

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK



NAMIBIA, MAIN DIVISION,

JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2018/00248

In the matter between:

TOW-IN SPECIALIST CC

APPLICANT

and

RICHARD PORTIER

RESPONDENT

Neutral Citation: *Tow-In Specialist CC v Portier* (HC-MD-CIV-MOT-GEN-2018/00248) [2019] NAHCMD 44 (22 February 2018)

CORAM: CLAASEN, AJ

Heard: 5 February 2019

Delivered: 22 February 2019

ORDER

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1. The default judgment granted in favour of the respondent/plaintiff against the applicant/ defendant by this court on the 8th of June 2018 under the case number HC-MD-CIV-ACT-OTH-2017/04016 is hereby rescinded.
 2. The writ of execution, issued by the registrar of this court on 25th of June 2018 under case number HC-MD-CIV-ACT-OTH-2017/04016 is hereby set aside.
 3. The applicant/defendant is hereby granted leave to defend the action by the respondent instituted under the case number HC-MD-CIV-ACT-OTH-2017/04016.
 4. The applicant is to file its notice of intention to defend on or before 8 March 2019.
 5. The matter is referred to the Registrar for allocation to a managing judge for the further conduct of the matter.
 6. Costs of the application are reserved for determination by the trial court.

JUDGMENT

CLAASEN A J:

Introduction

- [1] The matter is before court for rescission of judgment, setting aside a warrant of execution, and leave to defend the main case number HC-MD-CIV-ACT-OTH-2017/04016.
- [2] The applicant is Tow-In Specialist CC, a close corporation incorporated under the laws of Namibia, with Mr. Jan Kritzinger as sole member of the corporation. The principal address of the applicant is at 51A Parson Street, Southern Industry in Windhoek.

[3] The plaintiff in the main case, and respondent in this application is Mr. Richard Portier, a self-employed individual. He resided at Cardboard Box, 15 Johan Albrecht Street, Windhoek, at the time that the summons was issued. The residential address has since changed to Pierikspad 1 7596KD Rossum, Netherlands.

Background of matter

[4] The matter emanated from a vehicle breakdown on 22 July 2015, in the vicinity of Opuwo. The respondent, the owner of the vehicle, a Mercedes 312D camper van (hereinafter referred to as the camper) hired the applicant a few days later to tow the camper to Windhoek. On 27 July 2015 Mr. Kritzinger gave instructions to Mr. Edward Gariseb, who was employed as a tow in driver for the applicant, to travel to Opuwo to collect the camper. On 28 July 2015 Mr. Gariseb loaded the camper on the tow-truck of the applicant and commenced his trip to Windhoek. During the journey, an electrical short circuit occurred in the camper. It caught fire and was completely destroyed.

[5] The incident prompted the respondent to issue summons for the payment of (i) € 121 845 and (ii) € 15 743 respectively or the Namibian equivalent thereof, interest *temporae morae* and cost of suit. The claim which is delictual in nature, is based on vicarious liability, holding the employer liable for the damages suffered, as a result of the negligence of Mr. Gariseb. The allegations in the particulars of claim were that Mr. Gariseb failed to ascertain the whereabouts of the electrical cables of the camper and that he failed to take adequate precaution to protect the electrical cables of the camper.

[6] On 8 June 2018 a default judgment was granted in favour of the respondent. A warrant of execution for movable property was issued on 25 June 2018. Subsequently thereto the applicant applied for rescission of judgment.

Applicable law and application to facts

- [7] There are three ways in which an applicant may approach the court for rescission of judgment. In terms of the Rules of the High Court, an applicant may approach the court in terms of Rule 16 or Rule 103 depending on the grounds forming the basis for the application. The third mode is to approach the court in terms of the common law. The applicant opted to apply on all three of these modes. For the sake of brevity, I confine myself to the Rule that I find applicable to dispose of the matter.
- [8] In my considered opinion Rule 16¹ applies to the matter. The rule stipulates that an application for rescission must be made within 20 days after the applicant has knowledge of the judgment.
- [9] On behalf of the applicant it is averred in its founding papers that it learnt of the default judgment on 28 June 2018 when the Deputy Sheriff served the writ of execution. *In casu*, the applicant's rescission application was one day late. Though the applicant filed a condonation application, the joint case management report shows that the condonation application was not opposed. Counsel for the respondent conceded this point in the hearing and I need not concern myself with this aspect of the case. Thus, the only question before court is whether the applicant has shown good cause for rescission of judgment.
- [10] The Supreme Court in *Minister of Home Affairs vs Van Den Berg*², confirmed the requirements for a rescission application to be: (i) the applicant must give a reasonable explanation for 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; (ii) the application for rescission must be bona fide and not made with the intention of merely delaying plaintiff's claim; and (iii) the applicant must show that he has a bona fide defence to the plaintiff's claim.

¹ Rule 16(2) The court may, on good cause shown and on the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of the application in the amount of N\$5 000, set aside the default judgment on such terms as to it seems reasonable and fair, except that – (a) the party in whose favour default judgment has been granted may, by consent in writing lodged with the registrar, waive compliance with the requirement for security; or (b) in the absence of the written consent referred to in paragraph (a), the court may on good cause shown dispense with the requirement for security.

² 2008 (2) NR 548 (SC) at para 23

Reasonable explanation

- [11] I will proceed to examine the explanations proffered by the applicant, to assess if it is plausible.
- [12] The summons was served on 14 December 2017 on a responsible employee, Mrs. Pretorius at the company's principal place of business³. Mrs. Pretorius telephonically informed her employer, Mr. Kritzinger who was out of town during that stage, of the summons so served. She drove the messenger to the legal practitioner's practice but it was already closed and Mr. Richter could not deliver it. Mrs. Pretorius kept the summons on her desk but it inadvertently intermingled with the papers of a file she was working on. Mrs. Pretorius only realised her omission to hand the summons to Mr. Kritzinger when the Deputy Sheriff arrived with the writ of execution. Meanwhile Mr. Kritzinger was under the impression that the summons was handed to the legal representatives.
- [13] Counsel for the respondent contended that the 'misunderstanding' regarding the summons explanation is not adequate. He based his submission on the fact that there was a previous attempt to serve summons and stated that around October 2017 the applicant knew that the plaintiff intends to sue. He categorised the conduct of the applicant and/or legal representatives as reckless abandonment, as they were in communication, yet the matter was not defended. He furthermore stated that applicant's legal practitioners could have investigated on e-justice and would have known about the matter.
- [14] It was common cause that the plaintiff served another summons regarding the same cause of action, prior to this one. The initial summons appears to have been withdrawn as the respondent thought it wise to issue an amended summons. The default judgment was granted on the amended summons. The amended summons was served on an employee, at the applicant's principal place of business during a date that borders on the commencement of *dies non*. The reason for not being able to deliver the summons to the legal representatives of the applicant, the attempted delivery of the summons to the legal practitioner's

³ In terms of Rule 8(3)(a) of the Rules of Court.

office, and the subsequent intermingling of the summons with other documents on Mrs. Pretorius's desk were not disputed and must therefore be accepted as true. Both Mrs. Pretorius who received the summons and Mr. Richter, the messenger who was driven to the legal representative's office filed confirmatory affidavits. It may be that a previous unsuccessful summons may give rise to an expectation of a fresh summons to follow, but it does not equate it to being issued. There can be no merit in the argument on behalf of the respondent that the applicant's legal practitioner should have searched e-justice to determine if a new summons was issued. Especially given the fact that the applicant's legal practitioner did not receive the amended summons from his client.

- [15] The explanation for failure to defend the plaintiff's claim cannot be said to be indicative of gross negligence or reckless desertion of the matter. In the circumstances the court finds the explanation of the applicant to be reasonable.

Bona fide application

- [16] The next question is whether the application was made merely to delay the main case or whether it represents a bona fide application. In looking at the surrounding circumstances, the explanation for default does not signify wilful default and the applicant did not wait a disproportionately long time to bring the rescission application. According to the applicant's explanation, Mr. Kritzinger became aware of the default judgment on 28 June 2018 and the rescission application was launched on 27 July 2018. It represents a bona fide application to bring about rescission.

Bona fide defence

- [17] An applicant is also required to demonstrate a bona fide defence. The defendant's case is based on the perspective that the chain was wrapped around a leaf spring, which got entangled in the electricity wires, and caused the fire. The respondent referred to a certain picture in the Moolman report,⁴ which shows two electrical wires to bolster their view as to the position of the chain to secure

⁴ Assessment report uploaded by applicant and marked as "JJK5."

the camper to the tow truck. In its founding affidavit the applicant denies that the camper was secured in that manner and stated that according to Mr. Gariseb there was no electrical wires visible at the place where the chain was attached to the camper at the time that the camper was loaded. The applicant laid out the technique in which the camper was tied. It was stated that the day in question a truck known as 'roll back truck' was used, which make it easier to load a vehicle onto the flat deck of the tow truck. The process commenced with the tow truck that parked in front of the vehicle to be loaded. Thereafter the tow truck lowered a loading box on a hydraulic arm onto the ground, the camper was pulled onto the load box by a wind-up cable and the load box lifted the camper into a stationery position onto the tow truck. As far as securing the vehicle to the tow-truck, it was stated that a cable was used over the back axle of the camper, which chain was fastened to the load box of the tow truck. The assertion was made that the procedure followed complies with the industry's norms and standards and that on the day in question the respondent did not communicate anything to Mr. Gariseb about electrical wiring of the camper or express any reservations regarding the method used to secure the camper.

[18] Counsel for respondent expressed doubt whether the applicant has a real defence, especially because Mr. Gariseb who drove the tow-truck on the ill-fated day did not depose of a substantive affidavit. Given that Mr. Gariseb attested that he confirms all the aspects referring to him in the founding affidavit, the applicant has postulated a counter argument.

[19] In addition, the applicant asserts, through a confirmatory affidavit and a report by Jan Moolman Assessors⁵, who inspected the camper afterwards, that the camper was modified. According to Mr. Moolman some of the adjustments were not up to standard and the camper could have caught fire for other reasons. In particular, averments were that angle iron was used to strengthen the chassis, that wiring loom was put through the modification, which could have caused a short circuit,

⁵ Report "JJK5".

and there was no indication of circuit cut-off devices to prevent fire in case of a short circuit.

[20] The applicant in its replying affidavit refuted the reliance by the respondent on a certain photo⁶ as indicative of the location where the cable was originally secured. It was asserted on behalf of the applicant that the camper had to be disconnected and offloaded due to the fire, and upon loading the camper again, it could not be secured over the back axle as before. It was stated that the picture “RP4” cannot be relied upon as it does not represent the position of the cable prior to the fire, which the court must accept in the absence of proof to the contrary.

[21] As far as the requirement of a bona fide defence is concerned, it was stated in *Minister of Home Affairs*⁷ that the onus upon the applicant is that of a *prima facie* bona fide defence. The applicant need not go fully into the merits at this stage and tender evidence that the probabilities are actually in his favour. The applicant has met this requirement.

Conclusion

[22] In the circumstances of the matter, there are several triable issues such as the original position and state of the electrical cables on the camper, the modifications effected to the camper as well as whether the employee concerned performed his duties in a negligent manner. These matters are better suited to be determined during a trial.

[23] For these reasons the court is satisfied that the applicant met the requirements for rescission of judgment in terms of Rule 16. In the result the following order is made:

⁶ Photo numbered “RP4” annexed to assessment report “JJK5”

⁷ Supra

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C CLAASEN
ACTING JUDGE

APPEARANCES:

APPLICANT:

C J VAN ZYL

Instructed by Francois Erasmus & Partners
Windhoek.

RESPONDENT:

A W BOESAK

Instructed by Mueller Legal Practitioners
Windhoek