IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA) 25-1/16

CASE NO: 72674/14

(1) REPORTABLE: ~~YES~~ / NO

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

(3) REVISED.

25/01/16
DATE

SIGNATURE

In the matter between:

THE AIRPORTS COMPANY SOUTH AFRICA SOC LIMITED **Applicant**

and

TOURVEST HOLDINGS (PTY) LTD First Respondent

TOURVEST FINANCIAL SERVICES (PTY) LTD Second Respondent

JUDGMENT

KGANYAGO,AJ:

[1] The applicant has launched an application for rescission of an order of this court granted on 4th December 2014. The applicant is also seeking a costs order against the respondents, in the event of them opposing their application. The

respondents are opposing the applicant's application. Mr Eric de Jager has deposed the opposing affidavit on behalf of both first and second respondents.

[2] The default order obtained on 4th December 2014 read as follows:-

" HAVING HEARD COUNSEL FOR THE APPLICANT and in the absence of opposition or appearance by the Respondent, THE COURT MAKES THE FOLLOWING ORDERS:

1. In respect of bid number ORT011/2013 (" the 2013RFB") the following decisions taken by the respondent are reviewed and set aside:

1.1. the decision taken by the respondent to disqualify the first applicant in regard to its bid submitted in respect of the open retail concept for shop DFE09 in terms of the 2013 RFB,

1.2. the decision not to make an award with respect to opportunity DFE09 in terms of the 2013 RFB;

1.3. the decision to issue a new bid in respect of DFE09 in terms of bid number ORT 324/2014 ("the 2014 RFB");

2. The respondent is ordered and directed to award opportunity DFE09 in terms of the 2013 RFB to the first applicant on the terms of the first applicant's bid.

3. In respect of the bid number ORT011/2013 (" the 2013 RFB") the following decisions of the respondent are reviewed and set aside:

3.1. the decision to disqualify the second applicant in regard to its bids submitted in respect of the foreign exchange outelets F-01, F-02, F-03 and F-04 in terms of the 2013 RFB ("the forex opportunities").

3.2. the decision not to make an award with respect to the forex opportunites in terms of the 2013 RFB;

3.3. the decision to issue a new bid in respect of the forex opportunities in terms of bid ORT334/2014 (" the 2014 forex RFB") and

4. The respondent is directed and ordered to award opportunity FO-02 in the 2013 RFB to the second applicant on the terms of the second applicant's bid.

5. The respondent is ordered to pay the costs of the application."

[3] The respondents, have given consent to the rescission of paragraphs 2,3 and 4 of the order granted in favour of the second respondent by Mr Justice De Vos on the 04th December 2014. Therefore, paragraphs 2,3 and 4 of the order of the 04th December 2014 are hereby rescinded by consent of the respondents.

[4] What I am now called upon is to determine whether paragraph 1 and its sub-paragraphs 1.1 to 1.3 and paragraph 5 of the order of the 04th December 2014 should be rescinded.

[5] The applicant was served with the respondents' review application on the 2nd October 2014. The applicant took the application to their present attorneys of record, and instructed them to oppose the review application. The applicant's attorneys of record did not enter the notice to oppose, and that resulted in the respondents obtaining a default order.

[6] According to deponent on behalf of the applicant, Mr Leslie Mkhabela, the applicant's attorney instructed a junior colleague, Mr Ehimeren Enabor, to enter a notice of intention to oppose the main application and to attend to the filing of the record in terms of rule 53 only after they have held a consultation with the applicant. However, it seems Mr Enabor had misunderstood the instruction to mean that he should await for the consultation with the applicant before a notice of intention to oppose the main application is filed.

[7] The consultation between the applicant and its attorneys was held on the 13th November 2014. All along Mr Mkhabela was under the impression that the notice of intention to oppose has been filed as per his instructions. It was only on the

5th December 2014 when the applicant was informed by the respondents' attorneys that a default judgment had been granted against them. The applicant was under the impression that the application was opposed. They had every intention of opposing the respondents' application, and they were therefore not in willful default. The respondents have also conceded that the applicant was not in willful default.

[8] The applicant argues that the respondents in their main review application,has failed to join other interested parties, and that the default judgment should be rescinded on that ground alone. Secondly, the applicant has submitted that the respondents have failed to show exceptional circumstances in their main review application why the reviewing court should award them the tender. Thirdly, the applicant argues that the default judgment application was not served on ACSA in terms of Rule 6(5) of the Uniform Rules of Court, so that it could oppose it, despite the fact that the respondents knew where to serve the papers on the applicant. The applicant contends that the failure by the respondent to serve it with the default application, has denied them an opportunity to oppose it.

[9] The applicant submits that they have given a reasonable explanation for its failure to enter a notice of intention to oppose. The applicant further submits that it has good prospects of success in the main application and a bona fide defence.

[10] The first respondent submits that even though they have consented to rescission on paragraphs 2,3 and 4 of the order, they did not concede that the applicant has made out a good case for rescission in paragraph 1 and 5 of the order. However, the first respondent, do concede that the applicant did not willfully elect not to oppose the review application, but contends that the applicant and its attorneys were grossly negligent in the handling of the intended opposition to their review application. According to the first respondents, an attorney's negligence does not always constitute a reasonable explanation.

[11] The respondents submits that the applicant has failed to establish good prospects in its defence to the main review application. The first respondent further submit that the applicant has failed to establish that it has a bona fide defence to the relief claimed in prayer 1 of the notice of motion in the main review application, and that the application for rescission should accordingly be dismissed with costs, inclusive of senior counsel.

[12] The applicant has brought their application for rescission under both common law and rule 42(1). Under common law, in order to succeed, an applicant for rescission of a judgment taken against him/her must show good cause. Rule 42(1) provides that the High Court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any affected thereby. (See Colyn v Tiger Food Industries LTD t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)).

[13] *In Chetty v Law Society, Transvaal 1985 (2) SA 756 (AD) at 765 B-D the court stated:*

"But it is clear that in principle and in the long-standing practice of our Courts two essential elements of sufficient cause for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default, and

(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success. (De wet case supra at 1042; PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A);Smit No v Brummer 1954 (3) SA 352 (0) AT 357-8.)

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default."

[14] It is not in dispute that the applicant was properly served with the review application. On been served with the review application the applicant took that application to its attorneys of record and instructed them to oppose the respondents review application. Due to a misunderstanding that occurred at the attorney's office, the notice of intention to oppose was not entered. It is clear that the applicant's intention was to oppose the respondents' application. However, the respondents contends that the applicant and its attorneys were grossly negligent in the handling of the intended opposition to the review application.

[15] The applicant in instructing their attorneys of record expected them to execute their mandate with the necessary diligence, skill and care required of a reasonable attorney under the circumstances. Once he had given his attorney proper instructions, it will be for the attorney to take the matter forward. In this case the instruction to their attorneys was clear, and that was to oppose the respondents' review application. The instruction was even given on time. I therefore, do not find any ground to find that the applicant was negligent in handling of the intended opposition to the review application. It did all what was within its powers to hand the matter to the people whom it regarded to be skilled to handle the matter further, and in this case their attorneys.

[16] I now turn to the issue whether the applicant's attorneys were grossly negligent in handling the applicant's matter. It is not in dispute that the applicant's attorneys had a legal duty to execute the applicant's mandate with the necessary diligence, skill and care required of a reasonable attorney under the circumstances.

[17] Now it must be determined whether, given the circumstances of this case, can it be said that the applicant's attorneys conduct in not entering a notice of appearance to oppose, which resulted in the default judgment been granted, amounted to a failure to measure up to conduct expected of a reasonable attorney acting with due care, skill and diligence. Or put it otherwise, whether by failing to enter the notice of appearance to oppose, the applicant's attorneys have failed to act with the necessary skill and diligence expected of an ordinary

reasonable attorney. The next question will be how does one determine how a reasonable attorney would have acted in similar circumstances.

[18] According to the applicant's attorneys, consultation with the applicant was held on the 13th November 2014.Still they did not realize that the notice of intention to oppose the respondent review application has not yet been served and filed. The applicant became aware of the default judgment on the 5th December 2014 when they were notified by the respondents' attorneys. At that stage still the notice of intention to oppose has not yet been served and filed. If indeed the intention of the applicant's attorney was to file the notice of intention to oppose after consultation with the applicant, what prevented them from serving and filing the notice to oppose after the 13th November 2014. It is unfortunate that there is insufficient evidence regarding what happened after consultation with the applicant on the 13th November 2014, except to say that Mr Mkhabela all along assumed that the notice of intention to oppose had been filed in accordance with his instructions to the junior attorney.

[19] In my view on the 13th November 2014,a reasonable attorney would have updated his/her client as to when the notice to oppose was filed and also as to when was the last day to file their answering affidavit. It seems that did not happen. Had Mr Mkhablela updated the applicant about the status of their case, he would have realized that the notice of intention to oppose had not yet been served and filed.

[20] Under the circumstances, I am satisfied that the applicant's attorneys has failed to act with the necessary care and skill expected of an ordinary reasonable attorney under the circumstances. The applicant's attorney was therefore negligent in handling the applicant's matter.

[21] Now it must be determined whether the applicant is bound by the negligence of their attorney. To put it otherwise, is negligence by an attorney an acceptable explanation to rescind the default judgment.

[22] In Webster and Another v Santam Insurance 1977 (2) SA 874 (A) at 883 G-884A the court stated:

" *A lay client, like each of the appellants, is ordinarily entitled to regard an attorney duly admitted to the practice of law as a skilled professional practitioner. Ordinarily he places considerable reliance upon the competence, skill and knowledge of an attorney and he trusts that he will fulfil his professional responsibility. It is, of course, not unknown for an attorney or his firm to be negligent in carrying out professional duties, but that is not usual and a fortiori to the lay client it would be a most unsual and unexpected occurrence. Consequently, in considering whether the neglect of an attorney constitute a special circumstances within the meaning of that phrase in sec. 24 (2)(a) of the Act, the correct approach should be to regard it as a relevant factor and to recognize that such neglect by an attorney may frequently be a special circumstance on its own vis-à-vis his client. To hold, without qualification, as was done in Snyman's case, supra at p. 194 A-B, that a client is bound by the negligence of his legal advisor is, in my respectful view, wrong."*

[23] While courts are slow to penalize a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys (See Salojee and Annother NNO v Minister of Community Development 1965 92) SA 135 (A) and Colyn Tiger Foods Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA).

[24] From the beginning the applicant's instructions to their attorneys, was clear, and was to oppose the respondents' review application. Even after they have given instruction to their attorneys to oppose the matter, when called for further consultation, they did attend those consultations. In their view, they were relying upon the competence, skill and knowledge of their attorney. They have trusted that their attorney will fulfil his professional responsibility. In my view the

negligence of their attorney cannot be imputed to them. The applicant could not have foreseen that their attorney would have acted they way they did.

[25] It is therefore, my view, that even though the applicant's attorney have acted negligently, the applicant has given a reasonable explanation for its failure to enter a notice of intention to oppose the main application.

[26] I now turn to the applicant's prospects of success, entailing among others whether the applicant has a bona fide defence, which prima facie carries some prospects of success. It is not in dispute that the respondent in the main application did not join all the affected parties. The respondents were not the only bidder in the tender that they were disqualified. Other bidders who were part of the tender or the successful bidders should have been joined to the proceedings. They are the interested parties as the outcome of the main application will also affect them. Their exclusion in my view is fatal to the respondents' main application.

[27] In Amalgamated Engineering Union v Minister of Labour 1949(3) SA 637 (A) at 657 the Court stated:

" *The question of joinder should surely not depend on the nature of the subject-matter of the suit, as some of the head-notes I have referred to would seem to imply, but whether the suit relates to a will, an aqueduct, a partnership or anything else on the manner in which, and the extent to which, the court's order may affect the interests of third parties.*"

[28] The successful bidder or other bidders who were not disqualified when the respondents were disqualified, will definitely be affected by the court order and their interests are also to be affected. They must be given an opportunity to decide whether they wish to oppose or support the respondent's main application or not. That can only be done if they are a party to the proceedings and the application is brought to their attention.

[29] The first respondent is challenging the manner in which they were disqualified from the bidding. They are of the view that the decision to disqualify them was irrational.

[30] According to the applicant, at the briefing of the 06 December 2013, they clarified the criteria already contained in the RFB, and that the clarification did not introduce a new criterion. In my view, the applicant has raised a triable issue, and has therefore shown good cause for the relief it seeks.

[31] I now turn to the issue of costs. The award of costs is in the discretion of the court, which discretion should be exercised judiciously, having regard to what is fair to both sides.

[32] In Giuliani v Diesel Pump Injector Services (Pty) Ltd 1966 (3) SA 451 (R) at 453 B-E the Court said the following:

"The language used by Lord Justice Bowen in the case of Forster v Farquhar (1893) 1 Q. B. D. 564 at p.568, appears to me to reflect the law with regard to costs which is appropriate to this case:

" The measure of what is fair as to costs is not to be found in a mere consideration of his conduct towards the opposite side. It may have been reasonable from his point of view to do so that which it would be unreasonable to make the opposite litigant pay for. Although he has won the action, he may have succeeded only upon a portion of his claim under circumstances which make it more reasonable that he should bear the expense of litigating the remainder than that it should fall on his opponent. The point is not merely whether the litigant has been oppressive in the way he waged his suit or prosecuted his defence, but whether it would be just to make the other side pay. We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success.... 'I am cannot entertain a doubt,' says Lord Halsbury, LC, 'that everything which increases the litigation and the costs, and which places on the defendant a burden which he ought not to bear in the course of that litigation, is perfectly good cause from depriving the plaintiff of costs.' The language of Lord Watson is to the same effect: ' I shall not attempt,' he says, a complete definition of what is meant by these words. They at all events embrace in my opinion everything for which the party is responsible,

connected with the institution or conduct of the suit and calculated to occasion unnecessary litigation and expense.'

(see Scheepers and Nolte v Pate, 1909 T.S. 353 at p.359, and Kerwin v Jones, 1958 (1) SA 400 (SR)"

[33] Counsel for the respondents have submitted that an application for rescission of judgment is regarded as an indulgence and, as a general rule, the applicant would be ordered to pay the costs of such an application if the respondent's opposition thereto was reasonable. It was common cause from the onset that the applicant was not willful in its failure to deliver notice of intention to oppose. In my view, there was very little basis for its opposition. Taking into consideration the circumstances under which the applicant's attorneys have failed to serve and file the applicant's notice of appearance to oppose, and also for the respondents to oppose the applicant's application whereas it was clear from the onset that the applicant was not in willful default, I am of the view that it will be fair and just if each party pays its own costs.

[34] In the result I make the following order:

34.1. The default judgment of this Court granted against the applicant under case no 72674/14 on the 4th December 2014 is hereby rescinded.

36.2. Each party to pay its own costs.

MF KGANYAGO
ACTING JUDGE OF THE HIGH COURT