance of convenience and equity it has complied with the onus disproving that the proceedings in the high court was vexatious. It is clear that the magistrates court summons was not served on the applicant and that the matter in the magistrates court was not pursued by the respondent. Accordingly the plea of *lis pendens* must be dismissed.

WAS THE LEASE AGREEMENT PROPERLY CANCELLED UNDER SECTION 14 OF CONSUMER PROTECTION ACT, 2008("CPA")

- [11] It is common cause that on the 11th of November 2014 a letter was dispatched to the respondent requesting early termination of the lease agreement with effect from the 1st of December 2014. The applicant in his capacity as executive chairman also informed the respondent that National Garnishee Assist is undergoing a process of being winded up..., and advised that all members have resigned. The letter written on the 11th of November 2014 is hereinafter referred to as the "termination request". On or about 14 January 2015,

Reit responded to the termination request and stated that they would be prepared to consider NGA's request for the early termination of the agreement subject to the following conditions:

10.1 the successful conclusion of a new lease agreement with a suitable replacement tenant;

10.2 NGA would be liable for any agent's commission incurred to secure a new tenant;

10.3 NGA would be liable for the rental of the beneficial occupation by the new tenant;

10.4 the payment of all monies due and payable as well as all monies in arrears owing to Reit by NGA;

10.5 NGA would conduct a take back inspection; and

10.6 NGA could not vacate the lease premises at the insist time unless the above conditions were complied with ("the early termination terms").

[12] It was a further condition set out in the reply letter that the said document must be signed and must reach the respondent by no later than the 23rd January 2015. The applicant only signed the aforementioned mandate on the 6th of February 2015.

[13] Under the early termination terms, NGA remained liable to Reit for the rental and additional charges under the agreement until the replacement tenant was found, alternatively, until expiry of the agreement. NGA did not fulfil its continued obligations under the agreement, and vacated the premises.

[14] On 24 February 2015, Matjokana sent an e-mail to Reit in which he stated that the NGA had been liquidated and that it was, therefore, impossible for it to perform under the agreement. Accordingly, Matjokana again requested that Reit allow early termination of the agreement. As the early termination terms had not been fulfilled, Reit did not agree to the request.

[15] Thereafter on the 6th of April 2016 Reit issued a summons against Matjokana in the Pretoria magistrates court under case number 13419/2016 ("the magistrates' court summons").

[16] As explained previously, NGA no longer existed and had vacated the premises, Reit was under an obligation to ensure that services of the summons came to Matjokana's attention because service on a vacated domicile address would not have been competent. See in this regard, *Botha v Neasroch* 1960 TPD 142 at 146.

[17] Reit accordingly instructed a tracing agent to look for Matjokana. Matjokana could not be found at the location provided and a return of non-service was rendered. On the 6th of October 2016, Reit's attorneys telephonically contacted Matjokana who provided them with an address where the magistrates

court summons had to be served. Matjokana denies that it provided the address. However, when the default judgment was granted, in the High Court, Reit's attorney had stated under oath that they had contacted Matjokana who provided the address to them. It appears that the court granting the default judgment has already accepted Reit's attorney's version as to how the address was obtained.

- [18] Due to the increased quantum of the claim Reit's attorneys then elected to sue Matjokana out of the High Court instead of the Magistrate's court. I have dealt with this issue before. On the 29th of September 2017 the court action was served on Matjokana's place of residence. Service was effected on Matjokana mother. Under rule 4(1)(a)(ii), this was proper service.
- [19] Notably, Matjokana does not deny that the high court action was served at his place of residence. He merely alleges that his mother did not inform him of the action being instituted against him that was served at his place of residence. It appears therefore that despite proper service, Matjokana did not defend the high court action. Consequently, on the 2nd of February 2018, the order was taken by default. On the 7th of March 2018, Reit issued a warrant of execution against Matjokana which was sent to the sheriff for service on Matjokana;s residential

address. It was then established that Matjokana had sold the property. Reit then again instructed a tracing agent to track Matjokana. On 13 December 2018 the tracing agent indicated that they have contacted Matjokana but that he refused to provide any details to enable the execution. There cannot be any doubt that from that date onforwards Matjokana was undisputable aware of the order granted. Despite that he took no steps to have it rescinded.

- [20] On or about the 3rd of October 2019 after Reit's attorney have sent a section 65A
- (2) and 65J (2) notice to Matjokana, Matjokana contacted Reit's attorneys about the order and requested them not to proceed with the warrant of execution. Reit's attorneys refused. After their refusal Matjokana brought this application on the 31st of October 2019.
- [21] It is clear from the foregoing that the agreement was never cancelled. Cancellation would only be accepted conditionally which was accepted by Majokana on the 6th of February when he signed the document. From the evidence it is clear that he failed to comply with the conditions set out in the document and accordingly there is no merits to set the judgment aside on this grounds.

WAS THERE PROPER SERVICE?

- [22] As it appears from the foregoing paragraphs, Matjokana only responded and contacted Reit's attorney on or about 3rd of October 2019. At that stage he requested that they stop the execution process. After the refusal to stop the execution Matjokana brought this application on the 31st of October 2019. The excuse raised by Matjokana that he was unaware of the order being granted against him, that he was unaware that service was effected at his address and his failure to explain what transpired between Reit's attorneys and himself during the course of events, raises one's eyebrows. Notably he doesn't attach a confirming

affidavit by his mother explaining why she didn't hand him any of the documents served upon her. Having regard to the fact that the evidence is abundantly clear that he gave his address to the tracing agents which in turn found his mother at the said premises is clear proof that he was fully aware of the ongoing process and that the present application is merely brought to buy time.

[23] Having regard to all the facts before me it is my finding that the applicant has failed to show good cause as required by law to:

22.1 give a reasonable explanation for the entire period of delay;

22.2 satisfy this court on oath that it has a bona fide defence, which on merits, is not patently unfounded;

22.3 show that the application is bona fide and not made with intention to delay Reit's entitlement to execute the order.

[24] Majokana's only explanation for the delay is that:

23.1 he travels often and was not at his place of residence when the High Court action was served;

23.2 his mother did not inform him about the high court action;

23.3 despite being contacted about the execution on or about the 13th of December 2018 he was not aware of the order until the 3rd of October 2019.

[25] It is trite law that a litigant must give a full and proper explanation of the entire period of delay. Accordingly, Matjokana did not satisfy the first requirement for a rescission.

[26] As a second requirement Matjokana must satisfy this court that on the merits of the high court action, Matjokana has a bona fide defence, which prima facie carries some prospect of success. His only defences raised against the high court action are that the agreement was properly cancelled under section 14 of the CPA; service was improper because it did not take place on his chosen domicile; the high court action was lis pendens because of the magistrates court summons and as a point in limine that the deponent to Reit's answering affidavit was not authorised to depose to it.

[27] The reliance on section 14 of the CPA is without merit, section 14 of the CPA "does not apply to transactions between juristic persons regardless of their annual turnover or asset value. See in this regard: section 14(1) reads as follows:

"Expiry and renewal of fixed term agreements

(1) This section does not apply to transactions between juristic persons regardless of their annual turnover or their asset value."

[28] NGA was a juristic person. The agreement was concluded between Reit and NGA. Section 14 of the CPA accordingly does not apply. There was also no consensual cancellation of the contract. The documents Matjokana relied upon plainly illustrate that he had requested a

consensual termination of the agreement, which Reit did not consent to. The third ground was that service was not properly effected. It is common cause that the high court action was served at Majokana's place of residence in terms of rule 4(1)(a)(ii). Service was therefore validly effected. As no service could be effected on Matjokana's chosen domicile as he had vacated the said premises no proper service could be effected at the domicile address. Reit merely complied with the obligation

to ensure that the summons come to the knowledge of the defendant. As the magistrate's court summons was never served on Matjokana the action never became alive between the parties, therefore cannot sustain an allegation of *lis pendens*.

[29] Accordingly, the application is without merit and is dismissed. Respondent was entitled to oppose this application and was substantially successful and is entitled to costs.

[30] Accordingly, the following order is made:

1. The application for rescission is dismissed with costs.

DE VOS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 20 OCTOBER 2020

DATE OF JUDGMENT: 23 OCTOBER 2020

FOR THE APPLICANTS: D THUMBATHI

INSTRUCTED BY: MAMOGOBO NT INCORPORATED

FOR THE RESPONDENT: J BREWER

INSTRUCTED BY: VINING CAMERE INC. C/O BOSHOF INCORPORATED

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