

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 13922/2018

In the matter between:

RAYMOND CEBON MNCWANGA

APPLICANT

and

ABSA BANK LIMITED

RESPONDENT

JUDGMENT

BEZUIDENHOUT J:

[1] Applicant on 18 May 2022 brought an application for rescission of a judgment obtained against him by Respondent on 29 January 2019 save for prayer B. He also sought condonation for late filing of the application papers and costs against Respondent.

[2] In his affidavit Applicant contended that the judgment was granted in error as he had never been in possession of the motor vehicle nor did he apply for finance and did not sign any forms. Applicant contends that his ex-wife had informed him that she had

won a car in a competition. When he left the matrimonial home the motor vehicle was left in the possession of his ex-wife to whom he had been married by antenuptial contract and divorced on 23 October 2019. Judgment for that motor vehicle was granted against him.

[3] On 20 April 2020 a letter was sent to Respondent and again on 4 May 2020 by his attorney. The letter sets out the history and what is referred to above as to how he was married and that he had not purchased the vehicle. In the said letter it sought a consent from Respondent to rescind the default judgment.

[4] Respondents attorney responded that their file had been closed and on 10 May 2020 informed Applicant's attorney that the motor vehicle was sold 3 years previously and that they were not in a position to consent thereto without seeing the affidavit of Applicant.

[5] As already stated Applicant launched the application on 18 May 2022 and on 23 June 2022 Respondent gave notice of intention to oppose the application on the issue of costs. The notice stated that Respondent will abide the court's decision insofar as prayers 1 and 2 of the notice of motion were concerned. Prayer 1 was condonation for the late filing of the application and prayer 2 but save for prayer B that the default judgment in favour of Respondent against Applicant granted on 29 January 2019 be rescinded. The relief in B was an order that Respondent could sell the vehicle in question.

[6] Respondent, in its answering affidavit, states that it does not admit the contents of the founding affidavit. The return of the motor vehicle was not being sought and it was therefore not opposed. It further contends that Applicant was seeking a rescission in terms of section 31(6)(a) and even if Respondent had granted consent it would have had to pay the costs of such an application and therefore Applicant must pay the costs. It did not deal with the issues as to the signature of the agreement, whether the agreement was signed by Applicant and whether he took possession of the vehicle etc. Except for the issue of costs it stated that it leaves the matter in the hands of the Court.

[7] In the first response to Applicants letter Respondent's attorney replied that the vehicle had been sold and that the file had been closed for about 3 years. It is therefore apparent that at that stage the judgment was no longer being pursued by Respondent and accordingly that it would not have suffered any prejudice if it granted the consent for the rescission of the judgment at that stage. There would not have been any costs implications at that stage.

[8] After Applicant brought the application and on 1 August 2022 Respondent, in court, consented to the order of the rescission of the judgment except in respect of the issue of costs. This was then the only remaining issue which was opposed and was then adjourned to the opposed roll.

[9] There is no material dispute of fact on the papers as Respondent did not answer the averments made by Applicant in his founding affidavit as to the events of the purchase of the vehicle but merely stated that it does not admit it but also did not deny it. If the averments by Applicant were incorrect one would have expected Respondent to at least dispute them and state why. It also did not set out in its affidavit that it did not pursue the relief claimed because it had either fully recovered its damages or was not pursuing the damages.

[10] The question therefore arises whether the issue of costs was caused by the conduct of Respondent or Applicant.

[11] It is submitted on behalf of Applicant that if Respondent consented without objecting to the costs and prior to the application being brought it would have resulted in a simple application in terms of Rule 31(6)(a) and not the application which is now before court. It was submitted that Applicant did not seek the costs of a Rule 31(6)(a) application but that this costs order was only sought once Respondent indicated that it was opposing the costs order in the application brought and would abide the decision of the court in respect of the other relief.

[12] It was submitted on behalf of Respondent that the reason for the rescission appears from the affidavit of Applicant to be due to the fraudulent activities of his former spouse and that no impropriety is alleged on the part of Applicant. It is further submitted that it is Applicant who seeks an indulgence and must therefore bear the costs of the application. It cannot be held against Respondent that it stated that it would abide the decision of the Court. It is further submitted that it is not clear what additional costs Applicant could have incurred in the substantive application as opposed to the application brought in terms of Rule 31(6)(a). I was referred to the decisions of Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd 2000 (2) 1007 (C) at 1015G-H and Minnaar v Van Rooyen NO 2016 (1) SA 117 (SCA) at paragraph 20.

[13] It is indeed so that if prior to the launching of this application Respondent had consented to the rescission and condonation that a simple application attaching the said consent could have been brought by Applicant and it would not have resulted in any costs to Respondent. However due to the approach taken by Respondent a substantive application had to be brought which caused Respondent to file an answering affidavit and to which a replying affidavit was filed and causing an opposed hearing on the issue of costs.

[14] By stating that it will abide the decision of the Court in respect of the first two prayers sought Respondent caused the application to be heard by the Court to make a ruling in that regard. This thus prevented a granting of an order of rescission of condonation by consent. Considering all these factors which I have mentioned above and the cases referred to above, which in my view do not assist Respondent, Respondent was responsible for the matter being heard on an opposed basis on the issue of costs and that it should accordingly be liable for such extra costs which have been incurred.

[15] I accordingly make the following order.

Respondent is ordered to pay the costs of Applicant from the date of the filing of Respondents answering affidavit on 8 July 2022, such costs to include the reserved costs and the costs of the opposed application.

BEZUIDENHOUT J.

JUDGMENT RESERVED:

18 OCTOBER 2022

JUDGMENT HANDED DOWN:

21 OCTOBER 2022

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