



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 2022-26923

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: NO
[3] REVISED: NO

SIGNATURE

DATE: 19 FEBRUARY

2024

In the matter between:

DANFORD DAMBA

Applicant / Defendant

and

REDDY CARGO SERVICES (PTY) LTD

Respondent / Plaintiff

Summary:

Application for rescission of a default judgment – Condonation for delay in bringing rescission application. Consideration of a bona fidei defence.

JUDGMENT

Z KHAN AJ

INTRODUCTION

[1] This is an application for the rescission of a default judgment granted against the Applicant on 14 February 2023, premised on Uniform Rule 42(1)(a) and Rule 31(2)(b). The Applicant alleges that he did not receive the summons, was not aware of the default judgment being taken and became aware of the Judgment on 23 March 2023, when the Sheriff of the Court attempted to arrange a date with Applicant to receive the warrant of execution. On 3 April 2023, the Sheriff attached movables at the address cited in proceedings. Applicant indicates that such attached movables are the belongings of a third party.

[2] It is Applicants assertion that he is a bystander in a dispute between the Respondent and an independent party called Fuel Giants (Pty) Ltd. This entity is extraneous to this litigation. The allegation is that Fuel Giants (Pty) Ltd is a debtor of the Respondent and not Applicant.

[3] Applicant says that he is the owner of a company called Dantak Incorporated, which trades in the transportation of fuel products. Applicant and Dantak are

alleged to hold no interest in Fuel Giants, an assertion that is called into doubt based on the evidence put forward by the Respondent. Dantak was utilising the services of Fuel Giants to transport fuel to its customer. The Respondent took control of Fuel Giants' tanker transporting the fuel of Dantak. It is unclear if the Respondents assumption of possession of the tanker was pursuant to an order of court but it appears that the Respondents action in taking possession of the tanker arise as a result of a financial dispute between Respondent and Fuel Giants, as per Applicant. Respondents version of events are in contrast to what Applicant says.

[4] Applicant says that he engaged with Respondent for the release of Dantaks fuel that was housed within the tanker but this was refused. Applicant then threatened Respondent with criminal action for the theft of the fuel. Arising from such threat, Respondent undertook not to deal further in the fuel product located in the tanker that it took possession of. Respondent made overtures to purchase the fuel from Dantak but this was rejected by Applicant. Despite Respondents undertaking not to deal further in the fuel, it would appear that Respondent offloaded 11 000 litres of fuel, with an approximate value of R223 300 from the tanker. This was done without Applicants consent on or about 1 April 2022.

[5] Applicant then demanded the release of the remaining fuel from Respondent and Respondent refused such demand on the basis that Respondent exercised a lien over the tanker and the fuel product on the tanker. The legal basis of such lien is unclear.

- [6] Applicant says that he came under pressure from Dantaks client that was due to receive the fuel being transported. On this basis, Applicant then reached an agreement with Respondent for the release of the remaining fuel on the basis that Applicant conclude an acknowledgement of debt to Respondent for the indebtedness of Fuel Giants. Applicant signed off on the acknowledgement of indebtedness to Respondent.
- [7] On 10 April 2023, Applicant was met with the information that Respondent had further unlawfully removed the remaining fuel from the tanker as an offset of the indebtedness of Fuel Giants and Respondent was thus unable to make good on its undertaking to release the fuel.
- [8] Applicants further investigations appear to reveal that the indebtedness owed by Fuel Giants is substantially less than the acknowledgement of debt undertaken by Applicant.
- [9] It is alleged that should the court not accept the version that Applicant acted under duress then the court ought to allow the rescission having regard to the counterclaim of R1'231'483.50. It is unclear if this counterclaim is enjoyed by Applicant or Dantak Incorporated, a separate legal entity.
- [10] Respondent opposes the application for rescission on the basis that it entered into a verbal agreement of lease with Fuel Giants during August 2021, for the

lease of Respondents vehicles at a rental amount of R110 000 per vehicle per month.

[11] Applicant then requested that the Respondent begin invoicing Dantak as Applicant was a 'partner' in both Dantak and Fuel Giants. The documentary evidence put up by Respondent is in contrast to Applicants version that he bears no association to Fuel Giants. Dantak essentially became the lessee of the vehicles. The Respondent was also involved in purchasing fuel from Fuel Giants. Perculiarly, invoices were only to be delivered to Applicant by messaging to a mobile phone number.

[12] Respondent says that Dantak was indebted to Respondent for an amount of R770 000 as at March 2022. Respondent elects not to annex the electronic messages from Applicant to Respondent in respect of the payment of monies due. At some point Respondent made payment of monies to Fuel Giants for fuel to be supplied by Fuel Giants to Respondent. This notwithstanding that Dantak allegedly owed the Respondent monies.

[13] On the face of matters, Applicant appears not to be fully candid with the Court regarding his involvement in Fuel Giants. He does not fully explain away the reason for the acknowledgement of debt as opposed to an urgent application or criminal charges and he does not say why he enjoys a counterclaim as opposed to Dantek. He certainly does not explain why he would casually offer Respondent (a party with whom he is not associated) a joint venture in further business. The Applicants version before this Court is wholly fanciful.

[14] Respondent equally plays possum. There is no explanation for how it took possession of the tanker, no explanation for the further self help with off loading the fuel from the tanker and certainly not sufficient documentary evidence regarding the fully financial transactions between Applicant, Respondent, Fuel Giants and Dantek.

THE LAW

[15] A party seeking a rescission of a judgment must demonstrate a bona fidei defence and no wilful default.

[16] Applicant says that he did not receive the summons and had he received same then he would have opposed the action. He relies on Uniform Rule 4(1)(a)(iii) that calls for personal service of proceedings.

[17] Applicants defence (inclusive of a counterclaim against Respondent), as set out in the papers is that the judgment debt is neither due, owing or payable by the Applicant to Respondent. The amount claimed by Respondent is a debt possible due by Fuel Giants (Pty) Ltd.

[18] An application for rescission of a default judgment in terms of Rule 31(2)(b) must be brought within 20 days of acquiring knowledge of the default judgment. I am satisfied with the Applicants explanation for the delay of 14

days in launching such application due to intervening events necessary to provide proper instruction to his legal representatives. Such explanation is however to be read against the requirements of a rescission of a bona fidei defence.

Uniform Rule 4(1)(a)(iii) – service of process

[19] Uniform Rule 4(1)(a)(iii) provides for the “by leaving a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than 16 years of age...”

[20] Applicant does not dispute that the place of service was his home or that the person who received the legal process was less than 16 years of age. Applicant's explanation is that the process did not come to his attention as the person who received the process did not pass the summons onto Applicant.

[21] Applicant makes much of not having received personal service or that the Respondent ought to have employed further alternative steps to notify him of the litigation then instituted such as telephonically informing Applicant of the legal proceedings.

[22] The Applicant does not attach a confirmatory affidavit by the person who received the service of the summons in this matter and neither does he explain why, whilst being asleep in the house, he did not receive the

summons shortly thereafter. His version is simply improbable alternatively untenable.

THE REQUIREMENT OF A BONA FIDEI DEFENCE

[23] The defence put up by a party seeking rescission must satisfy the requirement of a bona fidei defence, meaning that it must be a defence which, if proved at trial, will be a good defence on a balance of probabilities. The defence need not be proved at the stage of a rescission application.

[24] Respondent says 'I arranged for such vehicle to be removed from the possession of DANTAK and to be returned to the possession of the Respondent.' No explanation is given for the legal basis of such action. It smells of self help.

[25] An observation is that Respondent is rather guarded with regards to documentary proof that it has placed before the court in this application. Respondent denies the Applicants version of a computer 'memory stick' containing the draft acknowledgment of debt and invites Applicant to produce same.

[26] The versions put up by the parties in this application are riddled with inconsistencies and it would be unadvisable to speculate on affidavit as to

which parties' version is correct. Suffice to say that there is more to this web than meets the eye.

[27] I express concern that the Applicant and Respondents versions do not assist in taking this matter further and that, given the Respondents apparent self-help of the tanker as well as the allegations regarding the offloading of the fuel from the tankers is one that might be the subject matter of a misrepresentation to Applicant. This would impact the validity of the acknowledgement of debt and certainly be a good defence to the claim as currently formulated, if proved.

[28] The papers before the court reveal numerous disputes of fact that cannot be interrogated on affidavit and will require viva voca evidence.

CONDONATION

[29] The Applicant seeks condonation for the late bringing of this application. The warrant of execution was personally served on Applicant on 3 April 2023 and the application for rescission served on 25 May 2023.

[30] Condonation should not be lightly refused if the delay did not prejudice the other party in respect of the merits or in the conduct of his case, other than the procedural advantage gained by him owing to the existence of the time-limit. Everything should be done to secure a fair trial between the parties in

the litigation so that the disputes and questions between them may be settled on their merits. The court also held that it is a fundamental rule that justice cannot be done to a person without having given him an opportunity to present his case.¹

[31] The Constitutional Court in *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) at 43G–44A has laid down that lateness is not the only consideration in determining whether condonation may be granted and that the test for condonation is whether it is in the interests of justice to grant it. The factors generally considered by a court determining whether condonation should be granted were restated in *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC)

[32] In the matter of *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at para 20, the Constitutional Court stated that:

“It is axiomatic that condoning a party’s non-compliance with the rules or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.”

[33] There appears to be no substantive grounds of prejudice set out by the Respondent for the delay of a few days and I am alive to closing the doors of

¹ **Evander Caterers (Pty) Ltd v Potgieter** 1970 (3) SA 312 (T) at 316

the court on a party merely on the basis of a late application for rescission, having regard to the duration of the delay.

CONCLUSION

[34] I am not persuaded by the Applicants allegation that there ought to have been personal service of the proceedings on him. This deficiency in wilful default must be made up for in the demonstration a bona fidei defence.

[35] Applicants version is equally weak regarding a bona fidei defence.

[36] The Respondent is guarded in furnishing documentary evidence to this court regarding the involvement of Fuel Giants, Dantak and the applicant in business relations with Respondent regarding the subject matter of this dispute.

[37] Notwithstanding, it remains of concern that Respondent engaged in self-help of the fuel in the tanker, even if it had a valid claim against Dantak. This impacts the acknowledgment of debt that is central to Respondents claim.

[38] It is also a consideration that Respondent possibly misrepresented that it would release the fuel to Applicant or Dantak, should the Applicant sign off on an acknowledgment of debt. Such a defence would have merit if proved

correct. These are all matters that need not be considered in a rescission application.

[39] What is of moment, is that there are various disputes and triable issues that call for viva voca evidence and cross examination. It might be that Respondent is correct in its assertions but that does not take away from the test at the stage of rescission that there ought to be a bona fidei defence, which if proved at trial would answer the Respondents claim. The fact that Applicant intends joining Fuel Giants to the proceedings as well as a possible claim by Dantak (however this may be introduced to the present litigation in terms of the once and for all rule) are not matters for this court but for a trial court.

[40] It is not appropriate that this court consider the issue of costs at this stage as the trial court will be the ultimate arbiter of the rights of the parties and in a better position to determine costs holistically.

[41] In the result the following order is made:

1. The default judgment granted against Applicant is rescinded;
2. This application for rescission of the default judgment shall stand as the Applicants notice of intention to defend and the Uniform Rules of Court shall guide the further proceedings in this matter;
3. Costs of this rescission application shall be costs in the cause.

Z KHAN

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to as reflected on the caseline computer system.

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APPEARANCES:

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**ATTORNEY FOR THE APPLICANT: BURGER HUYSER
ATTORNEYS**

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ATTORNEY FOR THE RESPONDENT: WRIGHT ROSE-INNES INC