IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: **36986/2009**

13/8/2012

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

10/8/2012
DATE

D WALLIS 1st Applicant

DC WALLIS 2nd Applicant

CF WALLIS 3rd Applicant

SIGNATURE

and

ESKOM HOLDINGS LTD 1st Respondent

LIBRA LANDSCAPE & CLEANING SERVICES CC 2nd Respondent

JUDGMENT

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[1] This is an application for rescission of the order granted by this court on 7 September 2010 whereby plaintiffs' claims against first defendant were dismissed and plaintiffs (the current applicants) were ordered to pay the costs of the action including the costs of the application. It is common cause that this application for rescission is brought in terms of the common law. As the

applicants' claims as against the first respondent only, were dismissed, no relief is claimed against the second respondent.

[2] The deponent on behalf of the applicants is the managing director of the personal injury department of MacRobert Incorporated, Mr LE Scott. According to Mr Scott's affidavit MacRobert Incorporated (*"MacRobert"*) received an instruction from Adendorf Attorneys Incorporated ("Adendorf") of Tyger Valley, Bellville, Western Cape, to issue summons against the first and second defendants on their behalf. At that stage MacRobert was merely acting as a *"post box"* for Adendorf. The matter was allocated to one Deirdre Swanepoel, a professional assistant in Mr Scott's department. Summons was issued and first defendant (*"respondent"*) duly entered appearance to defend. On 12 April 2010 respondent served a request for further particulars for trial on Adendorf care of MacRobert. On 6 May 2010 respondent's Pretoria correspondent attorney addressed a fax to the said Deirdre Swanepoel, requiring the applicants' reply to the request for further particulars by 13 May 2010. On 12 May 2010 the said Pretoria correspondent of respondent again addressed a fax to Deirdre Swanepoel requiring the applicants' reply to the request for further particulars by 15 May 2010, in response to a request for an extension of time apparently deriving from the applicants' attorney. On 19 May 2010 respondent's attorney served MacRobert with a notice of motion in an application to compel the applicants to

reply to the respondent's request for further particulars for trial. This application was set down for hearing on 16 July 2010. On 16 July 2010 the respondent's application to compel was granted and a filing sheet with the court order was served on MacRobert on 5 August 2010.

[3] It is common cause that the applicants failed to react in any way to the service of the court order compelling their reply to the request for further particulars. On 25 August 2010 respondent's attorney served on MacRobert an application for the dismissal of the applicants' claim against respondent. This application was set down for hearing on 7 September 2010. On 7 September 2010 the respondent's application for a dismissal of the applicants' claims was granted and the applicants' claims against the respondent were dismissed with costs. On 10 September 2010 respondent's attorney addressed a fax to second defendant's attorney of record advising that the application to dismiss the applicants' claims against the respondent had been granted.

[4] In his replying affidavit Mr Scott states that he takes no issue to the chronology set out by respondents' attorney in paragraph 4 of the answering affidavit. In the founding affidavit Mr Scott stated that upon receipt of the instruction from Adendorf, the matter was allocated to the said Deirdre Swanepoel and a file was opened

under her reference and she dealt with the matter. He himself had no knowledge of the matter and was not involved in the matter at all at this stage of the proceedings. However, on 14 July 2010 he received a telephone call from a director of Adendorf, enquiring whether he would be prepared to take the file over as the instructing attorney and to liaise directly with the applicants with regard to the continuation of the matter. He was prepared to do so. He requested Ms Adendorf to forward the entire file contents in the possession of Adendorf to him, to enable him to bring himself up to date with the matter and to do the necessary in preparation for the upcoming trial, which had been enrolled for 12 November 2010. At that stage he also requested his secretary to obtain the office file from Deirdre Swanepoel and to advise the latter that he will in future deal with the file. However, Deirdre Swanepoel was on leave at that time and he could not discuss the matter with her. Upon receipt of the correspondent's file contents he requested his secretary to sort, index and paginate the file in preparation for the upcoming trial date and also reserved senior counsel for that purpose. He states that he was at no stage aware of the fact that an application to compel the delivery of further particulars had been served or that an order compelling the delivery of such particulars has been obtained by the respondent.

[5] Mr Scott furthermore states that upon receipt of the file contents from Adendorf it became clear that all the notices and pleadings were not in the file and his secretary requested a candidate attorney at MacRobert's, Verusha Naidoo, to obtain copies of the documents that were not on the file and to ensure that a full set of pleadings, notices and other documents was available. Ms Naidoo communicated with the respondent's attorney of record as well as with second defendant's attorney of record. Her file notes indicate that the court file was not available and that she arranged with second defendant's attorneys to obtain copies of the various outstanding documents that were required and to have them collected on 13 September 2010. However, as Ms Naidoo was hospitalised during the weekend preceding 13 September 2010 she apparently made arrangements with another candidate attorney to collect the documents. The latter merely put the documents on her desk after collecting same.

[6] On 15 September 2010 and during a social conversation with a certain senior advocate, Mr Scott, for the first time, became aware of the dismissal of applicants' claims. Upon subsequently inspecting the file he noticed for the first time the application to compel as well as the court order granted in this respect and the application to dismiss applicants' claim and the court order in that regard. These documents were all among the bundle of documents obtained by

the candidate attorney, Ms Naidoo. As Ms Naidoo was still on sick leave the office file and the documents uplifted were not returned to him. Upon inspecting the documents he also noted that a letter was addressed to Ms Naidoo by first respondent's attorney of record annexing a copy of the application to dismiss. Also this letter was never brought to his attention.

[7] Having gained knowledge pertaining to the documentation as aforesaid Mr Scott immediately addressed a letter to respondent's attorney in which he made certain suggestions and proposals which are not relevant to the current issue. Mr Scott furthermore avers that it was at all times the intention of the applicants to pursue their claims and that they were unaware of the order compelling them to deliver further particulars and what followed thereupon. Mr Scott accordingly submits that what had occurred was due to a *bona fide* error, oversight, and administrative errors. Confirmatory affidavits by Ms Swanepoel, Ms Naidoo and one of the applicants (on behalf of all three applicants) were duly filed, confirming the averments made by Mr Scott relating to each, respectively. In essence, none of these affidavits contains anything in addition to what had already been stated by Mr Scott in his affidavit.

[8] Mr Mulligan, on behalf of respondent, argued that no reasonably acceptable explanation had been put forward by the applicants.

More in particular, it was pointed out that subsequent to a request to that effect respondents' attorneys on 12 May 2010 granted MacRobert an extension to file a reply to the request for trial particulars i. e. from 13 to 15 May 2010. This is indicative of the fact that Ms Swanepoel was aware of the request for trial particulars. However, nowhere in the founding papers is any effort made to explain Ms Swanepoel's failure regarding these issues. In a similar vein, applicants have not offered a satisfactory explanation for their failure to take action pursuant to the copy of the application to dismiss the action which was e-mailed to Ms Naidoo on 6 September 2010. Mr Scott (so the argument goes) merely deals with matters as from 14 July 2010. Hence, no explanation of any kind whatsoever is proffered for McRobert's failure to deal with the issues prior to that date or, for that matter, Adendorf's lack of action.

[9] In ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)*** at 9E – F it was stated:

> *"With that as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has*

a bona fide defence to the plaintiff's claim which prima facie has some prospect of success."

With regard to the question whether *"good cause"* had been shown in that matter, Jones AJA remarked as follows:

> *"[12] I have reservations about accepting that the defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a 'reasonable' explanation. While the courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys (references omitted). Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that count unless, perhaps, the*

weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success." (at 9F – 10A).

[10] I am of the view that, in the current instance, applicants' attorneys' conduct likewise amounts to *"inexcusable inefficiency on their part"*. I also agree that *"it is difficult to regard this as a reasonable explanation."* There simply is no explanation on record why, how, or for what reason, applicants' attorneys, whilst being fully aware of the request for particulars for trial (as is apparent from the request for an extension of time) did not react thereto. Ms Swanepoel's lack of action is glossed over in applicants' papers. Not the slightest attempt to explain her conduct is put forward. This lack of action on MacRobert's part is directly and causally connected to the eventual dismissal of applicants' claim. At the very least an affidavit by Ms Swanepoel explaining the neglect should have been filed. What had happened prior to 14 July 2010 is shrouded in uncertainty. Mr Scott's acceptance of responsibility is, without any doubt, professionally correct and laudable. But such an acceptance of responsibility does not in itself suffice and, moreover, does not cure the defects in the applicants' case. I am, therefore, of the view that applicants have not shown good cause by giving a reasonable explanation for the default. I am furthermore of the view that this is

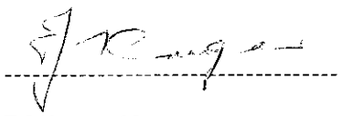
an instance where, however unfortunate it may be, the litigants will have to bear the consequences of the negligence of their attorneys.

[11] With regard to the remarks made by Jones AJA in ***Colyn v Tiger Food Industry supra*** to the effect that *"... perhaps, the weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success"*, it must be borne in mind that those remarks were made with regard to an application for the rescission of summary judgment. I am of the view that, having reached the conclusions as aforesaid, I need not decide whether applicants succeeded in showing a prima facie prospect of success. However, I wish to remark (albeit *obiter)* that there seems to be no good reason why a plaintiff need not show in the application itself that a prima facie prospect of success does exist. In my view the latter requirement has not been satisfied by the applicants. The references in the applicants' papers in this regard merely boil down to averments that it would be for a trial court to decide whether there is merit in applicants' claim and that it was at all times the intention of the applicants to pursue their claim. Although I was urged by counsel on behalf of the applicants that cognisance could and should be taken of the pleadings to the extent that they show that plaintiffs do have a *prima facie* case, the requirement of

"prospect of success" in an application for rescission cannot be satisfied with reference to the pleadings only.

I make the following order:

The application is dismissed with costs.



T J Kruger AJ