IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED ✓
DATE 20/8/14 SIGNATURE

CASE NO: 64067/2011

DATE: 22/8/14

IN THE MATTER BETWEEN

LULAMA LEONORA LETLAPE	APPLICANT
AND	
HENTIQ 2517 (PTY) LTD	RESPONDENT
In re:	
HENTIQ 2517 (PTY) LTD	PLAINTIFF
AND	
ROWMOOR INVESTMENTS 737 (PTY) LTD	1ST DEFENDANT
TAELO PHOKELA RUDOLPH MALATJI	2ND DEFENDANT
NONHLANHLA PATRICIA	3RD DEFENDANT
LULAMA LEONORA LETLAPE	4TH DEFENDANT

JUDGMENT

PRINSLOO, J

[1] The applicant applies for the rescission of a judgment granted against her by default by the Registrar of this court on 7 September 2012. The application is opposed.

[2] Before me, Mr Tsatsawane appeared for the applicant and Mr Patrick for the respondent.

Introduction and brief notes about the procedural history of the case

[3] On 10 June 2009 the first defendant listed above entered into a franchise agreement with the respondent, as franchisor of a chain of well-known "Cape Town Fish Market" restaurants in which the respondent holds trade marks, trade names, logos, service marks, trade secrets and so on.

[4] The situation is neatly summarised in paragraphs 2.3 and 2.4 of the franchise agreement:

> "2.3 The franchisor grants to persons who meet the franchisor's qualifications and are willing to undertake the investment and effort, franchises to establish and operate Cape Town Fish Market Restaurants at specified locations and licences to use the Trade marks in connection with the promotion and operation of the Restaurant.
>
> 2.4 The franchisee is desirous of obtaining a franchise to establish and operate a Cape Town Fish Market Restaurant and Sushi Bar ('the Restaurant' or the 'Cape Town Fish Market Restaurant') at the Location and the franchisor is willing to grant such a franchise upon the terms and conditions hereinafter set forth."

[5] The franchise agreement is a lengthy and detailed affair meticulously listing the rights and obligations of both parties.

[6] At the same time, the applicant, as a member of the franchisee company, and two other members, the second and third defendants listed above, signed suretyships binding themselves as co-principal debtors with the franchisee "for the due and proper fulfilment of all the obligations of and for the punctual payment of all sums which are or may become due" by the franchisee.

[7] The location where the franchisee elected to run the restaurant was in the Parkview shopping centre Moreletapark Pretoria. This is also the *domicilium* address selected by the applicant for purposes of her obligations in terms of the suretyship.

[8] On a general reading of the papers, the restaurant was not properly administered and it fell on hard times.

[9] On 14 December 2010, the respondent as franchisor, in writing, cancelled the agreement claiming non-compliance on the part of the franchisee with a number of obligations in terms of the agreement and non-payment of a list of dues such as royalty and service fees, accounting fees, training expenses, marketing fund contributions and so on.

[10] Pursuant to the cancellation, settlement negotiations ensued and it was agreed that the franchisee would be allowed to continue trading as Cape Town Fish Market Parkview Pretoria on the same terms and conditions set out in the franchise agreement. This is termed by the respondent as "the second agreement".

The arrangement was short-lived, because on 21 April 2011 the respondent cancelled the "second agreement" as well in writing, claiming further breaches on the part of the franchisee.

[11] In November 2011, the respondent issued summons against the franchisee and the sureties, including the applicant, and on 7 September 2012, the Registrar granted judgment by default against all the defendants listed above as follows:

1. payment of the sum of R442 662,95;
2. interest from 14 December 2010 (the date of the first cancellation) to date of judgment at a rate of 11% per annum;
3. interest from the date of judgment to the date of payment at 15,5% per annum;
4. costs on the attorney and client scale.

[12] On 18 September 2012 the respondent issued a writ of execution for the attachment of movable property of the applicant and the attachment took place on 10 October 2012. Movables of the applicant to the value of some R214 000,00 were attached and removed. This included three motor vehicles.

[13] Importantly, for purposes of the adjudication of this case, the respondent and the applicant, through their attorneys, entered into settlement negotiations which terminated in a settlement, in January 2013, to the effect that the applicant would pay R300 000,00 to the respondent in settlement. The settlement (to which I will henceforth refer as "the settlement") was described as follows in a letter ("the settlement letter") dated 23 January 2013 addressed by the applicant's attorney to the respondent's attorney:

"Dear Sir

Re: ROWMOOR INVESTMENTS (PTY) LTD/HENTIQ

We refer to the above matter and earlier telephonic conversations between the writer and your Mr Brazington.

This serves to confirm the agreement reached this afternoon in respect of the Letlape matter.

We confirm that this afternoon, a payment of R40 000,00 (forty thousand rand) was made into the account of Brazington McConnell attorneys. The payment was pursuant to an agreement between our Mr Langa and your Mr Brazington, the details of which are as follows:

- Upon payment of the amount of R40 000,00 (forty thousand rand) the goods would not be removed from our client's premises. Further that the goods that had already been removed would be returned back to the said premises;
- Our client will make payments in the amount of R20 000,00 (twenty thousand rand) at the end of February 2013, March 2013 and May 2013 respectively; and
- Our client will make payment in the amount of R100 000,00 (one hundred thousand rand) at the end of April 2013 and June 2013 respectively."

[14] The settlement letter is endorsed "without prejudice".

[15] The next day, on 24 January 2013, the respondent's attorney wrote to the Sheriff, Centurion West, referring to an earlier telephonic discussion on 23 January 2013, mentioning this particular case with the same case number 64067/11 in the heading and stipulating:

> "Kindly be advised that the fourth execution debtor, represented by Mr Langa, has made an offer acceptable to our client.
>
> You are therefore instructed to make the goods, which you removed from the fourth execution debtor's residence on 23 January 2013, available to her for collection with immediate effect.
>
> Notwithstanding the aforesaid, the goods must remain under attachment.
>
> You are requested to furnish us with the full inventory of the items which were removed as well as a detailed statement of your costs.
>
> Yours faithfully"

[16] From this it appears that the settlement of 23 January 2013 was reached on the same day when the Sheriff removed the goods of the applicant.

[17] Despite having entered into the settlement, and having paid the first instalment of R40 000,00, the applicant, on the day when the second instalment was due in terms of the settlement, 28 February 2013, launched this rescission application. It is fair to assume that she would have already instructed her legal representatives, either before the settlement was reached or shortly thereafter, to proceed with the application.

[18] In my view, the conclusion, on the overwhelming probabilities, to be drawn, is that the applicant never intended to honor the settlement but simply concluded the settlement in order to obtain release of her attached and removed valuable movable assets. In fact, she states in her papers that "I always intended to bring this application".

This I consider to be dishonourable conduct.

The "first" rescission application

[19] The applicant perpetuated her dishonourable conduct in this rescission application (which I refer to as 'the first' rescission application for reasons which will appear later) by not uttering a single word about the settlement that was reached.

The respondent, in its opposing affidavit, says the following about this:

> "68. Nowhere in the applicant's papers will one find reference to the fact that upon receipt of the writ the applicant agreed to pay the sum of R300 000,00 in three monthly instalments of R20 000,00, with an initial balloon payment of R40 000,00, and two payments of R100 000,00 each in April and June 2013. I attach hereto, marked J a letter from her attorneys confirming this and marked K a letter from the respondent's attorneys advising the Sheriff to cease execution proceedings. Though she paid the initial R40 000,00 she did not make the first monthly payment, and instead, in bad faith, launched this application."

[20] There was no replying affidavit.

[21] The "defence" advanced by the applicant as one of the requirements to obtain rescission of a judgment, was, to say the least, nonsensical in nature. It contained a suggestion to the effect that "The respondent was to negotiate everything that was essential to the business and run the business on our behalf against payment of money. We were only investors ..."

[22] Before me, and to their credit, both counsel agreed that this "defence" that was advanced, was ill-founded and could not sustain a rescission application. It is not necessary for me to dwell any further on the details of this "defence".

The "second" rescission application

[23] On 18 July 2013, and perhaps in view of the flaws of the "first" rescission application, an application was launched to file a supplementary founding affidavit (which was granted on an unopposed basis) and this was followed by the supplementary founding affidavit. In this founding affidavit, a number of new defences are raised with a view to fortifying the application for rescission: there is a defence to the effect that the deed of suretyship did not survive the cancellation of the agreement, so that the applicant can no longer be held liable as a surety. Another defence places the amounts claimed in the particulars of claim in dispute. For example, the applicant denies that she is liable for the book-keeping fees and also points out that on the respondent's own allegations an amount of some R182 000,00 claimed in respect of advertising expenses is allegedly due to another company and not to the respondent. Other, smaller, amounts claimed are also placed in dispute: for example, the applicant pleads that the respondent did not earn any royalty fees after cancelling the agreement in December 2010.

Another defence raised, is that the Registrar was not vested with the power to grant this judgment by default. In terms of the provisions of rule 31(5) he is only empowered to grant judgment in cases involving a "debt or liquidated demand" which, according to the applicant, does not apply to the present matter where certain calculations still have to be done with regard to, for example, training fees, royalty fees and so on. This state of affairs, according to the defence raised, would support a rescission in terms of rule 42 because the judgment was "erroneously sought and erroneously granted".

In an opposing affidavit to the supplementary founding affidavit, the respondent argued that none of the claims upon which judgment was sought was such as to require the hearing of evidence and that each one of them was for a "debt or liquidated demand".

[24] The main thrust of the defence offered in the supplementary opposing affidavit, is an argument that with the settlement reached in January 2013, when the applicant agreed to pay the judgment debt off in instalments, she communicated a waiver of her right to have the judgment rescinded.

[25] In a supplementary replying affidavit, the applicant denies having waived her right to apply for a rescission. As I already pointed out, she stated "I could not even have done that since I always intended to bring this application." In my view, this supports my conclusion, *supra*, that she only entered into the settlement in order to secure the return of her movable goods from attachment and not because she did not want to proceed with the rescission in any event.

The applicant adds a further defence to the waiver argument which is based on an allegation that the settlement letter was written "without prejudice" so that it constitutes inadmissible evidence which should not be before the court.

The waiver argument

[26] It is correct that the settlement letter was marked "without prejudice".

[27] Mr Patrick argued that although it is generally the case that communications made during the course of settlement negotiations are privileged, the settlement letter does not fall in that category. It is a formal recordal of the conclusion of the negotiations.

In this regard I was referred to Zeffert & Paizes, *The South African Law of Evidence* 2nd ed, 2009 at p703 where the following is stated:

> "There is no particular magic in the use of the words 'without prejudice' as introduction to a statement or as heading to a letter ... a letter headed 'without prejudice' will not be privileged if it is not a *bona fide* part of negotiations or if there was a dispute between the parties ... The 'privilege' appears to survive the conclusion of the dispute if the same or some connected issue should later be contested, but where negotiations have ended in a settlement, evidence about the settlement and the negotiations leading to it become admissible because the whole basis for non-disclosure will have fallen away."

Authority for the latter proposition is to be found in the judgment of JAMES JP in *Gcabashe v Nene* 1975 3 SA 912 (D&CLD) where the following is said at 914H:

> "Negotiations conducted without prejudice are, of course, designed to resolve disputes between the parties and if the negotiations result in a settlement then

logically evidence about the settlement and the negotiations leading up to it should be available to the trial court because the whole basis of non-disclosure has fallen away."

[28] The settlement letter is clearly no more than a recordal of a settlement already reached. Consequently, in my view, the presence of the words "without prejudice" will not render the letter privileged.

Moreover, to revisit the words of the learned authors in *Zeffert, supra*, the negotiations were not conducted *bona fide* by the applicant, for the reasons mentioned, so that, for that reason too, the settlement letter is not privileged.

[29] The applicant offered another defence to the waiver argument: she argues that at the time when the settlement letter was written, she and her attorneys were unaware of the fact that they had the rule 42 defence at their disposal, namely that the judgment was "erroneously sought and erroneously granted". Had the attorneys known this, so the argument goes, the settlement letter would not have been written.

In *Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and others* 1978 1 SA 914 (A) at 923C-E the learned Judge of Appeal says the following:

> "Voluntary acceptance by parties to a compromise of an element of risk that their bargain might not be as advantageous to them as litigation might have been is inherent in the very concept of compromise. This is a circumstance which the court must bear in mind when it considers a complaint by a dissatisfied party that, had he not laboured under an erroneous belief or been

> ignorant of certain facts, he would not have entered into the settlement agreement."

See also *Wilson Bayly Holmes v Maeyane* and others 1995 4 SA 340 (TPD) at 345E.

On this basis, it was argued by counsel for the respondent that the settlement agreement entails waiving both substantive and procedural rights, and that the applicant, by concluding the settlement, waived the right to rescind the judgment upon which the agreement is premised.

[30] In view of the aforegoing, it seems to me that the two arguments against waiver offered on behalf of the applicant ought not to be upheld. Nevertheless, the *onus* is on the party alleging waiver to prove it, and that is not an easy *onus* to discharge. In Christie's *The Law of Contract in South Africa* 6th edition the learned author says the following on p457 when dealing with the requisites of waiver:

> "There is therefore a presumption, even in some cases a strong one, against waiver. That means not only that the *onus* is upon the party asserting waiver to prove it but that although, as in all civil cases, the *onus* may be discharged on a balance of probability, it is not easily discharged."

The learned author then quotes from *Hepner v Roodepoort-Maraisburg Town Council* 1962 4 SA 772 (A) at 778E where the learned Judge of Appeal also quotes former Chief Justice INNES as saying the following in *Laws v Rutherford* 1924 AD 261 at 263:

"The *onus* is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."

[31] In this case, it seems to me that the respondent failed to discharge this stringent *onus*: it is clear from the conduct of the applicant, as described, and the actual fact that she launched the rescission application shortly after the settlement and also in view of her own statement, *supra*, that she always intended to bring this application, that she never waived her procedural right to apply for a rescission. She entered into the settlement in bad faith in order to get her movables released from attachment always intending to apply for the rescission. The argument that she, at the time, was not aware of her rights flowing from rule 42, is also ill-founded because she applied for the rescission well before she considered the rule 42 defence.

[32] In the result, I have come to the conclusion that the probabilities strongly indicate that the rights were not waived so that the *onus* which rested on the respondent was not discharged.

[33] Having come to this conclusion, and taking account of the other defences raised in the supplementary founding affidavit, it seems to me that the duty on the applicant to disclose a triable defence for rescission purposes, has been complied with.

What is left for consideration, is the question of wilful default.

Wilful default

[34] The summons was served on the applicant at her *domicilium* address which is the business address of the restaurant but this had been abandoned and the restaurant closed by the time the summons was served. The summons was served with the knowledge of the respondent that the applicant was no longer to be found at that particular address.

[35] Arguments were offered on behalf of the respondent that, on the probabilities, the applicant had due knowledge of the summons because it was also served on another member of the company but in view of the stringent requirements set for showing wilful default, I am of the opinion that the applicant managed to show that she was not in wilful default as intended by the relevant authorities.

Counsel for the applicant, Mr Tsatsawane, referred me to the case of *Neuman (Pvt) Ltd v Marks* 1960 2 SA 170 (SR) where the learned Judge said the following at 173A:

> "A defendant may be most unwilling to suffer a judgment to be entered against him and the consequences of such a judgment are such that he cannot in fact be indifferent to them ... The true test to my mind is whether the default is a deliberate one – ie when a defendant with full knowledge of the set down and of the risks attendant on his default freely takes a decision to refrain from appearing."

In *Harris v Absa Bank Ltd* 2006 4 SA 527 (T) at 530A it was stated that:

> "Before an applicant in a rescission of judgment application can be said to be in 'wilful default' he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant

must deliberately, being free to do so, fail or omit to take the steps which would avoid the default and must appreciate the legal consequences of his or her actions."

[36] Moreover, there is authority for the proposition that, where the rescission application is based on the provisions of rule 42, it is not necessary for the applicant to show good cause (which would include the absence of wilful default). I was referred to *Tshabalala and another v Peer* 1979 4 SA 27 (T) at 30C-E and *Topol and Others v LS Group Management Services* 1988 (1) SA 639 (W) where the learned Judge said the following at 650J:

"In the result I conclude that it is not a requirement for rescission under rule 42(1)(a) that an applicant need, in addition, establish good cause for such rescission."

[37] In any event, given the conduct of the applicant throughout, and the clear indication that she intended all along to resist the action, it is in my view inherently improbable that she would recklessly have decided not to enter an appearance even if she had full knowledge of the summons. In the result, I have come to the conclusion that the applicant succeeded, inasmuch as she may have been required to do so, in showing the absence of wilful default, so that, on this basis as well, she has made out a case for a rescission of the judgment.

Costs

[38] The court has a discretion to refuse a rescission application even if it is based on the provisions of rule 42(1) – see *Tshivhase and another v Tshivhase and another* 1992 4 SA 852 (A) at 862I-863A where the learned Judge of Appeal said:

> "I agree with the statement of Vivier J [in a Cape case] that the court has a discretion whether or not to grant an application for rescission under rule 42(1)."

See also the remarks of ELOFF JP in *First National Bank of Southern Africa Ltd v Van Rensburg and others: in re First National Bank of Southern Africa Ltd v Jurgens and others* 1994 1 SA 677 (T) at 681G.

[39] It was, *inter alia*, on this basis that the respondent persisted with its opposition of the rescission application even after the supplementary founding affidavit was filed. Counsel for the respondent contended that the discretion ought to be exercised against granting the rescission "for three reasons: the bad faith evident in the bringing of the application; the delay in the bringing of the application; and the applicant's mendacity in the original application".

The mendacity ("mendacious: lying, untruthful" - *Concise Oxford Dictionary* p632) referred to in the original application is motivated in the original opposing affidavit in paragraph 73 thereof (record p242) where the respondent lists twelve instances in which it alleges that the applicant was less than truthful or attempted to mislead the court. I do not propose revisiting all those allegations. The first one, however, is the failure to disclose to the court that a settlement had been reached and there are also other allegations relating to the objectionable nature of the "defence" offered in the "first" application which had no merit and which consisted, by and large, of a misrepresentation of the true nature of the franchise agreement. There were also misrepresentations to the effect that the respondent had failed to provide training when

it had done so extensively and that the respondent had offered to settle the defendant's debt to the bank, which was clearly an outrageous submission.

[40] Given the circumstances of this particular case, I am satisfied that the opposition offered to the application throughout was reasonable. Where the applicant is the party seeking the indulgence, the normal approach would be for such an applicant to pay the costs.

I have also expressed the view that the conduct of the applicant to negotiate the settlement for an ulterior purpose and not with the *bona fide* intention of concluding a real settlement amounts to dishonourable conduct which ought not to be tolerated by a court. For this reason, I am of the view that a punitive costs order ought to be granted against the applicant. This is also what was sought by the respondent in the original opposing affidavit.

The order

[41] I make the following order:

1. The judgment granted against the applicant on 7 September 2012 is rescinded.
2. The warrant of execution dated 20 September 2012 which was granted against the applicant is set aside.
3. The applicant is ordered to pay the costs of the respondent on a scale as between attorney and client.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 28 JULY 2014
FOR THE APPLICANT: K TSATSAWANE
INSTRUCTED BY: LANGA ATTORNEYS
FOR THE RESPONDENT: R G PATRICK
INSTRUCTED BY: BRAZINGTON & McCONNELL