IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT-MTHATHA

Case No: 439/2005
Judgment Delivered: 24 October 2013
NOT REPORTABLE

In the matter between:

STRAUSS DALY INCORPORATED Applicant

and

BULELWA NOZUKO GOQWANA Respondent

In re:

MEEG BANK LIMITED Plaintiff

and

BULELWA NOZUKO GOQWANA Defendant

JUDGMENT

DUKADA J:

[1] This is an application for rescission of a costs order granted against the applicant *de bonis propriis* on an attorney and client's scale. That order was granted in an action which was instituted by Meeg Bank Limited against the respondent on the 12th May 2005 (herein-after referred to as the main action). The applicant acted in the matter as attorneys for the plaintiff while attorneys X.M Petse Inc. acted for the respondent.

[2] The main action was allocated the 31st May 2011 as the trial date but it was postponed after it transpired that Meeg Bank Limited was deregistered on 16th September 2009 and Absa Bank Limited took over that bank.

[3] Absa Bank Limited then launched an application for it to be substituted for Meeg Bank Limited as party in the main action.

[4] Some correspondence was thereafter exchanged between the parties. The relevant extracts of some of those letters will be quoted later in this judgment as the applicant relies on them for her case.

[5] On the 8th September 2011 the respondent obtained the following Court Order:-

"*1. The action of Meeg Bank Limited (Case No 459/2005) is hereby dismissed.*

2. Attorneys Strauss Daly Incorporated are hereby directed to pay costs occasioned by this action on attorney and own client's scale and such costs to include those reserved on 26 May 2011."

[6] It is paragraph 2 of the above order which applicant seeks in this matter to be rescinded.

APPLICANT'S CASE

[7] The applicant states that she received a Notice of intention to tax a Bill of Costs in respect of the main action on the 2nd November 2011. The notice was directed to the applicant as plaintiff's attorneys and there was no mention of the fact that the applicant had been ordered to pay the costs. Applicant did not appear at the taxation on behalf of the applicant as it was unaware of the order granted against her.
The applicant only got to know on the 18th January 2012 that the order for costs was granted against her.

[8] The applicant states that she was not in wilful default in not appearing in Court on the date when the Court Order was granted as there was firm agreement in place between the respective parties that no costs order would be sought other than prayer 3 set out in the Notice of Motion dated 15th June 2011. Applicant further states that the Court was, at the time it granted the costs order, clearly not made aware of the settlement agreement between the parties and was probably under the impression that the applicant had maliciously conducted the trial without a mandate. She further states had there been an opportunity to file an answering affidavit it would have been pointed out to the Court that the applicant only became aware of the status of Meeg Bank Limited when the applicant's authority to institute the main action was challenged in May 2011.
The applicant avers that the costs order was granted under circumstances where there was a settlement agreement and under circumstances where the applicant was never afforded an opportunity to explain why it persisted with the litigation without a proper mandate.

[9] From the above it appears that the applicant bases this application for rescission on the following grounds:-

(a) (i) That she was not in wilful default is not appearing in Court on the date when the costs order against her was granted;

(ii) She has a good and *bona fide* defence, namely that there was a settlement agreement in respect of the costs;

On (i) and (ii) above the applicant appears to employ the provisions of Rule 31(2)(b) of the Uniform Rules of Court which, in my view, do not apply in this case, as the applicant had not been in default of delivering a notice of intention to defend or of a plea.

(b) The applicant also employs Rule 42 stating the respondent failed to provide the Court with copies of letters reflecting the agreement that had been reached and thus the order was erroneously granted.

RESPONDENT'S CASE

[10] The respondent raised two points in *limine*, viz

(i) That of non-joinder of X.M. Petse Incorporated and misjoinder the respondent Bulelwa Nozuko Goqwana,

(ii) Lack of jurisdictional facts in support of the application for rescission in terms of Rule 42 of the Uniform Rules of Court.

[11] I will now deal with these points in *limine seriatim*:-

NON-JOINDER

The respondent states that the relief is sought against X.M. Petse Incorporated, more particularly an order that X.M. Petse Incorporated pay

the costs *de bonis propriis* on an attorney and own client's scale, whereas she is not a respondent in this application.

Adv Richard Quinn SC, Counsel for the respondent, has argued that the general rule is that any person who has a direct and substantial interest in any order which the Court might make or who is bound to be affected prejudicially by putting into effect of a Court order, is a necessary party and should be joined, unless the Court is satisfied that he has waived his right to be joined. He contended that it is no answer to say that the application papers were served upon X.M. Petse Incorporated and that they are before Court. The fact of the matter is that the papers were delivered to X.M.Petse Incorporated in their capacity as the attorneys for the respondent, Bulelwa Nozuko Goqwana, and not cited as a party nor mentioned in the Notice of Motion as a party against whom relief is sought. He submitted that in the absence of joinder, as opposed to notice of proceedings in their capacity as attorneys for the respondent, the order sought by the applicant would not be *res judicata* against X.M.Petse Incorporated who would be at large to execute the costs order in the respondent's favour.

Adv A.P. Den Hartog, Counsel for the applicant, in reply has argued that it is the respondent who was the applicant who obtained a costs order against Strauss Daly Inc. on an attorney and own client's scale. The relief sought in this matter is the setting aside of a costs order in favour of Bulelwa Nozuko Goqwana as an applicant and X.M. Petse Incorporated was not a party to the original application.

He therefore submitted that there is no basis for alleging non-joinder.

I fully agree with Mr Den Hartog, the Court in appropriate circumstances does award costs *de bonis propriis* against an attorney and in most of those cases the attorney would be acting for a party in the case.

If an application for rescission of that costs order is made, being an interlocutory application, its papers would be served on the attorneys of the respondent concerned. The latter attorneys would then get to know of that application for rescission when its papers are served upon them.

As an alternative to joinder, the Court may order that judicial notice of the proceedings be served on the party and will then be prepared to proceed in the absence of the party if, in response to the notice, there is clear evidence of a waiver of the right to join in the proceedings.[1]

Judicial notice means notice emanating from the Court which is formally served on the third party by an officer of the Court. In my view, the essence of a judicial notice is to bring to the notice of the third party the full knowledge of the proceedings. In the instant case the respondent's attorneys X.M.Petse have full knowledge of this application for rescission of a costs order which was made in their favour while they were not a party to the man action but only acting as attorneys for the respondent. In my view, it was not necessary to join the respondent's attorneys procedurally as a party in this application. I therefore find no merit in this point in *limine*.

(b) **MISJOINDER**

The respondent also raises a point in *limine* of misjoinder in respect of the respondent Bulelwa Nozuko Goqwana. The foundation for this objection does not appear clearly from the papers other than the averment that no relief is sought against the respondent, instead it is sought against the respondent's attorneys, X.M. Petse Incorporated. In response the applicant states that the costs order which the applicant seeks to rescind

[1] Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa, 5th Edition, Vol 1 by Cilliers, Loots & Nel at page 216

was granted in favour of the respondent who was the defendant in the main action.

Mr Den Hertog has followed that line in his argument. He contended that he does not understand this objection. I tend to agree with Mr Den Hertog on this point and I, too, cannot understand the legal foundation of this point in *limine*.

(C) **LACK OF JURISDICTIONAL FACTS IN SUPPORT OF THE APPLICATION FOR RESCISSION IN TERMS OF RULE 42 OF UNIFORM RULES OF COURT**

Mr Quinn has argued that in order for applicant to succeed on this ground she must make out a case disclosing jurisdictional facts stipulated in Rule 42(1)(a) to (c) of the Uniform Rules of Court.

Rule 42 Provides:-

"(1) The Court may, in addition to any other powers it may have mero motu or upon the application of any party affected rescind or vary:-

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party effected thereby,

(b) an order or judgment in which there is ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties."

The applicant does not specify on which sub-rule of Rule 42 she relies. In fact she does not come out clearly on this ground and one has to rake through her affidavit to find some indication of the basis of this ground. For instance, in paragraph 22 of her founding affidavit she states:-

"*If the version as represented by the respondent's attorneys is correct that the Court of its own accord ordered the applicant to pay the costs de bonis propriis, it is submitted that such order was erroneously granted in the absence of the applicant and was granted under incorrect circumstances as provided for in Rule 42 of the Uniform Rules of Court."*

The applicant further states as follows in paragraphs 24 and 25:-

"*24. The Honourable Court was clearly not made aware of the settlement agreement between the parties and was probably under the impression that the applicant had maliciously conducted the trial without a mandate. Had there been an opportunity to file an answering affidavit, it would have been pointed to the Honourable Court that the applicant only became aware of the status of Meeg Bank when the challenge arose is May 2011. It was directly after this that the matter was settled on the basis that it was.*

25. The order was thus granted under circumstances where there was a settlement and under circumstances where the applicant was never afforded an opportunity to explain why it persisted with the litigation without a proper mandate."

On closer examination the applicant's thrust seems to me to be on that the order was erroneously granted because the Court was not informed of the existence of a settlement agreement between the parties. To me it seems it can best be pigeon-holed within subrule (1)(a) Rule 42 of the Uniform Rules of Court . The critical question seems to me to be whether there was a settlement agreement between the parties which, if the Court was informed of, would have persuaded the Court not to grant the costs order in question. In support of her stance that a settlement agreement was reached the applicant refers to the following extracts from the correspondence exchanged between the parties:-

(i) From a letter by applicant to respondent's attorneys dated 25th June 2011:-

"*We confirm a firm agreement between our Mr Karato Moetsi and your Mr Zilwa that Absa Bank Limited will withdraw its Substitution Application and tender costs, subject to your client not seeking de bonis propriis cost order neither against Keightly Inc. and/or Strauss Daly Inc.*

We further confirm that the aforesaid costs order will not be sought against Keightly Inc. Strauss Daly Inc. and/or Absa Bank Limited in Client's dismissal application."

(ii) A letter in reply dated 6th July 2011 from the respondent's attorney:-

"*Whilst we are ad idem about the issue of costs in a substitution application, we do not understand when you say there will be no costs order with regard to the dismissal application. It will be noted that in our application for dismissal our client has prayed for costs on a scale as between attorney and client. Our instructions are that we should pursue our prayers to the application. In the circumstances you will understand client's stance and therefore the sooner your client tenders such costs the cheaper it will be, since there will be no need to argue that in Court."*

(iii) A letter from applicant dated 7th July 2011 in reply:-

"*We refer to your fascimile dated 06 July 2011, contents which have been noted.*

With regard to your client's dismissal application, all that we mean is that neither Keightly Inc.;Strauss Daly Inc. and/or Absa Bank is opposing the said application, as a result you may proceed to pursue your prayers as stated in your Notice i.t.o Rule 6(11).

In the circumstances, it makes sense that we also agree that no costs order be sought neither against Keightly Inc.; Strauss Daly and/or Absa Bank."

As appears from above the exchange of correspondence between the attorneys of the parties ended in the letter of the applicant's attorneys dated 7th July 2011. In my view, it is the interpretation of that letter, more particularly the last paragraph thereof, quoted above, that will assist us in determining whether a settled agreement was reached between the parties with regard to costs, viz where the applicant says :-

"*In the circumstances it makes sense that we also agree that no costs be sought neither against Keightly Inc; Strauss Daly Inc and/or Absa Bank Ltd."*

The most common and the most helpful technique for ascertaining whether these has been an agreement is to look for an offer and an acceptance of that offer.[2] R.H.Christie, op cit however, goes further to sound a warning that offer and acceptance must never be sought for their own sake, but as aids whether an agreement has been reached.

A person is said to make an offer when he puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed.

It seems to me that when the applicant says "*In the circumstances it make sense that we also agree that no costs be sought ……",* she was putting a proposal to the respondent's attorneys. She does not confirm or record an agreement that had been reached. As the respondent's attorneys did not respond to that proposal, the question that arises is what the legal effect or result of such failure to respond or to put it differently, can such silence be taken as acceptance.

On this aspect Watermeyer CJ remarked as follows in Collen V Rietfontein Engineering Works.:-[3]

[2] The Law of Contract in South Africa, 5th Edition by R.H. Christie at page 28
[3] 1948 (1) SA 413 (A) 422

"Quiessence *is not necessarily acquiescence and one party cannot, without the assent of the other, impose upon such other a condition to that effect."*

However, that is not always the case, as Muller JA in Mc Williams v First Consolidated Holdings (Pty) Ltd [4] put is aptly as follows :-

"*I accept that quiescence is not necessarily acquiescence (see Collen v Rietfontein Engineering Works 1948(1) SA 413 (A) at 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such a party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will be more be readily drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion*."

Reverting to the instant case I am not persuaded that the above-quoted passage of the last letter from the applicant's attorneys contained an assertion such that the silence of the respondent's attorneys to it may be taken to constitute an admission by them of the truth of such assertion. In fact, in my view, the said passage contains no assertion at all but a proposal.

In my view, therefore, such proposal without acceptance by the respondent's attorneys did not result to an agreement, a settlement agreement in the words of the applicant.

I, therefore, cannot agree with Mr Den Hertog's submission to the contrary.

[4] 1982 (2) SA 1 (A) 10

A further dimension to this aspect is brought about by the following paragraph in the answering affidavit of Hymie Zilwa of the respondent's attorneys' firm, in the application for substitution and dismissal dated 15th June 2011:-

"*By reason of the conduct of the attorneys who purported to act on behalf of Meeg Bank subsequent to its deregistration, both Strauss Daly and Keightly Incorporated should be directed to pay the applicant's costs de bonis propriis on a scale as between attorney and client.*

Alternatively Absa Bank should be directed to pay the costs of both applications on the scale as between attorney and client."

I cannot understand why on the face of this paragraph and in the absence of a clear and unequivocal acceptance of their afore-mentioned proposal the applicant's attorneys did not appear in Court on the date on which the costs order was made.

To sum up, I do not agree that if what the applicant alleges to have been a firm settlement agreement, was brought to the notice of the Court, the costs order in question could not have been granted. I say so because, as I have concluded, there was no settlement agreement as to costs at all at the time the costs order in question was made.

It is my view, therefore, that such costs order was not erroneously granted.

[12] From the common law perspective, for applicant to succeed she must show sufficient cause for the rescission.

Trengrove AJA (as he then was) set out the provisions of our common law relating to the rescission of judgments as follows:-

"*Thus, under the common law, the Courts of Holland were, generally speaking, empowered to resend judgments obtained on default of appearance, on sufficient cause shown ……Broadly speaking, the exercise of the Court's discretionary power appears to have been*

influence by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case."[5]

[13] Turning to the present case, as appears from para 24 of her founding affidavit quoted above, it might happen that the applicant can succeed to present a reasonable and acceptable explanation as to why she continued with the action though her client Meeg Bank Ltd was deregistered.

[14] Generally an order for costs *de bonis propriis* will be ordered against attorneys only in reasonably serious cases. The costs order in question here also granted costs on an attorney and client's scale. It is trite law that such costs are not granted lightly, as the Court looks upon such orders with disfavor and is loath to penalize a person who has exercised a right to obtain a judicial decision on any complaint such party may have.[6]

[15] Normally an order for costs on the attorney and client's scale will be made only when there is a special prayer for it or when notice has been given that the order will be asked for.[7]

In this case the Notice of Motion contained a notice of a prayer "*That Meeg Bank Limited be directed to pay the defendant's costs on the scale as between attorney and client."* There was no such special prayer as against the applicant. Though there are circumstances, such as suggested in Sopher's case, supra at p 600 E, where the absence of any sort of notice does not necessarily debar the granting of the order, and furthermore, although there was an intimation to ask for such order in Hymie Zilwa's affidavit quoted afore, one has to bear in mind that as

[5] 1979 (2) SA 1031 (A) at 1042 F-H; See also Chetty v Law Society Transvaal 1985 (2) SA 756 (A) at 765 B-C; Nyingwa v Moolman NO 1993 (2) SA 508 (TK); Harris v Absa Bank Limited t/a Volkskas 2006 (4) SA 527 (T) at 528 H – 529 A; Naaido v Motlala NO. 2012(1) SA 143 (GNP) at 152 H-153A

[6] See Herbstein & Van Winsen, opcit, at page 971, and the cases cited in note 169.

[7] Sopher v Sopher 1957 (1) SA 598 (W) at 600 D-E; Marsh v Odendeabrus Cold Strages Ltd 1963(2) SA 263 (W) at 269 H

attorney –and-clients's costs order is (as Williamson J puts it *Sopher v Sopher, supra, at 600 F-G)* an extraordinary order made only in [certain] circumstances , it is for the party asking for the order to establish the "*special consideration*" or "*the conduct of the losing party*" which justify the award of such costs. Consequently I am of the view that it would have been fair and just to have heard an explanation, if any, from the applicant before granting the order.

[16] In the circumstances I conclude that the applicant has shown sufficient cause for the rescission of the costs order of the 8th September 2011.

[17] There remains the question of costs. In my view, in the circumstances of this case, the question of costs at this stage hangs in the balance between the parties and they need to be fully ventilated in argument in the hearing of the question of costs.

[18] A point has been raised in argument to the effect that if this application succeeds the action of Meeg Bank Limited under Case No: 439/2009 will stand dismissed without a costs order. I understand this application to be for the rescission of only paragraph 2 of the Court Order dealing with costs, in other words paragraph 1 dismissing the action will remain.
It is trite law that where, as in the instant case, a disputed matter is settled on a basis which disposes of the merits except so far as the costs are concerned, the Court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the Court must with the material it its disposal, make a proper allocation of costs.[8]

[8] See Jenkins v SA Bookmakers Iron and Steel Workers and Shipbuilders Society 1946 WLD 15; Mashaone v Mashoane 1962 (2) SA 684 (D) 687; Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd 1996 (3) SA 692 (C) at 700G; First National Bank of Southern Africa Ltd t/a Wesbank v First East Cape Financing (Pty) Ltd 1999 (4) SA 1073 (SE) 1079; Dekock v Minister of Public Works [2004] 1 All SA 282 (CK) 296.

[19] In the result the following order shall issue:-

1. Paragraph 2 of the order of this Court granted on the 8th September 2011 reading:-
   "Attorneys Strauss Daly Incorporated are hereby directed to pay costs occasioned by this action on an attorney and own client's scale and such costs to include those reserved on 26 May 2011," is hereby rescinded;

2. Costs of this application for rescission are hereby reserved for determination together with the question of costs in the main action.

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D.Z. DUKADA
JUDGE OF THE HIGH COURT

Appearances

For the applicant	:	Adv. Den Hartog, Instucted by Keightly, Sigadla & Nonkonyana Inc. **MTHATHA**
For the 2nd Respondent	:	Adv Quinn SC, Instructed by X.M. Petse Inc **MTHATHA**