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

DATE: 18/5/2006
CASE NO: 22828/ 2003

UNREPORTABLE
In the matter between:

BOTHA, THEUNIS LOUIS	Applicant/Defendant
And	
VAN DEN HEEVER, THEODOR WILHEM, N.O.	1ST RESPONDENT
MOTALA, ENVER MOHAMMED N.O.	2ND ESPONDENT
PEMA, JAYANTA DAJI, N.O.	3RD RESPONDENT

JUDGMENT

MAVUNDLA, J

1. On the 25 April 2006 I dismissed with cost the application for the rescission of the judgment that was granted against the Applicant on the 16 September 2005. The Application was opposed. I indicated that the reasons for the dismissal of the application would be made available in due cause. I therefore proceed to set out the reasons for the dismissal.

2. On the 11 August 2003 the Respondents issued summons against the Applicant, who filed an appearance to defend on the 8 September 2003. On the 24 November 2003 Attorneys Boschoff &

Associates withdrew as attorneys of record for the Applicant. On the 26 November 2003 Attorneys Etienne Loots then came on record as the Applicant's attorneys. On the 1 December 2003 an application for summary judgment was brought by the Respondents. However, the Applicant was granted leave to defend the action. The Respondents filed their declaration to which the Applicant pleaded on the 6 May 2003. The pleadings became closed. On the 28 May 2004 the Respondents' attorneys applied for a trial date. On the 14 October 2004 a notice of set down of the matter for trial on the 16 September 2005 was served upon Attorneys Etienne Loots, Applicant's attorneys.

3. On the 16 March 2005 the Applicant's aforesaid attorneys filed a notice of withdrawal as attorneys of record for the Applicant.

4. On the 16 September 2005 default judgment was granted against the Applicant. A warrant of execution was issued against the Applicant and same was served upon the Applicant on the 7` February 2005.This resulted in the Applicant bringing an application for rescission of the said judgment on the 8 March 2005.

5. In explaining his failure to attend court on the date of the granting of the default judgment, the Applicant states that:

(a) He was not aware of the application and or the action.

(b) his then attorneys, Attorneys Etienne Loots, failed to inform him of the trial date;

6. He further states that he has a bona fide **defence.**

7. There are three dispensations under which an application for rescission can be brought and these are:

7.1 Rule 31(2) (a). Under this Rule reside those instances where there was no appearance to defend or where the defendant had filed an appearance to defend but failed to file a plea or was barred from so doing. This situation does not attain in casu since the Applicant did file his plea.

7.2 Rule 42.1. Within this territory resides those instances where the judgment sought to be rescinded:

(a) was erroneously sought or granted in the absence of any affected party;

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

(c) Was granted as the result of a mistake common to the parties. This application does not reside in this territory as it would become clear herein below.

7.3 Common law. In regard to common Law based application for rescission the position is setout in vide Promedia Drukkers & Uitgewers (EDMS) Bpk v Kaimowitz and Others 1996 (4) SA 411 at page 417 where Van Reenen J stated that:

"In terms of the common law, a court has discretion to grant rescission of judgment where sufficient or good cause has been shown. But it is clear that in principle and in the long standing practice of our Courts, two essential elements of 'sufficient cause' for rescission of a judgment by default are:

(a) That the party seeking relief must present a reasonable and acceptable explanation for his /her default;

(b) That on the merits such party has a bona fide defence, which prima facie, carries some prospect of success (See Chetty v Law Society of Transvaal 1985 (2) SA 756 A at 765B-C; Athmaram v Singh 1989 (3) SA 953 (D) at 954E- F)."Vide also De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 AD at 1042 H.

8. It is trite that the applicant who seeks relief or an indulgence bears the onus to establish that there is sufficient cause. For the applicant to acquit himself of this onus he must show that both these above mentioned elements exist, vide Harris v Absa Bank Ltd t/a Volkskas 2002 [3] ALLSA 215 at 217 a full bench Appeal Court

judgment delivered by Moseneke J, as he then was , now the DCJ, where he eloquently states the relevant principles and says inter alia that;

> 'The test whether sufficient cause has been shown by the party seeking relief, is dual in nature, it is conjunctive and not disjunctive. An acceptable explanation of default must co-exist with evidence of reasonable prospects of success on the merits. In Chetty v The Law Society (supra) Miller JA explained this rule thus:
>
> "It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain for the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits"

9. In the matter of Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 Brink J at 476 -477 stated that:

(a) He must give a reasonable explanation of his default. If it appears that his default was wilfull or that it was due to gross negligence, the Court should not come to his defence.

(b) His application must be bone fide and not made with the intention of delaying the Plaintiff's claim;

(c) He must show that he has a bona fide defence to the Plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."

10. As stated herein above the reason why the applicant was in default, he says that he was not informed of the trial date by his then attorneys. On examination of the notice of withdrawal as attorneys of record by Attorneys E J Loots, dated the 16 March 2005, it reflects that the notice provided the last known address of the Applicant as;

30 Beethoven Kompleks,
Beethovenstraat 206,
Waterkloof Glen.

There is, however, no indication that this notice of withdrawal was sent to the Applicant as well.

11. It is being submitted on behalf of the Applicant by Mr. S.M. Maritz that the Respondents' attorneys should have taken further steps to inform the Applicant of the trial date. I do not agree with this submission for the very reasons set out in the authority of Bakoven Ltd v G.J. Howes (PTY) Ltd 1992 (2) SA 466, which he relies upon in support of this submission.

12. In the matter of Bakoven Ltd v G.J. Howes (PTY) Ltd at 470C Erasmus said that:

"In any event, an applicant seeking rescission of a judgment is not entitled to rely on the fact that the notice of withdrawal filed by his attorney did not comply with the Rules of Court. De Wet and Others v Western Bank Ltd was also a case where the litigants sought to set aside in terms of Rule 42 (1) a judgment granted in their absence, they too having no knowledge that their case had been set down. It was held in the Court of first instance (De Wet and Others v Western Bank Ltd 1977 (2) SA 1033 (W) at 1036A-B) confirmed on appeal to the Full Bench (1977 (4) SA 770 (T) at 777H-778B) and on further appeal to the Appellate Devision (De Wet and Others v Western Bank Ltd 1979 (2)SA 1031 (A)) , that the fact that the notice of withdrawal filed in the matter did not comply with the Rules did not assist the applicants (the applicant in the matter). (I refer hereafter to these three reported judgments as respectively De Wet (1), (2), and (3).) In delivering the judgment the Court, Trengove AJA (as he then was) stated as follows in the De Wet (3) (1038D-H)"

'The appellants cannot avail themselves of the fact that their attorney had not complied with all the requirements of Rule 16 (4).

There is no question of any irregularity on the part of the respondent. At the stage Lebos withdrew as the appellants' attorney, the case had already been set down for hearing on the 16 August 1976 in accordance with the Rules of Court, and there was no need for the respondent to serve any further notices or documents on the appellant in connection with the hearing. As far as the trial Court was concerned the Rules of Court had been dully given. When the case was called before Van Reenen J neither the appellants nor their legal representative were present in Court, and, in the circumstances, the respondents' counsel was entitled to apply for an order of absolution from the instance with costs in terms of Rule 39 (3) in respect of the appellants' claims and to move for judgment against the appellants, under Rule 39(1) on the counterclaim. The fact that the appellants had not been advised timeously of the withdrawal of their attorney is, of course, a factor to be taken into account in considering whether good cause has been shown for the rescission of the judgments under the common law, but is not a circumstance on which the appellants can effectively rely for the purposes of an application under the provisions of Rule 42(1)(a).'

13. The Applicant has not stated why he had not been in contact with his attorneys, nor when last he did so. There are various stages that the case had progressed, from summary judgment application to the filing of the plea. These are indicative that the Applicant has been in regular contact with his attorneys. However, from that point up to the stage when the warrant of execution was served upon him, he is silent as to what steps he took to liaise with his attorneys. It must be recalled that the onus rest on him to demonstrate that he was not in willful default. A person cannot simply take a supine position and make no effort to acquaint

himself of the progress of his affairs which he entrusted in the hands of an attorney, especially when the matter involves huge amounts. In casu the amount involved is R600962.00. The failure to explain his supine position as I have indicated herein above leaves me with no other alternative but to conclude that he has not acquitted himself of the onus to demonstrate that he was not in willful default.

In the matter of Mkwanazi and another v Mantsha and another 2003 (3) ALL SA 222 (T) at page 231b Van Rooyen AJ cites Jones AJA in Colyn v Tiger Food Industries Ltd t/a a Meadow Feed Mills Cape 2003 (2) ALL SA 113 (SCA) as saying that the:

" inadequacy of his explanation may well justify a refusal of rescission on that account unless, perhaps the weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospects, but a good prospect of success."

It must further be borne in mind that the Courts are slow in coming to the assistance of a party who, with knowledge that there is an action which he has entrusted to an attorney fails to direct an inquiry to the attorney of the progress of the matter, **vide Promedia Drukkers & Uitgawers (Edms) Bpk 1996 (4)SA 411 at 420A**; **Neuman (Pvt) Ltd v Marks 1960 (2) SA 173A; Saloojee & *Another v Minister of Community Development 1965 (2) SA 135* at 141F-H** where Steyn C.J. said that: "If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much

as directing any reminder or enquiry to his attorney (**cf Regal v African Superslate (Pty.)** ., supra at 23 p i.f) and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney"

14. In the light of the above I am not persuaded that there was sufficient cause for the failure on the part of the Applicant to attend court, I need now look at whether the Applicant has a bona fide defence.

15. The Applicant states that he has a bona fide defence. He further states that on the 1 December 2003 the Respondents brought summary judgment application which he opposed. He has been advised that the fact that leave to defend was granted is indicative that he has a prima facie defence to the action. He has filed his plea. His defence appears fully in his opposing affidavit to the summary judgment application as well as in his plea. He further states that he has enough defenses, which if successful will be proved in the hearing of the matter, and which will be the defenses against the action of the Respondents. He then attaches as annexure "E" and "J" respectively the application for summary judgment and his opposing affidavit.

16. In their declaration the Respondents point out that the Applicant has in its opposing affidavit to the summary application admitted that there was a contract entered into between the company

represented by Zuppa and the Applicant, a copy of which contract is presently not at hand. A copy of the general standard terms and conditions that form the agreement between the company and the defendant, (who is the Applicant in this application) has been attached to the declaration as annexure A. The terms thereof reflect inter **alia** that the company was to supply the Applicant with day old chickens and poultry feed on continuous basis on certain condition. One of the terms was that any variation to the contract shall be in writing for it to be binding. It is also alleged that the Applicant has had to furnish certain guarantees to the company in terms of clause 17 of this standard terms and conditions and that he has breached one or more of the conditions by failing to:

16.1. Pay the supply price of the day old chickens;

16.2 Pay the supply price of the poultry feed;

16.3 Pay for medical and vaccination provided by the company; and /or

16.4 Supply all broilers reared to the company in that the broilers were sold and delivered to the third parties It is further stated that the company has performed all its obligations.

17. In its plea the Applicant has admitted that there is a contract he entered into with the company. He says that the standard terms were however altered but he cannot recall. It is hard to understand how one can say that the standard terms have been altered yet not recall in what manner and how such terms have been altered. He who alleges must prove. The Applicant in his own

admission does not recall the terms to which the contract has been altered to and therefore there are no reasonable prospect of success on his part on this point. Since clause 17 of the standard terms provides that any variation to the contract shall be in writing, in the absence of such written variation the prospect of success of this defence is certainly dim. The Applicant's further defence in the plea is that the company has failed to perform as it provided substandard feed and that as the result of non performance there was a high mortality of the chickens. Strange enough the Applicant has not filed a counterclaim in regard to whatever damages he is supposed to have suffered as the result of the non or poor performance of the company. In any event, even if the Applicant had a claim against the liquidated company, such claim has long prescribed since the company was liquidated on the 27 January 2003, and the Applicant's alleged claim would have arisen in prior the liquidation. There is no explanation as regards what steps he took pre - liquidation to institute such claim as he now wants to allege to have had against the company. This must be seen in the light of the allegation that as the result of the none or poor performance by the company, the Applicant's business declined with an amount of R688000.00

18. I am of the view that, not withstanding that the Applicant was granted leave to defend during the application for summary judgment, that does not mean that for purposes of this application, he must therefore be granted rescission of default judgment. It is one of the factors that I need to place on the overall scheme of thinks to determine whether I should grant him the rescission for default judgment. I have placed on the balancing scale the lack of sufficient cause for the failure to attend court, the lack of the prospect of success on his alleged defence. I am

therefore concluding that there is no bona fide defence on the merits. I need not canvass each and every denial or placing in dispute of every issue by the Applicant. If I am of the view that, as I am, the overall the defence is doomed to fail, I am entitled under those circumstances to dismiss the application for rescission, as I did.

19. It is trite that the cost follow the event.

20. It is for the above reasons that I dismissed the application for the rescission with costs.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

HEARD ON THE: 06/03/2006
DATE OF JUDGMENT: 31/03/2006
APPICANT`S ATT: STATE ATT
APPLICANT`S ADV: S PHOSWANA
DEFENDANT`S ATT: SECHELE INC
DEFENDANT`S ADV: MOTEPE