OFFICE OF THE CHIEF JUSTICE

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 14318/2017

In the matter between:

RENASA INSURANCE CO LTD Applicant/Defendant

and

VISHAL RAMCHED Respondent/Plaintiff

ORDER

(a) The default judgment granted against the Defendant on the 25th of May 2018, under case No. 14318/2017, is hereby set aside.

(b) The Defendant is ordered to file its plea to the Plaintiff's particulars of claim within 15 days of the grant of this order.

(c) The Defendant remains liable for the Plaintiff's costs of the application for default judgment.

(d) The costs of this application are to be costs in the cause of the action.

JUDGMENT

Delivered on: 12 August 2019

TOPPING AJ

[1] The Applicant in these proceedings is the Defendant in the main action and the Respondent the Plaintiff therein. I shall accordingly refer to the Applicant as the Defendant and the Respondent as the Plaintiff.

[2] The Defendant seeks an order setting aside a judgment granted, by default, on the 25th of May 2018 and that it be directed to file a plea to the Plaintiff's particulars of claim within 15 days of the granting of such order. The Defendant also seeks costs against the Plaintiff in the event of this application being opposed.

[3] In the founding affidavit, deposed to by the general manager of the Defendant, it is alleged that the Plaintiff instituted proceedings against it out of this court by the issue of a combined summons on the 1st of December 2017. The Plaintiff's claim was founded upon a contract of insurance, pursuant to which the Defendant undertook to indemnify or compensate him for any loss or damage to his property. It is alleged in the particulars of claim that the Plaintiff's home had been burgled on two separate occasions, namely on the 20th and 22nd of November 2016, and that the Defendant was accordingly liable to indemnify him for the loss which he had sustained. The Defendant had however repudiated liability in terms of the policy. The Plaintiff's claim was for payment of the sum of R 980,607.50.

[4] It is then alleged that the Sheriff's Return of Service reflects that the summons was served upon one "Vicky Nene", a receptionist at the Defendant's offices, on the 4th of December 2017. Reference is then made to the supporting affidavit of Ms Nene, where she states that she cannot recall having been served with the documents and

cannot recall how she “handled them” after she had accepted service. She assumes that she must have put the documents aside, with the intention of bringing them to the attention of one of the Defendant’s managers, but that she must have misplaced the documents and thereafter forgot all about them. It is therefore alleged that the summons did not come to the attention of the Defendant’s management and an appearance to defend was not entered timeously.

[5] The deponent then goes on to state that the Plaintiff sought default judgment against the Defendant, despite being aware that the Defendant had rejected his claim under the policy. The deponent further states that, although the Plaintiff’s application for default judgment was addressed to the Defendant, the application was not served upon it. It is contended that, had this been done, the Defendant would have sought to oppose same. The Defendant alleges that it first became aware of the fact that a default judgment had been entered against it when the Sherriff arrived at its premises on the 11th of June 2018 with a Notice of Attachment in Execution.

[6] It is alleged by the Defendant that it has a *bona fide* defence to the Plaintiff’s claim, based on the contention that the claim was in certain respects fraudulent, that the Plaintiff had claimed an indemnity in respect of property which had not been stolen during the alleged burglaries, that certain documents which the Plaintiff had submitted in support of the claim had been altered and falsified, that the Plaintiff had misrepresented the values of certain items of property included in the claim and that the Plaintiff had been unable to quantify the value of the clothing which had allegedly been stolen and included in the claim.

[7] The Defendant accordingly contends that it ought to be found that it has established good cause for the rescission of the default judgment, given that it was not in wilful default, that it has furnished the court with an explanation for its failure to enter an appearance to defend, that it has a *bona fide* defence to the Plaintiff’s claim and that it is *bona fide* in instituting this application and is not simply seeking to delay the execution thereof.

[8] Supporting affidavits have been put up by the aforementioned Ms Nene and the Defendant's portfolio manager, who in essence confirm the events outlined above.

[9] In his answering affidavit, the Plaintiff confirms the service of his summons and the cause of action as outlined by the Defendant. The Plaintiff disputes the contention that Ms Nene simply cannot "recall" the events and believes that her contention in this regard is false. In support of this, the Plaintiff makes reference to the Sheriff's Return of Service wherein it is confirmed that the nature of the process was explained to Ms Nene. The Plaintiff accordingly submits that the Defendant would have had sight of the documents delivered and that its failure to defend the action only exhibits an indifference to the consequences of the processes of this court and cannot be tolerated.

[10] It is further alleged by the Plaintiff that the application for default judgment was in fact served upon the Defendant and puts up the Sheriff's Return of Service in support thereof. It is evident from the Return of Service that the application was indeed served on the Defendant, again upon Ms Nene, the receptionist, on the 9th of May 2018. Again it is apparent from the Return of Service that the nature of the documents being served upon her were also explained to her.

[11] Insofar as the Defendant's contention that it has a *bona fide* defence to his claim is concerned, the Plaintiff simply denies same. The Plaintiff also submits that the Defendant is in wilful default as it not only failed to defend the action but also failed to oppose the application for default judgment.

[12] I also had before me an interlocutory application, instituted by the Defendant, seeking to deliver a supplementary founding affidavit and further supporting affidavits of Ms Nene and its portfolio manager. It is stated in the affidavit in support of the interlocutory application, deposed to by the Defendant's attorney of record, that, subsequent to the institution of the rescission application, it had come to his attention that the Return of Service issued in respect of the application for default judgment indicated that the application had been served upon the Defendant. The Defendant accordingly sought to supplement its founding papers in order to deal with such fact. Although the interlocutory application was initially opposed, counsel representing the

Plaintiff, rightly in my view, conceded that the supplementary affidavit ought to be considered in my determination of this matter.

[13] If one has reference to the supplementary affidavit, again deposed to by the Defendant's general manager, he concedes that the Plaintiff's application for default judgment was served upon Ms Nene on the 9th of May 2018. He states that Ms Nene, again, cannot recall being served with the application papers and is again forced to conclude that she put the documents aside with the intention of bringing them to the attention of one of the members of the Defendant's management, but failed to do so. This is confirmed by Ms Nene in a further affidavit filed by her.

[14] This being the case, it is accepted by the Defendant that the summons was served upon it on the 4th of December 2017 and the application for default judgment was served upon it on the 9th of May 2018. In both instances Ms Nene cannot recollect the documents being served upon her and she assumes that she must have misplaced them and thereby failed to bring them to the attention of the Defendant's management.

[15] In order to succeed in this application, as the Defendant would appear to be well aware of by virtue of the submissions made in its founding affidavit, it will have to (a) give a reasonable explanation of its default, (b) show that it, at the very least, has a *bona fide* defence to the Plaintiff's claim which, *prima facie*, has some prospects of success, should the judgement be rescinded and the matter proceed to trial, and (c) show that this application is made *bona fide*, in that it is not merely endeavouring to delay matters.[1]

[16] It has been held that, while wilful default on the part of the applicant is not a substantive or compulsory ground for the refusal of an application for rescission, the reasons for the applicant's default remain an essential ingredient of the good cause to be shown.[2] The wilful or negligent nature of the Defendant's actions is one of the

[1] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003(6) SA (SCA) at page 9 paragraph 11.
[2] Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at 529 E-F.

considerations which the court must take into account in exercising its discretion in determining whether good cause has been shown.[3]

[17] If one has reference to the explanation provided by the Defendant in these proceedings, it is common cause that the Defendant's representative, on two occasions, simply ignored the processes of this Court being served upon her. It was however argued by counsel for the Defendant that her actions should not be imputed as being the actions of the Defendant, as the Defendant's "controlling mind" would be its management, who were simply unaware of the fact that an action had been instituted against it, or that an application for default judgment had been launched, until such time as the Plaintiff sought to execute upon his judgment already obtained.

[18] The Plaintiff does not dispute that the Notice of Attachment in Execution was served upon the Defendant on the 11th of June 2018. It is also evident from these papers that the founding affidavit was deposed to on the 30th of June 2018 and this application itself instituted on the 5th of July 2018. It appears therefore that the Defendant's management indeed did react upon becoming aware that an action had been instituted and a judgment had been obtained against the Defendant.

[19] It is also evident, from the letter put up in these proceedings, that the Defendant informed the Plaintiff, as far back as the 27th of February 2017, that it had repudiated his claim and invited him to contact the Ombudsman for Short-Term Insurance should he not be satisfied with such decision. This, in itself, gives some credence to the contention that the Defendant intended to defend any action instituted by the Plaintiff throughout. This being the case, it is reasonable to assume that, had the Defendant's management been aware of the fact that a summons, or an application for default judgment, had been served upon them, they would have timeously reacted thereto and would not have consciously ignored it. Save to state that he believes that the Defendant would have had sight of the documents delivered by the Sherriff and that its failure to defend the action only exhibits an indifference to the consequences of the process of this Court, the Plaintiff cannot gainsay the Defendant's version of events.

---

[3] Harris v Absa Bank Ltd t/a Volkskas *supra* at 530 B-531B.

[20] As far as the Defendant's defence is concerned, counsel for the Plaintiff correctly conceded that such would constitute a defence to the Plaintiff's claim, if proved at trial. In applications of this nature, the minimum that the Defendant must show is that its defence is not patently unfounded and that it is based upon facts which, if proved, would constitute a defence to the action. This the Defendant has done by contending that the Plaintiff's claim was, in certain respects, fraudulent. It has put up the letter addressed to the Plaintiff in repudiation of his claim in support of such contention. It accordingly appears that the Defendant has sought to contend this defence throughout.

[21] Counsel for the Defendant referred me to the case of Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd[4] in support of his submission that, even though Ms Nene's actions may be construed as grossly negligent in the manner in which she dealt with the documents served upon her by the Sherriff, this would not debar the Defendant from being granted the relief sought, having regard to all the circumstances relevant to the current consideration.

[22] In that case, the summons had been served upon the managing director of the Defendant, who in turn, handed it to his "site controller" to convey it to an attorney to act upon. The site controller conveyed the summons to the attorney, but found him to be unavailable and thereafter "forgot about the matter". The court found that although they clearly intended to instruct an attorney to defend the action, their lack of diligence in carrying out that intention was "deplorable". The court was of the view that, although the Defendant's representatives were grossly negligent in their handling of the matter, their conduct was neither wilful nor reckless. Having regard to the fact that it was accepted as having been established that the Defendant had a defence to the action and had seriously intended to defend it, the court did not consider that the negligence was so gross as to debar the Defendant from relief, after having regard to all the circumstances.

[4] 1975 (1) SA 612 (D).

[23] The actions of Ms Nene in the present instance can also be described as "deplorable". Her version however cannot be gainsaid and the immediate reaction of the Defendant's management upon becoming aware that a default judgment had been granted against it adds credence to the submission that the Defendant was not wilful in its failure to timeously enter an appearance to defend, or oppose the application for default judgment. The probabilities favour a conclusion that they would have acted upon the service of the court processes upon the Defendant had they known about them at the time.

[24] Bearing in mind that it has been conceded that the Defendant has a valid defence to the Plaintiff's claim, and bearing in mind that the Defendant's management immediately sought to rescind the default judgment granted against it upon becoming aware of its existence, I do not consider that the clearly negligent actions of Ms Nene ought to debar the Defendant from the relief sought in this application. Considering all relevant factors, I am of the view that the Defendant has established that it is *bona fide* in instituting these proceedings and that it has not done so simply to delay matters. I am therefore of the view that there is good cause for setting aside the default judgment forming the subject of this application.

[25] Having reached this conclusion, I now need to consider the issue of costs. If one views the circumstances prevailing at the time, the Plaintiff was clearly entitled and justified in seeking a default judgment against the Defendant. He had served both the summons and the application on the Defendant and had received no response thereto. The Defendant only has the actions, or more appropriately described "inaction", of its receptionist to blame for the Plaintiff forming the view that he was justified in seeking a default judgment against it. I am therefore of the view, despite my finding that the relief sought in this application ought to be granted, that it would be appropriate for the Defendant to remain liable for the costs incurred by the Plaintiff in instituting the application for default judgment.

[26] I have been urged by the Defendant's counsel to hold that the costs of this application should follow the result. He submitted that, if I find for the Defendant, it

follows that the Plaintiff was not justified in his opposition to these proceedings. Having regard to the initial confusion in the Defendant's founding papers regarding the service of the application for default judgment upon it, I am of the view that there was some justification in the Plaintiff opposing this application. As things developed however such justification appeared to wain once the Defendant was allowed to file a supplementary founding affidavit and it appeared that the Plaintiff would not be able to gainsay the fact that the Defendant's management simply did not know about the service of the processes upon it. This however only came into fruition at the hearing of the matter and the costs consequent upon an opposed motion already having been incurred. At the end of the day, the justification of either instituting or opposing this application will be determined by the result of the trial, and once a finding has been made as to whether the Plaintiff has been successful in its claim, or the Defendant successful in his defence thereof. I am therefore of the view that the costs of this application should follow the result of the trial.

[27] I therefore make the following order:

(a) The default judgment granted against the Defendant on the 25th of May 2018, under case No. 14318/2017, is hereby set aside.

(b) The Defendant is ordered to file its plea to the Plaintiff's particulars of claim within 15 days of the grant of this order.

(c) The Defendant remains liable for the Plaintiff's costs of the application for default judgment.

(d) The costs of this application are to be costs in the cause of the action.

_____

TOPPING AJ

Appearances:

For the Applicant/Defendant : Mr. M. Swain

Instructed by : Neerajh Ghazi Attorneys, Durban.

For the Respondent/Plaintiff : Ms A Moodley

Instructed by : Keowan Y Reddy Inc, Mount Edgecome.

Date of hearing : 30 July 2019

Date Delivered : 12 August 2019