

**REPUBLIC OF SOUTH AFRICA**



**THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Case No: 6806/2018**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<b>27/3/2019</b>	
DATE	SIGNATURE

In the matter between:

**EPIPHANYI IT TRAINING AND ADVISORY (PTY) LTD**      Applicant

**T/A FREEWI TECHNOLOGIES**

And

**MOBEN SOUTH AFRICA**      First Respondent

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**JUDGMENT**

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- [1] This is an application for rescission of default judgment taken under case 6806/18.
- [2] To avoid confusion in this matter, the Applicant will be referred to as the Defendant interchangeably and the Respondent as the Plaintiff interchangeably in this application.
- [3] The Respondent issued summons against the Applicant on 21 February 2018 and default judgment was granted on 25 April 2018. The Applicant's attorneys of record were instructed to ascertain granting of the default judgment.
- [4] The cause of action in the summons was the alleged fraudulent misrepresentation which allegedly induced the Respondent into concluding a written co-operation agreement with the Applicant, Judgment by default was entered against the Applicant for R546 000-00 plus interest at 10.5% tempore morae and costs of suit.
- [5] It is this judgment that the Applicant seeks to be rescinded.
- [6] The Applicant claims that it did, however, not receive the summons. It referred me to the return of service which shows that the combined summons was served by leaving the copy thereof at the main gate at the registered office as the premises were found to be locked. The sheriff in his return of service also states that he could not determine whether the defendant resides at the given address.
- [7] It contends that the registered address as reflected in a CIPC search for the Applicant shows the address of 21 Darter Avenue, Donglasdale. It claims that the registered address was its previous residential address which it sold on 5 June 2015.

- [8] The Applicant became aware, so it avers, of the judgment on 23 May 2018 when the Applicant's attorney received a call from the Respondent's attorney informing it of the judgment and this was not disputed by the Respondent.
- [9] The Respondent contends that the Applicant has failed to make out a case in its founding papers.
- [10] The Applicant contends that the judgment stands to be reconsidered on the ground that the summons ought to have been served at an address indicated in correspondence. The Respondent contends furthermore that the Applicant presumes that the Registrar would have requested the summons to be served at the address in the correspondence and thus concludes that the default judgment stands to be reconsidered. It is contended that there is no merit in the Applicant's proposition and that the facts and the law do not support the conclusion drawn by the Applicant.
- [11] The Respondent furthermore contends that the summons was served in accordance with Rule 4(1) (a) (ii) of the Uniform Rules and that the reconsideration of judgment is bad in law because the judgment was granted in an open court by Mudau J.
- [12] The issues before this court are whether:-
- 12.1. a judgment granted in an open court is susceptible to being reconsidered in terms of Rule 31(5) (d);
  - 12.2. there was proper service of the summons on the Applicant;
  - 12.3. the court had jurisdiction to determine the issues pleaded in the Respondent's particulars of claim; and

12.4. whether it is permissible for the Applicant to formulate a new cause of action in its replying affidavit.

[13] it is trite that in terms of Rule 31 (5) (d) *"any party dissatisfied with the judgment granted or direction given by the registrar may, within 20 days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court"*

[14] Service of any process of the court is regulated by Rule 4 of the Uniform Rules which provides that a service of any process of the court directed to the sheriff any document initiating application proceedings shall be effected by the sheriff in one of the following manners:-

14.1. in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there be no such office or place of business, or any manner provided by the law.

[15] It is clear that whilst the Applicant's relief in the founding affidavit is based on the review of the registrar's order in term of Rule 31 (5) (d), this prayer cannot be sustained since the judgment sought to be rescinded was made in an open court and not by the registrar. The relief must therefore fail.

[16] The Applicant sought in its answering affidavit to amend the relief originally sought. This should also fail as the rules of this court are clear. The Applicant's case must succeed or fail based on its founding affidavit. There was no reason advanced on why the Applicant had not been able to establish from the court's records as to who granted the default judgment. Court

records are public documents to which all parties have access to and it is therefore inexcusable that the Applicant took no steps to verify what was contained in the court records.

- [17] On the issue whether there was a proper service, section 23 (3) of the Companies Act 71 of 2008 provides that every company must a registered office as indicated in its Notice of Incorporation. The service at the registered office or at the principal place of business within the jurisdiction of court will be in compliance with the rules and be good in law. (See *Federated Insurance Co Ltd vs Malawana* 1986 (1) SA 751 (A) at 759E-G).
  
- [18] In this case, the Applicant contends that the registered address was a house it used to occupy few years back. This is an unacceptable excuse as it was the Applicant's duty to inform the CIPC of its change of registered office. No factual proof had been advanced of such change. Consequently, I am of the view that the service was proper and in compliance with the rules of this court.
  
- [19] I now deal with the issue whether the court that heard the default judgment application had the jurisdiction to determine the issues pleaded.
  
- [20] In *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA (SCA) para 62 it was held that the society looks to the courts to implement a uniform system of resolving disputes. The courts are guarantors that no one in society will be deprived of their rights without due process of law. For the courts to meet their obligations and for there be binding conflict resolution the courts must function within the bounds of its rules for an ordered and just society.

[21] There is no basis to reconsider the judgment obtained in default before Mudau J. The arbitration clause concluded as the basis for the court not to have considered the application pre-supposes that the court had no jurisdiction on the matter. There was no application to stay the proceedings and this ground must fail as well.


[22] The application has in effect been amended to be based on the replying affidavit. This is impermissible as the Respondent has not been afforded an opportunity to prop its version. If that were to be permitted, the Respondent would be prejudiced because the Applicant's case was based on the founding affidavit to which it responded by way of opposing affidavit. It is, furthermore, impermissible that new grounds for rescission are established by the Applicant in its replying affidavit, which is what the Applicant has done in this case..

[23] It therefore follows that the application for rescission based on the founding affidavit must fail.

#### Order

[24] The following order is made:

- (a) The application for rescission of judgment is dismissed with costs.



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M.L. SENYATSI  
ACTING JUDGE OF THE HIGH COURT  
OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION,  
JOHANNESBURG

**Appearances:**

Date of hearing	: 29 January 2019
Date of Judgment	: 27 March 2019
For the Applicant	: Adv V Vergano
Instructed by	: Mayet Inc Attorneys
For the Respondent	: Adv Nyanyiwe
Instructed by	: Tony Tshivhase Inc