

SOUTH AFRICA / JUDGMENT

## Wait v Strydom N.O and Others (Leave to Appeal) (389/2022) [2024] ZAECKMKHC 64 (24 May 2024)

[2024] ZAECKMKHC 64

COURT

Eastern Cape High Court, Makhandla

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 YES/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- APPLICATION FOR LEAVE TO APPEAL

Cengani-Mbakaza AJ:

[1] This is an application for leave to appeal against the judgment that I handed down on 26 March 2024. As a consequence of the judgment, I issued the following order:

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

[2] In the notice of the application for leave to appeal dated 18 April 2024, the applicant states that I erred in not finding that there was a bona fide defence in the applicant’s claim. In a nutshell, the applicant asserts that the applicant had pleaded facts which if proved at trial would constitute a defence in terms of section 29 of the Insolvency Act, 24 of 1936. The applicant pleaded that the payments made by Free Agape Enterprises (Pty) Ltd (Free Agape), were payments of the capital that the applicant invested, and such payments were made in the ordinary course of business and not with the intention to prefer one creditor over another.

[3] Referring to *Gazits Properties (Pty) Ltd v Botha N.O*, [1]the applicant’s counsel argued that I failed to consider that the monies invested by the investor, remains the property of the investor and does not become the property and/or assets of Free Agape.

[4] To oppose the application for leave to appeal, the respondents’ counsel referred me to the case of *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*[2] where the law relating to the two requirements for rescission of the default judgment under common law was re-emphasized.

[5] Counsel argued that a reasonable explanation must be tendered for failing to defend the case before any consideration is given to whether there is a defence to the claim, in the absence of such a reasonable explanation, the application for leave to appeal falls to be dismissed on this ground alone. Regarding this contention, the applicant’s counsel argued that where there is a bona fide defence a court may grant an application for rescission of the default judgment even if a poor explanation is tendered.

[6] In dealing with the requirement of a bona fide defence, the respondents’ counsel argued that the investment scheme conducted by Free Agape was declared illegal, unlawful and void, and that all investment agreements concluded between Free Agape and investors, including the applicant, were null and void. He further argued that the facts in *Garits Properties’* case are distinguishable, I agree with the arguments raised in this regard. It is not disputed that during 28 September 2017 to 21 November 2017, Free Agape paid the applicant an amount of R478 250. The debtor (Free Agape) made a disposition of property. The disposition was made 6 months prior to the launching of the liquidation proceedings in the Western Cape High Court. This payment which was made by Free Agape to the applicant less than six months before sequestration, had the effect of preferring the applicant from other investors who received no payment once the liquidation was complete.

[7] The application for leave to appeal is governed by section 17 of the Superior Courts Act 10 of 2013 which provides,

‘[17

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)

(i) The appeal would have a reasonable prospect of success; or

(ii) There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

(b) ... ..

(c) ... ..’

[8] In Zuma’s[3] case, 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’. (My underlining)

[9] It is gleaned from the Constitutional Court judgment that the applicant is obliged to first furnish a reasonable and satisfactory explanation for his default. Furthermore, a failure to meet one of the two requirements may result in refusal of the request to rescind. In his notice of the application for leave to appeal, the applicant

opted not to address the first requirement for the rescission of the default judgment. In my judgment, I dealt with both requirements

extensively. Regarding the first one, I made the following observations,

‘[20] ..... 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, 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. Upon careful consideration of the facts presented in this regard, I find the defendant's explanation of his default unsatisfactory and unreasonable.'[Footnotes omitted]

[10] It is a well-established principle that an application for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal[4]. A mere possibility of success, an arguable case or one that is not hopeless is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal[5]. Regarding both requirements for the rescission of the default judgment, I still stand by my reasons which are comprehensively

addressed in my judgment. In addition, I find that the applicant's failure to deal with the first requirement in his notice of the application for leave to appeal renders the application under consideration fatal. Considering the facts of this case, there is no substance to the argument that a poor explanation will compensate for bona fide defence's prospects of success on appeal. Fortified by Zuma's[6] case, I conclude even at this point that absent reasonable explanation for the default demonstrates no prospects of success on

appeal. Strictly speaking, it is unnecessary to make findings or to consider the arguments relating to the applicant's bona-fide defence.

Resultantly, the application for leave to appeal cannot succeed.

Order

[11] The following order is issued:

1. The application for leave to appeal is dismissed.
2. The applicant shall pay costs in accordance with scale B as contemplated in Rule 69 of the Uniform Rules of Court.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

Counsel for the Applicant: 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 Counsel for the Respondents: 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 Date heard: 17 May 2024 Date delivered: 24 May 2024

[1]

[2011] ZSCA 199.

[2] [2021] ZACC 28.

[3] Fn 2 above.

[4] Van Zyl v Steyn (83856/15)

[2022] ZAGPPHC 302 (3 May 2022).

[5] MEC for Health: Eastern Cape (case 1221/2015 ZASCA (25 November 2016 at paragraph 17.

[6] Fn 2 above.

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