

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION,
PRETORIA

30/7/15

CASE NO: 2013/1853

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED. ☒
30-7-15 DATE	
..... SIGNATURE	

In the matter between:

IMPERIAL CROWN TRADING 248 (PTY) LTD

APPLICANT

and

INVESTEC PRIVATE BANK LIMITED

RESPONDENT

J U D G M E N T

WRIGHT J

1. The respondent bank launched motion proceedings, in one application, against the applicant and against twenty five other respondents. The applicant was cited as fifth respondent. The applicant's erstwhile attorney delivered a notice of intention to oppose the main application. At least two extensions of time were granted to the applicant within which to file an answering affidavit. No answering affidavit was forthcoming. A notice of set down, placing the

matter, correctly, on the unopposed roll was served on the applicant's erstwhile attorney at a time when he was still the applicant's attorney of record. The notice sets the matter down for a particular date at a certain time "*or so soon thereafter as Counsel for the Respondent may be heard.*" In my view nothing turns on the incorrect reference to a respondent's counsel rather than to an applicant's counsel.

2. The notice contains an incorrect case number. The case number on the notice of set down is that of a different court file in which the parties are the same as in the main application in the present case. It appears that the Registrar opened a duplicate file with a different case number. At least because the incorrect number did not cause either the applicant or the applicant's erstwhile attorney to do anything or not to do anything it is not relevant to the present proceedings. The notice of set down did not specify that relief would be sought against the fifth respondent only. In my view nothing turns on this. In my view none of the three imperfections in the notice of set down, considered alone or in combination, led to the judgment being sought or granted erroneously within the meaning of Uniform Rule 42(1)(a).
3. The applicant's counsel suggests that the notice of set down should have been served on the applicant's present attorney. This attorney came on record after the set down was served on the erstwhile attorney while that attorney was still on record. I disagree with counsel. See **De Wet and others v Western Bank Ltd 1979 (2) SA 1031 SCA** at 1038.
4. The applicant relies on the common law. The question, in this case, is whether or not the applicant has shown sufficient cause. See **Colyn v Tiger Food Industries 2003(6) 1 SCA** at paragraph 4.
5. The papers in the present application are lengthy and complex. Both sides have filed two sets of papers. The heat between the parties and between their attorneys rises as one ploughs through the papers. The respondent seeks to strike out certain portions of the applicant's papers. I am not inclined to grant the striking out. Hard talking is done in portions of the papers sought to be struck but in my view the applicant has not crossed the line. The statements are made in the course of presenting a defence. Mere repetition does not

prejudice the respondent. In my view it would be fair to order the parties to pay there own costs in the striking out application.

6. In short, the applicant says that it intended to oppose the main application and was in the process of preparing answering papers when judgment was taken against it. The applicant claims to have been unaware of the notice of set down or the date of set down. The applicant is a very unlucky litigant. Its erstwhile attorney, through an office error, missed the notice of set down. The applicant's present attorney, through oversight, missed a clear reference to the relevant court date in a letter sent to him by the respondent's attorney well before the court date but after the applicant had changed attorneys.
7. The respondent's present attorney provided, in a supplementary affidavit, a copy of an e-mail sent to Mr Du Raan, the moving force behind the applicant. This e-mail should have featured in the first set of opposing papers. The e-mail ostensibly informs Mr Du Raan, timeously, of the looming court date. Mr Du Raan denies having received the e-mail. He points to no extraneous proof that the e-mail was sent, received or read. He says that the e-mail is a fabrication.
8. The respondent relies on the decision in **Colyn**, at paragraph 12, saying that the applicant's attorneys' negligent conduct attracts for the applicant the onus to show that it has good prospects on the merits of the main application rather than merely a bona fide defence which has some prospect of success. Even assuming for the moment, and in the respondent's favour, that the explanation for the applicant's default was weak and that its attorneys were as slack as those in **Colyn**, I would distinguish **Colyn** from the present case. In **Colyn**, the respondent in the rescission application had instituted an action. In the present case the respondent launched an application. The present applicant, in the main application, would thus enjoy the benefit of the decisions in **Plascon-Evans** and related cases where sufficient disputes of fact exist. This is so even where the present applicant (the respondent in the main application) bears the onus to prove a particular defence. See **Rawlins v Caravantruck (Pty) Ltd 1993(1) SA 537 A** at 541-542. In the present application the cause of action is non-payment of a loan. Without putting too fine a point on it, the defence raised is that the agreement was a sham

involving a contravention of section 38 of the 1973 Companies Act in which the respondent participated. Both sides make strong allegations which are denied by the other side. There are far reaching disputes of fact. In my view the applicant has done just enough to appear to raise a bona fide defence with some prospect of success, taking into account the degree of the applicant's legal teams' less than ideal conduct.

9. The opposition to the application was not unreasonable and in my view the parties should pay their own costs.

ORDER

1. The application by the respondent to strike out is dismissed. The parties shall pay their own costs.
2. The default judgment granted against the applicant (fifth respondent in the main application) is rescinded. The parties shall pay their own costs.



GC WRIGHT J
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION,
PRETORIA

On behalf of the Applicant:

Adv P Louw SC

Instructed by:

Geyser Van Rooyen

012 344 1445

On behalf of the Respondent:

Adv M Leathern SC

Instructed by:

Van Der Merwe Du Toit Inc

012 452 1314

Date of Hearing:

30 July 2015

Date of Judgment:

30 July 2015