DE WET AND OTHERS v WESTERN BANK LTD 1977 (4) SA 770 (T)

Citation	1977 (4) SA 770 (T)
Court	Transvaal Provincial Division
Judge	Boshoff AJP, Curlewis J and Melamet J
Heard	August 31, 1977
Judgment	September 14, 1977
Annotations	Link to Case Annotations

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Flynote : Sleutelwoorde

Practice - Judgments and orders - Default judgment - Setting aside of - Three ways of doing so - Scope of each - "May" in Rule of Court 42 (1) - Meaning of - Court need not be a party to F the mistake before relief can be granted under Rule 42 (1) *(c)* - Relief granted where judgment entered against him through no fault of the applicant - Not granted in respect of other parties who failed to remain in communication with their attorney. G

Headnote : Kopnota

There are three generally accepted ways by which a default judgment can be set aside in the Supreme Court, viz. *(a)* under Rule 31 (2) *(b)* of the uniform Rules of Court; *(b)* under Rule 42 (1) thereof; *(c)* under the common law.

Under the common law a judgment can be altered or set aside only under limited circumstances and the additional relief extended by the Rules of Court is intended to modify such rigid H provisions but within the confines of the Rules. The Court is empowered to grant relief in certain additional circumstances. The inherent power of a Court to control the procedure and proceedings in its Court does not include the right to interfere with the principle of the finality of judgments other than in the circumstances specifically provided for in the Rules or at common law. Such a power is not a necessary concomitant to the inherent power to control the procedure and proceedings in a Court.

The word "may" in Rule 42 (1) of the Uniform Rules of Court does not indicate that the Court has been vested with a discretion and that this should only be exercised in favour of an applicant if good or sufficient cause - e.g. probability of success in the action - were shown. It is used in the sense that the Court is empowered, in

certain defined circumstances, to rescind or vary an order or judgment.

The Court need not be party to the common mistake between the parties before relief can be granted under the provisions of Rule 42 (1) *(c)*. Where judgment has been entered against an applicant by a mistake common to the parties, the Court should set the judgment aside under the provisions of this sub-Rule.

Where, however, a default judgment had been entered against A parties due to their failure to remain in communication with their attorney or agent as to the progress of the case, they cannot divest themselves of their responsibilities in relation to the action and then complain *vis-à-vis*, the other party to the action that their agents, in whom they had vested sole responsibility, had failed them.

The decision in the Witwatersrand Local Division in *De Wet and Other v Western Bank Ltd*.. 1977 (2) SA 1033, in part confirmed and in part reversed. B

Case Information

Appeal from a decision in the Witwatersrand Local Division (HIEMSTRA, A.J.P.). The facts appear from the reasons for judgment.

A. J. Heyns, S.C. (with him *B. Galgut*), for the appellants.

C *M. E. King, S.C*. (with him *E. M. Wentzel*) for the respondent.

Cur. adv. cult.

Postea September 14).

Judgment

MELAMET, J.: This is an appeal against the whole of the D judgment and orders made by HIEMSTRA, A.J.P., in the Witwatersrand Local Division on 22 March 1977, by which he dismissed with costs, including the costs of two counsel, the application of appellants, on notice of motion, to have the judgments which were entered against them, in their absence, in the Witwatersrand Local Division on 16 August 1976 set aside.

On that day, in their absence, appellants' claim as plaintiffs E against the respondent as defendant, in an action, were dismissed with costs including the costs of two counsel, and judgment was entered for the defendant as plaintiff in reconvention on its counterclaim against each of the appellants jointly and severally in an amount of R56 500 with interest thereon at the rate of 1 per cent per month as from 1 March F 1973, with costs on the attorney and client scale, and certain properties specially hypothecated were declared executable.

The five appellants and one George Coligionis were the six plaintiffs in the action instituted by them in March 1971 against the respondent as defendant, in which they claimed an G order declaring that certain written agreements of lease entered into between themselves and defendant, for the lease of certain motor trucks, should be declared to have been ended by reason of defendant's repudiation thereof and for the repayment of certain monies paid over to defendant by them in terms of an agreement between the parties.

Respondent, in its plea, admitted that it had entered into the H alleged contracts of lease but counterclaimed against each of the plaintiffs, alleging that each one had failed to pay amounts due thereunder and that defendant had thereupon cancelled each lease and had in terms of the provisions of the leases become entitled to claim various amounts of money from each plaintiff. It did now so claim various amounts, and alleged that the plaintiffs had become sureties for the obligations of each other to it and were therefore jointly and severally liable to it, and also claimed interest

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at the rate of 1 per cent per month *a tempore morae* on the total amounts claimed.

During February 1972 one Mr. Brian Lebos was substituted as attorney of record for the plaintiffs.

A Plaintiffs pleaded to each counterclaim denying that defendant was entitled to cancel the leases, disputed the amounts claimed and pleaded that defendant had not given them any notice of cancellation of the leases and therefore the *onus* to prove the claims rested on defendant.

The action came to trial before COLMAN. J., on 19 February 1973 B and counsel for the plaintiffs addressed the Court - senior Counsel appeared for both sides.

In the course of such address senior counsel for plaintiffs made the following statement in consequence of discussions between counsel:

> "As a result of which I can tell your Lordship that if the plaintiffs fail in their claim the plaintiffs concede that the C defendant Bank is entitled to judgment against the plaintiffs, jointly and severally, my Lord, the one

paying the others to be absolved, in the sum of R56 500 with interest on that amount at the rate of 1 per cent per month from 1 March 1973. And, my Lord, that it would be entitled to have the properties mentioned in the counterclaim declared executable."

When the trial was resumed the next day, 20 February 1973, counsel for the plaintiffs advised the Court that, as a result D of negotiations between the parties, they had arrived at an interim arrangement and part of the arrangement was that the case be postponed *sine die*.

The action was postponed *sine die* on 20 February 1973 without any evidence being led by plaintiffs or any agreement being recorded or disclosed to the Court.

On 12 February 1974 the estate of the first plaintiff, G. E Coligionis, was sequestrated and the name of his trustee. C. Simmons, N.O., was substituted as plaintiff in the action during July 1976.

Originally, and in terms of the said agreement, the trial had been prepared for 1 June but this date did not suit counsel: it was therefore agreed between counsel and attorney for F plaintiffs and counsel and attorney for defendant that the matter be set down 16 August.

The action came to trial again on 16 August 1976 before a different Judge and with different counsel appearing for the parties.

It might be convenient, at this stage, to deal with the provisions of the written agreement between the parties which was not handed in at the hearing 20 February 1973. The G agreement dealt with the prosecution of plaintiffs' action against Badenhorst Garage (Pty.) Ltd. for damages arising from the defective motor trucks which that company had sold to plaintiffs with the finance received via the leasing arrangements with defendant. Plaintiffs undertook to continue with the said action as speedily as possible and certain rights H were given to defendant in respect of the proceeds from such action and in the event of plaintiffs not proceeding with due despatch. The only terms of the agreement that are relevant in the appeal are clauses 3 and 8 which are set out hereinafter for ease of reference:

"3. In the event of the plaintiffs succeeding in their said action against Badenhorst Garage (Pty.) Ltd. in

(a) recovering or

(b) settling for

an amount exceeding the sum of R56 500 together with interest thereon at the rate

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of 1 per cent per month, reckoned from 1 March 1973, together with the costs of the present action which costs shall include the costs consequent upon the employment of two counsel, then, and, in that event, the first proceeds of such recovery or settlement shall be appropriated towards the payment of the counterclaim of the defendant in the present matter for the said sum of R56 500 and the A claims ancillary thereto set out above.

8. In the event of the defendant being of the view that the plaintiffs are not proceeding with their claim against the said Badenhorst Garage (Pty.) Ltd. with reasonable despatch then the defendant shall be entitled to take the necessary steps which it considers the plaintiffs should have taken or at its option to reinstate the present action for hearing."

B The amount due under the counterclaim is determined at R56 500 together with ancillary relief in various paragraphs of the agreements.

The respondent, acting in terms of para. 8 of the interim agreement, caused the action to be set down for hearing on 16 August 1976.

When the case was called before VAN REENEN, J., on 16 August 1976 there was no transcription of what had been said in Court C on 19 and 20 February 1973. There was only the note on the cover of the case which read: "Result: Settled. Postponed *sine die*." The interim agreement was also not before the Court.

Mr. *King* appeared for the defendant and Mr. *Liebowitz* said that he was appearing for the third plaintiff, Mr. N. Klidaris, presently the second appellant. Save, as will later appear, the D other parties were not represented and none of the plaintiffs was present in Court.

The trustee of the first plaintiff, Coligionis, had filed a notice of withdrawal of his claim dated 13 August 1976.

Regarding the second, fourth, fifth and sixth plaintiffs, presently appellants Nos. 1, 3, 4 and 5, counsel for the E defendant is recorded to have stated that, although their attorney Lebos had withdrawn as their attorney of record and his formal notice of withdrawal had been filed, these plaintiffs were present in the Court. He moved that their claims against defendant be dismissed with costs.

He told the Court with regard to the counterclaim of defendant F against these plaintiffs that at the previous hearing the defendant's counterclaim had been admitted in the sum of R56 500 together with interest at 1 per cent per month from 1 March 1973.

No evidence was adduced but certain bonds and consents from bondholders in regard to the properties of the fourth and fifth plaintiffs were handed in with the request that the properties G be declared executable. One of the leases was handed in to justify the claim for attorney and client costs in terms thereof.

The Court granted judgment against appellants Nos. 1, 3, 4 and 5 jointly and severally on the defendant's counterclaim for the sum of R56 500 with interest thereon at 1 per cent per month from 1 March 1973 to date of payment, with costs on the H attorney and client scale, including costs of two counsel, and the properties of the fourth and fifth plaintiffs were declared executable, and dismissed the claims of these plaintiffs against defendant with costs.

The case of the third plaintiff, N. Klidaris, presently the second appellant for whom counsel had said he was appearing, stood down until the afternoon.

It then transpired that counsel who had said that he was appearing for

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the third plaintiff, was in fact appearing for the second plaintiff, P. J. de Wet, presently the first appellant. The mistake was due to a misunderstanding between counsel and his instructing attorney. This fact was and has never been challenged. A

As there was no appearance for the third plaintiff, counsel for the defendant moved and obtained the same orders against him as he had obtained against the other plaintiffs earlier in the day.

Counsel for the second plaintiff, P. J. de Wet, immediately moved the Court to rescind the judgment and orders B which had been given against his client that morning whilst counsel was in Court but under the mistaken impression that he was appearing for the third plaintiff.

Counsel for defendant opposed the request for rescission and VAN REENEN, J., refused to consider an informal application to this effect from the C Bar and required that formal application be made supported by affidavits.

Counsel for the plaintiff, De Wet, when he was mistakenly appearing for Klidaris in addressing the Court, stated that his client had only heard on 14 August 1976 that his attorney had withdrawn and the matter had been enrolled for 16 August 1976. D The other plaintiffs were unaware that the matter had been enrolled for that day. In actual fact he was referring to his client De Wet when he told the Court what his client had heard on 14 August 1976.

On learning that their claims against defendant had been dismissed and judgment had been granted against them the five appellants launched an application to have the Court's judgment and orders set aside.

E This application came before HIEMSTRA, A.J.P., and it is the judgment and orders in that application which is the subject of this appeal.

It appears from the affidavits filed in the application that De Wet, the first appellant, was the only one of the appellants who knew before 16 August 1976 that the matter would be heard on that date, when he was so informed by Coligionis on F Saturday, 14 August 1976, when he came from work and he immediately got in touch with an attorney Mr. Travilas and instructed him to arrange representation for him at Court on 16 August 1976.

Due to a misunderstanding between his attorney and counsel such fact was not correctly brought to the attention of the Court or G the defendant and judgment was entered against him, with the Court, defendant's counsel and his counsel being under the mistaken belief or impression that he was unrepresented. His case is in these circumstances distinguishable from that of the other plaintiffs who were neither present nor represented in the Court.

It would appear from the affidavits filed that the failure of H the remaining plaintiffs to appear or be represented in Court is due to their attorney Lebos withdrawing as their attorney without notifying them both thereof and of the fact that the action had been set down for hearing on 16 August 1976.

Lebos acted for all the plaintiffs together, including the first plaintiff, Coligionis, prior to the sequestration of his estate, and used to communicate with Coligionis who would then communicate with the other plaintiffs. He never communicated, directly, with the other plaintiffs. Coligionis was effectively the agent of the other plaintiffs to deal with the litigation.

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They left the appointment of an attorney and the conduct of the litigation to him. Lebos was the attorney of Coligionis and as A a result acted, also, for the other plaintiffs. On the insolvency of Coligionis, Lebos assumed that his trustees would continue with the action and in so doing act, also, for the other plaintiffs, particularly as he had asked him to do so, informing the attorney of the trustee that, in his opinion, there was a good case. Lebos knew that the matter was set down for 16 August 1976. He knew this from some time in March 1976. In July 1976 he apparently wrote to the attorney for the trustee in the estate of Coligionis informing him that Coligionis wished to pursue the action and that the other B plaintiffs were relying on him. The attorneys for the trustee were apparently not prepared to continue with the action and on 5 August 1976 advised him to this effect. Lebos thereupon decided to withdraw as attorney for the plaintiffs.

Lebos had the telephone number of Coligionis to hand in August 1976 but on 9 August 1976 he wrote a letter to Coligionis to a C post box in Brakpan requesting him to advise the present five appellants, as he did not have their addresses, that he was no longer acting for them and to advise them to make suitable arrangements immediately regarding the action.

On the same date 9.8.76 he wrote a letter to the attorney acting for the trustee of Coligionis' insolvent estate advising D him to get in touch with Coligionis by telephone and advising the attorney to proceed with the action on the trustee's behalf.

On Friday 13 August 1976 Coligionis received a copy of the notice by the attorneys of his trustee that the trustee was withdrawing his claim in view of a settlement having been E reached between him and the defendant. He immediately took the notice to Lebos who said he did not know why the attorneys had withdrawn the claim and that Coligionis was to communicate with

him on Monday 16 August 1976. That Friday evening on opening his post box in Brakpan he found the letter from Lebos dated 9 August 1976 advising him of his withdrawal as attorney in the action. Coligionis F went to see De Wet, second plaintiff, on Saturday 14 August 1976 and advised him of what had happened. He advised him to arrange for his representation at Court on 16 August 1976. He did not advise the other plaintiffs who had no knowledge that the case had been set down for 16 August 1976 - they had left everything to him. Coligionis assisted De Wet in obtaining the services of an attorney, one Trevilas, who G thereafter acted for him and instructed counsel to appear on his behalf at the trial on 16 August 1976. De Wet was thus the only plaintiff, apart from Coligionis, who knew of the date of the action.

On 9 August 1976 Lebos filed a notice of withdrawal with the Registrar of the Court, after service on the attorneys for defendant and the attorneys acting for the trustee of H Coligionis. The notice read as follows:

> "Be pleased to take notice that Messrs. Lebos, Reid and Banchetti hereby withdraw as attorneys of record for the second to sixth plaintiffs in this action. And further take notice that the last known address of the plaintiffs is care of G. Coligionis, 4 Milner Avenue, Brakpan."

It is not in dispute that the above notice does not comply with the provisions of Rule 16 of the Rules of Court.

HIEMSTRA, A.J.P., found that, except for No. 1 appellant, De Wet, not one of the other plaintiffs knew that their attorney, Lebos, had withdrawn

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as their attorney of record or that the matter was enrolled for hearing on 16 August 1976. They took it for granted that their attorney was protecting their interests.

HIEMSTRA, A.J.P., found that the facts as set out above did not justify A his setting aside the judgments granted against the five plaintiffs (appellants) in their absence either under the provisions of Rule 42 (1) *(a)* of the Rules of Court or under the common law. It was not disputed that the provisions of Rule 31 (2) *(b)* could not be applied in the present instance.

B It is contended on appeal that the learned Judge erred in holding that he could not come to the assistance of the appellants either under the provisions of Rule 42 (1) *(a)* of the Rules of Court or under inherent powers allegedly vested in the Court, in the pursuit of justice between parties, to rescind a judgment granted in circumstances not covered by the Rules of Court.

C The learned Judge found that counsel for the appellant De Wet had made no move on his behalf. In the light of the facts which I have set out above, this finding can only relate to the position when judgment was entered against him, for, immediately counsel for De Wet discovered that he had D erroneously intimated that he appeared on behalf of Klidaris, he attempted to rectify the position by applying for rescission of the judgment granted against his client De Wet.

There are three generally accepted ways by which a default judgment can be set aside in the Supreme Court:

(a) Rule 31 (2) *(b)*

(b) Rule 42 (1)

E *(c)* common law.

In this regard, I would merely refer to the following decided cases in which this was so found *Louis Joss Motors (Pty.) Ltd*. v *Riholm*, 1971 (3) SA 452 (T) at pp. 454 - 455: *Hardroad (Pty.) Ltd*. v *Oribi Motors (Pty.) Ltd*., 1977 (2) SA 576 (W) F at p. 578: *Bristow v Hill*, 1975 (2) SA 505 (N) at p.506.

Before a judgment would be set aside under the common law, an applicant would have to establish a ground on which *restitutio in integrum* would be granted by our law such as fraud or *justus error* in certain circumstances. *Childerley Estate Stores* v. G Standard Bank of SA Ltd.. 1924 OPD 163 at pp. 166 - 168: *Seme v Incorporated Law Society*, 1933 (1) T.P.D. 213 at p. 215: *Makings v Makings*, 1958 (1) SA 338 (AD) at p. 343: *Athanassiou v Schultz*, 1956 (4) SA 357 (W). It would appear that the procedure to set aside a judgment on grounds justifying *restitutio in integrum* is by way of action.

The position as set out above recognises the finality of a judgment once H delivered or issued (*vide, Estate Garlick v Commissioner for Inland Revenue*, 1934 AD 499 at pp. 502 - 503).

Under the common law a judgment can be altered or set aside only under limited circumstances and the additional relief extended by the Rules of Court is intended to modify such rigid provisions but within the confines of such Rules. The Court is empowered to grant relief in

certain additional circumscribed circumstances.

I shall return to the above matter if it proves necessary to consider the

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appellants' contention that, in addition to the above grounds, the Court has an inherent jurisdiction to set aside a default judgment in the interest of ensuring justice between the parties.

It is not necessary to decide whether it is competent for a A Judge to recall an order granted by him against a party, in the absence of such party, on the grounds that such order has not yet been issued by the Registrar, in view of the opposition to such recall in the present instance. There is precedent for the practice in this Division of recalling by agreement or in the absence of opposition a judgment granted in the absence of the other party before such order has been issued by the B Registrar. *Dewar v Sondheim*, 1906 T.H. 230 at p. 232: *O'Neill v O'Neill*, 1910 W.L.D. 186; *Muller v Fitzgerald and Fine*, 1944 W. L. D. 200; *International Tobacco Co. (S.A.) Ltd*. v *United Tobacco Co. (South) Ltd*., 1955 (2) SA 29 (W) at p. 31. It would appear that this practice is not universal in the Republic of South Africa - *Ex parte Nel*, 1957 (1) SA 216 (D).

It was not argued on appeal that it would have been possible C for the Judge in the Court *a quo* to have set aside the judgment under the provisions of Rule 31 (2) *(b)* or the common law. It was contended that the Judge in the Court *a quo* erred in not so doing under the provisions of Rule 42 (1) *(a)* of the Rules of Court. I set out for ease of reference the relevant D provisions of Rule 42 (1) *(a)*:

> "42. (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:
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> *(b)* an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or E omission;
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> *(c)* an order or judgment granted as the result of a mistake common to the parties.
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> (2) Any party desiring any relief under this Rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought."

As set out above, the above Rule enables the Court, in addition to any powers it has, to grant relief to an applicant under the F circumstances set out in the Rule. It was contended that the word "may" indicates that the Court has been vested with a discretion and that this should only be exercised in favour of an applicant if good or sufficient cause - e.g. probability of success in the action - were shown. There is no basis, in my view, to graft such further requirement on to the Rule and G it is clear from the context in which the word is used and the Afrikaans version that the word "may" is used in the sense that the Court is empowered, in certain defined circumstances, to rescind or vary an order or judgment. In this connection I would refer to *Hardroad (Pty.) Ltd*. v *Oribi Motors (Pty.) Ltd., supra* at p. 578F. As set out above, the provisions of Rule 16 (4) of the Rules of Court were not complied with by the H said Lebos when he served his formal notice of withdrawal on the Registrar as attorneys for the plaintiffs. He failed to specify in such notice, the date when and the manner in which he notified all the parties and, further, failed to attach a copy of such notification. In such circumstances, it is contended, the proviso to the Rule did not become operative and it would still be necessary to serve all future notices on the parties. This might well be the position - *Botes v Botes*. 1966 (4) SA 295 (T) at p. 296 - but this does not avail the

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appellants in the present instance as the attorney (and counsel) for plaintiff were aware months before the withdrawal of Lebos that the matter had been set down for 16 August 1976. Defendant was not required, in terms of the Rules, to serve any A further documents on the plaintiffs.

It is contended that, on the above account, the judgment had been granted erroneously by VAN REENEN, J. It appears to me that it has not been shown that there was error on the part of the Court in this regard. The appellants' submissions in this regard are, in my view, based on an incorrect premise that B there was an obligation under the Rules on the defendant to give the plaintiffs fresh notice of set down of the trial. Without in any way attempting to define the term "erroneously made", there is in my view no suggestion of such error in this regard on the part of the Court.

In regard to the appellant De Wet, it is clear in my view that C counsel for the defendant, counsel for De Wet, then appearing for Klidaris, and the Court (VAN REENEN, J.) were all of the view that De Wet was not represented in Court and under that mistaken belief, which was common to the parties, judgment was entered against De Wet as if he were not represented in Court. On appeal, senior counsel for the defendant, who appeared D before VAN REENEN, J., conceded, fairly, that if he had been aware of the true facts he would not have moved for judgment against De Wet. He had opposed the recall of the order on instructions received. The Court need not be party to the common mistake between the parties before relief can be granted under the provisions of Rule 42 (1) *(c)*. Both counsel were E under the mistaken belief of fact that De Wet was not represented, and acted thereunder in obtaining and not opposing the application for judgment by default. The Court could and should have come to the assistance of this particular plaintiff on this basis. As set out above, I am of the view that the learned Judge in the Court *a quo* erred in finding that counsel F for De Wet had made no move on his behalf once he had discovered the correct position. The learned Judge in the Court *a quo* erred, in my opinion, in not treating the case of De Wet on a different basis to those of the other appellants. It might be fortuitous that Coligionis communicated with him but the fact does remain that immediately he was informed of the position he took the necessary steps to be represented in G Court. Judgment was entered against him by a mistake common to the parties and the Court should have set the judgment aside under the provisions of Rule 42 (1) *(c)*. He finds himself in a better position than his co-appellants, in this regard, but this appears to be due entirely to the actions of their appointed agents, Coligionis and Lebos. The remaining appellants were negligent in not maintaining contact with their agent and attorney. *Bristow v Hill, supra* at p. 507F - G.

H It was contended, further, that the judgment had been entered against the appellants by the Court on the mistaken information that the appellants were in Court at the time judgment was sought and were not opposing such application. Counsel for the defendant is recorded as having said in addressing the Court that the second, fourth, fifth and sixth plaintiffs were in the Court but in the light of the prior and subsequent statements by counsel to the Court this must be only an error in the transcript or an unfortunate way of stating the position that prevailed at the time. The

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Court could not have been under any misapprehension that the plaintiffs were in Court. It is clear from a perusal of the record that counsel and the learned Judge proceeded on the basis that the plaintiffs were not present in Court. The statement by counsel was intended to mean and could only have been understood as meaning that the plaintiffs were before the A Court inasmuch as plaintiffs' attorney was aware of the date of the continued trial. The submission, raised in a different form, was not dealt with in the judgment of the Court *a quo* but I am of the opinion that there is no substance in such submission.

It was submitted, further, that the learned Judge erred having B regard to the provisions of Rule 39 (1) and 39 (4) in granting judgment on the counterclaim of the defendant without the defendant having led any evidence to substantiate the claim for damages contained in such counterclaim. The claim set out therein was not a claim in a liquidated amount and the learned

Judge in the Court *a quo* erred in finding that the claim was C based on the interim written agreement between the parties. The learned Judge would appear to have erred in this regard but it is clear from the history of the proceedings which I have set out above that senior counsel in addressing the Court announced that the parties had reached an agreement as to the *quantum* of defendants' counterclaim in the event of the trial continuing D and plaintiff failing in its claim. The effect of this agreement was to determine the amount of plaintiffs' counterclaim and convert it into a liquidated claim. It was suggested that this was merely a statement by counsel in the opening of plaintiffs' case and that it should not be treated as an admission formally made and recorded. *Standard Bank of* E *S.A. Ltd*. v *Minister of Bantu Education*, 1966 (1) SA 229 (N) at pp. 242, 243. In the present case, however, this was a

settlement of an issue announced to the Court after discussions between counsel in an adjournment for this purpose. This settlement was carried forward by the parties into the written agreement of settlement subsequently entered into between the parties. It was suggested that the written settlement had the effect of novating the verbal settlement F announced to the Court on the previous day as a means of curtailing the proceedings. This on the facts is obviously not so because the written agreement, as set out above, dealt with the position arising from plaintiffs' action against Badenhorst Garage (Pty.) Ltd. whereas the verbal agreement covered the position in the event of a continuation of the action. The G written agreement envisaged that in certain circumstances the action could be enrolled and continue and in which event the agreement between counsel would obviously govern the position.

It was contended, lastly, in this regard that the agreement whereby the claim of defendant became a liquidated claim was H conditional upon the failure of plaintiffs' claim. It was argued that the dismissal of plaintiffs' claim with costs was not a failure of plaintiffs' claim because it was tantamount to an order for absolution from the instance with costs on plaintiffs' claim and that plaintiffs could again institute action on the said claim. The agreement obviously related to the action before the Court and there is no doubt that the order made on plaintiffs' claim, irrespective of what its effect might be in relation to future actions is that plaintiffs have failed in their claim in the action against defendant and that the amount

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of defendant's counterclaim has been agreed to be R56 500. This applies also to the claim for interest and the date from which such interest was to commence to run.

It was therefore not necessary, in my view, for defendant to A have led evidence in respect of its counterclaim and the learned Judge did not err in granting judgment without requiring evidence to be adduced as to the *quantum* of the counterclaim. In regard to the claim for attorney and client costs, it appears from the record of the proceedings that the defendant handed in one of the leases entered into with one of B plaintiffs' in substantiation of its claim for attorney and client costs. It has not been established by the appellants that a judgment was wrongly sought or granted in terms of Rule 39 (4) read with Rule 39 (1).

In the ultimate, it was contended on appeal that the Court has a residual inherent jurisdiction to set aside the judgment by C means of which it holds the scales of justice where no specific law or rule exists to cover the particular circumstances of the case. It is submitted that these powers will he invoked when the Rules of Court are silent and do not provide for a particular situation. It is argued that in the present instance, if it is found that the Court did not grant the order erroneously, or that an order was not erroneously D sought, that the appellants find themselves in their present predicament because they have virtually been abandoned by their attorney at the last moment without an opportunity to obtain legal assistance. This, in my view, does not explain their default of appearance at the trial. Their default of appearance is due to a failure on their part to remain in communication E with their attorney or agent Coligionis as to the progress of their case. They cannot divest themselves of their responsibilities in relation to the action and then complain *vis-à-vis* the other party to the action that their agents, in whom they have apparently vested sole responsibility, have failed them. Earlier on I referred to a decision in which it was held that failure to remain in communication with one's attorney during the course

of legal proceedings is negligent F conduct, but in the present case the conduct amounted to a complete lack of interest in the proceedings. Even if the Court did have an inherent jurisdiction to assist the appellants, I am of the opinion that the circumstances, which I have set out, are such that a Court should not come to the assistance of the appellants. They are the authors of their own problems and it would be inequitable to visit the other party to the action G with the prejudice and inconvenience flowing from such conduct.

A Court obviously has inherent power to control the procedure and proceedings in its Court. This is done to facilitate the work of the Courts and enable litigants to resolve their H differences in as speedy and inexpensive a manner as possible. This has been recognised in many decided cases which are collected by the learned authors of Herbstein and Van Winsen, *The Civil Practice of the Superior Courts of South Africa*, 2nd ed., pp. 20 - 21. This, in my view, does not include the right to interfere with the principle of the finality of judgments other than in circumstances specifically provided for in the Rules or at common law. Such a power is not a necessary concomitant to the inherent power to control the procedure and proceedings in a Court. I am of the opinion, as set out above, that the powers in the Rules of Court, in this regard, are specific powers vested in

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the Court over and above the powers to assist in this connection in the common law. In view of the conclusion I have reached, on the facts, even if a discretion were vested in the Court, that I would not come to the assistance of the appellants. It is not necessary to express a final view on this A aspect. I should point out that the authorities which I have consulted in this regard, and which recognise such inherent power of the Court, all but one relate to the position before the introduction of the Uniform Rules of Court. In *Roopnarain v Kamalapathy and Another*, 1971 (3) SA 387 (D) at p. 389A - D, this conclusion was reached on an agreement between counsel. On the other hand in *Bristow v Hill, supra* at pp. 506 - 507, the learned Judge came to the conclusion that a Court did not B have an inherent power to set aside a judgment by default and was limited to the provisions of the Rules or where the litigant makes out a case for *restitutio in integrum* at common law.

It was argued, but faintly and in my view correctly so, C finally, that the Court could have come to the assistance of the appellants at common law on the basis of *justus error*. Apart from cogent other reasons which it would serve no purpose to enumerate herein, there is no merit in this submission for the reasons that the contentions based on error and/or common error have been rejected.

In the result the appeal by the second, third, fourth and fifth D appellants is dismissed with costs. The appeal of the first appellant is upheld and the order whereby his claim was dismissed with costs and judgment entered against him in the sum of R56 500, jointly and severally with the other appellants, with interest at the rate of 1 per cent per month from 1 March 1973 with costs on the attorney and client scale E is set aside. The first appellant is to pay the costs of the respondent (defendant in the action) in the application in the Court *a quo* on an unopposed basis and the costs occasioned by the opposition by respondent to first appellant's application are reserved for decision by the Judge hearing the trial between the parties. The respondent is to pay first appellant's costs of appeal which are to include first appellant's costs in F connection with the preparation of the record for the appeal.

BOSHOFF, A.J.P., and CURLEWIS, J., concurred.

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