IN THE HIGH COURT OF SOUTH AFRICA
(REPUBLIC OF SOUTH AFRICA)
PRETORIA

4/11/2014

CASE NO: 76278/13

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

4 NOVEMBER 2014 _____
DATE SIGNATURE

In the matter between:

GILLIS BRIEL MOUMAKOE INC	**FIRST APPLICANT**
DANIEL BRIEL MOUMAKOE	**SECOND APPLICANT**
ABRAHAM JOHANNES BRIEL	**THIRD APPLICANT**
TSHEPO B MOUMAKOE	**FOURTH APPLICANT**

AND

JOHANN GERHARD VAN DEN BERG	**RESPONDENT**

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] The applicant seeks an order:

"1. That the Judgement granted against the applicants by His Lordship Justice Janse Van Niewenhuizen, on 28 March 2014,be rescinded and set aside.

2. Directing that the applicants be allowed to file their Affidavit Opposing the Summary Judgment application, within 5 days of the Honourable Court Summary Judgment application, (sic) within 5 days of the Honourable Court rescinding and setting aside the Summary Judgment granted in default.

3. That any Writ of Attachment or Execution order that may have been issued pursuant to the Summary Judgment granted in default on 28 March 2014 be set aside.

4. That any action that have been undertaken in an attempt to give effect to the Summary Judgment granted in default on 28 March 2014 be set aside and reversed.

5. That any party who opposes the granting of the relief sought be ordered to pay the costs.

6. That such further and /or alternative relief as the court may deem appropriate, be granted."

BACKGROUND FACTS

[2] The respondent is an advocate of this court and practicing as such at High Court Chambers 220 Madiba Street, Pretoria, Gauteng Province. The first applicant is a company with its directors, the second to the fourth applicants. They all practice as attorneys from 34 Jacobs street,Heidelberg which is also in Gauteng Province. The applicants and the respondent had a working relationship together. The applicants would brief the respondent who in turn would do work for them. The respondent contends that the applicants briefed him and he then did work for them. The applicants, according to the respondent, still owe him an amount of R251.837.50 in respect of services rendered. The respondent, as a result, instituted an action against the applicants, claiming payment of the said amount, interest thereon at the rate 15.5% per annum and costs. The applicants entered their appearance to defend whereupon the respondent applied for Summary Judgment. The applicants filed their notice to oppose the Summary Judgment application. The application, according to the

papers, was to be heard on 31 March 2014.The date was, however, changed to 28 March 2014 by the Registrar. It appears that there was no interaction between the parties and the Registrar when the date was changed. The Registrar appears to have notified the respondent who, in turn, notified the applicants of the change in the date. The applicants did not file their affidavits opposing the Summary Judgment as, according to them, the affidavits, would be served and filed on 28 March 2014.This, according to the applicants, meant that they had to get a junior counsel to attend court on their behalf on 28 March 2014 as their counsel was only available to handle the matter on 31 March 2014.The applicants contend that their junior counsel was only briefed to go and apply for a postponement. Summary Judgment had been granted when their counsel ultimately arrived in court. A message, according to the applicants, was sent to counsel for the respondent and it appears that such message was late because Judgment had already been granted when same reached its destination. The granting of the Judgement resulted in this application which is opposed by the respondent.

[3] The applicants' application is based on rule 31(2)(b) of the Uniform Rules of Court which provides:

"*(b)* A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgement and the court may, upon good cause shown set aside the default judgment on such terms as to it seems meet."(my emphasis)

[4] The applicants averred that it had already been their intention to defend the matter. This, as they contended, because they entered appearance to defend the matter and filed their intention to oppose the Summary Judgment application.

[5] The respondent contends that:

1. On 20 March 2014,The applicants, promised to file their answering affidavit which was being prepared by their counsel, on or before 12h00 on 28 March 2014
2. The applicants, due to the unavailability of their counsel to attend to their matter on 28 March 2014, would, as promised, brief junior counsel to apply for a postponement.
3. The applicants then requested that the matter be removed from the roll. The request was not acceded to.
4. The respondent, in no uncertain terms, informed the applicants that the matter would proceed as arranged on 28 March 2014.

[6] The respondent, on 28 March 2014, when: there was no appearance on the side of the applicants; there was no sign of the answering affidavit which the respondent was promised would be served and filed and when no one moved an application for a postponement, took judgment.

[7] On 23 April 2014,a writ of execution was issued and executed on 29 April 2014.The present application, incidentally, was also served on 29 April 2014.The respondent then filed its answering affidavit on 29 May 2014.

[8] It is noteworthy that the applicants did not file their replying affidavit. They also failed to file an index and their heads of argument as required by the Practice Directives of the division. The heads of argument were only served on the respondent and made available to the court on 24 October 2014, the day on which the matter was heard. The answering affidavit, as Mr Rossouw, for the respondent, correctly pointed out, "still has not seen the light of day".

[9] It is noteworthy that the applicants failed to set the matter down. This was done by the respondent on 14 August 2014. This, according to the respondent's counsel, resulted from the fact that the respondent's allegations were unanswerable. There could be merit in the submission.

[10] Rule 31(2)(b) is key to the applicant's application. Mr Rossouw submitted that the rule does not find application in this application. The submission has merit. Rule 31 (2) (b) relates to judgement taken where the defendants (applicants) are in default of delivery of notice of intention to defend or of a plea.

[11] Mr Rossouw then proceeded on the basis that the application had been brought in terms of the common law. According to him, the applicants had to present a reasonable and acceptable explanation for their default and demonstrate that they have some prospect or probability of success. This, according to him, depends on whether the applicants acted in wilful disregard of Court rules, process and time limits.

[12] Mr Rossouw submitted that the applicants' conduct in handling this matter left a lot to be desired. The conduct, indeed, is not plausible. This is evident from what has been referred to above.

[13] Mr Rossouw submitted that the applicants, having regard to their failure to comply with the rules and the Practice Directives would not succeed in their application for a postponement. I do not agree. My disagreement stems from the fact that the date of hearing had been brought forward at short notice. Indeed, it cannot be gainsaid that this affected the applicants in the conduct of their case.

[14] On the assumption that the court found that the applicants would have succeeded with an application for postponement, Mr Rossouw submitted that the applicants have no prospect or probability of success in respect of each and every claim contained in the application for summary judgment.

[15] Mr Shumba, for the applicants, in respect of claim 2, submitted that on the issue of merits, the applicants:

1. queried the correctness of the amounts in the claim;
2. Contended that certain amounts had been paid; and
3. in certain of the claims the respondent had not been briefed to attend to the matters

[16] Rule 32(6) provides:

"(6) if on the hearing of an application made under this rule it appears-

(a) that any defendant is entitled to defend and any other defendant is not so entitled; or

(b) that the defendant is entitled to defend as to part of the claim, the court shall-

(i) give leave to defend to a defendant so entitled thereto and give judgment against the defendant not so entitled; or

(ii) give leave to defend to the defendant as to part of the claim and enter judgment against him as to the balance of the claim, unless such balance has been paid to the plaintiff; or

(iii) make both orders in sub-paragraphs (i) and (ii)."

Mr Rossouw has also so submitted.

[17] Mr Rossouw, in my view, properly summarised the applicant's case regarding the respondent's invoices, relating to claim 2 and the applicants contentions.

[18] From the summary and the evidence at the disposal of the court the following emerge:

1. There are ten invoices relating to ten independent claims. Their total is the amount of R251.837.50.
2. The applicants aver that the amounts in invoices 1416 and 1506 totalling R42.475.00 have become prescribed.
3. The applicants have allegedly been overcharged with R375.00 in respect of invoice 1713.
4. Regarding invoice 1710, the applicants allege that they have paid the amount of R13250.00 appearing therein.
5. They admit the full amount of R18.000.00 in invoice 1721
6. They admit R18 000.00 of the amount of R18 500.00 appearing in invoice 1742.They dispute the balance.
7. They are said to owe R96 237.50 according to invoice 1741.They, however admit R75.570.00 and dispute the balance.
8. They admit R12.000.00 which is owed in respect of invoice 1714
9. Regarding invoice 1755 which shows the amount of R28.500.00, R18.000.00 is admitted and the balance is disputed
10. The full amount of R4.500.00 which relates to invoice 1793 is disputed by the applicants who allege that the respondent had no brief.

[19] Mr Rossouw submitted that on the applicants' version the total amount admitted is R159.510.00. I agree.

[20] It, in my view, will be prudent and just to allow rescission in respect of the disputed parts of the claims and to give the applicants leave to defend as to those parts of the claims that are disputed. This, because Summary Judgement was granted in respect of ten claims each of

which is based on a separate and distinct cause of action and also because of the inherent jurisdiction which the court has in terms of the common law.

(See **SOS Kinderdorf International V Effie Lentin Architects 1993(2) SA 481 (NM) 491D-493C**)

COSTS

[21] Mr Rossouw, because of the applicants' conduct in their handling of the matter, lastly submitted that the applicants ought to be hit with punitive costs to demonstrate the court's disapproval of such conduct. I agree only to the extent that the costs will be on an attorney and client scale which costs will include the costs consequent upon the employment of senior counsel.

[22] The following order, in the result, is made:

1. The judgment granted against the applicants by His Lordship Justice Janse Van Niewenhuizen on 28 March 2014 is rescinded and set aside only in respect of an amount of R92.327.50 made up as follows:
   - 1.1 R25.125.00 of invoice 1416 dated 8 January 2009.
   - 1.2 R17.350.00 of invoice 1506 dated 30 December 2009
   - 1.3 R375.00 of invoice 1713 dated 17 February 2012
   - 1.4 R13.250.00 of invoice 1710 dated 14 May 2012
   - 1.5 R500.00 of invoice 1742 dated 14 May 2012
   - 1.6 R20.727.50 of invoice 1741 dated 4 June 2012
   - 1.7 R10.500.00 of invoice 1755 dated 1 August 2012
   - 1.8 R4.500.00 of invoice 1793 dated 7 February 2012
2. The applicants are granted leave to defend in respect of the said amount of R92.327.50;

3. The applicants are to file their affidavit opposing the Summary Judgment application within 5 days of the granting of this order;

4. Any writ of attachment or execution order that may have been issued pursuant to the summary judgment granted in default on 28 March 2014 is set aside;

5. Any action that may have been undertaken in an attempt to give effect to the Summary Judgment granted in default on 28 March 2014 is set aside.

6. The applicants are ordered to pay the costs on an attorney and client scale which costs include the costs consequent upon the employment of senior counsel.

M.W MSIMEKI
JUDGE OF THE NORTH
GAUTENG HIGH COURT

COUNSEL FOR THE APPLICANT:	Adv. G Shumba
INSTRUCTED BY:	GILLIS BRIEK & MOUMAKOE ATTORNEYS
COUNSEL FOR THE RESPONDENT:	Adv. A B Rossouw
INSTRUCTED BY:	VAN ZYL ATTORNEYS

DATE OF HEARING: 24/10/2014
DATE OF JUDGMENT: 04/11/2014