

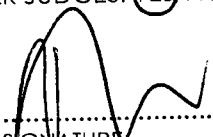
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA



3/5/16

CASE NUMBER: 24270/2014

- (1) REPORTABLE: YES / ☒ NO
- (2) OF INTEREST TO OTHER JUDGES: ☒ YES / ☐ NO
- (3) REVISED.
3/5/2016
DATE
- 
SIGNATURE

In the matter between:

MOHAMED JAVED GANI

First Applicant

KWIK PROPERTY HOLDINGS (PTY) LTD

Second Applicant

and

AUTUMN LEAF TRADING CC

First Respondent

THE SHERIFF: CENTURION WEST

Second Respondent

JUDGMENT

BRENNER AJ

1. This is an application for the rescission of an order, granted by consent on 20 June 2014, in terms of which a written settlement agreement was made an order of Court. Leave is sought to rescind the settlement agreement, and the warrant of execution issued against the applicant in consequence of the order.
2. The applicants appear to rely on the common law and/or the provisions of Rule 42 (1) (a) of the Uniform Rules of Court in their application. Under this Rule, an affected party may apply to rescind a judgment which was erroneously granted. Their case is based on the principle of *iustus error*.
3. At common law, a judgment may be set aside on the ground of *iustus error*, albeit on rare occasions. See **De Wet v Western Bank Limited 1979 (2) SA 1031 (A) at 1039H to 1043A.**
4. A judgment given by consent may be set aside on "good and sufficient cause", in accordance with the same principles as those which apply to rescissions under Rule 31(2). In such application, the applicant must provide a reasonable explanation for the circumstances in which the consent judgment was entered, and is required to demonstrate the *bona fides* of the application, and the *bona fides* of the defence on the merits of the case, which defence *prima facie* carries with it a good prospect of success.
5. The judgment of **Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)** involved a case in which summary judgment was granted by default. The Court noted: *Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success (Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A))*.
6. A *prima facie* defence suffices. It is not necessary for the applicant to traverse the merits in detail or to produce evidence that the probabilities are in its favour.
7. The pivotal issue in *casu* is whether the applicants have been able to discharge the burden of proving, *prima facie*, whether the documents which

culminated in the execution of the settlement agreement were forged by an employee of the second applicant, so as to vitiate the validity of the agreement.

8. For ease of reference, the first applicant will be referred to below as "Gani", the second applicant as "Kwik Property", and the first respondent as "Autumn Leaf". The second respondent, being the sheriff of Centurion West, has not opposed the proceedings. Another company, Build Kwik Trading (Pty) Ltd, ("Build Kwik"), an associate company of Kwik Property, forms part of the *dramatis personae*.
9. At all material times, Autumn Leaf traded as "Timber Junction" and was the supplier of timber products, while Kwik Property and Build Kwik were wholesalers.
10. A conspectus of the papers in the application reveals that the alleged forgery of the three documents which gave rise to Autumn Leaf's cause of action was raised for the first time on 7 August 2014, in a detailed letter from Gani's attorneys to Autumn Leaf's attorneys. This was one week after service on Gani of a warrant of execution for the attachment of movable property to satisfy the debt, which remained unpaid.
11. The following chronology of events merits mention.
12. In 2011, Build Kwik wished to acquire timber from Autumn Leaf on credit. An application for credit facilities was ostensibly signed by Gani as director of Build Kwik on 27 June 2011, in which a credit facility of R1,5m was sought ("the credit application"). The credit application appears to have been signed by Gani on behalf of Build Kwik, and, beneath his signature, at clause 13 of the document, he stood surety for the liability in his personal capacity. There are two unidentified witnesses to the credit application.
13. Some four months later, on 10 October 2011, at the behest of Autumn Leaf, two other documents were ostensibly executed by Gani. A cross company guarantee was signed by Kwik Property in favour of Autumn Leaf, (its trade name is mentioned), for the liability to Autumn Leaf of Build Kwik ("the cross company guarantee"). There are two identified witnesses to this document,

namely, Brigesh Patel ("Patel") and Neel Soni. On the same date, a resolution was ostensibly signed by Gani on behalf of Kwik Property, to authorise the cross company guarantee.

14. Where deemed appropriate, the credit application, cross company guarantee and resolution will be referred to below collectively as "the 2011 documents".
15. In his opposing affidavit in this application, Alistair Gilson ("Gilson"), a member of Autumn Leaf, asserts: "I personally saw Mr Gani sign....(the credit application, the cross company guarantee and the resolution)".
16. Between July 2013 and August 2013, Autumn Leaf supplied goods to Build Kwik on credit, resulting in the amount of R828 318,48 being owed to it. Payment was not made.
17. On 13 February 2014, following a phone conversation between Gilson and Gani, Autumn Leaf's attorneys wrote a letter to Gani enclosing an acknowledgment of debt for signature by him, personally, for payment of the above liability in four instalments ("the AOD"). Included with this document was a resolution to be signed by Kwik Property to authorise the execution of the AOD. Clause 6.1 of the AOD confirms the existence of the cross company guarantee by Kwik property. Clause 6.4 contains a suretyship by Kwik Property as co-surety with Gani for the debt owed to Autumn Leaf. The AOD was never signed. On 19 February 2014, written demand was made by Autumn Leaf's attorneys to Gani's attorneys. In a reply of the same date, a bare denial was made while at the same time, copies of "all agreements, invoices and other documents" were called for. Autumn Leaf's attorneys replied that they would furnish the documents on instructions from their client. It would appear that the documents were not provided at this time but instead a decision was made to issue Summons.
18. On 24 March 2014, Autumn Leaf issued Summons out of this Court, against Build Kwik, Gani and Kwik Property, jointly and severally, for payment of the sum of R828 318,48. Reliance was placed on the credit application, cross company guarantee and resolution, all of which were attached to the particulars of claim.

19. The Summons was served on 31 March 2014 on Kwik Property, on "Javid – director of Kwik Property Holdings (Pty) Ltd". "Javed" is Gani's middle name. The Summons was served on 2 April 2014 on Build Kwik at its registered address, with a sheriff's note that Build Kwik no longer traded from the premises at 20 Schubart Street Eldoglen. Service was effected on 2 April 2014 on Gani at corner Lanham and Engelbrecht Street East Lynne, Pretoria, on one Mrs Thompson, who accepted service in the temporary absence of Gani.
20. Prima facie, therefore, it would appear that Gani received copies of the credit application containing his surety, the cross company guarantee, and resolution, on 31 March 2014 by the latest. Gani has this to say about the Summons: "The relevant documentation that were later attached to the combined summons were then delivered to my attorney on approximately 25 February 2014." Gani is obviously mistaken about the date, but confirms receipt and later delivery of the Summons to his attorney.
21. Gani says that his attorney was "bona fide and prima facie" under the impression that Gani had signed the documents. Gani then says "The documents were forwarded to me and I initially also prima facie thought that I signed the documents but have bona fide forget (sic) about it." He then proceeded to instruct his attorney to "settle the matter on the most favourable terms possible."
22. The settlement negotiations purportedly occurred while Gani was in the UK, and took place, as alleged by him, "under extreme pressure", being finalised on the day of the summary judgment application, which was 20 June 2014. On this date, a written agreement was signed by one P Dewes for Autumn Leaf, and by AJ Henn for Gani and Kwik Property, both indicating on the document that they were duly authorised. The terms of this agreement were made an order of Court on 20 June 2014. Gani and Kwik Property agreed, jointly and severally, to pay the sum of R900 000,00 to Autumn Leaf in three equal instalments of R300 000,00 on 7 July 2014, 7 August 2014 and 7 September 2014.
23. In the meantime, on 6 May 2014, Build Kwik was liquidated.

24. Gani's statements about the revelation that his signatures were forged on the credit application, cross company guarantee and resolution, are not entirely illuminating. He omits to mention precisely when it was that he noticed that his signatures had been allegedly forged. This is a material issue which he simply avoids addressing.
25. He asserts that, "after investigation and proper perusal of the documents", he established that one of his employees, Brijesh Patel ("Patel") had forged his signature on the 2011 documents. An affidavit from Patel is attached to his affidavit. Gani states in his affidavit dated 8 August 2014: "I am considering disciplinary steps against Patel in my capacity as his employer." He goes on: "I would never have consented to personal liability towards (Autumn Leaf) and/or to bind (Kwik Property) in favour of (Autumn Leaf), for (Build Kwik's)... liability."
26. After the execution of the settlement agreement, post 20 June 2014, he says: "I then got involved in investigating the matter and to decide together with my attorney regarding the correct strategy after the real facts came to my knowledge.....Unfortunately (Autumn Leaf) then proceeded with the writ and I immediately had detailed consultations with my attorney as a result of which a letter was sent to (Autumn Leaf's) attorney dated 7 August 2014.....I deny that Patel had any authority to sign the suretyship, resolution and guarantee attached to (Autumn Leaf's) combined summons.....I inter alia intend to obtain the services of a handwriting expert in order to prove the defences of myself and (Kwik Property)."
27. Much is made by Gani and Kwik Property of the request for signature of the AOD, in addition to the 2011 documents. They contend that this request was made because Autumn Leaf was aware that the 2011 documents were invalid, and had been forged. This is denied by Autumn Leaf. I find no sinister connotations in this conduct. It would appear that Autumn Leaf simply wished to reiterate the existence of the pre-existing securities and make an accommodation to the applicants for payment of the debt in instalments.
28. Service of the warrant of execution took place on 30 July 2014. In Gani's attorney's letter to Autumn Leaf's attorneys, dated 4 August 2014, still no

mention is made of the purported forgery. Instead, Gani's mother, Rashida Gani, lays claim to all movable property under attachment by way of interpleader. The first time the alleged forgery is mentioned is in a subsequent letter dated 7 August 2014.

29. Patel's affidavit dated 8 August 2014 mentions that he and not Gani signed the 2011 documents. The credit application was signed because Build Kwik needed wood-building material "urgently" and Autumn Leaf would not supply same without a signed application. He says: "Mr ABD Gilson was personally present at the premises of (Build Kwik) at the time of signing by myself" of the credit application. He goes on: "Although (Autumn Leaf) then delivered the relevant goods Mr ABD Gilson again approached (Build Kwik) to get further security and under the exact same circumstances I signed (the cross company guarantee and resolution)". (my emphasis). Patel states: "I am presently unemployed".
30. The gist of the case for Gani and Kwik Property is summarised by Gani as follows: "I now respectfully wish to resile from the settlement agreement entered into with (Autumn Leaf) mainly on the ground that when the agreement was entered into it was done because of a genuine iustus error on my side and the bona fide but mistaken belief that (Kwik Property) and myself are liable towards (Autumn Leaf) on the grounds as set out in (Autumn Leaf's) combined summons."
31. The rescission application was served on 11 August 2014. Notice to oppose was served on 20 August 2014. The opposing affidavit was served a year later, on 14 August 2015. Condonation was sought and there was no opposition by the applicants to the late service of same. No replying affidavit was forthcoming from the applicants. The application was enrolled for hearing on 25 April 2016.
32. The opposing affidavit of Autumn Leaf denies the alleged forgery and the basis for the iustus error relied upon by the applicants. It sets out to prove that Kwik Property and Gani had, since the launch of the rescission application, admitted their liability to Autumn Leaf on several occasions. A litany of emails and letters from 11 September 2014 until 17 June 2015 evidences averments

as to admissions of liability by Kwik Property and Gani, protracted negotiations concerning repayment of the debt, and a series of broken promises.

33. On 1 July 2015, a written agreement was even signed by Gani and Gilson in which it is confirmed that Autumn Leaf is owed a higher sum of R1 350 000,00, but that such agreement does not supercede prior agreements.
34. Gilson has this to say about the alleged forgery: "In particular, I wish to take issue with the suggestion in Patel's affidavit that I saw him sign (the credit application). I personally saw Mr Gani sign (the credit application) as well as (the cross company guarantee) and (the resolution). Concerning Patel, Gilson says: "I mention that notwithstanding what Patel says about being unemployed, he still works for the applicants or at least for Gani. I saw him at Gani's premises on 1 July 2015, the day on which I signed the agreement...." (the 1 July 2015 agreement mentioned above).
35. As stated above, no replying affidavit was forthcoming from Kwik Property and Gani, even though various allegations of a material nature in the opposing affidavit called for an answer. Certain of these allegations therefore remain uncontested by the applicants.
36. On the subject of iustus error, the Court in **National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A) at 479G-H** said:

"Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for the defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable(justus) and it would have to be pleaded."
37. The decisive question to be asked was formulated in **Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis 1992 (3) SA 234 (A) at 239I to 240B**:

"Did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his

declared intention represented his actual intention?To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that misrepresentation; and thirdly, was the other party misled thereby?... The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?"

38. In addressing the issue of iustus error, Autumn Leaf's Counsel drew my attention to the case of **Absa Bank Limited v Jansen van Rensburg 2015 (5) SA 521 GJ**. In this case, an attorney for Absa Bank arranged for a bidder to attend an auction of property in a sale in execution. The bidder was authorised to bid for the property up to R35 615. The bidder exceeded her limit and bid at R125 000,00 and this was accepted. The Court found that the mistake was due to the fault of the mistaken party, and that Absa Bank could not escape from the sale which came into place on acceptance of the bid. By appointing its attorneys to bid on its behalf at the auction, Absa Bank had represented to third parties and to the sheriff that its agent had unlimited authority to bid.

39. In its judgment, the Court referred with approval to the case of **Monzali v Smith 1929 AD 382 at 385**:

"Where any person by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to any one dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority which he was so represented to have."

40. Gani and Kwik Property have failed to advance a defence which has good prospects of success. There was no iustus error on the part of the applicants on the facts before me. There was no mistake and, even assuming there was one, it was in any event not reasonable.

41. On his own version, Gani is a businessman and is the sole director of various companies which he manages. It is stretching credulity for him to imply that he did not peruse the Summons served on 31 March 2014, with its annexures, being the 2011 documents, and appreciated then that he was being sued personally, with Kwik Property, for the liability of Build Kwik.

42. It beggars belief that he would have failed to observe that he was sued in his personal capacity qua surety and that Kwik Property was sued qua guarantor for the debt of Build Kwik. It is highly improbable that, over the period from 31 March 2014 until about 7 August 2014, he would not have observed that his signature on the 2011 documents was "forged". Gani's assertion that he would never have stood personal surety or have bound another company to stand surety is inconsistent with his version that he did not initially appreciate that this was the case, when he received the Summons and before he mandated his attorney to settle the matter in June 2014.
43. Gani is also not candid about a fact of paramount importance, namely, when he first observed the alleged forgery.
44. He says in August 2014 that he intends to take disciplinary steps against Patel, and this assumes that Patel is still employed by him. Yet Patel, in his own affidavit in August 2014, mentions that he is unemployed. Gilson states that he saw Patel on 1 July 2015 at Gani's premises, when Gani and Gilson signed an agreement. This is not contested by the applicants because they failed to reply. Patel corroborates Gilson's version that Gilson was present at the applicants' premises in June 2011 and October 2011 when the documents were signed.
45. No mention is made whether any effort was made to procure a supporting affidavit from Neel Soni, a witness to the cross company guarantee. No effort has been made to introduce the expert evidence of a handwriting expert concerning the purported forgery.
46. Little probative value can be attached to Patel's averment that he perpetrated the forgeries under the given circumstances, a fortiori considering the relationship between him and the applicants.
47. The allegation that the case was settled "under severe pressure" is belied by the fact that the matter ran its course for over two months before settlement.
48. I remain unconvinced, on the prima facie evidence before me, that there was indeed a "forgery" of the 2011 documents. Gani's version on this issue is inherently improbable, and little weight, if any, can be attached to the

corroborating evidence of his employee, Patel. Even assuming there was, Gani's error in settling the matter on the strength of what he considered to be valid documents was not reasonable.

49. On a totality of the evidence, Gani and Kwik Property have failed to prove good cause for the setting aside of the order against them. Costs should follow the result, with cognisance being taken of the cavalier manner in which the applicants have conducted themselves in this application.

50. The applicants failed, even prima facie, to establish the requirements for a iustus error, as adumbrated in the Sonap case. On the facts, neither was Gani actually misled about the true factual position, nor would a reasonable man in his position have been misled. The applicants were not able to prove a bona fide, prima facie defence with a good prospect of success, and have therefore failed to prove good cause for the relief sought.

51. In the result, the following order is made:

- a. The application is dismissed;
- b. The first and second applicants are directed to pay the costs of the application, jointly and severally, on the attorney and client scale.



BRENNER AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

3 May 2016

Appearances

Counsel for the First and Second Applicants	: Advocate KT Jordt
Instructed by	: Attorneys Lacante Henn Inc
Counsel for the First Respondent	: Advocate D Schaup
Instructed by	: Venn's Attorneys