

•JOHAN JORDAAN v KAMATSU SOUTHERN AFRICA (PTY) LTD

Levy, AJ

2001/08/20

It is irregular and improper for an attorney of record to testify for his client concerning a material point in issue whether by oral evidence or by affidavit. He must withdraw as attorney of record.

Default Judgment had been granted against the wrong party. Rescission of judgment granted where applicant showed that he had a bona fide defence to the claim and that his default was not willful and that the delay in bringing the application was not inordinate.

Furthermore the default judgment should in any event not have been granted as the order for costs was irregular firstly in that it did not accord with the power of attorney and secondly costs must be taxed before a plaintiff can sue for a specific amount

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOHAN JORDAAN

APPLICANT/DEFENDANT

and

KOMATSU SOUTHERN AFRICA (PTY) LTD

RESPONDENT/PLAINTIFF

CORAM: LEVY, A.J.

Heard on: 6<sup>th</sup> August 2001

Delivered on: 20<sup>th</sup> August 2001

JUDGMENT

LEVY, A.J.: In this matter Mr J A N Strydom appears for applicant/defendant and Mr J C van Wyk appears for respondent/plaintiff.

This is an application brought by the defendant to rescind a default judgment granted at the instance of the plaintiff against defendant personally, on 25<sup>th</sup> August 2000, by the assistant registrar of this Court for:

1. Payment of N\$ 123 000,00.
2. Interest at 20% *a temporae morae* from 24<sup>th</sup> February 2000;
3. Costs of suit in an amount of NS800.00 plus Deputy Sheriffs costs in the amount of 383.00 i.e. a total of N\$1 183,00.

Before dealing with the merits of this application, I draw attention to the improper practice of a lawyer, whether attorney or advocate appearing in Court for a client, when it is abundantly clear that such lawyer will have to testify in the ensuing trial or make a affidavit on behalf of his client which contradicts any material point made by the opposing side.

In *Westdeutsche Landesbank Girozentrale v Horsch* 1992 NR 313 the Court considered *inter alia* the undesirability of an attorney of this Court, who was a sworn translator, translating a document which was to be used on behalf of his client in litigation. The Court there referred to the rule of practice that where an attorney is the attorney of record, he should not put himself in the position where his duty to the Court may clash with his client's interests. The Court in that case, referred to *Hendricks v Davidoff* 1955(2) SA 369 (C) where it was held that it was "irregular and improper" for an attorney to give evidence for his client where the attorney was the attorney of record and was acting as such when the evidence was given. In *Nochomowitz v Bellville Liquor Licencing Board* 1956(2) SA 228 the Court held that an affidavit attested by an attorney of record for his client could not be filed and used in the relevant proceedings.

(See also *Koch v Koch* 1947(2) SA 129 (SWA).)

In the present matter, when the applicant's/defendant's founding affidavit was served on attorney J C van Wyk, he, the attorney, should have realized that what was allegedly said by applicant/defendant and what was allegedly said by him in a telephone conversation, would be relevant in these application proceedings as well as in the final adjudication and ensuing trial. Mr

van Wyk was entitled to make an affidavit testifying as to his version of that conversation but he should not thereafter have appeared in this Court for the respondent/plaintiff. As a fact Mr van Wyk referred to the telephone conversation while engaged in arguing his client's case and the Court had to stop him from attempting to enlarge on what he had deposed to in his affidavit concerning the said telephone conversation.

The instant application arises from an action instituted by respondent/plaintiff against applicant/defendant for payment of NS123 000-0 interest and costs. In the particulars of claim, respondent/plaintiff alleges *inter alia* that an "hydraulic pump" was sold to applicant/defendant for N\$1 12 000-00 and was to be installed at a price of N\$1 1 000-00.

The applicant/defendant was served with the combined summons on 26<sup>th</sup> July 2000, and failed to enter appearance timeously and respondent/plaintiff applied for and was granted default judgment on 25<sup>th</sup> August 2000 as more fully set out above.

In his affidavit in support of his application to set aside the default judgment, applicant/defendant says that he is not personally liable as the contract whereon respondent/plaintiff relies, was concluded between respondent/plaintiff and a closed corporation. Furthermore he says the amount the close corporation is liable for is NS34 000-00 although initially the price was N\$45 000-00. The best evidence on this issue could only be given by the managing director of plaintiff or the salesman who concluded the contract. It is significant that no one from plaintiff company has made an affidavit.

The applicant/defendant, avers in his founding affidavit that when he received servios of the aforesaid combined summons he telephoned Mr van Wyk and explained the situation to him. Furthermore he says that it was agreed that the amount due would be paid during the period

September and October 2001 but prior to payments being made default judgment was applied for and granted.

Mr van Wyk made an affidavit opposing the application on behalf of his client and in his affidavit he refers to the telephone conversation aforesaid, but his version thereof differs substantially.

This conversation is relevant not only to this application but also in the main action should this matter go to trial.

It is undesirable for a Court to consider a dispute of fact on affidavits only, and I refrain from doing so. However, it was argued by Mr Strydom that objective evidence in the form of two cheques does exist which supports his clients case. These two cheques are dated 21 January 2000 and 25<sup>th</sup> February 2000 and are for N\$25 000-00 and N\$20 000-00 respectively. They are both drawn by the relevant closed corporation and the respondent/plaintiff is the payee. The cheques were deposited by respondent/plaintiff but were not paid and referred to drawer.

Mr van Wyk responded to Mr Strydom's argument by saying that this does not prove that the contract was between the respondent/payee and the closed corporation as the latter could have paid the debt for applicant/defendant. This may well be so but this Court is not at this stage in a position to make such decision. The cheques *prima facie* support Mr Strydom's argument.

Rule of Court 31(2)(b) gives the Court a discretion to set aside a default judgment "upon good cause shown'. The requirements were summarized in *Grant v Plumbers (Pty) Ltd* 1949(2) SA 470 (O) and approved of in *Griitemeyer No v General Diagnostic Imaging* 1991 NR 441 by Hannah, AJ (as he then was) as follows:

- "(a) He must give a reasonable explanation of his default. If it appears that his default was willful or that it was due to gross negligence the Court should not come to his assistance.
- (b) His application must be *bonafide* and not made with the intention of merely delaying plaintiff's claim.
- (c) He must show that he has a *bonafide* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."

It is abundantly clear that if the averments which applicant/defendant makes that the closed corporation is the contracting party, applicant/defendant has a defence. It is also clear that the default in entering appearance and defending the action is not willful.

The delay in entering an appearance as well as the delay in bringing this application are not inordinate and an explanation for both such delays has been given which is reasonable.

It is also apparent therefore that the conversation between Mr van Wyk and the applicant/defendant which took place on the telephone is material and if applicant's/defendant's version **B** correct, applicant/defendant has a defence.

I have considered all the factors in this application and I am satisfied that applicant/defendant should be given an opportunity to plead and have his case adjudicated in the usual way.

In addition to the foregoing there is a further reason, (which counsel did not argue) why the default judgment should be rescinded.

The plaintiff gave Mr van Wyk a power of attorney to sue for payment of N\$ 123,00000, interest and costs. This was claimed in the particulars of claim. The attorney therefore had no authority to claim default judgment for any other amount or to deviate from his Power of Attorney. He had no

authority to claim "Costs of suit in the amount of NS800-00 plus deputy sheriff costs in the amount of NS383-00 i.e. a total of N\$ 1,183-00".

Furthermore, the Assistant Registrar should not have granted such claim.

It is necessary that costs be taxed before such costs can be sued for. *InBelim v Orel*. 1953(4) SA 96 at 99/100 Ogilvie Thompson J (as he then was) said:

"Moreover, taxation of costs is - again in the absence of agreement - necessary to determine their total."

For all these reasons the default judgment obtained by the plaintiff on 25<sup>th</sup> August 2000, should be rescinded and set aside. The defendant should be granted leave to enter an appearance to defend the action. Mr Strydom asked that the costs in this matter stand over for decision at the trial. The order of this Court is:

- (a) The Default Judgment granted on 25<sup>th</sup> August 2000 is rescinded.
- (b) The defendant is given leave to enter an appearance and to plead as required by the rules of the court.
- (c) Costs shall stand over for decision by the trial court when, and if, the action comes to trial.

**For the Defendant/Applicant:**

**Advocate J A N Strydom**

**Instructed by:**

**Messrs van der Menve-Greeff**

**For the Plaintiff/Respondent:**

**Mr J C van Wyk**

**Instructed by:**

**J C van Wyk Attorney**