

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

15/5/2015

DATE

SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

15/5/15

CASE NUMBER: 59473/2012

In the matter between:

MINISTER OF SAFETY AND SECURITY

FIRST APPLICANT

CAPTAIN NKUMANE

SECOND APPLICANT

and

PIETER JOHANNES BURGER

RESPONDENT

JUDGEMENT

TLHAPI J

INTRODUCTION

[1] This is an application for the rescission of an order granted on 7 November 2014. The applicants were ordered to jointly and severally, the one paying the other

to be absolved, to pay the respondent an amount of R250 000.00 in damages and costs on an attorney and client scale. There was a further prayer for an order that the matter be set down to determine quantum. The application was brought in terms of Rule 42(1)(a) and Rule 31(2)(b) of the Rules of Court. The application was opposed.

[2] The applicants averred that the order granted on 7 November 2014 where quantum was determined was erroneously sought and granted in the absence of the applicant. This occurred despite the fact that the applicant had timeously delivered its plea to the claim for damages as contained in the summons, which damages had to be proved by oral evidence.

It was contended that Rule 31(2)(a) provided for the procedure to be followed where default judgement could be granted in the absence of an intention to defend and after hearing of evidence. The applicants were not in default of a delivery of an intention to defend. They had pleaded their defence and, that action proceedings could not be converted into application proceedings, as happened in this instance, and where the applicants had been given only two days to react to the application which was applicable only to urgent applications in terms of Rule 6(12). There was further no notification to the applicants as provided in Rule 31 (4) which provided for the setting down of the hearing with not less than five days notice to the party in default

[3] The respondent instituted action against the applicant claiming damages in the amount of R2 012 500.00 suffered during his alleged unlawful arrest on 21 May 2011, detention and subsequent acquittal. The sequence of events leading up to the obtaining of the order to be rescinded was outlined in paragraph 9 of the answering affidavit.

[4] After the close of pleadings the respondents launched an application to compel in terms of rule 35(3). The order was granted on 7 November 2013 and the appellant failed to comply. An application was then launched by the respondent in terms of rule 35(7), for striking out of the applicants defence. The applicants filed an opposing affidavit on 20 January 2014 and a further affidavit on 18 February 2014. The replying affidavit was filed on 5 March 2014. The respondent and applicants filed their heads of argument on 31 March 2014 and 16 April 2014 respectively.

[5] In paragraph 9.2.2 of the answering affidavit the respondent stated:

"Due to the fact that the respondent at that stage could not file a quantum affidavit, the respondent requested that the determination of quantum be postponed sine die. In this regard I humbly refer ..to the notice of motion and founding affidavit of the above mentioned application that already forms part of the record before this Honourable Court. I request that same be incorporated into this application as if specifically part of the record. For sake of reference the full bundle will be marked "B"

The notice of motion read as follows:

- "1. Dat die Eerste en Tweede verweerder se verweer/e geskrap word;*
- 2. Dat die beregting van quantum sine die uitgetstel word;*

[6] The application to strike out was heard on 21 July 2014 with both parties being represented by counsel. An order striking out the defence of the applicants was granted and the determination of quantum was postponed sine die. The applicants filed a notice of application for leave to appeal the order on 8 August 2014 and shortly thereafter served a follow up notice abandoning the application for leave

to appeal. The respondent contended that it accepted the applicants abandonment of the application for leave to appeal the order striking out its defence and proceeded to file an application for judgment on quantum. The application which was set down for hearing on 7 November 2014 and was served on the applicants on 4 November 2014 and an order which is the subject of this application was granted. In paragraph 9.2.11 of the answering affidavit the notice of motion and founding affidavit on quantum were incorporated into this application.

[7] The respondents contended that the wording of the striking out order envisaged a striking out of the applicants' plea without any qualification and that it was not a striking out of the applicants' plea only with regard to the merits and that there was no separation of the issues ordered by the court or by agreement.

They contend that despite the fact that the applicants' were disentitled by the striking out order to further litigate, the applicants had failed to deal in the founding affidavit with the version of the respondent in the application to determine quantum. No version was put forward in the founding affidavit disputing the respondent's version, nor was there evidence of a possibility of a *prima facie* defence that might lead the court to a different conclusion. The only version was that of the State Attorney for applying for the rescission with no indication from the applicants themselves of their stance regarding the order that is sought to be rescinded.

[8] In reply the applicants denied that the striking out of the defence brought finality to the action in that what had been struck out was the defence on the liability or the merits and that the respondents were still obliged to set the matter down for the determination of damages to enable the applicants to participate in the adjudication of the damages. It was averred that the documents giving rise to the

striking out of the defence were discovered and served on the respondent's attorney on 10 November 2014 and the document was annexed to the affidavit and marked 'MTM6'.

[9] The main issue is whether the applicants are entitled to a rescission in terms of rule 42(1)(a) or rule 31(2)(b) and whether the action should have been set down in terms of rule 31(4) for a hearing to determine quantum after the applicants defence had been struck out in an application launched in terms of Rule 35 (7).

[10] Mr Phaswane for the applicants submitted that it being a delictual claim, for an unliquidated amount and where the respondent bore the burden of proof of damages alleged, determination of quantum required evidence to be led as provided in terms of Rule 31. Furthermore, that the striking out of the defence was not a bar to the applicants contesting the quantum and subjecting the respondents to cross examination. Therefore the order was erroneously sought in the absence of the applicant.

[11] Mr Hamman for the respondent submitted that an application to strike out in terms of rule 35(7) could only be engaged where an opposing litigant had, to the prejudice of the other party neglected to respond to the notices envisaged in rule 35(3) read with rule 35(6). In this instance such notices were served on the applicants on 6 June 2013 and the applicants having failed to comply therewith and with an order compelling them to do so, the respondents launched the application in terms of rule 35(7). He submitted further that the abandonment of the application for leave to appeal was a concession that the judgment of 21 July 2014 was correct.

I am in agreement with this submission because the striking out of a claim or defence is a drastic measure which should only be resorted to by a court having

judiciously exercised its discretion after considering all the facts before it.

[12] The position of the applicant as a result of the striking out of the defence was that it was left without a leg to stand on, the doors were effectively shut. It cannot be correct as argued by Mr Phaswane that the effect of the striking out was that it left room for the applicant to still participate in the trial in as far as the determination of the quantum was concerned. Mr Phaswane made a concession (which he later reneged on), by referring to page 824 paragraph 1 of Herbstein and Van Winsen (The Civil Practice of the High Courtsof South Africa, 5th edition), "*If the defence is struck out, the defendant cannot appear at the trial and crossexamine the plaintiff's witnesses*". *Langley v Williams* 1907TH 197 and in this matter the Court upheld the objection raised on behalf of the plaintiff that "*a defendant shall be placed in the same position as if he had not defended* . Mr Maritz relied on *Langley supra* and on *Leggat and Others v Forrester* 1925 WLD 36 and *Mostert v Pienaar* 1930 WLD 151, the plaintiff would be entitled to a judgement where the defendant's defence had been struck out. It was however correctly submitted by Mr Phaswane that where the claim was for an unliquidated amount the court shall hear evidence before granting judgement. Mr Hamman submitted that the only limitation on the respondent was to ensure that there was evidence sufficient to convince a court that the order sought was in the interests of justice and not as could have been the case in a damages claim, exorbitant.

[13] In my view, a rule 35(7) application is not meant to also deal with the determination of quantum hence, a prayer in that application that the determination of quantum be postponed *sine die*. Mr Hamman submitted that what followed was for the applicant to obtain judgement and since the claim was for an unliquidated amount the responsibility placed on the respondent was to have applied for

judgement and to have placed sufficient facts before the court to enable it to make such determination. Because it was a claim for damages the respondent had to convince the court that the order he sought was not only in the interests of justice, also that it was not exorbitant. I am in agreement with these submissions.

[14] The question that has to be answered was whether judgement should only have been granted by way of prior notice to the applicant in terms of rule 31(5) and, by *viva voce* evidence, alternatively whether the affidavit by the respondent sufficed. Mr Hamman submitted that the in *Havenga v Parker* 1993(3) SA 724(T) evidence in a claim for damages could also be given by way of affidavit was applicable in this instance. The application for judgment on 7 November 2014 was for the amount claimed for in the summons. It was a substantive application of about 67 pages, which not only gave an account of the facts and why he alleged that he was entitled to the damages suffered, it also related the history of the trial and the reasons why the applicant was not before the court. The respondent was only awarded an amount of R250 000.00.

[15] The respondent deemed it necessary to serve the applicants with the application for judgment albeit at short notice. Mr Hamman submitted that it was not necessary to do so. Based on the decisions of *Langely*, *Leggat* and *Mostert supra* the doors were shut for the applicants, service upon them could only have meant that the applicants were either being notified as a courtesy of the respondent's next step. Even if the applicants were of the view that service was an invite for them to participate in the trial the problem would still revert to the fact that the applicants' defence was struck out. In my view the only manner in which they would have been entitled to participate in the trial again, was if they had been successful in the appeal

which they voluntarily abandoned. Their service on the respondents of better discovery as appeared in annexure 'MTM6' of the replying affidavit was irregular in that their defence was struck out and they had not business filing further processes. It seems to me that that was a means to enter the trial again by the back door. Mr Hamman criticised this on the basis that no case had been made out in the founding affidavit.

[16] Although I have expressed my views about the applicant's standing relating to the hearing of 7 November this still remains an application for rescission.

Rule 31(2)(b)

I am of the view that this rule is not available to the applicants because they are not defendants who were in default of delivering a notice of intention to defend or a plea and where on the grant of default judgement they would have been entitled to set the judgement aside upon good cause being shown.

Even if the applicants were entitled to approach the Court in terms of this rule, what they failed to do was to show good cause, The application consisting of 67 pages was served on them and, available to them were all the facts upon which the respondent alleged he was entitled to judgment. The founding affidavit in the rescission application was lacking in grounds to indicate a *prima facie* defence to the respondents claim.

Rule 42(1)(a)

Mr Hamman submitted for the respondent that for the applicant to be entitled under this rule it was required that he fall within the parameters set out by the rule.

The preamble to the rule required that the application be made by an affected party. It was argued that the deponent to the founding affidavit was not an affected party for purpose of the rule and that there was no indication in the founding affidavit that the applicants were aware that the application was being launched, had given authorisation and had interest in such application being made. He argued that the respondents were not opposed to the deponent who was an attorney deposing to evidence within his person knowledge, however they objected to him deposing as an affected party.

[17] It is settled law that an applicant must show that he has an interest in the subject matter of the judgement or order sufficiently direct and substantial, *United Watch & Diamond Co(Pty) Ltd v Disa hotels Ltd* 1972 (4) SA 409 (C) and in *Standard General Insurance Co Ltd v Gutman* 1981 (2) SA 426 (C) 433H-436C it was held that an application for rescission stood to be dismissed in the absence of the necessary *locus standi*. *Galp v Tansley NO and Another* 1966 (4) SA 555 (C) was also instructive in the discussion obiter on the affected party

Again, while in reply the deponent contended that he was entitled to launch the application on behalf of his clients, the founding affidavit is lacking on any information on why I must rescind the judgement, how the applicants were prejudiced thereby or adversely affected thereby and what possible defence they had. For example the respondent's claim was drastically reduced to only R250 000.00. I have already indicated that the application for judgement by way of affidavit and annexures was a lengthy one. I have absolutely no reason to interfere

with the order. It is my view that the application for rescission must therefore fail.

[18] Mr Hamman made lengthy submissions on why the deponent an attorney in the office of the State Attorney should not be personally liable for costs in this application. I am not inclined to do so.

[19] In the result the following order is given

1. The application is dismissed with costs.



TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	11 MAY 2015
JUDGMENT RESERVED ON	:	11 MAY 2015
ATTORNEYS FOR THE APPLICANTS	:	THE STATE ATTORNEY
ATTORNEYS FOR THE RESPONDENTS	:	VAN ONSELEN & PARTNERS ATTORNEYS