

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG NORTH HIGH COURT, PRETORIA)

CASE NO: 40554/06

DATE: 2009.04.24

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|------------------------------------|------------------------------|
| ORIGINAL DOCUMENT IS NOT AFFIDAVIT |                              |
| (1) IMPROBABLE                     | YES/NO                       |
| (2) OF INTEREST TO OTHER JUDGES    | YES/NO                       |
| (3) REVISED                        | ✓                            |
| DATE <u>11/9/09</u>                | SIGNATURE <u>[Signature]</u> |

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In the matter between

HAZAR CORPORATION (PTY) LTD

Applicant

and

MUASSA INVESTMENTS CC

1<sup>st</sup> Respondent

Trading as CROWN FABRICO

THE SHERIFF OF THE HIGH COURT:

CENTURION

2<sup>nd</sup> Respondent

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## JUDGMENT

BERTELSMANN J: This is an application for the rescission of a judgment that was granted against the applicant which judgment was granted a considerable period ago, on the 27 March 2007.

The applicant alleges, by way of an affidavit filed by Mr Knight, that it became aware of the judgment only when the sheriff arrived with a warrant for execution consequent upon a judgment of default having been

granted by default.

An urgent application was launched which was dismissed for lack of urgency. Thereafter an application for rescission was filed which had to be postponed because no heads of argument had been filed and nobody had apparently been instructed to prepare them. Thereafter the matter was enrolled for the 13<sup>th</sup> May 2008 and it was dismissed with costs because there was no appearance for the applicant. The court is now faced with a further application that the judgments granted on the 27<sup>th</sup> March 2008 and the 13<sup>th</sup> May 2008 should be rescinded.

10       An explanation for the failure to file heads of argument is non-existent. The explanation for the failure to enter appearance against the claim is that the summons was served on an address that was no longer occupied by the applicant. There is a dispute of fact in this regard. The question whether the summons did come to the applicant's management's notice need, however, not be debated at this stage.

20       On the 13<sup>th</sup> May 2008 when the matter was enrolled, there was no appearance for the applicant and the application was dismissed. The explanation that is offered for that failure is that settlement negotiations had been entered into, that there had been some meeting with a representative of the first respondent and that the deponent, Mr Knight, *bona fide* believed that the matter would not proceed. That is all that is said. There is no reference to a draft agreement, to proposals, no reference to further meetings. There is no explanation of the fact that the previous attorneys, who represented the applicant at that stage, sent an e-mail to Mr Knight to advise applicant that the matter was still on the roll.

There is no reference to any telephone call or any letter that was sent to the first respondent's representatives or directors, or to Mr Yussep, to confirm that the matter would not proceed. There is no attendance at court. There is no explanation why there was not even a simple telephone call made to Mr Yussep to confirm that the matter would not proceed.

When the matter was enrolled for this week, there was no practice note. There were no heads of argument. The matter was kept on the roll because of the first respondent's request that the matter be dealt with in the light of the history that I have recited. The absence of a practice note and the absence of heads of argument until this morning has not been explained in the condonation application that was presented today. There was a communication from the Bar that instructions were given at a very late stage.

There is a history of a change of attorneys at critical points in the process. All these machinations point to a litigant that is in deep trouble and cannot keep attorneys in funds. There is no other explanation for the repeated change of attorneys. Quite apart from which, however, the defence that is raised against the claim by the first respondent for which judgment was granted, is that the applicant allegedly has a counterclaim. The first version of this counterclaim was presented in an affidavit by Mr Knight which asserted that it was the applicant who had suffered damages. When it was pointed out in the answering affidavit that business had in fact been conducted through two related corporate entities that did business together, the applicant and an associated

company, who dealt with Mr Price to whom deliveries had been made, Mr Knight in his replying affidavit offered the explanation that because the companies were so closely associated, he had confused their identity in his own mind.

It is very difficult to understand how a *bona fide* business person, who is a director of two companies that attend to separate branches of his business and presumably have separate books of account, operating at least notionally independently although controlled by the same shareholders, could conceivably and honestly have come to make a  
10 mistake of such significant dimensions. It creates the impression of a counterclaim having hurriedly been concocted and put on paper to proffer a defence to avoid incurring a judgment debt.

In any event, when the explanation was advanced that these two companies had operated together, it was averred the associated company had suffered damages which the applicant 'had taken over'. There is not a title of documentary evidence to support this version. There are no book entries. There is no cession. There is no transfer. There are no delivery notes. There are no inter-company notes. There is no shred of bookkeeping of whatever nature. There is no company  
20 resolution. There is nothing to substantiate the allegation that is now being placed before the court. Today, when the consequences of this litany of all the failures to comply with the Rules of this Court must be explained there is again no practice note filed timeously. No heads of argument are filed. There is no explanation other than that that was offered from the Bar, that instructions were received late. There was no

apology to the first respondent and there was no apology to the court. As I have already underlined, there has been no application for condonation.

Against this background the essential elements of an application for a rescission of judgment, are absent, namely that there must be a *bona fide* explanation for the default and that there is a *bona fide* defence, that, if the judgment is rescinded, would constitute a defence to the first respondent's claim.

The history of this matter allows only one of two conclusions. There is either a consistent purposeful attempt at evading the  
10 consequences of the judgment or there is a persistent abuse of the processes of this court, or perhaps both, and the court must set its face sternly against these machinations that prevent honest businessmen from enforcing their claims.

The application for rescission of judgment is dismissed. Because of the woeful history of the application, it is dismissed with costs on the scale of attorney and client.

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