

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, HIGH COURT PRETORIA)

Not Reportable

Case No: 56699/2008

Data: 24/08/2010

In the matter between:

JAMES GILBERT SA (PTY) LTD                      Applicant

And

RUGBY WORLD DISTRIBUTORS CC Respondent

**JUDGMENT**

MAVUNDLA, J.

[1] This is an opposed application for rescission of default judgement granted against the applicant by the Registrar of this Court on 6<sup>th</sup> of February 2009 for payment in the amount of R186 846, 00 with interest a tempore morae and cost to be taxed.

[2] The plaintiff caused simple summons to be issued against the defendant on 4 December 2009. On the 5<sup>th</sup> December 2009, according to the Deputy Sheriff's return of service, was served on Mrs Pieterse, the receptionist, at Gordon and Gordon and Partners. The applicant did not deliver a notice of intention to defend the action. On 6 February 2009 , the Registrar of this Court granted judgment by default for the payment of in the amount of R186 846, 00 with interest a tempore morae and cost to be taxed.

[3] The application for rescission is premised on the affidavit of one Eric Ichikowitz who describe himself as a major businessman And chief executive officer of the applicant.

He has further stated that the facts contained in his affidavit are within his personal knowledge. He has however not stated that he has been dully authorised to bring the application.

[4] The first salvo by the plaintiff who is the respondent in the application, is a point *in limine*. The essence of the point *in limine* is that the defendant is closed corporate. As such the defendant is a juristic person and therefore the deponent to the affidavit must show that he is dully authorised.

[5] In rebuffing this preliminary attack, the defendant contends that the plaintiff has failed to attack the authority of the attorneys representing it to act on behalf of the defendant, it should be therefore accepted that it is not disputed. It is further contended that the present attack is flawed because the point of authority should be challenged in terms of Rule 7(1) of the Uniform Court Rules. For thjis submission, reliance is made on the Full Bench of Kwa-Zulu High Court judgment in the matter of ANC Umvoti Council Caucus and Others v Umvoti Municipality 2010 (3) SA 31 (KZP).

[6] In the Umvoti matter (supra) it was held "that absent a specific challenge by way of authority by way of rule 7(1) 'the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant' were sufficient. Further the application papers were not the correct context in which to determine whether an applicant which was an artificial person had authorisation the initiation of the application proceedings. Rule 7(1) must be used.

[7] The decision in the Mvoti case in respect of rule 7(1) having to be employed when challenging authority of the deponent to the affidavit on behalf of the juristic person,

accords with the views expressed by the Supreme Court in the matter of Ganes and Another v Telcom Namidia Ltd 2004 (3) SA 615 (SCA) ([20004] 2 ALL SA 609) which its dictum in para [19] was followed.

[8] Having regard to these authorities, in particular that of the Supreme Court of Appeal, I am bound therefore to uphold the submissions made on behalf of the defendant in repulsing the first salvo of the plaintiff, as I would do herein below. The defendant, as the successful party on this preliminary point, is entitled to the costs pertaining thereto.

[9] The defendant says in its affidavit that obtained knowledge of the judgment in this case on 16 April 2009 and prior thereto had no knowledge of the institution of the action and the judgment. Mrs Pieterse upon whom the summons does not deny that the summons was served on her but simply says that she cannot remember anything about this. The defendant says that the summons were never brought to his attention by the firm of accountants Gordon and Gordon and partners where Pieterse is employed and where the summons were served.

[10] It needs pointed out that, although the affidavit of Ichikowitz was deposed to on 6 May 2009. The confirmatory affidavit of Pieterse was commissioned sometime in May 2009 without a specific date reflected thereon. However a further confirmatory affidavit of Haether Lawlor, a candidate attorney in the employ of the defendant's attorney of record, was deposed to on 7 May 2009. The essence of this last mentioned confirmatory affidavit is to show that a fax dated 24 April 2009 attached to the papers as annexure E was remitted to the plaintiff making it known of the defendant's intention to launch an application for rescission.

[11] However the application for rescission was only lodged with the Registrar of this Court on 18 May 2009, one day outside the 20 days prescribed by rule 31(2)(b) of the Uniform Rules of this Court. There is no explanation proffered for this remissness. In the absence of an explanation for this remissness, albeit one day, in my view, there is nothing before the Court upon which it can exercise its discretion to condone the late filing of the application.

[12] The mere fact that the plaintiff had been made aware of the intended application in April is of no great moment. The fact remains that the application was not brought within the prescribed period and there is no condonation sought.

[13] The absence of an explanation why the application was not brought timeously, coupled with the fact that the summons were served on the defendants' registered address as well as the preferred address by Pieterse, these are important in deciding whether there is good cause shown, why the court must come to the rescue of the defendant. In my view, it is highly unlikely that Pieterse did not bring to the attention of the defendant the summons against it. I am therefore not satisfied that the defendant has shown "good cause". I am consequently of the view that I need not interrogate the rest of the merits of this application. If one of the requirements for a successful application for rescission is lacking, then the application cannot succeed.

[14] In the result I make the following order:

1. That the Respondent's point *in limine* is dismissed with costs.
2. That the Applicant's application for rescission is dismissed with costs.

**N.M. MAVUNDLA**

**JUDGE OF THE HIGH COURT**

**APPLICANT'S ATT : NOCHUMSOHN TEPER ATT.**

**PLAINTIFF'S ADV : ADV M D SILVER.**

**DEFENDANTS' ATT : VAN ZYL LE ROUX & HURTERS**

**DEFENDANTS' ADV : ADV S G MARITZ**

**DATE OF JUDGEMENT: 24 AUGUST 2010**