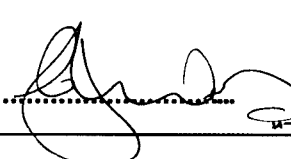


IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

9/9/16.

Case No: 75525/2010

(1)	REPORTABLE: YES / <del>NO</del>
(2)	OF INTEREST TO OTHER JUDGES: YES/ <del>NO</del>
(3)	REVISED.
<p>9/09/2016</p> <p></p>	

In the matter between:

K & D TELEMARKETING CC

First Applicant

KAREN SCHAFER

Second Applicant

ERIC BUTOWSKY

Third Applicant

and

LIBERTY GROUP LTD t/a LIBERTY LIFE

Respondent

In re:

LIBERTY GROUP LTD t/a LIBERTY LIFE

Plaintiff

and

K & D TELEMARKETING CC

First Defendant

KAREN SCHAFER

Second Defendant

ERIC BUTOWSKY

Third Defendant

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JUDGMENT

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VAN DER WESTHUIZEN, AJ

1. This is an application in terms of the provisions of Rule 30 of the Uniform Rules of Court for the setting aside of a notice in terms of Rule 28 served by the respondent upon the applicants in the above named action.
2. The respondent, as plaintiff, launched an action during 2010 against the applicants in respect of the refund of commissions paid by it to the applicants in respect of insurance policies that lapsed on grounds whereof the first applicant purportedly became liable to refund such commissions to the respondent. The second and third applicants are sureties in terms of written agreements of surety for the liability of the first applicant to the respondent.
3. That action proceeded to trial in April 2015 and the trial court, after hearing evidence on behalf of the respondent and the applicants, granted on 4 September 2015, in a written judgment, absolution from the instance together with costs orders.
4. The trial court found *inter alia* that the respondent had not on a balance of probabilities proven its claim for the refund of the commissions paid by it to the first applicant. It was on that basis that the order of absolution of the instance was granted.
5. On the aforementioned judgment being delivered, the respondent caused a notice in terms of the provisions of Rule 28 to be served on the applicants, the defendants in the action. Together therewith, the amended pages to the particulars of claim were served. In addition, a summary of expert evidence in terms of the provisions of Rule 36 was also served upon the applicants.
6. The applicants, on receiving the notice to amend, caused a notice in terms of the provisions of Rule 30 to be served on the respondent, calling upon the respondent to remove the irregular step of the notice

in terms of Rule 28 within the prescribed time period. The respondent declined or failed to do so. Hence the launch of this application.

7. The premise upon which the applicants seek the setting aside of the notice in terms of Rule 28 relates to the order of the trial court granting absolution from the instance.
8. The parties have divergent views as to the effect of an absolution from the instance being granted.
9. In this regard the applicants contend that the action in which the order for absolution from the instance was, has come to an end. It is further contended that the trial court is *functus officio* and that the order and judgment are final and binding on all the parties.
10. It is contended on behalf of the applicants that the respondent has two options in regard to the order and judgment being final and binding. In this regard the applicants submit that the respondent is obliged to either, appeal the order and judgment, or to commence proceedings *de novo*. In this regard, the applicants rely on authorities from which it is to be discerned that the correct procedure to be followed is to start “a fresh”.<sup>1</sup>
11. The respondent contends that its claim is not defective and that the procedure it seeks to follow is merely a situation of curing deficient evidence and proceeding on the papers as they stand or amending them if necessary. In this regard, the respondent relies on the dictum in *Sparks v Sparks*.<sup>2</sup>
12. Mr Roux, who appeared on behalf of the respondent, submitted that, although the authorities all state that a party who is faced with an order of absolution from the instance is to start afresh or *de novo*,

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<sup>1</sup> *Corbridge v Welch* (1892) 9 SC 277 at 279; see also *Colman v Dunbar* 1933 AD 141 at 163

<sup>2</sup> 1998(4) SA 714 at 721D

none of those authorities attempt to state what is meant thereby. Mr Roux submitted with reference to the full court's judgment in *Sparks, supra*, that the equivalent of absolution from the instance would be that no order is made or that leave is granted to apply again on the same papers.<sup>3</sup> Hence, the procedure followed by the respondent is in keeping with the *Sparks, supra*, dictum, is correct and does not constitute an irregular step.

13. In my respectful opinion, the reliance is misplaced. In the context of what is stated in *Sparks, supra*, and in *African Farms and Townships*, it was held that where no order is made by the court or that the court grants leave to apply again of the same papers, such instances are equivalent to absolution from the instance. It does not mean that absolution from the instance implies that leave is granted to apply again on the same papers. That specific order is to be made by the court. It follows that when the court grants leave to apply again on the same papers, such order is equivalent to absolution from the instance being granted.
14. Support for the foregoing interpretation is found in the *ratio decidendi* in *Colman v Dunbar* where the Appeal Court (as it then was known) found that a litigant who has a judgment of absolution from the instance against him could always proceed *de novo* if he discovers fresh evidence.<sup>4</sup> Further in this regard, the meaning of *de novo* is afresh; anew (opnuut; van nuuts af).<sup>5</sup>
15. In view of the foregoing, the respondent's contentions cannot be upheld.

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<sup>3</sup> See *African Farms and Townships Ltd v Cape Town Municipality* 1963(2) SA 555 (A) at 563F

<sup>4</sup> at 163

<sup>5</sup> *Trilingual Legal Dictionary*, V. G. Hiemstra and H. L. Gonin, 3<sup>rd</sup> ed. p. 175

16. It follows that the notice in terms of Rule 28 served on the applicants stands to be set aside as an irregular step.

I grant the following order.

- (a) The Respondent's Notice in terms of Rule 28, dated 18 February 2016, served on the Applicants in the matter under case number 2010/75525 is set aside as an irregular step.
- (b) The respondent is to pay the costs.

  
C J VAN DER WESTHUIZEN  
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicants:  
Instructed by:

Ms N Strathern  
Karen Shafer Attorneys

On behalf of Respondent:  
Instructed by:

C D Roux  
R C Christie Inc.