REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 41433/12

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

LESLIE JANICE BECK First Applicant

CARL BECK Second Applicant

And

DR ENRICO F MARASCHIN INC Respondent

J U D G M E N T

MAKUME, J:

[1] In this matter the applicants seek an order rescinding and setting aside the judgment entered against them on the 6th February 2013.

[2] In the judgment the applicants were ordered to pay the respondent a sum of R106 620,40 plus interest thereon at the rate of 15,5% from 2nd November 2012 to date of payment.

[3] It is necessary to set out a brief narrative of certain facts and circumstances giving rise to this litigation which have a bearing on the question to be answered in this application.

[4] On the 29th September 2009 the applicant gave birth to a baby girl Isabella Beck ("*Isabella*"). The baby was born three months premature and was admitted to intensive care due to her condition.

[5] Dr Maraschin the sole member and director of the respondent was Isabella's paediatrician. He attended and treated Isabella from date of birth up until four months thereafter.

[6] The respondent remitted all invoices indicating the charges and fees due, to Discovery Health the first applicant's medical aid. Payments were made however some invoices were disputed leaving the balance owing and due to the Respondent was the sum of R106 620,40. This amount is still owing.

[7] The balance outstanding is as a result of the fact that Discovery Health pays only up to the rate that the first applicant's medical aid plan covered and any differences remained the responsibility of the member.

[8] When the respondent served and filed the application seeking payment of the balance of R106 620,40 the second applicant filed an opposing affidavit in which he raised the following defences namely:

8.1 That he was not a party to the doctor/patient contract that was signed by his wife the first applicant. He alleges that the respondent's cause of action is based on that doctor patient contract.

8.2 That the personal undertakings that he as second applicant made to pay the balance of R106 620,40 do not constitute a suretyship and consequently no legal *nexus* exists between him and the respondent. He contends that he is wrongly joined in the proceedings.

8.3 That the agreement between the parties is a credit agreement within the meaning of the provisions of the National Credit Act 34 of 2005 and accordingly the respondent should have prior to instituting the application have sent them a notice as is required by the provisions of sections 129(1) and 130(1) of the National Credit Act.

[9] Having filed the opposing affidavit the matter was set down for hearing before Lamont J on the 5th February 2013. A few days before the date of hearing the applicant's attorneys withdrew as attorneys of record for the applicants.

[10] In paragraph [2] of his judgment Lamont J says the following:

> "*The applicant's case was that a contract was concluded between the first and second respondents and the applicant in terms whereof the applicant was entitled to payment of the sum claimed for work done and services rendered together with goods supplied in connection therewith. The applicant attached a detailed statement setting out how the amount was claimed.*"

[11] What is significant is that nowhere in the judgment does the learned Lamont J say that the applicant's claim was based on Annexure "FA2" that is the doctor/patient contract. All he says is that a contract was concluded between the first and second respondents as well as the applicant. He then refers to the detailed statement of account.

[12] When referring to the detailed statement of account he was obviously referring to Annexures "FA4" on pages 26 up to page 47. The detailed statement of account is issued in the name of Dr Enrico Maraschin Inc.

[13] It is common cause that when the first applicant's medical aid was not paying the balance of R106 620,40 her husband the second applicant through

his attorneys Messrs W B Zwiegers addressed a letter to the respondent's attorneys dated the 6th July 2010 which letter in part reads as follows:

> "*Carl has requested me to inform you that we represent him in substantial claims, inter alia, against the Gauteng Department of Transport.*
>
> *The matter has reached the point where we are now in a position to enrol it which will be done once we are out of recess on the 27th of July 2010.*
>
> *Carl has indicated that your account is the first that will be paid from the proceeds.*"

[14] This letter was later followed by a similar one dated the 29th August 2011 from Zwiegers Attorneys to the respondent's attorneys which letter reads as follows:

> "*In the interim this serves to confirm our client's intention to pay once he is in a position to do so.*"

[15] In both these letters reference to "our client" means Carl Beck the second respondent.

[16] On the 25th February 2013 two weeks after judgment had been entered and a day before the applicants filed an application for leave to appeal second applicant addressed a letter to the respondent and copied his attorneys. In the letter he says the following:

"*Dear Robyn/Enrico*

I was really disappointed in the manner the matter was handled from your side especially since we made written commitment to settle the account.

However, in an attempt to rectify the situation I propose the settlement of the outstanding fees due by the end of April 2013, at which time some of our recoveries would have been made."

[17] It is clear that the "*written commitment*" that the applicant refers hereto is the letter dated the 6th July 2010 and others that followed. It is on this correspondence on which the respondent's claim is based not on Annexure "FA2".

CONDONATION

[18] The applicants seeks condonation for the late filing of this application but say nothing in support thereof. The application was launched in August 2013. There is no explanation why they waited six months since judgment more so that they had withdrawn their ill-fated application for leave to appeal on the 19th March 2013.

[19] What is further strange is that in paragraph 9 of his affidavit Carl Ludwig Beck says that during May 2013 Attorney Patrick O'Donovan attempted to negotiate a settlement which settlement would be subject to a payment of the judgment debt as soon as he shall have received payment from the Gauteng Provincial Government. This clearly shows that the

applicants had no intention of challenging the judgment and were prepared to pay.

[20] On the 20th February 2013 the applicants' attorney Messrs Zwiegers addressed a letter to the respondent's attorneys in which letter they say the following:

> "*Our instructions are that our client wished to take your client up on its offer to reach some form of settlement. We are available to meet during the course of next week some time and would be grateful if you could arrange with your client so that we may have a roundtable at you and your client's convenience.*"

[21] The sum total of all the correspondence from the applicants indicates that the applicants knew of the judgment and adopted tactics aimed at delaying payment. On that aspect alone this application must fail.

A *BONA FIDE* DEFENCE

[22] An applicant seeking to set aside a judgment or order of court taken in his absence needs to satisfy the court hearing the application that he has a *bona fide* defence to the plaintiff's claim.

[23] The second applicant in his opposing affidavit in the main action dated 5th December 2012 did not deal with the merits of the claim against him and his wife. He raised two technical defences the first saying that he did not sign

the document marked “FA2” and therefore he was wrongly sued. He attached to his affidavit an unsigned affidavit by his wife the first applicant.

[24] Technically his wife the first applicant did not plead to the claim. She had no answering affidavit on the merits. Judgment was accordingly granted against her in default.

[25] The second technical defence was that the agreement between applicant and the respondent fell within the ambit of the National Credit Act and that the respondent failed to deliver a notice to the applicants as is required by the provisions of sections 129(1) and 130(1) of Act 34 of 2005.

[26] In the present application for rescission the applicant for the first time raises a point *in limine* that the respondent has no *locus standi* to have launched the application against them because document “FA2” on which he says the cause of action is based was signed between E F Maraschin in his personal capacity and the first applicant. The description of the applicant as Dr Enrico Maraschin Inc non-suits the respondent so argues the applicant.

[27] Once again the applicant has failed to deal with the merits of the matter and has resorted to technical defences. He has not told the court what their defence is to the claim of the respondent.

[28] In dealing with the technical defence in terms of the National Credit Act I have been referred by the respondent to a judgment of Wallis J in the matter

of *JMV Textiles (Pty) Ltd v De Chalain Spare Invest 14 CC and Others* 2010 (6) SA 173 (KZD). At paragraph [33] of that judgment Wallis J says the following:

> "*The agreement is that the respondent rendered his services on credit to applicants. The expectation is that the price of the services will be paid each month as it falls due. There is no fee paid for this and there is no entitlement to pay less than the full amount due each month. The obligation to pay interest flows from default in making timeous payments, not from a legitimate decision not to pay the full amount that is due each month. There is no contemplation that respondent will ever send a bill for only part of what is due or at periodic intervals. This type of transaction is wholly distinct from those that are manifestly intended to fall within section 8(3) that the language should not be stretched to encompass it.*"

[29] Document "FA2" does not create an obligation on the respondent in terms of sections 129(1) and 130 of the National Credit Act. This defence is accordingly without merit. The same applies to the strange new defence raised that the respondent has failed to comply with section 50(1)(c) of the Companies Act. Section 50 of the Companies Act requires that a registration number of the company should appear on documents listed in subsection (1)(c). This does not include the contract entered into between the respondent and the first applicant.

[30] The applicants have not met the requirements for granting rescission of judgment. In my view the arguments advanced in support of the applicants' contentions are so far-fetched and legally untenable and require no further consideration. The defences were misconceived right from the onset.

COSTS

[31] The respondent says that in considering costs of this application same should be punitive costs. There is merit in this request. What remains is whether I should grant such costs against the applicants' attorney *de bonis propriis* or not.

[32] The first applicant never signed any affidavit and yet such affidavit has been attached to the second applicant's affidavit as supporting affidavit. Secondly the affidavits of the applicant was commissioned by his own attorney which aspect is irregular as Mr O'Donovan being the attorney of the applicants has an interest in the outcome of the matter.

[33] The conduct of the applicants' attorneys and the role they played since the judgment was entered is cause for concern. In a matter decided in the Supreme Court of Appeal heard on the 1st March 2010 known as *Francesco Pitelli v Everton Gardens Project CC* Case No 191/09 a judgment by Nugent JA at paragraph [20] the Honourable Judge said the following:

> "*The filing of both an application for leave to appeal and an application to rescind the order was contradictory because for an order to be appealable it must have as one of its features that the order is final in its effect by which I mean that it is not susceptible of being revisited by the court that granted it (see Zweni v Minister of Law and Order 1993 (1) SA 523 (A) at 532J). The fact alone that it was thought fit to file an*

application for rescission immediately raises the question whether the orders are appealable."

[34] In this matter not only did the attorneys file an application for leave to appeal which was later correctly withdrawn they proceeded to address letters to the respondent's attorneys proposing a settlement which promises were never met. In the end they proceeded with this application based on fruitless defences and unsigned affidavits. The attorneys deserve to be punished for this type of shoddy workmanship and for not advising their clients appropriately.

[35] I accordingly make the following order:

1. The application is dismissed.

2. The applicants' attorneys Messrs Zwiegers Attorneys are ordered to pay the respondent's costs on an attorney and client scale *de bonis propriis*.

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M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING	3 MARCH 2014
DATE OF JUDGMENT	14 MARCH 2014