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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

CASE NO. 1558/2014

Date heard: 15 August 2019

Date delivered: 29 August 2019

In the matter between:

DE WITT STADLER

First Applicant

WATTEC (PTY) LTD

Second Applicant

ORAFLEX TRADING (PTY) LTD

Third Applicant

and

SANTO CIARAVINO

Respondent

JUDGMENT

RUGUNANAN, AJ:

[1] In a notice of motion issued on 26 October 2018 the applicants seek rescission of an order in terms of which the respondent (as plaintiff) obtained a judgment by default against the applicants (as defendants). The background to the matter is set out below.

[2] On 2 December 2014 this Court, *per* Gqamana AJ, granted the respondent an order (“the order”) in the following terms:

- “1. *That the Defendants render a full account, supported by vouchers of the business account of the First Defendant with Absa Bank Limited being account number 40[...].*
2. *For a debatement of the said account.*
3. *That payment to the Plaintiff of whatever amount appears to be due to him upon a debatement of the account from whichever of the Defendants have been unduly benefited by receipt of monies otherwise due to the plaintiff.*
4. *That the Defendants be liable jointly and severally, the one paying the other to be absolved, for the payment of costs of suit, together with interest thereon at the legal rate of 9% per annum payable as from date of taxation to date of payment.”*

[3] The order interceded in the absence of the applicants or their legal representatives and was granted by default on pain of a notice of bar for failure to deliver a plea; the defendants alleging the failure being due to the fault of their attorneys based in Uitenhage. Without repeating every averment made in the applicants’ founding affidavit, the explanation for the failure put forward by the deponent thereto is that he was provided with incorrect legal guidance. On this point there is a lack of sufficient material detail to explain how the default came about. It is revealing that the default appears only to have been ascertained roundabout 10 October 2018 as can be gleaned from an emailed communication from the applicants’ erstwhile Uitenhage attorneys to the applicants’ current attorneys based in Pretoria.¹ Although mindful that a court should be *“loath to penalise a blameless litigant on account of the*

¹ Founding affidavit, Annexure I

*negligence of his attorney,”*² there is ample material in the papers before me indicating that the applicants acquiesced to the order through substantial compliance. This is dealt with later in this judgment.

- [4] The applicants seek rescission of the order solely in terms of rule 42(1)(a)³ which provides as follows:

“42(1) The court may in addition to any other powers it may have mero motu or upon the application of any party affected rescind or vary:

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.”

- [5] In the particulars of claim the second and third applicants are cited as companies with limited liability registered according to the company laws of South Africa. The respondent's cause of action is founded on an alleged oral agreement with the third applicant represented by the first applicant, for the acquisition of a 50 % shareholding in the second applicant in respect of work on a construction project secured by the second applicant. The work would be undertaken by the second applicant but would be subject to site supervision by the respondent while the first applicant would deal with administrative matters attendant on the execution of the work. In addition, the respondent and the third applicant would share equally in the profits made by the second applicant on the construction project.

- [6] Mr Laubser who appeared for the applicants contended that the order was erroneously granted in that the respondent's particulars of claim were excipiable and could not sustain an application for default judgment; it being the applicants' case that section 46 of the Companies Act⁴ is applicable. The section is headed *“Distributions must be authorised by board”* and contains the following sub-sections (those considered irrelevant are omitted):

² *Reinecke v Incorporate General Insurance Ltd* 1974 (2) SA 84 (AD) at 92F

³ Uniform Rules of Court

⁴ Act No. 71 of 2008, as amended

“(1) A company must not make any proposed distribution unless-

(a) the distribution-

(i) is pursuant to an existing legal obligation of the company, or a court order; or

(ii) the board of the company, by resolution, has authorised the distribution;

(b) it reasonably appears that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution; and

(c) the board of the company, by resolution, has acknowledged that it applied the solvency test, as set out in section 4, and reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution.

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...”

[7] Taken further, the argument advanced for the applicants is that section 46 is in the nature of a suspensive condition and that it was incumbent on the respondent to have pleaded compliance failing which the agreement alleged in the particulars of claim is rendered unenforceable. To this end, Mr Laubser placed reliance on the case of **Marais v Standard Credit Corporation Ltd.**⁵ In that matter, the court was required to consider an application for the rescission of a default judgment under rule 42(1)(a). The plaintiff's cause of action was founded on an instalment sale agreement under the Credit Agreements Act⁶ for payment of an amount of R23 796, 44 being the balance of the purchase price of a motor vehicle sold to the defendant. The case for rescission was that judgment by default had been granted erroneously because the summons was excipiable in that it disclosed no cause of action. The basis for this argument was that section 6(5) of the Credit Agreements Act required as follows:

⁵ 2002 (4) SA 892 (W)

⁶ Act No. 75 of 1980, now repealed.

“No credit agreement shall be binding until the credit receiver has paid at least the initial payment or initial rental prescribed by regulation.”

- [8] In upholding the excipiability argument the court in **Marias** found that it was essential for the plaintiff to have made the averment that the initial payment was paid by a certain date from which it followed that from thereon the contract was enforceable.⁷ Failure to have done so permitted rescission of the judgment under rule 42(1)(a) on the ground that it was erroneously granted where no cause of action was disclosed.
- [9] In this matter, an intrinsic feature of the respondent’s cause of action in the particulars of claim is the allegation of an agreement concluded with the applicants for a shareholding and distribution of profits. The founding affidavit to which the first applicant deposed, avers the existence of an agreement that excluded shareholding and distribution of profits. Relying on the reasoning employed in **Marias**, the applicants contend that section 46 should have been specifically pleaded in the particulars of claim. On the other hand, it is noted that if recourse is had to the averments in the founding affidavit, it would appear that section 46 could be relied upon as a defence (assuming it to be such). Whether the section was essential for the particulars of claim to have disclosed a cause of action or whether it could be availed belatedly as a defence,⁸ is insignificant in the light of the very substantial passage of time that has lapsed since the order was granted which cannot be viewed in isolation from conduct offering indications of acquiescence by the applicants. The applicants’ reliance on the fault of their attorney in failing to deliver a plea, whether due to negligence or incapacity, does not as from what appears below afford grounds for rescission.⁹

⁷ At 896 D- 897 A

⁸ *Kgomo v Standard Bank of South Africa and Others* 2016 (2) SA 184 (GP) at 187F-188C

⁹ *Bristow v Hill* 1975 (2) SA 505 (N); *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (AD); *Bakhoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E)

- [10] Mr Marais who appeared for the respondent argued that the present application should be dismissed by reason of the passage of time since the date on which the order was granted and the launching of this application. The application was launched on 26 October 2018 almost 4 years after the order was granted.
- [11] Moreover, Mr Marias submitted that the applicants have acquiesced to the order in a substantial manner. They provided the plaintiff with necessary documents in compliance with the order. These included bank statements, trial balances and proof of payments to the South African Revenue Service as were needed for debatement of the ABSA Bank account. In addition, they made material and significant admissions at a rule 37 conference prior to the matter being set down for trial on 14 November 2017 to deal with the remaining issues stemming from the order.¹⁰
- [12] With the foregoing in mind it is not clear what the applicants will gain from having the order rescinded and indeed what prejudice they will suffer should the order not to be rescinded. As was said in **Bakoven Ltd v G J Howes (Pty) Ltd**,¹¹ rule 42(1) was designed “*to correct expeditiously an obviously wrong judgment or order.*”¹² It is in the interests of justice that finality in litigation be preserved rather than eroded. A litigant in whose favour an order has been made should be entitled, once a reasonable time after its issue has lapsed, to know that the last word has been spoken on the subject.¹³ I consider that a reasonable time in this case to be substantially less than 4 years.
- [13] The power created by rule 42(1) is discretionary and although one might assume that the applicants may have established that the order was

¹⁰ Opposing affidavit paragraph 18 *et seq*

¹¹ 1992 (2) SA 466 (E) at 471E-F

¹² See also *Firestone South Africa (Pty) Ltd v Gentraco AG* 1977 (4) SA 298 (a) at 306H

¹³ *First National Bank of South Africa Ltd v Van Rensburg NO and Others* 1994 (1) SA 677 (TPD) at 681F

erroneously granted, I think it would be a proper exercise of discretion to say that the applicants should not be heard to complain after the lapse of more than a reasonable period of time.

[14] In the circumstances the application is dismissed with costs.

S. RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicants:

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Port Elizabeth

For the Respondent:

Adv. P. T. Marias
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