IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE   **SIGNATURE**

Case Number: A987/13

In the matter between:

S E JANSEN VAN VUUREN   Appellant

and

STANDARD BANK OF SOUTH AFRICA   Respondent

JUDGMENT

POTTERILL J

[1] The appellant is with the leave of the court *a quo* appealing against the refusal of an application for rescission of a summary judgment granted against the appellant on the 21st of October 2011.

[2] The appellant is also, in terms of section 19 of the Superior Courts Act 10 of 2013, applying to admit new evidence on appeal.

[3] From the outset it must be stressed that the appellant filed and served a totally defective appeal record. The appeal record did not include the judgment of the court *a quo* nor any grounds of appeal or the notice of appeal. The notice of set down of the appeal was delivered already in January 2014 for the appeal to be heard on 13 May 2015.

[4] Pursuant to the registrar, on behalf of the Judges, informing the appellant's attorneys that the appeal record was incomplete, a supplementary index was served and filed on the attorneys for the respondent on the 8th of May 2015 and delivered to the chambers of the Judges. Once again the registrar informed the attorneys for the appellant that the documents were out of time and that counsel for the appellant would have to seek permission from the court at the hearing for the inclusion of the documents in order to prosecute the appeal.

[5] The day before the hearing of the appeal, the registrars of the Judges were furnished with a notice of removal by the appellant wherein the appellant tendered the reasonable wasted costs of the respondent on a party and party scale. The Judge's registrar again enquired from the appellant's attorney whether the removal was by consent. The registrar was informed that this notice of removal was not by agreement. The appellant's attorney was cautioned that it would be wise for there to be an appearance for the appellant at the hearing the next day.

[6] At the hearing, the appellant's counsel profusely apologised to the court for the defective appeal record and requested that the matter be removed and that the appellant tenders the reasonable wasted costs.

[7] On behalf of the respondent, it was argued that the correct procedure for the appellant would have been to bring a substantive application for postponement. Furthermore it was not denied by the appellant that the respondent had in correspondence (a day prior to the hearing) objected to any notice of removal. Despite this objection a unilateral notice of removal was served on the respondent.

[8] At the hearing, Mr. De Beer, appeared on instructions of a set of attorneys on behalf of the attorneys representing the respondent. This was necessitated by the fact that counsel for the appellant had in his heads sought a costs *de bonis propriis* order

against the attorneys for the respondent. Mr. De Beer's appearance was thus necessary to protect the attorneys' rights pertaining to such punitive costs order.

[9] Mr. De Beer, as well as counsel for the respondent, argued that the appeal should proceed on the merits, alternatively that it should be dismissed due to the procedural defects. On behalf of the respondent, it was submitted that the respondent is suffering prejudice as the judgment was already obtained in 2011 and four years later they were still not in a position to execute on the judgment. The appellant had in correspondence informed them that the next available appeal date would be in August 2016. If this matter was only to proceed in August 2016 the appellant would have succeeded in successfully delaying any further execution for another year.

[10] In the interests of justice the court enquired from the appellant's counsel whether he was in a position to argue the merits of the appeal. The matter stood down for counsel to obtain instructions as he informed this court that he had a leader, Mr. Maritz, who was not available to argue the matter. This was news to the court, as well as counsel for the respondent, as on the practice note and the heads of argument on behalf of the appellant there was no indication of two counsel appearing on behalf of the appellant.

[11] Upon obtaining instructions, the appellant's counsel informed the court that he was ready to proceed on the merits. The matter stood down and proceeded at 14h00.

[12] Counsel for the appellant also obtained instructions pertaining to the costs *de bonis propriis* sought against the attorneys for the respondent. The appellant tendered the costs resultant upon the appearance and argument of Mr. De Beer on behalf of the attorney, as well as the costs of the attorneys for the attorneys of the respondent on an attorney and client scale.

[13] For both the appeal and the application for new evidence it is important to set out the chronology as background:

13.1 The respondent delivered a section 129 notice read with section 130 of the National Credit Act, No. 34 of 2005 ("the Act") dated the 9th of October 2008 on the 10th of October 2008.

13.2 Summons was issued on the 15th of January 2009 and served on the appellant on the 26th of January 2009.

13.3 On instructions from the respondent the attorneys for the respondent kept the matter in abeyance pending further instructions.

13.4 The summons was reissued on the 25th of February 2011 and was served personally upon the appellant on the 15th of April 2011.

13.5 The appellant served a notice of intention to defend on the attorneys for the respondent on the 18th of April 2011.

13.6 An application for summary judgment was served and filed on the 6th of May 2011.

13.7 The application for summary judgment was set down for the 14th of June 2011.

13.8 On the date of the hearing of the summary judgment the matter was postponed due to the court requiring an explanation as to why the section 129 notice had been delivered during 2008 while the summons was issued only in 2011.

13.9 A supplementary affidavit was filed wherein the attorneys for the respondent indicated that the file was held in abeyance and that the summons had expired and was accordingly reissued.

13.10 The appellant filed her answering affidavit to the application for summary judgment on 28 June 2011.

13.11 The application for summary judgment was then set down for the 4th of October 2011. On 4 October 2011 the appellant was not at court nor was there any representation on her behalf. The affidavit in opposition to the summary judgment was however before court. The summary judgment was after due consideration granted on the merits.

13.12 On 26 October 2011 the appellant served and filed an application for the rescission of the summary judgment.

13.13 A notice of intention to oppose this application was served on the 9th of November 2011.

13.14 The respondent filed its answering affidavit to the rescission application on 5 January 2012.

13.15 The appellant filed a replying affidavit on the 9th of March 2012.

13.16 On 18 March 2013 the application for rescission was heard and was dismissed.

[14] I find it prudent to first address the application for new evidence to be accepted in terms of section 19 of the Superior Courts Act 10 of 2013. A court exercising appeal jurisdiction may receive further evidence, but should exercise this power sparingly. A court will exercise its discretion based on the following (***Dormall Properties 282 CC v Renasa Insurance Company Ltd NNO and Others*** 2011 (1) SA 70 (SCA) at paragraph [21]):

14.1 There must be an acceptable explanation for the fact that the evidence was not adduced previously.

14.2 The further evidence must be material, relevant and weighty.

14.3 The new evidence must presumably be believed.

Although these requirements were in relation to section 22(a) of the Supreme Court Act 59 of 1959, the same principles are applicable.

For ease of reference I refer to the applicant to adduce further evidence as the appellant.

[15] It was reluctantly conceded by counsel for the appellant that in the application to lead further evidence the appellant is completely silent as to why this evidence was not presented at the application for rescission of the judgment. In paragraph 5 of the founding affidavit the appellant only stated as follows:

> *"My attorneys of record and more specifically Jennifer Rautenbach consulted with my counsel on 16 November 2012. During the consultation it became apparent that the counsel acting on behalf of the respondent made a reference to an exchange which were not attached to the summons that was served on me."*

The only reference therein is that they only became aware of this new evidence on 16 November 2012. This is not an explanation and an explanation is specifically required in view of the fact that this date is of course prior to the filing of the appellant's replying affidavit to the application for rescission of the summary judgment. This was also four months prior to the hearing of the application for the rescission of summary judgment on 18 March 2013. The appellant's numbness pertaining to the explanation, let alone an acceptable explanation, is frowned upon. In ***Mail & Guardian Media Ltd and Others v Chipu NO and Others*** 2013 (6) SA 367 (CC) in paragraph [8] the following is found:

*"[8] In **Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 (CC)** one of the requirements applied by this court for the admission of new evidence under s 22 was that it must be 'weighty and material and presumably to be believed'. It also applied the requirement that there must be a reasonably sufficient explanation as to why such evidence was not presented in the court of first instance. In **Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC)** this court said that its power to accept further evidence should not be exercised 'unless the circumstances are such that compelling reasons exist to do so'. It follows from this that, if the evidence sought to be adduced in this court under s 22 is not weighty and material or if it is weighty and material but there are no compelling reasons for this court to exercise its power in favour of admitting it, the application for the admission of the evidence should be dismissed."*

[16] The new "evidence" pertains to respondent's summons and annexures thereto. In the affidavit of the appellant seeking to introduce new evidence the new evidence is set out as follows:

"7. From these bundles it is abundantly clear that:

> *7.1 The original summons (bundle A) was excipiable in that the annexures attached to the particulars of claim did not relate to me. I respectfully submit that the summons did not disclose a cause of action and that the Honourable Court would have not granted judgment against me if it had been made aware of this fatal flaw.*
>
> *7.2 The copy of the summons (bundle B) that was served on me was similarly fatally flawed in that the annexures did not relate to me.*
>
> *7.3 The third bundle of documents (bundle C) that was prepared by the respondent for purposes of the summary judgment application is the only document that has annexures, which relate to me."*

[17] From paragraph 7.3 it is conceded by the appellant under oath that at the hearing of the summary judgment application the correct documents were before the court. The judgment was not fatally flawed or erroneously granted. If the submission is that the summons differed materially to that which was served on the appellant the appellant is confronted with the following averment in her affidavit resisting summary judgment:

> *"3. I have had the opportunity to read through the summons and particulars of claim and application for summary judgment and responds thereto as follows: …"*

Nowhere in this opposing affidavit is it raised that the loan agreement does not pertain to her. In paragraph 2 of the opposing affidavit she avers that where she makes legal submissions she does so on the advice of the legal representatives and she verily believes in the correctness of such advice. From this no other conclusion can follow but that the appellant, herself as well as her attorney, read through the summons and particulars of claim as well as the application for summary judgment and yet no mention is made of the fact that the wrong loan agreement is attached.

[18] In her own affidavit requesting to adduce further evidence the evidence is not material to the outcome of the summary judgment application. This is simply so because the correct loan agreement was attached to the application for summary judgment and the court applied its mind to this particular set of documents when granting summary judgment. The summary judgment was thus not sought or granted erroneously.

[19] On the appellant's own affidavit she has failed to establish a *prima facie* likelihood of the truth of the evidence that she did not receive the same summons and annexures attached to the summons as those that were presented for the summary judgment. I am accordingly satisfied that the new evidence to be adduced is not material, and did not result in an injustice to the appellant.

[20] The application to adduce new evidence is thus dismissed.

[21] Appeal on the merits of the refusal of the application for rescission of the summary judgment

On the merits of the refusal of the rescission of the summary judgment only one ground remained i.e. whether the rescission of the summary judgment should have been granted because the appellant applied to be placed under debt review on the 8th of August 2010.

[22] The provisions of section 86(2) of the Act provides that an application in terms of that section may not be made in respect of a particular credit agreement, if at the time of the application, the credit provider under that credit agreement had proceeded to take steps contemplated in terms of section 129 to enforce the agreement. In ***Nedbank v The National Credit Regulator*** [2011] ZASCA 35 (28 March 2011) the following was found:

> *"The purpose of a section 129(1)(a) notice is the resolution of a dispute in the bringing up to date of payments under specific credit agreements. While it is a 'step' prior to the commencement of a legal proceedings, it is also 'the first step' the credit provider 'has proceeded to take ... to enforce that agreement' (s 86(2)). It does not exclude a debt review save insofar as it relates to the particular credit agreement under consideration nor does it exclude the general debt review pursuant to section 83 and 85. Key to the*

construction of section 86(2) of the words 'has proceeded to take the steps' used in section 86(2). A 'step, amongst its meanings, includes "an action or movement which leads to result: one of a series of proceedings or measures".

[23] The section 129 notice delivered in October 2008 thus constituted a step as contemplated in section 129 of the National Credit Act and this particular credit agreement was thus excluded from any debt review process.

[24] Submitted from the bar the Court was implored to take cognisance of the fact that the respondent was part and parcel of a debt review rearrangement and that the applicant was making payments to the respondent in terms thereof. This argument is bad in law because section 86(2) specifically excludes this credit agreement from such debt review or any orders made pertaining thereto; section 129 had already initiated the process. This argument must thus be rejected.

[25] We were also furnished with a Government Notice No. 35327 dated 10 May 2012. Counsel for the appellant conceded that this regulation came into operation on 10 May 2012 and has no retrospective effect. This regulation accordingly needs no further address.

[26] I accordingly cannot find that the court *a quo* erred as the court had specifically made the following finding:

> *"30. I find that the Applicant not only failed to set out any sufficient reasons for the judgment to be rescinded in terms of the common law, but she also failed to set out a* <u>*bona fide*</u> *defence to the claim sought by the Respondent in the summons, more so that it is clear from the evidence in the papers that the Section 129 Notice sent by the Respondent preceded the Applicant's debt review application. Such notice was sent to the Applicant on 10 October 2008 and the Applicant only applied for debt review on 8 August 2010. In this respect, the provisions of Section 86(2) of the National Credit Act 34 of 2005 debt review and Section 129 notice apposite. It reads as follows:*
>
> *'(2) An application in terms of this section [for debt review] may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.*
>
> *By giving the notice envisaged by s 129(1)(a) the credit provider "has proceeded to take steps contemplated in section 129 to enforce*

> *that agreement". A debt review relating to that specific agreement is thereafter excluded.'"*

[27] The respondent argued that the costs of the appeal should be borne by the attorneys of the appellant *de bonis propriis* on the punitive scale of attorney and client. The conduct of the attorney and the counsel on behalf of the appellant necessitated such order.

[28] The appeal record was so defective as to constitute gross negligence. Counsel for the appellant had to concede that no attorney can unilaterally remove an appeal from the roll. Despite this knowledge the attorney proceeded to do so. This conduct was reckless because they, despite this knowledge, persisted to do so full well knowing that the respondent had objected to any removal of the matter from the roll. The attorney on behalf of the appellant proceeded to act with an attitude that the matter will "be postponed" to August 2016, the next first appeal court date. The appellant would suffer no prejudice and the respondent would suffer prejudice because they would not be able to execute pending an appeal. The necessity to bring an application to adduce further evidence was self-created. This evidence was available to the appellant prior to the hearing of the rescission application, but the appellant chose not to put it as evidence before the court hearing the application for rescission.

[29] The appellant or the appellant's team is dishonest as it is now averred that despite the appellant having received and read the summons and annexures thereto, according to the appellant, it was discovered that the wrong annexure was annexed. If this was the true situation then this would have been set out in the opposition to the summary judgment application as well as the opposing affidavit to the application for rescission. This is simply so because the appellant expressed voluntarily that she herself read the summons.

[30] In court wrong submissions were made by counsel on behalf of the appellant in that he tried to convince the court that the interpretation of paragraph 7.3 indicated that in fact the wrong documents were before the court when summary judgment was granted. This is plainly incorrect. The appellant's counsel persisted in making submissions from the bar that were not contained in the papers.

[31] On behalf of the appellant it was submitted that there was simply no dishonesty or any wrong submissions made to the court. Nothing the attorneys or the appellant did, according to the submissions, constituted gross negligence.

[32] A court has a discretion which must be exercised judicially in granting costs. In granting attorney and client costs a court is marking its disapproval of the conduct of the losing party. A court would do so by reason of special considerations pertaining to the conduct of the losing party. In granting such order the court is ensuring that

the successful party will not be out of pocket in respect of the expenses caused to it by the litigation. The appellant needlessly self-created the application for the leading of further evidence. In ***Treatment Action Campaign v Minister for Health*** 2005 (6) SA 363 (C) the court approved Innes CJ's (as he then was) finding that:

> *"I think it is the duty of the litigant to avoid any course which unduly protracts a lawsuit or unduly increases its expense" (**Scheepers & Nolte v Pate 1909 TS 353** at 356).*

[33] The grave defect in the appeal record and the deliberate attempt to proceed to deliver a notice of removal is unconscionable and is deserving of a punitive costs order. The deliberate understating of the gross negligence of the appellant's attorney, the untruthfulness in the affidavit and the reliance on arguments that are spectacularly bad in law necessitates in fact the awarding of a punitive costs order.

[34] The next question is whether the punitive costs should be borne by the appellant's attorney or the appellant herself. The basic notion underlying an award of costs *de bonis propriis* is a material departure from the responsibility of the office. The aim of the order is to indemnify a party against an account for costs from his own representative.

[35] For a court to grant such an order the court must be satisfied that the attorney acted negligently, unreasonably or is wanting in *bona fides*. The attorney has acted unreasonably and grossly negligent in the filing of a defective record, persisting with the removal of the matter from the roll unilaterally and from not putting further evidence before the court hearing the summary judgment or the rescission application. In judging whether a representative party's conduct is reasonable or not must be approached from the point of view not of the trained lawyer, but from the point of view of a man of ordinary ability bringing an average intelligence to bear on the question at issue – ***Re Estate Potgieter*** 1909 TS 982 at 1012. These circumstances set out above are most certainly not instances where the representative made a mere error of judgment or acted *bona fide*. As seen from the point of view of an ordinary person of average intelligence these actions can only be seen as being unreasonable and constituting gross negligence.

[36] I accordingly make the following order:

36.1 The application to adduce further evidence is dismissed.

36.2 The appeal is dismissed.

36.3 The appellant is to carry the costs of the appeal and application on an attorney and client scale and the attorneys representing the appellant must pay the costs *de bonis propriis*.

S. POTTERILL

JUDGE OF THE HIGH COURT

I agree

M.W. MSIMEKI

JUDGE OF THE HIGH COURT

I agree

S.A.M. BAQWA

JUDGE OF THE HIGH COURT

CASE NO: A987/13

HEARD ON: 13 May 2015

FOR THE APPELLANT: ADV. A.A. BOTHA

INSTRUCTED BY: E Coetzer Attorneys

FOR THE RESPONDENT: ADV. S. MARITZ

INSTRUCTED BY: Joubert & Scholtz Attorneys

DATE OF JUDGMENT: 19 May 2015