IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 5/8/2005
CASE NUMBER: 19099/2003

UNREPORTABLE

In the matter between

MOKOLO BUSINESS ENTERPRISES **APPLICANT**

and

YAKIRA, L L C **FIRST RESPONDENT**

NAF-NAF DISTRIBUTION BV **SECOND RESPONDENT**

In re:

YAKIRA, L L C **FIRST PLAINTIFF**

NAF-NAF DISTRIBUTION BV **SECOND PLAINTIFF**

and

MOKOLO BUSINESS ENTERPRISES **DEFENDANT**

JUDGMENT

Conradie, AJ

This is an application for:

(a) The granting of condonation for the late filing of an application for the setting aside an order of this Court of 5th October 2004.

(b) The setting aside of an order of this Court of 5th October 2004 dismissing an application for the setting aside of a Default Judgment.

Background

[1] Summons was issued on the 9TH July 2003 in terms whereof the Respondents/Plaintiffs sought to interdict the Applicant from passing off their trademarks and to restrain it from dealing in counterfeit goods together with further auxiliary relief.

[2] According to the return of service, the summons was served on the Applicant on 14 July 2003. The Applicant subsequently failed to deliver a notice of intention to oppose and on the 5 August 2003 His Lordship Mr. Justice Daniels accordingly granted an order by Default for the relief claimed in the summons.

[3] On the 23 February 2004 an application for the rescission of the Default Judgment granted on the 5 August 2003 was served on the Respondent's attorneys. The applicants Deponent, Thembi Mavimbela, claims that the summons and Particulars of Claim were never served on her despite the fact that the return of service reads that it was served at 12 Le Pelle Street, Kwa

Thema, Springs (the address of ms. Mavimbela) on Mrs. Mokolo, owner of the defendant.

[4] On 15 September 2003 the attorneys for the Applicant had already addressed a facsimile to the attorneys for the Respondent indicating that they have instructions to apply for rescission of Judgment. Only on 23 February 2004, some 5 months later, an application for the rescission of the Default Judgment was served on Respondent's Attorneys. The notice of motion, strangely enough, was dated 7 May 2003, a date three months earlier than the granting of the default judgment. The Respondents filed their answering affidavits opposing the application for rescission. The Applicant was then required to file a replying Affidavit by the 7 May 2004. The Applicant's attorneys requested an extension to file its replying Affidavit on the 14 May 2004, a week after the due deadline. An extension was granted by the Respondents' attorneys until 4 June 2005. The Applicant only filed its replying Affidavit on the 2 July 2004.

[5] An application was launched by the Applicant on the 2 September 2004 for the condonation of the late filing of its replying affidavit. According to an affidavit of the attorney for the Respondent, this application was not only unsigned, but also carried an incorrect case number. The application was set down for the 7 September 2004 and was opposed by the Respondents. On

the 7 September 2004 the application was postponed to the 5th October 2004 to be heard with the rescission application and costs were reserved. The Applicant did not at any stage request condonation for the late filing of the application for rescission despite considerable time lapsing between the Applicant obtaining knowledge of the judgment and applying for rescission. [6] On the 5 October 2004 there was no appearance in court either by the Applicant, its attorney or its counsel and His Lordship Mr. Justice Motata dismissed both the application for rescission and the application for condonation for the late filing of the replying affidavit. The Applicant was ordered to pay costs on an attorney and client scale.

[7] Subsequent to the second default Judgment being granted, the Applicant launched an application for the setting aside of the order dated 5 October 2004 and for condonation of the late filing of the application for rescission of the said order. It is these two applications that are now before the Court. The facts leading up to this application will further show from the judgment:

THE APPLICATION FOR CONDONATION OF LATE FILING OF THE APPLICATION FOR RESCISSION:

[8]. The application for condonation, which the Court has to accept to be the document contained in pages 222 to 225 of the bundle of documents, not

only lacks page 2 of the Notice, but also does not bear any proof that it was filed or served on the Respondents. It seems to have been signed by the attorney for the Applicant on 29 April 2005. In the light of the fact that the application for condonation is undated, this Court is not in a position to determine whether the application complies with Uniform Rule 6 of this Court's Rules. In the Respondent's heads of argument, Counsel makes the submission that the application was only served on the Respondent's attorneys on the 3 May 2005, which would not have given the Respondents the required 15 days to respond.

[9] In terms of Rule 31 (2)(b) an applicant has 20 days from date of obtaining knowledge of the Default Judgment to apply for rescission of the Judgment. The applicant's attorney confirms in her affidavit that she had received a letter from her correspondents on 7 October 2004, confirming that the application for condonation and the application for rescission were dismissed as no one was in attendance on behalf of the Applicant at the hearing of the application. The application for rescission is only served on the Respondents on the 23 December 2004, clearly out of time.

[10] The applicant's attorney, in her undated founding Affidavit, gives no proper explanation or reasons for the late filing of the application for rescission. She says that the main reason for the delay in bringing the

application was that she was struggling to obtain assistance from Mr. Bischoff, the counsel for the Applicant at that stage. She further confirms that she had addressed a letter to her correspondent on the 6 December 2004, "enquiring as to what was transpiring in the matter." She says: "I had also previously asked him to do the notice of Motion for the setting aside of the order dated 5 October 2004." The applicant's attorney does not convince the Court that she had timeously requested her correspondent to draft the notice of motion for the setting aside of the order of the 5 October 2004, but simply explained that her correspondent was short staffed and could not attend to the matter immediately and that was the reason for the late filing of the application.

[11] The application for the rescission was clearly hopelessly out of time and the explanation for the Applicant's default is wholly inadequate. In reading the papers in this matter, a consistent pattern emerges, by which it seems that the Applicant as well as her legal representatives appeared to have manifested a disinterest in the conduct of the case ever since the summons was served on the 14 July 2003. There is a repeated disregard for the Rules of this Court. Both the attorney for the Applicant, Ode Retief-De Lange and its counsel, Mr. Bischoff, have at more than one occasion displayed a shocking lack of care in conducting their client's case. Despite not keeping

to the time limits for filing papers, the Applicant's papers have throughout been of poor quality, lacking dates, signatures and even important pages. The Applicant did not even go to the trouble to seek condonation for the late filing of the initial application for rescission.

[12] The attorney's explanation for the repeated default is not only unconvincing but paints a rather dark picture of her commitment to her client's case. She first of all indicates that she was struggling to get hold of the Applicant and then explained that Counsel was ill and unavailable to prepare a replying affidavit. She also explained that documents faxed to Counsel were in a mess and that he could not read it and that she thereupon handed the original documents to a friend of Counsel which he didn't receive because the friend was on holiday in Russia. She further explained that her mother was ill. She gives no explanation for her own absence in court and does also not explain why she had not ensured that Mr. Bischoff was in court. She goes on to explain that she struggled for weeks thereafter to communicate with counsel, she expects her correspondents to draft an application and does not follow up that it is timeously done. She threatens to report counsel but also does not seem to get so far. None of the factors described by the Attorney, prevented the Applicant from bringing an

application in mean time and thereby convincing court that expeditious steps were taken.

[13] Although court is reluctant to penalize a litigant for their lawyers conduct, Harms says in *Civil procedure in the Superior Courts* on p B - 182, with reference to a number of cases: "Where a litigant relies on the ineptitude or negligence of his lawyer, he should show that it is not to be imputed to him". In the matter before the court, there is no attempt by the Applicant to show that its lawyers conduct is not to be imputed on it.

[14]As a result of the careless approach of both the Attorney and the Counsel for the Applicant in the aforegoing applications, the fact that no expeditious steps were taken to bring the application and the unsatisfactory explanations of the delays, the Court is reluctant to grant condonation to the Applicant for the late filing of the application for rescission.

THE APPLICATION FOR RESCISSION

[15] Even if the Court grants condonation for the late filing of the application, the Applicant has in the Court's judgment not shown good cause for the rescission of the judgment.

[16] The non appearance of a legal representative for the Applicant on 5 October 2005 is inexcusable. The attorney for the Applicant explains in her

affidavit that she tried to contact counsel for the Applicant, Mr. Bischoff, on 5 October 2004 without success. Not being at court herself, she only became aware of the default judgment two days later on receiving a letter from her correspondents. A paralegal, employed by the correspondents says in her affidavit that she was called at 10h05 on 5 October 2004 by Mr. Bischoff requesting her to brief local counsel in order to request that the matter stands down to later in the day or the next morning. She confirms that she could not find an available counsel and informed Mr. Bischoff thereof.

[17] The Attorney at no stage indicates that there were communications with Counsel in preparation for the application. There is also no prior enquiry from her side regarding his availability. She simply states that she called him on the day of the application. Despite threatening to report Mr. Bischoff to the National Forum of Advocates, there is no proof thereof before the court and it seems to have been only an empty threat in an attempt to shift the blame.

[18] Counsel for the Respondent drew the Court's attention to the Judgment of the Honorable Judge Patel in *Hardy Ventures* CC *vs. Tshwane Metropolitan Municipality 2004(1) SA* 199 *(T)* on 201: "My concern is that it is increasingly becoming a practice where members of the Bar are on brief to appear in Court but do so without being accompanied by their attorneys. Seemingly it is apparent that there is nothing untoward in this practice. However, quite often when Counsel needs to take instructions, the attorney

is not present and more often the client is not in Court .... This recently innovated practice is one that I am not accustomed to, having been at the Bar, and it certainly does not accord with protocol of the legal profession in the country." The learned Judge goes on to say: " But more than that it is a clear and stern message to both members of the Bar and the Sidebar that they should abide by the Rules of the Court as well as the Rules of the Bar and the Society of Attorneys." The attorney for the Applicant does not at any stage explain her own absence in court.

[19] The rules of the Law Society require that an Attorney has a duty, if he or she is for whatever reason not available to attend to a client's matter, to make satisfactory arrangements to ensure that the client is properly represented by someone else. The Court is of the opinion that the Applicant's attorney did, on more than one occasion, not properly fulfill her duty in this respect.

[20] Mr. Bischoff, counsel for the Applicant in the initial application, on the other hand, calls the attorney's correspondent in Pretoria at lOh05 on the day of the application with a request to find a substitute for him. When she reverts back to him saying that she could not find a replacement, he simply says that he has to go to court and does not make any attempt whatsoever to find a solution to the problem. He later explains that he was unaware of a recent change of the Rules of Practice regarding the calling of the opposed motion roll in this Division.

[21] The court also finds this explanation unsatisfactory. Counsel must have been aware of the date of the application well ahead of time and should have made satisfactory arrangements beforehand, even if it was only to request a colleague to be present at the calling of the roll. Once Counsel has been briefed to appear in a matter the primary responsibility remains with him or her to ensure that there is representation at the hearing of the matter. It is not appropriate to delegate that responsibility to an employee of the correspondent.

[22] Counsel for the Respondents submitted that an Applicant could not rely on the negligence of its legal representatives when making application for rescission of Default Judgment. Jammy AJ says in *Electrocomp (Pty) Ltd* vs *Novak (2001) BLLR* 118 *(LC):* "The Court reiterated the principle that provides that where a party to an application was genuinely unaware of the date of set down, the granting of Judgment by Default will be erroneous and is not necessary for the party to show or prove good cause. This principle is however qualified by the consistent refusal by the Courts to grant rescission orders where there was no irregularity in the proceedings and default can be attributed to the negligence or incapacity of the parties' legal representatives". Had the Applicant it been dissatisfied with the way in which it's Attorney had conducted the matter, it could have consulted other attorneys. It is noteworthy that it did not do so and is thereby condoning and accepting the conduct of the lawyers.

[23] The applicant has further not convinced the Court that it has a bona fide defense. The Applicant has failed to deal with allegations made by the

Respondents in the Particulars of Claim. The Applicant has simply denied that the emblem, as depicted by the first Respondent in the Particulars of Claim, does not resemble the emblem on the clothing which the applicant purchased in Bangkok, Thailand. The second indication of a bona fide defense is that the clothing purchased contained the name Chevgon instead of Chevignon as alleged by the second Respondent. The applicant at no stage denies or contradicts the submissions made in the affidavit of the Second Respondent's Deponent that the Chevignon tag is sown onto the pockets of the jeans and that they quite clearly intend to be imitations of the Second Respondents products. A photograph of the sample of the offending goods also clearly depicts the name tags Chevignon. The Court accordingly finds that the applicant has failed to set out the bona fide defense as it is required to do.

FINDING:

The Court therefore finds that both the application for condonation of late filing of the application for the rescission, as well as the application for setting aside the order of this Court of 5 October 2004 is dismissed with costs on an attorney and client scale .

Conradie T

Acting Judge

For the Applicant: Adv. J.P. du Plessis

For the Respondents: Adv C Georgiades