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

DATE: 11/05/2005

DELETE WHICHEVER IS NOT APPLICABLE

CASE NO: 25717/01

(1) REPORTABLE: /NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

SIGNATURE

In the matter between:

Robert Christopher Athony Jewell	**First Applicant**
NO Thalita Jeanne Hillebrand NO	**Second Applicant**
and	
Imperial Bank Limited	**First Respondent**
MJB Bruitenbach NO	**Second Respondent**
Martin Peter Hillebrand NO	**Third Respondent:**
Martin Peter Hillebrand NO	**Fourth Respondent**

JUDGMENT

BOSIELO, J

[1] This is an application for the rescission of a judgment granted by default against the applicants on 18 March 2003 in the amount of R 1 107 484-80 together with interest herein at the rate of 13,75% per annum from 17 July 2001 to date of payment plus costs. This action

was based on a deed of suretyship in terms whereof the Hillebrand Family Trust had allegedly signed surety in favour of first respondent for the debts of second respondent. It is alleged by the first and second applicants that neither the trust nor first or second applicants ever signed the deed of suretyship forming the basis of this action. It is common cause that the summons commencing action were served on neither the first nor the second applicants but at the trust's chosen domicilium reflected in the impugned Deed of Suretyship. Curiously this address belongs to second respondent. After the fourth respondent became aware of the summons wherein the trust was sued, he, without consulting with the applicants, instructed a firm of attorneys, Messrs Johnsen-Attorneys to defend this matter. On 14 March 2003, Messrs Johnsen-Attorneys formally withdrew as attorneys of record for the trust, allegedly due to lack of instructions and legal fees. It is common cause that the Notice of Withdrawal was never ser/ed on the applicants. The first respondent then proceeded, to obtain judgment by default, which is the subject matter of this application.

[2] The case for the applicants as I could glean it from the papers is that the applicants failed to defend this action because they were not aware of it. The first applicant states that he only became aware of the judgment aforesaid during March 2004 when he was advised by Mr Johnsen, the attorney. He then requested the said Mr Johnsen to furnish him with the documents pertaining to this case for his perusal.

He only obtained the said documents from Mr Johnsen during May 2004. I interpose to state that Mr Johnsen is the same attorney who was instructed by fourth respondent to defend the case. First applicant then consulted second applicant who advised him that she has never given fourth respondent authority to enter into a suretyship agreement on behalf of the trust. During May 2004, first applicant instructed another firm of attorneys to prepare the necessary application for rescission of the judgment. It is common cause that the application for rescission of judgment was only finalised in August 2004.

[3] Concerning second applicant, she avers that she became aware of the judgment during 11 August 2003 when an attempt was made by the sheriff to attach her property in execution of t/1is judgment. She then confronted the fourth respondent and demanded an explanation, Quite curiously the fourth respondent referred her to Mr Johnsen, the attorney. Mr Johnsen advised her that in order to protect her personal property against execution, she had to file an interpleader summons instead of an application for rescission of the judgment. It is common cause that Mr Johnsen attended to the interpleader proceedings successfully. As second applicant did not understand the legal implications of the involvement of the Hillebrand Family Trusts or her name in this case, she was satisfied when her personal property was restored to her. The second applicant discloses that as she is not an

and Mr Johnsen, the attorney. As a result when her property was restored to her, she assumed that the entire problem was solved. I can find no fault with this attitude.

[4] I interpose to state that the first respondent opposed this application vigorously. Inter alia, it was argued by Mr Du Plessis for the first respondent that this application has been delayed inordinately for no good reason and that I must dismiss it as it amounted to an abuse of the court process. See Rule 31(2)(b) of the Rules. Secondly the first respondent submitted that the applicants have not proved sufficient cause and a bona fide defence to the first respondent's claim as required by Rule 31. Mr Du Plessis for the first respondent, ar9ued zealously that even if I were to find that the fourth respondent had no authority to bind the trust, the first and second applicants retained their right of resource, against him for whatever damages they had suffered. In conclusion he submitted that the applicants did not show that a refusal of this application will cause them irreparable prejudice. In conclusion, he argued, with force, that the defence raised by the applicants is frivolous and not bona fide.

[5] Concerning the delay in launching the application for rescission (which is agreed by the parties to amount to 6 (six) months), it is not disputed that such a delay unless properly explained, is unreasonable and

the light of the peculiar facts of this case, such a delay cannot be said to be so inordinate or unreasonable as to disentitle the applicants to the rescission of the judgment, which will assure them the right of access to court. Relying on Land and Agricultural Bank of South Africa v Parker and others 2005 (2) SA 77 (SCA) at page 89 par 32, Mr Greyling argued that "it is correct, as Harms JA warned in Niewoudt, that outsiders dealing with trusts must be warned to be careful. It is also correct, as Mpati DP has recently pointed out, that an outsider dealing with a trust has a manifest interest in ensuring that trustees have authority to encumber the trust property "See Standard Bank of South Africa Ltd v Koekemoer and Other 2004 (6) SA 498 (SCA). Based on the above-quoted dictum, Mr Greyling argued that as fourth respondent had no authority to bind the trust, his c1ctions were of no legal force or effect. He then concluded by arguing b-tat this judgment should not be allowed to stand as it is based on patently unlawful acts by fourth respondent.

[6] Although he did not raise this point pertinently, I understood Mr Du Plessis to be submitting that, based on the facts of this ca~=, I should find that the first respondent was justified in assuming without any enquiries that the fourth respondent had authority to act on behalf of the trust. The logical conclusion hereof is that first respondent was therefore not obliged to enquire if fourth respondent had the necessary authority to act on behalf of the trust. This submission was dealt with

pertinently in the Land and Agricultural Bank case supra at p90 par 37.2 where Cameron JA stated that:

> *"The inference may in appropriate cases be drawn that the trustee who concluded the allegedly unauthorised transaction was in fad authorised to conduct the business in questions as the agent of the other trustees. (In Niewoudt the matter was sent back for evidence to be heard on flow the farmer there conducted the ordinary business of farming without being authorised thereto by his wife, the other trustee), ,<u>Such an inference may in a suitable case be drawn from the fact that the other trustees previously permitted the trustee or trustees effective charge of affairs free rein to conclude contracts.</u> A close Identity of interest, between trustee-beneficiaries as in most family trusts, may make it possible for the inference of implied or express authority to be more readily drawn."* (my own emphasis.)

[7] However in casu, the applicants stated clearly that tll2 fourtl1 applicant was never given authority or free rein to enter into contracts on behalf of the trust without the knowledge or authority' of the other trustees. The first applicant states that all the decisions affecting the trust were taken at properly convened meetings by either a majority vote or resolution. In support hereof, first applicant attached copies of previous written resolutions which conclusively prove that al! previous

decisions concerning the trust were reduced to writing signed by all trustees and arrived at either on majority vote or resolution. This was however not the position when the Suretyship herein was signed. It is patently clear that the fourth respondent acted contrary to the accepted procedures and practices normally used by the trust. In my view, there is no basis from which it can be implied or inferred that the fourth respondent was permitted or given free rein to ad on behalf of the trust or even as an agent of the trustees when he signed the suretyship in favour of first respondent. It is patently clear that fourth respondent in signing the Deed of Suretyship, which committed the trust and also in defending tile action by first respondent, acted unilaterally and without proper authority. Self-evidently his action cannot and does not bind the trust or the other trustees. I therefore find, as a logical corollary that the applicants have a bona fide defence to the respondent's claim.

[8] Having concluded that the actions of fourth respondent were unlawful and prejudicial to the trust, I now have to consider whether I can condone the late filing of this application of rescission by the applicants. Both Counsel were agreed that I have a discretion, which I have to exercise judicially and not capriciously in considering this vexed question. As the learned Flemming DJP (as he then was) aptly remarked in W. Silky Touch International v Small Business Development Corporation [1997] ALL SA 439 (W) at p 444 9

" .....*the court will exercise its discretion to ensure that justice between the parties triumphs above procedural rules and restrictions and breaches thereof.* "

In my view, it will be sad and unfortunate that the applicants be denied access to justice on such a purely technical point. I am particularly fortified in my view by the learned author Erasmus, in the Superior Court Practice at p Bl-204 where he correctly pointed out that

"The object of rescinding a judgment is to restore a chance to air a real dispute. "

See Lazarus v Nedcor Bank Ltd; Lazarus v Absa Ltd 1999(2) SA 782 (W). Although the delay of six (6) months may ***prima facie*** appear to be unreasonable and inordinate, I am of the view, that, in the peculiar circumstances of this case, it is excusable. I am furthermore of the view that the refusal to grant the necessary condonation would result in grave injustice to the applicant. In any event, I am satisfied that having become aware of the judgment, the applicants did everything expected of them, with reasonable expedition, to instruct attorneys to rescind the judgment. I cannot fault the applicants for the delay caused by their attorneys.

[9] In conclusion, I must state that I am satisfied that the applicants have shown good cause for their default. As I have stated above, the summons were served at an address chosen by fourth respondent.

Quite paradoxically! this is the address of the second respondent First respondent stated clearly that they had very little access to this address. Furthermore he stated that he and second applicant went very seldom to this address. It is clear that, even after receipt of the summons, fourth respondent kept it a secret from tile applicants. He unilaterally attempted to defend this action until his attorneys, Messrs Johnsen withdrew, due to lack of funds and instructions. It is dear from the formal notice of withdrawal, that the applicants were never advised of these developments. In my view it cannot be said that the applicants were in wilful default. In the circumstances fairness and justice demand that the judgment herein be rescinded.

[10] Concerning the issue of costs, I am of view, despite the order I am about to make, that the first respondent was entitled and justified to defend this application for rescission, particularly in view of the age of this matter and the delay of the applicants in bringing this application for rescission. Although I have found that the delay is excusable, I see no reason in law or equity why the first respondent should be mulcted in costs. I am unable to say that its opposition was frivolous or vexatious. In my view, fairness and justice dictate tt1at [he costs of this application be made costs in the cause.

In the result, I make the following order:

(a) The application by the applicants for condonation for the late filing of this application in terms of Rule 31{2){b) of the Uniform Rules is granted;

(b) The judgment by default granted against the applicants on 18th March 2003 is rescinded;

(c) The applicants are granted leave to defend the action and;

(d) The costs of this application shall be costs in the cause.

L. O. BOSIELO

JUDGE OF THE HIGH COURT

FOR THE FIRST APPUCANT: ADV GREYLING
INSTRUCTED BY: MESSRS
FOR THE FIRST RESPONDENT: ADV D T V R DU PLESSIS
INSTRUCTED BY: MESSRS BLAKES MAPHANGA INC. c/o LE ROUX JANSEN INC.
DATE OF JUDGMENT:
HEARD ON: