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Case No. 8/1983

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

MARTROSE ENTERPRISES (PROPRIETARY) LIMITED

Appellant

and

DEREK KEITH EMBLIN

Respondent

CORAM:

CILLIÉ, BOTHJA JJA et SMALBERGER AJA

HEARD:

6 NOVEMBER 1984

DELIVERED:

30 NOVEMBER 1984

JUDGMENT

/BOTHJA JA ...

BOTHA JA:-

This appeal was set down for hearing on 6 November 1984. When the matter was called in Court on that date there was no appearance for or by the respondent. He had in fact not received notice of the date of hearing. Counsel for the appellant (having been requested in advance to do so) addressed us first on the question whether the appeal should be entertained on its merits, having regard to the facts I have mentioned. At the conclusion of the argument on that question the Court announced that it was prepared to entertain the appeal on its merits and argument proceeded on that basis. This Court decided to deal with the appeal on its merits because of certain exceptional features of the circumstances surrounding the respondent's default of appearance. It is necessary now to refer to those circumstances. I shall do so as briefly as possible.

/The ...

The judgment appealed against was delivered in the Witwatersrand Local Division on 21 December 1982, in an action instituted by the respondent as plaintiff against the appellant as defendant. Summons had been issued in May 1981 and the hearing of the trial took place during October 1982. Throughout the proceedings in the Court a quo the respondent was represented by a firm of attorneys in Benoni, Slomowitz, Dobie, Smith and Myburgh Inc, and their correspondent in Johannesburg, Mr David R Snaier, who acted as the attorney of record. The appellant's notice of appeal was served on Mr Snaier and on the Registrar of this Court on 13 January 1983. For a considerable period of time thereafter the respondent's aforementioned attorneys continued to act on his behalf in matters pertaining to the prosecution of the appeal. So, for instance, on 18 March 1983, Mr Slome, a member of the Benoni firm of attorneys, refused, on the respondent's behalf, to accede to a request by the appellant's

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attorney to consent to an extension of the time in which the appellant was required to file copies of the record; on 15 June 1983 Mr Snaier accepted service on the respondent's behalf of an application by the appellant for condonation of the late filing of copies of the record; and on the same day Mr Snaier acknowledged receipt of two copies of the record and of notice to the Registrar that security for costs had been agreed upon. A firm of Bloemfontein attorneys, Messrs E G Cooper and Sons, was appointed to act on the respondent's behalf at the seat of this Court.

Then, on 17 and 24 February 1984, a document headed "Notice of Withdrawal" was served on the Registrar of this Court and on the appellant's Johannesburg and Bloemfontein attorneys. It purports to be signed on behalf of the respondent's Benoni, Johannesburg and Bloemfontein attorneys, and in part it reads as follows:

/"BE ...

"BE PLEASED TO TAKE NOTICE THAT SLOMOWITZ, DOBIE, SMITH & MYBURGH of Benoni and DAVID R SNAIER of Johannesburg and E G COOPER & SONS of Bloemfontein, hereby withdraw as Attorneys of Record for the abovementioned Respondent (Plaintiff a quo).

AND TAKE NOTICE FURTHER that the Respondent's last known address is 123 Elsie Road, Bapsfontein, care of P O Box 17343, Hillbrow, 2038."

In May 1984 the appellant's Johannesburg attorney attempted to serve a copy of the appellant's heads of argument and list of authorities on the respondent in compliance with the provisions of A D Rule 8 (1). He did so in two ways. First, he sent a copy of the documents by registered post to the respondent at the post office box number in Hillbrow mentioned in the notice of withdrawal quoted above. The envelope was returned by the post office, marked "Unknown", and bearing the legend: "Return to sender. Not for Box 17343". Secondly, he

/despatched ...

despatched a copy of the documents to the Deputy Sheriff of Bronkhorstspuit with a request that they be served on the respondent at "123 Elsie Road, Bapsfontein", the other address mentioned in the notice of withdrawal. The Deputy Sheriff thereafter reported to the Registrar of this Court that the respondent could not be found at the address stated or elsewhere in Bapsfontein and that enquiries from a number of people and an estate agency in Bapsfontein revealed that the respondent was wholly unknown in that area.

On 24 September 1984 the Registrar of this Court attempted to comply with the requirements of A D Rule 7 (1) by despatching by registered post an envelope containing a notice of set down of the hearing of the appeal on 6 November 1984, addressed to the respondent's erstwhile Benoni attorneys, but at the address of Mr Snaier in Johannesburg, as it appeared on a number of

/documents ...

documents in the Registrar's file. It would seem that Mr Snaier had in the meantime moved from that address to another. In any event, the envelope was returned by the post office to the Registrar, with stamps on it indicating that the addressee had "left" and that delivery could not be effected.

On 15 October 1984 (after the appellant's counsel had been notified that the Court would require argument on the question whether the appeal should be heard on its merits) the appellant's attorney filed with the Registrar an affidavit deposed to on 8 October 1984 by Mr Slome, referred to above, which reads as follows:

" 1.

I am an Attorney of the Supreme Court of South Africa (Transvaal Provincial Division) duly admitted and practising as such as a director of Slomowitz, Dobie, Smith and Myburgh Inc. at 65 Bedford Avenue, Benoni (hereinafter referred to as 'the firm').

/2. ...

2.

The facts contained in this affidavit are within my personal knowledge.

3.

I represented the Respondent, not only in the above appeal but in the trial and motion proceedings between the Appellant and him, and I continued to do so until the firm withdrew as the Respondent's Attorneys of Record in this appeal.

4.

The firm withdrew as the Respondent's Attorneys of Record pursuant to instructions to do so given to me by the Respondent, who informed me that he could not afford to contest the appeal. The Respondent informed me further that, in so doing, he did not intend to concede the appeal. However, he did not intend to attend the hearing of the appeal or to argue same, either in person or by Counsel, but would leave the matter in the hands of the Court.

5.

I am not in contact with the Respondent at present, nor is his present address known to me. I believe that he is somewhere in Zululand."

On these facts it is clear that if this Court

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declined to dispose of the appeal on the merits, the only alternative would have been to postpone the hearing of it. But if that course was followed, it would have had the effect of depriving the appellant of its right to be heard in this Court, unless the appellant took steps to trace the present whereabouts of the respondent and thereafter, depending on the outcome thereof, to cause a fresh notice of set down to be served on him, or to approach this Court by way of a substantive application for directions as to a substituted form of service or other relief. The Court decided against burdening appellant with the necessity of taking such further steps in order to procure a decision on the merits of the appeal. In weighing up the interests of the appellant in having the appeal heard against the interests of the respondent in being notified of the date of the hearing of the appeal, the Court considered the contents of Mr Slome's abovequoted affidavit to be of decisive importance.

/Paragraph ...

Paragraph 4 of Mr Slome's affidavit makes it quite clear why the respondent terminated his attorneys' mandate to represent him in matters relating to the appeal. There is, of course, no reason to doubt the correctness of the information supplied by Mr Slome, nor is there any reason to think that, in disclosing that information, Mr Slome breached any confidence reposed in him by the respondent. The Court is accordingly obliged to take cognizance of the information which has been placed before it.

That information discloses that the respondent intentionally and deliberately terminated his attorneys' mandate to act for him in the appeal, upon the footing that he did not desire to be afforded the opportunity of being represented or being present himself at the hearing of the appeal. It is implicit in his instructions to Mr Slome that he did not expect to be notified

/of ...

of the date of hearing. That being his attitude, considerations of fairness dictate that the appellant's right to have the appeal heard should not be frustrated or postponed because of the absence of notice of the date of hearing to the respondent, having regard also to the fact that his present whereabouts cannot readily be ascertained.

It is conceivable that the respondent's attitude towards the appeal may have changed since the occasion of his instructions to Mr Slome, as deposed to by the latter, because of an improvement of his financial position or for some other reason. That possibility should not, however, carry any weight, for it was the respondent himself who deliberately severed the link of communication between himself, on the one hand, and the appellant and its attorneys, on the other, in connection with matters relating to the further prosecution of the appeal, and

/if ...

if he wished to restore such link in order to be notified of the date of hearing of the appeal, it was incumbent upon him to take appropriate steps in that regard. This he has failed to do.

I accordingly turn now to the consideration of the merits of the appeal.

The appellant carries on business as a dealer in second-hand fork-lift trucks ("fork-lifts"). The respondent was formerly employed by the appellant as a salesman. He was paid a salary of R800 per month and a travelling allowance of R400 per month. In addition, he earned a commission on sales of fork-lifts effected by him. He stopped working for the appellant as from the end of March 1981. It was the events surrounding the termination of his association with the appellant at that time that gave rise to the litigation between

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the parties.

Some time prior to the end of March 1981 the appellant's sole director, Milligan, received information which caused him to believe that the respondent, acting in collusion with one Couling, was diverting to the latter, for his benefit, sales of fork-lifts that should have been effected by the respondent on behalf of and for the benefit of the appellant. Milligan consulted his attorney and as a result an application to Court for an interdict against Couling and the respondent was launched. The papers in that application were served on the respondent on 31 March 1981, at the appellant's offices. Milligan and his attorney were present. In the ensuing discussion the respondent demanded payment of the remuneration due to him for the month of March, but his demand was turned down. The respondent left and thereafter did not return to work. The further

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