

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

7/11/2014  
Case No: 61918/2013

In the matter between:

LEON HEUNIS	First Applicant
L J SIMPSON N.O.	Second Applicant
C B ST CLAIR COOPER N.O.	Third Applicant
Z KAJEE N.O.	Fourth Applicant

and

BENITHA VEEVOERE (PTY) LTD	Respondent
----------------------------	------------

JUDGMENT

REPORTABLE : YES/NO

FOURIE, J

(2) OF INTEREST TO OTHER JUDGES : W  
(3) REVISED ✓

DATE

7/11/14

SIGNATURE

[1] This is an application by the first applicant for the rescission of a default judgment granted against him on 21 October 2013 for payment of R3,305,282.37. According to the founding affidavit the application is brought in terms of Rule 31(2)(b), alternatively in terms of Rule 42(1). Although the first applicant relies almost entirely on the provisions of Rule 31(2)(b), it has also been alleged that the judgment was granted erroneously.

[2] Rule 42(1)(a) provides that a Court may rescind an order or judgment which was erroneously sought or granted in the absence of a party affected thereby. Once the Court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind the order and it is not necessary for a party to show good cause as required in terms of Rule 31(2)(b) (see in this regard Topol & Others v L S Group Management Services (Pty) Ltd 1988 (1) SA 639 (WLD) at 650D-J).

[3] According to the return of service the summons was served upon an employee of the first applicant on 3 October 2013. It means the *dies* to enter an appearance to defend would have expired on 17 October 2013. According to the first applicant he only became aware of the summons on 8 October 2013. On 17 October 2014 his attorney contacted the respondent's attorney at Three Rivers and also sent him a letter on the same day. In this letter the first applicant's attorney said the following:

*"At this stage we wish to record that our client intends to defend the proceedings, but fears that application will be made for default judgment as he is unsure when exactly summons was served. In the circumstances, will you kindly confirm when summons was served and afford us an opportunity to consider the documents fully? We will then be in a position to advise Mr Heunis properly and deal with the matter accordingly."*

[4] On 18 October 2013 the respondent's attorney at Three Rivers responded as follows:

*"Our telephone conversation and your letter dated 17 October 2013 have reference. I have tried to contact my correspondent yesterday but was informed that he was unfortunately in Court the whole day. Will you be kind enough to allude to as to what your client's basis for his defence in this matter may be. Upon receipt of your reply I will consult with my client to see if he is prepared to entertain your request."*

On 21 October 2013 and to protect his interests the first applicant's attorney instructed his correspondent in Pretoria to enter an appearance to defend. Such a notice was served on 22 October 2013.

[5] However, in the meantime and unbeknown to the first applicant or his attorney the respondent's attorney in Pretoria (the correspondent of the attorney at Three Rivers) had already filed an application for default judgment on 18 October 2013. Subsequent thereto judgment by default was granted by the Registrar on 21 October 2013.

[6] It appears that the Pretoria attorney was not notified by the attorney at Three Rivers that he had already been contacted by the first applicant's attorney on 17 October 2013 and that the first applicant intended to defend the action. It also appears that the first applicant's attorney was not informed by the attorney at Three Rivers that the respondent's attorney in Pretoria would in the meantime proceed to apply for default judgment.

[7] The invitation on 18 October 2013 (when the application for default judgment was filed by the correspondent in Pretoria) to disclose the first applicant's defence and the undertaking that *"upon receipt of your reply I will*

*consult with my client to see if he is prepared to entertain your request” could have created the impression that default judgment would not be applied for in the meantime. As a matter of fact the contents of this letter and the application for default judgment on the same day are so divergent that they are irreconcilable.*


[8] Common sense and good practice dictate that when attorneys are communicating with one another about procedure in a matter, one should not allow your correspondent to continue in the meantime by applying for default judgment without notifying your opponent timeously, because a failure to do so might create a false sense of confidence. It appears that the first applicant's attorney was not informed that the process would continue in the meantime and that he was taken by surprise.

[9] No doubt, if these circumstances had been brought to the attention of a Court, or in this case, the Registrar, the application for default judgment would and should have been refused, notwithstanding the fact that at that time a notice of intention to defend was not yet filed. This approach was articulated as follows by Southwood J in Naidoo v Matlala N.O. 2012 (1) SA 143 GNP at 153C:

*"In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment."*

[10] Having regard to the facts and circumstances of this case, I am of the view that the default judgment was erroneously granted and should therefore, in terms of the provisions of Rule 42(1)(a) be rescinded. It is therefore not necessary, in my view, to consider the question whether there was proper compliance with the provisions of rule 31(2)(b) or not. In the result I grant the following order:

- (a) The default judgment granted against the first applicant in case number 61918/2013 on 21 October 2013 be and is hereby rescinded;
- (b) Within 10 days from date hereof the first applicant shall serve and file a notice of intention to defend if he wishes to do so;
- (c) Costs of this application shall be costs in the cause.

  
**D S FOURIE**  
JUDGE OF THE HIGH COURT  
PRETORIA

Date: 7 November 2014