IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 50358/2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED
12/8/2014
DATE SIGNATURE

In the matter between:

MUONDLI CONSULTING AND PROJECTS CC	First Applicant
A YELENI	Second Applicant
And	
FIRSTRAND BANK LIMITED T/A AUDI FINANCIAL SERVICES	Respondent

REASONS FOR **JUDGMENT**

STRAUSS, AJ:

1. The applicants launched an application to set aside court orders of Prinsloo J, dated 14 March 2013, which ordered the applicants to file their discovery affidavit within 10 days from date of receipt of the order, and a further court order dated 12 June 2013, by Thlapi J, striking out the applicants' defence with costs, and giving judgment in favour of the respondent, ordering and directing that the applicants return the goods

being a 2010 Audi A4 motor vehicle, failing which the sheriff was authorised to attach the goods, as well as judgment against the applicants for damages that the respondent may have suffered, which damages were postponed *sine die* pending the return of the goods as set out above.

2. I dealt with the matter on 21 July 2014, dismissing the applicants' application and ordering the applicants to pay the costs as well as the wasted costs on 23 April 2014 on attorney and client scale. I was requested by the applicants on receipt of a written letter to provide reasons for the order given on 21 July 2014, as the applicant was not present on the day of hearing of the matter.

3. The background to this matter is that the respondent issued summons against the applicants during September 2011, the cause of action being, an instalment sale agreement entered into between the applicants and the respondent, wherein the applicants contractually bound themselves to monthly instalment payments to the respondent, and subsequent to the applicants' default, the respondent instituted action.

4. The applicants were granted leave to defend the action subsequent to a summary judgment being applied for, and after close of pleadings the applicants were called upon to make discovery. No such discovery was made and the respondent proceeded to launch an application to compel discovery. The application to compel discovery was set down for 14 March 2013, on the unopposed motion roll, and the respondent served the application by way of sheriff on the applicants on 11 February 2013,

on their registered address being, 38 Snow Avenue, Chantel Extension 8, Pretoria, by affixing a copy of the notice of motion to the principal door thereof, the only possible means of service.

5. On 14 March 2013, the matter was unopposed by the applicants and the court ordered by way of Prinsloo, J that the applicants (the first and second defendants in the main action) must file their discovery affidavit within 10 days from service of the court order, ordering the applicants (defendants) to pay the costs of the application.

6. The respondent served the order of Prinsloo, J on the applicants' chosen *domicilium citandi et executandi* on 11 April 2013.

7. The applicants prior to the granting of the order to compel , on 10 May 2012, served a notice with the heading "*REPLY TO NOTICE IN TERMS OF RULE 35(1)*" and indicated in this notice that they need further information from the respondent to be able to make a true and representative oath and to supply documents and tapes as requested, and wherefore the applicants in accordance with rule 35(3) required the respondent to produce all tape recordings of the conversations between the applicants and the respondent relating to the contract.

8. On 4 March 2013, also prior to the order compelling discovery, the applicants brought a "cross motion" application indicating that they will request a cost order on 14 March 2013, and an order dismissing the petition and denying the respondent's motion for ordering the first and second applicants to file their discovery affidavit within 10 days and that the respondent be ordered to pay the costs thereof. They mention in this

"cross notice/ application" that the respondent had refused to give the applicants the complete documents and tapes required by them to be able to make a true and representative oath, and they stated that the respondent has lied under oath regarding the available recordings of conversations between the applicants and respondent, and in this cross-motion they request that the respondent must hand over all documents and recordings pertaining to the agreement in question.

9. I find thus that when the Court by way Prinsloo J, heard the notice to compel discovery on 14 March 2013, the court had notice of this cross-motion brought by the applicants. I pause to mention that the applicants throughout had defended themselves and had never obtained legal representation on their behalf, and the cross motion had no substance in law, and was not a notice in terms of the Rules of this Court.

10. After the notice to compel discovery was served on the applicants, they responded by requesting reasons for the judgment. It seems as if these reasons were never requested from the Judge, or were not made in the prerequisite form and were never given to the Prinsloo J.

11. Due to the failure of the applicants to make any discovery and also to adhere to a court order that was granted on 14 March 2013, the respondent launched an application in accordance with Uniform Rule 35(7) to strike out the applicants' defence with costs. This application was once again served on the applicants at their chosen *domicilium citandi et executandi* on 23 May 2013, by affixing it to the principal door as no other method of service was possible.

12. Once again the applicants responded with a cross-motion served on 7 June 2013, on the respondent's attorneys, in which cross-motion the applicants stated that they would on 12 June 2013, seek an order dismissing the petition and denying the respondent's motion for application in terms of Rule 35(7) on the basis that the applicants are waiting for a detailed order by Prinsloo J, to be able to lodge an appeal as the applicants believed that the order should not have been granted, as the applicants were still awaiting further information from the respondent to be able to comply with such an order.

13. It is clear that no appeal lied against the order of Prinsloo J, being a interim order granted in the course of unopposed motion proceedings

14. The respondent therefore proceeded with the application in terms of Rule 35(7) to strike the defence of the applicants, and this application was heard by Thlapi J. The Presiding Judge explained the procedure of discovery to Mr Yaleni on behalf of the applicants who was present in court on the day the matter was heard, and the court subsequently granted the order whereby the applicants' defence was struck out. This order forms part of the papers.

15. During August 2013, the applicants responded with the present defective application to set aside the court orders as previously mentioned by Prinsloo J and Thlapi J. Respondent objected to the defective application by way of a Rule 30A(1), which notice was dated 6 September 2013.

16. The applicants ignored the rule 30A notice served on them and proceeded to re-enrol the present application to set aside court orders.

The rescission application brought by the applicants was served on the respondent and the respondent filed an opposing affidavit. The applicants failed to file any replying affidavit and the matter was set down on the opposed motion roll by the respondent, for 22 April 2014. The applicants filed heads of argument and a practice notice on 6 January 2014.

17. The applicants attempted to remove the matter from the opposed roll by serving a notice of removal from the opposed motion court roll on 10 April 2014, on the respondent's attorneys quoting in the removal notice that counsel for the applicant was not available for that day. A letter was written by the respondent's attorneys to Mr Yeleni indicating to him "*that he may not remove the matter from the roll as he did not set the matter down for hearing, but that the respondent's had done so, and should they not wish to proceed with the application they should withdraw the application with a tender for the wasted costs.*"

18. On 22 April 2014, the day of the opposed motion, a letter was directed to Mavundla J, by the applicants, in the letter to the judge, the applicants stated that they were unable to attend court on 22 April 2014 for this matter on the ground that Mr Albert Yeleni, the counsel for the applicants, was not available, as he would be participating in a family Easter ritual in Limpopo Province. They make application in this letter that the matter should stand down and requested the court to set the matter down for 29 May 2014, or as soon thereafter as counsel may be heard.

19. The court hearing the opposed motion on 23 April 2014, by Mavundla J, then made the following order: *Postponing the matter to the opposed*

motion roll of 21 July 2014 having reference to the letter dated 22 April 2014 received by the Judge in Chambers. The respondent had to telephone Mr Yeleni on his cell phone number, but there was no response as he had deserted his cell phone. It was noted that the matter was set down on the roll by the respondent for 22 April 2014, that the notice of set down was served on the applicants on 13 March 2014, that the applicants had failed to deliver their heads of argument or had failed to set the matter down, and the respondent sought punitive costs relating to the costs occasioned by the postponement. The court reserved costs and ordered the respondent to serve a notice advising the applicants of the date of the postponement and also ordered the applicants to file an affidavit explaining the reasons for the postponement and the absence of counsel to formally seek a postponement.

20. The court order dated 23 April 2014, was sent to the applicants via post and was delivered on 5 May 2014. Hereafter the applicants failed to deliver any heads of argument or to provide a practice note, but made an affidavit under oath on 24 June 2014, which was also served on the same day explaining the reasons for the postponement and their absence in court on 22 April 2014.

21. The applicants also filed a notice of an "intended first amendment dated 19 September 2013, in terms of Rule 28(1)" in terms whereof the applicants sought to amend the particulars of claim to their "application" to set aside court orders. The applicants hereafter filed a second application or "notice of intended amendment in terms of Rule 28(1)"

wherein they seek to add a prayer for spoliation for unlawful possession of the Audi motor vehicle, and they claim that the applicants' peaceful and undisturbed possession of the motor vehicle be restored. This was served on the respondent's attorneys on 3 July 2014.

22. What is of relevance, is that the applicant filed a notice stating the applicants' costing methodology for damages claimed is incorrect and they indicated in this filing notice, that the date for the matter to be heard was 21 July 2014, this being the date to which Mavundla J, postponed the matter to the opposed motion roll.

23. I find therefore that the applicants knew full well that the matter would be continuing on 21 July 2014, on the opposed motion roll, and having such knowledge still neglected to file heads of argument or a practice note for the application to continue.

24. On 21 July 2014, counsel for the respondent addressed me and reminded me that the matter had previously been set down for 23 April 2014, for hearing of the application, and on that day the applicants provided a letter seeking a postponement of the matter. Counsel on behalf of the respondent also informed me that the applicants were not at court, but that there is an individual who had spoken to the respondent's counsel alleging that the matter had not been properly enrolled.

25. I engaged the gentleman in court, and he indicated to me that he is Mr Chauke. After several questions from the court it transpired that he

works for the first applicant, Mr Yeleni, but that he is not the legal representative of the applicants. He informed me that the matter had not been confirmed on the roll for 21 July 2014. He was advised to re enrol it for another day and he indicated that a new date was provided by the Registrar, being 5 September 2014.

26. I indicated to Mr Chauke that the matter had been postponed previously by Mavundla J, and that the enrolment was served on Mr Yeleni personally on 5 May 2014. Mr Chauke indicated that he was doing something else when he saw that the matter was on the roll today and as it was not confirmed with him, he put it on the roll for 5 September 2014. He indicated to the court that he had spoken to Mr Yeleni who informed him that the matter must be enrolled for another date, which date he then obtained.

27. I indicated to Mr Chauke that I was going to proceed with the matter as it had been properly enrolled and postponed to 21 July 2014, and that Mr Yaleni was aware of the date, and that the 2nd applicant had provided neither the court nor the respondent, with any reasons for his absence on 21 July 2014, and that the court in the premises was not going to be held ransom by the applicants, who clearly were not proceeding with their application.

28. It is trite law as to rescission applications that a judgment or court order can only be rescinded on one of the following grounds: on appeal or, in terms of rule 31(2)(b), or in terms of rule 42(1) of the Uniform rules of court, or on common law grounds. This is set out in **Bezuidenhout v**

Patensie Sitrusbeherend Beperk 2001 (2) SA 224 (ECD) at 229B – D and **Erasmus, Superior Court Practice, B1 – 306.**

29. Obviously, this matter did not come to court by way of appeal and therefore the judgment and the court orders concerned are not attacked on this front.

30. A judgment and court order may be rescinded in terms of Rule 31(2)(b) where the applicant had either failed to deliver the requisite notice of intention to defend or where the applicant has done so, but failed to deliver the requisite plea. Therefore the judgment and court orders concerned cannot be attacked on this basis either. **De Souza v Kerr 1978 (3) SA 635 (WLD) at 637D – E and Herbstein & Van Winsen, the Civil Practice of Superior Court of South Africa, 4th Edition, page 539.**

31. Similarly an order or judgment may only be rescinded in terms of Rule 42(1) where such order was erroneously sought or erroneously granted in the absence of the party thereby aggrieved. **Mtebwa v Mtebwa & Another 2001 (2) SA 193 (TKHC) at paragraph 15 and further at paragraph 17, as per Jafta, J as he then was:**

> *"It follows therefore that this rule too does not regulate the situation at hand. In the instant case the parties are ad idem that the court order sought to be set aside was granted by way of the applicant's failure to discover. If regard is had to the principle prevailing in our law and if regard is had to the papers before me as well, it*

must be accepted that the only basis on which the judgment and court orders can be rescinded is under common law."

32. As set out in **Bakoven Ltd v GJ Howes (Pty) Ltd 1192 (1) SA 466 (ECD) at 468, per Erasmus J**:

"Under common law rescission will only be granted where sufficient or good cause has been shown. It is a long-standing practice of our courts that the concept of sufficient or good cause has two elements. Firstly, that a party seeking rescission relief must present a reasonable and acceptable explanation for his default which gave rise to the court order or judgment. Secondly, that such a party has to establish that on the merits he has a bona fide defence which prima facie carries some prospect of success."

33. As set out in **Chetty v Law Society Transvaal 1985 (2) SA 756 (AD) at 765A – C. Miller J observed:**

"It is not sufficient if only one of the two requirements is met. For obvious reasons the party showing no prospect of success on the merits will fail in the application for rescission of the default judgment against him, no matter how reasonable and convincing the explanation of his default is , and all the judicial process would be negated if on the other hand a party who could offer no explanation of his default other than his disdain of the rules, was ever permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

34. From the facts in causa, after leave to defend the summary judgment was granted, the applicants pleaded to the summons as follows: "*the court must consider the South Africa economic situation, and the fact that the applicants are suffering from temporary cash-flow problems, that the court considers that the second applicant as the sole owner of the first applicant has been a client of the respondent for many years and conducted his account in a good manner and paid off two of his cars even earlier, and that any repossession will burden the applicants.*

35. The applicant seek in essence that the court gives the applicants a break from payment of instalments until such time as the applicants are able to make such payments, capitalising the arrears and revising the interest rate to a lower rate. It therefore seems that the applicants had no bona fide defence to the respondent's claim in the main action and simply called on the court's goodwill, to assist the applicants against the respondent.

36. The applicants have throughout unfortunately shown disdain for the rules of court and have shown an absolute ineptitude to deal with any of the Rules of court.

37. They further have opted to defend themselves in the main action against the respondent and the plea sets out no defence to the claim of the respondent. Therefore any court having regard to rescission of previous orders granted by my Prinsloo J and Thlapi J, herein would have regard to any good cause shown by the applicants, if it is presumed that they are bringing a rescission application based on the common law. I am

presuming as much in favour of the applicants, due to the fact that it is not set out in their papers on which basis they are making application for rescission.

38. It is unclear on which basis the applicants intended to proceed with the rescission application of previous orders granted by this court. It is trite law that any order of court stands even though an applicant might be unhappy with it, until such order is rescinded.

39. The applicants main defence in the rescission application is improper service on them of any of the court orders, and they suggest that this improper service, makes any court order granted, null and void.

40. The court, however, had regard to all the returns of services and all these applications by the respondent were filed and served in the proper manner on the applicants either personally or by affixing such at the chosen *domicilium citandi et executandi* being 38 Snow Avenue, Chantel Extension 8, Pretoria.

41. The applicants have no hope in succeeding ever in their opposition of the claim of the respondent and I therefore find that they also have no prospects of success in rescission of any of the orders granted against them by Prinsloo, J and/or Thlapi, J.

42. What is more disconcerting is the fact that the applicants were aware of the order granted by Thlapi, J striking out their defence as they were present in court. Even in these circumstances the applicants still went ahead and on their own steam and obtained no legal advice whatsoever

in order to deal with the order given by Thlapi J .The respondent therefore argue that a rescission application is not the correct application and that the applicant must appeal the order of Thlapi J, I find that this is probably the correct position and any application for rescission should therefore also fail on this ground.

43. The applicants have throughout shown a disdain for the court and the rules of court, I say this due to their approach when the application was set down initially in April 2014, they simply wrote a letter to the Judge indicating to him that they were not available on a said date.

44. At this stage Mavundla, J was very lenient and gave the applicants an indulgence and granted a postponement to 21 July 2014, the applicant became aware of this date. Once again on 21 July 2014, the applicants has Mr Chauke address the court and inform the court simply that the matter has been re-enrolled for another date, the applicant once again failed to appear in court.

45. Applicants may not be allowed when they are *dominis litis* to drive a matter in a fashion that suits them and showing total disregard to the Rules ,and practice in Courts.

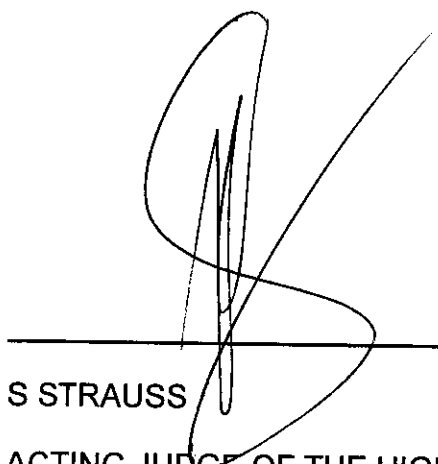
46. I therefore made the following order on 21 July 2014:

The applicants' application to rescind the following orders is dismissed:

(1) Justice Prinsloo's order dated 14 March 2013 and Justice Thlapi's order dated 12 June 2013, under case number 50358/2012;

(2) The applicants are to pay the costs, the one to pay the other to be absolved, of the application on a party and party scale;

(3) The applicants pay the wasted costs of the application on 23 April 2014 on an attorney and client scale.



S STRAUSS

ACTING JUDGE OF THE HIGH COURT