



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 3450/2022

In the matter between:

GAIL FRANCIS BUECHEL

Applicant

and

**SOUTH AFRICAN SECURITISATION
PROGRAMME (RF) LIMITED**

First Respondent

SASFIN BANK LIMITED

Second Respondent

SUNLYN (PTY) LTD

Third Respondent

IN RE:

**SOUTH AFRICAN SECURITISATION
PROGRAMME (RF) LIMITED**

First Plaintiff

SASFIN BANK LIMITED

Second Plaintiff

SUNLYN (PTY) LTD

Third Plaintiff

and

GAIL FRANCIS BUECHEL

Defendant

Coram: Bishop, AJ

Dates of Hearing: 15 February 2024

Date of Judgment: 5 March 2024

LEAVE TO APPEAL JUDGMENT

BISHOP, AJ

[1] The Applicant sought the rescission of a default judgment in terms of rule 32(1)(b). I refused the rescission because, while she was not in wilful default, she failed to establish a bona fide defence. The Applicant seeks leave to appeal my order dismissing her application.

[2] Leave should be granted if the appeal “would have reasonable prospects of success” or there is another compelling reason to grant it.¹ Leave to appeal is not there for the asking. It should be granted “only when there is ‘a sound, rational basis for the conclusion that there are prospects of success on appeal’.”²

[3] To my mind the prospect of another court coming to a different conclusion from mine depends on the nature of the discretion that a court exercises when it decides

¹ Superior Courts Act 10 of 2013 s 17(1)(a).

² *Four Wheel Drive Accessory Distributors CC v Rattan NO* [2018] ZASCA 124; 2019 (3) SA 451 (SCA) at para 34, quoting *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

an application for rescission under rule 31(2)(b). There is ample authority for the proposition that a court under rule 32(1)(b) exercises a discretion:

[3.1] *Herbstein and Van Winsen* cite a Rhodesian and a Namibian case for the proposition that “[t]he court has a very wide discretion”.³

[3.2] Similarly, *Erasmus* says: “The court has a wide discretion in evaluating ‘good cause’ in order to ensure that justice is done.”⁴ It cites a recent Full Bench decision in Pretoria in support.⁵

[3.3] The Constitutional Court has held that “The discretion of the Court in granting rescission at common law is fairly wide.”⁶ I understand the discretion under rule 31(2)(b) to be similar to the common law discretion.

[4] But none of these cases or authorities specifically deal with the nature or type of the discretion. Beyond these general descriptions, I could find no authority on the point, and counsel could refer me to none.

[5] The question matters because “the approach of an appellate court to an appeal against the exercise of a discretion by another court will depend upon the nature of

³ Cilliers, Loots & Nel *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th Ed, 2009) ch27-p715, fn 98, citing *Du Preez v Hughes NO* 1958 (1) PH F17 (SR); *Krauer v Metzger* (2) 1990 NR 135 (HC) at 139G–140F, 141G–J.

⁴ D Van Loggerenberg *Erasmus: Superior Court Practice* (2022, RS 20) D1-365.

⁵ Ibid fn 66, citing *Hosseini N.O and Others v Adinolfi and Others* [2022] ZAGPPHC 857 at para 19.

⁶ *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) at para 71.

the discretion concerned.”⁷ If it is a discretion in the strict sense⁸ – where the court could legitimately choose from different options – the appellate court will only interfere if “the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law”.⁹

[6] But sometimes the term “discretion” is used merely to convey that a court “is entitled to have regard to a number of disparate and incommensurable features in coming to a decision”.¹⁰ If it is this type of discretion – a discretion in the ordinary sense – an appellate court is entitled to interfere simply because it disagrees with the outcome, even if the original court acted judicially.

[7] There is also case law that suggests this neat boundary between discretion in the strict sense and the ordinary sense is not rigid and binary, but that there are gradations of discretion. The scope for legitimate appellate interference will depend on the precise nature of each discretion, rather than its categorization.¹¹

[8] For reasons I set out more fully below, if the discretion to grant or refuse rescission is one in the strict sense, then I see no reasonable prospects that an appellate court will interfere with my judgment. The Applicant has not convinced me

⁷ *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at para 19.

⁸ As O'Regan J notes in *Giddey* at fn 17, various terms are used to describe this type of discretion – a “strong” discretion a discretion “in the narrow sense” or a “true” discretion. I use her descriptor of a discretion “in the strict sense”.

⁹ *Giddey* (n 7) at para 19.

¹⁰ *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 361H-I.

¹¹ *Giddey* (n 7) at para 19, referring to *S v Basson* 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) at paras 110-1.

that my decision to refuse the application for rescission was based on wrong application of law or facts, or that I did not act judiciously.

[9] However, if I exercised a discretion in the ordinary sense, then I can readily see another court coming to a different conclusion. I refused to grant rescission because, in my view, the Applicant had failed to establish a bona fide defence in her founding papers. However, an appellate court may legitimately take a broader view, consider the allegations in reply, venture into possible defences not made out in the application, and decide to rescind.

[10] As I do not think there is a clear answer on the nature of the discretion, and as the Applicant will have reasonable prospects of success if it is a discretion in the ordinary sense, there are reasonable prospects of success. I intend to grant leave to appeal for that reason.

[11] As it may aid the appellate court, I intend to nonetheless briefly set out my own view on the nature of the discretion, and on the merits of the various arguments raised in the application for leave to appeal.

The Nature of the Discretion

[12] Whether a discretion is on in the true or the ordinary sense appears to depend on the type of issue a court is deciding (procedural or substantive), whether policy should encourage or discourage appeals, and the nature of the factors the court must consider and the question it must answer.

[13] Issues that go primarily to a court's process are ordinarily regarded as discretions in the strict sense – costs,¹² condonation,¹³ postponement,¹⁴ the admission of evidence,¹⁵ and just and equitable remedy¹⁶ are classic examples. Questions that determine the substantive outcome of a dispute, are generally discretions in the ordinary sense. So the grant or refusal of an interim interdict,¹⁷ or an eviction¹⁸ is subject to full appellate re-evaluation.

[14] The decision to grant or refuse rescission has elements of both. It is a procedural issue – should a case that was finalized be re-opened? That is an issue that affects the operation of the court that granted it. That is why a decision to grant rescission is not appealable. But an order refusing rescission is also a decision that can finally close the door to a party and so can be determinative of their substantive rights and obligations. If rescission is refused, the judgment stands.

[15] Judgments on this issue refer to the question of whether, as a matter of policy, appeals should be allowed.¹⁹ This is particularly the case with interlocutory decisions. While the grant of rescission is unappealable because it is not final, the refusal of

¹² *Giddey* (n 7).

¹³ *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 20.

¹⁴ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11.

¹⁵ *Basson* (n 11)

¹⁶ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

¹⁷ *Knox D'Arcy* (n 10).

¹⁸ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at para 18.

¹⁹ See, for example, *Giddey* (n 7) at para 22.

rescission is final. It does not seem to me that there is any policy reason to avoid appeals against the refusal of rescission.

[16] Finally, the nature of the issues to be considered – was there wilful default and is there a bona fide defence – are issues where a court can either be right or wrong. The Court must apply the appropriate test. It seems that a court may have some discretion where the scales are finely balanced – where it is debatable whether there was wilful default, and the bona fides of any defence is uncertain. But where an applicant shows she is not in wilful default and establishes a bona fide defence, a court has limited if any scope to refuse rescission for other reasons.

[17] On balance, despite the cases and academic authorities that describe it as a “wide discretion”, in my view it is a discretion in the ordinary sense. But that is ultimately an issue the court on appeal will need to determine.

Grounds of Appeal

[18] With regard to the Applicant’s grounds of appeal, I address them only briefly. As I intimated above, I am not convinced that any of them demonstrate that I acted injudiciously or on wrong facts or law. But I do accept that an appellate court may evaluate the pleadings and the facts differently. The reasons arise from the Applicant’s grounds of appeal.

[19] First, the Applicant submitted that the Court ought to have considered that she was sued as a guarantor, not as a principal debtor. This did not affect the nature of her defences; but, she argued, it meant that she was only placed in a position to fully analyse the facts when she received the answering affidavit. I was therefore wrong to

insist that the case should have been made in founding, and could not be made in reply. I do not think this ground has merit. An applicant for rescission either has a bona fide defence or she does not. She can either make out that defence in founding papers or she cannot. If she does not know facts that would establish a bona fide defence, then rescission should be refused. It is of course true that sometimes defendants only identify a defence through pleading and discovery. But rescission is for parties who already have a bona fide defence, not for those who have none but hope to identify one at trial.

[20] Second, the Applicant pointed out that I erred in concluding that it was not clear when Gragood was placed in business rescue. I admit the error, but I do not see how it affects my evaluation of the Applicant's defences. She also alleged I was wrong about the date on which the agreements were cancelled. I do not believe I erred in this regard, but in any event I fail to see why it would matter if I had.

[21] Third, the Applicant contends that I failed to adequately consider the role of Kalt in insisting she sign as a guarantor, and in approving the transaction for "astronomical" amounts. Neither argument addresses my fundamental difficulty – there is no basis laid in the founding papers to explain how the Respondent was involved in any fraud. These two facts – that the applicant was a guarantor and that the prices were high – would not justify an inference of fraud even if proved at trial. They do not give rise to a bona fide defence.

[22] Fourth, the Applicant alleges that I wrongly sought to enter into the probabilities. I do not believe that I did so. Where a defence relies on inference, a court must inevitably consider some degree of probabilities in order to assess whether it is a bona fide defence or not. It must ask whether, if the facts alleged are established, the

inference the applicant seeks to draw would follow. Here the argument was that the rates were exorbitant, therefore there was fraud. The difficulty I saw was that even if the Applicant could establish that the rates were exorbitant, that could not, without more, lead to an inference of fraud. As no additional fact was alleged – that the rates were increased for her specific transaction – there was no bona fide defence.

[23] Fifth, I was wrong, the Applicant claims, to hold her to her founding papers on the basis that Kalt had been denied an opportunity to provide an answer because he had given his full version in answering papers. But he answered the case that was made. The case was that one of Sunlyn's agents was directly involved in the fraud. As the Applicant accepted in reply, that was not the case. Kalt and the Respondents were not called to answer a case that, despite Kalt having never met the Plaintiff or Koegelenberg, fraud could be inferred from other facts. That is also the reason that, despite alleging the rentals were exorbitant, the Respondents were not afforded a fair opportunity to answer – because the fraud was not inferred from the exorbitant rentals but directly alleged through the connivance of an unnamed agent. That allegation was abandoned. It was not necessary, given the nature of the case in the founding papers, for the Respondents to have shown that their rentals were not increased for the Applicant. And it would have been unfair to grant rescission in those circumstances.

[24] Sixth, the Applicant referred to various judgments that rely on ubuntu or good faith in contracts. But the law on this is clear – parties must be held to their contracts unless to do so would be contrary to public policy, or unconstitutional.²⁰ The Applicant did not raise, as one of her defences, that the leases or her guarantees were contrary

²⁰ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC).

to public policy, or unconstitutional. Nor did she argue that enforcing them in these circumstances would violate the Constitution or public norms. She cannot, in an application for leave to appeal, seek to introduce a new defence.

[25] Seventh, the Applicant pointed out that the letter of 19 January 2023 arrived just a day before she launched her application for rescission. That is so. But the same allegation – that “the cost of sale of the goods exceeded the amount the goods were sold for” – appeared in the particulars of claim. The Applicant knew this fact, yet sought to advance a defence that failed to take it into account.

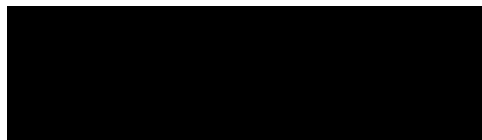
[26] For these reasons, I see no fundamental error in my judgment. Rescission demands fairness to both parties. A party that properly served a summons and obtained a default judgment is entitled to rely on the finality of that judgment unless a case is made for rescission. I took the view that it would be unfair to the Respondents – and almost certainly of no benefit to the Applicant – to reopen a case which would still end in her being liable as guarantor, however unfair that may seem.

[27] But I accept that another court may be more lenient to the way the Applicant’s case morphed from founding to reply, or may see the equities differently. Therefore, as an appellate court may have the ability to reconsider how I exercised my discretion, I grant leave to appeal.

[28] I make the following order:

[28.1] Leave to appeal is granted to the Full Bench.

[28.2] Costs of this application will be costs in the appeal. If the Applicant does not prosecute the appeal, she shall pay the Respondents’ costs in this application.



M J BISHOP
Acting Judge of the High Court

Counsel for Applicant:
Attorneys for Applicant

Adv M Nowitz
STBB|Smith Tabata Buchanan Boyes

Counsel for Respondents:
Attorneys for Respondents

**Adv L Wessels (heads of argument
prepared by Adv S Aucamp)**
Smith Jones & Pratt Inc