IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 41297/2012

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED ✓

21/9/2015

DATE SIGNATURE

HEARD ON: 16 FEBRUARY 2015

In the matter between:

MINISTER OF SAFETY AND SECURITY Applicant

and

DESMOND JOSIAS Respondent

JUDGMENT

MOHLAMONYANE AJ:

[1] This is an application by the Applicant (Defendant in the main action) for rescission of a judgment and order granted by default by the above Honourable Court on 18 March 2014.

[2] The application is opposed by the Respondent (Plaintiff in the main action).

BRIEF BACKGROUND:

[3] Erwee Incorporated are attorneys of record of the Respondent. Their office is in Musina. In July 2012 the attorneys of record sued a civil summons out of this Court, claiming damages for alleged unlawful arrest and detention by members of the South African Police Service *("SAPS")*. The summons was received by the office of the State Attorney in Pretoria.

[4] The cause of action, according to the particulars of claim, arose at Taaibos Avenue, in Hopefield in the Western Cape. The Respondent resides at Taaibos Avenue in Hopefield and all SAPS witnesses also reside in the Western Cape. The State Attorney's office in Pretoria *("the Pretoria office")* sent the file in the main action to the Office of the State Attorney in Cape Town *("the Cape Town Office")* at the request of SAPS Legal Services in Cape Town. Of course, that was done for convenience of SAPS and all stake holders. In my view, it was a sensible route to take. I must also mention that prior to November 2013, there was an influx of delictual claims where the cause of action arose in the Western Cape and where summons was served at the Pretoria office. In fact, all these summonses were issued by one firm of attorneys, Erwee Incorporated. Mr Henrik Marthinus Erwee *("Erwee")* confirms in his opposing affidavit that such cases were issued out of this Court and were over a hundred. As I have indicated above, it was a sensible thing to do to send all the matters to the Cape Town office for better management of these cases.

OBTAINING OF JUDGMENT BY DEFAULT:

[5] On 18 March 2014, the main action was on the trial roll in this Court. Ms Arnelle Marsh-Scott *("Marsh-Scott")* who is the Applicant's attorney of record in the Cape Town office, received a call on the morning of 18 March 2014 from one Ms Luter of the office of the State Attorney, Pretoria, that the Deputy Judge President of this Court had contacted Ms Luter to inform her that there was no appearance for the Applicant. Marsh-Scott then made several attempts to contact the attorneys for the Respondent but failed. She also contacted the Pretoria office, looking for Mr Nel *("Nel")*, who was unavailable. Marsh-Scott could only speak to Nel late that afternoon.

Default judgment was obtained against the Applicant. A copy of the judgment is annexed to the Applicant's papers marked Annexures "PL2" and "PL3" appearing on paginated pages 17 and 40 respectively. I must mention that the date appearing on the order is 19 March 2014.

THE GENERAL APPROACH TO APPLICATIONS FOR RESCISSION OF DEFAULT JUDGMENTS:

[6] The general requirements that an applicant has to meet in this kind of application have been dealt with in a myriad of decided cases. The general approach to applications for rescission was restated by Smallberger J (as he then was) in **HDS Construction (Pty) Ltd v Wait 1979 (2) SA 298 (E)** at 300f-301C in the following terms:

> *"In Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) Brink J, in dealing with a similar provision, held (at 476) that in order to show good cause, an applicant should comply with the following requirements:*

1. *He must give reasonable explanation for his default;*

2. *His application must be bona fide;*

3. *He must show that he has a bona fide defence to the Plaintiff's claim".*

[7] The jurisdictional requirement of 'good cause', entails two essential elements. First, a reasonable and acceptable explanation for the default, and second, a demonstration of a *bona fide* defence. In **Chetty v Law Society, Transvaal, 1985 (2) SA 756 (A) at 765B-C**, the following was stated:

> *"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:*
>
> *(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and*
>
> *(ii) that on the merits such a party has a bona fide defence which prima facie carries some prospect of success".*

[8] In **De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd, 1994 (4) SA705 (E)** Jones J stated the following:

> *"An application for rescission of judgment is never simply an inquiry whether or not to penalize a party for his failure to follow the Rules and procedures laid down for civil proceedings in our courts. The question is rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide. The Magistrate's discretion to rescind the judgment of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion, by*

> *balancing the interests of the parties, bearing in mind the considerations referred to in Grant v Plumbers (Pty) Ltd (supra) and HDS Construction (Pty) Ltd v Wait (supra) and also any prejudice which might be occasioned by the outcome of the application. He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgments of the Courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in the party's absence without evidence and without his defence been raised or heard."* (at 711E-H).

[9] Nel mentioned above was the attorney of record of the Applicant in the Pretoria office. Upon establishing contact with Nel, Marsh-Scott informed Nel that she had not received the notice of set-down. In her evidence, Marsh-Scott does not state what Nel's response was when she informed him that she did not receive the notice of set-down. I would have expected that the intimation from Marsh-Scott to Nel would elicit a response. If it did then it was an omission on the part of Marsh-Scott not to make mention thereof. On the other hand, it is Erwee's version that after he had received Applicant's papers he approached Nel, *"...who had personally dealt with the file of this matter in that office..."* who had informed Erwee that the notice of set-down *"...was indeed timeously delivered to the State Attorney's Cape Town office by the State Attorney's Pretoria office"*. I find this assertion perplexing as it is unsupported by, in the least, a document showing when and the mode of *"delivery"* to the Cape Town office. The alleged timeous delivery remains unexplained. At the most, Nel should have deposed to an affidavit explaining when and how he sent the

notice of set-down to Cape Town. In the absence of any explanation from Nel one is left wondering whether the notice of set-down was ever sent to the Cape Town State Attorney.

[10] In her heads of argument, the Applicant's counsel seeks to suggest that the notice of set-down did not come to the attention of Marsh-Scott as a result of what she refers to as a *"filing error"*. I am unable to decipher where this *"filing error"* notion emanates because in the entire evidence of Marsh-Scott she does not suggest that it was received but was erroneously filed. All that Marsh-Scott is saying is that she did not receive the notice of set-down at any stage.

[11] Mr Snyman, who appeared for the Respondent, correctly pointed out in argument before me that the case turns on one point only, i.e. whether Marsh-Scott received the notice of set-down or not. I agree with him.

SCATHING ATTACK ON THE OFFICE OF THE STATE ATTORNEY:

[12] Erwee has embarked on a scathing attack of the Cape Town Office of the State Attorney. Mr Ferreira argued that such attacks were unfounded. Erwee alleges, *inter alia, "...that the present case was poorly and grossly negligently managed by the Applicant's Cape Town State Attorney's office,"...had failed grossly negligently in the execution of the Applicant's assumed intention and instructions to defend this action, "...through its own gross negligence, slackness and incompetence..."*. Erwee also refers to the *"...malaise, ignorance, slackness and gross negligence on the part of the State Attorney's Cape Town Office"*.

[13] One way or the other, I will have to deal with these profoundly scathing attacks on the office of the Cape Town State Attorney and the criticism levelled against Marsh-Scott for allegedly not acting responsibly and adopting a so-called do not care

attitude, as described in the Respondent's heads of argument and opposing affidavit. Throughout the entire opposing affidavit there is a reverberation of these scathing attacks.

[14] In the scathing attacks the Respondent's counsel seeks to rely on the case of Minister of Safety and Security v G4S International UK Ltd: In re G4S International UK Ltd v South African Airways (Pty) Ltd and Others, reported at (07/12735) [2002] ZAGPJHC 50 (30 March 2012). The case is cited by both counsel for the Applicant and Respondent in their heads of argument. In the judgment Van Oosten J fully outlines the duties and responsibilities of the office of the State Attorney. The learned Judge also expressed dissatisfaction and concern at the level of *"...neglect and the general decline in the standards of service rendered by the State Attorney's office..."*, (at par. 16). I align myself with the sentiments expressed by the learned Judge. He was particularly dealing with the State Attorney's office in Johannesburg. The question that immediately arises is this: was Marsh –Scott or the State Attorney's Cape Town office *"negligent"* or *"grossly negligently managed"* the present case? In the totality of circumstances of this case, can I conclude that Marsh-Scott adopted an attitude described as a *"do not care"*. I will later in this judgment revert to these aspects.

WAS THERE WILFUL DEFAULT?

[15] The Respondent's attorney and counsel criticises Marsh-Scott for looking for Nel for the whole of the 18th March 2014, even in the face of she having been told that there was no representation on behalf of the Applicant. In my view, it was not unreasonable for Marsh-Scott to look for Nel who was seized with the matter in Pretoria, and who had send the pre-trial minutes to Marsh-Scott after he had attended a pre-trial conference in the office of Erwee in Musina with counsel he had appointed for the matter in

Pretoria. I agree with Mr Ferreira that Marsh-Scott did what she could from Cape Town. I must also comment that the said pre-trial conference was held by Nel, the Pretoria counsel he had appointed for the case and Erwee on 07 January 2013. It has to be noted that at the time of the holding of the pre-trial conference, the case file in the main case was already transferred to Marsh-Scott, some two months before, i.e. 05 November 2012. The notice of set-down was received by the Pretoria office on 22 February 2013. I am inclined to believe that as at that date Nel apparently accepted that he was still seized with the matter. I say so simply because Erwee Inc. sent the notice of set-down to the Pretoria office with Nel as reference.

It boggles the mind why a pre-trial conference is held to the exclusion of the Cape Town attorney after the case file was already sent to the Cape Town office. I may surmise from this fact that such pre-trial conference was held to the exclusion of the Cape Town attorney, seemingly without her knowledge or acquiescence, because, according to Erwee, Nel was opposed to the case file being sent to Cape Town. According to Erwee, the Pretoria office dealt with cases emanating from the Western Cape Province *"...in proper and diligent control and taking all due professional care...."*.

[16] Furthermore, according to Erwee, Marsh-Scott *"...had done absolutely nothing in order to manage the matter which was duly transferred to her..."*. In my view, the holding of a pre-trial conference is one part of managing a case. Erwee does not suggest that Marsh-Scott was invited to the pre-trial conference after the case was transferred to her, to which she declined to attend or did not show interest. I therefore disagree with this contention which is an over exaggeration and an unfair attack on Marsh-Scott. There was nothing more which Marsh-Scott should have done other

than what was expected from her, which is, among others, to engage SAPS to locate police witnesses for trial, brief counsel, and to consult with counsel and witnesses in preparation for trial. This criticism is accordingly unjustified.

[17] I agree with Mr Ferreira that the scathing attack on the Cape Town office is unfounded. I could make out that in Erwee's affidavit some paragraphs are incessantly riddled with unjustified ridicule to Marsh-Scott. I found no unbecoming or unimpressive conduct on the part of Marsh-Scott in her handling of the case. I also find that the criticism and scathing attacks by Erwee on the Cape Town office was mainly meant to taint the Cape Town office as being incompetent, negligent and slack. The reason for tainting it in such manner was because it is Erwee's contention that the Pretoria office was *"diligent"* and *"professional"* in dealing with his cases emanating from the Western Cape.

[18] In the circumstances, reliance by the Respondent's counsel on the case of Minister of Safety and Security v G4S International, referred to above, for the proposition that I should find that there was gross negligence on the part of Marsh-Scott and the Cape Town office, is misplaced. I am, accordingly unable to find, on the facts, that the notice of set-down was sent to Cape Town.

[19] Counsel, briefed by Nel, was supposedly on brief as at 07 January 2013 when the pre-trial conference was held. It is unclear as to when the Pretoria counsel's mandate ended. What is clear is that the file in the case, as already stated above, was already with Marsh-Scott at the time the pre-trial conference was held. Had Marsh-Scott been aware of the trial date, at least in March 2013, at the earliest, she would have appointed counsel timeously. There is nothing on the facts suggesting otherwise.

[20] Marsh-Scott, who had received the pre-trial conference minute, discovery documents and the notice of request for further particulars for purposes of preparing for trial, had, according to her, a legitimate expectation that she would receive the notice of set-down. For all intents and purposes, the Pretoria office acted as the correspondent attorneys for the Cape Town office. Accordingly, the Pretoria office, in particular Nel, had a duty to follow up on the notice of set-down to ensure that it has reached Marsh-Scott.

[21] According to Marsh-Scott the pre-trial conference minute indicated that the matter would proceed on both merits and quantum. It was therefore not unreasonable for Marsh-Scott to have expected that Nel or the Respondent's attorney would furnish her with the necessary documents regarding quantum. None was received by her.

[22] In the light of the facts and authorities cited above, I accordingly find that Marsh-Scott gave a reasonable and acceptable explanation for her default. On the merits of the case, the Applicant, who avers that the Respondent was arrested for being drunk in public, appears to have a *bona fide* defence. I consequently find that Marsh-Scott was not in wilful default.

ISSUES RAISED BY THIS CASE:

[23] I am constraint to consider other issues brought to the fore by this case. Whilst the application is for rescission of a default judgment, this case highlights one important aspect. The main action poses logistical problems for the Cape Town office in dealing with the case. It will not be this case only, but the rest of the other hundred or so cases lined up for trial in this Court. The logistical problem will perpetuate if the Cape Town office is not put on record as the office at which all processes must be

served, or, if the Pretoria office does not co-operate with the Cape Town office. Even if the Pretoria office remains correspondent attorneys for the Cape Town office, it is expected that both offices should assist each other for the smooth running of the proper administration of justice. In my view, part of the proposed co-operation would be recommendation of counsel by the Pretoria office to the Cape Town office for trial purposes. This, in the end, would save public funds because it may be unnecessary for the Cape Town counsel to travel from Cape Town to Pretoria for these over a hundred trials to be held in Pretoria. The Respondent (Plaintiff) and members of SAPS are all living in the Western Cape. The case would be heard in the Pretoria High Court. The costs of securing attendance of witnesses from the Western Cape are enormous. The Plaintiff's attorney is in Musina. It is understandable that this Court has jurisdiction to hear the matter, by virtue of the principal place of business of the Minister of Police being in Pretoria. However, the trial involves unnecessarily great expense on the state's coffers. Erwee decided that this Court should try the cases for his own convenience and not for the convenience of any other person.

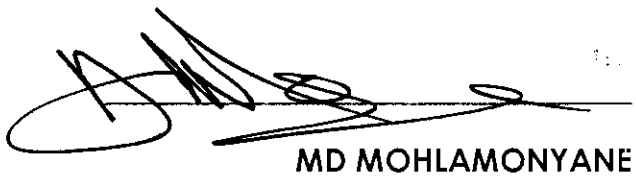
[24] If the present matter was an application by either party in terms of section 27 of the Superior Courts Act, no 10 of 2013, for reasons of convenience and cost implications, I would have seriously considered granting it, in accordance with the provisions of section 27(1)(b) (ii) of the Superior Courts Act. However, it is not.

[25] In the words of Jones J in the De Witt's case *supra*, in the exercise of my discretion to rescind the judgment of this Court *"...is therefore primarily designed to enable ..."* me *"to do justice between the parties"*. In my view, justice between the parties requires that the judgment should be rescinded.

[26] In the result I make the following order:

26.1 The default judgment dated 19 March 2014 under case number 41297/2012, granted by the High Court, Gauteng Division, Pretoria, be and is hereby rescinded and set aside.

26.2 The Respondent is ordered to pay the costs of this application.



MD MOHLAMONYANE

[Acting Judge of the High Court of South Africa,
Gauteng Division, Pretoria]

APPEARANCES:

For Applicant : **Adv A. C. FERREIRA SC**
Adv Y. ISAACS
[Instructed by the State Attorney, Cape Town]

For Respondent : **Adv T. P. SNYMAN**
[Instructed by Erwee Incorporated, Musina]