

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NUMBER: 9996 / 2015

DATE OF HEARING: 11 OCTOBER 2016

DATE OF JUDGMENT: 17 OCTOBER 2016

In the matter between:

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

17-10-2016
.....
DATE

SIGNATURE

ERROL ELSDON

First Applicant

TRACEY ROSCHER

Second Applicant

and

CHRISTIAAN SCHOEMAN

First Respondent

STEMELA & LUBBE INC

Second Respondent

WILNA LUBBE

Third Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

- [1] This is an application for the rescission of a judgment granted in the absence of the applicants on 26 February 2015. The judgment comprises a cost order alone, including the costs of senior counsel. The application is brought in terms of common law. In doing so, the applicants have submitted that they have set out in their founding papers, a reasonable explanation for the default, that the rescission application is brought *bona fide* and that they have a *bona fide* defence including a *prima facie* case on the merits.
- [2] On 10 February 2015 the applicants brought an urgent *ex parte* application wherein they sought an interdict restraining the second and third respondents from making payment to the first respondent of the proceeds emanating from a settlement agreement and that the second and third respondents would retain the proceeds of the settlement agreement in their trust account, pending the return date. The respondents were afforded the opportunity to anticipate the order on not less than 24 hours' notice.
- [3] The applicants submitted that they believed if notice of the application was given, the funds held by the second respondent would be dissipated. The justification submitted by the applicants is that the first respondent was in a dire financial situation and that he and the third respondent had been in a personal relationship. This allegation, in my view, is quite astounding in the light of the third respondent being an admitted and practising attorney of this court. In the absence of information supporting the applicants' allegation, more than just their belief, such allegation appears to be conspicuous.

- [4] I would imagine that an attorney who receives a request for an undertaking would either give such undertaking or furnish an explanation why an undertaking could not be given. I can hardly imagine that the third respondent, having been requested for an undertaking, would simply transfer funds to the first respondent to the prejudice of the applicants, thereby rendering her culpable of professional misconduct.
- [5] Be this as it may the *ex parte* application was based on the aforesaid allegations. It is uncertain why the applicants deemed it necessary to cite both the second and third respondents. The second respondent is a law firm, incorporated as such under the company laws of South Africa. The third respondent is a director of the law firm.
- [4] The return date of the *ex parte* order was 10 March 2015. The second and third respondents anticipated the return date and the application was scheduled to be heard on 26 February 2015. In her notice of anticipation of the return date the third respondent stated that she would move for an order discharging the rule *nisi* and a cost order would be sought against the applicants on the scale as between attorney and own client.
- [5] The applicants argued that because the third respondent had stated in her answering affidavit attached to the notice of anticipation that she would abide by the decision of the court, she is precluded from attacking the decision of the court. Moreover, the fact that she did not deny that she had knowledge of

the settlement between the first respondent and the applicants, she should not have taken the cost order against the applicants in their absence.

[6] This brings me to the conduct of the applicants. On 26 February 2015 the applicants were represented by their current attorneys. The applicants did not attend court, because, they argued, they were under the impression that the matter was settled as against the second and third respondents as well. They conceded that this assumption was incorrect. The attorneys for the applicants did not establish what would happen with the rule *nisi* that had been anticipated.

[7] The anticipated return date was heard before De Vos J in the urgent court and a cost order was granted against the applicants, including costs of senior counsel. On the previous day, 25 February 2015, the *ex parte* application was settled between the applicants and the first respondent. The parties thereto agreed to a draft order which was made an order of court. Neither the applicants nor their attorneys considered the second and third respondents or the anticipated return date.

[8] The applicants first became aware of the cost order when the second and third respondents' bill of costs was served. At that stage it would have been incumbent upon their attorneys or the applicants themselves to take steps to establish why the cost order had been granted in their absence and to take steps for the rescission thereof. Instead, the attorneys for the applicants embarked on opposing the taxation of the bill of costs in the ordinary course

of events. This in my view is a clear indication that they did not intend applying for the rescission of the cost order.

[9] On 24 April 2015 the applicants, duly represented, despatched their objections to the itemised bill of costs wherein they raised arguments on the various items contained in the bill of costs. On 14 July 2015 the taxation process was completed and the taxing master signed the allocator. On 28 July 2015 the applicants served this application on the second and third respondents. For the second time I find it strange that the applicants would go to the extent of opposing the taxation of the bill of costs instead of liaising with the second and third respondents to stay the taxation process pending the rescission application.

[10] My questions to counsel on the conduct of the applicants in this regard as also to the blatant disregard of the anticipated return date was met with submissions that there is much criticism that may be levelled at the applicants but so too at the second and third respondents. This of course is not an acceptable explanation.

[11] In my view the delay in launching the application is fatal. This brings me to the requirement of a *bona fide* defence and whether this application was brought *bona fide*. In my view, and on the facts before me, the rescission application cannot be said to have been brought *bona fide*. There is no acceptable explanation for the applicants' conduct. Furthermore, the applicants do not set out any facts to sustain a *bona fide* defence. The *ex parte* order was in my

view an abuse of process and the second and third respondents should have been afforded the courtesy of responding to a request for an undertaking, at the very least. Consequently I find that there is no *bona fide* defence.

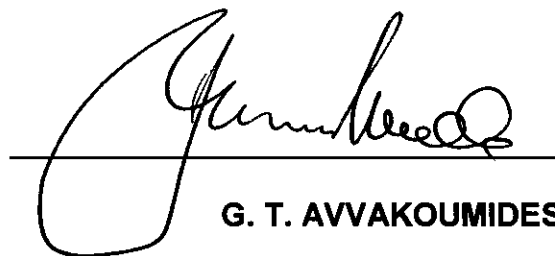
- [12] Mindful that I am not sitting on appeal I remarked during the hearing of this application that the costs of senior counsel should not have been included in the cost order. Counsel for the second and third respondents agreed on the basis of the decision in *City of Johannesburg Metropolitan Municipality v Chairman of the Valuation Appeal Board for the City of Johannesburg and Another* [2014] 2 All SA 363 (SCA) wherein Leach JA at paragraph 34 stated the following:

"Secondly, the first respondent was represented in this appeal by a senior counsel who appeared alone. He asked for costs 'on the scale of senior counsel'. I know of no such scale. Should the complexity of a matter and the amount involved justify the employment of two counsel as a wise and reasonable precaution, a court will make a special order in that regard. Where a single counsel is employed, no special order is required and it is for the taxing master to determine a fair and reasonable fee to be allowed on taxation. Even where the matter is one deserving of the employment of senior counsel (which this clearly is) it would be wrong for a court to somehow attempt to fetter that discretion; just as it would be wrong for a taxing master not to consider the reasonableness of a senior counsel's fee in a deserving case merely as the court did not order that the fee of a senior counsel should be allowed. I therefore see no need to make any specific order as to costs."

- [13] I note however from the taxed bill of costs that a substantial portion of senior counsel's charges were taxed off and in my view nothing more turns on this

aspect. It is clear that the taxing master exercised his/her discretion in reducing such costs. In the premises I make the following order:

[13.1] The application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'G. T. Avvakoumides', is written over a horizontal line. The signature is stylized with a large initial 'G' and a long, sweeping underline.

G. T. AVVAKOUMIDES
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
DATE: 17 OCTOBER 2016

Representation for Applicants:

Counsel: L. Hollander

Instructed by: Fairbridges Wertheim Becker

Representation for First Respondent: No appearance

Representation for the Second and Third Respondents:

Counsel: A. F. Arnoldi SC

Instructed by: Stemela & Lubbe