THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 1006/2018

In the matter between:

TOP TRAILERS (PTY) LTD **First Appellant**

SIPHO SONO NO **Second Appellant**

and

JOHANNES PETRUS KOTZE **Respondent**

Neutral citation: *Top Trailers (Pty) Ltd & another v Kotze* (1006/2018) [2019] ZASCA 141 (1 October 2019)

Coram: Ponnan, Zondi, Molemela and Plasket JJA and Weiner AJA

Heard: 5 September 2019

Delivered: 1 October 2019

Summary: Civil Procedure – default judgment obtained without prior notice to opposite party after the matter became opposed, may be rescinded in terms of rule 42(1)*(a)* of the Uniform Rules of Court as a judgment that was erroneously granted – applicant need not show bona fide defence.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Phiyega AJ, sitting as court of first instance):

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following order:

‘(a) The application succeeds.

(b) The judgment granted by default by the high court on 27 June 2016 is set aside.

(c) The respondent is ordered to pay the costs of the application.’

JUDGMENT

Zondi JA (Ponnan, Molemela and Plasket JJA and Weiner AJA concurring)

[1] The issue in this appeal, with the leave of this court, is whether the Gauteng Division of the High Court, Pretoria (high court) (Phiyega AJ) erred in dismissing an application by the appellants for the rescission of an order granted by default on 27 June 2016 by Khumalo J. In terms of that order, Khumalo J set aside a resolution of the board of the first appellant, Top Trailers (Pty) Ltd (the company), to begin business rescue proceedings and place the company under supervision in terms of s 129 of the Companies Act 71 of 2008 (the Act).

[2] The issue arose in these circumstances. On 13 August 2014, the board of directors of the company resolved that the company begin business rescue proceedings. On 18 August 2014, the notice of commencement of business rescue proceedings was filed with the Companies and Intellectual Property Commission. The second appellant, Mr Sipho Sono (Mr Sono) was appointed as the business rescue practitioner on 22 August 2014. At that time, the company was allegedly indebted to the respondent, Mr Johannes Petrus Kotze (Mr Kotze), in the amount of

R1 842 050.28. Mr Kotze had claimed that amount in respect of royalties owing to him under a licence agreement that he had concluded with the company.

[3] Following his appointment and after consulting various stakeholders, Mr Sono prepared a business rescue plan. The plan was considered and adopted by the company's creditors at a meeting held on 11 February 2015.

[4] It is common cause that Mr Kotze was not given proper notice of the resolution placing the company under business rescue. He only learnt of its existence during the course of May 2015 when a business colleague mentioned it to him. By that time Mr Kotze had already obtained a judgment by default against the company, inter alia, for the payment of R1 842 050.28 pursuant to the summons that he had caused to be issued in the high court, on 16 January 2014.

[5] On 12 May 2016, Mr Kotze applied to the high court for an order to set aside the resolution commencing the business rescue. The basis of his application was that the company and the business rescue practitioner had failed to provide him with any of the required publications or notifications in terms of s 129(3) and (4) of the Act. Neither the business rescue practitioner's consent, nor the court's leave was sought and obtained by Mr Kotze to institute the proceedings. It is common cause that by the time Mr Kotze sought to set aside the resolution, the business rescue plan had been adopted and substantially implemented.

[6] In the notice of motion, Mr Kotze informed the appellants that should they intend to oppose the application they had to:

'(a) Notify [Mr Kotze's] attorney of record in writing of your intention so to oppose within 5 days of receipt of the Notice of Motion. In your notice of intention to oppose, provide an address contemplated in rule 6(5)(b) where you will accept the further notices and delivery of all documents in these proceedings;

(b) File your answering affidavit, if any, within 15 days from date of filing your Notice of Intention to Oppose;

Should the Respondents fail *to file and serve their Notice of Intention to Oppose as well as their Answering Affidavit within the time limits as set out herein above*, [Mr Kotze] will proceed

to set the matter down on the unopposed roll for the *27th of June 2016 at 10h00*, or as soon thereafter as [Mr Kotze] may be heard.'

[7] This application was served on the first and second appellants on 25 and 26 May 2016, respectively. The company thus had until 2 June 2016 to deliver its notice of intention to oppose. Correspondence was thereafter exchanged between the appellants' attorneys and Mr Kotze's attorneys.

[8] On 1 June 2016 the appellants' attorneys of record wrote to Mr Kotze's attorneys demanding that Mr Kotze withdraw the proceedings as they were instituted without the consent of the business rescue practitioner. The letter reads:

'5. We would like to place on record that your client has not requested consent from our Client to institute these proceedings in terms of Section 133 (a) of the Companies Act 71 of 2008, as amended ("the Companies Act") and such consent is not granted. We confirm that this or any other interaction with you and/or your client or the filing of a notice of intention to oppose this application does not constitute consent to continue with these proceedings.

6. We advise that the business rescue plan, adopted on 11 February 2015 ("the Plan"), has been substantially implemented and as such the business rescue proceedings are at the end stage. All that remains to be finalised is the final dividend payment to creditors, which payment has been delayed by the pending litigation instituted by the directors of Top Trailers.

7. In addition, the business of Top Trailers has, as part of the Plan, been sold as a going concern to CIMC Vehicles South Africa Proprietary Limited. The sale agreement is unconditional and the transaction is complete. Top Trailers will be deregistered as a company with the Companies and Intellectual Property Commission in the coming months, thus the objectives of your application have no merit.

8. In light of the above, your client's application, bears little, if any, prospect of success. Kindly confirm that you will be withdrawing your application before close of business on 3 June 2016.'

[9] On 8 June 2016 and in response to the demand for the withdrawal of the application, Mr Kotze's attorneys wrote:

'1. You fail to indicate in your letter whether our client's claim has been entertained by your client and if not, why? We hereby record that until date of this letter our client did not receive any notice of the "Business Rescue" application by your client, nor did our client receive any proof that their claim formed part of the Court order or any settlement.

2. You indicate that Top Trailers (Pty) Ltd has been sold as a going concern, but does not deal with our client's intellectual property, being the patent on the "swingbin" trailer: We hereby record that our client's intellectual property does not form part of Top Trailer's (Pty) Ltd property.

We hereby inform you that our client does not consent to the use or sale of its intellectual property by Top Trailers (Pty) Ltd, or anyone else.

We hereby specifically request that your client, as the appointed "Business Rescue" practitioner, confirm in writing, on or before close of business on 10 June 2016, that they did not sell our client's patent as part of the transaction with CIMC Vehicles South Africa (Pty) Ltd.

3. We place on record that it is our instructions that our client was never informed or included in the "business rescue" application as a creditor, although legal proceedings against Top Trailers had already been instituted on the 4th of December 2013 and summons was properly served on 30 January 2015 by our client.

4. Your client was informed in writing of most of the facts mentioned in the application on 28 May 2015 and elected to ignore our client's claim against Top Trailers (Pty) Ltd as well as the issue regarding the return of the patented sketches and drawings.

. . .
It is therefore our instructions to hereby inform you that should your client fail to entertain our client's claim and tender the return of all our client's patented sketches with regard to the "swingbin" patent, our client will proceed with it's application.'

[10] This response prompted the appellants' attorneys to file on 10 June 2016 a notice on behalf of the appellants to oppose the application. This was late because the company had until 2 June 2016 to deliver its notice of opposition. It is common cause that the appellants did not file their answering affidavit as required by the Rules of Court. Without notice to the appellants' attorneys, Mr Kotze's attorneys caused the application to be set down for hearing on the unopposed roll on 27 June 2016. The matter served before Khumalo J. She granted the order which reads:
'1. the first respondent's resolution dated 13 August 2014 in terms of section 129 of the Companies Act 71 of 2008, whereby the first respondent was placed under business rescue, be set aside;

2. the applicant is authorised to instruct the sheriff to proceed with the execution of the Warrant of Execution against the first respondent, under case number 2842/2015;

3. the first and second respondents are to pay the costs of the application de bonis propriis jointly and severally, the one to pay, the other to be absolved, on an attorney and client scale.'

[11] It is not disputed that the appellants only became aware of the default order on 26 July 2016, whereupon the appellants' attorneys telephoned Mr Kotze's attorneys to request a copy of the court order as they had instructions to have it rescinded on an urgent basis. Mr Kotze's attorneys were also informed that CIMC SA (CIMC), who had since purchased the company, had located Mr Kotze's intellectual property and that the appellants were prepared to return it to Mr Kotze subject to him agreeing not to enforce the court order and agreeing to its rescission. Mr Kotze refused to give an undertaking. In consequence, on 1 November 2016, the appellants applied to the high court for the rescission of the order granted by default on 27 June 2016 by Khumalo J. The appellants sought the relief in terms of rule 42(1)*(a)* of the Uniform Rules of Court, as also on two alternative bases that need not detain us.

[12] The appellants, in a founding affidavit deposed to by Mr Sono, advanced various grounds on which they sought rescission of the order granted by Khumalo J. They, among others, contended that: (1) Mr Kotze had not sought Mr Sono's consent or leave of the court when he instituted proceedings against the company in terms of s 133 of the Act; (2) he failed to join the other affected persons; (3) he enrolled the matter on the unopposed roll when he was aware that the appellants opposed the relief he sought; (4) he prematurely enrolled the matter before the lapse of the *dies* for the filing of the answering affidavit; and (5) the business rescue proceedings in respect of the company were at an advanced stage and to undo that would not only be a complicated and expensive exercise for the company, but also to the detriment of its employees and creditors. As regards the merits, the appellants contended that they informed Mr Kotze through his attorneys that his intellectual property did not form part of the sale to CIMC and they tendered to return it to him.

[13] Mr Kotze opposed the application. He contended that he was entitled to the order setting aside the resolution and the business rescue proceedings because the

board of directors who passed a resolution failed to inform him that the company was in business rescue; and, upon his appointment, the business rescue practitioner failed to provide him with any notification that the company was in business rescue. Mr Kotze further contended that, procedurally he was entitled to default judgment, because he followed the correct procedure in setting the matter down. He denied that the appellants were not aware of the date of set down of the application. Mr Kotze contended that in his notice of motion he informed the appellants of the steps they were required to take if they intended to oppose the application. But the appellants simply failed to comply with the time limits specified in the notice of motion.

[14] Rule 42(1)*(a)* provides:

'(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.'

[15] Rule 6(5)*(f)*(i) of the Uniform Rules of Court provides:

'Where no answering affidavit, or notice in terms of sub-paragraph (iii) of paragraph *(d)*, is delivered within the period referred to in sub-paragraph (ii) of paragraph *(d)* the applicant may within five days of the expiry thereof apply to the registrar to allocate a date for the hearing of the application.'

[16] Para 13.10 of Gauteng: Pretoria Practice Manual regulates the enrolment of applications after a notice of intention to oppose has been filed. It provides:

'1. Where the respondent has failed to deliver an answering affidavit and has not given notice of an intention only to raise a question of law (rule 6(5)*(d)*(iii)) or a point *in limine*, the application must not be enrolled for hearing on the opposed roll.

2. Such an application must be enrolled on the unopposed roll. In the event of such an application thereafter becoming opposed (for whatever reason), the application will not be postponed as a matter of course. The judge hearing the matter will give the necessary directions for the future conduct of the matter.

3. The notice of set down of such an application must be served on the respondent's attorney of record.'

[17] Mr Kotze's attorneys were thus obliged to have given the appellants' attorneys notice that the application had been set down for hearing. This court in *Lodhi*[1] considered the meaning of the phrase 'erroneously granted' and came to the following conclusion at para 24:

'Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when the judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given.'

It follows, on the strength of *Lodhi*, that the judgment was 'erroneously granted' as contemplated by rule 42(1)*(a)* and ought therefore to have been rescinded.

[18] In the result the following order is granted:

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following order:

'(a) The application succeeds.

(b) The judgment granted by default by the high court on 27 June 2016 is set aside.

(c) The respondent is ordered to pay the costs of the application.'

_____

D H Zondi
Judge of Appeal

[1] *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA) para 24.

APPEARANCES

For appellants:	A Bham SC (with him J E Smit)
Instructed by:	Edward Nathan Sonnenbergs Inc
	c/o Jacobson & Levy Inc, Pretoria
	Symington De Kok, Bloemfontein
For respondent:	E L Theron SC (with him Z Schoeman)
Instructed by:	PWG Attorneys
	c/o Malan Nortjé Attorneys, Pretoria
	Honey Attorneys, Bloemfontein