IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

CASE NO 29641/03
29642/03

DATE: 28/4/2005

In the matter between:

PATRICIA S. BISSCHOFF N.O. — 1ST APPLICANT

MALA LOUW N.O. — 2ND APPLICANT

And

REINETTE KARSTEN N.O. — 1 ST RESPONDENT

HENRY J. VAN RENSBURG — 2ND RESPONDENT

PHILLIP FOURIE N.O. — 3RD RESPONDENT

In re:

Application between:

REINETTE KARSTEN N.O. — 1ST APPLICANT

HENRY J. VAN RENSBURG N. O. — 2ND APPLICANT

PHILLIP FOURIE N.O. — 3RD APPLICANT

And

ENTERGRA TRUST (PTY) LTD N.O. 1ST **RESPONDENT**

(represented by Adam Johannes Du Plooy)

PATRICIA S. BISSCHOFF N.O. 2ND **RESPONDENT**

MALAN LOUW N.O. **3RD RESPONDENT**

(in their capacities as trustees

of the Joda Trust (IT No.230/01)

JUDGMENT

TOKOTA A.J.

[1] In this matter the applicants brought applications for rescission of the final orders, in respect of sequestrations of Joda Trust and Jona Trust, granted by this court on 31 August 2004. These applications were served on the respondents on 29 September 2004. For convenience this judgment refers to both applications as I was made to understand that they are substantially similar in all respects. Consequently where in the course of this judgment I refer to one matter such reference should be construed as referring to both matters.

The respondents opposed such applications and answering affidavits were filed. Although the filing of answering affidavits was late the applicants condoned such. The matters were set down for hearing on 21 April 2004. The applicants were to file their replying affidavits later obviously before the 21 st April 2004.

[2] When the matters came before me the applications had been withdrawn and I was called upon to decide as to who is liable for costs. For this reason it is not necessary to deal at length with merits of the applications. The general rule is that once a party withdraws an action this is tantamount to accepting a defeat and unless there are exceptional circumstances the other party is entitled to its costs. See: Germishuys v Douglas Besproeiingsraad 1973 (3) SA 299 (NC) at 300D-E ; Waste Products Utilisation (Pty) Ltd v Wilkes And Another (Biccari Interested Party) 2003 (2) SA 590 (W) at 597B

Reuben Rosenblum Family Investments (Pty) Ltd And Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd And Others Intervening) 2003 (3) SA 547 (C) at 550C-E.

[3] There were no exceptional circumstances that were advanced in argument before me. For that reason, in my opinion, the costs ought to follow the results. Consequently the respondents are entitled to their costs. However, the respondents have asked for such costs against the

applicants to be punitive costs in their personal capacities and on a scale as between attorney and own client. Mr Dreyer SC who, together with Mr Badenhorst SC , appeared for the respondents, argued that I should make an order for punitive costs and such cost order to be made *de bonis propriis* against Brenda Jansen and Bisschoff in their personal capacities. This argument, as I understood it, is based on the following grounds:

(a) After the granting of the final order on 31 August 2004 no attempt was made by the applicants to contact the respondents' attorneys about the intention to apply for rescission. However, on the 29th of September 2004 the respondents' attorneys were served with applications for rescission shortly before the sale in execution;

(b) The sale of the immovable property belonging to the trust was advertised to be auctioned on the 6th and 7th October 2004;

(c) It was only on the 2nd of October 2004 which was a Saturday that the applicants' attorneys faxed to the respondents' attorneys, a letter dated 30 September 2004, the contents of which are referred to hereunder;

(d) An attorney, Mr De Beer of Coetzer, de Beer Incorporated, was appointed to arrange for the viewing of the immovable property for sale and Brenda Jansen freely agreed to assist in that regard;

(e) No application was made to stop the sale in execution pending the finalisation of the rescission applications instead Mr Mashobane, attorney for the applicants, confirmed that the rescission application was to proceed;

(f) The applications were placed on the unopposed roll of the 16th November 2004. By that time the respondents had not filed their answering affidavits. On that day the matter was removed from the roll. The applicants' attorney again placed the matters on the opposed roll of the 10th March 2004. On the 11th March 2004 the respondents served the applicants' attorney with the application for condonation for the late filing of the answering affidavits, which was subsequently granted. The matter was then by agreement postponed to the 21st April 2004 to enable the applicants to file their replying affidavits;

(g) He argued that, firstly, such applications were, in any event, doomed to fail. The applicants had failed to comply with the provisions of section 149(2) of the Insolvency Act no. 24 of 1936. In this regard I was referred to the decision of Abdurahman v Estate Abdurahman 1959 (1) SA 872 (C) at 873B

See also Storti v Nugent And Others 2001 (3) SA 783 (W) at 806D- F;

(h) Secondly, the applicants were not genuine in their applications.

The applications were instituted solely for purposes of stalling the sale in execution, which was schedule for the 6th and 7th of October 2004. This is fortified by the correspondence emanating from the applicants' attorneys. One such letter is dated 30 September 2004. I quote herein the relevant portion, which reads thus *"Kindly note that we served an application for rescission of judgment in both matters and thus require you to confirm that you are not proceeding with the auctions."* The second one, which is dated 5th October 2004, reads thus: *"We bring to your attention the fact that our client has brought an application to set aside the final orders of liquidation. We enclose copies of the faces of the applications for your attention.*

In the light of the above we request an undertaking from yourselves that you will proceed with the auctions pending the finalization of the application We refer you to section 150(3) of the Insolvency Act 24 of 1936. " The quotation of section 150(3) indicates that the applicants' attorney intended to mean that the undertaking was that the sale would not proceed;

(i) Thirdly, despite the fact that the applicants were given time to file their replying affidavits none were filed by the 19th of April 2004.

(j) Fourthly, the withdrawal of these applications was done on the last moment and without complying with Rule 41 of the Uniform rules of this court.

(k) Fifthly, Brenda Jansen fully co-operated in allowing the prospective buyers to view the immovable properties in question before the sale on 6th of October 2004.

(l) Sixthly, the Trustees, Brenda Jansen and Bisschoff, did not act in the interests of the insolvent estate as they did not have *locus standi* to bring the said applications. From the version of the applicants there were insufficient trustees to authorise them to bring the said applications. Accordingly, so it was submitted, an order of costs should be awarded against the applicants in their personal capacities and not in their representative capacities.

[4] It seems to me that there is merit in Mr Dreyer's argument and, accordingly, I am generally in agreement with him. Mr Swanepoel, who represented the applicants, could not really assist me in this regard. Mr Dreyer briefly sketched out the circumstances

of this case and argued that the conduct of the applicants, right from the start, was reprehensible and this court should frown upon it. The withdrawal was done at the very last moment. It was not done in accordance with the rules of this court.

[5] Rule 41 provides as follows;

"41 Withdrawal, Settlement, Discontinuance, Postponement and Abandonment

(1) (a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.

(b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs. " It is clear that the applicants did not comply with the provisions of this rule. Although I was told from the Bar that the applications have been withdrawn I did not even see the letter of withdrawal. I am not even sure whether or not costs were tendered.

[6] When the applications were withdrawn they were already set down for hearing. In terms of rule 41 the applicants were not entitled to withdraw without the consent of the respondents or the leave of the court. The applicants never sought consent from the respondents nor did they seek leave of the court. They did not even comply with rule 41 by filing a formal notice. Despite this I can see no reason why this court cannot grant them leave to withdraw even despite the fact that they did not seek it as no one can be forced to litigate.

[7] According to Mr Swanepoel he was only briefed on 19 April 2004. For this reason he could not be in a position to prepare the heads of argument. In my view there is no reason why the respondents should be put out of pocket as a result of the conduct of the applicants. Mr Swanepoel correctly conceded that the matter warranted employment of two counsel. The papers were voluminous. The two counsel were of great assistance to the court. Regard being had to all the circumstances adumbrated above I am satisfied that the applications were an abuse of the court process as they were manifestly without merit. However, in the exercise of my discretion I do not think that the conduct is of such nature that costs on an attorney and own client should be ordered. In the result I make the following order:

1. The withdrawal of the applications for rescission by the applicants is granted;
2. The applicants are ordered to pay costs, which should be taxed on the scale as between attorney and client, and, such costs to include costs consequent upon employment of two counsel.
3. The applicants are to pay such costs de bonis propriis jointly and severally the one paying the other to absolved .

B R TOKOTA

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 21 APRIL 2004

DATE OF JUDGMENT: 28 APRIL 2004

Appearances for the applicants: K. Swanepoel

Instructed by Messrs Mashobane Attorneys

Appearances for the respondents: J H Dreyer SC with him M A Badenhorst SC

Instructed by Myburgh Incorporated