



**HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

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

*15/2/2018*

DATE

*C. J. R. de la Harpe*

SIGNATURE

*15/2/18*

**CASE NO: 84955/2014**

In the matter between:

**J. WALKER**

**Applicant**

and

**C.A. Williams**

**First Respondent**

**THE LAW SOCIETY OF THE  
NORTHERN PROVINCES**

**Second Respondent**

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**JUDGMENT**

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1. The applicant herein applied for an order rescinding a default judgement granted by this court on 5 August 2015 together with condonation for the late filing of the application. The applicant stated that at all relevant times he had the intention to oppose the relief claimed by the first respondent and secondly that he has a bona fide defence and is not merely pursuing this application for purposes of delaying the first respondent's claim. The first respondent opposed the application. For the sake of brevity I shall refer to the first respondent merely as "the respondent".
2. Before going into the merits of the application I must state that the founding papers had been so poorly drafted that I found it extremely difficult to establish exactly what the surrounding facts of the matter were. The opposing papers also hardly assisted in giving clarity in this regard. I was ably assisted by counsel during the hearing of this matter and most of the relevant facts turned out to be common cause.
3. It is necessary to briefly refer to the salient features of the case. The applicant is a practising attorney. At some point he took over files from an attorney, Me van Heerden, who had closed her practice. Me van Heerden then entered into the employ of the applicant's firm as a professional assistant. One of the aforesaid files taken over by the applicant related to the transfer of certain immovable property in the Brits Township.
4. This property was registered in the name of Flying Falcon Properties CC (hereinafter "FFP"). In terms of written purchase and sale agreement dated 8

October 2012, FFP sold the property to Mr GJ Bernardo. Mr Bernardo in turn sold the property to Mr Y Ismail in terms of a written purchase and sale agreement dated 11 October 2012. The intention was that the transfer of the property to the respective purchasers would occur simultaneously. Mr Ismail made payments in terms of his agreement with Mr Bernardo into the trust account of the applicant.

5. During the process of transfer Mr Bernardo, the seller in the second agreement, approached Mr Ismail, the purchaser, and requested that some of the funds be released to him for his personal use. Mr Ismail agreed and an addendum to the sale agreement was prepared to make provision for the sum of R800 000,00 to be paid from the proceeds of the transaction, which were in the trust account of the applicant, to Mr Bernardo.
6. During February 2013 Mrs van Heerden was requested by the attorney of FFP, Mr Storm, to provide his firm with an undertaking in the amount of R350 000,00. According to the written undertaking the amount "in bogenoemde transaksie" was made available to Mr Storm's client. The transaction referred to appears, according to the heading of the undertaking, to be the following: "Ons koppeltransporte: Flying Falcon Properties 14 CC / GJ Bernardo en GJ Bernardo / Y Ismail Erf 591 Brits Dorpsgebied (te wete 48 Ludorf straat, Brits)". It is therefore clear that the undertaking to keep available the amount of R350 000,00 was to keep the amount available for the benefit of FFP being the registered owner and seller of the property to Mr Bernardo, before him on-

selling it to Mr Ismail. It seems to be common cause between the parties that during these negotiations the respondent acted as the representative of FFP.

7. During June 2013 all three the parties involved in the aforesaid two transactions agreed that the agreement should be cancelled in the light of the pending sequestration of Mr Bernardo. The agreements were duly cancelled and a new agreement, dated 1 July 2013 was entered into between FFP and Mr Ismail in terms of which Mr Ismail purchased the property from FFP. Registration of transfer occurred 5 November 2013 in the name of Mr Ismail.
8. It seems that since Mr Bernardo had fallen out of the picture, he had to pay the money back which he had already received towards the purchase price of the property. Apparently he failed to repay the money. Consequently the parties apparently met to discuss "settlement proposals". It is not clear from the papers what exactly these negotiations entailed but according to the plaintiff Mrs van Heerden provided Mr Storm with a further written undertaking on 12 December 2013.
9. This undertaking has the same heading as the first undertaking and thus referred to both the transaction and in the last paragraph stated that "this additional arrangement will have no bearing whatsoever on the original undertaking from our firm and will not change or effect in any which way." (sic).
10. The undertaking related to the amount of R350 000,00 and also contained provisions regarding, inter alia, interest and legal fees. Of importance,



however, is that it was noted in the undertaking that the amount of R350 000,00 was due to "Mr Williams in regard to the above-mentioned transaction". I shall refer to the relevance of this aspect later in this judgement.

11. It is common cause that Mr Williams, the respondent, issued summons against the applicant for payment of the amount of R 350 000,00 during November 2014 based on the undertaking of 12 December 2013 referred to above. It was also alleged the particulars of claim that the plaintiff, being the respondent in this application, was a trust creditor of the defendant, being the applicant in this application. As mentioned before judgement was entered into against the applicant in favour of the respondent and it is this judgement and order which form the subject of the present application.
12. Upon receipt of the summons the applicant contacted Mr Storm and requested him to hold over further legal steps pending the filing of a claim by him with the Attorneys Insurance Indemnity Fund ("the Fund").
13. The applicant corresponded with the Fund and supplied them with the necessary documentation. According to the applicant he was informed by the Fund that they would attend to the matter on his behalf and would appoint an attorney from their panel to represent him. According to the applicant he was at all times under the impression that the matter was properly taken care of when, on 27 August 2015, he was served with a writ of attachment of movable property in execution of the judgement against him. It appears that there was a miscommunication between him and the Fund and he was also later

informed that they would not assist him in any manner or form. He was informed that the Fund had declined his claim and would not proceed with the rescission of the judgement on his behalf.

14. The applicant filed an application for rescission of judgement which was served on 25 November 2015. After the affidavits had been filed the applicant realised that due to a mistake his defence had not been included in his answering affidavit. Consequently the applicant had to withdraw the application and tender the cost of the application. Consequently the applicant filed the second application for rescission of judgement which is the one relevant in the proceedings before this court.
15. In his founding affidavit the applicant denied that the respondent was a trust creditor of his firm and stated that no monies had ever been paid into his trust account for the credit of the respondent. The applicant furthermore stated that Mrs van Heerden never had the authority to give the undertaking which she did. She also had no authority to bind the applicant or his firm as set out in the undertaking. The applicant further stated that Mrs van Heerden should have familiarised herself with the financial situation of the transaction before giving the undertaking to attorney Storm. If she had done so she would have realised that the funds held on trust for this specific transaction had been paid to Mr Bernardo during October 2012 in terms of the addendum to the agreement between the parties. Mrs van Heerden, according to the applicant, didn't have the authority for permission to give any of the two undertakings mentioned

above. The only person who was obliged to pay any amount was Mr Bernardo who had earlier received part of the purchase price.

16. In the answering affidavit much was made by the respondent of the fact that the defence of the applicant to the main claim as set out in the second application for rescission, which is the present application before this court, does not appear in the first application for rescission and that the defences offered in the two applications consequently differ. The respondent also took issue with some of the factual averments made by the applicant.
17. Although the issue of Me van Heerden's authority seems to be a triable dispute between the parties which can only be adjudicated in a trial process, the application should in my view mainly be granted for the reasons submitted by Advocate Jooste, on behalf the applicant, during the hearing of this matter. Shortly prior thereto he filed supplementary heads of argument to which Advocate Harms, on behalf of the respondent, also replied by way of supplementary heads of argument.
18. On behalf the applicant it was submitted that even if it was accepted for purposes of the argument that the applicant was bound by the undertaking given by Mrs van Heerden, the respondent never had the right to institute a claim against the applicant for the reason that he did not have locus standi to do so. It was submitted that it was at all times common cause that the undertaking was given for the benefit of FFP, as seller of the property, which was the only entity entitled to receive money in terms of the first set of



agreements between it and Mr Bernardo and Mr Ismail, and later in terms of the second agreement between it and Mr Ismail.

19. It was submitted that the undertakings, and especially also the last undertaking, was given on the basis of the respective purchase and sale agreement and for the sole purpose of benefiting the person entitled to the money namely the seller, FFP.
20. This submission was based not only on the facts which were alleged to be common cause, but support therefore is to be found in the wording of the first undertaking which, in its heading, refers to the two agreement between FFP, Mr Bernardo and Mr Ismail and also in the heading of the second agreement between FFP and Mr Bernardo, which refers to the same transaction. Support is also to be found in the reference to the fact that the money was available for Mr Storm's client, which was FFP. It was submitted that the respondent was not Mr Storm's client, or at least not the client referred to in the undertaking, and that the client referred to was FFP.
21. It was further submitted that the second undertaking, on which the claim was based as set out in the particulars of claim, also supports the aforesaid. The heading thereof still referred to the aforesaid transactions and the effect have not changed except for the fact that Mr Bernardo had fallen out of the picture. Consequently, although the second undertaking refers to the money being held available for the respondent, such a reference was clearly wrong as the respondent was at no stage and/or for any reason entitled to the money



referred to in the undertaking. It was submitted that the reference to the respondent in the second undertaking was consequently clearly a mistake which was a mistake of which the respondent and his attorney, Mr Storm, had at all times been aware.

22. Reference was also made in support for the aforesaid contentions to an email dated 12 December 2013 by Mr Storm in which he referred to the undertaking "as conclusion of the Ludorf Street property transaction" and which in its heading also referred to the subject of the email being "TRS: Flying Falcon Properties / GJ Bernardo / Ismail".
23. It was thus submitted on behalf of the applicant that the respondent never became entitled to the payment of any money and that insofar as the second undertaking may have created such an impression, such an impression was the result of a mistake common to the parties. The cause of action of the respondent's claim against the applicant was consequently flawed and could never have led to a judgement in his favour. To put it differently, the respondent had at all times merely been the representative of FFP and had never been entitled to receive for his own account any money arising from the transaction between FFP and Mr Ismail and thus from the undertaking which was given as a result thereof. If anybody became entitled to payment in terms of the undertaking, it would have been FFP as the seller of the property.
24. Advocate Harms, inter alia, referred to another agreement between the respondent and Mr Bernardo relating to the transfer of a member interest in

FFP and submitted that money had been due to the respondent by Mr Bernardo and that the undertaking could have referred to that debt. There is no merit in this submission. It is clear from the facts before this court and to which I have to some degree referred to above, that both the undertakings, which included the December 2013 undertaking, clearly related to payment due to the seller of the properties, being FFP, in terms of the respective transactions.

25. Having regard to the aforesaid I am satisfied that the applicant has shown that there is a triable dispute between him and the respondent and that he consequently has a bona fide defence. As a result of this finding I need not refer to the issue of Mrs van Heerden's authority.
26. Furthermore, and having regard to all the information before me I am satisfied that the applicant has explained adequately how the order came to be granted against him by default. Consequently I find that the application for rescission should be granted.
27. As far as costs are concerned I am of the view that the usual order for costs should be granted.
28. In the result the following order is made:
  1. The default judgement granted by this court on 5 August 2015 is hereby rescinded and set aside.
  2. The costs of this application shall be costs in the cause.

A handwritten signature in black ink, appearing to be 'C.P. Rabie', written in a cursive style.

**C.P. RABIE**

**JUDGE OF THE HIGH COURT**