REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no: 38313/2018

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

12/12/2019
DATE

SIGNATURE

In the matter between:-

Natcorp Specialised Logistics Solutions (Pty) Ltd — Applicant

and

Mercedes Benz Financial Services South Africa — Respondent

JUDGMENT

Kollapen J

Introduction

[1] This application in which the Applicant seeks the rescission of various judgments taken against it on the 10 February 2017 as well as other relief had its origins as an urgent application in terms of which Part A thereof was meant to be adjudicated as a precursor to Part B of the Application .

[2] Given the prolixity of the papers as well as agreements reached between the parties and the Deputy Judge President to expedite the hearing of the matter in its entirety, Part A was not dealt with separately as was originally envisaged. Part A as well as Part B of the relief sought were then dealt with together in the same hearing.

The relief sought

[3] In Part A of the Notice of Motion the following relief is sought:-

1. *The respondent is interdicted and restrained, from pursuing any execution steps, premised upon the default judgments, granted under the case numbers listed in Annexure "A" to the notice of motion, pending the finalisation of the relief claimed in Part B of this application;*
2. *All writs of attachment and further execution process, issued, under any of the case numbers, listed in Annexure "A", to this notice of motion, is hereby stayed, pending the finalisation of the relief claimed in Part B of this application;*
3. *The respondent is interdicted and restrained, from either directly or indirectly, interfering with, or make contact with any person, office or depot of AFROX, for the purpose of disseminating any information regarding applicant, insofar as same pertains to the solvency of the applicant, the capability of the applicant to perform its obligations towards AFROX, the dealings, disputes and legal proceedings between the applicant and respondent;*
4. *The respondent , is to forthwith deliver to the applicant, at its premises in Kempton Park, the four trucks, attached at the insistence of the respondent, on 7 May 2018, the detail of which trucks, appear from Annexure "B" to this notice of motion;*

In Part B of the Notice of Motion the following relief is sought

1. *The default judgments granted under the case numbers, reflected in Annexure "A" to this notice of motion, are rescinded and set aside.*

In the alternative to paragraph 1 above:

2. *The default judgments granted under the case numbers, listed in Annexure "A" to this notice of motion are declared void ab initio;*

The factual background

[4] The Applicant is a freight and transporting company that specialises in the abnormal transportation industry and one of its clients is AFROX who would require specially fitted trucks in order to transport its gas products to various hospitals throughout the country.

[5] The Applicant sought to acquire 39 trucks and says that the sales pitch for the acquisition of such trucks was made by representatives of the respondent who pitched a particular financial model that had as one of its attractions the respondent paying to the South African Revenue Service ('SARS') the Value Added Tax (VAT) in respect of each such vehicle resulting in the Applicant being liable to the Respondent for the VAT component of the transaction.

[6] The Applicant says further that the representations made by the Respondent was that the Applicant could then immediately claim and receive within 21 days the VAT from SARS which it would then use to pay for the refitting of the trucks and would be only liable to pay the VAT back to the respondent over a staggered time period.

[7] In essence the model that the Applicant says made the deal attractive was the availability of finances through the VAT scheme that would enable it to have the money to refit and cover the operating costs of the trucks at least for the initial period of the contract.

[8] The Respondent denies that the representations as alleged were made by it arguing that it is a financier and not a vendor of vehicles and that the vehicles were sold by Sandown Motors and that it (the Respondent) only became the seller after the vehicles were selected by the Applicant from the dealer. It points out that the individuals the Applicant

identifies as being responsible for the representations were all in the employ of Sandown Motors and not the Respondent.

[9] The relevance of the above is that the Applicant did not receive the VAT repayment from SARS within 21 days which it says then placed it in an unforeseen financial burden which it says flowed from the representations made by the Respondent.

[10] In addition to the VAT issue, the Applicant states that it was agreed between itself and the respondent that there would be a 2 month reprieve in instalments that in effect would mean that the Applicant would only become liable for instalments to the Respondent 2 months post -delivery of the particular vehicle in question.

[11] The Respondent denies this and points out that once the various agreements were signed, it paid the dealership in full and the liability of the Applicant to it then arose and that the agreements make no provision for a 2 month payment reprieve after delivery.

[12] The first batch of the agreements constituting some 26 agreements were signed on the 27 May 2016 and the dealership was paid in full by the Respondent at the end of May 2016 while the remaining 13 agreements were signed on or about the 30 June 2016 and the dealership paid at the same time. The stance of the Respondent is that once the credit is extended (when the agreement is signed and the dealership is paid) the Applicant would have become liable to pay the instalments due in terms of the agreement.

[13] On this aspect it is clear that the written agreements contain the usual non variation except in writing provisions, a provision dealing with representations as well as one that deals with the position of the defendant as financier as opposed to the supplier of the vehicles :- Those provisions read as follows :-

In this regard, clause 23.2 of the agreement provides as follows:

'You acknowledge that we did not make any representations or give any warranties before the conclusion of or in connection with this agreement'

Clause 18.1 of the agreement provides as follows:

'This agreement constitutes the entire agreement between the parties and no alteration or variation hereto will be of any force or effect unless recorded in writing and signed by or on behalf of both parties'

Clause 8.3 provides as follows:

'You further acknowledge that we are merely providing the finance to purchase the vehicle and provide no guarantee as to its suitability for any purpose you have purchased the vehicle or the vehicle itself in respect of the warranty, guarantee or maintenance plans that you might have obtained in relation to the vehicle from the manufacturer or supplier of the vehicle, whether directly, implied or otherwise'

[14] The Applicant says that as a consequence of not receiving the VAT repayment in the period contemplated it ran into problems and could not make the payment of the VAT component of the various agreements during months 2 to 4 of the lifetime of the agreements as it was expected to do and that Mr Van Jaarsveld agreed to devise a restructured payment model and that the Applicant should merely pay the capital instalment and not the VAT whilst a new payment strategy was being devised.

[15] The Respondent denies that Mr Van Jaarsveld was in its employment and says that he worked for Sandown Motors, says that the defence of a *pactum de non petendo* as contended for by the Applicant is an afterthought saying it was never mentioned in the draft urgent application papers the Applicant made available to it in January 2018 as well as in the actual urgent application that the Applicant served in May 2018. Its stance is that if the *pactum* is one of the central reasons advanced by the Applicant in the rescission application it is inexplicable that it was not raised in the urgent application papers and supports its view that it was an afterthought.

[16] While the Applicant's stance is that in the urgent application it did not need to disclose the *pactum* to secure the relief it sought, it must nevertheless be a matter of concern if the *pactum* was so central to advancing the argument that the Applicant was not in arrears, it would surely have been raised in the urgent proceedings.

[17] The existence of the *pactum* is accordingly placed squarely in dispute by the Respondent who goes on to point out that there is nothing by way of any evidence even in the form of an email or a letter confirming the existence of the *pactum.*

[18] The Respondents position is that the Applicant fell into arrears when it failed to pay the full amount of the instalment on the 1 September 2016 and that it then acquired the right to cancel the agreements in terms of the provision of the written agreements

entered into between the parties and that the election to cancel was communicated to the Applicant when summons was served on the 29 November 2016.

[19] The Applicant in the draft and final version of the urgent application confirmed that it was in arrears with the instalments due in terms of the written agreements and as indicated made no reference to the *pactum*.

[20] It appears that there were attempts by the parties before the issue of summons to resolve the problem created by the existence of the arrears and the Applicant states that agreement was reached that the arrears (constituting the VAT payments) would be paid over six months . The Respondent denies that any agreements were reached and says that the Applicant was not co-operative and that in any event there is once again nothing by way of documentary proof that suggests such an agreement was in fact reached.

[21] On the contrary it says that restructure discussions were ongoing from September until December 21016 when it forwarded to the Applicant Restructure Agreement that it proposed but that such agreement was simply never signed by the Applicant . It accordingly denies that a restructure was in place as alleged by the Applicant or that it was not entitled to proceed to judgment in the absence of the parties agreeing upon a restructure and having the same signed. Indeed the Respondent points out that in the urgent application papers the Applicant does indeed confirm that the negotiations between the parties continued into 2017 strongly suggesting that no restructure was in fact agreed upon in October 2016 as contended for by the Applicant. The Restructure Agreement makes provision for it to be signed.

[22] On this issue it does appear however from correspondence that the Respondent generated that it took the stance that it had approved a restructure and that the Applicant was obliged to perform in terms of that restructure. The language used in the correspondence is clear and unambiguous. The Applicant on the other hand says that this was a unilateral restructuring by the Respondent which was then foisted upon it.

[23] It therefore is evident that no restructure came into existence and that the Respondent's assertion that there was a restructure could only have credence if the terms of the restructure were accepted by the Applicant and it was reduced to writing as required by the non-variation clause in the agreements between the parties . To the extent that this

did not happen it cannot be then said that the Respondent was under a duty to inform the registrar of the restructure when this did not in law take effect.

[24] After summons was issued and served, the Applicant says that they were induced into not opposing the actions on the basis that they were told that given that they were in negotiation the legal team of the Respondent were advised accordingly and there was no need for the matters to be defended. This is denied by the Respondent who take the view that if the Restructure Agreement that it proposed was signed that would have resolved the matter but failing that it was entitled to proceed with judgment.

[25] It is common cause that default judgment was applied for and granted during February 2017 and the Applicant challenges these judgments on the basis that they were void *ab initio* alternatively stand to be rescinded on the basis that they were erroneously sought and/or erroneously granted. In this regard the Applicant takes issue that the applications for default judgment did not disclose;-

a. The defective financing model; and/or
b. The fact that Natcorp was not in arrears; and
c. The restricting approval; and/or
d. The assurance that the action would not be pursed; and/or
e. That Labuscher was instructed to make the approved restructuring an order of Court, as already canvassed above.

[26] On the matter of the judgments being void the Applicant says that the relief granted in the judgments does not accord with that in the summons and that absent an amendment with notice to the defendant, the judgments are rendered void.

[27] A comparison between the substance of the relief sought in the summons and that in the request for default judgment does not reveal any differences of the kind that would suggest that relief different from that which was initially sought was being applied for and under those circumstances no amendment was necessary .This challenge must fail.

[28] In so far as the case is advanced that the judgment was erroneously sought and granted on the basis of non-disclosure of material facts, I am not of the view that the disclosure of any of the above was neither required nor necessary.

[29] All of the matters raised are strenuously disputed by the Respondent and therefore cannot be said to constitute facts. If they were relevant then surely it was up to the

Applicant to have raised them in opposition to the claim represented in the Summons. In particular the Respondent did not hold the view that the that the financing model was defective , that the Applicant was not in arrears , that there was an agreement reached on restructuring ,that there was an assurance that action would not be pursued and could not therefore have been under any obligation to place this before the registrar.

[30] The judgment sought and granted was one that the Respondent was procedurally entitled to and it therefore could not be said that it was erroneously sought and granted.

[31] In Lodhi *2 Properties Investments CC and Another v Bondev Developments 2007 (6) SA 87*, the Court took the view that a judgment that a party was procedurally entitled to could not be considered to be one that was erroneously granted. In this regard and to the extent that the rescission application is not confined to the provisions of Rule 42 but also is founded in the common law, the Applicants case in support of the rescission is that it was not in wilful default as it was induced by the Respondent into not defending the action and further that it had a valid and *bona fide* defence to the action of the Respondent. That defence it says included that:-

a) It was not in arrears
b) That a *pactum de non petendo* was concluded
c) That representations were made regarding the financing model that did not materialise
d) That a restructuring was agreed upon after summons and before judgment was applied for and granted.

Wilful default

[32] While it is so that negotiations between the parties with regard to a restructure continued into January 2017 and even if the Respondent had taken the view that a restructure was in place , in truth and reality a restructure would only be valid if it was reduced to writing and signed by the parties . This did not happen. In any event it appears that on the 12 January 2017 the Respondent send an email to the Applicant advising that the debit orders in respect of the newly restructured contracts were not met and failing payment, the Respondent intended to proceed to obtain default judgment. Whatever the status of the restructured agreement may then have been, what the email evidences is that far from being induced into not defending the summonses , the email clearly sets

out the stance of the Respondent that it would seek to obtain default judgment in the event of non- payment.

[7] In Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at par8, the following was said:-

> *[8] Before an applicant in a rescission of judgment application can be said to be 'wilful default' he or she must bear knowledge of the action brought against brought against him or her and of the steps required to avoid the default. Such an applicant must be deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions"*

In Morkel v Absa Bank Bpk& Ander 1996 (1) SA 899 (C), the court held that:

> *"Where a Defendant has subjective knowledge of that fact that if he refrains from entering an appearance, judgment can be granted against him without further notice to him and he decides not to enter an appearance, such a Defendant is in wilful default"*

[33] Whatever the position may have been after the issue of summons, the email of the 12th January 2017 would have left the Applicant with no illusions about the intent of the Respondent and certainly would not have sustained a belief that the Respondent was not proceeding with legal action or that it was consistent with conduct that sought to induce the Applicant into not defending the action. On the contrary it would serve as the sharpest of warnings to the Applicant that action had been instituted and that default judgment would be sought in the event of non-payment. It hardly matters whether the payment required was in terms of the 'restructured agreement ' or the original agreement as on both scenarios the Applicant was in arrears .

[34] The Applicant would have become aware of the default judgments taken in February 2017 but did not seek to have them rescinded despite its view that it had strong grounds to do so. What it rather did was to enter into a post judgment agreement to settle the matter and only brought the rescission application after a dispute had arisen on its compliance with the post judgment agreement.

[35] It can hardly be open to party to make an election (as the Applicant made in February 2017) not to challenge the judgments taken but somehow reserve the right to do so at a later stage depending on the operation of another agreement.

The *'bona fide'* defences

[36] Bearing in mind that the financing arrangements between the parties were regulated by a written agreement one of the most formidable obstacles facing the Applicant is firstly that Sandown Motors and the Respondent are two separate legal entities and whatever representations may have been made by Sandown Motors could not be laid at the door of the Respondent. In addition the written agreement provides at Clause 18.1 thereof an acknowledgment by the Applicant that the Respondent did not make any representations or give any warranties before the conclusion of or in connection with this agreement '

[37] This is relevant in the context of both the alleged *pactum* as well as the restructuring that the Applicant alleges came into force prior to the application for default judgment. If a *pactum* was concluded then its validity would depend on whether it was reduced to writing and signed by the parties and the same would apply to any restructuring.

[38] The stance of the Applicant is that notwithstanding the inclusion of a non-variation except in writing provision in the agreements entered into between itself and the Respondent, its defences of a *pactum* and a restructure warrant considerations as they would justify a departure from the Shifren principle that seeks to ensure fidelity to the non-variation except in writing principle in the interests of certainty and predictability.

The possible departure from Shifren does not in my view even arise. In the case of the *pactum* it is at best an agreement between Mr Van Jaarsveld (of Sandown Motors) and the Applicant and cannot purport to be a variation of an agreement between the Applicant and the Respondent while in the case of the restructure it must be evident, as I have earlier demonstrated, that on either of the parties versions no restructure came into existence so the existence of some oral agreement in this regard does not even arise.

[39] In those circumstances I cannot agree that from what is canvassed on the papers it can be said that the Applicant has disclosed a *bona fide* defence. *In Breitenbach v Fiat SA (EDMS) BPK 1976 (2 SA (T) at 229* the Court expressed the view that a *bona fide*

defence is a defence, valid in law in a manner which is not inherently and seriously unconvincing. None of those attributes find application here and the application for rescission accordingly fail.

The post judgment agreement

[40] It is common cause that during March 2017 a post judgment agreement was concluded between the parties that provided for the payment of the arrears due to the Respondent as well as an undertaking by the Respondent not to take execution steps as long as the Applicant honoured the post judgment agreement.

[41] The stance of the Applicant is that it had little choice but to accede to the agreement as it was caught 'between a rock and a hard place' and was faced with the option of either attacking the judgments taken against it or salvaging the AFROX contract which it could only do it says by acceding to the Respondents coercive threats that if the Applicant challenged the judgments there could be no settlement of the matter.

[42] Faced with this option it says it then signed the post judgment agreement. It says that it complied with that agreement in the period April 2017 to November 2017 but failed to make payment of all the VAT instalments paying only 4 of the 8 instalments that the agreement provided for.

[43] For the record the post judgment agreement records that the Applicant was in arrears, records the cancellation of the agreement as well as the obtaining of the default judgments. The Applicant stance that it was precluded from challenging the judgments because of the coercion by the Respondent cannot be sustainable. While the law seeks to advance fairness, it also seeks (in particular in business transactions) to provide for certainty.

[44] The Applicant is a commercial entity and made an election to enter into a post judgment agreement because of what it considered was its best options for continued operations. Having done so it cannot as it were bank its rights to seek rescission at a later date as it now purports to argue. It must live by the election it made. It advances the reasons for non-payment the breakdown of several of the trucks that were the subject of the agreement. The stance of the Respondent in this regard is that as financier it was not responsible for any defects that may have manifested itself in the vehicles.

[45] It is not in dispute that the Applicant breached the post judgment agreement which would have entitled the Respondent to take steps to issue warrants of delivery based on the default judgments it had secured. It also was a term of that agreement that provided the Applicant made all payments timeously the Respondent agreed to stay execution steps as long as the Applicant honours the agreement.

[46] On the above scenario the Respondent was therefore entitled to proceed with execution but what complicates the matter somewhat is that the Respondent intimated in writing to the Applicant on the 14 December 2017 that it would be willing to temporarily and at least until the end of January 2018 suspend further execution steps on condition that the Applicant unconditionally paid the sum of R 7 000 000.00 by no later than 9am the same day. In this regard the Respondent insisted that the indulgence it was granting did not in any manner prejudice its rights obtained under the default judgments.

The Applicant made the payment but did so on the basis that it was not a unilateral payment and therefore had the effect of reinstating the post judgment agreement which it had breached. As a consequence the Applicant argues that any rights to execution that the Respondent would have acquired as a result of a breach of the post judgment agreement would have fallen away as the payment of R 7m had the effect of remedying the breach and reinstating the agreement.

[47] On this aspect, the Applicant could not unilaterally impose a condition on the payment it made that was in variance with the indulgence granted. The stance of the Respondent was clear in its letter of the 14 December 2017 that the indulgence granted did not extinguish any of its rights it acquired in the judgments. One of those rights was the right to execute in the event of breach. A breach having occurred it was therefore within its rights to execute and the payment of R 7m could not have the effect of extinguishing that right simply because the Applicant elected to make the payment on that basis.

[48] On this aspect and whatever the amount of the arrears may have been it must follow that there was a breach of the post judgment agreement, that the justification offered for the non- payment does not constitute a proper justification in law and that the Respondent was entitled to act in terms of the breach provision of the post judgment agreement.

[49] In these circumstances the application both in respect of Part Applicant as well as Part B must fail.

Order

Part A and B of the application is dismissed with costs which costs are to include the costs in respect of Part A.

NJ. KOLLAPEN
JUDGE OF THE HIGH COURT,
PRETORIA

APPEARANCES

DATE OF HEARING	:	**30 August 2019.**
DATE OF JUDGMENT	:	**13 December 2019.**
APPLICANT	:	**Adv C van Der Merwe**
INSTRUCTED BY	:	**Minnie & Du Preez Inc**
RESPONDENTS COUNSEL	:	**Adv SG Maritz** **Adv S Maritz**
INSTRUTED BY	:	**Strauss Daly Inc**