IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. A594/07

In the matter between:

M I VAN EEDEN	First Appellant
ISODAVID TRUST	Second Appellant
KOLGANS ESTATE CC	Third Appellant

and

BASSON ATTORNEYS	Respondent

JUDGMENT

Z F JOUBERT AJ

1. The three Appellants appeal against the dismissal by a Magistrate of an application brought by them for the rescission of a judgment granted against them on 26 November 2002 by the Clerk of the Court at Bredasdorp Magistrate's Court. The judgment dismissing the rescission application was handed down by a Magistrate in Bredasdorp Magistrate's Court on 6 June 2007. The Magistrate handed down an *ex tempore* judgment on 6 June 2007 dismissing the rescission application, and provided his reasons in terms of Rule 51 of Act 32 of 1944 on 16 July 2007.

2. The matter has a strange and somewhat convoluted history. In addition, the papers contain serious allegations of fraudulent conduct with allegations that documents annexed to the affidavits by the parties constitute forgeries. Not surprisingly, this has led to factual disputes, which are not capable of resolution on the papers as they stand. However, it is not necessary to resolve these disputes for the purposes of the determination of this appeal.

3. In 2002, the Respondent, who is an attorney practising for his own account in Napier, issued summons against the three Appellants in the Magistrate's Court in Bredasdorp. The particulars of claim, which were signed by the Respondent himself, are far from perfect. The Second Respondent (*sic)* is stated to be the First Appellant and one de Lacie in their capacity as trustees of the Isodavid Trust. Neither the summons nor the particulars of claim cite them *Nominee Officio.* The Third Defendant is stated to be the First Appellant, in her capacity **as a member** of the Third Respondent close corporation. The particulars further aver that the Respondent and the *"verweerder"* (presumably the First Appellant) agreed on the rate of interest to be charged. It is further alleged that the amount claimed represents agreed fees and disbursements, inclusive of interest, for professional services rendered by the Respondent to *"verweerders"* (presumably all three Appellants). There is thereafter a paragraph containing the bald averment that the *"verweerders"* (presumably all three Appellants) are jointly and severally liable to the Respondent for the

amount claimed. No averments are made in support of the allegation that the liability of the three Appellants is joint and several.

4. After an appearance to defend had been entered on behalf of the Appellants, the Respondent saw fit to apply for summary judgment against all three Appellants and deposed to an affidavit in support of the application for summary judgment. This affidavit only served to further muddy the waters. In paragraph 3 of the affidavit, the Respondent states the following:

> *"Die Verweerderes is aan Eiser die bedrag van R50419,60 verskuldig, op gronde in die dagvaarding uiteengesit, trouwens, Mev van Eeden erken dat Verweerders gesamentlik en afsonderlik, reeds meer aan die Eiser verskuldig is, ooreenkomstig haar nota gemaak op Aanhangsel "A" hierby aangeheg. Geen beswaar word hoegenaamd teen die bedrag verskuldig en aangetoon op die rekeningstaat, aangeteken nie, en aangesien eerste verweerder opdragte gee wat verband hou met tweede en derde verweerders is slegs een rekening ge-open waarop die dienste gelewer aan die laasgenoemde verweerders aangesui word. Daar word ook geen beswaar hierteenoor aangeteken nie.*
>
> *Die feit dat eerste verweerder namens al die verweerders erken dat die bedrag aan Applikant verskuldig meer is as die bedrag in die dagvaarding vermeld, stel die bedrag in die dagvaarding*

vermeld gelyk aan 'n gelikwideerde vordering, aangesien die verweerders se uitdruklike erkenning, 'n afstanddoening van 'n versoek om taksasie daarstel." (Own emphasis)

5. In terms of Rule 14(1)(b), if the claim is founded on a liquid document, a copy of such document may be annexed to the application for summary judgment. However, the document annexed as annexure "A" to the Respondent's affidavit is no more than a statement of account reflecting a balance carried over of R46 073,25 with a few entries relating to faxes, letters and telephone calls and the like, and reflecting a balance due in the amount claimed. The "*nota gemaak op Aanhangsel "A" hierby aangeheg*" referred to in the Respondent's affidavit reads as follows:

"Ek sal u besigheid verkoop om so die geld te delg".

6. This is a far cry from an admission by the First Appellant that the Appellants are liable jointly and severally to the Respondent for more than the amount claimed, as is stated twice in the paragraph quoted from the affidavit, and by no means amounts to a "... *uitdruklike erkenning, 'n afstanddoening van 'n versoek om taksasie ...*" as deposed to on oath by the Respondent.

7. However, it appears that the application for summary judgment was not proceeded with, as the First Appellant signed a consent to judgment in terms of Section 58 of Act 32 of 1944 on 12 November

2002. In terms of this consent, the First Appellant agreed to pay the amount outstanding in monthly instalments of R500,00 as from 30 November 2002. There is no mention of the Second and Third Appellants in the body of the document, and there is nothing in the document to indicate that they consent to judgment.

8. In her application for rescission, brought on behalf of herself and the other two Appellants, the First Appellant states that on 26 February 2007, the Sheriff of Bredasdorp served a warrant of execution issued under Case No. 1614/2006 on her. She immediately contacted her attorney to ascertain what judgment had been taken against the Appellants as, according to her, the Appellants owed the Respondent no monies. On 28 February 2007, the Appellants' attorney wrote a letter to the Respondent in this regard, and received no reply. On 5 March 2007, he attended at Court and drew the file for Case No. 1614/2006 and ascertained that no summons had ever been issued under this case number, but that the Respondent had applied for default judgment on the basis of a consent to judgment in terms of Rule 58, a copy of which was annexed to the application. This was however a different consent to judgment to the one signed in 2002 by the First Appellant. This consent to judgment purports to have been signed in 2004, and the first two pages thereof differ from those of the previous one. The First Appellant denies ever signing this consent to judgment. She further states that she received no notice whatsoever from the Respondent in regard to this application for judgment. It is

noteworthy that on page 3 of the 2002 consent, the space for the year is left blank. Otherwise, this page appears to be identical to the third page of the 2004 consent, except that the year "2004" appears thereon in the space which is left blank in the 2002 consent.

9. In paragraph 12 of her founding affidavit in the rescission application, the First Appellant states the following in this regard:

> *"Ek het nooit aanhangsel B onderteken nie en is dit duidelik dat Respondent die laaste bladsy van aanhangsel C uitgehaal het en by aanhangsel B gevoeg het. As daar na die oorspronklike aanhangsel B gekyk word kan gesien word dat die pen waarmee B geskryf is verskil op bladsy 3 van bladsye 1 en 2. Ek sou nooit aanhangsel B geteken het nie aangesien Applikant geen gelde aan Respondent verskuldig is nie, gestaaf deur aanhansel D."*

The Respondent denies the allegation.

10. During the hearing, the Respondent abandoned the judgment which he obtained on the basis of the 2004 "*consent*", that is to say, the 2006 judgment, and writ of execution accordingly falls away. However, the Respondent persisted in his opposition to the application for the rescission of the 2002 judgment. In regard to this judgment, the First Appellant states that she signed 2002 consent to judgment as the parties had settled the matter on 12 November on

the basis that payments would be made in instalments, although the Appellants felt that they were not liable to the Respondent. She states that thereafter the First Appellant and the Respondent agreed that the full amount of the alleged indebtedness would be set off by the Appellant selling Erf 136 Napier (which apparently belonged to the Respondent). She states that she sold the property, and at the same time also referred other transactions to the Respondent, including those relating to Erf 288 Napier, Erf 714 and Erf 345 Napier, in respect of which the Respondent, according to her, retained commissions which were due to her. She states that after she had sold Erf 136 and owed the Respondent nothing further, he kept behind further commissions and she claims that he is in fact indebted to her. She further claims that he signed a document, which is annexed to her application as annexure "D", in which he acknowledges that she is not indebted to him. The signature which appears on this document is remarkably similar to his, but he denies signing the document and this is a further dispute which cannot be resolved on the papers.

11. The Respondent himself avers that the 2006 judgment was sought and obtained in error as he had apparently lost sight of the fact that he had already obtained a judgment. In an application in terms of Section 63 of the Act to enable him to execute upon the judgment, he relies upon an affidavit deposed to by a member of his staff in which she claims that the relevant file had inexplicably been "*misfiled*". In

view of the ongoing business relationship between the parties, this is a remarkable state of affairs. It is further remarkable that for a period of some t here or four years after judgment had been obtained, no effort was apparently made by the Respondent to obtain payment.

12. It is clear that the 2002 judgment should never have been sought or granted against the Second and Third Appellants. As far as t he First Appellant is concerned, I am of the view that the Magistrate should have found that the First Appellant showed "*good cause*" and that there were good reasons why the judgment should be rescinded.

13. In my view, on the common cause facts, and leaving aside the factual disputes which are irresoluble on the papers, there is no probable inference that there is no *bona fide* defence and that the application for rescission was not *bona fide*. I am of the opinion that the appeal should succeed with costs, and that the judgment of the Magistrate should be set aside and substituted with an order that the judgment granted in Case No. 917/02 in the Magistrate's Court in Bredasdorp be set aside.

Z F JOUBERT AJ

Ek stem saam, die APPÈL SLAAG MET KOSTE, die vonnis toegestaan in die landdroshof te Bredasdorp onder saak nommer 917/2002 is tersyde gestel en vervang met die volgende.

Die VONNIS TOEGESTAAN IN DAARDIE SAAK NOMMER IS TERSYDE GESTEL.

DESAI, J