

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A5064/2021
10763/2020

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

14 June 2022

Judge

Dippenaar

In the matter between:

LLR Properties (Pty) Limited

Registration Number: 2015/151786/07

First Appellant

Ramatshila – Mugeru, Lesley Lufuno

Identity Number: 751127 5742 087

Second Appellant

And

Sasfin Bank Limited

Registration Number: 1951/002280/06

First Respondent

Sunlyn (Pty) Limited

Formerly known as Sunlyn Rentals (Pty) Ltd

Second Respondent

Coram: Dippenaar J, Yacoob J et Manoim J

Heard: 04 May 2022 - the virtual hearing of the Full Court Appeal was conducted as a videoconference on Microsoft Teams

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 14th of June 2022.

Summary: Rescission – procedural deficiency in service in terms of rule 42(1)(a) – not necessary to illustrate good cause – bona fide defence illustrated in any event under rule 31(2)(b) denial of signature and conclusion of master rental agreements and guarantees relied upon by respondents — signature of second appellants on agreements false-case for rescission established.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (J Gautschi AJ, sitting as Court of first instance):

[1] The appeal is upheld with costs, including the costs of the application for leave to appeal and the costs of two counsel, where employed;

[2] The order of the court *a quo* is set aside and replaced with the following:

“[1] The default judgment granted on 19 August 2020 is rescinded and set aside;

[2] A notice of intention to defend is to be delivered within ten days of date of this order;

[3] The respondents are directed to pay the costs of the application”.

JUDGMENT

DIPPENAAR J (YACOOB J ET MANOIM J CONCURRING):

[1] The appellants appeal against the judgment and order of J Gautschi AJ (“the court *a quo*”) granted on 24 May 2021, in terms whereof the appellants’ rescission application of a default judgment, granted on 19 August 2020, was dismissed with costs. A further order was granted referring the judgment to the Legal Practice Council to consider disciplinary proceedings against the second appellant. This appeal is with the leave of the court *a quo*. The costs of the application for leave to appeal were reserved.

[2] The respondents, as cessionaries of agreements concluded between the appellants and Thusano Group (Pty) Ltd, instituted action proceedings claiming against the first appellant, the return of certain specified goods and payments of amounts due under three master rental agreements concluded with the first appellant in three separate claims, pursuant to the first appellant’s breaches of the master rental agreements. Against the second appellant, the sole director of the first appellant at the time the agreements were concluded, the respondents claimed payment of such amounts in terms of guarantees concluded by the second appellant in favour of the first appellant. The second applicant is a practicing attorney.

[3] In their particulars of claim, the respondents averred that the first appellant chose its *domicilium citandi et executandi* at Cedar Lodge Cnr Bush and R28 Chancliff, Krugersdorp and that the second appellant resided at 10 Bluegumspoort Road, Louis Trichardt, which address was chosen as his *domicilium citandi et executandi*.

[4] Service of the action proceedings was effected on the first appellant on 14 May 2020 by affixing to the outer principal door at the aforesaid *domicilium* address in terms

of r 4(1)(a)(iv). In relation to the second appellant, service was effected on 17 June 2020 at the Louis Trichardt address. The return of service stated: "*in her temporary absence, a copy of the combined summons was served to employee Mr Steven Mukwovho in terms of r 4(1)(a)(ii)*".

[5] Judgment by default was granted against the appellants jointly and severally on 19 August 2020 in relation to each of the 3 claims.

[6] On the appellants' version, the second appellant found out about the judgment when he was contacted by the sheriff on 17 September 2020 to arrange service of a warrant of execution, pursuant to which the second appellant's vehicle was attached. A rescission application was launched by the appellants on or about 5 October 2020.

[7] The appellants case was that the appellants were absent from the hearing as a result of the service of the summons at the wrong addresses for the applicants and that they were not in wilful default. In their founding papers, reliance was placed in the alternative on r 31(2)(b), r 42(1)(a) and the common law. The appellants' case was that they did not receive the summons and had not chosen any *domicilia citandi et executandi* as the agreements relied upon by the respondents were fraudulent and were not concluded or authorised by the second appellant, the sole director of the first appellant, or by any authorised representative of the first appellant. It was contended that the signatures on the agreements are an obvious and clear falsification of the second appellant's signature, that the appellants have no knowledge of the rental agreements and that the appellants were not party to the contractual agreements. It was also disputed in reply that the second appellant authorised any debit authorisation or the conclusion of the agreements themselves.

[8] It was argued that service of the summons was thus invalid as neither of the appellants chose a *domicilium citandi et executandi*. It was not disputed that the registered address of the first appellant and the residential address of the second

appellant differed from the service addresses. Two of the three guarantees did not contain a *domicilium* address.

[9] The respondents opposed the rescission application primarily on the basis that the appellants' version that the agreements were fraudulent was untrue and the appellants had not illustrated any bona fide defence. It put up substantial evidence pertaining to the circumstances surrounding the conclusion of the agreements, which involved the manager of Cedar Lodge, the wife of the second appellant, payments made by the first appellant of the contractually agreed rental payments for a period. They contended that the appellants' version was without merit and so deficient that they failed to demonstrate good cause for the rescission of the default judgment. It was further contended that the second appellant, the deponent to the appellants' affidavits, as an officer of the court had a particular duty to be honest and to disclose all facts and circumstances to the court and had to be cautious about making "wild allegations of fraud", which duty he did not comply with. In reply, the appellants did not meaningfully deal with many of the averments made by the respondents and responded in broad terms.

[10] The court *a quo* considered the main dispute between the parties as being whether the appellants have shown a bona fide defence¹. It considered the circumstances leading up to and surrounding the signing of the agreements, relied on by the respondents in disputing appellants' averments of fraud, and raised concern about the absence of detail and explanations in the appellants' affidavits. The court *a quo* concluded that the appellants had to show not only that they had a defence but also that such defence was bona fide. The court *a quo* stated: "*In the absence of proper explanations, the second applicant's bald denials and averments in the founding and replying affidavits are not plausible*".

[11] The court *a quo* concluded:

¹ Judgment court a quo, para [13]

"In conclusion therefore, the unacceptably bald denials and averments in the applicants' founding affidavit, particularly when combined with the total absence of proper explanations in the replying affidavit, fall far short of what is required to show a bona fide defence, that, in my view, the applicants have not shown that the defence raised is bona fide. In so far as I have a discretion nevertheless to grant rescission notwithstanding my conclusion that the applicants had not shown that their defence is bona fide, I decline to exercise that discretion in favour of the applicants. The second applicant, an attorney, had the opportunity to provide the necessary fleshed out explanations in reply and to submit a supporting affidavit from his wife. The fact that he provided neither and persisted with no more than generalized denials and averments, in my view, do not justify the exercise of a discretion in favour of the applicants.

[12] It was not disputed that the first appellant's registered address differed from the service address. Only if the agreements were concluded between the parties, would the respondents be entitled to rely on a *domicilium* address. It was also not disputed that the second appellant resided in Midrand and did not practice or reside at the Louis Trichardt "*domicilium* address" reflected on one of the guarantees. The other two guarantees contained no *domicilium* address. The copies of the agreements in the appeal record are unclear and illegible in various respects, specifically in relation to the manuscript details of the addresses on the guarantees. The copies of the master rental agreements are also poor and difficult to read.

[13] On this issue, the court *a quo* held: "

"I should add that it is, in any event, not clear to me that domicilia citandi et executandi had been inserted in each of the guarantees. The manuscript details of the address on the first guarantee...are illegible. In the case of the second guarantee dated 30 July 2018...the manuscript details are so illegible that it is not clear whether any address has been inserted. In the case of the third guarantee...dated 29 August 2018, as far as I can see, no address has been inserted.

[14] The court *a quo* nevertheless concluded:

"Given that I have found that the applicants have not shown that the defence raised is bona fide, it follows that the respondents were entitled to serve the combined summons on the first applicant at the chosen domicilia citandi et executandi. Consequently, the default judgment granted is not void ab origine as contended by the applicants. Furthermore, with regard to the service of the summons on the second applicant, insofar as there may have been service at an incorrect address, this is, in my view, no reason for me to exercise any discretion in favour of the applicants given my finding that a bona fide defence has not been shown".

[15] The appellants argued that the default judgment should be rescinded in terms of r 42(1)(a) considering the service issues already referred to. It was further argued that

the appellants have, in any event, illustrated good cause for rescission and illustrated, first, that they were not in wilful default and second, a valid and bona fide defence to the respondents' claims under r 31(2)(b).

[16] For purposes of a rescission under r 42(1)(a), if there is a procedural defect in the judgment it is not a requirement for an applicant for rescission to show good cause². Service at an incorrect address would constitute such procedural defect and would illustrate that the judgment was erroneously granted in the absence of the appellants.

[17] If the appellants' defence that the agreements were not signed by the second appellant and were fraudulent is thus established at trial, the respondents did not establish that the appellants had chosen the service addresses as *domilicia citandi et executandi* and service of the summons on them was not proper service. Moreover, two of the guarantees did not contain any *domicilium* addresses and in relation of those claims against the second appellant, there was no proper service on him. In relation to those claims at least, it must be concluded that the default judgment was erroneously granted in the absence of the appellants and the default judgment falls to be rescinded under r 42(1)(a)³.

[18] Considering the requirements of a rescission application under r 31(2)(b), the issues raised by the appellants pertaining to the service illustrate that it cannot be concluded that the appellants were in wilful default of opposing the action⁴.

[19] In the rescission application, the appellants were required to make out a *prima facie* defence in the sense of setting out facts, which if established at trial, would constitute a defence. They need not fully deal with the merits of the case and produce evidence that the probabilities are actually in their favour.⁵

² *Rossiter v Nedbank* [2015] ZASCA 196; *Lodhi 2 Properties CC v Bondev Developments (Pty) Ltd* 2007 (6) 67 (SCA)

³ *Tshabalala and Another v Peer* 1979 (4) SA 27 (T)

⁴ *Harris v Absa Bank Ltd* 2006 (4) SA 527 (T) at 530A

⁵ *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* 2017 JDR 1655 (SCA)

[20] If the appellants were to establish that the signatures which appear on the agreements on which the respondents rely were indeed fraudulent, it would vitiate the agreements and constitute a complete defence to the respondents' claims.

[21] The respondents relied on *Odendaal v Ferraris*⁶ in arguing that the appellants relied on fraud in vague and unspecific terms and failed to set out all the facts which underpin the alleged fraud in clear and specific terms. The arguments advanced by the respondents, are predicated on the contention that the appellants' version is improbable and stated in vague and ambiguous terms, thus lacking bona fides.

[22] Although the appellants did not meaningfully deal with various of the averments made by the respondents in their answering affidavits, and no confirmatory affidavit was produced by the second appellant's wife who was involved in running the business conducted by the first appellant, it is not the duty of this court to fully evaluate the merits of the appellants' defence or determine the ultimate success of such defence on the probabilities. It is sufficient for the appellants to illustrate that their defence *prima facie* has some prospects of success and to illustrate the existence of a triable issue⁷.

[23] It is apposite to refer to *RGS Properties (Pty) Ltd v eThekweni Municipality*⁸, wherein it was held:

"Therefore, in my view, in weighing up facts for rescission, the court must on the one hand balance the need of an individual who is entitled to have access to court, and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default judgment being granted in the first instance. In its deliberation the court will no doubt be mindful, especially when assessing the requirement of reasonable cause being shown, that while amongst others this requirement incorporates showing the existence of a bona fide defence, the court is not seized with the duty to evaluate the merits of such defence. The fact that the court may be in doubt about the prospects of the defence to be advanced, is not a good reason why the application should not be granted. That said however, the nature of the defence advanced must not be such that it prima facie amounts to nothing more than a delaying tactic on the part of the applicant".

⁶ 2009 (4) SA 313 (SCA) at [42]

⁷ *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* supra paras [13], [17]

⁸ 2010 (6) SA 572 (KZD) para[12]

[24] The signature of the agreements by the second appellant, both on his own behalf and on behalf of the first appellant is expressly denied and it is averred that those signatures are fraudulent. *Prima facie*, the nature of the fraud defence raised by the appellants is not unsustainable at law and a determination of the probabilities and the ultimate prospects of success of that defence at this stage is not appropriate. It cannot in these proceedings be concluded that the appellants' averments lack bona fides or that no triable issue is raised with some prospects of success.

[25] For these reasons it is concluded that the appeal must succeed. It follows that the referral of the judgment to the Legal Practice Council also falls to be set aside.

[26] The normal principle is that costs follow the result. There is no reason to deviate from this principle. The costs of the application for leave to appeal were reserved. Those costs must follow the result. The appellants sought the costs of two counsel. It was not disputed that the employment of two counsel was justified.

[27] The following order is granted:

[1] The appeal is upheld with costs, including the costs of the application for leave to appeal and the costs of two counsel, where employed;

[2] The order of the court a quo is set aside and replaced with the following order:

“[1] The default judgment granted on 19 August 2020 is rescinded and set aside;

[2] A notice of intention to defend is to be delivered within ten days of date of this order;

[3] The respondents are directed to pay the costs of the application.”

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING :04 May 2022

DATE OF JUDGMENT :14 June 2022

APPELLANTS' COUNSEL : Adv. K. Tsatsawane SC
: Adv. H. Salani

APPELLANTS' ATTORNEYS : Ramatshila-Mugeru Attorneys Inc.

RESPONDENTS' COUNSEL : Adv. JG. Botha

RESPONDENTS' ATTORNEYS : ODBB Attorneys