✓ 22/05/2018

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: 34798/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 22/05/2018

SIGNATURE: .....

In the matter between:

LEBONE CHICKEN AND MEAT OFFAL (PTY) LTD	First Applicant
ELIZABETH SUSANNA LOUWRENS	Second Applicant
and	
ASTRAL OPERATIONS LTD	Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The first and second applicants ("the applicants") pray for the rescission of a summary judgment granted by default on 21 October 2014. The respondent opposes the application.

[2] The parties are *ad idem* that the application is brought in terms of the common law and that the following requirements need to be met by the applicants:

I. the applicants must present a reasonable and acceptable explanation for its default, and

II. The applicant must show the existence of a *bona fide* defence, that is, one that has some prospect or probability of success. [Vide: *Harris v ABSA Bank t/a Volkskas* 2006 (4) SA 527 T]

[3] An application for rescission of a judgment in terms of the common law should be brought within a reasonable time.

REASONABLE TIME AND DEFAULT

[4] The question whether the applicants launched this application within a reasonable time is largely intertwined with the reasons for the summary judgment being granted by default. The averments pertaining to the delay and the reasons for being in default are either common cause or not seriously disputed by the respondent.

[5] On or about 14 May 2014 the respondent instituted action against the applicants. Upon receipt of the summons, the applicants duly appointed T S Joka of T S Joka Attorneys to defend the matter on their behalf. To this end Mr Joka served a Notice of Intention to Defend on the respondent's attorneys on 17 June 2014.

[6] The respondent proceeded to serve an Application for Summary Judgment on Mr Joka on 20 June 2014. The application for summary judgment was set down for hearing on 7 August 2014. Mr Joka did not inform the applicants of the application.

[7] On 6 August 2014, a day prior to the hearing of the summary judgment application, Mr Joka filed a *"Notice of Intention to Oppose"* the summary judgment application. It is common cause that Mr Joka did not take any steps to obtain an answering affidavit from the applicants. To the contrary, Mr Joka simply neglected to attend to the matter and at the last minute filed a document that is not in accordance with the provisions regulating summary judgments.

[8] Mr Joka instructed counsel to appear on 7 August 2014 in order to obtain a postponement of the application. The application was postponed to 21 October 2014.

[9] According to the transcript of the proceedings of the 21st of October 2014, counsel appearing on behalf of the applicants stated *inter alia* the following: *"I appear on behalf of the respondents* (applicants). *My instructions are to ask for a postponement. Apparently the respondent is ill and tenders the wasted costs. The postponement is opposed but that is all. I do not have affidavits that were handed to me. Anything else is just the instruction that the postponement..."*

[10] The postponement was denied and summary judgment was granted against the respondents for payment of the amount of R 358 370, 85 together with interest and costs.

[11] The applicants only became aware of the judgment during late November 2014 or early December 2014 when they received a telephone call from the Sheriff of Odi informing them of a warrant of execution that was issued in respect of the judgment.

[12] The applicants immediately contacted Mr Joka who advised them not to *"worry"*. Mr Joka assured the applicants that he will immediately attend to the matter and advise them of any further steps that need to be taken.

[13] Mr Joka forwarded an application for the rescission of the judgment to the Sheriff of Odi on 3 December 2014. No affidavit was attached to the Notice

of Motion and same was not served on the respondent's attorneys of record. I pause to mention that, according to the Notice of Motion, Mahonza & Associates were the attorneys representing the applicants. Needless to say, the applicants deny that they have ever instructed the aforesaid firm to act on their behalf.

[14] The applicants did not hear anything further from Mr Joka. On 23 April 2015 the Sheriff, once again, endeavoured to execute the warrant of execution. The applicants contacted Mr Joka and a consultation was arranged at a restaurant. During the consultation Mr Joka gave various explanations as to why judgment was granted against the applicants. Mr Joka further explained that an application for rescission of judgment must be launched and presented an affidavit to the applicants, which was duly signed by the second applicant.

[15] The applicants felt uneasy with the way in which Mr Joka dealt with the matter and decided to obtain advice from another firm of attorneys. To this end the applicants sought advice from another attorney, Mr Steenekamp. During a consultation in July 2015, the applicants were advised of Mr Joka's negligent handling of the matter. Upon further investigation, the applicants were informed that a rescission of judgment application is the incorrect procedure and that an application for leave to appeal the judgment of 21

October 2014 should be brought. At that stage the respondent was also of the view that a rescission application is the incorrect procedure to follow.

[16] An Application for Leave to Appeal was duly served on the respondent's attorneys on 4 September 2015.

[17] In preparation for the hearing of the application for leave to appeal, the transcript of proceedings referred to *supra* was obtained. The presiding judge, Judge Legodi arranged a meeting with the parties for 8 September 2016. At the meeting Judge Legodi indicated that the facts as they appear from the transcript indicated that judgment was granted by default and not in the presence of any representative of the applicants.

[18] The discussion at the aforesaid meeting resulted in the present application being launched on 30 September 2016.

[19] Mr van Rensburg, counsel for the respondent, submitted that the applicants were negligent in not contacting Mr Joka on a regular basis. The applicants are lay persons in law and specifically appointed Mr Joka to represent them in the litigation. They trusted Mr Joka's advice until the consultation in April 2015. I am of the view that the applicants' conduct up and until April 2015 cannot be faulted.

[20] Unfortunately and due to the limited information available at the time, the application for leave to appeal was launched. Upon being alerted to the fact that the summary judgment was in actual fact granted by default, the present application was launched.

[21] The time delay was therefore first of all caused by the gross negligence of Mr Joka and secondly by the incorrect procedure that was followed by the applicants' present attorneys of record. Throughout the period since judgment was granted on 21 October 2014 until the launching of the present application, the applicants relied solely on the legal advice provided to them by their attorneys.

[22] I am of the view that the applicants are not to be blamed for the unfortunate concatenation of legal incidents which transpired. Consequently under the circumstances I am satisfied that the application was brought within a reasonable time.

[23] Similarly, I am satisfied that the applicants have provided a reasonable and acceptable explanation for their default.

BONA FIDE DEFENCE

[24] The respondent's claim against the first applicant arises from a written agreement of the sale of goods and its claim against the second applicant is

based on a suretyship agreement. In terms of the suretyship agreement the second applicant stood surety for any amounts due and owing by the first applicant to the respondent.

[25] The respondent alleges that the first applicant purchased goods, in accordance with the agreement between the parties, from 27 March 2014 to 11 April 2014. The goods were delivered, but the first applicant failed or neglected to pay for the goods and is indebted to the respondent in the amount of R 358 370, 85 as on 30 April 2014. In support of the aforesaid allegation the respondent attached a monthly statement dated 30 April 2014 to its particulars of claim.

[26] The statement reflects purchases for the period 27 March 2014 to 4 April 2014. According to the statement the first applicant made only one payment in the amount of R 12 171, 55 on 2 April 2014.

[27] The applicants responded to aforesaid averments as follows:

"*16*

DEFENCE AND COUNTERCLAIM

16.1 It is my respectful submission to this Honourable Court that the First Applicant and I have a bona fide defence herein;

16.2 Firstly, the First Applicant already sued out a summons against the Respondent/Plaintiff for payment of the amount of R 923 459-47, plus

interest thereon, arising from the business conducted between the First Applicant and the Respondent/Plaintiff;

16.3 *I attach hereto as Annexure "ESL9" a complete copy of the summons sued out under case number 58919/2015 in this Honourable Court and whereof the content is self-explanatory. I clearly state that the contents of the particulars of claim attached thereto are correct and incorporate the contents thereof herein as if specifically repeated;*

16.4 *I am advised that the summons has been properly served and I humbly submit that the trial from this summons sued out by the First Respondent and this very case should eventually be consolidated and heard at the very same time as it relates to exactly the same business transactions between the parties;*

16.5 *I point out that in the event of the First Applicant being successful with the action under case number 58919/2015 against the Respondent/Plaintiff, the First Applicant's claim exceed the Respondent/Plaintiff's substantially;*

16.6 *Secondly, the First Respondent already paid to the Respondent/Plaintiff the amount of R 219 651-29 of the amounts claimed by the Respondent/Plaintiff in this matter;*

16.7 *I have now searched the First Applicant's records and found the source documents relating to the "statement" the Respondent/Plaintiff attached as Annexure B1 to its particulars of claim. I must reiterate that the Respondent/Plaintiff failed to attach the source documents. The reason*

for this is that the Respondent/Plaintiff's documentation is clearly wrong and prepared incorrectly;

16.8 *I attach hereto as Annexure "ESL10" a bundle of the source documents relating to the Respondent/Plaintiff's statement attached to the Respondent/Plaintiff's particulars of claim. The bundle contain the pro-forma invoices provided to the First Applicant, the delivery notes reflecting what product was actually handed over and bank deposit slips indicating what amounts of money the First Applicant deposited into the Respondent/Plaintiff's bank account as payment for the product received;*

16.9 *On a proper consideration of the documents, it is clear that the Respondent/Plaintiff incorrectly prepared Pro-Forma invoices, did not reconcile the payments received by deposit into the Respondent/Plaintiff's bank account and consequently incorrectly prepared the "statement" attached to the Respondent/Plaintiff's particulars of claim;*

16.10 *Not only is it clear that the Respondent/Plaintiff charged incorrect prices, but was the Respondent/Plaintiff already paid a substantial amount of money not reflected on the "statement" attached by the Respondent/Plaintiff to its particulars of claim;*

16.11 *The documentation clearly indicated that the summary judgment was incorrectly granted and certainly for the amounts that are claimed in the Respondent/Plaintiff's particulars of claim are simply clearly incorrect;*

16.12I must state that I believe, and am advised, that had these facts been disclosed to the Honourable Court before the application for summary judgment was considered, the Honourable Court would not have considered granting summary judgment.

[28] The applicants did not only aver facts in substantiation of a *bona fide* defence, but went further and attached detailed documents in support of the averments. In the premises, I am satisfied that the applicants have a *bona fide* defence to the respondent's claim.

COSTS

[29] Having satisfied the requirements for the relief sought, the only issue remaining is that of costs. The applicants seek an indulgence and would ordinarily be ordered to pay the costs of the application. Should it, however, appear that the respondent's opposition to the rescission application is without merit, a cost order against the respondent could follow.

[30] In the present instance, I am of the view that the opposition of the application was justified.

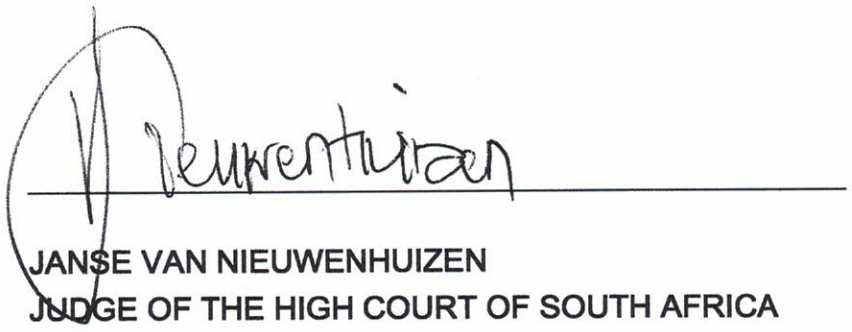
[31] The applicants were, however, substantially successful and I am of the view that in the circumstances, costs should be costs in the cause.

ORDER

[32] In the premises, I make the following order:

1. The summary judgment granted on 21 October 2014 is rescinded.

2. Costs to be costs in the cause.



JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD	4 May 2018
JUDGMENT DELIVERED	22 May 2018

APPEARANCES

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