



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

CASE NO: PS 23/13

Not reportable

In the matter between

BURMEISTER DE LANGE SONI INC

First Applicant

ZELPY 2345 (PTY) LTD T/A REAL

ESTATES INVESTMENTS (PTY) LTD

Second Applicant

and

MICHELLE PAY

Respondent

Application heard: 22 March 2018

Judgment delivered: 6 April 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an application to rescind a judgment granted by default by Lagrange J in Chambers on 31 May 2016. In his order, Lagrange J directed the first respondent in the main application (the first applicant in this application, and to whom I shall refer as 'the applicant') to pay the respondent the amount of R 18 378.21, being commission due and owing, and a further amount of R11 300, being a deduction from salary.
- [2] The applicant makes no reference in the founding affidavit to the statutory or regulatory provision in terms of which the application is brought. The heads of argument signed and filed by the applicant make matters no clearer, but for a passing reference to an absence of wilful default. The focus of the heads is on preliminary points of a trivial nature. For example, the applicant avers that when the answering affidavit was signed, the commissioner of oaths failed to use the pronoun 'she' when the oath was administered (the affidavit, as do the regulations, reflect the word 'he'). From this it is deduced that the answering affidavit is not an affidavit and that the application is therefore unopposed. The heads are signed by an attorney, who describes himself as the managing director of the first applicant. This court has long required parties' representatives to avoid technicalities and point-taking, and to deal with the substantive merits of the disputes in which they are engaged. The applicant's heads of argument represent the antithesis of what the court expects of practitioners. The inadequacy of the applicants' heads of argument was no doubt drawn to the attention of the applicants' attorney. Counsel thereafter prepared what are described as supplementary heads of argument, and which formed the basis of the submissions made on the applicants' behalf.

- [3] The matter has a history that extends beyond the judgment by default that is the subject of the present application. Judgment by default was originally granted against the first applicant in February 2014 by Molahlehi J in the sums of R18 378.21, being commission owed to the respondent, and against both applicants in the sum of R 11 300, being a deduction from the respondent's remuneration. That judgment was rescinded on 5 February 2015. Paragraph 2 of the order reads "*The First and Second Respondents are granted leave to defend the Respondent's action*".
- [4] The applicants aver that for a period of two years, the respondent took no steps to proceed with the matter and that they accepted that the respondent had elected not to pursue the matter. The applicants state further that they did not receive any notice of the respondent's intention to seek default judgment to which they were entitled in terms of Rule 7 nor of the directive issued by the court calling upon them to file a statement in response to the statement of claim, and that they became aware of the judgment only on 6 June 2016. The applicants submit that they have a *bona fide* defence to the respondent's claim, the basis of which is set out in the previous application for rescission.
- [5] An application for rescission may be brought either under s 165 of the LRA or in terms of Rule 16A (1) (b). The difference between the two procedures relates to the requirement of good cause – it has been held that under Rule 16, it is incumbent on an applicant to provide a reasonable explanation for his or her default, that the application must be bona fide and not made with the intention of delay and to demonstrate a bona fide defence to the claim. Section 165 on the other hand simply requires an applicant to establish that the judgment was erroneously granted in the absence of the party, and is ordinarily used when party was genuinely unaware that a matter had been set down. Put another way, a judgment is granted erroneously if at the time it was granted, there existed facts of which the court was unaware and, had it been aware of them, it would not have granted the judgment.

- [6] It is not disputed that the terms of the order granted on 5 February 2015 specifically grant the applicant leave to defend the action. It was incumbent on the applicants therefore to have filed a statement in reply to the statement of claim within the period permitted by the Rules. They failed to do so.
- [7] It would appear that on 17 March 2016, the registrar wrote to the applicants recording that Cele J had perused the file and directed that the applicants file a statement of defence *'within 30 days from today with a condonation application for the lateness calculated from the date of the rescission ruling'*. The letter went on to advise that in the absence of the filing of a statement of defence, the file would be presented to a judge for default judgment. The applicants deny having received the letter.
- [8] To the extent that the applicant's rely on the absence of notice of the application for default judgment, the simple answer is that they were never entitled to notice. Rule 16 was amended in 2001 to remove the obligation on the registrar to give notice to parties other than an applicant (see *BDO Spencer Stuart Inc v Otto* (2002) 23 ILJ 1374 (LC)). Similarly, and to the extent that the applicants seeks to show the absence of wilful default by reference to their failure to receive notice of the directive issued by Cele J, there is no provision in the Rules or the practice Manual that entitle the applicants to such notice. On the contrary, Paragraph 6 of the Manual makes clear that ordinarily, default judgments will be considered in Chambers. There is no requirement of notice.
- [9] The fact of the matter remains that the applicants, in terms of the order of rescission that they sought and were granted on 5 February 2015, were obliged to file a response to the statement of claim. It does not assist the applicants to assert, as they have done, that they were lulled into assuming that the respondent had elected not to pursue her claim. The applicants were obliged to file their response within 10 court days of the order – they could not in that short

period, in the absence of any express indication to the contrary from the respondent, have reasonably formed the view that she had abandoned her claim. The first applicant is a firm of attorneys and could not have misconceived of the nature and extent of its obligations once the order dated 5 February 2015 had been granted. The explanation for the failure to file the response is manifestly without merit.

- [10] The applicant has failed to satisfy the requirement of good cause in the sense of a reasonable and satisfactory explanation for its default. In these circumstances, their prospects of success are not relevant. Even if they were, they are in my view not so overwhelming so as to outweigh the failure to satisfy the requirement of good cause. The application stands to be dismissed. Finally, there is no reason to deny the respondent her costs.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk
Judge

REPRESENTATION

For the applicants: Adv. L Voultsos, instructed by BDLS Attorneys

For the respondent: Adv. C Burton, instructed by Wikus van Rensburg Attorneys