IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 43275/2019

In the matter between:

OCULAR TECHNOLOGIES (PTY) LIMITED	First Applicant
VELOCITY IMPORTS (PTY) LIMITED	Second Applicant
LUTCHMAN, PREEMESH SHASHIKANT	Third Applicant

and

AI VISION CONSULTING (PTY) LIMITED	Respondent

JUDGMENT

K. MEYER AJ

[1] This is an application for the rescission of a default judgment granted by this court on 24 February 2020 in terms whereof the first, second and third applicants were ordered to pay to the respondent the sum of R3 681 822,44 plus interest and costs (the main application).

[2] The applicants seek the rescission of the default judgment on the common law ground of fraud, in that the respondent is alleged to have misled the Court in seeking the default judgment.

[3] The factual background of this matter is largely common cause. The main application was brought as a result of the applicants' failure to comply with the first applicant's obligations contained in a written consultancy agreement between the parties (the consultancy agreement), the amount claimed being in respect of the outstanding last two instalments owed to the respondent in terms thereof. The applicants were jointly and severally liable, the second and third applicants' liability arising out of suretyships in respect of the first applicant's liabilities.

[4] The applicants did not oppose the main application, despite it having been personally served on the third applicant, who is also the sole shareholder of both the first and second applicants.

[5] The sole director of the respondent, Ebrahim Dinat (Dinat) and of the third applicant, Preemesh Shashikant Lutchman (Lutchman), had been business partners, and directors and shareholders of the first applicant. Upon the souring of their business relationship and their decision to part ways, it was agreed that Dinat would sell his 43.5 shares in the first applicant Ocular Technologies (Pty) Limited (Ocular) to Lutchman for a total amount of R18,8 million. This included the share price, certain sale claims and the "separation costs", a residual component which included outstanding salaries, restraint of trade and subsequent assistance.

[6] A first step in formalising the agreement between the parties was the recordal of heads of agreement drafted by the respondent's attorney and signed on 5 July 2018. The R18,8 million to which Dinat was entitled would be paid as follows: R7 million upon his resignation from Ocular

(and he would be responsible to manage the tax implications of such payment); and R11.8 million over 18 months in quarterly instalments.

[7] After further negotiations between the parties' respective legal representatives, Lutchman on 3 August 2018 despatched an email to all concerned, attaching a suite of agreements. These included the heads of agreement signed on 5 July 2018, an employee restraint of trade agreement, a consultancy agreement, a sale of shares agreement, a shareholder restraint of trade agreement and a settlement agreement.

[8] The agreements were signed on 31 August 2018 and essentially provided for the following:

a) In terms of the employee restraint of trade agreement, Dinat would be paid R1,5 million, the restraint being applicable to a defined list of customers attached to the document;

b) the sale of shares agreement provided for a payment to Dinat of R5 million from the second applicant, effective 1 July 2018;

c) the shareholder restraint of trade agreement provided for a payment of R500 000,00 to prohibit and limit Dinat's activities;

d) the settlement agreement contained a payment of R500 000,00 in respect of the salary of Dinat and others, and an *ex gratia* payment of R1 000,00; and

e) the consultancy agreement.

[9] It is the consultancy agreement that is relevant in these proceedings. It is undisputed that the parties complied with all obligations in respect of the suite of agreements, with the exception of the consultancy agreement.

[10] In terms of the consultancy agreement, the respondent would be paid the sum of R12 727 886,40 in four instalments, the first being R3 830 199,76 on 31 October 2018, the second instalment of R3 384 642,47 on 31 March 2019, the third instalment of R3 146 683,30 on 31 July 2019 and the fourth instalment of R2 364 360,97 on 31

December 2019. The respondent was to render consultancy services in terms of the agreement "*as and when required by the Company*" and "*as requested by the Company*" (Ocular). The period during which such consultancy services could be called upon was between 1 August 2018 and 31 December 2019. The agreement also confirms the restrictions imposed on Dinat in terms of the employee restraint of trade agreement and the shareholder restraint of trade agreement. Further, the parties agreed that the respondent "*shall be responsible for accounting to the appropriate authorities for income tax or any other monies required to be paid in terms of legislation or any other law. The consultant* [respondent] *hereby indemnifies the Company* [Ocular] *against all losses, claims, liabilities, damage or expense which the Company may suffer as a result of, or which may be attributable to any liability of the Company for taxation in respect of payment made in terms of this agreement.*"

[11] With the exception of the third and fourth instalments payable in terms of the consultancy agreement, all amounts due in terms thereof and in terms of the other agreements were duly paid. It is the sum of the

third and fourth instalments in respect of which the default judgment was sought and granted.

[12] It is trite that the applicant in a rescission application must set out a reasonable explanation for its default. ‘Where a defendant allows a case to go by default he always needs to provide a satisfactory explanation as to why he did not raise his defence timeously. That is so even if the defence is one of fraud”: *Basson and Others NNO v Orcrest Properties (Pty) Limited* [2016] 4 All SA 368 (WCC) paragraph [47]. The applicant cannot succeed if its default was wilful or due to gross negligence. The application itself must be *bona fide* and not made with the intention of delaying the claim of the party who obtained default judgment. In addition, the applicant must demonstrate that it has a *prima facie bona fide* defence to the claim.

[13] The default judgment was granted on 24 February 2020 and the rescission application served on 28 May 2020. The applicant contends that the rescission application was brought within a reasonable time,

being just over three months after the default judgment was granted. The respondent contends however that the following ought to be considered:

a) No explanation is proffered for the default in opposing the main application, in spite of the fact that there had been personal service of the main application on Lutchman on 4 February 2020, and that his conduct is readily conciliable with a party who believes that the debt claimed is in fact due and payable. The respondent further contends that this conclusion is supported by the fact that the applicants elected not to join issue with the respondent's allegations that extensive settlement negotiations had taken place in 2019 between the applicants' erstwhile attorney and the respondent's attorney, following on the default of the third and fourth instalment payments in terms of the consultancy agreement.

b) A further contention is that it appears that the decision of the applicants not to oppose the main application was a deliberate and informed one and that the default in opposing the main application was in fact wilful. It is not until the applicants consulted new attorneys that the

defence raised in the rescission application emerged for the first time. This is recorded in a letter despatched on the applicants' behalf on 19 March 2020 by their new attorneys, Vally Chagan & Associates.

[14] In my view these contentions have merit. There is a further delay between the letter dated 19 March 2020 and the launching of the rescission application on 28 May 2020, for which no explanation is given, save that mention is made of the Level 5 National Lockdown which applied from 26 March 2020 onwards. As correctly pointed out by the respondent's counsel, the Lockdown applied only after the applicants were appraised and aware of their possible defence that the consultancy agreement is a "fiction". It is difficult to accept, in the absence of particular or special facts and circumstances, that there was any obstacle to the applicants and their legal representatives in launching this rescission application with the appropriate haste, considering that even prior to the national lockdown, matters in this division of the high court had for some time been dealt with electronically. In any event, practitioners and litigants communicate and engage by electronic means with each other and with the court. Accordingly, it is my view that the applicants have failed to

provide the court with a reasonable explanation sufficient to satisfy one of the requirements to establish good cause for the granting of a rescission of the judgment.

[15] In order to succeed in obtaining the rescission of the default judgment in this matter, the applicants bear the onus of demonstrating that they have a *prima facie bona fide* defence to the respondent's claim in the main application. The defence proffered by the applicants is that of fraud allegedly committed by the respondent in obtaining default judgment. It is further contended on their behalf that the court would not have granted the default judgment, but for such fraud. The applicants must establish the existence of the various requirements of fraud as succinctly set out in *Fraai Uitzicht 1798 Farm (Pty) Limited v McCulloch and Others* (118/2019) ZASCA 60 (5 June 2020) at paragraph 16:

'In spite of being a 1924 decision, *Childerley* remains good authority regarding the circumstances under which a court can grant *restitutio in integrum* against a judgment. Following *Childerley* our courts have repeatedly stated that a judgment induced by fraud to which one of the parties was privy, cannot stand.[1] It was held that in order to succeed

[1][*Schierhout v Union Government* 1927 AD 94 at 98. *Rowe v Rowe* 1997 (4) SA 160 (SCA); [1997] 3 All SA 503 (A) at 504. *Makings v Makings* 1958 (1) SA 338; [1958] 1 All SA 510 (A) at 342H-345A.]

on this ground there are three requirements that a plaintiff must prove: (1) the defendant gave incorrect evidence at the initial trial; (2) that the defendant did so fraudulently with the intention to mislead the court; and (3) that such false evidence diverged from the true facts to such an extent that the court, had it been aware thereof, would have given a different judgment.'[2]

[16] The applicants contend that the respondent has perpetrated a fraud in that the consultancy agreement constituted an unlawful evasion of tax obligations through a misrepresentation of the true nature of the agreement as a consultancy agreement when, so they allege, it actually constituted a sale of shares agreement designed to evade tax implications attendant thereon. In particular, the applicants contend that the real price of the shares, being subject to capital gains tax, is reduced and the fiscus is short changed, when in truth the sale of shares is concealed in an agreement named "consultancy agreement". The applicants have failed to demonstrate factually that this contention is valid. They present no evidence or calculation demonstrating how and to what extent the alleged tax evasion would have operated to the respondent's benefit, if at all. This is all the more the case having regard to the fact that the whole suite of

[2][*Childerley* at 169.]

agreements provided for a structured transaction of many parts. Moreover, the applicants had devised and authored the whole suite. All parties were at all relevant times legally represented, and confirmation of their consensus on the terms of the agreement was conveyed at the time. In Lutchman's email dated 3 August 2018 he refers to *"the structure that we have put together"* and states that the suite of agreements was *"drafted, discussed and verified by Dheven, Len and Ocular .."* , the firstmentioned being a director of Ocular and Len being the respondent's auditor. Accordingly, all parties concerned may be accepted as having entered into the suite of agreements freely and voluntarily, and fully apprised of the rights and obligations contained therein, and the consequences thereof. I have regard also to the fact that the consultancy agreement specifically provides that the respondent will be liable and responsible to account to SARS. The respondent confirmed that the first and second instalments paid to the respondent in terms of the consultancy agreement had already been declared to SARS and the VAT paid.

[17] The question arises whether the successful litigant, the respondent, was a party to a fraud. The founding affidavit in the main application reveals that the respondent relied on an agreement for the rendering of services (the consultancy

agreement); that the respondent had duly performed all its obligations in terms of the consultancy agreement; and that the respondent had rendered an invoice which the applicants had failed and/or refused to pay.

[18] It is contended on behalf of the applicants that the respondent through the affidavit of Dinat misrepresented that the respondent "*had rendered services in terms of the consultancy agreement*". I disagree. The deponent stated that reliance was placed on the consultancy agreement, that a part payment had occurred and that the respondent had *duly performed its obligations* in terms thereof and that there was an outstanding balance which it then claimed. In my view, the contractual obligations of the respondent in terms of the consultancy agreement was that it would be available for a fixed period of time to provide such services if and when called upon to do so. By being available for that period of time to provide such services, the obligation had been discharged. As the respondent's counsel correctly points out, in the circumstances it is not for the consultant to do anything more than be available and be paid for such availability, whether or not it is called upon to actually provide such services to the other party contractually entitled to such services.

[19] The further question to be decided is whether a fraud was in fact committed and if so, upon whom. I disagree with the contention that SARS has been defrauded in any way by the signing of the agreement or by Dinat stating that the respondent had "*duly performed all its obligations in terms of the consultancy agreement*".

[20] The irony of the applicants' contention in this regard is that they too signed the consultancy agreement, they performed in accordance with the entire suite of agreements including the consultancy agreement, then did an about-turn after the second of four instalments in terms of the consultancy agreement had been paid, then negotiated with the respondent as a result of their non-payment of the last two instalments, and only some time later began to allege that the consultancy agreement was a fiction.

[21] The onus is throughout on the party who seeks to set aside or amend a judgment affected by fraud (*Hotz v Hotz* 2002 (1) SA 333 (W) at 336-337) para 9.

[22] For the reasons set out herein, I cannot find that the respondent deliberately and fraudulently and with intent to mislead the court gave the

evidence it did in the founding affidavit of the main application. In coming to this conclusion I am guided by the principles of our law that fraud is not easily inferred (*Gilbey Distillers & Vintners (Pty) Ltd v Morris NO* 1990 (2) SA 217 (SE)), and that fraud must not only be pleaded but also proved clearly and distinctly (*Courtney-Clarke v Bassingswaighte* [1991] 3 All SA 625 (Nm), 1991 (1) 684 (Nm)p. 689).

[23] The applicants further bear the onus of proving that the court would have given a judgment other than that which it was allegedly induced to give by the respondent's evidence, if the true facts had been placed before it. In the absence of any allegation that an agreement is void or voidable upon proper grounds, the court will give effect to the terms of an agreement. The rights and obligations provided for in the consultancy agreement *per se,* and viewed in the context of the entire suite of agreements, are in my view on the facts presented in this application valid and enforceable in every respect. The applicants have failed to demonstrate convincingly in which way and to what extent, if any, the terms of the consultancy agreement are a fiction designed to evade tax liability.

[24] Accordingly, I cannot agree with the applicants' contention that there is" *no doubt that had the court been aware of the truth and been apprised of all the facts it would not have granted default judgment in favour of the respondent*". Less still am I persuaded that the court would *"certainly"* have enquired into the true nature of the agreement and given effect to that. On the contrary, the respondent approached the court on the basis that the last two instalments in terms of the consultancy agreement had not been paid by the applicants. There is in my view no apparent reason why the respondent could not have approached the court on that basis and made the allegations it made in order to obtain judgment for the balance outstanding in terms of the agreement. It was not for the respondent to "*come clean*" about anything untoward as is suggested by the applicants, and if the applicants had been uncomfortable at any stage, believing that the agreement was a fiction, they have had several years to raise this concern and rectify the matter. They failed to do so and in fact complied with most of their obligations in terms thereof. The consultancy agreement formed part of a carefully considered and executed suite of agreements documenting the parties' true intent. With the exception of the third and fourth instalments due in terms of the consultancy agreement, the parties' true intent was manifested in that all other payments were made in terms of the entire suite of agreements.

[25] This then is not a case where ‘strong merits of success may excuse an inadequate explanation for the delay (to a point)’: *Valor IT v Premier, North West Province and Others* 2021(1) SA 42 (SCA) para 38.

[26] The applicants have failed to show good cause for the rescission of the default judgment granted by this court on 4 February 2020 in that, firstly, they have failed to provide a reasonable explanation for their failure to defend the main application and the subsequent delays in bringing this rescission application, and secondly, they have failed to discharge the onus of satisfying the requirements for the granting of a rescission at common law based on fraud, and that the court, but for the alleged fraud, would not have granted the default judgment.

[27] In the result, the following order is made:

The rescission application is dismissed with costs.

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K MEYER

Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Electronically delivered: This judgment was prepared and ordered by the acting judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file of this matter on CaseLines. The date of the judgment is 11 February 2022.

Judgment : 11 February 2022
Heard: 27 October 2021
Applicants' counsel: Adv Y Alli
Instructed by: Vally Chagan &Associates, Johannesburg
Respondent's counsel: Adv C Acker
Instructed by: Jordaan & Wolberg Attorneys, Johannesburg