IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A 194 / 2021

In the matter between:

BARRISFORD BRENT PETERSEN LAW INCORPORATED	First Appellant
BARRISFORD BRENT PETERSEN	Second Appellant

and

DONALD ROBERT MITCHELL TRADING AS MITCHELL & CO	Respondent

Coram: Samela et Wille, JJ

Heard: 19th of November 2021

Delivered: 3rd of December 2021

JUDGMENT

WILLE, J: (Samela, J concurring)

INTRODUCTION

[1] This is a civil appeal from the lower court. For the purposes of convenience and clarity, the parties will be referred to as they were cited in the proceedings in the lower court. The defendants seek to set aside the order of the judicial officer in the lower court in terms of which the lower court refused to rescind a judgment granted by default against the defendants, jointly and severally, the one paying the other to be absolved. This for alleged professional fees owed by the defendants to the plaintiff.

[2] The first defendant is a law firm and the second defendant is a practising attorney. The plaintiff is also a practising attorney. The grounds of appeal as set out in the defendant's notice of appeal are as follows, namely: that the lower court erred in finding that the application to rescind the judgment was piloted under the incorrect section of the Act[1], read with the incorrect applicable rule[2]: that the plaintiff's claim had in any event prescribed in law due to the effluxion of time: that the plaintiff had been incorrectly and

[1] The Magistrates' Courts Act 32 of 1944.
[2] The Magistrates' Courts Rules (which came into effect from the 15th of October 2010).

defectively cited and that the defendants further enjoyed a *bona fide* defence to the plaintiff's claims for professional fees as claimed by him against them.

THE RELEVANT BACKGROUND FACTS

[3] During September 2020[3], the plaintiff issued out a summons in connection with a joint and several claim against the defendants for professional fees due owing and payable, together with interest and costs. Upon receipt of the summons, the second defendant sent an email to one of the first defendants professional employees[4], with the specific instruction to enter an appearance to defend the action on behalf of the defendants.

[4] At this time, the said professional employee, who was and is a practising attorney was working from home because of the pandemic.[5] Some further issues were encountered during this time, due to the alleged partial destruction of one of the first defendant's branch offices. According to the said employee, he only physically returned to this branch office on the 5th of October 2020.

[5] It is indicated that because of these peculiar circumstances no office file was opened and the matter was accordingly left wholly unattended. The second defendant assumed that the matter had been defended. Thereafter, on the 4th of February 2021, the second defendant contacted his delegated employee to inform him that the sheriff of the

[3] On the 25th of September 2020.
[4] Mr Ashworth.
[5] The Covid 19 pandemic.

court was in the process of attaching some movable property, at his residence. This, because a judgment had been granted against the defendants, jointly and severally, by default. No doubt, this triggered the application for the rescission of the default judgment which was launched on the 8th of February 2021.

THE JUDGMENT IN THE LOWER COURT

[6] The judicial officer in the lower court found, *inter alia*, that the defendants erroneously elected to follow the incorrect procedure, regrettably by 'limiting' themselves to the provisions of section 36(1)(b) of the Act, read with rule 49 (8) of the court rules. This, is but one of the reasons why the application was refused in the lower court.

[7] Further, the lower court went on to reason that the defendants failed to convince the court *a quo* that they had a reasonable plausible explanation for their default by not launching their application for the rescission of the judgment timeously and, in terms of the court rules. This because the rescission application was only chartered on the 8th February 2021. The judgment by default having been granted as early as the 26th of October 2020.

[8] Finally, the court *a quo* held that the defendants had failed to convince the court that their attorney was unable to properly and timeously file an appearance to defend with the clerk of the court. This, despite the fact that the said attorney was working from home during the pandemic. The judicial officer in the court *a quo* also found that the

defendants did not exhibit the required 'good cause' to rescind the judgment and was also not satisfied that that there was 'good reason' to rescind the default judgment.[6]

THE TWO 'APPLICATIONS' FOR CONDONATION

[9] As alluded to earlier the first defendant is a law firm and the second defendant is an attorney. The plaintiff is also an attorney. None of the parties seemingly had an overwhelming or vigorous desire to follow the court rules and the practice directives of this court.

[10] None of the parties filed their respective 'Heads of Argument' in accordance with the court rules, read with the applicable practice notes and a plethora of excuses were advanced. All concerned could have done much better and I expected a higher degree of professionalism from all the parties. I was disappointed to say the least.

[11] Because of this tardiness a further postponement would have merely delayed the hearing of this appeal unnecessarily. Accordingly the respective condonation applications for the late filing of the respective 'Heads of Argument' were granted. The matter was initially due to have been heard on the 19th of November 2021, but due to the difficulties referenced above, the following order was granted on the 19th of November 2021, namely:

1. *That the appeal proceedings are postponed sine die.*

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[6] Rule 49 (1).

2. *That the appellants' counsel and the respondent's counsel are to arrange for an alternative future date for the hearing of this appeal (on a date and time suitable to Judge Samela and Judge Wille).*

3. *That alternatively, upon further consideration of the papers, including the respondent's condonation application and Heads of Argument, it may be directed by the court that the appeal may be dispensed with in accordance with section 19(a) of Act 10 of 2013.*

4. *That the wasted costs of an incidental to the appeal, including the costs of and incidental to the application for condonation, shall stand over for later determination.*

[12] Having thereafter granted the condonation applications and having perused the respondent's further papers, it was ruled that the appeal would be dispensed with on the papers in terms of section 19(a) of Act 10 of 2013.

THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANTS

[13] As mentioned, the plaintiff is an attorney. He carries on business in Gauteng. The first defendant is a law firm and the second defendant is a director of the first defendant. The defendants carry on business in the Western Cape. Historically, the plaintiff had established and maintained a good legal working relationship with a particular corporate client[7], this in order to be of service to them in connection with specialized commercial work.

[7] 'Engen'

[14] In terms of a prior agreement struck between the plaintiff and the defendants, the defendants agreed to pay to the plaintiff an amount equal to two-thirds of any professional fees levied against this corporate client, for the specialized commercial work performed by the plaintiff for the corporate client. At the time, the plaintiff worked as a consultant to the first defendant.

[15] In terms of this prior agreement, the plaintiff would periodically provide the first defendant with his time-sheets and schedules for this specialized work performed for the corporate client, whereupon the first defendant would thereafter render an invoice to the corporate client. During September 2017, the first defendant informed the plaintiff that it would be unable to effect payment to the plaintiff of his aliquot share of paid fees due to him, this despite the first defendant having received payment from the corporate client for these specialized legal services rendered.

[16] Solely as a result of the non-payment of the fees to the plaintiff by the defendants, the plaintiff terminated his agreement and contractual relationship with the defendants. The plaintiff thereafter instituted action against the defendants for two separate claims of R114 509,88 and R32 117, 20 respectively. This, coupled with a claim for interest on these amounts, together with costs.

THE DEFENDANTS' CASE

[17] In the founding affidavit in support of the application for rescission of judgment, the deponent thereto avers that he is an attorney employed by the first defendant. He

goes on to say that he is duly authorized to represent the defendants. Nothing more and nothing less is advanced in this connection. Moreover, he makes the point that in so far as 'condonation' may be necessary, the defendants seek condonation for the late filing of their application for rescission of the judgment because, neither the application for default judgment, nor the order that was granted pursuant thereto, were served on them as the defendants. The reasoning on this score is hard to follow.

[18] What the deponent does say is that the first time that the defendants became aware of the fact that a default judgment had been granted against them, was only when the sheriff executed the warrant of attachment at the residence of the second defendant. The defendants do not in any manner deal with the provisions of rule 49(2). This rule indicates a deeming provision, establishing an onus on the defendants as far as the time period for the launching of the rescission application is concerned. This is not dealt with by the defendants.

[19] Most significantly, the deponent further records that the second defendant was under the impression that a notice of intention of defend the action had been filed. Moreover, he emphasises that no further correspondence was received during the period between the 27th of September 2020 and the 4th of February 2021.

[20] This in itself begs the question as to what the second defendant and his employee who was entrusted with the matter, did about this matter for over (4) months. It is suggested that in the circumstances, the defendants' conduct was neither indolent nor dilatory. I must disagree. Finally, he takes the position that the default judgment was

obtained by fraud or mistake and accordingly that the provisions of rule 49(8) find application. Again, I disagree.

DISCUSSION

[21] The shields to the claims by the plaintiff raised by the defendants bear scrutiny. The first of these is a highly technical defence and may be dealt with swiftly. The defendants advance that the plaintiff has been incorrectly and defectively cited. This, because the plaintiff was cited in his personal capacity but 'trading' as Mitchell and Co. The defendants for this argument, rely on the written agreement which refers to one of contracting parties as 'Robert Mitchell' Attorneys. The defendants allege that no such entity[8] is registered with the Legal Practice Counsel.[9] This, absent any material from the LPC in support of these allegations. This is euthanized by the plaintiff in reply.

[22] The second defence is that of a special plea of prescription due to the effluxion of time. The defendants advance that certain of the amounts became due and payable prior to the conclusion of the first defendant's agreement on the 1st of February 2017. This shield must of necessity also be considered in the correct context taking into account that the defendants made a payment 'on account' which clearly interrupted the running of any prescription.

[23] However, this shield also does not take into account that the plaintiff pleads and avers that an agreement was struck with the defendants already in 2016.[10] In the

[8] Donald Robert Mitchell trading as Mitchell and Co
[9] The 'LPC'
[10] Paragraph 6 of the particulars of claim.

plaintiff's affidavit, the plaintiff explains that he was previously for many years, a consultant to a different discrete law company.

[24] He resigned from this latter company in 2014 when this subject firm was sold to the second defendant. Thereafter, with effect from March 2015, he once again was employed as a consultant to deal specifically with the commercial work of the corporate client. Subsequently, the first defendant submitted a tender to the corporate client for its specialized commercial work.[11]

[25] This was precisely when the plaintiff and the defendants concluded their partly oral and partly written agreement which is confirmed in their respective email communications. The plaintiff only became aware during August and September 2017, that the defendants were withholding information and payments from him in connection with the work he had performed for this corporate client, as previously agreed.

[26] As a consequence, the plaintiff made enquiries with the legal advisor of the corporate client, whom confirmed to him that at least, portion of the fees due to him, had already been paid to the first defendant. This enquiry no doubt prompted the first defendant to make a payment on account to the plaintiff on the 25th of September 2017.[12]

[27] Moreover, because of the peculiar nature of the professional fee agreement between the parties, it is clearly evident from the cause of action that the plaintiff completed the professional work in 2017. The defendants did not put up any evidentiary

[11] During 2016.
[12] This in the amount of R 20 000,00.

material or file any confirmatory affidavits in support of their case. Accordingly, the judicial officer in the lower court cannot be faulted for drawing an adverse inference on this score.

[28] The plaintiff takes the following position in connection with the defences raised by the defendants, namely: that the plaintiff indicates that a prudent attorney would have followed up as to what had transpired during the (4) month intervening period after the summons was served: that the summons was issued out in his personal capacity and that the rules[13] clearly cater for the position that any person carrying on business under a name or style other than in his own name, may indeed sue or be sued in that name or style as if it were a firm name. The plaintiff attached his fidelity fund certificates in support of these allegations.

[29] Most interestingly, the defendants seem to place some weight on the fact that the plaintiff did not give them notice of the application for default judgment and the application for a warrant of execution. Reliance on this is totally misplaced. In my view, the defendants did not have any defences whatsoever to the claims advanced by the plaintiff and did not exhibit the required 'good cause' to rescind the judgment. Besides, there was no good reason to rescind the default judgment. I say this also because the object of rescinding a judgment is to restore an opportunity to litigate a real dispute.[14]

[30] Further, the judgment was not erroneously granted and was not tainted by any fraud, mistake or error. Patently, there was no mistake common to both parties. Further,

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[13] The provisions of rule 54 (4).
[14] *Saphula v Nedcor Bank* 1999 (2) SA 76 (W) at 79B

in any event, there was no causative link between the alleged mistake and the grant of the order by default.[15] In addition, the judgment was not granted by any sort of fraud.

[31] What we are left with in essence is a application for rescission of judgment in accordance with rule 49 (1), (2) and (3). As a matter of logic, a case for condonation must be made out as the first hurdle to cross.[16] The defendants also face the second hurdle of the provision in the rules that they were 'deemed' to have knowledge of the default judgment within (10) days of the granting of the order. No reasonable and plausible explanation has been given for the (4) month delay that occurred in this case.[17]

[32] In my view, taking into account the circumstances of this case, with specific reference to the attempts made by the plaintiff to obtain the legitimate amounts owed to him, as compared to the inaction on behalf of the defendants, the judicial officer in the lower court correctly refused to rescind the judgment.[18] No real plausible or reasonable explanation has been preferred by the defendants as to why nothing was done about this matter for a period of approximately (4) months.

[33] In all the circumstances of the matter, I hold the view that there is accordingly no room to interfere with the judgment of the lower court on appeal. In the result, I propose an order in the following terms, namely:

1. That the appeal is dismissed.

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[15] *Tshivhase Royal Council v Tshivhase* 1992 (4) SA 852 (A) at 386 A-C
[16] *Wright v Westelike Provinsie Kelders* Bpk 2001 (4) SA 1165 (C) at 1174 F-G
[17] *Ozen Wholesalers (Pty) Ltd v Silber* 1953 (4) 697 (T)
[18] *Cavalinias v Claude Neon Lights SA Ltd* 1965 (2) SA 649 (T) at 652

2. That the defendants (the appellants), be ordered to pay the costs of and incidental to this appeal (jointly and severally), the one paying the other to be absolved, on the scale as between party and party, as taxed or agreed.

WILLE, J

I agree, and it is so ordered:

SAMELA. J