

In the KwaZulu-Natal High Court, Durban
Republic of South Africa

Case No : 697/2010

In the matter between :

Disarie Gladys Samuels

First Applicant

Harry John Richard Fouche

Second Applicant

Cederick Shelton Samuels

Third Applicant

and

William Lawson MacMillan

Respondent

Judgment

Lopes J

[1] The applicants in this matter seek an order rescinding the judgment granted by Vahed J on the 3rd December 2012 under the above case number.

[2] The history of the matter may be summarised as follows :

- (a) on the 21st January 2010 the respondent caused a summons to be issued against the applicants claiming payment of the sum of R1 000 000 together with interest thereon and costs on the scale as between attorney and client;
- (b) the respondent's cause of action was based on a written agreement of sale in terms of which the respondent sold his shares in a proprietary limited company to the first applicant;
- (c) in due course, and during March of 2010 the applicants delivered a plea to the respondent's particulars of claim together with a claim in reconvention;
- (d) on the 31st May 2010 the respondent delivered a plea to the applicants' claim in reconvention.

[3] On the 3rd December 2012 the matter came before Vahed J on trial. At the outset the applicants' counsel applied for an adjournment of the action on the basis that the matter was not ready to proceed. Vahed J refused that adjournment and granted the applicants' legal representative leave to withdraw. He then immediately granted absolution from the instance with costs on an attorney and client scale in respect of the applicants' claim-in-reconvention, and granted judgment in favour of the respondent for the relief it sought in its claim in convention.

[4] The applicants now seek an order rescinding the judgment of Vahed J. Mr *Tobias* who appeared for the applicants, ultimately sought to rely upon the provisions

of Rule 42(1)(a) and (c) of the Uniform Rules of this Court as the basis upon which he moved for the rescission application.

[5] Mr *Tobias* conceded that because the matter did not relate to a situation where the applicants had been in default of a notice to defend or of a plea, the provisions of Rule 35(1) were inapplicable.

[6] Rule 42 of the Uniform Rules of this Court provides :

‘(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;

...

(c) an order or judgment granted as the result of a mistake common to the parties.’

[7] Mr *Tobias* contended that the judgment had been erroneously sought and erroneously granted because it had not been drawn to the attention of Vahed J, nor had he considered the fact, that the respondent, as plaintiff, had not complied with the provisions of Rule 37(1) of the Uniform Rules of this Court prior to setting the matter down or in any event prior to the date of the judgment.

[8] Rule 37(1) provides :

'A party who receives notice of the trial date of an action shall, if he has not yet made discovery in terms of rule 35, within 15 days deliver a sworn statement which complies with rule 35(2).'

Sub-rule 35(2) deals with the provision of a discovery affidavit. Mr *Tobias* submitted that the effect of sub-rule 37(1) is that a party to an action is obliged to make discovery prior to setting the matter down for trial.

[9] Mr *Combrinck*, who appeared for the respondent, submitted that there were two questions to be answered :

- (a) whether the judgment of Vahed J was granted 'in the absence of any party affected thereby' as required by Rule 42(1)(a); and
- (b) whether the judgment was erroneously sought or erroneously granted as a result of a mistake common to the parties.

In view of the conclusion at which I have arrived in regard to the second question, I do not deal with the first question.

[10] It was common cause between the parties that there is no evidence that Vahed J considered or dealt with the question of whether the respondent had complied with the provisions of the discovery rule prior to, or within 15 days after setting the matter down for trial. Mr *Tobias* submitted that the provision of sub-rule 37(1) which should have been drawn to his attention by the legal representative for the respondent was a factor which Vahed J should have considered in refusing to grant a judgment after the applicants' legal representatives had withdrawn.

[11] In my view the short answer to this application is that it was irrelevant for Vahed J to have considered whether or not the respondent had made discovery, at least at the stage when he was granting judgment.

[12] The consequences for plaintiffs in not having made discovery at the time that the matter is set down for trial may include the fact that they may be precluded by a judge from admitting evidence relating to items not discovered at the trial, that they may need to request an adjournment in order to discover so that they can use documents at the trial, and they may become mulcted in costs because of their failure to discover. Those are very different matters to the plaintiff in an action being denied the ability to prosecute a claim in the absence of a defence because of a lack of discovery. The main purpose of discovery is to apprise the defendant of the documents which the plaintiff intends to use at the trial. It is a process primarily designed to prevent surprise and to ensure that at the outset of the trial all parties are fully apprised of the case with which they have to deal or meet.

[13] In this case the respondent did not discover. The applicants did not, however, take this point in order to prevent the leading of any evidence by the respondent. They sought an adjournment on the basis that the matter could not proceed and when that was refused their legal representatives withdrew from representing them. At that stage Vahed J was only required to consider whether or not he could grant default judgment. Whether or not the respondent had discovered at that stage became irrelevant. I have no doubt that, had the lack of discovery been drawn to his

attention by the respondent's counsel at the hearing when he granted judgment, he would have regarded that fact as irrelevant, and granted judgment anyway.

[14] I am accordingly of the view that the submission of Mr *Tobias* regarding the prejudice to the applicants as a result of Vahed J not having considered this aspect is without merit. Accordingly, it cannot be said that the judgment of Vahed J was erroneously sought or erroneously granted. In addition, it was clearly not granted as a result of a mistake common to the parties.

[15] In the circumstances the application falls to be dismissed with costs. I accordingly make the following order :

The application for rescission is dismissed with costs.

Date of hearing : 15th August 2013

Date of judgment : 26th August 2013

Counsel for the Applicant : D G Tobias (instructed by Ashika Maharaj and Associates)

Counsel for the Respondent : P J Combrinck (instructed by H J van Rensburg Inc)