

Sneller Verbatim/ct

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NO: 2002 J3232.00

2002-04-19

In the matter between

SUPERB MEAT MARKET SUPPLIES CC

Applicant

and

C MARITZ

Respondent

J U D G M E N T

LANDMAN J:

1. Mr Charl Maritz instituted proceedings in this court against Superb Meat Supplies CC. Pleadings were exchanged, a pre-trial conference was held and after two postponements, the matter was finally enrolled for hearing on 12 March 2001.

1.

2. Mr Maritz and his attorney attended on the day of the trial. The CC was not represented on this day and judgment by default was granted. Mr Maritz' attorney communicated this to attorney Majola who acted on behalf of the CC. He did this on the same day and was advised that an application for rescission would be made.

3. When the application for rescission was not served by 30 May 2001, a writ was issued out of this court. On 29 June 2001 an application for rescission was made. I shall refer to this as the first rescission application. The founding affidavit is made by attorney Majola. A supporting affidavit is attached from Mr Schreiber, a member of the CC. It is dated 27 June 2001 and, was or states that it was, attested before the sheriff, Thaba 'Nchu. The application was opposed. Replying affidavits were filed by attorney Majola, and Mr Schreiber. The affidavit of Mr

Schreiber is dated 4 February 2001. It was or purports to have been attested before a commissioner of oaths who is an attorney practising in Bloemfontein.

4. This matter ie the first rescission application was enrolled for hearing on 14 February 2002. It was struck off the roll with the costs to be paid by the CC on attorney and client scale.
5. On 15 March 2002 an application was made to stay the writ of execution and for related relief. It was accompanied by a single affidavit, that of Mr Schreiber. The affidavit, was or states that it was, signed by Mr Schreiber and that it was attested before the sheriff of Thaba' Nchu. This application was not served on Mr Maritz or his attorneys, but came to their notice. It was opposed and was dismissed with costs although I have not found a note to this effect on the court file.
6. On 12 April 2002 the CC launched a second application for rescission. This was done on an urgent basis to rescind the judgment which this court granted on 12 March 2001. The application was also to stay the writ of execution and for related relief. This application

was opposed. An answering affidavit was filed and the matter came before me on 18 April.

7. Mr Williamson, who appeared for Mr Maritz, submitted that the first rescission application was still pending and thus it was not competent for this court to entertain the second application. He submitted that, in any event, that part of the second rescission application to stay the writ was *res iudicata* because judgment had been delivered in a similar application.
8. The essence of the CC's case for rescission and for staying the writ is that the first two applications are nullities. They were not authorised by the CC. Mr Schreiber admits signing the affidavit of 27 June 2001, but says he did not read it and did not attest to it before the commissioner of oaths who signed it. He says attorney Majola told him the document which he signed was necessary to obtain a new date for hearing of the case. He says he was unaware that the judgment had been granted against the CC. Mr Schreiber says that the replying affidavit, which is in his name, is fraudulent. He did not sign it.
9. Mr Schreiber also says that he did not sign the

affidavit relating to the application to stay the writ and therefore he did not attest to it before a commissioner.

10. I am of the opinion that the first application for rescission was authorised. Mr Schreiber knew he was authorising some application or step to be taken in this court. If he did not bother to read the papers, he cannot be heard to say he did not authorise the application. I am troubled about the alleged fraudulent replying affidavit, but that does not detract from the authorisation to institute the first application.

11. Mr Blignaut, who appeared for the CC, submitted that if I found the application to be authorised, his client tendered to withdraw the application and to pay the costs. I therefore proceed on the basis that the first rescission application has been withdrawn and note that the CC tendered to pay the costs.

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12. As far as the application of 15 March to stay the writ is concerned, I am unable to find on the papers that it was properly authorised. The probabilities are that attorney Majola proceeded without instructions. He

should explain the allegations of fraudulent conduct. The papers have been faxed to his firm, but he has decided on the advice of an advocate, who seems to have been briefed at one stage to act for the CC, not to make a statement.

13. I return to the merits of the only application before me, namely the second rescission application, which also includes a prayer for the writ to be stayed. It is common cause that the CC has on paper a *bona fide* defence and therefore prospects of success. The main issue is whether the CC was in wilful default of appearance on 12 March 2001 and whether the judgment in question was granted erroneously.

14. The CC's case is that it was only on 28 February 2002 that it became aware of the judgment. It then made diligent enquiries at the firm of attorneys representing it as to what was happening. By 18 March 2002, when the sheriff came to remove the attached goods, the promises made by this firm had not materialised. Mr Schreiber telephoned attorney Majola and was told that he would come to the CC's offices. He did not arrive. The CC paid the sheriff R40 000 to retain its goods. When contacted, Mr Majola said he

was on his way to court to obtain a stay of the writ. Several other conversations took place. Mr Schreiber concluded that attorney Majola was lying to him. At 20:00 attorney Majola told Mr Schreiber that the application had been prepared with the help of counsel. On 19 March attorney Majola told Mr Schreiber that the CC had lost the case "on a technical point and that he planned to go to Johannesburg the following day to repeat the application on Friday 22 March 2000".

15. On 21 March the CC terminated the mandate of attorney Majola and his firm and engaged its present attorney. The CC also obtained the file and attended a meeting with its current attorney, attorney Majola and one of his partners, attorney Meyer.
16. The extent of attorney Majola's *prima facie* fraudulent activities became apparent and resulted in the present application. Mr Maritz is adamant that the goods should be removed and sold. One can understand his attitude, because the cause of action in this case arose in July 1999.
17. I am satisfied that this application is an urgent one and that it was formulated in such a way, with regard

to time periods, that Mr Maritz had an adequate opportunity to answer it as indeed he has done.

18. The history of the matter related above also provide grounds for condoning what is a very late application to rescind the order of this court made on 12 March 2001. The CC submits that the rescission application should be granted on the following grounds: I read from page 108 of the papers paragraph 9:

"I submit on behalf of the applicant that the default judgment was erroneously granted in that:

9.2.1 the applicant, due to the conduct and neglect of its former attorney Majola, did not have the opportunity to draft a proper statement of defence, nor did it have the opportunity to present its evidence or argument in respect of its defence to the honourable court or to cross-examine the respondent properly;

9.2.2 I submit that if such opportunities were afforded to applicant, judgment would in all probability not have been granted against the applicant;

9.3 I submit that the applicant was not in wilful default as the applicant was never informed by Majola of the set-down of the hearing as explained above.

9.4. I furthermore submit that the applicant has a *bona fide* defence against the claim of the respondent for

the reasons stated above and humbly pray that the honourable court afford the applicant the opportunity to present its defence in a proper manner."

19. There is nothing in this passage or anywhere else in Mr Schreiber's affidavit which justifies the complaint that the presiding judge granted the judgment erroneously. There is indeed no suggestion that the presiding judge erred in any way whatsoever. The fact that the matter may have been tried and may have resulted in judgment in favour of the CC clearly does not justify the inference that the presiding judge granted the judgment erroneously.
20. Mr Schreiber is incorrect in saying that the CC did not have an opportunity to draft the statement of defence. The statement of defence has been filed, a pre-trial conference by fax was held and the minute of that conference has been filed. There is no allegation that the statement of defence or the minute is fraudulent.
21. Was the CC in wilful default? The fact that the first rescission application has been withdrawn does not wipe the slate clean. At best for the CC there is before the court an unsworn document which refers to the

affidavit of attorney Majola and although Mr Schreiber says he did not read it, he signed it with the intention that it would be used in this court.

22. In this document Mr Schreiber says that he had an appointment to attend a pre-trial consultation on 10 March 2001, but he became indisposed and sought the assistance of Dr Setlogelo. A certificate issued by Dr Setlogelo, was eventually provided to Mr Maritz's attorney after an inexplicable delay. It is dated 10 March 2001. Mr Schreiber was diagnosed as having appendicitis, but after further examination he was told that he was suffering from gastritis. He had follow-up consultations with Dr Setlogelo.

23. This diagnosis and the indisposition is challenged in the answering affidavit to the first rescission application and in an affidavit by a specialist. Mr Schreiber now denies that he saw Dr Setlogelo and it can be inferred - although the papers are not entirely clear on this - that Mr Schreiber was not ill on 12 March, being the date of the trial.

24. But the alleged indisposition of Mr Schreiber was not the cause of the non-appearance at the trial on 12

March. Attorney Majola requested the postponement from attorney Van den Bergh who acted for Mr Maritz. Attorney Van den Bergh refused to agree to the postponement. Attorney Majola says that then he told attorney Van den Bergh that he would appoint a correspondent in Johannesburg to appear and move for a postponement. Attorney Van den Bergh in his affidavit of 19 September 2001 confirms this part of attorney Majola's affidavit. According to attorney Majola he or his correspondent, an attorney Samuels practising in Johannesburg, had a miscommunication and no-one appeared for the CC on the first day of the trial. This would be of little consequence, because unknown to the correspondent he or she would be there to put forward a fraudulent reason for the postponement, namely that Mr Schreiber was indisposed. Can this be laid at the CC's door? Even if the CC was unaware of the proposed fraudulent reason for requesting a postponement on 12 March 2001, Mr Schreiber has condoned that by recklessly signing the document on 27 June 2001, which he knew was going to be presented to this court and which would have influenced the court's staff or a judge dealing with this matter.

25. A further fact pointing to wilful default on the part

of the CC is to be found in Mr Schreiber's affidavit.

He says and I read from page 97, paragraph 5.1 to 5.3:

"5.1 The respondent instituted an action against the applicant in August 1999 from this honourable court. On receipt of the respondent's statement of case I, on behalf of the applicant, instructed Majola Steyn Meyer to act on its behalf.

5.2 My present attorney Mr Coetsee, inspected the court file on 27 March 2002 and established the following:

5.2.1 The matter was enrolled for hearing by the registrar of this court on 2 June 2000, and was apparently postponed by agreement between the parties.

5.2.2 The matter was re-enrolled for hearing on 30 October 2000 and was again postponed by agreement. The reason for the postponements are unknown to me as Majola never informed me of the aforesaid set downs.

5.2.3 The matter was enrolled for the third time for hearing on 12 March 2001.

5.3 Majola never informed me that the matter was enrolled. Shortly after 12 March 2001 Mr Majola arrived at my office with a bundle of documents."

26. It seems improbable that the CC did not have any contact with its attorney between August 1999 and 12 March 2001 so that it was unaware of the postponements

and trial dates and general progress of the matter, including the drafting of a statement of response. One would expect the respondent, which faces a claim for R322 000 -00 in round terms, together with the claim for enforcement of payment of a salary of R40 000 per month, to monitor the litigation very carefully. But the CC does not say that it has had any contact with its attorney at all during this period. The members of the CC would know if there was contact. Moreover they have attorney Majola's file and his notes. The CC is content to blame attorney Majola, *prima facie* with good reason for some of the defects, but this does not absolve the CC from abandoning its case entirely to its attorney. This disinterest amounts to wilful default. The CC through Mr Schreiber's willingness to recklessly place false evidence before the court, is a factor that I cannot ignore in considering where the equities and justice lie. I am extremely mindful of the allegedly fraudulent activities of attorney Majola, but in some respects, minor as they may be, there is corroboration for some of the statements that attorney Majola has made. This is to be found in attorney Van den Bergh's affidavit.

27. Finally I should mention that the CC's predicament was

not caused in any way by Mr Maritz or his representatives.

28. In the result:

1. the application is dismissed;
2. the applicant in this application (Superb Meat Supplies CC and attorney NN Majola and his firm) are ordered to pay the respondent's cost, jointly and separately, the one pay, the other to be absolved;
3. that portion of the order in paragraph 2 referring to NN Majola and his firm is provisional and becomes final unless attorney Majola and his firm deliver an objection and file an affidavit within ten days of this order;
4. the Registrar is directed to send a copy of this judgment and the papers in this matter to (a) The Law Society of the Free State for attention regarding the activities of attorney Majola and that of the attorneys who acted as commissioners of oath, (b) the Board for Sheriffs for attention regarding the attestation of the affidavits by the sheriff concerned, and (c) to Majola, Steyn & Meyer Incorporated.

SIGNED AND DATED AT BRAAMFONTEIN THIS 24TH DAY OF APRIL 2002.

AA Landman

Judge of the Labour Court of South Africa

Adv JP Blignaut instructed by Dirk
Coetsee Attorneys.

Adv A Williamson instructed by Willem
Van Rensburg Attorneys.

18 April 2002.

19 April 2002.