REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2023-020677

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

6 Dec 2024
DATE

In the matter between:

CAL-CO (PTY) LTD Applicant/plainfiff

and

CHANTELLE MACKINNON Respondent/defendant

JUDGMENT

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[1] The applicant makes application for default judgment in terms of Rule 31(5) in the following circumstances:

a. The defendant was duly served with copies of the combined summons, at her chosen domicile and place of residence on 24 April 2023;

b. the time for the defendant to enter an appearance to defend expired on 11 May 2023; and

c. the defendant failed to enter an appearance to defend within the stipulated time period.

[2] The claim is based on a written acknowledgement of debt signed by defendant in favour of the plaintiff on 23 August 2016.

[3] Rule 31 (5) provides as follows, in relevant part:

"*(5)(a) Whenever a defendant is in default of delivery of notice of intention to defend …, the plaintiff, who wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: ….*

(b) The registrar may — …

(vi) require that the matter be set down for hearing in open court."

[4] The matter was referred by the registrar for hearing in open court.

[5] The certificate of balance issued in accordance with the acknowledgement of debt records the amount claimed as due, in the sum of R 1 087 717.50 as of 23 February 2023. It follows that the claim is for "a debt or liquidated demand" as required by Rule 31(5), *i.e. a claim for a fixed, certain or ascertained amount.*[1]

[6] When the matter was first called in this court, the Defendant appeared in person raising the following defences in her opposing "affidavits" dated 18 and 20 November 2023 (which do not comply in all respects with the formal requirements for affidavits) – the list excludes allegations which manifestly do not qualify for serious consideration as viable defences:

a. The plaintiff continued supplying goods on credit despite her inability to repay thus "drowning (her) in debt" which caused her to opt for "voluntary debt review";

b. She tried to pay but earns too little to afford payment of plaintiff's claim;

c. She is married in community of property and her husband was "never present at any AOD (acknowledgement of debt) signing" which she signed

[1] See Erasmus, Commentary at RS 23, 2024, D1 Rule 31-18.

"on both of our behalfs". She concedes that plaintiff's attorney offered that she could have her own lawyer present. She was advised that the AOD is void;

d. Some credits in her favour have been overlooked and never addressed;

[7] I made allowance for the fact that the respondent appeared in person and approached the matter as follows:

a. if the defendant desired to raise a valid defence to the claim, such defence is required – in terms of the rules – to be raised by way of a plea. The defendant is required in her plea to either admit or deny or confess and avoid all the material facts alleged in the combined summons or state which of the said facts are not admitted and to what extent and shall clearly and concisely state all material facts upon which she relies.

b. as matters stood at that stage, the defendant had not applied for condonation for the late filing of any cognisable defence.

[8] These are fundamental requirements which underpin the civil procedure of the courts in South Africa. I refer, in this regard, to Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at page 107C-E:

"At the outset it need hardly be stressed that:

'The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.'

(Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1082.)

This fundamental principle is similarly stressed in Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd ed at 113:

> *'The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.'*

The degree of precision obviously depends on the circumstances of each case."

[9] At the court's request, counsel for the plaintiff produced helpful supplementary heads of argument – at short notice – concerning the question whether the acknowledgement of debt is subject to the NCA. It is clear from these submissions that the question is complex and would require careful analysis of several decisions which may be in conflict. The proper application of the NCA is not straightforward and depends, largely, on the facts of a particular transaction. Defences based upon the NCA requires pleadings crafted with a high degree of precision.

[10] There was however no plea and none was proposed. All there was at that stage were a few random general passages, cut and pasted into defendant's opposing submissions from an unknown source. This effort was, unsurprisingly, lacking in precision and fell woefully short of what is required for a viable defence in compliance with the civil practice of the High Court to which all litigants are subject.

[11] Parties cannot be allowed to ignore the rules to the point where defences are raised, as they were in this case, haphazardly and without precision without any regard for the rules. If parties are allowed to cast the basics aside, the justice system will descend into chaos and inevitably cause injustice.

[12] I had sympathy for the defendant who was not legally represented. I considered that, if the defendant had a viable defence which could in due course be pursued, she would have enjoyed some protection under Rule 31(6) which provides for rescission of a judgment granted by default in the following circumstances:

> "*(6)(a) Any person affected by a default judgment which has been granted, may, if the plaintiff has consented in writing to the judgment being rescinded, apply to court in accordance with Form 2B of the First Schedule to rescind the judgment, and the court may upon such application rescind the judgment.*
>
> *(b) A judgment debtor against whom a default judgment has been granted, or any person affected by such judgment, may, if the judgment debt, the interest at the rate granted in the judgment and the costs have been paid, apply to court to rescind the judgment, and the court may on such application by the judgment debtor or other person affected by the judgment, rescind the judgment*."

[13] Rule 31(6) protection was however only available after payment was made of the debt which offered no real consolation in practice. In the exercise of my discretion, I then decided to afford the defendant a final opportunity by postponing the matter to 5 December 2024 on condition that she filed an application for condonation, a plea and limited heads of argument by not later than 15 November 2024 and the applicant was afforded the right to respond.

[14] In the event, the defendant mandated qualified lawyers to represent her and she complied with the order of 1 November 2024.

[15] Importantly, the defendant delivered a notice to defend as well as a plea by the deadline of 15 November 2024. Counsel for the defendant submitted that the delivery of a notice to defend rendered an application for condonation unnecessary because of Rule 19(5) which provides as follows:

> "Notwithstanding the provisions of sub-rules (1) and (2) a notice of intention to defend may be delivered even after expiration of the period specified in the summons or the period specified in sub-rule (2), before default judgment has been granted: Provided that, the plaintiff shall be entitled to costs if the notice of intention to defend was delivered after the plaintiff had lodged the application for judgment by default." [my underlining]

[16] I do not agree. What this argument overlooks is the fact that at the time when the defendant was granted the indulgence on 1 November 2024 (requiring the application for condonation) no notice to defend or plea had been filed. In fact, the defendant was in serious jeopardy of suffering a default judgment. The defendant was afforded an indulgence by being granted a final opportunity to avert the catastrophe of judgment by default as explained already. The obligation to bring an application for condonation arose from the order made on 1 November 2024. Rule 19(5) is irrelevant in this regard.

[17] Be that as it may, the defendant complied with the 1 November 2024 order and duly filed an application for condonation which I find to be compelling.

[18] The acknowledgment of debt signed by defendant renders her liable for applicant's costs on the attorney the attorney and client scale and there is no

reason to deviate from the approach to costs that was applied in the 1 November order.

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

1. Condonation is granted to defendant for the late filing of her notice of intention to defend and plea, to the extent it is required, in terms of the order made on 1 November 2024;

2. The defendant is ordered to pay the applicant's (plaintiff's) costs on the scale as between attorney and client.

BADENHORST AJ

JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant: Adv K Blair instructed by Gerings Attorneys

For the Respondent: Initially in person and on 5 December 2024, Adv .J J Marais instructed by Schoemand & Massyn Attorneys.