

SOUTH AFRICA / JUDGMENT

Isserie and Others v South African National Tuberculosis Association (A5059/2013)

[2015] ZAGPJHC 27 (18 February 2015)

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COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten, KM Satchwell, V Tlhapi

CASE / FILE NUMBER

A5059/2013

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: A5059/2013

DATE: 18 FEBRUARY 2015

In the matter between

SATEESH ISSERIE.....FIRST APPELLANT

DECAWITZ INVESTMENTS (PTY) LTD.....SECOND APPELLANT

SERVIPLEX 24 CC.....THIRD APPELLANT

PRIMED-ACUTE MEDICAL CC.....FOURTH APPELLANT

NAOMI REDDY.....FIFTH APPELLANT

ELIZABETH CHETTY.....SIXTH APEPLANT

And

SOUTH AFRICAN NATIONAL TUBERCULOSIS ASSOCIATION.....RESPONDENT

J U D G M E N T

VAN OOSTEN J:

- [1] This is an appeal by the appellants against the dismissal with costs by this court (Fischer AJ) of their application for rescission of a judgment obtained against them in favour of the respondent in default of their appearance, as defendants, on the trial date of the action. The appeal is with leave of the court a quo.
- [2] In this appeal the same issues dealt with in the court a quo arise. First, whether the judgment can be rescinded in terms of rule 42(1)(a). Second, and in the alternative, whether the appellants have shown sufficient cause for rescission under the common law. On both these issues the learned judge a quo found against the appellants.
- [3] It is at the outset necessary to summarise the facts which gave rise to the application for rescission. On 2 November 2011 the respondent (SANTA), represented by David C Feldman attorneys (Feldman), instituted action against the appellants in which it claims payment of the sum of R13 477 224-01, interest thereon and costs. The claim arises from alleged fraudulent transfers by the first and/or fifth and/or sixth appellants acting personally and on behalf of the second, third and fourth appellants, of SANTA's funds from its bank account to the fourth appellant, without SANTA's consent. The appellants, then represented by Brider and Associates attorneys (Brider), filed a notice of intention to defend and SANTA applied for summary judgment. An affidavit resisting summary judgment was filed and leave to defend by agreement granted. The appellants delivered a plea containing a bare denial. On 10 February 2011, before the close of pleadings, SANTA delivered a notice of enrolment of the trial and subsequently, on 20 March 2012, a notice of set down for hearing on 12 November 2012. On 17 April 2012 SANTA and pursuant to SANTA's application to compel discovery, Maluleke J ordered the appellants to respond to SANTA's notice in terms of rule 35(1) and (10) within 10 days of the date of service of the order on them and to pay the costs of the application. The appellants' discovery affidavit was subsequently, on 30 May 2012, filed.
- [4] On 24 August 2012 Brider served a notice of withdrawal as attorneys of record on behalf of the appellants on Feldman. On 9 November 2012 and thus three days before the trial was to be heard, Feldman deposed to an affidavit in which he sets out his unsuccessful attempts to locate and contact the appellants (the pre-trial affidavit). On 12 November 2012 the matter was called in the roll call court before Boruchowitz J. The appellants were in default of appearance. Counsel for SANTA applied for judgment by default. It is common cause that both the pre-trial affidavit and a practice note, prepared by counsel for SANTA, served before Boruchowitz J. The learned judge thereupon granted judgment by default for payment of the amount claimed in the summons together with interests thereon and costs (the default judgment).
- [5] Subsequent to the granting of the default judgment a warrant of execution against property was authorised and issued. It is alleged that it was only upon service thereof on the first appellant at his residence in Durban that any of the appellants became aware that the default judgment had been obtained. The appellants launched an urgent application for the stay of the execution pending the finalisation of an application for rescission of the default

judgment. SANTA opposed the application and it was heard by Tshabalala J on 19 January 2013. The learned judge reserved judgment and on 22 January 2013 granted an order for the stay of execution and subsequently delivered written reasons for the order to which I will revert.

- [6] The application for rescission of the default judgment was launched on 15 February 2013. SANTA vigorously opposed the application and filed an answering affidavit. The appellants responded in a replying affidavit and subsequently filed a supplementary replying affidavit to which SANTA replied by way of an answering affidavit. The paper trail accumulated into a bundle of documents extending into nine volumes, consisting of 865 pages. The application came up for hearing before Fisher AJ on 11 June 2013 and the judgment and order dismissing the application with costs, was delivered on 19 July 2013.
- [7] The learned judge a quo carefully and meticulously analysed, examined and considered the two issues I have referred to. In the course of the judgment the bona fides of the defence proffered by the appellants came under close scrutiny and a number of adverse findings, including credibility findings, were made against them. In the view I take of this matter I do not consider it necessary to engage in these findings. I propose to only deal with the first issue which is whether the default judgment was erroneously sought and granted, in accordance with the provisions of rule 42(1)(a). That issue, in my view, is decisive of the appeal and I

turn now to deal with it.

- [8] The notice of set down of the trial was duly served on Brider, almost three months prior to his withdrawal as attorney of record on behalf of the appellants. The appellants maintain that Brider never informed them of the trial date. I should add that the trial date was again referred to in the application to compel discovery but the appellants likewise claim ignorance thereof.
- [9] Brider, as I have mentioned, filed a notice of withdrawal. The appellants state that they never received the notice. Their version in this regard did not find favour with the judge a quo. Be that as it may, the appellants further place reliance on a number of irregularities which they contend render the notice defective. Counsel for SANTA readily conceded that the notice of withdrawal does not comply with the provisions of rule 16(4)(c). The irregularities relied on are first, that the wrong address was furnished in respect of the first appellant, second, that no address was furnished in regard to the fourth, fifth and sixth appellants, third, the absence of any statement as to the date when and the manner in which the notice was sent to the appellants and, finally, the absence of proof, by way of registered post slip or otherwise, of the sending of the notice to the appellants. Rule 16(4)(c) requires,

notably in peremptory terms, that ‘the notice shall state the names and addresses of the parties notified and the date on which and the manner in which the notice was sent to them’. The irregularity of the notice of withdrawal accordingly, has been shown and the question arising is whether that, without more ado, resulted in the erroneous granting of the default judgment.

[10] The court a quo and supported by counsel for SANTA, relied on the judgment of the then Appellate Division, in *De Wet and others v Western Bank Ltd* 1979 (2) SA 1031 (A). There the question whether a defective notice of withdrawal rendered the subsequent resumed trial proceedings irregular was

answered in the negative. In this regard Trengove AJA (as he then was), writing for the court, held that the appellants could not avail themselves of the fact that their attorney had not complied with the requirements of rule 16(4). The learned judge of appeal held that the enrollment of the matter before the appellants’ attorney had withdrawn, obviated the need to serve any further documents or notices on the appellants concerning the resumed hearing and that counsel for the respondent, in the absence of an appearance by or on behalf of the appellants, was fully entitled to seek and obtain absolution from the instance with costs. It was however, further held, that the fact that the appellants had not been advised timeously of the withdrawal of their attorney was a factor to be taken into account in the consideration of the good cause requirement in applications for rescission of judgments under the common law. It follows that the appellants in the present matter cannot avail themselves of the defective notice of withdrawal as a basis for relying on rule 42(1)(a). But, the enquiry does not end there: regard must be had to the events occurring after the filing of the notice of withdrawal and in particular whether the trial judge was misled or influenced by incorrect facts placed before him, to grant the judgment by default.

[11] This brings me to the hearing before Boruchowitz J. The appellants contend that the learned judge was fraudulently misled by the pre-trial affidavit and the practice note to grant the default judgment. It is common cause that both these documents contain incorrect information. As for the pre-trial affidavit, Feldman states that he was unable to arrange a pre-trial conference with the appellants ‘as despite attempts to locate them I have been unable to do so’. The statement is factually incorrect. The closest one gets to an attempt to locate them is Feldman’s reference to a charge of theft that was laid by SANTA against the appellants, pursuant to which a Col Ueckermann was appointed to investigate. Col Ueckermann however, according to Feldman, had ‘great difficulty in contacting’ the appellants and Feldman accordingly requested him to be notified should he trace them. And there it ends. Terseness and lack of detail aside the allegations clearly fall short of establishing any attempt

to locate the appellants.

[12] It furthermore has now become apparent that no attempts at all were made to contact inter alia the second, third and fourth appellants in respect of which the commonly used internet search for their contact details, no doubt, would have produced results.

- [13] Counsel for the appellants was at pains to submit that Feldman as well as counsel for SANTA fraudulently misled the trial court in the hope of securing a judgment by default in SANTA's favour. In the absence of a proper enquiry in regard to this aspect I do not propose to deal with it any further.
- [14] The practice note likewise, contained wrong information: it stated that a pre-trial conference could not be held as '1st, 5th, 6th defendants representing 2nd, 3rd, 4th defendants could not be found after the defendants' attorneys of record withdrew' and further, with reference to the notice of withdrawal, that 'the defendants and representatives could not thereafter be contacted at the last known address provided by their erstwhile attorneys and failed to respond to the plaintiffs' notices thereafter'. The fact of the matter is that, after the withdrawal of Brider, no notices of any kind were sent to any of the appellants.
- [15] To sum up: the information before Boruchowitz J justified the conclusion that despite attempts to locate and contact the appellants, they could not be found. Juxtaposed hereto are the true facts that no attempts at all were made to either locate or contact them. The decisive question accordingly, is whether the true facts, had the trial judge been apprised thereof, would reasonably have precluded him from granting the default judgment or would have induced him not to grant the default judgment (see *Nyingwa v Moolman* NO 1993 (2) SA 508 (Tk) 510G; *Naidoo and another v Matlala and others* 2012 (1) SA 143 (GNP) 153C and *Topol and others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W)).
- [16] On a conspectus of all the facts I am satisfied that knowledge of the true facts would have constituted insuperable difficulties to the granting of the default judgment. Furthermore, had counsel for SANTA alerted the learned judge to the defective notice of withdrawal it would have constituted a further stumbling block to the granting of the default judgment. The practice in this Division is that, in the event of a withdrawal of the attorneys of record, proof is required of the sending of the notice to the parties concerned, in particular the withdrawing attorney's erstwhile client/s. The ratio for the practice is to be found in the provisions of rule 16 which are clearly aimed at ensuring that at least the notice of the withdrawal is sent to the parties, including
- the parties formerly represented by the attorney. In this matter the defects I have referred to, in my view, would have created
- considerable doubt as to whether the granting of judgment by default was appropriate.
- [17] It follows that the default judgment was erroneously sought and granted and that in the exercise of this court's discretion, it falls to be rescinded in terms of rule 42(1)(a) (see, generally, *Lodhi 2 Properties Investments CC and another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) para
- [17] – [27]. It is accordingly not necessary to decide the second issue (see *F & J Electrical CC v MEWUSA obo E Mashatola and others* [2015] ZACC 3 (CC) para 27).

- [18] It remains to deal with the costs of the appeal. The appellants are the successful parties and in accordance with the general rule of costs following the result, ordinarily would have been entitled to the costs of the appeal. In the circumstances of this case however, a deviation from the general approach, in my view, is justified.
- [19] SANTA is a welfare organization. Its case against the appellants is based on serious allegations of fraud involving a vast amount of money. The matter by now has progressed way beyond mere allegations of fraud in the pleadings. In the application for rescission the appellants were acutely alive to the requirement of having to disclose a bona fide defence. At an early stage of the proceedings when a stay of execution was granted, Tshabalala J remarked that their conduct was ‘with respect very strange and suspicious’ but the learned judge cautiously and fairly left open the possibility that ‘the defendants may produce another paper trail (in the application for rescission) from the fourth defendant to other creditors of the plaintiff’.
- [20] And a formidable paper trail indeed followed: not only from the appellants but also from the respondent. I have already referred to the magnitude of the case before this court. The learned judge a quo, as I have already alluded to, having carefully analyzed the defence proffered by the appellants, made numerous well-grounded adverse findings against the appellants and readily rejected their defence, albeit not having had the benefit of viva voce evidence.
- [21] This court, on appeal, in view of the finding I have made, is not called upon to pronounce on the bona fides of the defence raised. That will be determined by the trial court after having heard all the evidence and argument. The merits and bona fides of the appellants’ defence was fully dealt with in argument and hotly contested before this court. The bulk of the documents and the better part of the argument before this court related to the appellants’ defence. Suffice to say that, for present purposes, the appellants’ defence is replete with improbabilities and seemingly unsatisfactory aspects. This appeal is decided on a narrow technical point. In the light hereof, it would be unjust and unreasonable not only to SANTA but also in general, before

findings are made concerning the appellants’ alleged fraud, to award the costs of the appeal to the appellants. In my view those costs should be costs in the action, which in the final analysis turns on whether the appellants had acted fraudulently or not. For all these reasons the costs of the appeal should be costs in the action.

[22] In the result the following order is made:

1. The appeal is upheld.
2. The order of the court a quo is set aside and in its place is substituted with the following:
 - i. The judgment by default of this court granted on 12 November 2012 is rescinded.
 - ii. The costs of this application shall be costs in the action.

3. The costs of the appeal shall be costs in the action.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

I agree.

KM SATCHWELL

V TLHAPI

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