IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

12/11/2014
DATE

SIGNATURE

CASE NUMBER: 39452/14
DATE: 12 November 2014

CITY OF TSHWANE METROPOLITAN MUNICIPALITY — Applicant

V

IMATU — First Respondent

SUZANNE TERRY — Second Respondent

ELIZNA ROCHELLE VON MOLLENDORF — Third Respondent

JUDGMENT

STRYDOM AJ:

INTRODUCTORY REMARKS

[1] The applicant is applying, in terms of the provisions of the common law, to have an order by his lordship Mr. Justice Vorster AJ, made in the urgent court on 10 June 2014, rescinded.

[2] In terms of the court order sought to be rescinded:

2.1 The termination of the second and third respondent's training agreements, with the applicant on 22 May 2014 was found to be unlawful;

2.2 The applicant was ordered to comply with the training agreements and to reinstate the second and third respondents into the training program in which they participated before the cancellation of the training agreements.

[3] The facts of this matter can be summarised as follows:

On or about 20 November 2013, the second and third respondents entered into training agreements with the applicant, as trainees for the applicant's Metropolitan Police Department. According to the training agreements the training commenced on 1 December 2013 and it is to expire on 31 May 2015. On commencement of the training, both the second and third respondents had worn hair of medium length and/or long hair. On 3 December 2013, the second and third respondents were instructed to cut their hair short and when they indicated that they were not obliged to do so, an employee and instructor of the applicant, a certain Ms Ndlovu, forcefully cut the hair of both the second and the third respondents. Ms Ndlovu was subsequently found guilty of assault and the chairman of the disciplinary hearing dismissed her. It is also common cause that the second and third respondents, after the above incident, continued with their training until 22 May 2014 on which date the applicant terminated the training agreements of the said respondents. After his Lordship Mr Justice Vorster, AJ made the above said order the second and third

respondents returned to the training program of the applicant on 11 June 2014, but they were again taken off the training program on 12 June 2014, subsequent to the applicant lodging the current rescission application.

[4] In view of the above background facts I am called upon to decide on two issues:

4.1 Whether the order granted by his lordship Mr. Justice Vorster, AJ, occurred on a default basis against the applicant;

4.2 Whether the applicant has made out a proper case in common law for rescission of the latter judgment.

Default Judgement

[5] It is trite that judgments may be set aside in terms of the provisions of Rule 31(2)(b) and Rule 42 of the Uniform Rules of Court as well as the common law. In order to succeed with an application on the Rule 31(2)(b) an applicant is required to demonstrate:

(1) That the judgment was granted by default by a court, and;

(2) It must have been due to the failure to enter an appearance to defend or a plea.[1]

[6] In terms of Rule 42(1)(a) the court is entitled to rescind a judgment obtained on default of appearance if sufficient cause is shown for such rescission.[2]

[1] See: De Wet and Others vs Western Bank Ltd 1977(4) SA 770 (T) at 776
[2] See: Topol vs LS Group Management Services (Pty) Ltd 1988(1) SA 639 (W) at D-J

No default judgment

[7] Once a judgment is given in a matter it is final. The guiding principle of the common law in this regard is certainty of judgment. After a judgment is given it may not be altered by the judge who delivered it. He becomes *functus officio* and may not vary or rescind his own judgment.[3] It is trite law that it is the function of a court of appeal to interfere with judgments given by lower courts. The Supreme Court of Appeal listed three exceptions to this rule, being: [4]

(1) After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud, or exceptionally, *justus error*;[5]

(2) Rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause;

(3) A judgment may be altered, not on rescission, but for correction, alteration and/or supplementation of a judgment or order.

[8] I am not convinced that his lordship Mr. Justice Vorster, AJ, granted an order in default of the applicant's failure to deliver its opposing affidavit. The applicant was indeed in default for filing its opposing affidavit, within the required time period set by the respondents in their urgent application. When the matter came before my brother Vorster, AJ, on 10 June 2014, the applicant was represented by its present counsel (Adv. K Tsatsawane) and the applicant's present attorneys of record. It is

[3] See: Firestone SA (Pty) Ltd vs Genticuro AG 1977(4) SA 298 (A) at 306 F-G
[4] See: Colyn v Tiger Foods Industries t/a Meadow Feed Mills (Cape) 2003(6) SA 1 at 6
[5] Before a judgment would be set aside under the common law, the applicant is required to establish ground on which *restitutio in integram* would be granted by our law, such as fraud or *justus error,* See De Wet *supra* at 776 F-H

common cause between the parties that the applicant's counsel was allowed to address the presiding justice on why the applicant's answering affidavit should be allowed as well as on the issue of urgency of the respondent's aforesaid application. After having heard argument from both the applicant's counsel and the second and third respondent's counsel, Vorster AJ ordered that the answering affidavit were not be allowed, found the matter to be urgent, and after hearing argument on the merits, only by the counsel for the respondents, granted the order which is now sought to be set aside.

[9] There was thus appearance on behalf of the applicant at the time when the matter came before Vorster AJ. Accordingly the order was not granted in *default of appearance* by the applicant, or *in default of the applicant filing its opposing affidavit.* The opposing affidavit was not permitted by court as evidence, after hearing argument why it should be permitted. No application for condonation for the late filing of the opposing affidavit was made by the applicant.

[10] In these circumstances I am of the view that the applicant's remedy lies in appeal against the judgment of Vorster AJ for not permitting the applicant's opposing papers to serve before him. I do not have the power to interfere with the judgment of Vorster AJ, it is *res judicata.*

Common law application for rescission

[11] However in the event that I might be wrong in my aforesaid view, I now turn to consider whether the applicant made out a case in common law for rescission of the judgment of Vorster AJ.

[12] In order to succeed an application for rescission of a default judgment must show good cause.[6] The authorities emphasize that it is unwise to give a precise meaning to the term good cause.[7] Three requirements are however normally set for a party to show *good* (or *sufficient*) *cause*:

(1) There must be a reasonable explanation for the default;

(2) The applicant must show that the application was made bona fide, and;

(3) The applicant must show he has a *bona fide* defence, which *prima facie* has some prospects of success.[8]

Explanation for default

[13] The default in respect of which the applicant relies is its failure to file its opposing affidavit within the time limit set by the respondents during the urgent application. The applicant's reasons for its default boils down to an explanation that it was not able to deal with the matter within the unreasonable time limit set by the respondents in the urgent application. The urgent application was delivered on Friday, 30 May 2014 at 15h30 on which date it could not be attended to, and assigned to the legal

[6] See: De Wet, supra at 1042 F to 1043 C
[7] See: Colyn, supra at 9
[8] See: De Wet vs Western Bank Ltd 1979(2) SA 1031(A) at 1042; Colyn, supra at 9 E-F; Chetty vs Law Society, Transvaal 1985(2) SA 756(A) at 764I to 765F

advisor of the applicant. The applicant referred to the latter time as a "*late hour of the day*". This is certainly not the case. The applicant further indicates that over the weekend of 31 May 2014 and 1 June 2014 the urgent application was not attended to, because the employees of the applicant do not work on weekends. The applicant was only able to attend to the matter on Monday 2 June 2014. Thereafter on 3 June 2014 the matter was submitted to the relevant legal advisor, Mr. Simon Sithole. It was at this stage that the applicant decided to oppose the application and the applicant's attorneys of record was instructed to deliver a notice of intention to oppose. The said notice was delivered to the respondents on 4 June 2014. The applicant was only able to secure a consultation with its legal team on 6 June 2014. The applicant's opposing papers was drafted during the weekend of 7 and 8 June 2014 and an unsigned copy of the applicant's opposing affidavit in the urgent application was delivered to the respondents on 9 June 2014.

[14] In rebuttal of the explanation the respondents indicated that the applicant was pre-warned in letters that they intended to bring an urgent application if the second and third respondents are not placed back on the training program by the applicants after the agreements was terminated.

[15] The reasons advanced by the applicant do not warrant the inference, in my view, that the applicant was in wilful default of filing its opposing affidavit. It appears, however, that the applicant adopted a *lazy fair* attitude, which borders on negligence. This is condonable in my view. In the circumstances I am of view that the

explanation for its said default although not good, is nonetheless a sufficient explanation.

[16] The same counsel appearing for the applicant in this matter also appeared on behalf of the applicant (then the respondent) in the urgent proceedings. The same reasons for the default of the applicant to file its opposing affidavit within the time periods set by the respondents (then the applicants) was also submitted to Vorster AJ. In making my aforesaid finding, I am not expressing a judgment in respect of the reasons Vorster AJ had to refuse the applicant's opposing affidavit in the urgent application; neither am I making any finding in respect of the correctness of his said judgment. I reiterate that the applicant's remedy in this regard lies in appeal against the said judgment and not in rescission thereof.

Applicant's Defence

[17] The applicant's defence, in argument before me, was placed on clause 7.5 and clause 9 of the training agreements, for terminating the said training agreements with the second and third respondents. Clause 7.5 of the training agreements, reads as follows:

> *"7. The Department shall immediately terminate the trainee from the training program if the trainee:*
> *7.5 Refuses or neglects to carry out a lawful instruction given by the facilitator/senior official."*

Clause 9 of the training agreement reads as follows:

> *"9. The above provisions are not automatically waived if not applied. No waiver of any of the terms and conditions of this agreement shall be binding for any purpose unless reduced to in writing and signed by the parties and any such waiver shall be effective only in the specific instance and for purposes given. No failure or delay on the part of either party in exercising any right, power or privilege, precludes any other or further exercise thereof, or the exercise of any other right, power or privilege."*

[18] The applicant's defence is in short that it gave the second and third respondent a lawful command to cut there hair, which they refused to obey. As a result the Applicant was, by virtue of the aforesaid provisions at any time thereafter entitled to dismiss the second and third respondents. It elected to do so 22 May 2014 notwithstanding that the insident occurred on 3 December 2013.

Prospects of Success

[19] There are absolutely no prospects of success with the defence of the applicant against the claim of the respondents to be reinstated in the program of the applicant. It is common cause between the parties that in terms of paragraph 5.4 of the training agreements the second and third respondents were obliged to comply with the applicant's rules, regulations and policies. Paragraph 5.4 of the training agreement reads in this regard as follows:

> *"5. It will be required of you:*
>
> *5.4 To comply with all rules, regulations, policies and procedure applicable to the CoT, RTMC (Road Traffic Management Cooperation) and SAPS (South African Police Services)."*

[20] One of these policies of the applicant is a hair policy, and extract of which was attached as annexure "PCB5" to the respondents' opposing papers.[9] In paragraph 8 of the said extract it deals with hair style. It is the respondents' case that their hair was within the limits provided by this policy, which submission has fortified by an affidavit of Erens Hendrik van Biljon[10] who holds the rank of a Superintendent and who apparently is an instructor at the Tshwane Metropolitan Police Academy where the second and third respondents were enrolled in the training program. He also refers to the present matter and confirms the hair policy in respect of which the second and third respondents are relying upon. The Respondent denies that this policy was applicable to the second and third respondents. In argument it was advanced that the deponent of the Applicant is the head of the Tshwane Metropolitan Police and he outranks Inspector van Biljon. On that basis I should reject the evidence of the latter witness. This not a sufficient reason to do so. This still do not explain why the particular policy is, with reference to the express written agreement to the contrary, not applicable to the second and third respondents.

[21] It follows that the instruction of the applicant to the second and third respondents to cut their hair short was unlawful being in direct contradiction with its own policy which applied to the second and third respondents.

[22] The applicant's argument that it did not waive its right to terminate the second and third respondents training contracts can only be sustained if the said respondents

[9] See: Page 156 of the paginated papers.
[10] See: Paginated pages 185 to 188

indeed disobeyed a lawful command. Because the applicant did not give a lawful command to the second and third respondents, the applicant's right to dismiss never factually arose.

[23] Even if the command was lawful the applicant's right to dismissal did not arose because the applicant physically enforced the command it gave and elected not to dismiss the said respondents immediately. Moreover, the said respondents were kept on the program for more than five months. The dictionary meaning of immediate is "without delay, directly." This right cannot be exercised at any later date elected by the applicant, within the meaning of clause 9. Because the applicant did not exercise the right immediately it never arose and there was nothing to waive. Nothing turns however on the latter finding, since the applicant did not, in my view gave a lawful command to the second and third respondents.

[24] The ultimate conclusion is that there are no prospects of success with the defence raised by the applicant. Accordingly I find that the applicant failed to establish a *prima facie bona fide* defence which has some prospects of success on trial.

ORDER

In view of the above facts and considerations I make the following order:

1. The application for rescission of the judgment of Vorster AJ is dismissed;

2. The applicant is ordered to pay the wasted costs of the respondents on a scale as between attorney and client.

J.S. STRYDOM
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	*Adv. K Tsatsawane*
Instructed by:	*Gildenhuys Malatji Inc.*
Counsel for the respondents:	*Adv. G van der Westhuizen*
Instructed by:	*Savage Jooste & Adams Attorneys*
Date Heard:	*5 November 2014*
Date of Judgment:	*12 November 2014*