



THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA

Top Trailers (Pty) Ltd & another v J P Kotze (1006/18) [2019] ZASCA 141 (1 October 2019)

From: The Registrar, Supreme Court of Appeal

Date: 1 October 2019

Status: Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Supreme Court of Appeal (SCA) today upheld an appeal by Top Trailers (Pty) Ltd and Sipho Sono NO (the appellants) against a judgment of the Gauteng Division of the High Court, Pretoria dismissing the appellants' application for rescission of the order granted by default by Khumalo J on 27 June 2016. In terms of that order Khumalo J set aside a resolution of the board of directors of Top Trailers (Pty) Ltd, to begin business rescue proceedings and place the company under supervision in terms of s 129 of the Companies Act 71 of 2008 (the Act).

The respondent, Mr Kotze had sought the setting aside of the resolution on the basis of the contention that, as a company's creditor, he was entitled in terms of the Act to have been notified of the business rescue proceedings which, he argued, the company and the business rescue practitioner failed to do. The appellants filed their notice to oppose Mr Kotze's application.

Before the appellants filed their answering affidavit and without notifying them of the date of set down of the application, Mr Kotze obtained an order by default setting aside the resolution. The appellants unsuccessfully applied to the High Court for the rescission of that order. Their subsequent application for leave to appeal against the dismissal of their rescission application was also dismissed.

The appellants sought and obtained from the SCA leave to appeal against the dismissal of the rescission application. The appellants mainly sought rescission of the order in terms of rule 42(1)(a) of the Uniform Rules of Court on the ground that the order was erroneously granted. Mr Kotze, arguing in support of the order, contended that he was procedurally entitled to the order because in his notice of

motion he had notified the appellants of the steps they had to follow in order to oppose his application. Mr Kotze contended that the appellants failed to comply with the time limits set out in his notice of motion. The SCA rejected Mr Kotze's contentions.

The SCA held that the order granting the setting aside of the resolution had been erroneously granted against the appellants on the ground that they had not been notified of the date of set down of the application as required by the Uniform Rules of Court and the relevant provision of the Gauteng: Pretoria Practice Manual. The SCA held that the High Court ought to have granted rescission of the order that was granted by default. The appeal was accordingly upheld with costs, including the costs of two counsel.