

SOUTH AFRICA / JUDGMENT

Wait v Strydom N.O and Others (389/2022) [2024] ZAECKMKHC 62 (26 March 2024) [2024] ZAECKMKHC 62

COURT

Eastern Cape High Court, Makhandu

BEFORE

Cengani-Mbakaza

CASE / FILE NUMBER

389/2022

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IN THE HIGH COURT OF

SOUTH AFRICA

(EASTERN CAPE

DIVISION, MAKHANDA)

CASE

NO: 389 /2022

Reportable

No

In the matter between: JEANE
WAIT
APPLICANT
and
PIETER
HENDRICK STRYDOM N.O
FIRST RESPONDENT
HAROON
ABDOOL SATAR
SECOND
RESPONDENT
DEON
MARIUS BOTHA
N.O
THIRD RESPONDENT

JUDGMENT

CENGANI-MBAKAZA AJ:

Introduction

[1] This case concerns the rescission of the judgment which was granted by this court on 16 August 2022. The applicant is identified as a businessman whose details of the business are unspecified. The first,

second and third respondent are liquidators who were duly appointed by the Master of the High Court on 07 March 2019, to act as the joint liquidators of the company known as Free Agape Enterprises (Pty) Ltd (Free Agape).

[2] The application is opposed by the respondents. For consistency with the main action, the parties will be referred to as they were previously. The first, second and third respondents will be referred to as 'the plaintiffs', and the applicant will be referred to as 'the defendant'.

The background

facts

[3] In March 2018, Mr Howick Kirstein and three others applied to the High Court of South Africa, Western Cape Division for the winding up of Free Agape. On 12 June 2018 Free Agape was placed under

final liquidation. On 13 August 2019, the High Court of South Africa, Western Cape Division issued the following order:

1. The investment scheme conducted by the directors thereof under the name and style of Free Agape Enterprise (Pty) Ltd (in liquidation) and the respective trading names under which the scheme was conducted, propagated and marketed namely Choice Lifestyle change, CLC, Beleggingstrust, Free Agape, Choice Beleggingstrust and Induna Holdings, are declared to be illegal, unlawful and void;
 2. All investment agreements and related agreements entered into between members of the Public entities as investors with Free Agape Enterprises (Pty) Ltd (in liquidation), are declared to be null and void;
 3. The cost of this application are to be paid out of the insolvent estate of Free Agape Enterprises (Pty) Ltd (in liquidation)
- [4] Between 24 February 2017 to 21 November 2017, Free Agape made payments to the defendant in the sum of R1 404 500. Additionally, between 27 January 2017 to 02 October 2017, the defendant paid an amount of R1 250 000.00 to Free Agape. During September 2017 Free Agape made payments to the defendant in the total amount of R478 250.
- [5] On 09 February 2022, the plaintiffs issued a combined summons against the defendant for an order in terms of sections 26 (1) and 29 of the Insolvency Act 24 of 1936 (the Insolvency Act). In the particulars of claim, the plaintiffs alleged that a sum of R154 500 constituted a disposition and was thus liable to be set aside in terms of section 26 of the Insolvency Act. Furthermore, an amount of R478 250 constituted a disposition as intended in terms of section 29(1), read with section 2 of the Insolvency Act. The plaintiffs further alleged that the dispositions made by Free Agape had the effect of preferring the defendant above the other creditors of Free Agape. On 25 February 2022, the sheriff served copies of the combined summons, the particulars of claim and annexures as well as the notice in terms of Uniform Rule 41A at the defendant's residential address by affixing a copy at the main access gate.
- [6] At the time, the defendant was represented by Mr Gouws an attorney practicing under the name and style of D Gouws Inc, situated at Gqebera. On 07 March 2022, the defendant, through his corresponding attorney, Mr Nolte Smit, filed a notice of intention to defend via an email address t[...]. On 06 April 2022, the plaintiffs filed a notice calling upon the defendant to file a plea within five days after receiving the notice. The ultimatum was that the defendant would be barred from delivering the plea if he failed to do so during the stipulated time frame. On 13 April 2022, the defendant's attorney withdrew as attorney of the record. This correspondence was sent to the plaintiff's attorneys via email.

The impugned default judgment

- [7] On 28 May 2022, the plaintiffs applied for default judgment for an order in the following terms:

'Claim in terms of Section 26:

1.1 That the dispositions made by Free Agape to the defendant during the period 24 February 2017 to 21 November 2017 in the amount of R154 500 be set aside in terms of S26(1) of the Insolvency Act, 24 of 1936.

1.2 That the defendant be ordered to pay the sum of R154 500 to the plaintiffs, in their capacity as duly appointed liquidators of Free Agape.

1.3 Interest on the aforesaid amount at the mora rate from date of judgment to date of final payment.

1.4 Costs of suit.

1.5 Further and/or alternative relief.

Alternative claim:

1.1 That the dispositions made by Free Agape to the defendant during the period 28 September 2017 to 21 November 2017 in the amount of R478 250.00 be set aside in terms of section 29 of the Insolvency Act.

1.3 Interest on the aforesaid amount at the mora rate from time of judgment to the date of final payment

1.4 Costs of suit.

1.5 Further and/or alternative relief’.

[8] On 05 August 2022, the notice of set down for the default judgment was served electronically to the defendant’s e-mail address at j[...]. The defendant admitted to having received the notice of set down. On the date of the hearing, the judgment was granted in favour of the alternative claim. The order sought to be rescinded reads as follows:

‘1. The dispositions made by Free Agape to the defendant during the period 28th September 2017 to November 2017 in the amount of R478 250.00 be and is set aside in terms of section 29 of the Insolvency Act.

3. Interest in the amount at the mora rate from the date of judgment to date of final payment.

4. Costs of suit’.

[9] On 10 March 2023, a writ of execution was re-issued by the registrar of this court. Upon becoming aware of the writ of execution, the defendant promptly applied for an order for the stay of the writ of

execution pending the application for rescission of the judgment. The order was granted on 19 May 2023.

Before this court

[10] In his founding affidavit, the defendant asserted that throughout his consultations with either Mr. Scheffer or Ms. Kingwill, he was never informed of his attorneys' withdrawal from the case. Had he been apprised of this circumstance, he would have sought alternative legal representatives as he was unable to represent himself, being a lay person. The defendant maintained that he paid all the legal fees that were due to D Gouws Inc. and found no plausible reasons for

their withdrawal as his attorneys of the record. Upon receiving the notice of set down of the default judgment he consulted with his attorneys and was assured that the matter would be resolved. He never consulted with his attorney until the 3rd day of May 2023 when it was brought to his attention that the sheriff was at his home to execute a writ of execution.

[11] The defendant contended that he possesses a bona fide defence to the action, in that, he did not only invest an amount of R1 250 000.00 to Free Agape but, there were additional amounts of R200 000, R10 000, R90 000 and R120 000 which he also invested. He averred that the amount of R200 000 alone would fully pay the plaintiffs' claim of R154 500 and substantially reduce the alternative claim if found valid on the merits. The defendant provided proof of payment of the funds he deposited from his bank account to Free Agape six years ago. He further stated that due to the closure of his bank account, he was unable to retrieve the necessary information from his bank account regarding the other payments made to Free Agape. In essence, the defendant contended that the funds he deposited to Free Agape were made in the ordinary course of business and were not intended to favour one creditor over the other.

[12] In the answering affidavit, the plaintiffs asserted that the defendant was duly notified of the notice of set down of the default judgment and consciously elected not to oppose the application. The plaintiffs continued their argument by stating that the defendant failed to provide a satisfactory explanation as to how it was possible for him to receive the notice of set down of the default judgment and failed to receive the notice of withdrawal which was sent to his e-mail address.

[13] Regarding the defences raised, the plaintiffs alleged that Free Agape will never return to its position of solvency. They emphasized that the defendant is one of the investors who received preferential treatment through dispositions, unlike other investors who received no payments from Free Agape.

The legal framework and the evaluation by the court

[14] In the present case, the defendant did not specify whether the application was made in terms of Uniform Rules 31(1)(b), 42 or in terms of the common law. Nonetheless, it is well-established that rescission of the judgment in the High Court can be based on Rule 31, Rule 42 (1) or common law[1]. The purpose of Uniform Rule 42 is to correct expeditiously an obvious wrong judgment or order[2]. In the absence of evidence presented or arguments posited to demonstrate that at the time the judgment was granted, there were irregularities in the proceedings, or the judgment was erroneously granted, I will accept that the

judgment was correctly granted.

[15] The next issue for determination pertains to whether the defendant has made a case for the rescission of the judgment under uniform Rule 31 or the common law. Uniform Rule 31(1)(b) provides:

‘A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit’.

[16] In *De Wet and Others v Western Bank Ltd*[3] Trengrove AJA, (as he then was), deliberated on the common law provisions concerning the rescission of the judgment. The learned judge remarked as follows:

‘Under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the Courts. This discretion extended beyond, and was not limited to, the grounds provided in Rules of Court 31 and 42 (1) and those specifically mentioned in *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163’.(my underlining)

[17] In *Zuma v the Secretary of the Judicial Service Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public*

Sector including Organs of the State and Others[4], the Constitutional Court restated the requirements for the rescission of the judgment in terms of the common law as follows:

‘[71] The requirements for rescission of a default judgment are two-fold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.’

‘Thus, the existing common law test is simple: both requirements must be met’.

[18] In deliberating upon whether the defendant was in wilful default, I bear in mind what was stated in the case of *Harris v ABSA Bank (Pty) LTD Volksas*[5],

‘Headnote: Before an applicant in a rescission of judgment application can be said to be in ‘wilful default’ he or she must bear knowledge of the action brought against him or her and of the steps required to avoid [E] the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions. A decision freely taken to refrain from filing a notice to defend or a plea or from appearing will ordinarily weigh heavily against an applicant required to establish sufficient cause. However, it is not correct [F] that, once wilful default is shown, the applicant is barred; that he or she is then never entitled to relief by way of rescission as he or she has acquiesced. The Court’s discretion in deciding whether sufficient cause has been established must not be unduly restricted. The mental element of the default, whatever description it bears, should be one of the

several elements which the Court must weigh in determining whether sufficient or good cause has been shown to exist’.

[19] An argument was raised that the defendant was unaware that his attorneys had withdrawn and in his further consultation he was given an undertaking that the matter would be resolved. The averments made by the defendant at paragraphs 9-10 of his founding affidavit are puzzling. They read as follows:

‘After my consultation with Ms Sheffer, I had no further contact with her and assumed that she indeed sorted the matter out on my behalf. I was surprised when I received an email on the 5th of August 2022 where (to) sic a notice of set down of an application for default judgment against me was attached. I immediately forwarded same to Ms Sheffer and made an appointment with her. I consulted with Ms Scheffer, if my memory serves me correct, the following day. Ms Scheffer again assured me that she would give the matter the necessary attention and sort it out of my behalf. Thereafter I again had no contact with Ms Sheffer’ (my underlining.

[20] Incontrovertibly, the defendant received the summons along with the particulars of claim and the accompanying attachments. The defendant’s attorneys filed a notice of intention to defend the matter but neglected to file a plea resulting in an application for default judgment. Despite being served with the application for default judgment, the defendant consulted his attorney but failed to make a follow-up until the application for the default judgment was heard. Additionally, despite being consistently disappointed by his attorneys, the defendant failed to undertake reasonable measures to mitigate further disappointment and defend the action. He never appeared in court or took reasonable steps until the writ of execution was enforced.

[21] I concur with the sentiment raised in De Wet’ case[6], that since the defendant is the author of his misfortune, it would be unjust to hold the other party accountable for the harm and difficulty that resulted from his action. When a default judgment had been entered against a party due to his failure to remain in communication with his attorney or agent regarding the progress of the case, they cannot absolve themselves of this responsibility and complain against the other party to the action, alleging negligence on the part of their appointed representatives[7]. Upon careful consideration of the facts presented in this regard, I find the defendant’s explanation of his default unsatisfactory and unreasonable.

[22] In Chetty v Law Society[8], the court held a view that given the fact that the appellant's explanation was unsatisfactory and unacceptable, it was therefore,

strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success.

Nevertheless, in the interests of fairness to the appellant, the court found it desirable to refer to certain aspects of the merits of the defence submitted. I shall now adopt a similar approach.

[23] The default judgment was granted in terms of section 29 (1) of the Insolvency Act which provides,

‘Every disposition of his property made by a debtor not more than six months before the sequestration of his estate which has had the effect of preferring one of his creditors over the above another may be set aside by the court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of the assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another but subject to the provisions of sub-section 2’.

[24] Section 29 of the Insolvency Act addresses voidable preferences and stipulates a time frame of six months. The provision serves to protect the interests of the general body of creditors, ensuring that no party demonstrates a bias towards specific creditors at the expense of others[9]. To establish voidable preferences, the plaintiff must demonstrate the following: that a disposition was made by the insolvent; of his or her property; that the disposition took place not more than six months before the liquidation; that the disposition had the effect of preferring one of the creditors over the another; that immediately after the making of the disposition the liabilities of the debtor exceeded the value of the assets; and that the requirements of section 340(1) of the Companies Act were met.[10] The goal of Free Agape’s investment program was to collect deposits from investors and use them to pay back the investors.

Drawing from the evidentiary record, the plaintiffs collated all the financial information of the insolvent thereby ensuring transparency

and obviating any ambiguity regarding the discharge of their burden of proof. Mr Jacob Jan Dekker, an auditor and forensic

accountant was appointed and instructed to analyse and advise on the financial and related affairs of Free Agape. According to the quantification report, the defendant invested an amount of R5 000 between 02 October 2017 and 21 November 2017 around the same period he was paid an amount of R478 250 by Free Agape. The dispositions made to the defendant by Free Agape resulted in the liabilities of the debtor exceeding the value of its assets. Consequently, the defendant received preferential treatment above all other creditors. The quantification report is uncontroverted.

[25] Counsel for the defendant argued that the defendant made numerous other transactions with Free Agape. These transactions, so he argued, were made in the ordinary course of business without favouring any particular creditor. Counsel acknowledged that once the plaintiff has discharged its onus, the burden of proof shifts to the defendant to substantiate these assertions. This notwithstanding, the defendant claimed that some of his financial records could not be obtained from his bank account. Despite the fact that his bank account was closed, he managed to retrieve records of certain sums of money that he deposited to Free Agape six years ago. This is incomprehensible. Notably, the amount of R200 000, which

is a matter of common knowledge between the parties, relates to a claim in terms of Section 26(1) of the Insolvency Act. The claim in terms of Section 26(1) of the Insolvency Act is not the subject matter of the default judgment that was granted by this court.

- [26] It is crucial to bear in mind that a bona fide defence necessitates full disclosure of the nature, grounds and material facts relied upon to support the defence. In this instance, the account given by the defendant seems to be more general than specific. The material facts upon which his defence is likely to be based are missing and therefore no bona fide defence was exhibited. Consequently, the application for the rescission of the default judgment cannot succeed.

Order

- [27] The following order is issued:

1. The application for the rescission of the default judgment is dismissed with costs.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

Counsel for the plaintiffs: Adv M Somandi Instructed by: BANARD INCOPORATED PRETORIA C/o DE JAGER LORDAN INC 2 Allen Street MAKHANDA Tel: 046 622 2799 E-mail: stuart@djlaw.co.za
Counsel for the defendants: Adv I Lambrechts Instructed by: GREVENSTEIN INC. GQEBERHA C/o HUXTABLE ATTORNEYS 26 New Street MAKHANDA Ref: O Huxtable /cl/02GOO3052 Email: law1@huxattorneys.co.za Date heard: 22 February 2024 Date delivered: 26 March 2024

- [1] De Wet and Others v Western Bank Ltd 1977 (4) SA p770 (T) at para-E.
- [2] Colyn v Tiger Food Industries Ltd ta Meadow Feed Mills (Cape) 2003
- [6] SA 1 (SCA) at para 5. In Zuma v the Secretary of the Judicial Service Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of the State and Others [2021] ZACC 28, at para 53, the importance of Uniform Rule 42 was explained as follows, 'It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with the discretion to rescind its order. The precise ruling of rule 42, after all, postulates that a court 'may', not 'must', rescind or vary its order-the rule is merely an 'empowering' section and does not compel the court 'to set aside or rescind anything'. This discretion must be exercised judicially.
- [3] 1979
- (2) SA 1031 at para-F.
- [4] Supra fn 2.
- [5] 2006(4) SA 527 T

[6] De Wet supra fn. 3 (para 3)

[7] De Wet supra fn. 1 at paragraph G.

[8] 1985(2) SA 756

[9] Strydom N.O AND Another v Snowball Wealth (Pty) Ltd and others (356/2021)[2022] ZASCA 91(15 June 2022) at para 31.

[10] See Case number: 4028/19 Pieter Hendrik Strydom and 2 Others v Coernelius Grundling delivered on 18 May 2021 page 12 paragraph[

23]; Section 340(1), Companies Act 61 of 1973 provides, 'every disposition by the company of its property which, if made by an individual could for any reason, be set aside in the event of the insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay its debts, and the provisions of the law relating to insolvency shall mutatis mutandis be applied to any such disposition.'

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