


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

29/7/16.
CASE NO: 37238/2014

(1)	REPORTABLE: YES <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES/ <u>NO</u>
(3)	REVISED.
	
SIGNATURE	DATE <u>29/7/2016</u>

In the matter between:

WAYNE VAN DER BURGH

APPLICANT/ PLAINTIFF

and

DEBORAH MOOSA

1ST RESPONDENT/DEFENDANT

NEW ORDER INVESTMENTS 131 (PTY) LTD 2ND RESPONDENT/DEFENDANT

J U D G M E N T

MALI J.

- [1] The applicant seeks an order to strike out defendant's plea and consequently the default judgment in the sum of R4622 968.09 against the defendants in the main action who are the respondents herein.

[2] The applicant/plaintiff instituted action against the respondents/defendants on 22 May 2014. The defendants filed Plea on 22 July 2014. On 22 August 2014 the Applicant delivered exception to the respondent's plea because it failed to disclose a defence against the plaintiff's claim; alternatively it was vague and embarrassing. On 18 February 2015 the exception was upheld with costs and the respondents were allowed a period of 10 (ten) days from service of the order to launch an application to amend their Plea.

[3] The defendants filed notice of intention to amend on 5 March 2015. Despite this, the defendants did not file the proposed amendment. The applicant / plaintiff has applied in terms of Rule 21(4) of the Uniform Rules for the defendant's defence to be struck out. Rule 21 (4) provides:

"21 Further Particulars

(4) If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the court may make such order as to it seems meet."

[4] On 14 April 2015 the respondents served and filed their amended pages as well as filed an application for condonation for the late filing of the amended pages. The applicant set down the matter to strike out the respondent's defence for 16 November 2015. The application for striking out of the defence and default judgment intended to arise therefore, as well as the respondent's application for condonation of the late delivery of the amended pages of the defendant's plea were postponed sine die.

[5] The respondents were ordered to file their replying affidavit in respect of the condonation application, together with a condonation

application for the late filing of the said affidavit, within 10 days of the order. The respondents were ordered to serve and file their heads of argument 15 days after they had filed their replying affidavit. The respondents served their replying affidavit on 1 December 2015, one day out of time.

- [6] In the present application the defendant sought the condonation of the late filing of their amended pages. The respondents explained that the delay in delivering the amended pages was occasioned by the administrative error on the part of the respondent's erstwhile attorneys as well as their correspondent attorneys.
- [7] Counsel for the respondent in elaboration to the error referred to above stated that the erstwhile Durban attorneys of the respondent omitted to instruct their Gauteng correspondent attorneys to serve the amended pages. They could not be punished by the omissions of their legal representatives.
- [8] In respondent's head of argument the court is referred **GROOTBOM-v NATIONAL PROSECUTING AUTHORITY**¹ at paragraph 23 the court stated that:

"It is now trite that condonation cannot be there for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non- compliance with the rules or court's discretions. Of great importance, the explanation must be reasonable enough to excuse the default".

¹ 2014 (2) SA 68 (CC)

- [9] In my view Grootboom *supra* does not seem to exclude the requirement of a bona fide defence in respect of condonation applications. If it is so, I cannot understand how the court will ascertain the reasonableness of explanation without the disclosure of the defendant's defence in the affidavit. This is in order to weigh the prospects of success. The bona fides or lack thereof can only be determined when the defence is disclosed under oath.
- [10] The applicant's complaint is that the respondent's defences are not made under oath or simply put they are not disclosed in the respondent's affidavit. The respondent raised their defence in their heads of argument for the first time.
- [11] At paginated page 209 paragraph 27 of the of the first and second respondent's replying affidavit incorporating condonation the following is stated:
- "to the extent that I do not deal with the bona fide defence herein and in order not to burden the record with repetitions, I invite the Honourable Court, to what has been stated in the answering affidavit filed by the Respondents in opposition to the striking application, insofar as it deals with the condonation for the late filing of the amended pages and to what I shall state later herein , mutatis mutandis"*
- [12] It is apparent from the above that the defendants refer the court to the answering affidavit in opposing the striking application as far it deals with the condonation. There is nowhere in the entire affidavit where the defence of the respondents is dealt with. Gleaning from page 214 of the answering affidavit at paragraph 40 to 52 titled **"RESPONDENT HAVE NO BONA FIDE DEFENCE"** wherein I hoped to ascertain the defendants' defence, regrettably the court could not find that the 12 paragraphs deal with the lack of understanding of test

for condonation application by the applicant's deponent. In fact at paragraph 40 the following is stated

" This is so in dealing with the question of bona fide defence I am advised that it is not necessary for the litigant to set out in full all the facts in order to enable the Court to make a determination on the question of bona fide defence".

[13] I agree with the applicant's contention that the respondent have raised their purported defences in the heads of argument filed on 16 March 2016. As indicated above the defences raised in the heads of argument are nowhere to be found in the answering affidavit. In motion proceedings it is trite that the party makes his/her case in an affidavit.

[14] Having regard to the above the application for condonation in respect of the late delivery of the amended pages must fail.

[15] In the result I make the following order;

15.1. It is ordered that the Respondent's/Defendant's Plea is struck off,

15.2 The respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

15.3 it is ordered that judgment is granted against the first defendant on the following terms:

15.3.1 that the Addendum, attached to the Particulars of claim as Annexure "POC4" be rectified as follows:

- i by deleting reference to "*twenty (20) years*" in clause 2.2 and substituting it with reference "*ten (10) years*",
- ii by adding the following at the end of clause 2.2 "*in equal monthly instalments*" and
- iii by inserting the following after clause 2.2 as 2.2A "*In the event of the purchaser neglecting and/or failing and/or refusing to pay any instalment in terms of the addendum, the full amount outstanding will become due and payable by the purchaser to the seller.*"

15.4 against the defendants jointly and severally, the one paying the other to be absolved:

15.4.1 payment in the sum of R4 622 968.09;

15.4.2 Interest on the amount in 15.4.1 at the rate of 12% per annum *a tempore morae* up to date of payment thereof;

15.4.3 an order declaring the property known as:

EFR 1705 HOVELD PARK, EXT 1 TOWNSHIP

REGISTRATION DIVISION J. S. PROVINCE OF
MPUMALANGA

MEASURING 2930 (TWO THOUSAND NINE HUNDRED
AND THIRTY) SQUARE METERS

HELD BY DEED OF TRANSFER: T4469/2009

Subject to the conditions therein contained and

Erf 1710 HOEVELD PARK, EXT 1 TOWNSHIP

REGISTRATION DIVISION J. S. PROVINCE OF
MPUMALANGA

MEASURING 1560 (ONE THOUSAND FIVE HUNDRED
AND SIXTY) SQUARE METERS

HELD BY DEED OF TRANSFER: T9781/2009

15.5 The respondents are ordered to pay the costs of the suit.



N.P. MALI
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff:	D Prinsloo
Instructed by:	KLAGSBRUN EDELSTEIN BOSMAN DE VRIES

Counsel for the Defendant:	D. Motsweni
Instructed by	G H ISMAIL & ASS

Date of Hearing:	19 April 2016
Date reserved:	19 April 2016
Date of Judgment:	29 July 2016