

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case number: 46999/2012

Date: 21 August 2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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DATE

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SIGNATURE

In the matter between:

COOPERS CARRIERS CC
(Registration number: 1994/005618/23)

APPLICANT

And

LESLIE PHILIP WILSON

1ST RESPONDENT

STEFFEN DIETMAR WIENING

2ND RESPONDENT

LESLEY PATRICIA WIENING

3RD RESPONDENT

JUDGMENT

PRETORIUS J.

[1] This is an application for the rescission of two judgments granted by the court by default on 26 November 2012 on the merits and on 28 November 2013 on the quantum of the action. The application is being brought in terms of Rule 31(2)(b) of the Uniform Rules of Court.

[2] During September 2011 a collision occurred between a motor vehicle owned by the applicant and driven by the applicant's employee and the property of the respondents. The vehicle was a truck and trailer combination. The second respondent, being the owner of the immovable property, instituted action against the applicant. The second respondent allegedly suffered damages to his fixed property in an amount of R288 867.31.

[3] Subsequent to the issue of the summons the parties agreed to settle the matter. The applicant and respondents entered into a settlement agreement on 23 May 2014. The settlement agreement provided, inter alia,:

“2. The First Defendant was acting within the course and scope of his employment with the Second Defendant at the time of the collision on or about 15 September 2011, from which this matter ensues.

3. The Second Defendant is insured with ORA who are the underwriter managers on behalf of Hollard Insurance Company Limited and as such and in terms of the rules

of subrogation the Plaintiff's claim as and against the Second Defendant falls as and against the Second Defendant's Insurance company being Hollard Insurance Company Limited ("Hollard").

- 4. Hollard has undertaken to pay the agreed settlement amount, being 80% of the Plaintiff's damages in the sum of R231 093.85 (TWO HUNDRED AND THIRTY-ONE THOUSAND AND NINETY-THREE RANDS AND EIGHTY-FIVE CENTS) to the Plaintiff's Attorneys Trust Account..."*

[4] Furthermore it was agreed:

"Payment of the debt is made in full and final settlement of his claim, including capital, interest and costs, arising from a collision which occurred on or about 15 September 2011 involving the Plaintiff's property situate at Plot 281, Broederstroom and Hollard's insured truck tractor combination bearing registration numbers and letters WDV968GP and FBZ661GP."

And

"The Plaintiff or his heirs, dependents, administrators, executors or signs release and forever discharge ORA; Hollard; and the First and Second Defendants from all or any further claims whatsoever which the Plaintiff or his heirs, dependents, administrators, executors or signs may now or hereafter at any given time have against ORA; Hollard or the First and Second

Defendants or any other party arising from this incident, litigation, attachment or any ancillary costs thereto;” (Court’s emphasis)

- [5] It is admitted by the applicant that summons commencing action was served by method of affixing to the principal door of the respondents on 31 August 2012. The applicant, however, argued that the summons was not served on the correct address. I find that the Companies and Intellectual Property Commission’s company report was correct on 12 November 2013 and that the registered address was 6 Rooigras Street, Bassonia. It is clear that the applicant was under the impression that the address had been changed and referred the court to the “*Annual Return Application: Cooper’s Carriers*” dated 6 January 2012 on which the applicant relied. The applicant’s deponent and managing member did not receive any knowledge of the summons. Although it is not a requirement, it is common cause that no notice of setdown was served on the applicant.
- [6] I cannot find that in the circumstances where it was clear that there had been correspondence between the applicant and the respondents’ attorneys, that the applicant wantonly and wilfully disregarded the summons.
- [7] The applicant has to show that it has a *bona fide* defence against the respondent’s claim. The applicant raises three defences, namely a defence in respect of the factual events pertaining to the collision; the inadequacy and/or speculative nature of the determination of the respondents’ quantum and thirdly the existence of the settlement

agreement.

- [8] I must agree with the applicant, having regard to the summary of the expert opinion, that the basis on which the findings were made, was hearsay evidence from several people who were involved in the collision or who were bystanders at the time of the collision. I am not considering any of the facts regarding the collision at this stage, but am only considering the facts to establish whether the applicant has a *bona fide* defence, which could be fit for trial as set out in **PLJ van Rensburg en Vennote v Den Dulk 1971(1) SA 112 (W)**.
- [9] It is clear that the allegation is that the sole cause of the collision was the negligence of the third party vehicle driver, who was employed by Kiepersol Kwekery. These grounds are dealt with extensively and confirmed under oath. It is clear that these facts are at variance with what the respondents alleged. It can only be dealt with at trial where oral evidence will be presented and tested by way of cross-examination.
- [10] Linked to this is the fact that the respondents rely on the expert's opinions, which may be countered by direct evidence by either the party involved in the incident or by a bystander. See in this instance **Roux v Hattingh 2012(6) SA 428 (SCA)** at p 435, paragraph 20, where the court held:

*"In Motor Vehicle Assurance Fund v Kenny Eksteen J held, in the context of a motor collision, **that '(d)irect or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an***

expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training'; that the view of an expert witness as to what might probably have occurred should generally 'give way to the assertions of the direct and credible evidence of an eye witness'; and that it is 'only where such direct evidence is so improbable that its very credibility is impugned that an expert's opinion as to what may or may not have occurred can persuade the court to his view'." (Court's emphasis)

- [11] The applicant alleges that a court may make a finding of contributory negligence, which may negate the findings of the experts. It is further clear that there were witnesses at the scene who can give direct evidence pertaining to the collision, which may cause a court to find negligence.
- [12] The main complaint regarding the quantum of the damages claim is that most of the claims are based on replacement values of the movable items and not on the repair value.
- [13] It is so that in the summary of expenses and damages to vehicle HFG007NW has been set out. The loss of earnings has been presented as R350 per day from the date of the collision, 15 September 2011, until settlement. This cannot be correct, as there is no indication that the respondents made any effort to mitigate their damages and a basis for the amount has not been established.
- [14] Whether there is a responsibility on the respondents to mitigate their damages is a factual question which can only be determined during

trial.

- [15] The applicant's contention that the travel related expenditure is disputed and should be proven at trial is valid in the particular circumstances of this case.
- [16] The last ground setting out that there is a *bona fide* defence is the settlement agreement which had been reached and entered into by the parties, "*in full and final settlement*". A court will furthermore have to decide whether the settlement agreement pertained to and included damage to movables and incidental expenses. A court will have to decide whether the settlement agreement is binding and therefor I find that the existence of the settlement agreement may, at trial, constitute a valid, genuine and *bona fide* defence.
- [17] I find that the applicant was not in wilful default in respect of the action, and that the applicant has *bona fide* defences to the relevant claims.
- [18] Therefor rescission of judgment should be granted so that the *bona fide* defences may be ventilated and tested during trial.
- [19] Therefor I make the following order:
1. The default judgment granted on 26 November 2012 by the Honourable Justice Mavundla ("the first judgment") is rescinded;
 2. The default judgment granted on 28 November 2013 by the Honourable Justice Baqwa ("the second judgment") is rescinded;
 3. The first, second and/or third respondents are ordered to pay the costs of this application, the one to pay the other to be absolved.

Judge C Pretorius

Case number : 46999/2012

Appeal heard on : 4 August 2015

For the Applicant : Adv. WA De Beer

Instructed by : MULLER VOIGT ATTORNEYS

For the Respondent : Adv. C Richard

Instructed by : WEAVIND & WEAVIND INC

Date of Judgment : 21 August 2015