IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 5158/99

DATE: 24/3/2005

reportable

IN THE MATTER BETWEEN:

WENTZEL ANDRE LAUBSCHER	APPLICANT
AND	
JOHAN ALFRED SAAIMAN	1ST RESPONDENT
NICOLAAS JOHANNES VAN BLERK	2ND RESPONDENT

JUDGMENT

MALULEKE, J

1. This is an application for the rescission of a default judgment or order made against the present applicant by his lordship STAFFORD, DJP on 27 February 2002 under the above case no 5158/99 which order reads as follows:

" WORD GELAS

1. 'n Verklaring tot die ontbinding van die vennootskap.

2. Dat 'n likwidateur met die nodige magte aangestel word ten einde die vennootskapsbates te realiseer en te likwideer, 'n finale rekening vas te stel en aan die betrokke party uit te betaal op sterkte van die vennootskapsooreenkoms wat hom ook al toekom.

3. Koste van die geding.

4. Dat enige likwidateur wat aangestel word in hierdie saak, word aangestel met die magte en bevoegdhede soos uiteengesit in 'XYZ'."

The default judgment was taken at the instance of the present first respondent (who was the plaintiff in the main action) in the absence of the present applicant (who was the defendant in the main action). When the default judgment was taken the pleadings had closed and the matter had been set down for trial. The applicant defaulted from attending the trial.

2. Factual background

2.1 First defendant instituted the action against the applicant by way of a summons that was served on 8 March 1999. Applicant through his attorneys "Cornelius Attorneys" entered appearance to defend and on 15 June 1999 he filed a plea. 0n 7 June 2001 first defendant's attorneys served a rule 37(1)(a) notice upon the applicant's attorneys calling for a pre-trial conference. 0n 11 June 2001 first defendant's attorneys served and filed a notice of application for a trial date upon the applicant's

attorneys. 0n the same date, 11 June 2001 applicant's attorneys served a notice of withdrawal as attorneys of record for the applicant. This notice was filed with the Registrar on 27 June 2001 and has a registered post certificate annexed to it which shows that the notice was posted by registered post to applicant at PO Box 9193, Pretoria on 27 June 2001.

2.2 The notice reads as follows:

"KENNISGEWING VAN ONTTREKKING AS PROKUREURS VAN REKORD

Geliewe kennis te neem dat die firma Cornelius Prokureurs hiermee onttrek as prokureurs van rekord namens die verweerder in bogemelde aangeleentheid.

Geliewe verder kennis te neem dat die laasbekende adres van verweerder as volg is:

Posbus 9193

PRETORIA

0001

Geliewe verder kennis te neem dat die verweerder se aandag gevestig word op die bepalings van reël 16(4)(b) van die reëls van bogenoemde agbare hof, wat as volg lees:

'Na sodanige kennisgewing hoef geen dokumente meer aan die party wat voorheen verteenwoordig is, beteken te word nie, tensy hyself binne 10 (tien) dae na die datum van so 'n kennisgewing alle ander partye kennis gee van 'n nuwe adres van betekening soos bedoel in subreël (2), of tensy die hof anders gelas: Met dien verstande dat enigeen van die partye voor ontvangs van die kennisgewing van sy nuwe adres vir betekening, enige dokumente op die party wat voorheen verteenwoordig was, mag beteken.'"

2.3 It is common cause that the applicant did not appoint another firm of attorneys and neither did he notify the first respondent and the registrar of the court of a new address at which he may be served as is required. It is expedient to quote in full the provisions of rule 16(4)(a) and (b):

"(a) Where an attorney acting in any proceedings for a party ceases so to act, he shall forthwith deliver notice thereof to such party, the registrar and all other parties: Provided that notice to the party for whom he acted may be given by registered post.

(b) After such notice, unless the party formerly represented within 10 days after the notice, himself notifies all other parties of a new address for service as contemplated in

> subrule (2), it shall not be necessary to serve any documents upon such party unless the court otherwise orders: Provided that any of the other parties may before receipt of the notice of his new address for service of documents serve any documents upon the party who was formerly represented."

3. 0n 15 February 2002 first defendant's attorneys served on applicant at PO Box 9193, Pretoria per registered post a copy of the Registrar's notice that the matter has been enrolled for trial on 27 February 2002, together with a rule 37(2)(a) notice calling upon applicant to attend a pre-trial conference at their offices on 22 February 2002 at 10:00. Copies of the same documents were on the same date delivered by hand at the applicant's place of employment under cover of a letter dated 15 February 2002 marked "without prejudice". In this letter reference is made to the trial date and pre-trial conference notice and the settlement proposals by first respondent.

4. An affidavit by Daniel Eksteen Van Wyk, a candidate attorney of the office of the first respondent's attorneys, was handed to STAFFORD, DJP in support of the request for judgment by default. In this affidavit Mr Van Wyk states under oath *inter alia* that on 12 February 2002 he contacted applicant telephonically and obtained the physical address of applicant's place of employment. 0n 21 February 2002 applicant telephoned Van Wyk to re-arrange the date for the pre-trial

conference from 22 February 2002 to 25 February 2002 at 14:00 when he, applicant, would be available and prepared to discuss the settlement proposals. The applicant did not attend the pre-trial conference and efforts to contact him again telephonically were unsuccessful. Applicant did not attend court on 27 February 2002. It was in these circumstances that first respondent sought and obtained default judgment against the applicant.

The grounds for rescission

5. Applicant's explanation for the default is that he accepted the advice of his attorneys of record and counsel that the action instituted by the first respondent would not be successful; a proper notice of set down was not served upon him and he was accordingly not in a position to take the correct steps to defend the claim and he was accordingly not in wilful default as he was not in a position to have full knowledge and appreciation of the circumstances and risks involved in the failure to attend court. Mr Van Tonder, for the applicant, contended that the crux of the applicant's case for rescission is that since the first respondent did not serve on the applicant a proper notice of set down, the matter was not properly before court and the applicant is for that reason not in wilful default and the judgment was erroneously granted. He argued further that the error was not on the part of the court but on the part of the first respondent.

6. A default judgment may be set aside or rescinded only in terms of rule 31(2)(b) or rule 42(1)(a) or at common law. 0nly judgments obtained due to a defendant's

failure to enter appearance to defend or failure to file a plea may be rescinded in terms of rule 35(2)(b). For this reason this application cannot be considered in terms of this subrule 31(2)(b).

7. The purpose and ambit of rule 42(1) is pertinently described as follows by JONES, AJA in *Colyn v Tiger Food Industries Ltd, t/a Meadow Feed Mills (Cape)* 2003 6 SA 1 at para (3):

> "(3) The question is whether in these circumstances the judgment can properly be rescinded in terms of rule 42(1) of the Uniform Rules of Court. Rule 42(1)(a) provides that the high court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. The arguments before us centre on the question whether the facts upon which the defendant relies give rise to the sort of error for which the rule provides and, if so, whether the order was erroneously sought or erroneously granted because of it."

And at paragraph (7) of the same case

> "(7) Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission [rule 42(1)(b)]; or an order resulting from a

> mistake common to the parties [rule 42(1)(c)]; or 'an order erroneously sought or erroneously granted in the absence of a party affected thereby [rule 42(1)(a)]. In the present case the application was, as far as the rule is concerned, only based on rule 42(1)(a) and the crisp question is whether the judgment was erroneously granted."

For purposes of rule 42 the question is whether the judgment was sought and/or granted erroneously.

8. I agree with Ms Jacobs for the first respondent that having regard to the provisions of rule 16(4)(b) there was no obligation to serve the notice of set down upon the applicant. From the documents that were placed before court it is clear that applicant was notified of the trial date notwithstanding his failure to comply with the provisions of rule 16(4)(b). Accordingly in my view there is no indication of an error on the part of the first respondent and/or on the part of the court that would bring this application within the ambit of rule 42(1). The notice of application for a trial date was served upon Cornelius Attorneys before they withdrew as applicant's attorneys of record and this was followed by a notice from the Registrar advising the trial date allocated which notice was forwarded to applicant by registered post and also delivered by hand and signed for at his place of employment. This is similar to the situation where the attorney of record withdraw after the matter was set down and MELAMET, J said the following

about such a situation in *De Wet & 0thers v Western Bank Ltd* 1977 4 770 (TPD) at 778A-B:

> "The appellant's submissions in this regard are, in my view, based on an incorrect premise that there was an obligation under the rules on the defendant to give the plaintiffs fresh notice of set down of the trial. Without in any way attempting to define the term 'erroneously made' there is in my view no suggestion of such error in this regard on the part of the court."

9. The applicant's case for relief under the common law is based on the contention that acting on the advice of his erstwhile attorney and counsel, he genuinely believed that the case against him could not be successfully proceeded with. No confirmatory or varifying affidavit by the attorney concerned is annexed to the applicant's founding documents. The full nature, ambit, purview and context of the alleged "legal advice" is therefore unknown. I agree with Ms Jacobs that a negative inference should be drawn from the failure to annex a confirmatory affidavit on this point which is that the attorney and counsel would probably not confirm this assertion. The evidence then on what he was advised is hearsay and not admissible. In order to make out a case for rescission under the common law, the applicant must show good cause and this is achieved by:

> "(a) giving a reasonable explanation of his default;

(b) by showing that his application is made *bona fide*; and

(c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success."

Colyn v Tiger Food Industries, supra, at paragraph 11.

The contention that applicant failed to take proper steps to appear and to defend the case because he relied on the advice of his former attorney and counsel is also not satisfactory explanation for the default.

10. The default judgment was taken on 27 February 2002. This application for rescission was launched in December 2003 which was upon receipt of the letter dated 27 November 2003 from the appointed liquidator, the second respondent. It is common cause that on 15 February 2002 notices of trial and pre-trial conference and a letter with settlement proposals were delivered to applicant and on 12 February 2002 and 21 February 2002 there were telephonic discussions between applicant and Mr Van Wyk concerning the trial, pre-trial conference and settlement proposals on the matter. 0n the evidence the reasonable conclusion is that the applicant displayed a complete "lack of interest in the proceedings" before and after default judgment was granted. In these circumstances, the evidence does not show that the application is made *bona fide* and neither does it show that he desired throughout to defend the action.

11. 0n the question of prospects of success of his defence the applicant has not, in my view, put up a defence which has good prospects of success. His defence is that first defendant was in financial difficulties and for this reason he sold to him for R72 000,00 a property first respondent had purchased for R113 000,00 and that there was no partnership agreement between him and first respondent. The first defendant's claim is that in terms of an oral partnership agreement between them, he had the property transferred to applicant's name and first respondent would pay R400,00 per month and applicant would pay R800,00 per month towards settling the balance on the bond over the property. They would both develop the property to be a holiday resort and would share the profits from the business as partners. The plaintiff had purchased the property for R113 000,00 and there was a balance of R72 000,00 on the bond when he entered into the partnership agreement with applicant. 0n the applicant's version, first defendant gave him the property for him to pay only the balance of R72 000,00 which was owing on the bond. 0n these facts, I am of the view that the applicant has not put up a *bona fide* defence which has good prospects of success.

12. However the principle applicable in this case where applicant's explanation of the default is unsatisfactory, is eloquently stated in the following *dicta* from *Chetty v Law Society, Transvaal* 1985 2 SA 756 (AD) at 767-769:

> "But this is not to say that the stronger the prospects of success the more indulgently will the court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the

> prospects of success on the merits. In the light of the finding that appellant's explanation is unsatisfactory and unacceptable it is therefore strictly speaking unnecessary to make findings or to consider arguments relating to the appellant's prospects of success. Nevertheless, in the interests of fairness to the appellant, it is desirable to refer to certain aspects thereof." (My underlining.)

Accordingly even if I am wrong on my finding on the *bona fides* and prospects of success of the applicant's defence, the decision on whether to assist the applicant or not is, in this case, premised on his unsatisfactory explanation for his default.

13. The position in the common law was stated thus in *De Wet & Another v Western Bank Ltd* 1979 2 SA 1031 (AD) at 1042H:

> "The *onus* of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the court *inter alia* that there was some reasonably satisfactory explanation why the judgment was allowed to go by default."

The applicant has not succeeded in showing that the default judgment should be rescinded in terms of rule 42(1)(a) and he has failed to show good cause for rescission under the common law.

14. The late delivery and filing of the answering affidavit by the first respondent is condoned. The case was argued by both counsel on this basis. The decision I reach has included a consideration of the answering affidavit.

15. In the result the application fails and is dismissed with costs.

G S S MALULEKE
JUDGE OF THE HIGH COURT

5158-99

HEARD ON: 27/2/2002
FOR THE APPLICANT: ADV J A VAN TONDER
INSTRUCTED BY: SHAPIRO DE MEYER INC, PTA
FOR THE 1ST RESPONDENT: ADV G JACOBS
INSTRUCTED BY: STRACHAN KOTZE INC, PTA