



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO.

3380/2019

In the matter between:

JOYCE NOMVUME MATABESE

Applicant

and

SEARTEC TRADING (PTY) LTD

First Respondent

SHERIFF OF THE HIGH COURT

Second Respondent

JUDGMENT

RUGUNANAN J

[1] On 12 January 2021, the first respondent (as plaintiff, and hereinafter referred to as 'Seartec') obtained a judgment by default against the

applicant (as third defendant) along with two other defendants, the first being Ntsikelelo Matebese Funeral Services (Pty) Ltd, and the second being Ntsikelelo Matebese. The judgment was for payment of the amounts of R595 472.35 and R26 081.25 together with costs. The respondent's claim was founded on a rental agreement in respect of printing equipment which provided for cost per copy and personal suretyships signed by the applicant and the second defendant. In the deed of suretyship the applicant chose 11P Tantyi Location, Grahamstown, Eastern Cape as her *domicilium citandi et executandi*.

- [2] The default judgment, in what I will hereinafter refer to as the main action, was occasioned by the circumstance that the applicant (as well as the other defendants) were barred for failure to have delivered their plea within the prescribed period of time.¹
- [3] On 18 March 2021 the applicant launched an urgent application for an order for the return of goods attached by the sheriff on 9 March 2021 together with a further order interdicting the sheriff from executing against her. The fate of the application was that it was struck from the roll with costs on 23 March 2021.
- [4] The applicant (together with the other defendants, as co-applicants) subsequently brought an application in which they sought an order rescinding the default judgment granted on 12 January 2021. In the rescission application the applicant featured as third applicant. That application was dismissed in a judgment handed down by Smith J on 10 August 2021. Significant to note is that Smith J concluded that the applicant 'has not given any indication that she has joined in the application, neither has she filed an affidavit in support [thereof]'.

¹ As per an order of court of 8 October 2020, per Swartbooi AJ, page 129.

- [5] The affidavit to which Smith J refers is attached as annexure JNM3 to the applicant's founding affidavit in these proceedings. It is a supplementary affidavit sworn out by the applicant on 4 June 2021 that was not filed by her attorneys in support of the rescission application that served before Smith J.
- [6] The present application was issued on 5 October 2021 – it is before this court at the instance of the applicant in which, in addition to costs, she essentially seeks orders: condoning the late filing of this application, rescinding the judgment by Smith J, uplifting the bar for failure to have delivered a plea and granting her leave to deliver a plea in the action proceedings, that all goods attached and removed by the sheriff be returned, and that execution proceedings be stayed. Only Seartec opposes the proceedings.
- [7] The above scenario plays itself out as an application for rescission of a prior order dismissing a rescission application. On the face of it, this raises doubt about the propriety of these proceedings from a procedural and substantive perspective. Although, neither party addressed me on this issue, I will proceed to determine the matter on the basis of the material set out in the papers before me. The applicant was cited in the main action as surety², and as I consider that she is a party affected by the judgment, I am of the opinion that she has an interest in the subject matter sufficiently direct and substantial to launch these proceedings. That said, I proceed to deal with the merits of the application.
- [8] The applicant's founding affidavit is by no means a model of clarity. In claiming relief for a rescission she seeks reliance on uniform rule 42(1)

² Having signed a suretyship agreement dated 16 July 2015 attached to the summons in the main action as annexure POC 12.

(a) and the common law. I add that, in argument, her counsel indicated that reliance on rule 42(1)(b) was abandoned.

THE COMMON LAW

[9] At common law a party seeking rescission of a judgment or order must show sufficient cause (or good cause as it is otherwise known).³ An applicant relying on good cause must satisfy the court (i) that there is a reasonable explanation for their default; and (ii) that they have a *bona fide* defence which *prima facie* carries some prospect of success.⁴ Given my conclusion on the merits of the application, I do not intend weighing down this judgment by dealing extensively with the applicant's reasons for seeking condonation. To this end I refer to my comments in its closing paragraphs.

[10] In so far as the applicant places reliance on annexure JNM3 for aligning herself with the so-called defence/s raised by the co-defendants in the main action, I can do no better than quote at length from the judgment by Smith J. In the passages cited, where the learned judge refers to 'the respondent' this should be read as reference to Seartec.

'[9] To my mind they have also failed to establish a *bona fide* defence with some prospects of success. They assert that they are not indebted to the respondent in the amount stated in the particulars of claim, but have failed to state what amount they aver is owing to the respondent. They also aver that the respondent's representative misled the applicants by misrepresenting that the printing equipment was suitable for the first applicant's business requirements, when he had known that this was not true. He accordingly induced the applicants to sign the agreement to their prejudice as the equipment turned out to be unsuitable for the first applicant's business

³ *Athmaram v Singh* 1989 (3) SA 953 (D&CLD) at 957C; *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (AD) at 1040F

⁴ *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (ECD) at 708H-J; *Athmaram v Singh supra* at 957C

requirements. They aver furthermore that the agreement between the parties had been lawfully terminated on 21 February 2017, and that they have tended the return of the goods and payment of all outstanding amounts due at that date. They accordingly dispute liability for any invoices raised after the alleged lawful termination of the agreement.

[10] It is trite that in considering whether an applicant for rescission has shown good cause, the court will not consider the above-mentioned factors separately but will on a conspectus of all the evidence, decide whether good cause had been shown. Thus a solid defence with good prospects of success may compensate for a less than acceptable explanation for the default.

[11] Although an applicant is not at this stage are required to prove the veracity of the facts put up to establish his or her defence, facts must be pleaded with sufficient clarity to satisfy the court that, if proved in due course, they will constitute a valid and *bona fide* defence to the respondent's claim.

[12] The facts alleged by the applicant's in this regard are at best vague, sketchy and contradictory. Although asserting that the respondent's representative had misrepresented to them that the printing equipment was suitable for the first applicant's business requirements, no facts are averred in this regard. Instead, they seek to rely on conclusions which have no factual bases. By way of example; they do not say when the alleged misrepresentation took place, by whom, the exact nature thereof and in which respects the equipment was unsuitable. Their admission that they do owe the respondent some undisclosed sum in respect of the use of the equipment is also contradictory since it suggests that they did in fact use the equipment. The averment that the agreement had been lawfully terminated during February 2017 is equally devoid of any factual foundation, is sketchy and wholly inadequate to establish reasonable prospects.'

[11] As for the founding affidavit in the present matter, there does not appear to be anything explicit in support of allegations by the applicant that she has a *bona fide* defence, other than a nebulous rambling of causes of

complaint that the particulars of claim in the main action are deficient for want of compliance with uniform rule 18 which deals with the rules relating to pleading generally. She asserts, moreover, that she had resigned as director of Ntsikelelo Matebese Funeral Services (Pty) Ltd – in that way suggesting that she was released from liability for its debts and that Seartec’s involvement of her in the main action was unjustified.

- [12] The short shrift approach to the applicant’s stance is that Seartec’s cause of action against her is based on the deed of suretyship as pleaded and attached to the particulars of claim. The applicant has accordingly not put up a *prima facie* indication of a sustainable defence, and insofar as she ventures to make common cause with the co-defendants in the main action, I am unreservedly in agreement with the above remarks by Smith J.

RULE 42

- [13] Uniform rule 42(1)(a) permits a rescission or variation of an order or judgment provided that such an order or judgment is:

‘An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.’

‘erroneously sought/granted’

- [14] The ostensible basis upon which rescission is sought on this ground is that the summons in the main action was not served upon the applicant;

and that it manifested defects for non-compliance with uniform rule 18(4) and (6).

- [15] In the deed of suretyship attached to the summons in the main action, the applicant chose as her as her *domicilium citandi et executandi* the address specified earlier in this judgment. The deed of suretyship signed by her is attached to Seartec's answering affidavit in these proceedings. In reply, the applicant has not disputed having signed the agreement and contends herself by merely stating that she has noted the contents of the paragraph in the answering papers where reference is made to the agreement.
- [16] Rule 4(1)(a)(iv) of the uniform rules of court makes provision that service of process shall be effected 'if the person so to be served has chosen a *domicilium citandi*, by delivering or leaving a copy thereof at the *domicilium* so chosen'.
- [17] It is not disputed that service of the summons was effected by the sheriff on 27 November 2019 on the applicant's son, Ntsikelelo Matebese (the second defendant in the main action), at the applicant's chosen, *domicilium*. The applicant's complaint, however, is that service was not effected upon her and accordingly she was unaware of the action proceedings. In that regard there are two observations that require comment.
- [18] Firstly, rule 4(1)(a)(iv) does not require personal service. It is a well-established practice which is recognised by the rule that, if a defendant has chosen a *domicilium citandi*, service of legal process in judicial proceedings at such place will be good, even though it be a vacant piece of ground, or the defendant is not present at the time, or known to be

elsewhere, or has abandoned the property, or cannot be found.⁵ The very purpose of a choice of *domicilium* is to relieve the party causing service of the process from the burden of proving actual receipt.

- [19] Where service was effected on the applicant's son at her chosen *domicilium*, it was effective – and there is accordingly no room for contending that there was irregular service that occasioned a default judgment being erroneously sought or granted against her.

'in the absence of any party affected thereby'

- [20] Secondly, the contention by the applicant that she was unaware of the proceedings is far-fetched and is not borne out by the fact that she does not deny that she was represented by the same firm of attorneys (Mqeke) in the main action, the subsequent urgent proceedings and the rescission proceedings – all of which ensued under the same case number indicated in the heading to this judgment. On this leg of the applicant's case, her protestations that she was unaware of the proceedings do not support a claim for rescission on the basis that the default judgment was erroneously sought or granted in her absence in circumstances where her erstwhile legal representatives (Attorneys Mqeke) failed to file her supplementary affidavit timeously. They were at all times on record as acting for her; as such I doubt if she can be exonerated from the consequences of their tardiness.

- [21] As for the applicant's causes of complaint occasioned by Seartec's alleged non-compliance with rule 18, I am not persuaded that it provides a sustainable basis for seeking a rescission under the jurisdiction of rule

⁵ *Armcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) at page 5J-6; *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 384 (W) at 847C-F quoted with approval in *Firstrand Bank Ltd and Others v Meyer* (08/32310) [2011] ZAGPJHC 78 (12 August 2011) at paragraph [13]

42(1)(a). Non-compliance with rule 18 does not, in my view, implicate the kind of error necessary for invoking the said rule. Where a party believes that rule 18 has not been complied with, he or she may either have recourse to rule 23, alternatively rule 30 of the uniform rules of court. Even if it may be assumed (without finding as such) that rule 18 had not been complied with, it was not legally incompetent for Smith J to have dismissed the rescission application that served before him.

CONDONATION

[22] This is not a requisite under rule 42 but is informed by the requirement of good cause under the common law. In either instance the discretion to entertain a delayed application necessarily involves the weighing of considerations of certainty and finality in legal proceedings as also the interests of justice.⁶ The applicant has given a slender explanation for the delay of some two months after delivery of the judgment by Smith J and the launching of these proceedings. On the merits she has unmistakably failed to demonstrate any prospect of succeeding on any of the grounds relied on in support of this application. The indulgence sought for excusing the delay in launching these proceedings does not assist in advancing a case where there is none, nor will it advance the administration of justice in achieving finality in litigation.

[23] In the result the application is dismissed with costs.

⁶ *First National Bank of Southern Africa Ltd v Van Rensburg N.O. and Others: in re First National Bank of Southern Africa Ltd v Jurgens and Others* 1994 (1) SA 673 (TPD) at 681

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

APPEARANCES:

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Date heard: 04 August 2022

Date delivered: 01 November 2022