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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case no: **A147/2022**

In the matter between:

JOHANNES JACOBUS ERASMUS N.O.

First Appellant

GERHARD ALBERTUS VAN RHYN N.O.

Second Appellant

JOHANNES JACOBUS ERASMUS

Third Appellant

GERHARD ALBERTUS VAN RHYN

Fourth Appellant

and

STEPHANUS JOHANNES NEL VAN RENSBURG N.O.

First Respondent

MARGARETHA ALETTA NOTLEY N.O.

Second Respondent

ZANIA HARTMAN N.O.

Third Respondent

CORAM:

MUSI, JP *et* OPPERMAN, J *et* DANISO, J

HEARD ON:

11 SEPTEMBER 2023

DELIVERED ON:

12 OCTOBER 2023

JUDGMENT BY:

MUSI, JP

Judgment

- [1] This is an appeal against an order of a single Judge of this Division. The court *a quo* dismissed the appellants' (White Linen Laundry Trust (WLLT) and its trustees) condonation and rescission of judgment applications. It subsequently dismissed their application for leave to appeal. They successfully petitioned the Supreme Court of Appeal. The appeal is with the leave of the Supreme Court of Appeal.
- [2] On 30 September 2020, the respondent (Louriella Trust) issued summons against the WLLT and its trustees, in their personal capacities in terms of suretyship agreements in which they bound themselves as surety and co-principal debtors of the WLLT.
- [3] During September 2016, the executor of the estate of the late Alfred Robert Do Rego sold the property known as Portion 16 of Erf 9[...] also known as Tattersall Building 55 and 57 East Burger Street, Bloemfontein to the respondent. At that time, there was already a valid lease agreement entered into on 1 November 2015 between Carlos Nunes CC (CC) and Yvonne Barendse (Barendse) and the WLLT in respect of the property described as Portion 16 of Erf 9[...] situated at 53 East Burger Street, Bloemfontein.¹
- [4] In terms of the lease agreement the WLLT was supposed to pay the relevant service providers for electricity (Centlec) and municipal services (Mangaung Metropolitan Municipality). The CC and Barendse were supposed to pay the property rates. The WLLT vacated the premises and the respondent sued it for R 259 912.48 in respect of the outstanding water and electricity accounts and for R 11 299.00 with regard to an air conditioner that the WLLT allegedly removed from the premises. The latter amount represents the replacement value of the air conditioner.

¹ Although the addresses differ on the agreements, the parties were *ad idem* that it is the same property.

- [5] In its particulars of claim, the respondent alleged that it bought the property as a going concern and that the WLLT became its tenant on date of registration of the property into its name. It therefore sued the WLLT in its own name as if it entered into a lease agreement with the WLLT. It then transposed its name for that of the original lessor and alleged that the WLLT undertook all the duties and obligations in the original lease towards it.
- [6] It is common cause that in the original lease agreement, the WLLT chose 53 East Burger Street as its *domicilium citandi et executandi* (Domicilium). The third and fourth respondents did not chose a domicilium. It is further common cause that the combined summons was issued on 30 September 2020 and that the said summons and particulars of claim were served, on 21 October 2020, by affixing them to the main entrance at 53 East Burger Street (Rule 4(1)(a) (iv)). The sheriff made a note, on the return of service, to the effect that Bond Inx – Hairsalon is conducting business at the address. Default judgment was obtained on 15 July 2021.
- [7] In the application for the rescission of the judgment the WLLT pointed out that it vacated the leased premises during June 2019, with the knowledge of the respondent. On 20 March 2020, the CC and Barendse's attorneys, who are also the respondent's attorneys, wrote a letter of demand to the WLLT claiming the exact amount that the respondent is claiming from the appellants. The letter was addressed to the White Linen Laundry Trust with address Gruis Street, Hilton Bloemfontein. In the aforesaid letter, reference was made to the air conditioner that was allegedly removed by the WLLT. On 13 May 2020, the WLLT's attorney requested and confirmed that the summons may be served at their offices.
- [8] In its founding affidavit, the WLLT declared that it was telephonically informed about a possible judgment against it, by a Mr Hennie Bergh (Bergh), on 14 November 2021. It disbelieved Bergh because it had not received a summons. On 23 November 2021, the WLLT, represented by Erasmus (the third appellant), attended court in connection with another matter and their

attorney showed him a copy of the court order. It is common cause that the respondent's attorney sent a copy of the summons, return of service and the order to the appellants' attorney on 17 November 2021. The appellants' attorney therefore had knowledge of the order on 17 November 2021². The application for rescission was launched on 20 December 2021.

[9] The court *a quo* made the following finding:

'The Court agrees with the submission that actual knowledge of the judgment is required. There is no evidence before Court that the Applicants' attorney obtained actual knowledge of the judgment prior to the 17th of November 2021, or that the Applicants did not obtain actual knowledge of the judgment on the 23rd of November 2021.'

[10] This finding is confusing because the testimony is that Erasmus was shown a copy of the order on 23 November 2021. If that is the date on which the order came to the appellant's knowledge, no condonation was needed because the application would have been brought within the prescribed time limit, 19 days. If, however, the date on which the appellant became aware of the order was 17 November 2021 then the rescission application was 3 days late.

[11] The court *a quo* found that the appellants' attorney did not proffer any explanation why he failed to contact the appellants telephonically or via e-mail between 17 and 23 November 2021. In my view, the order of the court *a quo* can only mean that it found that the default judgment came to the appellants' knowledge on 17 November 2021. That is why the appellant had to apply for condonation.

[12] In applications for condonation, the interests of justice are paramount. In **Grootboom v NPA**³ it was stated that:

² In terms of the Uniform Rules (Rule 1) a 'party' or any reference to a plaintiff or other litigant in terms, includes such party's attorney with or without an advocate, as the context may require.

³ **Grootboom v National Prosecuting Authority and Another** 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC).

'However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.'⁴

[13] In the minority judgment the manner in which the interests of justice should be determined was set out thus:

'The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.'⁵

[14] The appellants did not state whether the application for rescission was brought in terms of Uniform Rule 31(2)(b)⁶ or Rule 42(1)(a)⁷. The appellants,

⁴ At para 22 and 23.

⁵ At para 51.

⁶ Rule 31(2)(b) reads: 'A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.'

amongst others, alleged that the summonses were not properly served on them, because they were served at the chosen domicile of the WLLT, whilst the respondent knew that the WLLT had vacated the premises. The court *a quo* and the parties dealt with the application as a Rule 31(2)(b) application. We will also deal with it on this basis, although Rule 42(1)(a) is also applicable, because if there was no proper service on a party then the order or judgment was erroneously sought and erroneously obtained.

[15] In **Lodhi 2 Properties v Bondev Development**⁸ it was said:

‘Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff’s return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously. See in this regard *Fraind v Nothmann* 1991 (3) SA 837 (W) where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant’s residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously.’⁹

[16] An applicant in a Rule 42 application does not have to show sufficient cause or a *bona fide* defence. In order for an applicant who approaches the Court in terms of Rule 31 to succeed, such applicant must:

⁷ Rule 42(1)(a) provides: ‘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;’

⁸ **Lodhi 2 Properties v Bondev Development** 2007 (6) SA 87 (SCA).

⁹ At para 24.

- (a) give a reasonable explanation of his default;
- (b) show that the application was made *bona fide* and not made with the intention of merely delaying plaintiff's claim;
- (c) show that he has a *bona fide* defence to the plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which established at trial would entitle him to relief asked for.¹⁰

[17] The rescission application was three days late, which is not an inordinately long period. Weak as the explanation is, it is clear that the appellants' attorney did not inform them of the default judgment between 17 and 23 November 2021. Although there is a limit beyond which a litigant should not be allowed to hide behind its attorney's dilatoriness and tardiness, the appellants' *bona fide* defence weighs heavily in their favour.

[18] The manner in which the respondent obtained the default judgment is suggestive of an orchestrated Street plan. The respondent caused the summons to be served at 53 East Burger Street knowing that the appellant ceased conducting business at that address.

[19] This is so because, during March 2021 the respondent's attorneys, whilst acting for its predecessor, sent the letter of demand to the WLLT claiming the same amount and for the replacement of the air conditioner. At that stage, on the probabilities, the respondent's attorneys knew that the WLLT is no longer occupying the premises, because it used a different address (Gruis Street). The appellant's attorneys invited the respondent's attorneys to serve the summons at their offices. Although this would have been an improper service because the summons was a process commencing proceedings and had to be served on the appellant, the respondent could have enquired about the addresses of all the appellants.

¹⁰ **Brown v Chapman** 1938 TPD 320 at 325; **Grant v Plumbers (Pty) Ltd** 1949 (2) SA 470 (O) at 476 – 477.

[20] When the summonses were served at the premises there were already other tenants occupying the premises. The return of service clearly states that the premises is occupied by a hairdressing business. The appellant conducts a laundry business. It is highly unlikely that the owners of the hair salon would have occupied the premises without a lease agreement or without the respondent's knowledge. If the respondent did not have access to the premises it would not have known in March 2021 already, that the air conditioner was removed from the premises.

[21] I am convinced that the respondent's assertion that it was unaware that the appellant had vacated the premises is improbable, hollow and untenable. A party should not be allowed to misuse the Rules in order to secure a judgment by default. As I will show later, the domicile chosen for the lease agreement between the WLLT and the respondent's predecessors cannot automatically be the WLLT chosen domicile in a lease agreement, verbal or in writing, between it and the respondents. The third and fourth appellants did not choose a domicile but they were served at the address chosen by the WLLT.

[22] The original lease agreement commenced on 1 November 2015 and endured for three years, subject to clause 4.2 and 4.3 which provide:

'Provided the Lessee shall have faithfully carried out the terms and conditions of this lease, and provided the Lessee is in no way in default hereunder at the expiration of the Initial Period, then the Lessee shall have the right of renewing this lease for a further period of 3 (THREE) years ("**the Additional Period**") upon the same terms and conditions of this Agreement.

If the Lessee desires to exercise the right of renewal referred to in clause 4.2, written intention to exercise the option must be given to the Lessor not less than 6 (SIX) Months before the Termination Date, failing which the right of renewal shall lapse.'

[23] It is common cause that the original lease was not renewed and the WLLT's right to renewal lapsed because it did not act in accordance with clause 4.3. When the respondent took ownership of the property, it did not enter into an

express written or verbal lease agreement with the WLLT. The parties seemingly assumed that the original lease agreement govern their relationship. The respondent did not state, in its particulars of claim, how and when it obtained all the rights and duties of the CC and Barendse.

[24] In an attempt to fill or explain this obvious vacuum, the respondent pleaded that it bought the premises as a going concern. This cannot be correct since it only bought the building in which a business was conducted by a lessee. It had no interest, whatsoever, in the business. It therefore could not have bought the premises as a going concern.

[25] The lease agreement was not ceded to the respondent when it purchased the property. In its founding affidavit in the application for rescission, the appellants stated that the combined summons lacks averments which are necessary to sustain an action, *inter alia*, because the respondent did not state how it acquired rights in terms of the expired lease. I agree.

[26] The WLLT attached a proof of payment document which on the face of it indicates that the amount claimed by the respondent was paid to the service providers. It denied removing the air conditioner. It cannot be said that the appellants failed to show that it does not have a *bona fide* defence. Neither can it be said that the application was brought as a delaying tactic or for any other ulterior motive. It was a *bona fide* application.

[27] I am of the view that the court *a quo* should have granted condonation notwithstanding the appellants' attorney's remissness. The prospects of success and the interests of justice militate against the order of the court *a quo*. Likewise, the application for rescission should have been granted for the reasons set out above.

[28] I accordingly make the following order:

1. The appeal is upheld with costs.

2. The order of the court *a quo* is set aside and replaced with the following order:
- i. Condonation for the late filling of the rescission application is granted.
 - ii. The order granted on 15 July 2021 against the appellants is hereby rescinded.
 - iii. The appellants are directed to file their plea within ten days of this order, if so advised.
 - iv. The costs of the application for rescission shall be costs in the cause of the action.

C.J. MUSI, JP

I concur.

M. OPPERMAN, J

I concur.

N.S. DANISO, J

Appearances:

For the Appellants: Adv F.G. Janse van Rensburg
JG Kriek and Cloete
Bloemfontein

For the Respondents: Adv R van der Merwe
Muller Gonsior Attorneys
Bloemfontein