

SOUTH AFRICA / JUDGMENT

**Van der Merwe v Firststrand Bank t/a
Wesbank and Barloworld Equipment
Finance (1346/05) [2010] ZAECGHC 132;
2012 (1) SA 480 (ECG) (7 October 2010)
[2010] ZAECGHC 132**

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Makaula

CASE / FILE NUMBER

1346/05

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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN) Case No: 1346/05
“REPORTABLE”**

In the matter between:

ROELOF PETRUS VAN DER MERWE
.....Applicant/Defendant
and
FIRSTSTRAND BANK LTD t/a WESBANK and
as BARLOWORLD EQUIPMENT FINANCE
.....Respondent/Plaintiff

JUDGMENT

Makaula J:

A. Introduction:

[1] This is an application in terms of Rule 42 (1) (a) of the Rules of this Court, for the rescission of an order granted by this court on 20 March 2008. The applicant further applies for the condonation of the late filing of the application for rescission. The application for condonation is not opposed.

[2] The application is opposed by the respondent (plaintiff in the main action).

B. Applicant's case:

- [3] The applicant is a farmer. On the 17th March 2004 he purchased a CAT D5N tractor through a loan facility granted by the respondent for an amount of R1 719 691.42 inclusive of finance charges. He, however, defaulted on his re-payment of the loan and the respondent repossessed the tractor and sold it. The respondent thereafter issued summons for the balance of the loan, being R415 740.24. The applicant defended the action and filed a plea and a counter claim. The matter proceeded in the normal course until the pleadings were closed. Throughout the action the applicant was represented by Mr Van Rensburg of Graaff-Reinett. A trial date was set for the 3rd December 2007.
- [4] On the 30th of November 2007 at Grahamstown, the applicant consulted with Mr Van Rensburg in preparation for the trial. There were discussions about settlement proposals which came to nought. He, thereafter, left for his home being of the view that the matter was going to proceed on the date of trial. En route to his home, Mr Van Rensburg called him on his mobile phone and told him that the respondent proposed to settle for an amount of R307 000.00. He did not accept the offer and informed his attorney as much. This is, however, denied by Mr Van Rensburg.
- [5] According to the applicant he was surprised when a Warrant of Execution against his property was served on him by the Sheriff. He instructed his attorneys of record to investigate the matter. It transpired that on the 30th November 2007 Mr Van Rensburg, without his instructions, written or otherwise, accepted the offer made by the respondent in terms of Rule 34 (1). On the strength of the offer, the respondent filed an application for an order in terms of Rule 34 (7). It turned out that the application was faxed to the applicant's erstwhile attorneys in Graaff-Reinette. He had given them instructions to file a notice of opposition which is enclosed in the court file. A notice of set down was issued by the Registrar and it was sent to the applicant, served on his attorneys of record and on the respondent. On the date of the trial there was no appearance on his behalf due to the fact that his attorneys had since withdrawn. The applicant avers that he did not receive the notice of withdrawal, nor the notice of set down for the 20th March 2007. The applicant laboured under a mistaken belief that he was represented at court on the 20th March 2007.
- On that day, Jones J granted judgment in favour of the respondent, hence the present application.
- [6] The applicant received advice from his present attorneys and counsel that the judgment obtained was either erroneously sought, or erroneously granted due to non-compliance with Rule 34 (1).

C. Respondent's case:

- [7] The respondent, in an affidavit deposed to by Mr Van Rensburg, disputes that the events leading to the offer are as detailed by the applicant. However, both Mr de la Harpe, counsel for the applicant, and Mr Belger, counsel for the respondent, agreed that the application was not based on those disputed facts, but purely on the question of the interpretation of Rule 34 (1). They agreed further that the applicant did not give written authority to his erstwhile attorney to make an offer on his behalf.

D. Argument on Rule 34 (1):

- [8] Rule 34(1) reads as follows:

“In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. Such offer shall be signed either by the defendant himself or by his attorney if the latter has been authorised thereto in writing.” (My underlining).

- [9] Mr de la Harpe, argued that the provisions of section 34 (1) are peremptory and require that an attorney who signs a written offer on behalf of his client should only do so if he has been authorised in writing by such client. He argued further that Rule 34 (1) is substantive in nature, in that it prescribes the law rather than deal with the procedure to be followed. He submitted that the signing of the written authority might seem to be procedural yet it is not. Compliance therewith is a matter of law and non-compliance cannot be condoned.
- [10] He therefore submitted that the offer made by the applicant's attorneys was bad in law for lack of compliance with Rule 34 (1) and on that ground, the application for rescission ought to be granted.
- [11] Mr Belger argued that Rule 34 (1) is peremptory in so far as it governs the relationship between a defendant and his attorney inter se. He submitted that “shall” which appears in Rule 34 (1) makes it peremptory “that if the defendant's attorney signs the offer of settlement, it must be on the written authority of the defendant.” Rule 34 (1), so he submitted, does not require that the offer of settlement must be accompanied by a written authority from the defendant, let alone that the plaintiff should be satisfied that there is written authority before seeking an order in terms of Rule 34 (7). He argued that the rule is there to protect the client from the wrongful conduct of his own attorney, should such attorney act contrary to his client's instructions.
- [12] The question to be answered in casu is whether the respondent was substantively or procedurally entitled to judgment in terms of Rule 34 (7) application.
- [13] An offer to settle is a procedure provided for by the rules of court and designed to protect defendants against the litigious zeal of plaintiffs. It enables a defendant who is prepared to admit the plaintiff's claim, in whole or in part, to safeguard against liability for the costs by utilizing the procedures prescribed by the rule.¹

[14] Offers of settlement and tenders to perform, must comply with the requirements of Sub-rules 34 (1)-(4). When an offer of settlement is made by a defendant to a plaintiff to pay a sum of money, the offer must be:

- (a) a written offer;
- (b) signed personally by the defendant or by the defendant's attorney if the latter has been authorised thereto in writing.²

[15] The wording of Rule 34 (1) is clear and unambiguous and spells out the peremptoriness thereof. This is evinced by the use of the word "shall" after the word "offer". In my view, this means that it is obligatory for the offer to be signed by the attorney only when he or she has been given written authority to do so by the defendant. My interpretation therefore resonates with the submission by Mr de la Harpe that the provisions of Rule 34 (1) are substantive, rather than procedural in nature.

[16] Mr de la Harpe argued that if I find that the provisions of Rule 34 (1) have not been complied with, then the order stands to be rescinded in terms of Rule 42 (1) (a). He contended that it cannot be argued that the judgment was erroneously sought for the reason that the respondent was unaware at the time that there was non-compliance with Rule 34 (1). He argued that the judgment was erroneously granted for the reason that had Jones J been aware that Rule 34 (1) had not been complied with, he would not have granted the order.

[17] Both parties have agreed that the application stands to be decided in terms of Rule 42 (1) (a) which provides as follows:

"1. The court may, in addition to any other powers it may have, mero motu or upon the application of any other party affected, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby ..."

[18] It is common cause between the parties that the applicant was neither present nor represented at court when the order was granted. It is furthermore common cause between them that there was nothing procedurally wrong with the manner in which the judgment or order was obtained. It is further common cause that at the time the order was sought there was non-compliance with Rule 34 (1).

[19] In support of his argument Mr de la Harpe relied on the decision of *Stander & Another v ABSA Bank*³. He, however, brought to my attention that this judgment is in conflict with judgments in other divisions. He referred in that

regard to the case of *Weare v ABSA Bank Ltd*⁴. He persuaded me to follow the decision in the *Stander* case as it is the only good authority and more so that it is from this division.

- [20] In *Stander's* case, the applicants had applied for the rescission of an order for absolution from the instance, granted against them in favour of the respondent. They contended that they were entitled to the relief sought by virtue of the provisions of Rule 42 (1) (a) of the Rules of Court. Their contention was that such an order amounted to an order “erroneously granted” because there existed, at the time the order had been made, facts of which the court had been unaware of and which, had it been aware of, would have induced the court not to grant the order sought. *Nepgen J* held that he was entitled to have regard to the facts which did not appear on the record of proceedings and of which the court that granted absolution from the instance had been unaware of at the time such order was made.⁵
- [21] The facts of the *Weare* case are distinguishable from the facts of the present case in that the applicant in *Weare's* case argued that the judgment would not have been granted if the court (through the Registrar) had been aware that the summons in fact had not come to the attention of the applicant. *Meskin J* in rejecting this argument, found that even if the court was aware of that factor the court, (through the Registrar) could not have refused to grant the judgment once it was sought by the respondent on the basis that there had been proper service of the summons, that the applicant was in default with an appearance to defend and the summons disclosed a cause of action for the relief sought.
- [22] Mr Belger submitted that applying the principle enunciated in the *Stander* case in the present matter, would not change anything if one has regard to his submission about the interpretation of Rule 34 (1). He argued that when the matter was presented before *Jones J*, the respondent had complied with all the procedural requirements. Even if it had been brought to the attention of *Jones J* that there was no written authority given by the applicant to his attorney, he would have granted the order in any event. He submitted that in the absence of a procedural irregularity, there can be no argument that the judgment was erroneously granted. He referred in this regard to the case of *Lodhi 2 Properties Investments CC & Another v Bondev Developments (Pty) Ltd*⁶ as authority for this submission.
- [23] The court in *Lodhi* dealt with two principles applicable to Rule 42 (1) (a); (a) that a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware; and (b) similarly, a judgment to which a plaintiff is procedurally entitled in the absence of the defendant, cannot be said to have been “granted erroneously” in light of a subsequent disclosed defence.⁷
- [24] The court in *Lodhi* further referred with approval to *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*⁸ in which an application in terms of Rule 42 (1) (a) for rescission of a summary judgment granted in the absence of the defendant was refused notwithstanding the fact that it was accepted that the defendant wanted to defend the application but did not do so

because the application had not been brought to the attention of the Bellville attorney. The court held in Colyn's case that no procedural irregularity or mistake in respect of the issue of the order, had been committed and that it was not possible to conclude that the order had erroneously been sought, or had erroneously been granted by the judge who granted the order.

[25] In the Lodhi case Streicher JA agreed with the principle enunciated in the Stander case that in deciding whether a judgment was "erroneously granted" the court is not confined to the record of the relevant proceedings.⁹ He, however, disagreed with the finding that the order had been erroneously granted because procedurally there had been nothing wrong with the process culminating in the order being obtained.¹⁰

[26] In the present matter the respondent was not aware that there had been non-compliance with Rule 34 (1) for want of the written authority by the applicant. Even Jones J was not aware at the time of the granting of the order that there was non-compliance with Rule 34 (1). It is apparent that compliance with Rule 34 (1) is not procedural in nature but requires as a matter of law, that an offer be signed by the defendant or by his attorney on condition that he had been given written authority to do so. The decision by Streicher JA that "[t]he existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot

transform a validly obtained judgment into an erroneous judgment,"¹¹ cannot find application in the present matter because it does not concern a defence which subsequently transpired after the order. The applicant herein has filed a plea wherein his defence appears. To the extent that the present error is fundamental to the requirements of Rule 34 (1), non-compliance therewith cannot be condoned. In my view had Jones J been aware at the time of the granting of the order, that there had been non-compliance with Rule 34 (1), he would not have granted the order he did. The facts at hand are distinguishable from those in the Lodhi case.

[27] In the light of the foregoing, I am of the view that the applicant is entitled to the relief he seeks. Even though the applicant is successful, I am of the view that the aspect of costs should be reserved for determination by the trial court because there is no indication that the respondent was aware that there was non-compliance with Rule 34 (1) at the time the order was sought and

granted.

As a result I make the following order:

1. The applicant's failure to apply for rescission within the required time period is hereby condoned;
2. The order granted by this court on the 20th March 2008 is hereby rescinded and set aside;
3. The applicant is granted leave to defend the action;

4. The costs occasioned as the result of the opposition to this application are reserved for decision by the trial court.

M MAKAULA

JUDGE OF THE HIGH COURT

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Heard on: 27 May 2010

Delivered on: 7 October 2010

1See: Naylor & Another v Jansen 2007 (1) SA 16 (SCA).

2See: Herbststein & Van Winsen, The Civil Practice of the High Courts of South Africa, Fifth Edition, volume 1, page 618.

3 1997

(4) SA 873 ECD

4 1997

(2) SA 212 (D) at 217D

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6 2007

(6) SA 87 (SCA) at para [27] as his authority:

7Para 25 and 27 at 94E and 95E

8 2003

(6) SA 1 SCA; [2003] 2 All SA 113 in para 9-10

9Page 93 para 23-24

10Page 95 para 26 C-D “In Stander the plaintiffs who obtained an order in their favour were, unlike the UDF in Theron, procedurally

entitled to the order when it was granted and the fact that it subsequently transpired that the defendants were not in wilful

default could not transform that order, which had validly been obtained, into an erroneous order.”

11Page 95 para 27 F

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