IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: A277 / 2019

DEON JOHANN PIENAAR **APPELLANT**

and

MIRVIN BEAN **RESPONDENT**

Coram: The Hon Mr Justice Binns-Ward and The Hon Mr Justice Wille

Heard: 16th of October 2020

Judgment: 21st of October 2020

(Delivered by email to the parties and release to SAFLII)

JUDGMENT

WILLE, J: (BINNS-WARD J, concurring):

[1] This is an appeal against the refusal by the magistrate in the court a quo, to rescind a judgment granted in favour of the respondent, against the appellant. The judgment was granted by default as the appellant had failed to timeously file a plea to the respondent's claims. For the purposes of ease and clarity the parties to this appeal will be referred to as the *plaintiff* and the *defendant*, as they were cited in the initial action proceedings.

[2] The defendant was unrepresented when the application for rescission of judgment was refused and remains so unrepresented for the purposes of this appeal. The central issue that was left for determination by the court a quo, in connection with the application to rescind the default judgment, was whether or not the defendant had advanced and set out a *bona fide* defence to the claims by the plaintiff. The court a quo found that the defendant had not set out any bona fide defence to the claims advanced by the plaintiff and accordingly refused to rescind the judgment.

[3] The factual matrix raises some *interesting* legal issues that require careful scrutiny. The plaintiff is a pensioner. The defendant is a financial planner conducting business for his own account in his own name. The defendant was an appointed broker and his business was to attract and secure financial investments for investment

companies. He was registered with the then FSB[1] as an independent broker for, inter alia, Purple Rain Properties 15 (Pty) Limited, trading as Realcor Cape[2] and Rocket Signs 116 (Pty) Limited, trading as Silkstar George,[3]both of which were property syndications.

[4] The plaintiff pursued two claims against the defendant, both sounding in money. It is the plaintiff's case that the defendant negligently represented that *Realcor* and *Silkstar* were in sound financial positions and might safely be trusted as investment vehicles. Further, that the defendant knew that the plaintiff, as a member of the public, would act on the assumption that the defendant's reports on *Realcor* and *Silkstar* were factually correct and accordingly that the defendant owed a *duty of care* to the plaintiff to provide the correct information to the plaintiff, so that the plaintiff could make an informed decision relating to any financial investments with *Realcor* and *Silkstar.*

[5] It is pleaded that the representations made by the defendant in connection with *Realcor* and *Silkstar* were made, inter alia, with the intention of inducing the plaintiff to act thereon. The plaintiff, relying on the truth of the representations made by the defendant, invested an amount of R175 000,00 with *Realcor,* together with an amount of R175 000,00 with *Silkstar*, on the 10th of November 2010.

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1 The Financial Services Board (since replaced by the Financial Sector Conduct Authority and the Prudential Authority).
2 'Realcor'
3 'Silkstar'

[6] The plaintiff alleges that these representations were false in that *Realcor* and *Silkstar* were not in a sound financial position at this time and also could not safely be trusted with the investments made by the plaintiff. Further that they were trading in insolvent circumstances and were unable to pay the returns on these investments.

[7] It was alleged that the defendant was negligent in making these representations to the plaintiff and failed in his *duty of care* towards the plaintiff in that, inter alia, the defendant failed to advise the plaintiff of the risks associated with these types of investments. Further, as a direct consequence of the defendant's representations, the plaintiff suffered damages in the sums of R175 000,00 and R161 584,00 (after the deduction of some monies received by the plaintiff on his investment with *Silkstar*).

[8] The action was instituted on the 2nd of September 2013 and a notice of intention to defend was served on the 22nd of October 2013. Thereafter, a notice to plead under threat of bar, was served on the 17th of February 2014.[4] No plea was filed and a request for default judgment was initially filed on the 6th of March 2014.

[9] The request for judgment by default was initially refused and upon the request of the clerk of the court, a *damages affidavit* was filed by the plaintiff in support of his application for judgment on the 7th of August 2014. Thereafter, a formal notice of set down was filed on the 8th of May 2015 and the matter was set down for hearing on the 8th June 2015 and default judgment was granted on that date.

[4] The defendant was legally represented when the notice of bar was filed

[10] The defendant launched his initial application for rescission of judgment on the 3rd of September 2015. This application was not pursued but was followed by a second application which was launched on the 9th of February 2016. This appeal lies against the refusal by the court a quo to grant the application for the rescission of the default judgment, which formed the subject of this latter application by the defendant.

[11] It seems to me to be common cause; that the defendant owed a duty of care to properly vet any prospective investment module prior to providing advice to the plaintiff; that based on the advice received from the defendant, the plaintiff made the respective investments; that the defendant was a registered financial advisor at the time and was possessed of a *duty of care* towards the plaintiff in connection with the two investments; that the defendant did not carefully and adequately analyse the business models of *Realcor* and *Silkstar* prior to advising the plaintiff on these investments, and that during the initial consultations with the plaintiff, the defendant was advised of the plaintiff's pending retirement and that these funds would become available for his retirement planning.

[12] Further, it was not disputed that the defendant was acutely aware of the plaintiff's requirements relating to these investments, in that the investments were to pose a minimal risk of loss of capital invested and would secure a small, but steady monthly income, to supplement the plaintiff's monthly pension. The defendant's case is inter alia, that the investment products he prescribed adhered to these specific needs of the plaintiff, better than any other products that the appellant was marketing at the time.

[13] In summary, the defendant's '*grounds'* of appeal are these;

[13.1] That - ‘the correct legal premise of the present appeal needs to be established’

[13.2] That - ‘the actions, conduct, authority in certain respects, powers, and inherent powers of the court and the application thereof within the judicial system and its officers of the court, is challenged’

[13.3] That - ‘the process followed by the court and its officers to restrict the defendant from enforcing his constitutional rights’

[14] Whilst I am cognizant of the fact that the defendant is unrepresented, these grounds of appeal in essence amount to a *constitutional challenge* for which no foundation has been properly created. The defences offered up by the defendant are the following; that the court *a quo* did not have jurisdiction to entertain the matter; that there was a *non-joinder* of certain parties and that there was *no causal link* between the damages suffered by the plaintiff and the advice given by the defendant.

[15] The *jurisdictional* complaint may be disposed of quickly. This is in essence a legal enquiry. The two claims are based on two different causes of action and the advice given by the defendant was in connection with two separate investment companies. Further, the monetary amounts of both of these claims fall within the jurisdictional limits of the court a quo. During argument the defendant conceded that there was no merit in this defence raised by him.

[16] Similarly, the defendant conceded during argument that the *non-joinder* point was of no merit as he agreed that there was no obligation in law on the plaintiff to join

any other parties to his action proceedings, as co-defendants. In addition, nothing prevented the defendant from joining further parties as co-defendants, should he have desired to do so.

[17] The final shield put up by the defendant is in connection with the issue of *causation*. This defence, on the facts of this case, rather goes to the issue of non-joinder. I say this for inter alia, the following reasons namely; that the defendant gave the advice to invest in the property syndications; that these property syndications had received negative publicity prior to the giving of such advice and that the defendant was aware of the plaintiff's investment requirements. Whilst I accept that the defendant has now taken up the cudgels on behalf of a host of investors into these property syndications[5] and is now a *gladiator* for their cause (which is commendable), this, in my view, does not in any manner go to the core of this appeal. This remains a narrow appeal dealing with the refusal by the court a quo to rescind the judgment granted against the defendant,

[18] As mentioned, the issue of causation was not fully engaged with by the defendant in his application for rescission of judgment. In addition, I take the following from the judgment in *Durr*[6], wherein it was held that a financial advisor had to disclose to the client the limits of his or her knowledge and expertise and;

> *'...either he had to forewarn the* [clients] *where his skills ended, so as to enable them to appreciate the dangers of accepting his advice without more ado, or he should not have recommended* [the investment]. *What he was not entitled to do was to venture into a field in*

[5] Although not on the papers, this became apparent during the defendant's argumentt before us
[6] Durr v Absa Bank Ltd and Another 1997 (3) SA 448 (SCA), page 469 H - J

which he professed skills which he did not have and to give them assurances about the soundness of the investments which he was not properly qualified to give…'

[19] In order for the defendant to have prevailed in his application for recission of judgment he was required to have demonstrated the following namely; that he had a reasonable explanation for his default; that his application was made *bona fide* and not with the intention of merely delaying the plaintiff's claim and that he had a *bona fide* defence. On this score, he must set out the averments which, if established at trial, would entitle him to the relief he seeks.

[20] It is trite that an applicant in an application for rescission of judgment, is obliged to disclose fully the *nature and grounds* of the defence and the material facts relied upon therefor.[7] In my view, and considering the well-advised abandonment by the appellant of his reliance on absence of jurisdiction and non-joinder, the appellant's supporting affidavit in the rescission application did not make out the basis of a bona fide defence in the manner described in *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at pp. 476-7, and the many subsequent authorities that have followed that judgment. That case treated of rule 43 of the Orange Free State Division Rules of Court, but the principles therein stated have been recognised as of pertinent application in respect of rescission applications brought in terms of rule 49 of the Magistrates Court Rules; cf. e.g *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* 2000 (2) SA 1007 (C) at 1012H-I.

[7] Standard Bank of SA Ltd v El-Naddaf and Another 1999 (4) SA 779 (W).

[21] In a last-ditch effort in an attempt to bolster his appeal, the defendant seeks to introduce new evidence on appeal by way of a further affidavit. In these circumstances, it is incumbent upon the defendant to exhibit the following, namely; that an acceptable explanation should be advanced as to why the evidence sought to be introduced, was not adduced previously; that the new evidence must be material, relevant and weighty[8] and that the new evidence must be believed. It is also incumbent on the defendant in these circumstances, to satisfy the court that it was not owing to any remissness or negligence on his part that the evidence in question was not adduced at the trial.[9]

[22] *Binns-Ward J*, writing for the court, in a prior judgment dealing with this appeal, pointed out to the defendant the necessity of a formal application in connection with any attempt to introduce new evidence on appeal. In the very same judgment, the defendant's attention was drawn to the fact that should he elect to raise a constitutional challenge, this must also be pursued having regard to the prescribed procedures. Despite this, no such application or procedure has been followed or adopted by the defendant.

[23] The defences raised by the defendant on affidavit do not in any manner challenge the defendant's failure to exercise the degree of skill, care and diligence required of a financial services provider in these circumstances. The findings by the court a quo cannot be faulted in this connection.

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[8] Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO 2011 (1) SA 70 (SCA) at para [21].
[9] De Aguiar v Real People Housing (Pty) Ltd 2011 (1) SA 16 (SCA) at paras [11] and [12].

[24] It is decided law in an application for rescission of judgment that '*bona fides'* needs of necessity to be established separately from the requirement that the party applying for the relief also sets out averments to show a *bona fide* defence. In my view the defendant did not meet this requirement at all. The defendant resorted to technical defences coupled with bald averments lacking in detail that do not meet the *bona fides* threshold as required in law.

[25] The judgment of the court a quo, can also not be faulted in any manner in that it was correctly held that there was no *good cause* and no *good reason* for setting aside the default judgment granted on the 8th of June 2015. In my view, there is no room for this appeal court to interfere with the order granted by the court a quo. It cannot be said that any of the findings in fact or any of the findings in law, by the court a quo, were wrong.

[26] In the result, the following order is made:

1. That the appeal is dismissed;

2. That the appellant (*the defendant*) shall be liable for the costs of and incidental to this appeal (inclusive of costs of counsel), on the scale as between party and party, as taxed or agreed.

E.D. WILLE
Judge of the High Court

A.G. BINNS-WARD,
Judge of the High Court