


IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	<input checked="" type="checkbox"/> YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	<input checked="" type="checkbox"/> YES
(3) REVISED.	<input checked="" type="checkbox"/> YES
In the matter between:	
9/12/11	
DATE	SIGNATURE

CASE No. 812/2009

9/12/2011

OAKLEY TRANS (PTY) LTD

Applicant

and

MERCEDES BENZ SA (PTY) LTD

Respondent

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] This is an application for the rescission of a judgment granted on 5 April 2011 in terms of which -

- (a) the defence of the Applicant (First Defendant in the action) was, because of its failure to comply with a court order dated 13 December 2010, dismissed with costs;

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- (b) judgment was granted in favour of the Respondent (Plaintiff in the action) in the sum of R254 644,80;
- (c) interest on the sum of R254 644,80 at the rate of 15,5 per cent per annum from 15 January 2009 to date of payment of that amount; and
- (d) costs of suit.

(I will for the sake of convenience refer to the parties as they are cited in the action)

[2] As is apparent from the Plaintiff's Particulars of Claim, it is the Plaintiff's case -

- (a) that it was at all material times the owner of a 2008 Mercedes Benz C180 motor vehicle;
- (b) that the Second Defendant was at all relevant times employed by the First Defendant and acted in the course and scope of his employment with the First Defendant;
- (c) that on or about 22 March 2008 and at or near Kei Cuttings on the Highway between East London and Butterworth an incident occurred caused by a vehicle with registration number "NFB 014 GP" having spilled its load on the road whilst being driven by the Second Defendant which resulted in Plaintiff's vehicle to loose control and to leave the road;

.../...

- (d) that the sole cause of the incident was as a result of the negligent driving of the Second Defendant in various respects;
- (e) that as a result of the incident the Plaintiff suffered damages in the sum of R254 644,80.

[3] After the pleadings were closed the Plaintiff on 9 February 2010 served a notice in terms of Rule 35(3) (**record p. 41, Annexure HJN 6**) on the First Defendant requiring it to make available to the Plaintiff for inspection certain documents, amongst which, the employment records of of all its employees employed with it during the period January 2008 to December 2008.

[4] The First Defendant failed to respond to that notice, whereupon, the Plaintiff on 19 August 2010 filed and served an application for an order directing the First Defendant to reply to the notice requiring the First Defendant to make such documents available for inspection (**record p. 60, Annexure HJN 12**).

[5] The First Defendant on 3 September 2010 filed a notice of intention to oppose, but as the First Defendant failed to appear this Court on 13 December 2010 granted an order ordering the First Defendant to comply with the Rule 35(3) notice within 10 days as from the date of that order (**record p. 84**) which order was served on the attorneys of record of the First Defendants on 6 January 2011 (**record p. 83**)

[6] The First Defendant failed to comply with that order, whereupon, the Plaintiff in

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terms of a Notice of Motion filed and served on 7 February 2011 (**record p. 78**) on 5 April 2011 obtained the order which is now sought to be rescinded (**record p. 29**).

The application for rescission of the order granted on 5 April 2011

[7] In an affidavit deposed to by the First Defendant's attorney of record filed in support of the application for rescission, it is contended in relation to the First Defendant's failure to oppose any of the relevant applications -

- (a) that he only became aware of the order granted against the First Defendant on 25 May 2011 when the Plaintiff instructed the Sheriff to execute the order granted on 5 April 2011;
- (b) that he then, upon having obtained the documents which had given rise to the granting of the order dated 5 April 2011, established, (1) that the Notice of Set Down dated 1 October 2010 (**record p. 76**) informing the First Defendant that the application to compel inspection was enrolled for hearing on 13 December 2010, (2) the court order dated 13 December 2010 (**record p. 83**) and (3) the Notice of Motion - Application to Dismiss Defence and Obtain Judgment dated 5 February 2011 (**record p. 79**) informing the First Defendant that application was enrolled for hearing on 5 April 2011, were served on his office on 1 October 2010, 6 January 2011 and 7 February 2011, respectively;
- (c) that the signature of the person who signed receipt therefor corresponds with

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that of their "*junior receptionist*";

- (d) that he, on perusal of the office court file, could not find any copy of those documents in the file;
- (e) that it was standard procedure in their office that the administrative personnel file all documents in the relevant file for the responsible attorney's attention;
- (f) that he instructed all office staff to start an immediate search for the documents, but no copies could be found;
- (g) that he suspect that the documents were either misfiled or misplaced or otherwise the person who served the documents failed to leave a copy at their offices.

No confirmatory affidavits are filed by the so-called 'junior receptionist or any of the other office staff.

It is, furthermore, apparent that no explanation is offered as to why, in view of the fact that a notice of intention to oppose the application filed and served on 19 August 2010 for an order directing the First Defendant to reply to the notice requiring the First Defendant to make such documents available for inspection, no opposing affidavits were filed.

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[8] In relation to the question pertaining to the First Defendant's alleged *bona fide* defence it is, relying on the Defendants' plea, contended -

(a) that it is denied that the Second Defendant was the driver of vehicle with registration number "NFB 014 GP" and that the vehicle referred to spilled its load (record p. 37, para 6);

(b) that it is denied that the Second Defendant was employed by the First Defendant and that it acted in the course and scope of his employment with the First Defendant (record p. 37, para 7);

(c) that, in the event of it being held that the First and Second Defendants are liable towards the Plaintiff, it is denied that the Second Defendant's negligence caused the accident (record p. 38, para 8).

[9] It is, furthermore, pointed out that the Plaintiff has in any event in the meantime issued two fresh separate summonses against Micromath on 3 February 2011 and against Lefofa Transfer on 21 February 2011 based on the same cause of action and based on the same facts as that of the main action.

[10] In view of the foregoing it is contended that, had the learned Judge who granted the order on 5 April 2011 been informed of these facts, the Judge would not have granted the order and that the Plaintiff has by not having done that deliberately misled the Judge in order to obtain the relevant order and misused this Court's

.../...

proceedings. I am not persuaded that the Judge would not have granted the order. As a matter of fact the Defendants' plea must have been available to the Judge at the time. In any event the application was one for the dismissal of the plea because of the failure to make the necessary documents available which may, at least potentially, have primarily proved or disproved the First Defendant's defence as set out in its plea.

Evaluation of the Plaintiff's application for rescission

[11] As I already indicated and as is apparent from the Defendants' plea, two defences are raised by the First Defendant, namely, that it is not the owner of the vehicle and that the Second Defendant is not employed by it.

[12] I fail to see to what extent the ownership of the vehicle that was involved in the incident can be of any assistance to the First Defendant as the Plaintiff's case is in effect based on vicarious liability in respect of the Second Defendant's actions.

[13] The real issue between the parties is, apart from the question of negligence, therefore, whether the Second Defendant was employed by the First Defendant (**record p. 140, para 2.15**).

[14] That is exactly the reason why the Rule 35(3) notice was served and filed so as to establish who were employed by the First Defendant during the period in question.

[15] On that issue the First Defendant has, despite a court order, failed to respond

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and has in fact to date failed to respond.

[16] The First Defendant even failed for purposes of this application to have made its employees' list available which would, if made available, have persuaded me that it has a *bona fide* defence.

[17] I need, furthermore, to point out that this matter is characterised by a long history of delays on the part of the Defendants. At first they failed to file their plea before a notice of bar was served on them, they failed to provide particulars for purposes of trial and thereafter a failure to make their discovered documents available for inspection in terms of Rule 35.

[18] As is apparent from the First Defendant's papers, the First Defendant, as far as the alleged negligence of the Second Defendant is concerned, made no attempt, apart from a denial of any negligence in its plea, to show any defence on that issue. It would appear that the reason for the First Defendant's failure in this regard is the fact that it seems that the First Defendant intends to fall or stand by its defence that the Second Defendant was at any time in its employ.

Conclusion

[19] In view of the foregoing, I am of the opinion -

(a) that, despite a highly dubious and unlikely explanation by the First Defendant's

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attorney for the First Defendant's failure to appear and oppose a series of applications by the Plaintiff and, particularly, the application to dismiss the Defendant's defence (**record p. 78**), I should not hold such failures by the attorney of Defendants' against the First Defendant;

- (b) that, particularly, in view of the First Defendant's failure to submit a list of its employees, the First Defendant failed to disclose a *bona fide* defence.

[20] In the circumstances I am unpersuaded that a case has been made out for the rescission of the order made on 5 April 2011.

Order

[21] In the result I make the following order:-

1. **THAT** the application be dismissed.
2. **THAT** the Applicant be ordered to pay the Respondent's costs of opposition of this application.


P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF APPLICANT

ADV J C KLOPPER

.../...

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On the instructions of:

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ON BEHALF OF THE RESPONDENT

ADV A C VAN DER NEST

On the instructions of:

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DATE OF HEARING

5 December 2011

JUDGMENT DELIVERED ON

9 December 2011