

SOUTH AFRICA / JUDGMENT

Johrews Mancorp and Publishers CC and Others v Du Toit Littleton Incorporated (15337/2014) [2017] ZAGPJHC 39 (3 February 2017) [2017] ZAGPJHC 39

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten

CASE / FILE NUMBER

15337/2014

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT SOUTH AFRICA
(GAUTENG
LOCAL DIVISION, JOHANNESBURG)
CASE
NO: 15337/2014

Reportable:

NO
Of
interest to other judges: NO
Revised.
3
February 2017
In
the matter between
JOHREWS
MANCORN AND PUBLISHERS CC FIRST
APPLICANT
SUNMID
PROPERTY INVESTMENT
CC SECOND
APPLICANT
SMD
LOGISTICS
CC THIRD

APPLICANT
KABALA
VERVAARDIGERS
CC FOURTH
APPLICANT
STEPHLINE
CC FIFTH
APPLICANT
JONATHAN
CHRISTOPHER ANDREWS SIXTH
APPLICANT
and
DU TOIT LITTLETON
INCORPORATED
RESPONDENT

JUDGMENT

VAN OOSTEN J:

Introduction

- [1] This is an application in terms of rule 32(1)(b) for rescission of a judgment taken by default against the applicants. The judgment was granted by the Registrar of this court on 21 July 2014, for payment of the amounts and interest, against such applicants as set out in claims A to F of the respondent's summons and particulars of claim. Claim F was instituted against the sixth applicant only, in his capacity as surety and co-principal debtor of the other applicants, for the aggregate of the amounts claimed in claims A to E, being R454 073-79.
- [2] The founding affidavit to the rescission application is deposed to by the sixth applicant, who was the sole member of the third and fourth applicants which have been deregistered, and further is the sole member of the first, second and fifth applicants. The application is for rescission of the judgment granted against all the applicants.

Wilful default

- [3] Although the summons was properly served at the domicilium address of each of the applicants, the sixth applicant denies that it ever came to the knowledge of any of the applicants. I should mention that the domicilium address of the second, third and fourth applicants, where the summons was served, happens to be the respondent's principal place of business. The respondent is an auditing firm and in that capacity rendered professional accounting and tax services to the first to fifth applicants on which its claims are based.
- [4] The respondent did not challenge the allegations that the summons did not come to the notice of the applicants and it follows that, as was conceded by counsel for the respondent, the applicants were not in wilful default of appearance.

- [5] A reasonable and acceptable explanation for the applicants' default has accordingly been tendered. It remains to deal with the second requirement necessary to an entitlement to rescission which is whether a bona fide defence, prima facie carrying some prospect of success had been shown.

Bona fide defence

- [6] The main defence raised by the applicants is that the amounts claimed by the respondent are illiquid and that expert evidence as to the reasonableness of the amounts, should have been tendered for an entitlement to judgment by default. In my view the defence is unassailable (*Consolidated Fish Distributors (Pty) Ltd v Sargeant Jones Valentine & Co* 1966 (4) SA 427 (C); *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) 738E). In pleading the terms of the agreement on which the claims are based, the following is stated:

'It was an express term of the agreement alternatively a tacit alternatively an implied term of the agreement that [the applicants] would pay the plaintiff a reasonable remuneration for such professional accounting and tax services.'

In a further paragraph of the particulars of claim it is pleaded:

'On a continuous basis the plaintiff presented [the applicants] with invoices for services rendered for the agreed and/or fair and reasonable remuneration for the said accounting services'

Contrary to what the respondent submitted, the allegations concerning the rendering of invoices and the reference there, notably in the alternative, to agreed remuneration, is not of any relevance in regard to the pleading of the terms of the agreement, where no mention is made of agreed remuneration.

- [7] The applicants dispute the quantum of the fees that were charged by the respondent and seek an opportunity to verify and challenge the reasonableness thereof in the trial. Counsel for the applicants has pointed to certain apparent discrepancies in comparing statements of account issued to the applicants by the respondent.
- [8] The applicants moreover dispute not only the workmanlike manner in which the professional services were rendered but also raise a defence of prescription in regard to certain portions of the respondent's claims.
- [9] I am satisfied that the applicants have disclosed a bona fide, triable defence and that they should be afforded the opportunity, by way of trial, to verify and, if necessary, challenge the amounts claimed by the respondent.
- [10] For all these reasons I conclude that the judgment by default falls to be rescinded.

Order

- [11] In the result I make the following order:

1. The judgment granted on 21 July 2014 against the first-, second-, third-, fourth-, fifth- and sixth applicants, in favour of the respondent, is rescinded.
2. The applicants' Notice of Motion in the rescission application shall stand as the Defendants' Notice of Intention to Defend the action.
3. The applicants (the defendants in the action) are to file a plea to the respondent's (the plaintiff's) Particulars of Claim within 20 days of the date of this order.
4. The costs of this application shall be costs in the action.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANTS

ADV GVR FOUCHÉ

ATTORNEYS FOR APPLICANTS

NOA KINSTLER ATTORNEYS

COUNSEL FOR RESPONDENT

ADV RJ BOUWER

RESPONDENT'S ATTORNEYS

ODBB ATTORNEYS

DATE OF HEARING

2 FEBRUARY 2017

DATE OF JUDGMENT

3 FEBRUARY 2017

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