

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

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED

DATE: 23.2.2016

SIGNATURE:

CASE NO: 49258/2013

59908/2013

DATE: 23/2/2016

**IN THE MATTER BETWEEN**

WILLEM ALBERTUS ROSSOUW

APPLICANT

AND

ABSA BANK LIMITED

RESPONDENT

**IN THE MATTER OF**

ABSA BANK LIMITED

APPLICANT

AND

WILLEM ALBERTUS ROSSOUW

RESPONDENT

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**JUDGMENT**

MSIMEKI, J

**INTRODUCTION**

[1] I shall refer to the parties as plaintiff and defendant.

Plaintiff, under case number 19260/2010, through its erstwhile attorneys, Tim Du Toit Attorneys, instituted an action against defendant. The summons had four separate claims in which plaintiff claimed payment for monies lent and advanced to him by defendant. Claims 1 and 2 are the relevant ones. Plaintiff obtained judgment by default in respect of the two claims. Defendant then brought an application to have the judgments taken by default set aside. The application covered claims 1 to 4. Defendant succeeded in having claim 1 set aside. The court dismissed the application in respect of claims 2, 3 and 4 and rescinded the judgment in respect of claim 1. This appears from annexure "E" which is the draft order of J W Louw J appearing on pages 85 and 86 of the paginated papers under case number 49258/2013.

### **BRIEF FACTS**

- [2] Plaintiff again, through his current attorneys, Delport Van den Berg, instituted two actions under case numbers 49258/2013 and 59908/2013 against defendant. Case number 49258/2013 relates to claim 1 while case number 59908/2013 relates to claim 2. Defendant, in the meantime, had brought an urgent application under case number 49258/2013 seeking an order staying the sale in execution which was scheduled for Friday 30 May 2014 at 10:00. On 29 May 2014, the court granted the order staying the sale in execution pending the institution and adjudication of defendant's application for rescission of judgment which was to be instituted within fifteen days of the court's order which is dated 29 May 2014. Defendant, pursuant thereto, has now brought the rescission applications under case numbers 49258/2013 and 59908/2013. In respect of the application under case number 49258/2013, defendant raised a claim of *lis pendens*, as according to him, litigation had been pending in respect of claim 1 at the time the current default judgment was granted. Defendant, in respect of claim 2, raised a claim of *res judicata* in light of the determination which had been made when the rescission application was dismissed by the court leaving the default judgment intact. Plaintiff, at the hearing of the two applications for the rescission of the two default judgments, assisted by Adv J Roux ("Mr Roux"), moved an application for the variation of the previous default judgment order made under case number 19260/2010 by substituting the wrong immovable property which was

declared executable with the correct immovable property described by defendant in the court papers. Plaintiff also applied for condonation for the late filing of its answering affidavit. Plaintiff opposes the two applications for the rescission of the two default judgments.

- [3] Plaintiff, correctly, in my view, consents to the rescission of the order granted under case number 59908/2013. The application for the condonation of the late filing of plaintiff's answering affidavit in the rescission applications is also not opposed. The variation of the order made under case number 19260/2010 is again not opposed. The issue the court has to consider in these instances is that of costs which I shall deal with later.

### **THE ISSUES**

- [4] These are:

1. whether *lis alibi pendens* can successfully be raised by defendant in his application for the rescission of the default judgment obtained under case number 49258/2013;
2. whether defendant should be held liable for costs in the two applications including the costs relative to the variation application and the application for condonation for the late filing of plaintiff's (respondent's) answering affidavit; and
3. whether the parties, post June 2012 to date of the two applications, were in fact engaged in negotiations with plaintiff's erstwhile attorneys Tim Du Toit Inc.

- [5] I shall first deal with the issue of *lis alibi pendens*.

I pointed out earlier in this judgment that plaintiff under case number 19260/2010 by default obtained judgment against the defendant in a case which contained four claims namely claims 1, 2, 3 and 4. Defendant then brought an application to have the default judgment rescinded. Defendant could only succeed in having the order relating to claim 1 rescinded (see the

order, annexure "B", on pages 136 and 137 of the paginated papers under case number 59908/2013). It was rescinded on the basis that defendant had not been in default. Plaintiff, at the time, also so conceded. That, in my view, disposed of the matter because there ought not to have been any claim against defendant who had done nothing wrong as he had not defaulted in his payments. Put differently, there was no case left as the order had been rescinded. There was no cause of action and there was no case hence plaintiff conceded that the case was a non-starter. Defendant cannot be heard to say that the case under case number 19260/2010 is still pending in respect of claim 1. There was no case.

[6] Case number 49258/2013 has its own cause of action arising from the default of payment by the defendant who had not defaulted under case number 19260/2010 in respect of claim 1. Plaintiff demonstrated the extent of the default adding that defendant's payment had been erratic. This can be gleaned from annexure "C" running from page 138 to 148 of the paginated papers. This, by now, must have adequately demonstrated that claim 1 under case number 19260/2010 and the claim under case number 49258/2013 are different. They are in fact unrelated. The one has no cause of action while the other has. This very clearly demonstrates that *lis alibi pendens* cannot successfully be raised by defendant under case number 49258/2013. The rescission of judgment under this case number must therefore fail.

[7] I deal next with the question whether judgment was taken prematurely in the two applications. This, because defendant contends that the parties were engaged in serious negotiations when the judgments were taken by default. Plaintiff has, in my view, successfully refuted this. Indeed after the first rescission application in which the order in respect of claim 1 was rescinded, numerous attempts to engage in negotiations were made. These attempts, according to the papers, became a futile exercise. Plaintiff and its attorneys sent e-mails to defendant, his spouse and his attorneys with a view to trying to have the matter resolved. An attempt is also echoed by defendant's attorneys in their written correspondence to plaintiff's attorneys dated 27 August 2013. Plaintiff always wanted to proceed with the matter. This is seen from plaintiff's

attorneys' e-mail to defendant's attorneys dated 14 December 2013. This was the final communication. It became clear, according to Mohamed Junaid Ali, the deponent to plaintiff's answering affidavit, that there was no room for negotiations. Ali, in the affidavit, stated categorically that "any allegations of current negotiations, even post 14 December 2013 to the present date, is devoid of all truth". The possibility of any negotiations taking place were no longer foreseen. This then shows that defendant could not have been engaged in any serious negotiations as he contended. This defence which, according to Ali, was defendant's high-water mark defence, in my view, should also fail.

### **COSTS**

- [8] Plaintiff expects defendant to be responsible for all the costs on the basis that they were successful with the variation application and the condonation application. This, according to Mr Roux, for the plaintiff, calls for punitive costs against the defendant. Mr Roux further submitted that the defendant misled the court regarding the alleged negotiations and that this bolstered their case for costs against defendant on a punitive scale.
- [9] It will be remembered that:
1. It was plaintiff's fault to include and describe a wrong property in its papers. The fact that there was no opposition in their application does not mean that defendant should be burdened with costs.
  2. The fact that plaintiff's application for condonation for the late filing of its answering affidavit was not opposed does not mean that defendant also should bear the costs. They delivered their answering affidavit late and that too is their fault.
  3. The submission that defendant misled the court regarding the settlement negotiations on its own does not warrant punitive costs against defendant.

4. Plaintiff reinstituted an action under case number 59908/2013 when the order of the court under case number 19260/2010 was still intact. Plaintiff correctly so conceded. Plaintiff cannot escape liability for the costs.

[10] The following order, in the result, is made.

A. CASE NUMBER 49258/2013

1. The application for the rescission of the judgment by default granted on 29 October 2013 is dismissed.
2. Defendant (applicant) is ordered to pay the costs of the application.

B. CASE NUMBER 59908/2013

1. Condonation is granted for the late filing of plaintiff's (respondent's) answering affidavit.
2. The application for the rescission of the judgment by default granted on 19 February 2014 is granted. The judgment is rescinded.
3. Plaintiff is ordered to pay the costs of the application.
4. The contents of paragraphs 3.1 to 3.4 of the order dated 15 November 2010 in respect of case number 19260/2010 are deleted and substituted with the following:

Erf 6[...] W[...] x 9, Township Registration Division I.P. Province of Northwest, measuring 2383 square meters, held by deed of transfer number T[...].

Physical address: 3[...] T[...] Street, Witkoppies, Klerksdorp.

M W MSIMEKI

JUDGE OF THE GAUTENG DIVISION, PRETORIA

49258/2013

Date of hearing: 28.4.2015

Judgment delivered: 23.2.2016

Appearances:

For the applicant: Adv A J Le Grange

Instructed by: Arthur Channon Attorneys

For the respondent: Adv J Roux

Instructed by: Delport Van Den Berg INC