IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, GRAHAMSTOWN

CASE NO: CA 337/2013
DATE HEARD: 18/8/14
DATE DELIVERED: 22/8/14
REPORTABLE

In the matter between:

IKAMVA ARCHITECTS CC **APPELLANT**

and

MEC FOR THE DEPARTMENT OF PUBLIC WORKS **FIRST RESPONDENT**

MEC FOR THE DEPARTMENT OF HEALTH **SECOND RESPONDENT**

Court order – interpretation – order unambiguous and meaning that on the failure of the defendants to comply with a rule 35(3) notice within ten days, their defence was automatically struck out – the desirability of such orders discussed.

JUDGMENT

PLASKET J

[1] The central issue in this appeal is the interpretation of an order issued by Majiki AJ (as she then was) on 10 November 2011. This court is called upon to decide whether the interpretation of that order by Dukada J in the court below was correct.

[2] The matter has its genesis in an action for damages instituted in August 2008 by the appellant, Ikamva Architects CC, as plaintiff, against the respondents, the MECs of Public Works and of Health in the Eastern Cape Provincial Government, as defendants. I shall refer to the parties as the plaintiff and the defendants respectively.

[3] In its particulars of claim, the plaintiff alleged that the Department of Public Works, either acting as the agent of the Department of Health or acting in its own right appointed it as consulting architect/principal agent for a project to upgrade the Frere Hospital, and that it accepted the appointment thereby concluding a valid, enforceable contract with the provincial government.

[4] The plaintiff alleged further that the appointment was then awarded to someone else, that this constituted a repudiation of the contract, which was 'accepted' by it and communicated to the defendants in writing. As a result of the repudiation, it alleged, it suffered damages in the amount of R44 040 032. It claimed that amount, interests and costs.

[5] Both defendants filed pleas. In essence, the pleas were to the effect that the Department of Public Works represented the Department of Health; that the head of the Department of Public Works appointed the plaintiff and that it accepted the appointment as alleged; and that the Department of Public Works had no power to enter into this contract with the result that it was a nullity and unenforceable. It was also alleged that there had been no repudiation.

[6] It is now necessary to detail the events concerning discovery, for they gave rise to the dispute that is now before us on appeal.

[7] By notice dated 17 February 2009 the plaintiff called on the defendants, in terms of rule 35(1),[1] to make discovery within 20 days. The defendants failed to do

[1]Rule 35(1) provides: 'Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within twenty days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.'

so and, on 9 July 2009, an order was made by Kemp AJ ordering them to 'reply to the Plaintiff's notice in terms of Rule 35(1) within 10 days of the service of this Order, failing which the Plaintiff may apply for Judgment against the Defendant based on the same papers, amplified if necessary'.

[8] This order appeared to spur the defendants into action because both filed their discovery affidavits with relative haste. By notice in terms of rule 35(3)[2] dated 12 October 2010, the plaintiff required the defendants to make available for inspection, in accordance with rule 35(6),[3] certain listed documents or to state on oath that they were not in their possession and, if this was the case, to state their whereabouts if known.

[9] This notice was not complied with. In a pre-trial conference on 20 July 2011, the plaintiff's attorney placed this on record and the defendants' legal representatives 'undertook to expedite a reply'. They did not do so.

[10] The failure to do so led to another application to compel. By notice dated 26 September 2011, the plaintiff applied for an order:

'That the Defendants be granted a period of ten (10) days from date of service hereof to reply to the Plaintiff's Notice in terms of Rule 35(3) dated 12 October 2010, failing which the

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[2]Rule 35(3) provides: 'If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring him to make the same available for inspection in accordance with subrule (6), or to state an oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.'

[3]Rule 35(6) provides: 'Any party may at any time by notice as near as may be in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of subrules (2) and (3). Such notice shall require the party to whom notice is given to deliver to him within five days a notice as near as may be in accordance with Form 14 of the First Schedule, stating a time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of his attorney or, if he is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade, business or undertaking, at their usual place of custody. The party receiving such last-named notice shall be entitled at the time therein stated, and for a period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof. A party's failure to produce any such document or tape recording for inspection shall preclude him from using it at the trial, save where the court on good cause shown allows otherwise.'

Defendant's defence will be struck out and the Plaintiff will apply for judgment against the Defendants based on the same papers amplified if necessary.'

[11] The application was served on the State Attorney, representing the defendants, on 30 September 2011 and the notice of set down was served on 14 October 2011. On 27 October 2011, the application was postponed to 10 November 2011 and on 2 November 2011 an affidavit in support of the application was served on the State Attorney. On 7 November 2011, the notice of set down for 10 November 2011 was served on the State Attorney.

[12] On 10 November 2011, an order was granted by Majiki AJ, the matter having been unopposed. The order read:

'IT IS ORDERED THAT:

1. The Defendants be granted a period of ten (10) days from date of service hereof to reply to the Plaintiff's Notice in terms of Rule 35(3) dated 22 July 2011, failing which the Defendants' defence will be struck out and the Plaintiff will apply for judgment against the Defendants based on the same papers, amplified if necessary.
2. The Defendants are to pay the costs of this Application, jointly and severally, payment by one absolving the other.'

[13] It is the interpretation of paragraph 1 of this order that is at the heart of this matter.

[14] It is common cause that the defendants did not comply with the order within the period stated. On 7 November 2012 the plaintiff gave notice of its intention to apply for default judgment in terms of the order. This elicited a notice of opposition from the defendants followed by a notice purporting to be in terms of rule 30A and an affidavit, unaccompanied by a notice of motion, requesting a postponement.

[15] In the affidavit, deposed to by Patrick Mncedisi Mashumi, a senior manager: contracts management in the Department of Health it is stated that subsequent to the order being granted the 'defendants requested time, from the plaintiff's attorney, to get the information required' and that it was 'finally secured and furnished to the plaintiff on 23 October 2012'.

[16] An answering affidavit was deposed to by Gary Joseph Stirk, the plaintiff's attorney. He said that he had had no dealings with Mashumi and that, as the matter was dealt with by the State Attorney's office and no affidavit was filed by the attorney handling the matter, Mashumi's allegations were inadmissible hearsay. In any event, he said that 'no "time" or extension of time was requested and none was granted'. He attached a letter from the State Attorney's office conceding that the order had to be complied with by 18 April 2012 but stating that, as the trial was set down for 20 April 2012, the matter should be postponed *sine die* with the costs reserved. Clearly, this was not a request to be afforded time to obtain the documents required.

[17] As far as the allegation is concerned that the order was complied with, Stirk stated:

'Save to admit only that a bundle of documents with an index was left at the Plaintiff's office on or about 23 October 2012, which index was in accordance with "M1", I deny each and every remaining allegation contained in this paragraph, and in particular deny that there has been any notice or affidavit filed as contemplated in Rule 35(3), and I furthermore deny that there has been or was compliance with the order of the above Honourable Court on 11 November 2011, or with Rule 35(3). Accordingly, the Defendants remain in breach of compliance with the court order in question. In any event, the effect of the court order is quite clear, namely, that the Defendants were granted ten days to comply with Plaintiff's notice in terms of Rule 35(3) "failing which the Defendants' defence will be struck out and the Plaintiff will apply for judgment against the Defendants based on the same papers, amplified if necessary".'

[18] No reply was filed. It must be accepted that the defendants have not complied with the rule 35(3) notice. At best for them, they furnished copies of some of the documents required by the plaintiff but then failed to file the affidavit contemplated by rule 35(6) in respect of the missing documents.

[19] Dukada J appears to have disregarded the rule 30A notice because, as the defendants sought to assail the application for default judgment as an irregular step,

they had placed reliance on the incorrect rule: it is rule 30 that is concerned with irregular steps, not rule 30A.[4]

[20] Dukada J held that the issue before him was whether the order meant that the defendants' defence had automatically been struck out as soon as they had failed to comply within the period provided for, or whether it meant that the plaintiff was still required to apply to strike out the defence and, not having done so, was not entitled to apply for default judgment. He held that the order was ambiguous but did not say why, that it should be interpreted to avoid the drastic consequences of the defence being struck out automatically and that it meant that after the defendants had been in default for the stipulated period, the plaintiff still had to apply for the striking out of the defence before applying for default judgment. Having come to this conclusion, he dismissed the application for default judgment with costs, including the costs of two counsel.

[21] Majiki AJ's order was not appealed against and neither have the defendants complied with it, given any explanation of their failure to comply with it or made an application for condonation. Their contumacy is startling, particularly given the size of the claim.

[22] I turn now to the central issue in this appeal – the interpretation of paragraph 1 of the order.

[23] A court order is interpreted in much the same way and in accordance with the same rules of interpretation as any other written instrument such as a statute, a contract or a patent.[5] The approach was set out thus by Trollip JA in *Firestone South Africa (Pty) Ltd v Gentiruco AG*:[6]

[4]Rule 30(1) provides: 'A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.' Rule 30A(1) provides: 'Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.'

[5]Cilliers, Loots and Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5 ed) (Vol I) at 936.

[6]*Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304D-H. See too *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39; *Engelbrecht &*

‘First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. . . Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what is subjective intention was in giving it. . . Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise. . . But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. . .’

[24] In my view, paragraph 1 of the order is clear and is not, as Dukada J found, ambiguous. It is drafted in different terms to the normal order in cases of this type in that it does not provide that in the event of non-compliance by the defendants the plaintiff may apply for their defence to be struck out on the same papers, amplified if necessary. I take this to be a strong indicator that an order having an effect different to the usual order was intended. Instead of the usual order, it provides that if the defendants have not complied within ten days of the date of service of the order on them, their ‘defence will be struck out’ and then ‘the Plaintiff will apply for judgment against the Defendants based on the same papers, amplified if necessary’.

[25] Paragraph 1 of the order has three distinct parts to it. In the first place it provides for a time period for compliance with its terms – ten days from the date of service of the order. Secondly, it states what the consequence of non-compliance will be – that the defendants’ defence will be struck out. Thirdly, it states what steps the plaintiff may then take – applying for default judgment on the same papers, ‘amplified if necessary’.

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another NNO v Senwes Ltd 2007 (3) SA 29 (SCA) paras 6-7.

[26] Paragraph 1 of the order was, in my view, unambiguously intended to provide for the striking out of the defendants' defences automatically in the event of non-compliance after ten days of service of the order on them. It follows that Dukada J erred when he interpreted the order to mean that an application for the striking out of the defence was required before an application for default judgment could be considered. In other words, he ought to have heard the application for default judgment. That means that the appeal must succeed.

[27] I am mindful of the dangers of *obiter dicta* and the reasons why courts should, as a general rule, pronounce only on what has to be decided. In this case, however, I consider it necessary to say something, for the guidance of courts of first instance, about orders such as the one with which this case is concerned and about the consequences for the defendants of their defence being struck out automatically.

[28] Mr Dugmore who, together with Ms Redpath-Molony, appeared for the plaintiff pointed us in the direction of cases in which similar orders have been made.[7] The fact that orders like this have been made before does not mean that they should be made in the future. Rule 35(7) creates a procedure specific to the enforcement of obligations to discover properly. It provides:

'If any party fails to give discovery as aforesaid or, having been served with a notice under sub-rule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that sub-rule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.'

[29] In my view, certainty and fairness dictate that the proper approach when a party does not comply with any of his or her obligations in terms of rules 35(1) to (6) is to apply to compel compliance in terms of rule 35(7) and that contemplates the

[7] See *Pietersburg Produce Co v Minnie Stores* 1961 (1) SA 702 (N), in which an order was made by Broome JP, without reasoning to explain it, directing the furnishing of particulars within four days failing which the applicant was 'granted leave on the same papers, supplemented if necessary, and on 3 days' notice to respondent, to apply for default judgment'. See too *Ocean Accident and Guarantee Corporation Ltd v Potgieter; Potgieter v Ocean Accident and Guarantee Corporation Ltd* 1961 (2) SA 783 (O) at 785H-786A in which, as a result of a party's failure to discover properly, Grobler J ordered that his 'action be dismissed unless he files a proper discovery affidavit sworn to by himself, on or before the 16th of March 1961'.

striking out of a defence, not automatically on non-compliance, but on application on the same papers, amplified if necessary. It is only when the court has had the opportunity to decide that grounds exist for the striking out of the defence that an application for default judgment may be made.

[30] In the light of rule 35(7) – a purpose-made procedure to compel discovery – I have my doubts that an order striking out a defence automatically is competent but I express no firm view on that. If it is, then, in my view, it is the type of order that should be reserved for only the most unusual of cases, and then it would be expected of an applicant that he or she place facts before the court to justify the making of such an order.

[31] Finally, the fact that in this case the defendants' defence has been struck out does not mean that nothing can be done by them. They can, even at this late stage, still comply with the order, give a full explanation of their default and apply for their defence to be re-instated. Rule 27 allows for this, even after the expiry of the ten day period stipulated in the order.[8]

[32] In the result, the appeal must succeed. The court below ought not to have dismissed the application for default judgment and it should not have made a costs order against the plaintiff. This court has no jurisdiction to grant default judgment itself as the application was not determined on its merits by the court below and so is not the subject of this appeal. In any event, we are not in a position to do so because evidence would be required in respect of the quantification of the plaintiff's damages. That means that once the court below's order is set aside, and the costs order made

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[8]See *Himelsein v Super Rich CC & another* 1998 (1) SA 929 (W) at 932E-933D. Rule 27(1) and (2) provide:

'(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

(2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these Rules.'

is corrected, the application for default judgment will have to be set down again in the normal course in the court below.

[33] The following order is made.

(a) The appeal succeeds with costs, including the costs of two counsel.

(b) The order of the court below is set aside and is replaced with an order directing the defendants to pay the costs of the plaintiff, including the costs of two counsel.

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C Plasket

Judge of the High Court

I agree.

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J Pickering

Judge of the High Court

I agree.

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F Dawood

Judge of the High Court

APPEARANCES

Appellant: G Dugmore and N Redpath-Molony instructed by Whitesides

Respondents: SM Mbenenge SC and XS Nyangiwe instructed by NN Dullabh and Co