10/05/2018

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 66156/12

Not reportable

Not of interest to other judges

In the matter between:

SILVERSTONE, COLIN WAINE	**First Applicant**
SILVERSTONE, NURIT	**Second Applicant**
and	
ABSA BANK LIMITED	**Respondent**

JUDGMENT

PETERSEN AJ:

Introduction

[1] This is an application for rescission of default judgment in the following terms:

"1. Condonation for the late filing of the application only insofar as it is necessary in which event Applicants' tender wasted costs on a party and party scale.
2. Rescinding the default judgment entered against the Applicants'... on or about 11 August 2016.

3. Staying the Execution of the warrant.
4. Staying the sale of execution of the property pending the finalisation of this application and/or the action.
5. Setting aside the warrant of execution herein..."

[2] The applicants' submit in the founding papers that the application is brought in terms of the provisions of rule 42(1)(a) alternatively the common law or the provisions of rule 31. In argument, *Mr Cohen*, for the applicants', however submitted that the application is premised on rule 42(1)(a).

Submissions by counsel for the applicants'

[3] The applicants' attorneys failed to file heads of argument of counsel timeously and *Mr Cohen* was constrained to argue the application from the bar. *Mr Cohen's* submissions are based on three (3) points.

[4] The first point is that an interdict was obtained by the applicants' preventing the sale of the immoveable property pending finalisation of this application. The submission is that the granting of the interdict demonstrates that the present application has a good basis in that the *prima facie* defences or allegations raised by the applicant's if established at trial will entitle them to the relief sought.

[5] The second point is premised on the decision of *Absa Bank v Havenga and Similar Cases* 2010 (5) SA 533 (GNP) with particular reference to page 535H, where Horwitz AJ remarked:

"I would, however, add an obvious rider to that, that before one can cancel an agreement, there has to be a right vesting in the credit provider to do so. That is precisely the difficulty which confronted me in the motion court during the last two weeks, and that is the reason for this judgment."

[6] The reference to this paragraph is based on the common cause fact that whilst there is a registered bond in favour of ABSA Bank, the original loan agreement is not available. The original loan agreement is said to have been destroyed in a fire whilst

held in storage at a company called Docufile. In the absence of the original loan agreement the applicants' deny the terms of a standard form of the loan agreement provided by the respondent. *Mr Cohen* submits that since the court is not concerned with the terms of the bond agreement but only that of the loan agreement, all the terms of the loan agreement are disputed by the applicants' which in itself is a triable issue warranting the granting of the rescission application.

[7] The third point likewise premised on *Absa Bank v Havenga*, is that the reliance on secondary evidence by the respondent is said to be excipiable.

Rule 42(1)(a)

[8] Rule 42(1)(a) provides that:

"(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; ..."

[9] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), the court said the following at paragraphs 5 to 7:

'5 It is against this common-law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. The Rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The Rule gives the Courts a discretion to order it, which must be exercised judicially...
6 Not every mistake or irregularity may be corrected in terms of the Rule...Because it is a Rule of Court its ambit is entirely procedural.
7 Rule 42 is confined by its wording and context to the rescission or variation of ... 'an order erroneously sought or erroneously granted in the absence of a party affected thereby' (Rule 42(1)*(a)*).'

[10] In *Naidoo v Matlala* 2012 (1) SA 143 (GP) at 153C, the court held, correctly in my view that a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the

granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment.

[11] Rule 42 is an extension of the common law in terms of which the court may rescind a judgment. The court therefore has the same powers at common law to rescind a judgment provided *"sufficient or good cause"* has been shown by the applicant. It is accepted that sufficient or good cause entails two essential elements:
(1) a reasonable and acceptable explanation for the default (otherwise stated as an absence of wilful default); and
(2) a *bona fide* defence on the merits with *prima facie* prospects of success *(a bona fide* defence). See *Colyn supra* and *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H-353A.

[12] "Sufficient or good cause" involves the exercise of a judicial discretion, encompassing the principles of justice and fairness in the consideration of all the peculiar facts and circumstances of the application as a whole.

Absence of wilful default

[13] The applicants' explain in the founding papers that on or about 23 September 2016 the Sheriff of the Court attended at the property and proceeded with an attachment. The applicants' attorneys investigated the matter and discovered, amongst others, that the respondent delivered notices in terms of rule 30(2)(b) and 30A(1) on or about 19 April 2016; and notices in terms of rule 30(1) and 30A(2) on 26 May 2016. The service of these notices it is said was for some inexplicable reason not brought to the attention of their attorneys by the correspondent attorney. The consequence is that their plea as well as their notice in terms of rule 30(2)(b) was set aside. The application for default judgment in relation to the present application was served on 26 July 2016 and likewise not brought to the attention of their attorneys by the correspondent attorney. Whilst an explanation has been requested from the correspondent attorney none has been forthcoming and as at the date of the founding affidavit 20 November 2016 the applicants' were in the process of preparing a formal complaint to the Law Society of the Northern Provinces. It is further stated by the first applicant that pursuant to an arrangement with his

attorneys his driver called on the offices of the correspondent no less than twice a month to collect any pleadings that may have been served for himself and that he was not advised of any notices or applications that existed in respect of the present matter.

[14] The applicants' contend in the founding papers that premised on the aforementioned default judgment was entered against them under the incorrect notion that they were aware of the notices and that they had wilfully not dealt with it, which is not the case. As a result they contend that judgment was wrongfully sought, alternatively wrongfully granted.

[15] The explanation given by the applicants' is analogous to the explanation furnished by the defendant in the *Colyn* matter in the context of an application for summary judgment. The court said the following at paragraph 9:

"...The defendant describes what happened as a filing error in the office of his Cape Town attorneys. That is not a mistake in the proceedings. However one describes what occurred at the defendant's attorneys' offices which resulted in the defendant's failure to oppose summary judgment, it was not a procedural irregularity or mistake in respect of the issue of the order. It is not possible to conclude that the order was erroneously sought by the plaintiff or erroneously granted by the Judge. In the absence of an opposing affidavit from the defendant there was no good reason for Desai J not to order summary judgment against him."

[16] The grounds relied upon in the present application in the context of rule 42(1)(a) to explain the default of the applicants' are analogous to those in *Colyn*. The sentiments expressed at paragraph 12 are apposite:

"I have reservations about accepting that the defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a *reasonable* explanation. While the Courts are slow to penalise a litigant for his attorney's inept conduct of litigation,

there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys (*Saloojee and Another NNO v Minister of Community Development*). Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success (*Melane v Santam Insurance Co Ltd*)."

[17] The explanation by the applicants' why the judgment was erroneously granted or wrongfully sought on a careful consideration is not a reasonable explanation. No affidavit is filed by the correspondent attorney who is by implication blamed for the default of the applicants' and no explanation is given why same has not been obtained, save for an unsupported allegation that several attempts have been made to secure an explanation. Further, the applicants' have not demonstrated that any formal complaint against the correspondent attorney has been lodged with the Law Society to date as alleged in the founding papers. The evidence of the driver employed by the first applicant to check for any legal processes at the offices of the correspondent on a monthly basis is peculiar to say the least, when attorneys are retained by the applicants' for this very purpose.

[18] I would in the circumstances be inclined to dismiss the application on this ground alone. However, I remain mindful of the approach proposed in *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) referred to by the majority and minority in the *Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) seemingly with approval. In the *Harris* matter Moseneke J said:

"10 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. (my underlining)

'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.'

De Witts Auto Body Repairs (Pty) Limited v Fedgen Insurance Co. Limited (supra) at 711D.

11 In amplifying the nature of the preferable approach in an application for rescission of judgment, I can do no better than quote Jones J with whose dicta I am respectfully in agreement:

'An application for rescission is never simply an enquiry whether or not to penalise a party for failure to follow the rules and procedures laid down for civil proceeding in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties .... He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised and heard.'"

[19] I further remain mindful of the role of the court as reiterated in *Quartermark Investments (Pty) Ltd v Mkhwanazi & another* (768/2012) [2013] ZASCA 150 (01/11/2013) at para 20:

"In considering the role of the court, it is appropriate to have regard to the well-known dictum of Curlewis JA in *R v Hepworth* 1928 AD 265 at 277 to the effect that a criminal trial is not a game and a judge's position is not merely that of an umpire to ensure that the rules of the game are observed by both sides. The learned judge added that a 'judge is an administrator of justice' who has to see that justice is done. While these remarks were made in the context of a criminal trial they are equally applicable in civil proceedings and in my view, accord with the principle of legality."

Evaluation

[20] I turn to the three points raised in argument by *Mr Cohen* in determining whether or not the applicants' have a *bona fide* defence with reasonable prospects of

success. The thrust of the submissions is pegged on the decision of *Havenga*. The applicants' in the absence of the original loan agreement deny the terms of the standard copy of a loan agreement utilised by the respondent and hold the view that the respondent's reliance thereon as secondary evidence is excipiable.

[21] In considering these submissions I align myself with the reasoning in *Absa Bank v Zalvest Twenty (Pty) Ltd* 2014 (2) SA 119 (WCC) handed down on 6 November 2013 by Rogers J with whom Traverso DJP concurred. In the *Zalvest* matter which dealt with an exception by the defendants' against the plaintiff's particulars of claim based on a mortgage loan agreement pursuant to which a mortgage bond was registered in favour of the of the plaintiff the essential complaint in the exception was that the plaintiff had failed to annex to its particulars of claim the mortgage loan agreement. The mortgage loan agreement as in the present application was destroyed in the Docufile fire and despite a diligent search a copy of the mortgage loan agreement could not be found. The best available evidence of the terms and conditions contained in the mortgage loan agreement was provided by the standard mortgage loan agreement regularly used by the plaintiff at the time it concluded its agreement with the first defendant.

[22] In the *Zalvest* judgment, the court reiterated that the rules of court exist to ensure fair play and good order in the conduct of litigation and that the rules do not set out substantive legal requirements of a cause of action nor are they concerned with substantive law of evidence. It is an accepted principle that the substantive law does not preclude a party to a written contract from enforcing it merely because the contract has been destroyed or lost. The only requirement in our law is that the prescribed formalities for a valid contract should have been complied with.[1] It is accepted that in terms of the substantive law the original signed contract is ordinarily the best evidence of the conclusion of a valid contract and should be adduced. There are, however, exceptions to the best evidence rule, as in the present matter where the original has been destroyed in a fire. Our law therefore recognises that a litigant who relies on a contract in such an instance may adduce secondary evidence of the

[1] Para 9 of the *Zalvest* Judgment

conclusion of the contract inclusive of its terms (see *Singh v Govender Brothers Construction* 1986 (3) SA 613 (N) at 616J-617D).[2]

[23] The court held further at para 10 that:

"A rule which purported to say that a party to a written contract was deprived of a cause of action if the written document was destroyed or lost would be *ultra vires*. But the rules say no such thing. Rule 18(6) is formulated on the assumption that the pleader is able to attach a copy of the written contract. In those circumstances the copy (or relevant part thereof) must be annexed. Rule 18(6) is not intended to compel compliance with the impossible. (I may add that it was only in 1987 that rule 18(6) was amended to require a pleader to annex a written copy of the contract on which he relied. Prior to that time the general position was that a pleader was not required to annex a copy of the contract – see, for example, *Van Tonder v Western Credit Ltd* 1966 (1) SA 189 (C) at 194B-H; *South African Railways & Harbours v Deal Enterprises (Pty) Ltd* 1975 (3) SA 944 (W) at 950D-H.)

The exception in Zalvest was dismissed with costs.

[24] The *Zalvest* decision to my mind encapsulates the correct approach and succinctly encapsulates the position in this Division as in many other Divisions where numerous applications are brought along similar lines. In this regard, Rogers J, correctly to my mind, states the position at para 18:

"The judges of this division (and no doubt of other divisions) will be very familiar with the allegations made by the plaintiff in the present case regarding the destruction of documents in the fire which took place on 28 August 2009. Hundreds if not thousands of default and summary judgments have been granted in favour of this particular plaintiff where it has made similar allegations. While this does not affect the principle, it does highlight the absurdity of the defendants' contention, implying as it does that a very large part of the plaintiff's debtors book (running no doubt to billions of rands) was, overnight, rendered irrecoverable merely because the plaintiff's documents were destroyed in a fire. It is gratifying to be able to conclude that the law is not such an ass."

[2] Para 10 of the *Zalvest* judgment

[25] The submission of *Mr Cohen* that the use of secondary evidence in the form of the copy of a standard contract is excipiable has no basis in the context of the facts of the present matter and *Havenga* decision accordingly does not persuade this court otherwise.

[26] The applicants' raise no less than five defences to the respondent's claim. In light of the narrow issue taken in argument by *Mr Cohen*, I do not propose to deal with the said defences in any great detail, save to say, that each of the defences have no merit and are clearly raised for the sole purpose of frustrating the respondents' claim when one has regard to the history of the conduct of the applicants'.

Order

[27] In the result:

The application for rescission of judgment is dismissed with costs.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

For the Applicants': Adv. Cohen

Instructed by: Larry Marks Attorneys, c/o Oltman's Attorneys

For the Respondent: Adv Vorster

Instructed by: Smit, Sewgoolam Inc c/o Pretorius Le Roux Inc.

Date Heard: 19 February 2018

Date of Judgment: May 2018