IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED: 11 September 2020

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CASE NO: 41614/2019

In the matter between:

SA TAXI IMPACT FUND (RF) (PTY) LIMITED Plaintiff
(Registration Number: 2012/093936/07)

and

MALULEKA, SEPODISANA PIET Defendant
(Identity Number: […])

AND

CASE NO: 19411/2019

In the matter between:

SA TAXI DEVELOPMENT FINANCE (PTY) LIMITED
Plaintiff
(Registration Number: 2008/012599/07)

and

NDABA, MELIKHAYA CLAREMAN
Defendant
(Identity Number: […])

AND

CASE NO: 19546/2019

In the matter between:

SA TAXI FINANCE SOLUTIONS (PTY) LIMITED
Plaintiff
(Registration Number: 2003/029687/07)

and

NGQUKUMBA, MICHAEL SOYISO Defendant
(Identity Number: […])

AND

CASE NO: 40717/2019

In the matter between:

POTPALE INVESTMENTS (PROPRIETARY) LIMITED Plaintiff
(Registration Number: 2011/118165/07)

and

NTONG, VINCENT THAPELO Defendant
(Identity Number: […])

REASONS FOR ORDERS

(Heard remotely over Zoom platform 9 September 2020)

SNYCKERS AJ:

INTRODUCTION

1. These are reasons for orders granted in four similar applications for default judgment heard over the Zoom platform in unopposed motion court on 9 September 2020.

2. In all four applications, default judgment was sought by vehicle financiers in the form of the repossession of vehicles the subject of credit agreements regulated by the National Credit Act 34 of 2005 (“NCA”).

3. In each case, the default judgment in question was sought on the basis of default in entering an appearance to defend.

4. Each application came before me as a “reconsideration” of a refusal on the part of the registrar to grant default judgment. Each reconsideration application was brought under Rule 31(5)(d) of the Uniform Rules of Court.

5. In two of the matters (*Ngqukumba* and *Ndaba*) the reason supplied by the registrar for refusing to grant default judgment was “*inconveniency (sic) caused to Defendant”*. In the other two matters (*Maluleka* and *Potpale*), the reason furnished was *“cause of action was completed outside the area of jurisdiction of this Division*”.

6. In each case, notice under s129(1) of the NCA was served on the defendant outside the area of the jurisdiction of this court. In each case the defendant appeared to be neither resident nor domiciled nor present in the area of jurisdiction of this court when summons was served. In each case, the relevant credit agreement was concluded within the court’s jurisdiction.

7. Counsel for the applicant submitted that the registrar’s reason in each case appeared to be based on the judgment of the Supreme Court of Appeal in *Blue Chip 2 (Pty) Limited tla Blue Chip 49 v Ryneveldt and Others* 2016 (6) SA 102 (SCA). That decision concerned section 28(1)(d) of the Magistrates’ Court Act 32 of 1944. It was submitted that the *ratio* of that decision, which concerned itself with the jurisdiction of the Magistrates’ Courts, was not applicable to actions instituted in the High Court and to the principles upon which jurisdiction was assumed in the High Court. I deal with this below.

RECONSIDERATION UNDER RULE 31(5)(d)

8. Rule 31(5) provides as follows:

(*5)*

(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, who wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than five days' notice of the intention to apply for default judgment.

(b) The registrar may-

(i) grant judgment as requested;
(ii) grant judgment for part of the claim only or on amended terms;
(iii) refuse judgment wholly or in part;
(iv) postpone the application for judgment on such terms as may be considered just;
(v) request or receive oral or written submissions;
(vi) require that the matter be set down for hearing in open court:

Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court.

(c) The registrar shall record any judgment granted or direction given.

(d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.

9. The first question that arises is whether "*a judgment granted or direction given"* in Rule 31(5)(d) includes a decision to refuse to grant default judgment.

10. The term *"grant judgment"* in the context of the registrar's functions in respect of default judgments certainly appears to be used in this Rule to envisage the granting of default judgment – see Rule 31(b)(i) and (ii) and also Rule 31(6)(a) and (b). On the face of it, it is an odd term in the context to use to refer also to

the refusal to grant default judgment. The registrar is fulfilling a very restricted quasi-judicial function when empowered to grant default judgment – he or she is not sitting as a court whose pronouncements, other than the granting of default judgment under the Rule, can accurately be described as "granting a judgment".[1] Even if the refusal of a default judgment can be termed a "judgment" by the registrar, as counsel submitted, it is difficult to see how this can be the "granting" of judgment, as nobody asked for such refusal. It is also somewhat strained to regard the refusal to grant default judgment as the "giving" of a "direction".

11. It is clear, however, that the entitlement to seek reconsideration is not restricted to defendants against whom default judgment has been granted – the Rule specifically refers to any party dissatisfied – and a plaintiff could well be dissatisfied with any of the more positive mandatory "directions" contemplated in Rule 31(5)(b).

12. The authors of *Erasmus: Superior Court Practice* (RS11 2019 D1-376) invoke the definition of "party" in Rule 1 to say of any dissatisfied party under Rule 31(5)(d): "*This includes the plaintiff and the defendant but not a non-litigant having an interest in the action."*

13. It remains strange that, if the Rule were intended to cover the spectrum of decisions in Rule 31(5)(b), it did not simply refer to any decision of the registrar under Rule 31(5)(b), and instead confines itself to "judgments granted" and "directions given". Perhaps it was thought inappropriate to refer

[1] See section 23 of the Superior Courts Act 10 of 2013 in terms of which the *grant* of default judgment by the registrar is deemed to be a High Court judgment.

to "orders" and the term "direction given" was intended to cover all the possible decisions contemplated in Rule 31(5)(b). *Prima facie* this makes sense.

14. Nevertheless, in *Pansolutions,* [2] the rationale for the existence of this Rule was based on the analogy of the similar "reconsideration" opportunity afforded by Rule 6(12)(c) – to afford a party against whom a judgment was granted in his or her absence the opportunity to have it "reconsidered" once presented with (at least part of) the other side of the story. This rationale would be wholly inapplicable to a plaintiff who unsuccessfully sought default judgment.

15. *Pansolutions* is cited in the *Erasmus* commentary for being in conflict with *Bloemfontein Board Nominees Ltd v Benbrook*[3] on the nature of the power exercised by the court under Rule 31(5)(d). In *Benbrook* Hancke J held that the court did not *"substitute its own discretion for that of the Registrar"* but should interfere only where the Registrar *"erred"* (*"fouteer"*).[4] In *Pansolutions*, Swain J declined to follow *Benbrook* and held that the court did indeed *"substitute its own discretion"* for that of the Registrar. Very different kinds of *"discretion"* were at issue – in *Benbrook*, a cost award by the registrar was at issue, something usually regarded as a decision in the nature of a "strong" or "true" discretion.[5] In *Benbrook*, it was indeed the plaintiff who had set the matter down for "reconsideration" of a cost award granted by the registrar. In *Pansolutions*, the defendant sought rescission of a default judgment, and so

[2] *Pansolutions Holdings Ltd v P&G General Dealers & Repairers CC* 2011 (5) SA 608 (KZD), paras 9 to 11.
[3] 1996 (1) SA 631 (O).
[4] At 634I.
[5] See *Giddey NO v JC Barnard & Partners* 2007 (5) SA 525 (CC) footnote 17 and cases discussed there.

the “discretion” at issue in *Pansolutions* related to the traditional requirement of *“good cause”* for rescission – something that would not be troubling the registrar at first instance.

16. The criticism of *Benbrook* in *Pansolutions* did not extend to any difficulty with allowing a plaintiff, to whom the rationales canvassed by Swain J in *Pansolutions* did not apply, to utilise the provisions of the Rule.

17. I revert below to the matter of a discretion when I address the reconsideration decision itself.

18. It seems to me that the Rule was indeed intended to allow reconsideration by a dissatisfied plaintiff of any decision of the registrar taken under Rule 31(5)(b), including the refusal of default judgment, which, even if not the “grant” of a judgment, must be accommodated as one of the possible “directions given” contemplated in the Rule. A defendant, after all, has available the ordinary rescission route under Rule 31(6) or Rule 42, and the ability to have the application “reconsidered” by the court is something the rulemaker appeared to me to seek to bestow on the unsuccessful plaintiff too. I therefore do not believe the reasons canvassed in *Pansolutions*, relating to an ability to have reconsidered something granted in one’s absence, are exhaustive in determining the scope of the Rule, nor its confined language.

19. I do, however, agree with *Pansolutions* that the “reconsideration” must be a reconsideration *de novo*. Of course, anything the registrar said or did could be an important consideration for the court in exercising its own discretion, but that does not mean it is appropriate to regard Rule 31(5)(d) as creating some

species of review, entailing deference to the registrar. I revert to the issue of discretion below.

JURISDICTION AND *BLUE CHIP*

20. Section 28(1)(d) of the Magistrates' Courts Act 32 of 1944 conflates personal and subject-matter jurisdiction of the Magistrates' Courts. It confers jurisdiction over any person, as long as the whole of the cause of action arose within the jurisdiction of the relevant lower court. And so, for such jurisdiction to vest in relation to persons residing outside the jurisdiction, it is important that "the whole" of the "cause of action" should arise within the relevant court's jurisdiction.

21. In *Blue Chip*, it was determined that, for purposes of claims in relation to which delivery of notice under s129(1) of the NCA was essential in order to sue, it could not be said that the "whole cause of action" arose within the relevant jurisdiction if the s129(1) notice was delivered outside the jurisdiction.

22. Counsel submitted that the statutory jurisdiction of the High Court was worded decisively differently, in referring to "causes arising" in section 21(1) of the Superior Courts Act 10 of 2013, rather than "the whole cause of action".

23. The relevant part of section 21(1) reads:

> *"A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance…"*

24. It has, however, been long established that identically worded provisions in predecessor statutes were question-begging in the sense of not referring to causes of action, but rather to cases over which the court properly assumed jurisdiction on recognised grounds. The "causes arising" formulation was therefore not itself a jurisdiction-conferring provision.[6]

25. At common law, the presence of a recognized basis for subject-matter jurisdiction was insufficient in the absence of personal jurisdiction or attachment or arrest to confirm jurisdiction. Yet statutes in this country from early on prohibited attachment or arrest to confirm jurisdiction in relation to persons who were *peregrini* of the court in question, but *incolae* of the Republic as a whole. The current section 28 of the Superior Courts Act continues that rule. It was authoritatively established in *Veneta Mineraria Spa* [7] that the prohibition had the effect also of rendering attachment unnecessary for jurisdiction in such cases, thereby implicitly conferring jurisdiction on the High Court if a recognised *ratio jurisdictionis* was present, even in the absence of personal jurisdiction, in the case of a local *peregrinus*.

26. Counsel was correct to submit that for High Court jurisdiction, jurisdiction founded on the *locus contractus* was sufficient, even if performance, or some performance, were to take place outside the jurisdiction of the court, or the cause of action needed completing in some or other way outside the

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[6] See *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 486C.

[7] *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in Liq)* 1987 (4) SA 883 (A) at 890. A digression on the fact that the wording of the statute, as was the case with its predecessor, prohibits attachment only to "found" jurisdiction, and not to "confirm" jurisdiction, is unnecessary, given that it has always been interpreted to apply to both.

jurisdiction of the court.[8] Accordingly, it appears that invocation of *Blue Chip* as a basis for refusing default judgment would be wrong.

INCONVENIENCE, JURISDICTION AND DISCRETION

27. It may be noted, however, that the registrar invoked jurisdiction twice and inconvenience twice.

28. Should the existence of a sufficient basis for jurisdiction be sufficient to grant default judgment?

29. Ordinarily, I would say yes. If a court is inclined to assume jurisdiction, and a plaintiff entitled to institute action out of it, it would seem capricious to deny the plaintiff the ordinary remedy of default judgment in all cases where, despite the existence of jurisdiction, the defendant is outside the area of jurisdiction of the court. After all, as counsel submitted, a defendant may seek a referral of the matter from one jurisdiction to another.[9] Furthermore, a judgment obtained in this way may be more vulnerable to rescission by a defendant who could more easily establish good cause, and that may be a risk the plaintiff takes in such cases.

30. It was on this basis that I granted the orders sought.

31. In preparing these reasons, however, I had occasion to consider the judgment

[8] See for example *Roberts Construction Co Ltd v Wilcox Bros (Pty) Ltd* 1962 (4) SA 326 (A).
[9] See section 27(1)(b)(ii) of the Superior Courts Act.

of the full court in *Thobejane*.[10] The full court was highly critical of the practice of finance houses employing the convenience of High Court jurisdiction in cases falling within the jurisdiction of the lower courts (even if the Regional Courts), as this amounted to a way of raising cost barriers to poorer litigants properly to defend the matters and could lead to, and in fact mostly entailed, an abuse of the process of the court. It appears that several such matters are still being brought, and orders routinely granted, in this court on the unopposed roll, and some of the orders granted by me in the week of 7 September would fall into this category, as did all four the cases at issue in the instant matter (Regional Court jurisdiction, if not District Court).

32. It appears to me in light of *Thobajane* to be important to discourage this practice in this court, and in particular in cases where the defendant resides outside the area of jurisdiction of this court, despite the fact that this does not deprive the court of jurisdiction as the *locus contractus.*

33. In the instant cases, however, the applications in question did raise serious questions of law that required the attention of the High Court, which tends to be a sufficient basis for justifying the invocation of concurrent High Court jurisdiction.

Frank Snyckers

Acting Judge

11 September 2020

[10] *Nedbank Ltd v Thobejane & Similar Matters* 2019 (1) SA 594 (GP)

For applicants: Rosalind Stevenson

Instructed by: Marie-Lou Bester Inc

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