



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

Date:

Signature:

CASE NO: A2023/041004

COURT A QUO CASE NO: 22/0714

DATE: 30 April 2024

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Appellant / Defendant

and

UNAHINA BUSINESS SOLUTIONS (PTY) LIMITED

Respondent / Plaintiff

Coram: Wright, J and M Van Nieuwenhuizen, AJ

Heard on: 25 April 2024

Delivered: 30 April 2024

FULL BENCH OF APPEAL JUDGMENT

M VAN NIEUWENHUIZEN, AJ:

- [1] The appellant/defendant applied for the rescission of a default judgment that the respondent/plaintiff had obtained against it. The respondent had sued as a cessionary in terms of a cession agreement of the books debts of the cedent, one Biggietech (Pty) Limited (hereinafter referred to as "*Biggietech*").
- [2] The summons was issued on the 22nd of June 2022 and served on the 23rd of June 2022. The defendant failed to defend the action. The Court *a quo* entered a judgment by default in favour of the respondent on 13 September 2022. The appellant's application for the rescission of the judgment was opposed and argued before the Regional Magistrate Mr Chaitram in the Johannesburg Regional Court on 20 February 2023. The Court *a quo* dismissed the appellant's application for a rescission.¹ The appellant requested written reasons on the 30th of March 2023, which written reasons of the Magistrate was received by the parties on the 5th of April 2023.
- [3] It is against this decision of the Magistrate to dismiss the appellant's application for a rescission on the 20th of February 2023 that the appellant seeks to appeal.
- [4] On the 3rd of May 2023 the appellant noted an appeal, which became opposed.²
- [5] The appellant served and filed heads of argument which was duly served on the respondent on the 11th of July 2023.³
- [6] The appellant has subsequently allowed its appeal to lapse. What was

¹ CaseLines, 002-1 to 002-6 (Magistrate's written reasons for judgment in terms of Rule 51(1))

² CaseLines, 003-3 to 004-3

³ CaseLines, 005-1 to 005-3

outstanding was the record of the proceedings.

REINSTATEMENT AND CONDONATION APPLICATIONS

[7] The appellant states in its updated practice note⁴ that since the appellant's laboured under the "*bona fide belief*" that, the proceedings were not recorded, upon an enquiry from the Registrar at the Regional Court, same proved to be otherwise. The appellant states that for this reason, a request for a transcription was made and upon receipt thereof, same was uploaded on to CaseLines on 28 August 2023. However in its application for condonation the appellant states under oath that "*the appeal record was not available at the time*".⁵

[8] The reinstatement application was only served on the 10th of April 2024,⁶ and the condonation application was served on the 12th of April 2024,⁷ after it was pointed out in the respondent's heads of argument that there had been no application. The respondent states that at the time of filing of the heads of argument no reinstatement application had been served.⁸

[9] The respondent argued that the condonation and reinstatement applications are not formally opposed as it wishes to dispose of the appeal without yet further delay, which such opposition may occasion. The respondent states that it shall abide the Court's decision in this regard.⁹ The respondent states that it was in the process of taking execution steps in light of the lapsed appeal, which had not been

⁴ CaseLines, 081-6

⁵ CaseLines, 017-9, para 6.4, Founding Affidavit, Condonation Application. "*Although the appeal record was not available at the time, and we proceeded to draft the applicant's heads of argument. This was duly served and filed on 10 July 2023. What remained outstanding was the appeal record.*"

⁶ Eleven Court days prior to the hearing of the appeal

⁷ Nine Court days before the hearing of the appeal

⁸ It was merely uploaded to CaseLines in November 2023

reinstated. The respondent's stance is that it does not wish for the matter to be further delayed and that the respondent not be further prejudiced by the tardiness of the appellant.

[10] The respondent in its supplementary heads¹⁰ argues that the entire attitude adopted by the appellant in respect of this appeal had been slack and lax, that the appellant had been haphazard and tardy and in circumstances where the approach evidences no intention by them, as *dominus litis*, to advance the matter.

[11] The respondent suggests that, should this Court exercise its discretion in not reinstating the appeal, no injustice would be done and it would be contrary to the interests of justice to allow a party who ignores the simple Rules of Practice, such as service, to flout the Rules and still be allowed to proceed.¹¹ The respondent argues that the appellant entered into a contract to be supplied with goods was in fact supplied with goods to which it raised no complaint and omitted to make payment in respect of part of the purchase price.¹²

[12] The appeal is reinstated.

THE MERITS OF THE RESCISSION APPLICATION

[13] The appellant's rescission application in the Court *a quo* was launched in terms of the provisions of section 36(1)(b) read with Rule 49(3) and

⁹ The respondent has filed and uploaded a notice to abide the decision of the Court insofar as the application to reinstate the appeal dated 15 November 2023 is concerned and the condonation application of 12 April 2024 by the appellant. Notice to abide, CaseLines 020-1 to 020-3

¹⁰ CaseLines 021-2, Supplementary Heads of Argument

¹¹ CaseLines 021-2, Supplementary Heads of Argument

¹² It is common cause that three payments were made to Biggietech in reduction of what PRASA owed to Biggietech.

(8).¹³

[14] Section 36(1)(b)¹⁴ reads:

“(1) *The Court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), suo motu –*

(d) rescind or vary any judgment granted by it which was void ab origine,” (Emphasis added)

[15] Rule 49(3) reads:

“Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant’s absence or default and the grounds of the defendant’s defence to the claim.” (Emphasis added)

[16] Rule 49(8)¹⁵ reads:

“Where the rescission or variation of a judgment is sought on the ground that it is void from the beginning, or was obtained by fraud or mistake, the application must be served and filed within one year after the applicant first had knowledge of such voidness, fraud or mistake.”

¹³ Rules regulating the conduct of the proceedings of the Magistrates’ Courts of South Africa, Magistrates’ Court Act 32 of 1944

¹⁴ Magistrates’ Court Act 32 of 1944

¹⁵ Rule 49(8) essentially gives an appellant who alleges a judgment is void *ab origine* a year to apply for rescission. The appellant is within this timeframe. The Magistrate correctly held that “as the defendant has, in any event, launched the application within the usual twenty limit imposed by Rule 49(1), the time limit issue does not arise and the plaintiff, correctly, did not pursue any point in this regard”.

[17] In the SCA decision of **Bayport Securitisation v Sakata**¹⁶ the Court held that:

“A proper reading of the rules makes it plain that where the objection is that the judgment is void ab origine compliance with rule 49(3) is preemptory. The defence to the claim must be set out with sufficient particularity to enable the court to decide whether there is a valid and bona fide defence.” (Emphasis added)

[18] Cited in **Bayport** with approval is the earlier SCA decision of **Leo Manufacturing CC v Robor Industrial (Pty) Ltd**,¹⁷ wherein the Court elaborated on the requirements and the appellant for rescission in such circumstances must meet, namely:

*“... An appellant seeking rescission of a default judgment on the grounds that the judgment in question is void ab origine must (in terms of Rule 49(3)) set out a defence “with sufficient particularity” so as to enable the Court to decide whether or not there is a valid and bona fide defence.”*¹⁸

[19] In the rescission application in the Court *a quo*, the appellant was required to meet the requirements of Rule 49(3) namely *“It must set out the reasons for the defendant’s absence or default and the grounds of the defendant’s defence to the claim”*.

[20] The defendant failed to address the reasons for its default at all in its application for rescission.¹⁹ The Magistrate correctly held that the papers explain what steps the appellant had taken after it had discovered that judgment had been entered against it, but it says nothing

¹⁶ (**“Bayport”**) 1320/17 2019 ZASCA 73 (30 May 2019)

¹⁷ (**“Leo Manufacturing”**) 2007 (2) SA 1 (SCA)

¹⁸ See **Leo Manufacturing** at para 7

about why it allowed the judgment to have been taken, in other words why it did not defend the action.²⁰

[21] The Magistrate correctly held that regarding the appellant's defence to the claim the appellant's papers were "somewhat muddled".²¹ The Court *a quo* stated that it nevertheless will attempt to isolate the key points made by the defendant in identifying its defence.

[22] In the Court *a quo* the appellant merely raised technical issues and a defence(s) had not been raised in respect of the merits.²²

TECHNICAL ISSUES RAISED BY THE APPELLANT IN THE COURT A QUO

[23] The appellant essentially raised four grounds for rescission of the judgment on the basis of the appellant possessing a valid and *bona fide* defence that being:

[23.1] the application of section 133 of the Companies Act 71 of

¹⁹ Whilst wilful default on the part of the appellant/applicant is no longer a substantive or compulsory ground for refusal of an application for rescission, the reasons for the applicant's default remain an essential ingredient of the good cause to be shown. ***Harris v ABSA Bank t/a Volkskas*** 2006 (4) SA 527 (T) at 529E-F; ***Nale Trading CC v Freyssinet Posten (Pty) Ltd in re Freyssinet Posten (Pty) Ltd v Nale Trading (Pty) Ltd*** (Unreported GJ Case No. 26992/2019 dated 22 September 2021 at para 14); ***Thondlana v ABSA Bank Ltd*** (Unreported GJ Case No 2941/2017 dated 3 March 2022 at para 26); ***Olisa t/a African Vibes v TUPA 2012 (Pty) Ltd*** (Unreported GJ Case No. A3150/2021 dated 11 January 2023) at para 11. The wilful and negligent nature of the defendant's default after the amendment to the Rules in 1992 becomes one of the various considerations which the Court will take into account in the exercise of its discretion to determine whether or not good cause is shown. ***De Witt's Autobody Repairs (Pty) Ltd v Fedgen Insurance Co Ltd*** 1994 (4) SA 705 (E) at 708G; ***Nale Trading CC v Freyssinet Posten (Pty) Ltd in re Freyssinet Posten (Pty) Ltd v Nale Trading (Pty) Ltd*** (*supra*) at para 13; ***Thondlana v ABSA Bank Ltd*** (*supra*) at para 26; ***Olisa t/a African Vibes v TUPA 2012 (Pty) Ltd*** (*supra*) at para 11

²⁰ CaseLines, 002-2, para 4 of Judgment. The Magistrate in paragraph 4 states "According to the Sheriff's return of service, the summons was served upon an administrator of the defendant, one B Makaza. Yet the defendant elected to remain silent about its response to the summons. At the hearing, the defendant's counsel conceded that the requirement had not been addressed."

²¹ CaseLines, 002-2, para 5 of Judgment

²² The appellant on more than one occasion in its application for rescission and in its argument in the Court *a quo* conceded that there is no defence on the merits

2008;

[23.2] lack of jurisdiction of the Magistrates' Court to hear the matter;

[23.3] no *locus standi* on the part of the plaintiff/respondent;

[23.4] material non-joinder of Biggietech.

Defence - Application of section 133 of the Companies Act 71 of 2008

[24] It appears from the founding affidavit in the rescission application in the Court *a quo* that the appellant alleges that the provisions of section 133 of the Companies Act 71 of 2008²³ creates a bar to the proceedings against the appellant.²⁴ This defence was however not pursued during argument in the Court *a quo* and neither during the appellant's argument in this Court.

[25] Section 133 states that:

“(1) *During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except ...*” (Emphasis added)

[26] From the papers it is apparent that the appellant (i.e. PRASA) is not in business rescue, however a subsidiary of PRASA namely Autopax (Pty) Limited (hereinafter referred to as “Autopax”), is in business rescue.

[27] This is of no consequence to the respondent for its claim is against the

²³ Companies Act 71 of 2008

²⁴ CaseLines, 014-13, para 6.5; CaseLines, 014-27, para 14.1

appellant who is PRASA, not Autopax. It is apparent that the agreement entered into was between Biggietech and the appellant and not between Biggietech and Autopax. All documents, *ex facie* evidences the aforesaid.²⁵

[28] The appellant has not established a *bona fide* defence.

Defence – Lack of jurisdiction

[29] The Johannesburg Magistrate’s Court had jurisdiction to entertain the rescission application. From the papers it is apparent that the appellant’s head office has relocated to Johannesburg. Section 28(1)(a) of the Magistrates’ Court Act reads:

“28. ***Jurisdiction in respect of persons***

(1) *Save in any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other:*

(a) *Any person who resides, carries on business or is employed within the district or regional division;”*

[30] The respondent argues that the initial and aborted attempt to institute the proceedings in Pretoria has nothing to do with the allegation that the plaintiff wanted to sue Autopax²⁶ – it relates solely to the location of the

²⁵ CaseLines, 014-159 to 014-164, para 32-48, answering Affidavit Rescission Application

²⁶ The respondent alleges that it was referred by representatives of the appellant to Autopax’s business rescue practitioner in Pretoria to institute a claim there – in order to expedite payment. The respondent alleges that it was misled by representatives of the appellant in this regard. The respondent however alleges that other payments made were made directly by PRASA.

appellant's head office.²⁷

[31] The summons was received at the Johannesburg Head Office of the appellant as conceded to by the appellant. No other address is alleged anywhere in the appellant's founding or replying papers or affidavits in the Court *a quo*. Paragraph 3 of the respondent's particulars of claim reads that:

"The above Honourable Court has jurisdiction by virtue of the fact that the defendant is domiciled within its area of jurisdiction."

[32] The defendant/appellant is PRASA.

[33] The Magistrate correctly held that the defendant has conceded in its heads of argument that the defendant's head office is within the area of the Court *a quo*'s jurisdiction.²⁸ It appears from the record in the Court *a quo* that the appellant did not pursue this defence in its argument in this Court.

[34] This defence too is unsustainable.

Defence – Lack of *locus standi* to sue

[35] The cedent/Biggietech was precluded from entering into a sub-contract pertaining to the agreement that it entered into with the appellant/defendant.

²⁷ E-mails from April 2022 are attached to the answering affidavit in the rescission application and a confirmatory affidavit from the correspondent attorneys who attended to locating the appellant's head office are attached to the answering affidavit. It appears that initially the respondent thought that the appellant's head office was still in Pretoria, however was directed to its head office in Johannesburg

²⁸ No further grounds of jurisdiction was necessary. The Magistrate also correctly states that the appellant seems to conflate the concept of an address based on one's domicile as opposed to an address that serves as *domicilium citandi et executandi*

[36] The appellant/defendant relies on a term in its agreement with Biggietech that reads:

“The supplier [Biggietech] may not assign or sub-contract any part of this order/contract without the written consent of PRASA.”

[37] The appellant/defendant contends that Biggietech was precluded from entering into a subsequent joint venture agreement with the respondent/plaintiff without the appellant/defendant’s consent.

[38] The appellant appears to contend, therefore, that the cession agreement entered into between the respondent and Biggietech was unenforceable and invalid and that it ought to have been Biggietech who should have sued.

[39] The Magistrate correctly held that this point is misidentified.²⁹

[40] The Magistrate correctly found that the joint venture agreement does not constitute an “assignment” or a “sub-contract” as contemplated by the agreement entered into between Biggietech and the appellant.³⁰

[41] In our view the Court *a quo* therefore correctly held that the appellant/defendant may raise any defence against the respondent/plaintiff that it could have raised against Biggietech.³¹ However, the existence of such a defence is unrelated to the plaintiff’s *locus standi* to sue on the strength of the deed of cession itself. The plaintiff derives its *locus standi* from the deed of cession. The Court *a quo* furthermore correctly held that there was no merit to this point.³²

²⁹ CaseLines, 002-3, para 5.4, Judgment in Court *a quo*

³⁰ CaseLines, 002-4, para 5, Judgment in the Court *a quo*

³¹ The appellant did not raise a defence of breach of contract on the merits.

³² CaseLines, 002-3, para 5.2, Judgment in the Court *a quo*

- [42] Cession, in order to be effective, does not require the prior knowledge, consent, occurrence or co-operation of the debtor (appellant *in casu*). The debtor has no right of veto. The cession is complete when the cedent and the cessionary reach finality on the act of cession. At that moment the right is transferred from the one creditor to the other. It is furthermore not necessary for the appellant to have received notice after the event that a cession has occurred.³³
- [43] It is trite that the cession is fully operative even though the debtor may be wholly unaware of it.
- [44] The debtor is not actively engaged in the process of cession. That is because it should not in principle matter to the debtor whether he or she renders his or her performance to the cedent or to the cessionary and where, in the exceptional case, it may make a difference to the debtor or to the legal consequences of the debtor's performance, the debtor is protected.³⁴
- [45] Biggietech ceded its book debts to the respondent. The respondent/plaintiff sued in terms of the cession of the book debts. The respondent correctly argues that the underlying cause of the debt owed to Biggietech matters not, in the context of the cession. All that matters is whether monies are owed to Biggietech, which is not denied by the appellant. The respondent argues that the tender was never performed by the respondent/plaintiff but by Biggietech. It is clear that what was ceded by Biggietech to the plaintiff are the following:

³³ **Jacobson's Trustee v Standard Bank** (1899) 16 SC 2001 at 203; **J MacNeal v Insolvent Estate of R Robertson** (1882) 3 NLR 190; **Brook v Jones** [1964] 1 All SA 446 (N); 1964 (1) SA 765 (N) at 766 and the cases cited therein; **Turbo Prop Service Centre CC v Croock t/a Honest Air** [1997] 1 All SA 18 (W); 1997 (4) SA 758 (W); **Sasfin Bank Ltd v Soho Unit 14 CC t/a Aventura Eiland** 2006 (4) SA 513 (T); **National Sorghum Breweries Ltd v Corpcapital Bank Ltd** [2006] 2 All SA 376 (SCA); 2006 (6) SA 208 (SCA); **Van Staden v FirstRand Ltd** 2008 (3) SA 530 (T)

³⁴ The debtor is protected if he or she performs in ignorance of the cession. The right is transmitted with all its attributes, benefits and privileges; Law of South Africa, Vol 3 (Cession), para 133, page 93 and para 176, page 132

“The company hereby cedes, assigns and transfers unto and in favour of the creditor all of the company’s right, title and interest in and to all book debts and other debts (together with rights of action arising thereunder), present and future due and to become due to the company, for whatsoever cause of debt arising and by whomever owing.”

[46] PRASA not only accepted delivery of the relevant goods from the respondent, as kind of agent for Biggietech, without quibble, but made three payments to Biggietech in reduction of what PRASA owed to Biggietech.

[47] Neither the joint venture agreement between Biggietech and the respondent, nor the cession agreement under which Biggietech ceded its rights under the Request for Quotation for supply and delivery of bus spares (hereinafter referred to as “RFQ”) to the respondent contained any clause purporting to transfer any obligation owed by Biggietech to PRASA. The RFQ understandably prohibits such attempt at transfer of obligations. The RFQ does not prohibit cession of rights, for example the right to payment from PRASA, by Biggietech to the respondent.

[48] We find that this ground too is unsustainable.

Defence – Non-joinder of Biggietech

[49] The appellant argues that the cessionary/Biggietech should be joined as a party to the proceedings. The respondent correctly argues that the reasoning of the appellant is uncertain and difficult to decipher from the papers in the legal context.³⁵ The respondent correctly argues that the intention of the parties was for the plaintiff/respondent to be able to step into the shoes of Biggietech and collect money owed to it. No requirement exists for Biggietech to be a co-plaintiff or co-appellant ex

³⁵ The director of Biggietech has filed a confirmatory affidavit in the Court *a quo* in which he confirms what is stated by the respondent

facie from the agreements or *ex lege* for that matter.

- [50] The Magistrate correctly held that the appellant has failed to show any reasons of substance for Biggietech's involvement. The appellant/defendant argued that Biggietech has a direct and substantial interest in the plaintiff's claim and ought to have been joined to the proceedings. On the facts as found by the Magistrate, Biggietech as a cedent has no real interest in the matter. We agree with the Magistrate's findings in this regard.
- [51] The Magistrate correctly held that the appellant failed to meet both legal requirements for a successful rescission of the judgment.
- [52] The appellant has not shown a probability of success on the merits.³⁶

COSTS IN THE COURT A QUO

- [53] We cannot fault the costs order of the Magistrate. Costs are in the discretion of the Court *a quo*. The Court *a quo*'s reasoning for granting a punitive costs order against the appellant was that in the Court *a quo*'s view the appellant failed to get out of the proverbial starting blocks and that it was not even necessary to hear from the plaintiff/respondent except on the question of costs. The Court found that the scale of costs sought by the respondent was merited.

COSTS OF THIS COURT

- [54] The respondent argues that having regard to the haphazard approach by the appellant and general tardiness in relation to the matter it should be awarded costs on a punitive scale. The respondent alleges various

³⁶ ***Brown v Chapman*** 1928 TPD 320 at 328 which has confirmed in various cases in a long line of judgments; ***Olisa t/a African Vibes v TUPA 2012 (Pty) Ltd*** (Unreported GJ Case No. A3150/2021 dated 11 January 2023) at para 10; ***Securiforce CC v Ruiters*** 2012 (4) SA 252 (NCK) at 261H

non-compliance issues with the Rules of the Court by the appellant relating to:

[54.1] the initial lapse of defending the action;

[54.2] the delay in making application to reinstate the appeal;

[54.3] the delay in serving the application on the respondent.

[55] This Court finds that the appellant has failed to provide an adequate explanation for their failure to defend the summons, provided no defence on the merits and has raised grounds of defence that are neither valid nor *bona fide*. We are of the view that the costs of the appeal be on the party and party scale. The complaints about the prosecution of the appeal do not warrant punitive costs. Given the recent addition of Rule 67A, effective from 12 April 2024, we are of the view that the costs of the appeal as from 12 April 2024 should be on scale A. This case is about as elementary as a High Court case can get. See ***Mashavha v Enaex Africa (Pty) Ltd*** (2022/18404) [2024] ZAGPJHC 387 (22 April 2024)

ORDER

[56] Accordingly, we make the following order:

[56.1] The appeal is reinstated and condonation is granted to the appellant for the late prosecution of the appeal. The parties shall carry their own costs in the reinstatement and condonation application.

[56.2] The appeal is dismissed with costs.

[56.3] The costs of the appeal, up to and including 11 April 2024 shall

be on the party and party scale.

- [56.4] The costs of the appeal, from 12 April 2024 onwards shall be at scale A on the party and party scale.

M VAN NIEUWENHUIZEN

*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

WRIGHT, J

I agree/disagree

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/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 on 30 April 2024.

HEARD ON: 25 April 2024

DATE OF JUDGMENT: 30 April 2024

FOR APPELLANT: Advocate Terence W Snyders
Cell: 060 737 1830
E-mail: terencewsnyders@rsabar.com

Maake Clement Inc. Attorneys
E-mail: maakeclement.attorneys@gmail.com
admin@maakecminc.co.za
clement@maakecminc.co.za

INSTRUCTED BY: Ref: CLE/006/PRASALIT

FOR RESPONDENT: Attorney Mr T J C Dunn

INSTRUCTED BY: TJC Dunn Attorneys
E-mail: tim@tjcdunnattorneys.co.za