IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

2/9/14

CASE NUMBER: 25803/2011

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

In the matters between: -

The First Rescission Application	
DAVID BERNARD ALLEN	First Applicant
MARIA MAGDALENE WILLEMSE	Second Applicant
and	
RALPH DENNIS DELL	Respondent
and	
The Second and Third Rescission Applications	
ROBERT DEMAJISTRE	First Applicant
HERMANN WINKLER	Second Applicant
PERRY TRECHAK	Third Applicant

HERBERT WINKLER	Fourth Applicant
PHILIP KALTENBACHER	Fifth Applicant
and	
RALPH DENNIS DELL	Respondent
In re:	
RALPH DENNIS DELL	Plaintiff
and	
SETON SOUTH AFRICA (PTY) LTD	First Defendant
ROBERT DEMAJISTRE	Second Defendant
HERMANN WINKLER	Third Defendant
PERRY TRECHAK	Fourth Defendant
ERIC EVANS	Fifth Defendant
DAVID ALLEN	Sixth Defendant
MARIA (MARLEEN) WILLEMSE	Seventh Defendant
SHALENDRA SEWNANDAN	Eighth Defendant
HERBERT WINKLER	Ninth Defendant
PHILLIP KALTENBACHER	Tenth Defendant

JUDGMENT

JANSEN J

[1] In this matter, the three applicants seek rescission of the judgments granted against them on 3 December 2012.

> "2 ***For ease of reference the Applicants will be referred to by their surnames, save that Hermann Winkler and Herbert Winkler will be referred to by their full names.***
>
> ***2.1 Allen and Willemse are the applicants in the First Rescission Application;***
>
> ***2.2 DeMajistre, Trechak and Kaltenbacher are the applicants in the Second Rescission Application;***
>
> ***2.3 Hermann Winkler and Herbert Winkler are the applicants in the Third Rescission Application.***"

[2] The basis for the rescission applications is that the default judgments were obtained without the summons having been served on any of the applicants. At the outset it should be mentioned that the applicants sought an amendment to the heading of the notice of motion where reference was made to a third and ninth applicant whereas the heading should have referred to the second and fourth applicants.

[3] The amendment is approved. No prejudice to the respondent was proved. The amendment was caused by a *de minimis* oversight, which could create no confusion.

[4] These applications were met with two defences raised by the respondent Mr Ralph Dennis Dell ("**Dell**"). First, an urgent application was launched to remove the cases from the unopposed motion role and second, Dell sought an order "striking out" the rescission applications in which he also sought an order that the applicants furnish security in the amount of R1 million each for the "costs" incurred. The respondent also annexed copies of the same documents to his affidavit(s) in opposition to the grant of the rescission applications. As a result, more than two thousand pages were generated.

[5] It bears mention that Mr Dell appeared on his own behalf. With the knowledge and the resources available to him, he, notwithanding certain legal errors which he committed, is to be commended for the thoroughness of his research, his endeavours to grasp issues, the lengthy heads of argument prepared by him and his references to authorities. Although misguided, he clearly genuinely believed in his causes of action, was courteous towards the court and knew when not to press an argument, or when to abandon a point. Further heads of argument were also filed, at the court's behest, by both parties on the issue of prescription which assisted the court to digest and understand the deluge of paper. Mr Dell took pains to research the issue as best he could.

[6] The court s is fully aware of the fact that this matter has a long history and that there has been ongoing litigation. This was placed before the court and it was scrutinised in detail. It would serve no purpose to set out the history in detail.

[7] In what follows the summary of the facts set out in the applicants' heads of argument has to a large extent been used as a road map through the quagmire of an entire one metre by one metre cardboard box filled with files. The court took pains to ascertain the accuracy of the summary.

[8] On 7 May 2013, at the request of the applicants' legal representatives, the matters were placed under case management by Van der Merwe DJP. The case manager, her ladyship Tolmay J directed that all the matters be heard contemporaneously, and that the parties file heads of argument.

[9] As summarised by counsel for the applicants, the issues to be resolved by the court are the following: —

[9.1] The applicants' applications for rescission;

[9.1.1] This includes an application for leave to amend the notice of motion in the third rescission application to correct a typographical error, and which amendment is opposed by the respondent;

[9.1.2] It also includes an application for condonation, insofar as may be necessary, for the late delivery of the second and third rescission applications. This is also opposed by the respondent;

[9.1.3] In the third rescission application the respondent has delivered a fourth set of affidavits. The applicants contend that they should be struck out.

[9.2] The respondent's application to strike out the three rescission applications.

[9.3] The respondent's applications for security of costs.

[10] The facts of the case are as follows: —

[10.1] The respondent worked for Seton SA (Pty) Ltd ("**Seton SA**"), the first defendant, until he was dismissed on 6 May 2005. With the exception of Kaltenbacher the applicants are all former employees or directors of Seton SA. Allen and Willemse live in Springs, South Africa whereas, DeMajistre, Hermann Winkler, Trechak and Kaltenbacher reside in the United States of America ("**USA**"). Herbert Winkler resides in China.

[10.2] During May 2011, the respondent instituted action under the above case number against the defendants, including the current applicants.

[10.3] The respondent relies on five causes of action.

[10.4] That a written employment contract between him and Seton SA obliged Seton SA (and by implication all the defendants) to review his remuneration at least once a year, that they breached this obligation by failing to increase his salary during the period 1 January 2003 to 30 April 2005 and that as result of this breach he has suffered loss of income and/or damages in the amount of R767 463.55. This amount appears to be calculated on the basis that Seton SA ought to have granted him an annual increase of 12.5% in respect of an initial salary of R121 500.00 per month and ought to have increased certain other benefits based on such increased salary.

[10.5] That in terms of the employment contract between him and Seton SA, the latter was obliged to give him three month's written notice of the termination of his employment, that it failed to do so, and that he has accordingly suffered loss of income or damages in an amount of R144 043 219.42, apparently being the amounts that he contends he would have earned in terms of the employment contract from May 2005 until his retirement at the age of 65 years, but for the defendants' conduct.

[10.6] That Seton SA failed to give him a bonus equal to 30% of his annual salary for the year 2002, which he alleges he was entitled to in terms of an oral agreement between him and Hermann Winkler concluded during November 2002.

[10.7] That, from 11 February 2005 to date, the defendants have, on a continuous basis wilfully, intentionally and with the sole objective of damaging or destroying his reputation, good name and integrity spread false and damaging information in his immediate and wider community. He claims an amount of R92 396 680.10 being, apparently, special damages relating to the amount that he would have been able to earn until his retirement at the age 65.

[10.8] All instances of defamation allegedly took place during proceedings before the CCMA and during the trial in the High Court. A further two statements by a Mr Holloway and a Mr Law are also relied upon. The fifth cause of action relates to the alleged physical and emotional pain and suffering caused to the respondent.

[10.9] After service of the summons, Seton SA, Evans and Sewnandan brought an application for an order striking Dell's claims on the basis that they were vexatious and an abuse of the powers of the court. It was further argued that the claims had no merit. This application met with success and Dell's claims were struck out by Prinsloo J.

[11] The tortuous route which the litigation followed is fully traversed in Prinsloo J's judgments and includes counterclaims in the action, which were dismissed, an appeal against such dismissals to the full bench, which failed, a petition to

the Supreme Court of Appeal and two unsuccessful petitions to the Constitutional Court.

Claim 1:

[12] The applicants content that all the actions instituted by Dell are *res iudicata*. Claim 1 now relied upon Dell was dismissed by Snijman AJ and the full bench which dealt fully with the salary that Dell should have received during the period 2001 to 2005 which held that Dell was not entitled to a salary in excess of R121 500.0. This claim has clearly prescribed as it relates to a period before 30 April 2005.

Claim 2:

[13] This claim is identical to counterclaim 3 in the high court action which was dismissed by the full bench which held that the clause of the contract of employment upon which Dell relied did not include a situation where somebody was summarily dismissed due to a material breach of contract. For this reason, this claim is also *res iudicata*. The claim also prescribed as it related to a summary dismissal on 6 May 2005.

Claim 3:

[14] Claim 3 is identical to the counterclaim in the previous high court action, which was dismissed by the full bench as "... *if not frivolous, ... entirely*

without merit". This claim has also prescribed because it relates to a debt which became due during 2002 and 2003.

[15] Regarding claims 1 to 3 against Allen and Sewnandan who were directors or employees of Seton SA, no cause of action was made out.

[16] Regarding claim 4, the claims arising from the alleged defamatory statements, made since 11 February 2005 to date, are stated to be continuous and can therefore not be stated to have prescribed, as contented. As stated all these statements were allegedly made during court proceedings. An amount of R92 396 860.00 is claimed as compensation.

[17] Regarding claim 5, continuing physical and emotional pain and suffering is claimed by Dell as a result of damage to his good reputation, good name and integrity by spreading false and damaging information. An amount of R53 601 478.00 is claimed as compensation.

[18] It is common cause that Prinsloo J. heard the matter in March 2012. Dell had not served a summons on the applicants in this application. The sheriff had rendered returns of non-service. Notwithstanding Prinsloo J's judgment and the lack of service Dell proceeded, and obtained, a default judgments against applicants on 3 October 2012. It is these judgments which the applicants are seeking to have rescinded.

[19] Copies of the default judgment order were sent by way of registered post to some of the applicants' residential addresses. The applicants upon such receipt, instructed their attorneys to proceed with rescission applications. Given the fact that all of the applicants reside overseas (save for Allen and Willemse) returns of non-service were predictable and foreseeable. Service was effected on Seton SA, after the applicants had severed all ties with it, and the summons was served on Allen and Willemse at addresses where they did not reside.

[20] However, after default judgment had been obtained, Dell, with apparent facility, ascertained the addresses of the applicants in order to post the default orders to them. No explanation is proffered by Dell for his sudden revelation regarding the correct addresses of the applicants.

[21] In order to obtain the default judgment against the applicant is it was alleged that the applicants had all left their residential and employment addresses, and that the residential addresses supplied to the sheriff in respect of Allen and Willemse were the registered domicile addresses of Allen and Willemse. Neither Allen nor Willemse had appointed a *domicilium citandi et executandi*. Regarding the applicants residing in the USA, "... *Dell stated that applicants refused to accept or acknowledge a South African summons as delivered on them*". If Willemse and Allen's addresses were considered *domicilia citandi*

et executandi the sheriff would, in the absence of any person, have affixed the summons to the doors of the premises. Neither does Dell explain how the applicants refused to accept or acknowledge the summons after it was "delivered on them" (whatever this sentence may mean.)

[22] It is Dell's case that the applicants intentionally avoided service of the summons. If this were the case, substituted service or service by way of edictal citation should have been requested from the court.

[23] The applicants became aware of the default judgments when they received parcels by registered mail containing a letter of demand, a copy of the judgment, a copy of the summons and returns of non-service.

[24] The relevant dates are as follows: —

[24.1]	Allen:	30 November 2012;
[24.2]	Willemse:	1 December 2012;
[24.3]	DeMajistre:	29 November 2012;
[24.4]	Hermann:	5 December 2012;
[24.5]	Trechak:	15 December 2012;
[24.6.]	Herbert Winkler:	22 December 2012; and
[24.7]	Kaltenbacher:	14 December 2012.

[25] The latter two was informed of the default judgment by their American law firm, namely While and Williams.

[26] Given the above, the applicants submit the following: —

[26.1] They rely on the judgment of Prinsloo J to the effect that the claims are obviously unsustainable and thus vexatious;

[26.2] That any claims which the respondent may have against them have clearly been extinguished by prescription;

[26.3] That the respondent's particulars of claim make out no cause of action against them; and

[26.4] They deny that they have defamed the respondent.

[27] In order to obtain rescission of the judgment and order of 3 October 2012 the applicants rely on the provisions of the rules set out below.

Rule 42:

[28] The applications for rescission are brought in terms of Rule 42. Once it is established that an order was erroneously sought or erroneously granted it is

the end of the enquiry in terms of Rule 42. There is no necessity to show good cause that the order or judgment be rescinded.[1]

[29] Should an order be made against a person who is entitled to know that an order is sought against him, without notice, such an order has been erroneously sought and erroneously granted.[2]

[30] The default of the applicants was not wilful. Reference was made by the applicants to the case of ***Solomon v Arkon Motors (Pty) Ltd*** **1940 (4) SA 327 (T)** at 332A as follows: —

> "***Wilful default pre-supposes valid service, because a person could not be in wilful default of something of which he had no knowledge; in other words, it seems to me that if the service was bad service initially, then it could never be said thereafter that the defendant was in wilful default. He could not be in default of something which had not been served upon him in terms of the Rules of Court.***"

[31] The applicants, in an excess of caution, also rely on Rule 31(2)(b) which should, however, be brought within twenty (20) days. As far as time limits

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[1] ***De Wet v Western Bank Ltd*** **1977 (4) SA 770 (T)** at 777F–G.

[2] ***Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*** **2007 (6) SA 87 (SCA) at 93H–93B;** ***Dada v Dada*** **1977 (2) SA 287 (T)** at 288C–D.

are concerned, Rule 42 simply requires that the application for rescission be brought within a reasonable time.

[32] The first rescission application was delivered on 18 December 2012 i.e. well within 20 days of Allen and Willemse becoming aware of the default judgment.

[33] The second rescission application was delivered on 30 January 2013. It was thus delivered eight days out of time in respect of Trechak and Kaltenbacher and 18 days late in respect of DeMajistre.

[34] The third rescission application was delivered on 11 February 2013 and was thus delivered 14 days late by Herbert Winkler and 25 days late by Hermann Winkler.

[35] In ***Grant v Plumbers (Pty) Ltd*** **1949 (2) SA 470 (O)** at 476–477 it was held that in order to establish that the applicants have a *bona fide* defence they must adduce averments which amount to a *prima facie* defence which, if established at trial would entitle them to the relief asked. However, there is no necessity to deal fully with the merits and prove that the probabilities favour them.

[36] The defences of *res iudicata* and prescription have been dealt with above.

[37] The applicants can also not be held personally liable for an alleged breach of contract by Seton SA. No such cause of action appears to have been made out. The particulars of claim are hence excipiable.[3]

[38] Furthermore, it is difficult to understand how statements, not made by the applicants, can be stated to constitute defamatory statements made by the applicants (save for the statement of Demajistre during the course of court proceedings). The claims in respect of compensation also appear to be completely inflated when regard is had to the existing case law on this issue and amounts previously awarded.

[39] Given the wide discretion that a court has to condone non-compliance with the rules, the non-compliance of the applicants with the provisions of Rule 31(2)(b) is of such a nature that it can be condoned. As summarised by the applicants in their heads of argument, the periods of non-compliance, particularly in respect of the peregrine applicants, are to be expected. It was due to Dell's non-compliance with the rules that they were caught unawares. They were confronted by the Christmas holiday period and had to liaise with South African and American attorneys. The Winklers had additional problems in that they were working in China.

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[3] ***Minister of Trade and Industry v E M Mphahlele and Another*** **(unreported decision of Southwood J under case number 64514/10 delivered on 25 August 2011) at par [12].**

[40] Over and above the ordinary number of affidavits which are filed in an application, the respondent delivered a supplementary affidavit to the second and fourth applicants replying affidavits and a supplementary affidavit to the fourth applicant's replying affidavit.

[41] No application was made to court for condonation for filing of these affidavits. The applicants served a Rule 30(1) notice on 8 April 2013 and an application to set the affidavits aside was filed when the cause of the applicants' complaint was not addressed. The further affidavits do not take the matter any further and these affidavits are not allowed by the court.

[42] Over and above this, and the filing of answering affidavits in the applications for rescission, the respondent seeks to strike out the applications for rescission. Clearly such a procedure is not competent and these applications to strike out the applications for rescission are dismissed.

The Rule 47(1) notices for security for costs and security for a percentage of the alleged judgment debt:

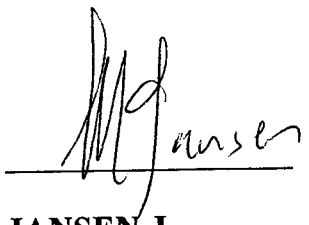
[43] There is no authority or precedent for security of a percentage of an amount in damages claimed. Neither can a plaintiff seek security from a *peregrines* who is a defendant. There is also no case made out by the respondent for the grant of security.

Order

In the result, the following order is made: —

1. The default judgments granted against the applicants on 3 October 2012, are hereby rescinded.
2. The respondent's application to strike out the applications for rescission and the respondent's application(s) for security for costs are dismissed, with costs.
3. The respondent is ordered to pay the costs occasioned by the filing of the further affidavits referred to in paragraph [49] above, which affidavits are disallowed.
4. The amendment to the notice of motion sought in the third rescission application is granted and the respondent is ordered to pay such costs as were occasioned by his opposition to the amendment.
5. The late filing of the second defendant and third defendant's rescission applications are condoned and the respondent is ordered to pay such costs as were occasioned by the respondent's opposition to the said late filing.
6. The respondent is ordered to pay the costs of the three rescission applications.

~~20~~ 19 ak.



JANSEN J

JUDGE OF THE HIGH COURT

For the Applicants **A de Kok** (083 287 1950)
Instructed by Fasken Martineau (Incorporated in South Africa as Bell Dewar Inc.)

For the Respondent
Mr Dell in person