

REPUBLIC OF SOUTH AFRICA



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

Case Number: A034592/2023
Court *a quo* Case Number: 30299/2013

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES/NO |

23 November 2023 _____

DATE

SIGNATURE

In the matter between:

NATIONAL HOME BUILDERS REGISTRATION COUNCIL

Appellant

(Applicant *a quo*)

and

VERSATILE POLYCRETE HOUSING CC

Respondent

(Respondent *a quo*)

JUDGMENT

THE COURT

Introduction

[1] This appeal is with the leave of the Supreme Court of Appeal. The appeal lies against the whole of the judgment and order granted by Senyatsi J on 31 January 2022 in terms of which he refused an application to rescind an order of Tsoka J granted on 06 February 2022 which struck out the appellants defences in an action for damages.

Background

[2] The appellant is the National Home Builders Registration Council which is established in terms of section 2 of the Housing Consumers Protection Measures Act.¹ It is mandated, *inter alia*, to regulate the home building industry and it has powers to discipline home builders who fail to comply with the Act.

[3] In 2008, in terms of its disciplinary powers, the appellant suspended the registration of the respondent for a period of 1221 days.

[4] In that period the respondent was unable to trade, and it alleges that as a result it suffered damages in the amount of R 7 796 550.

[5] Five years later in 2013, the respondent instituted an action for recovery of these alleged damages. The appellant raised good defences in well drafted pleadings. The respondent contended that the pleadings were closed and invoked the discovery and trial preparation provisions in the Uniform Rules of Court.

[6] The subsequent attendances (or rather non-attendances) to the matter by the legal representatives of the appellant represent a high-water mark of delinquency in relation to the adherence to the rules of court.

[7] The court *a quo* was justifiably of the view that the explanation by the appellant to the effect that it simply left the matter in the hands of its attorneys for years without being alerted to the chaos that was being meted out in the discovery and trial preparation phase of the matter was untenable. We agree with the court that this position is particularly egregious, especially given that the appellant is equipped with in-house legal assistance.

¹ 95 of 1998.

[8] The court a quo, continued:

“Even if I am incorrect in coming to the decision based on the abovementioned grounds another consideration I have given, is the evidence adduced by the respondent on the background of the litigation. ... *Having regard to the background I hold the view that the applicant has failed to provide it has a good defence to the claim.* The application for rescission must fail.” (Emphasis added.)

[9] An applicant for rescission of a judgment granted by default, must demonstrate good/sufficient cause.² The terms good or sufficient cause are used interchangeably.

[10] The Constitutional Court in the *Zuma*,³ restated the requirements for the granting of an application for rescission to be satisfied as follows:

“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.”⁴

[11] The appellant alleged that although its attorney informed it of a trial date, he did not inform it of the order compelling it to respond to the request for further particulars. Had it known of the order it would have complied. As stated above this barely passes muster.

[12] Having said this, there is redemption to be found in the pleadings in the action. The pleadings formed part of the documents to be considered by the court.

² *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* [2003] ZASCA 36; 2003 (6) SA 1 (SCA) at 9C and *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28; 2021 JDR 2069 (CC); 2021 (11) BCLR 1263 (CC) (“*Zuma*”) at para 71.

³ *Id.*

⁴ See *Zuma* (fn 2) at para 71.

- [13] Reference to the pleadings evidences an engagement with the case of the respondent in the action that is such that it discloses a number of triable issues.
- [14] These triable issues include a defence of prescription raised by way of special plea. The respondent did not replicate to the special plea. This leaves the plea unanswered.
- [15] This could mean either that there is no answer (in which event the plea must succeed) or that the respondent had, itself, neglected to plead its case. In the latter event the pleadings would not have been closed and the respondent thus not entitled to the compelling orders relied on to strike out the defences.
- [16] In relation to the second defence raised a similar lack of engagement with the defence by the respondent emerges. It is not in dispute that the loss allegedly suffered arose because of the appellant's disciplinary action.
- [17] The appellant acted in terms of the powers vested in it in terms of the Housing Consumers Protection Measures Act (the Act).⁵ In terms of section 10(5) of the Act the defendant's liability for loss or damage arising from anything done or omitted to be done in good faith is excluded.
- [18] Once again, the respondent made no replication to this defence and it stands unanswered. If the respondent wished to rely on bad faith this would have to be pleaded.
- [19] The upshot is that the appellant has pleaded two good defences which remain unanswered.
- [20] In *Harris v ABSA Bank Ltd t/a Volkskas*,⁶ Moseneke J, stated that:

“A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation

⁵ 95 of 1998.

⁶ *Harris v ABSA Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T).

‘Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole’.⁷

[21] We are of the view that the court *a quo* did not weigh the admittedly poor explanation for default against the nature and strength of the defences raised. It focused only on the explanation proffered, which is a misdirection.

[22] The defences raised demonstrate a high probability of success.

[23] At the hearing the respondent’s counsel was unable to respond to the court’s questions as to whether, it was even open to the respondent, to apply for the special plea of prescription to be struck out in the light of the lack of answer thereto.

[24] A court hearing an application to strike out a defence is not at liberty to ignore a defence made out simply on the basis that a litigant has failed to take an important procedural step.⁸

Conclusion

[25] We are of the view that the appellant’s albeit weak explanation to the effect that it trusted that its attorney was dealing with the matter under circumstances where he had actually abandoned his practice ought to have been accepted, particularly in the light of its complete defences.

[26] The court *a quo* did not weigh the explanation given against the defences raised.

[27] We are satisfied that the court *a quo* misdirected itself and that the rescission ought to have been granted.

Costs

[28] There is no reason why the costs should not follow the result.

Order

⁷ Id at para 10.

⁸ See *Capitec Bank Limited v Mangena*, unreported judgment of Wilson J of the South Gauteng High Court, Johannesburg handed down under Case No 28660/2021 on 16 March 2023.

[29] In the premises, the following order is made:

[1] The appeal is upheld with costs.

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

“The order of the court striking out the appellant’s defence is rescinded and set aside with costs”.

M L TWALA
JUDGE OF THE HIGH COURT
JOHANNESBURG

D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

S MAHOMED
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Court. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 23 November 2023.

Heard: 25 October 2023

Delivered:

23 November 2023

APPEARANCES:

For the Appellant:

Advocate R Soloman SC

Instructed by:

Gildenhuis Malatji Inc Attorneys

For the Respondent:

Advocate van Rooyen

Instructed by:

Greyling Orchard Attorneys