THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case No 127/2002

In the matter between

PIETER WESTERMAN COLYN Appellant

and

TIGER FOOD INDUSTRIES LIMITED
trading as MEADOW FEED MILLS CAPE Respondent

Coram: Olivier, Cameron JJA, et Jones AJA

Heard: 11 March 2003

Delivered: 31 March 2003

Summary: Rescission of judgment – Rule 42(1)(a) – mistake by attorneys – order not erroneously granted – good cause not shown for rescission at common law.

JUDGMENT

JONES AJA:

[1] This is an appeal against the dismissal of an application for rescission of an order for summary judgment. There are two issues. The first is whether the judgment can properly be rescinded in terms of rule 42(1)(a). The second issue is whether the appellant has shown sufficient cause for rescission under the common law.

[2] I shall deal with rescission in terms of Rule 42(1)(a) first. The facts are not complicated. The present appellant was the defendant in an action instituted by the present respondent in which summary judgment was taken against him. I shall for convenience refer to the appellant as the defendant, and to the respondent as the plaintiff. The defendant, a dairy farmer of

Vredendal in the Western Cape, was in dispute with his supplier of cattle fodder. He refused to pay for cattle fodder concentrate because, he says, it was defective and caused cattle disease in his herd with considerable concomitant loss. The supplier of the cattle fodder (the plaintiff) eventually issued summons against him out of the High Court in Cape Town for payment of R397 210.22. The defendant caused a notice of intention to defend to be filed by his attorneys, who have an office in Cape Town and also an office at Bellville. The plaintiff then filed an application for summary judgment and served it on the defendant's attorneys of record at their Cape Town office. That was the proper address for service in terms of rule 19(3). For reasons which are not clear the application papers were not forwarded to the Belville office to the attorney personally conducting the matter. The result was that the summary judgment application was not drawn to his or the defendant's

attention. In consequence, no notice of intention to oppose was given and no opposing affidavit was filed. The plaintiff's attorney set the case down for hearing as an unopposed matter, and in due course on 4 August 2000 Desai J ordered summary judgment by default. It is accepted that the defendant wanted to defend the action and that he would have done so if the application had been brought to the attention of his attorney at Bellville.

[3] The question is whether in these circumstances the judgment can properly be rescinded in terms of rule 42(1)(a) of the uniform rules of court. Rule 42(1)(a) 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 party affected thereby. The arguments before us

centre on the question whether the facts upon which the defendant relies give rise to the sort of error for which the rule provides and, if so, whether the order was erroneously sought or erroneously granted because of it.

[4] As I shall try to explain in due course, the common law before the introduction of rules to regulate the practice of superior courts in South Africa is the proper context for the interpretation of the rule. The guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the judge who delivered it. He becomes *functus officio* and may not ordinarily vary or rescind his own judgment (*Firestone SA (Pty) Ltd* v *Gentiruco A.G.)*[1]. That is the function of a court of appeal. There are exceptions. After evidence

[1] 1977 (4) SA 298 (A) 306 F- G.

is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, *justus error.*[2] Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause. There are also, thirdly, exceptions which do not relate to rescission but to the correction, alteration and supplementation of a judgment or order. These are for the most part conveniently summarised in the headnote of *Firestone SA (Pty) Ltd* v *Gentiruco A.G. supra*[3] as follows:

'1. The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, that the court overlooked or inadvertently omitted to grant.

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[2] *Childerly Estate Stores* v *Standard Bank of SA Ltd* 1924 OPD 163, *De Wet and others* v *Western Bank Ltd* 1979 (2) SA 1031 (A) at 1040. And see Harms, *Civil Procedure in the Supreme Court,* B42-10 and the authorities collected in footnotes 3, 4 and 5.

[3] The headnote is an accurate summary of the passage in the judgment appearing at pages 306H-308A.

2. The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order.

3. The court may correct a clerical, arithmetical, or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance.

4. Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.'

In the *Gentiruco A.G.* case Trollip JA left open whether or not this list is exhaustive.[4] The authorities also refer to an exceptional procedure under the common law in terms of which a court may

[4] At 308 A – 309 B. That is how matters presently stand, despite the reservation in *Seatle* v Protea *Assurance Co Ltd* 1984 (2) SA 537 (C) 542 at H- 543 A.

recall its order immediately after having given it, or within a reasonable time thereof, either *meru motu* or on the application of a party, which need not be a formal application (*De Wet and others* v *Western Bank Ltd supra*[5]; *First national Bank of SA Ltd* v *Jurgens*[6]*; Tom* v *Minister of Safety and Security.*[7] This procedure has no bearing on this case.

[5] It is against this common law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. The rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The rule gives the courts a discretion to order it, which must be exercised judicially (*Theron NO* v *United Democratic Front (Western Cape*

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5 Footnote 2 at 1044 E – 1045G.
6 1993 (1) SA 245 (W) 246. I
7 [1998] 1 All SA 629 (E) 637i – 638a.

Region) and others)[8] and *Tshivhase Royal Council and another v Tshivhase and another; Tshivhase and another v Tshivhase and another.*[9]

[6] Not every mistake or irregularity may be corrected in terms of the rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law[10]. That is why the common law is the proper context for its interpretation. Because it is a rule of court its ambit is entirely procedural.

[7] Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order

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8 1984 (2) SA 532 (C) at 536G.
9 1992 (4) SA 852 (A) 862J – 863A.
10 Harms, *Civil Procedure in the Supreme Court*, B42-1. But see the reservation in *Tshivase Royal Council* v *Tshivase supra* (footnote 9) at 862 I.

containing a patent error or omission (rule 42(1)(b)); or an order resulting from a mistake common to the parties (rule 42(1)(c); or 'an order erroneously sought or erroneously granted in the absence of a party affected thereby' (rule 42(1)(a)). In the present case the application was, as far the rule is concerned, only based on rule 42(1)(a) and the crisp question is whether the judgment was erroneously granted.

[8] The trend of the courts over the years is not to give a more extended application to the rule to include all kinds of mistakes or irregularities. This is illustrated by the facts of *De Wet and Others* v *Western Bank Ltd*[11] which is a decision of this court. I shall confine my consideration of this judgment to the appeal of the 2nd, 3rd, 4th and 5th appellants in so far as it relates to rescission under rule

[11] 1979 (2) SA 1031 (A).

42(1)(a). These appellants were in default of appearance at the resumed hearing of their trial. This was because their attorney had withdrawn (but not in terms of the rules) without informing them directly of his withdrawal or of the date of the resumed hearing. He had sent a message to their agent (a former co-litigant in the same proceedings whom they had appointed to deal with the attorney on their behalf) that he had withdrawn and giving the new trial date, but the agent had not passed it on to them. Counsel for the respondent sought and was granted an order in terms of rules 39(1), (3) and (4) for dismissal of their claims in convention and judgment against them by default on the counterclaim. The appellants applied for rescission of these orders. Their applications were dismissed[12]. They appealed to the full bench of the Transvaal

[12] *De Wet and others* v *Western Bank Ltd* 1977 (2) SA 1033 (W).

Provincial Division. Their appeals were dismissed[13]. In a further appeal to this court Trengrove AJA had this to say[14] during the course of dismissing the appeals and rejecting an argument that the judgment against them had been erroneously sought or granted under rule 42(1)(a):

'Firstly [counsel] contended that the Court of first instance should have rescinded the judgments and orders in question under the provisions of Rule 42(1)(a) as being judgments and orders "erroneously sought and erroneously granted" against the appellants, in their absence. A number of arguments were advanced in support of this proposition. Counsel for the appellants referred, in the first instance, to the fact that, in withdrawing as attorney for the appellants, Lebos had failed to comply with the provisions of Rule 16 (4) in at least two respects. This is common cause. The formal notification to the Registrar did not specify the date when, the parties to whom, and the manner in which notification was sent to all parties concerned, and it was not

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13 *De Wet and others* v *Western Bank Ltd* 1977 (4) SA 770 (T).

14 At 1038 B-G.

accompanied by a copy of last-mentioned notification. It was, accordingly, contended that the proceedings before VAN REENEN J were irregular and that the judgments against the appellants had been erroneously sought and granted. In my view there is no substance whatever in this contention. The appellants cannot avail themselves of the fact that their attorney had not complied with all the requirements of Rule 16 (4). There is no question of any irregularity on the part of the respondent. At the stage when Lebos withdrew as the appellants' attorney, the case had already been set down for hearing on 16 August 1976 in accordance with the Rules of Court, and there was no need for the respondent to serve any further notices or documents on the appellants in connection with the resumed hearing. As far as the trial Court was concerned the Rules of Court had been fully complied with and the notice of trial had been duly given. When the case was called before VAN REENEN J neither the appellants nor their legal representative were present in Court, and, in the circumstances, the respondent's counsel was fully entitled to apply for an order of absolution from the instance with costs in terms of Rule 39 (3) in respect of the appellants' claims and to move for judgment against the

appellants under Rule 39 (1) on the counterclaim. The fact that the appellants had not been advised timeously of the withdrawal of their attorney is, of course, a factor to be taken into account in considering whether good cause has been shown for the rescission of the judgments under the common law, but it is not a circumstance on which the appellants can effectively rely for the purpose of an application under the provisions of Rule 42(1)(a).'

[9] The same reasoning applies in this case. The defendant describes what happened as a filing error in the office of his Cape Town attorneys. That is not a mistake in the proceedings. However one describes what occurred at the defendant's attorneys' offices which resulted in the defendant's failure to oppose summary judgment, it was not a procedural irregularity or mistake in respect of the issue of the order. It is not possible to conclude that the order was erroneously sought by the plaintiff or erroneously granted by the judge. In the absence of an opposing affidavit from

the defendant there was no good reason for Desai J not to order summary judgment against him.

[10] During the course of argument counsel drew our attention to conflicting approaches of the courts to the proper application of rule 42(1)(a). *Bakoven Ltd* v *GJ Howes (Pty) Ltd,*[15] and *Tom* v *Minister of Safety and Security*[16] hold that the 'error' must be patent from the record of proceedings and that the court is confined to the four corners of the record to determine whether or not rule 42(1)(a) is applicable. *Stander* v *ABSA Bank Bpk*[17] on the other hand permits external evidence of the 'error'. The conflict seems to me to obscure the real issue, which is to determine the nature of the error in question. This judgment concludes that what happened in this case did not amount to an error in terms of the

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15 1992 (2) SA 466 (E).
16 [1998] 1 All SA 629 (E).
17 1997 (4) SA 873 (E).

rule, regardless of whether or not it manifested itself in the record of proceedings. It is consequently unnecessary for present purposes to say anything more about the conflict.

[11] I turn now to the relief under the common law. In order to succeed an applicant for rescission of a judgment taken against him by default must show good cause (*De Wet and others* v *Western Bank Ltd supra*).[18] The authorities emphasize that it is unwise to give a precise meaning to the term good cause. As Smalberger J put it in *HDS Construction (Pty) Ltd* v *Wait:*[19]

'When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (*Cairns'*

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18 At 1042 F- 1043 C.

19 1979 (2) SA 298 (E) at 300 *in fine* – 301 B.

Executors v *Gaarn* 1912 AD 181 at 186; *Silber* v *Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352-3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'

With that as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success (*Grant* v *Plumbers (Pty) Ltd*[20], *HDS Construction (Pty) Ltd* v *Wait supra*,[21] *Chetty* v *Law Society, Transvaal.*[22])

[12] I have reservations about accepting that the defendant's explanation of the default is satisfactory. I have no doubt that he

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20 1949 (2) SA 470 (O) 476
21 At 300 F-301C. See footnote 19.
22 1985 (2) SA 756 (A) at 764 I – 765 F.

wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a *reasonable* explanation. While the 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 (*Saloojee and Another NNO* v *Minister of Community Development*[23]). Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able

[23] 1965 (2) SA 135 (A).

to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success (*Melane* v *Santam Insurance Co Ltd*[24]*).*

[13] The defendant has not been able to put up a defence which has good prospects of success. Indeed, his prospects of success are so remote that it cannot in my view be said that he has a *bona fide* defence. The claim is for payment of the price of cattle fodder concentrate sold and delivered to the defendant. The defence is that the plaintiff's product was contaminated, and that after it had been mixed with other ingredients and fed to his dairy herd it

[24] 1962 (4) SA 531 (AD) 532 C – F, but note also the remarks of Miller JA in *Chetty* v *Law Society, Transvaal* (footnote 22) at 767 J – 769 D: 'As I have pointed out, however, the circumstance that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. (Cf *Melane* v *Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532.) But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits. In the light of the finding that appellant's explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success. Nevertheless, in the interests of fairness to the appellant, it is desirable to refer to certain aspects thereof.'

caused illness and death. The defendant intends to counterclaim for damages, which are provisionally assessed at about R1· 5 million. His founding affidavit alleges that the cattle fodder concentrate was infested with ergotamine poisoning. In two supplementary affidavits he alleges that it could also have been infested with botulism. I am satisfied that the defendant has no prospect whatever of establishing either of these defences.

[14] The defendant has led no evidence at all to relate the condition of his dairy herd to ergotamine poisoning or botulism. He cannot give this evidence himself. He is patently not qualified to express scientific opinions, draw conclusions from symptoms, or diagnose the cause of the illness and death of his cattle. The closest he can get to a diagnosis of ergotamine poisoning is an allegation that his veterinary surgeon suspected that this might be

the case. This caused him to have fodder samples analysed for ergotamine infestation. There is no affidavit from the veterinary surgeon to support this, and no reasons are given to explain why he entertained his suspicions. There is also no evidence to substantiate a diagnosis of botulism. Nobody suggested it at the time. The idea was planted in the defendant's mind by an animal fodder expert whom the defendant met while attending a 'World Dairy Expo' in the United States of America and who thought, from the defendant's account of the symptoms exhibited by his cattle, that botulism was a possibility. This led to an analysis of fodder samples for botulism. But unless there is admissible evidence of the results of the analyses, the defendant does not make out a *prima facie* case. There is no such evidence. The defendant has not filed affidavits from the persons who did the analyses to confirm and explain their results, despite objection to the

admissibility of the stated results in the defendant's opposing affidavits.

[15] Even if I overlook the problems of proof, ignore the rules of evidence and have reference to all the information placed before the court whether it is admissible or not, the defendant's case is insufficiently made. For his case of ergotamine poisoning he relies on the results of the tests done by the Commission for Scientific and IndustriaI Research, and for his case on botulism he relies on tests which were done in the USA. According to the defendant two certificates in respect of two tests done on two occasions by the CSIR show that the fodder samples tested positive for ergotamine contamination. He has also produced two certificates from the USA, one of which, in his words, 'shows conclusively that all five samples tested positive for the *Clostridial* species, the toxin

causing botulism', and that because of this result he has 'a strong case against [the plaintiff] and . . . good cause exists to set aside the judgment'. These contentions are insupportable. This is because the plaintiff has adduced a wealth of expert scientific evidence which is admissible and which the defendant has made no attempt to contradict. This evidence shows

1. that the fodder concentrate was not contaminated with ergotamine and that no reliance can be placed on the results of the CSIR analyses. Other analyses were done both at the plaintiff's instance and the defendant's instance. An expert consulted by the defendant, Dr Naude formerly of the Onderstepoort Veterinary Institute, arranged for an analysis and a repeat analysis of material from the samples analysed by the CSIR to be done by the University of Missouri-Columbia in the USA, with negative results. (These results were made available by the defendant but are also

not confirmed on oath.) The plaintiff arranged for an analysis to be done by Paarl Laboratories Analytical Services CC, which, in the person of its analytical chemist and manager Geyer, performed three different analyses on three separate occasions on material from the CSIR samples, all with negative results. The second analysis by the CSIR was done in Geyer's presence and he reports that the equipment, technique and methodology used by the CSIR technician was incapable of producing a reliable result. The plaintiff also arranged for an analysis of the material from the CSIR samples to be done by Dr Van der Merwe of Stellenbosch University, with highly sophisticated equipment. Those results positively exclude ergotamine contamination and Dr Van der Merwe's evidence also explains why the CSIR analyses were flawed and their results unreliable. As a result of all of this Dr Naude, whose affidavit is part of the opposing papers although he

was initially the defendant's witness, contacted the CSIR who advised him that they had made a mistake in their previous testing and that, on further re-testing, no ergot alkaloids were found to be present in the samples;

2. that a diagnosis of botulism can be excluded. There is no evidence that the defendant's cattle suffered from botulism. There is no affidavit from the analyst who did the tests in the USA and no expert evidence to relate the *Clostridial* species allegedly found in the sample to what happened to the cattle. The reason is not difficult to find. The evidence of the plaintiff's experts is that botulism is caused by a toxin produced by some, but not all, strains of the bacterium *Clostridium botulinum*. In order to make a positive diagnosis it would be necessary to isolate not only the particular strain of *C*. *botulinum* found to be present in the fodder, but also to isolate the toxin which it produced. This has not been

done. Even more important, the experts explain that only *C. botulinum* produces strains which produce the botulism toxin. No *C. botulinum* was found in any of the samples analysed by the defendant. It appears from the defendant's certificates that two species of *Clostridium* were identified, *C. per fringens* and *C. cadaveris.* These species do not produce botulism. Their possible presence in the fodder takes the matter no further;

3. that ergot poisoning is unlikely to cause fatalities and that the symptoms exhibited by the defendant's cattle, which the defendant thinks were consistent with ergotamine poisoning, are inconclusive and do not substantiate a diagnosis of ergotamine poisoning. This is clear from the uncontradicted evidence of a number of veterinary surgeons whose affidavits also show that symptoms of botulism cannot be mistaken for symptoms of ergotamine poisoning, and

that the symptoms displayed by the defendant's cattle do not support a diagnosis of botulism.

[16] The defendant is able to prove that his cattle, which had been healthy, began to show symptoms shortly after he put them on the plaintiff's fodder concentrate. He was not able to establish from post mortem examinations and other tests any cause of the deaths or illness which followed. In view of the close proximity in time, so it is argued, it is reasonable to conclude for the purpose of these proceedings that the plaintiff's fodder is the agent probably responsible for the deaths and illness, whatever the specific cause might be. As against this, the plaintiff's fodder was mixed with other ingredients not supplied by the plaintiff before it was fed to the defendant's cattle which could have been contaminated. Ten or so other cattle farmers in the district had been feeding their

stock with the plaintiff's fodder concentrate at about that time, with no untoward consequences. Furthermore, the defendant had not followed the plaintiff's instructions relating to the feeding of young animals, which may be a reason for unfortunate side effects. In the light of these considerations it cannot be said that an argument premised on reasoning along the lines of *post hoc ergo propter hoc* – reasoning which is frequently regarded as unreliable to prove causation – shows a *prima facie* defence which in the circumstances of this case is *bona fide*.

[17] In the result the defendant has not shown good cause for a rescission order under the common law, and he has not shown that he is entitled to rescission in terms of rule 42(1)(a). The appeal is accordingly dismissed with costs, which shall include the costs of two counsel.

RJW JONES
Acting Judge of Appeal

CONCURRED:

OLIVIER JA
CAMERON JA