

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION PRETORIA)

CASE NO: 62371/2019

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

30 May 2022

DATE

SIGNATURE

In the matter between:

OUTSURANCE INSURANCE

COMPANY LIMITED

APPLICANT/DEFENDANT

And

MSEKELI MPAPAMA

RESPONDENT/PLAINTIFF

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 30 MAY 2022.

JUDGMENT

COLLIS J

INTRODUCTION

1. This is an opposed rescission application. The default judgment which the defendant seeks to rescind was taken against the defendant on 26 March 2020.

2. In addition to seeking that the judgment to be rescinded, the defendant also wishes to be granted leave to defend the action and in the event of being successful for the plaintiff to be ordered to pay the costs.

3. The plaintiff opposes the rescission application on the basis that the defendant has not shown good cause¹ for the rescission of the default

¹ Uniform Rule 31(2)(b).

judgment. Further that they are in wilful default and do not possess a bona fide defence to the plaintiff's claim in the action.

BACKGROUND

4. The defendant is the plaintiffs' erstwhile insurance provider. On 22 August 2019 the plaintiff sued the defendant for an amount of R620,000.00 arising out of a breach of contract pursuant to a motor vehicle collision and repudiation of the claim by the plaintiff.

5. The summons in the action was served on the defendant's main place of business as per the underlying contract.² Despite having received the summons and therefore knowledge of the action and admitting proper service of the action, the defendant failed to deliver a notice of intention to defend the action. The plaintiff consequently obtained default judgment, in the amount of R620,000.00 plus interest and costs. It is this judgment that the applicant now applies to have rescinded.

ISSUES FOR DETERMINATION

6. As per the joint practice note, the issues for determination by this court, is firstly whether the defendant has made a case for the relief it seeks and

² Index 06 Sheriff's Return of service.

in particular whether the defendant was in wilful default by not entering an appearance to defend.³

7. Secondly, the court has to determine whether the rescission application is made bona fide and not simply made with the intention to delay the plaintiff's claim and thirdly whether the alleged defence to the plaintiff's claim is bona fide.

THE TEST

8. The test to be applied is whether the defendant has shown good cause for the rescission of the default judgment. The requirements to show good cause, is whether the defendants':

- 8.1 default was wilful and/or due to their gross negligence in not defending the action;
- 8.2 rescission application is bona fide and not simply made with the intention to delay the plaintiff's claim; and
- 8.3 alleged defence to the plaintiff's claim is bona fide.

³ Index 053-1 to 2.

THE LAW

REQUIREMENT: GOOD CAUSE

9 The court may rescind a default judgment granted upon good cause shown by the defendants.⁴ For rescission of a judgment a defendant has to show good cause, by giving a reasonable explanation of its default, by showing that its application is *bona fide* and that it has a *bona fide* defence, which *prima facie* has some prospects of success.⁵

10 The accepted formulation as to what “good cause shown” entails has been formulated to be that:⁶

10.1 The applicant for rescission must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

10.2 The application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.

⁴ Uniform Rule 31(2)(b).

⁵ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003 (6) SA 1 (SCA) at 9E.

⁶ *Coetzee and another v Nedbank LTD* 2011 (2) SA 372 (KZD) at 373G – I.

10.3 The applicant must show that he has a *bona fide* defence to the plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

11 The defendant in a rescission application, has the burden of actually proving, as opposed to merely alleging good cause for rescission.⁷

12 As to the the requirement of good cause shown, the defendant's explanation must not be found to be inadequate and improbable⁸, as it is sufficiently full to enable the court to understand how it came about that the judgment was taken and to assess the defendant's conduct and motives.⁹ In the *Brangus Ranching (Pty) Ltd*-case¹⁰, the court found in relation to the requirement of the existence of a bona fide defence, as

⁷ *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd* 2011 (3) SA 477 (KZP) at 485A-C.

⁸ Answering Affidavit Index 028-8 para 12.

⁹ Founding Affidavit Index 037-10 para 5.10-6.4; *Du Plessis v Tager* 1953 (2) SA (O) at 535A.

¹⁰ *Ibid* at 485A-C.

a part of showing good cause for the rescission, that such good cause includes, although it is not limited to, "the existence of a substantial defence".

13 It has been held in *Mnandi Property Development*¹¹ that the requirement of 'good cause' cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence but, in addition, of a bona fide presently held desire on the part of the applicant for relief actually to raise the defence concerned in the event of the judgment being rescinded.

14 In assessing as to whether the defendant has met the requirements set out the applicable Rule, it is important to have regard to the founding affidavit in this regard.

REQUIREMENT: WILFUL DEFAULT

15 In this regard the defendant explained that upon service of the summons, the said summons was scanned onto their system, emailed to the relevant department and thereafter inadvertently deleted. In this regard the deponent explained relevant staff members cannot recall the date when the relevant folder was emptied, as it was part of their regular

¹¹ *Ibid* at 464H-I.

duties and was not scheduled, noted or recorded and for a business that receives many documents daily, it is not unlikely that documents or emails are erroneously lost, misplaced or deleted from time to time.¹²

16 Furthermore, that the apparent deletion of the documents was clearly due to *bona fide* human error, by one of its relevant staff members.¹³ Thus, if the email had not inadvertently been deleted, the action would have been defended by its attorneys.

17 Accordingly, counsel for the defendant had argued that the defendant was not in wilful default, as it was due to a *bona fide* oversight by a staff member¹⁴ and as the defendant had no knowledge of the action, it did not intentionally refrain from defending it and had no *mala fide* attitude towards the consequences of default.¹⁵

¹² Founding Affidavit Index 037-10 par 5.11, 5.13; 6.1-6.4; Answering Affidavit Index 028-8 para 11.6.

¹³ Founding Affidavit par 6.1-6.2; Answering Affidavit, par 37.

¹⁴ Harris v ABSA Bank Ltd t/a Volkskas 2002 3 All SA 215 (T); Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352G.

¹⁵ Maujean t/a Audi Video Agencies v Standard Bank SA Ltd 1994 (3) SA 801 (C) at 804C.

- 18 In opposition the plaintiff in its answering affidavit sets out that the reasons provided by the defendant for its failure to enter an appearance to defend are wholly inadequate and highly improbable.¹⁶
- 19 The explanation provided that all the processes served in this matter were mysteriously deleted every time that it was served is also improbable.¹⁷
- 20 It is on this basis that counsel for the plaintiff had argued that the fact that none of the applicants' staff can recall deleting the file shows that the entire construct may well be a work of fiction and it is on this basis that it was further argued that the defendant's default was wilful and grossly negligent and should not be countenanced by this Court.
- 21 Having regard to the explanation which has been given by the defendant, this Court is satisfied that the failure by the defendant to have entered an appearance to defend, was not wilful but due to an administrative error which has been adequately explained before this Court. It is not far-fetched that emails can be deleted and unless the

¹⁶ Answering affidavit Index 028-8 para 12.

¹⁷ Answering affidavit Index 028-8 para 14.

recipient bears knowledge of such deletion, its existence might never be known. Consequently, this Court finds that the defendant's default had not been wilful.

REQUIREMENT: BONA FIDE DEFENCE

22 A defence is *bona fide* if it discloses the nature and grounds of a *prima facie* defence in the sense that, if established at trial, it may succeed and need not deal fully with the merits of the case, nor contain evidence that the probabilities favour it.¹⁸ As such, it suffices, if it demonstrates a *prima facie* case in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case.¹⁹

23 It is trite that the defences of fraud, material breach and contractual prescription raised herein by the defendant are all valid in law.

24 As per the founding affidavit, the defendant sets out that the plaintiff has lodged a fraudulent insurance claim and that he has materially

¹⁸ Colyn v Tiger Food Industries above in fn 5; Grant v Plumbers (Pty) Ltd at 467.

¹⁹ Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd [1980] 2 All SA 475 (W) at 477.

breached the insurance agreement concluded between the parties. It is on this basis that the defendant avers that it was lawfully entitled to repudiate the insurance claim of the plaintiff.²⁰

25 In addition that the plaintiff when reporting the vehicle accident claim, and during validation thereof, provided false, misleading and incorrect information to the defendant with the intention of unlawfully gaining financial benefit therefrom, specifically pertaining to the identity and state of sobriety of the driver of the insured vehicle.²¹ Further that the plaintiff failed to institute proceedings within the contractually prescribed period.²²

26 It is on this basis that counsel for the defendant had argued that the defendant's defences are not patently unfounded and is based on outlined facts, clearly set out, not bare, bald, sketchy, ambiguous, contradictory, vague or inherently unconvincing and if proved, is a good answer to the plaintiff's claim and therefore *prima facie* a full

²⁰ Founding affidavit Index 037-13 para 7.1.

²¹ Founding affidavit Index 037-14 para 7.2.

²² Founding affidavit Index 037-14 para 7.3.

defence.²³ In addition these defences were already put to the plaintiff before the action was instituted, this at the time when the insurance claim was repudiated and which remained the same²⁴, further indicating its *bona fides* therein. It is on this basis that counsel had argued that the defendant has a *bona fide* defence and any delay if the judgment were to be rescinded is not substantial or incurable, moreso in circumstances that the defendant has tendered security for the plaintiff's claim, costs and interest therein.²⁵

27 As per the answering affidavit and with reference to the defences raised by the defendant, it is averred that the fraud defence is not raised with any particularity on the papers so as to enable a court assessing the defendants' bona fides and prospects to distil the material facts underlying such defence.²⁶ This is incorrect. Some particularity has indeed been given by the defendant. As per the founding affidavit, it is alleged that the plaintiff failed to give details as to the state of sobriety of the driver of the insured vehicle. It is significant that no denial was proffered by the plaintiff in his replying affidavit with reference on this defence. The fraud defence, I am of of

²³ Founding affidavit, par 7.1-7.5, annexure "CF15"; *Du Plooy v Anwes Motors* (Edms) Bpk 1983 (4) SA 213 (O) at 216H.

²⁴ Founding Affidavit annexure "CF15"; *Mnandi Property Development CC v Beimore Development CC* 1999 (4) SA 462 (W).

²⁵ Founding Affidavit, para 4.1-4.2; Answering Affidavit, para 33.

²⁶ Answering Affidavit Index 028-1 para 18-20.

the opinion would as such constitute a bona fide defence to the plaintiff's claim.

28 In as far as the contractual prescription defence is concerned, a similar argument is raised in that this defence lacks particularity. In this regard the plaintiff contends that the defendant yet again makes another bald and vague allegation that the plaintiff failed to institute proceedings within the time frame allowed for in the contractual agreement. The defendant having failed to give any details regarding this alleged failure on the part of the plaintiff to act timeously has the result, so it was argued, that this amounts to an empty averment to sustain this particular defence.

29 Now albeit that there might be some merit in this argument in that the affidavit lacks particularity to sustain this defence on the founding affidavit, it is of no moment as this Court has already found that the defence of fraud would constitute a bona fide defence to the plaintiff's claim.

30 As for the remainder of the defence, I do not deem it necessary to consider same given the fact that this Court has found that a bona fide defence has already been established by the defendant.

ORDER

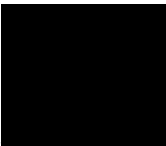
31. In the result the following order is made:

31.1 The default judgment granted against the Defendant on 26

March 2020 is rescinded;

31.2 the Defendant is granted leave to defend the action;

31.3 the Plaintiff is ordered to pay the costs of the application.



COLLIS C
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant	: Adv. R.C. Jansen Van Vuuren
Attorney for the Applicant	: Van Breda & Herbst Incorporated
Counsel for the Respondent	: Adv. M. Msomi
Attorney for the Respondent	: Tuckers Incorporated
Date of Hearing	: 22 November 2021
Date of Judgment	: 30 May 2022

Judgment transmitted electronically.