REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

8/2/2018

CASE NO: 27168/2014

8/2/18

In the matter between:

LIDE CONSTRUCTION (PTY) LTD	**Applicant**
and	
WOODFORD ASHMEAD BANNINK SNR N.O.	**First Respondent**
WOODFORD ASHMEAD BANNINK SNR N.O.	**Second Respondent**
GERHARDA MAGDALENA BANNINK N.O.	**Third Respondent**
MONOCA BANNINK N.O.	**Fourth Respondent**

JUDGMENT

SHANGISA AJ:

Introduction

1 The applicant brings the present application for rescission of judgment against a default judgment of this court dated 4 April 2016.

2 The rescission application is opposed by all the respondents. In the main, the respondents oppose the application on the grounds that the applicant has failed to make out a case for rescission in terms of the rules of court and common law. Later, I return to this aspect.

3 The respondents are cited in their representative capacities as trustees of a trust which entered into a contract with the applicant during or about March 2013. In their particulars of claim the

respondents allege that the terms of the said contractual agreement were as follows:

> *"The terms of the agreement were that the TRUST would lease to the Defendant-*
>
> *8.2.1 the trucks, including one driver per truck, to the defendant at an hourly rate of R190.00 per truck and driver;*
>
> *8.2.2 the excavators, including one driver per excavator, to the defendant at an hourly rate of R330.00 per excavator and driver;*
>
> *8.2.3 a once-off lease of a lowbed trailer for R9,000.00;*
>
> *8.2.4 the period of the lease commenced during or about March 2012 and would be for an indefinite period, terminating when the work which was to be performed was completed;*
>
> *8.2.5 the trust would provide the defendant with invoices for the amount owing to the trust in respect of the leased trucks on a monthly*

basis, for the hours worked by each truck and /or excavator, and driver; and

8.2.6 the defendant would pay the invoiced amounts within 30 days of delivery of the invoices."

Legal Basis for the Rescission Application

4 It is trite that there are three ways in which a judgment taken in the absence of a party can be set aside:

4.1 In terms of rule 42(1)(a); or

4.2 In terms of rule 31(2)(b); or

4.3 In terms of the common law. (See Terrace Auto Services Centre (Pty) (Ltd) and others v First National Bank of South Africa Ltd 1996 (3) SA 209 (W).

5 Rule 31(b) is applicable in cases where the judgment was obtained by default as a result of the defendant's failure to deliver

a plea or a notice of intention to defend. It is apposite to reproduce the rule here. It provides as follows:

> *"A defendant may within 20 days after he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."*

6 Properly construed, rule 31(2)(b) requires a party who wishes to rely on the rule ~~31(2)(b)~~ to allege and prove good cause for the setting aside of the judgment. Considerations of good cause not only require the party to prove that it was not in willful default, but also that it has substantial and prima facie defence.

Applicant's case

7 The applicant seeks rescission of the default judgment granted against it and relies for its application on rule 31(2)(b), 42(1)(a) and common law grounds. In its founding affidavit, the applicant concedes that it was served with summons and accordingly, it received service. It is necessary to quote from the applicant's founding affidavit. At paragraph 10 of its founding affidavit, the applicant makes the following averment:

> *"10. The respondents did serve the applicant with the combined summons. The applicant then immediately informed the respondents that the applicant has already paid the debt and furnished the respondents with proof thereof. The parties were still engaged in settlement negotiations when the respondents approached the court to obtain default judgment on or about the 4th April 2016 without giving further notice to the applicant."*

8 Further, at paragraph 11 of its founding affidavit, the applicant proceed-s to allege that:

"11. Had the applicant been aware that the respondents are no longer interested in the negotiation process or are rejecting the provided proof of payment, then the applicant would have filed the notice of intention to defend. The applicant was misled by the conduct of the respondents in not filing the notice of intention to defend the main action. Therefore, it is submitted that the applicant's failure to file its notice of intention to defend was not out of willful default."

9 It is common cause that the respondents initially issued summons against the applicant on 4 April 2014. The summons was served on 21 May 2014. The respondents assert that soon after the service of the summons, they were contacted by the representative of the applicant who requested to be granted an extension of time to repay the debt.

10 In their answering affidavit, the first respondent states, on behalf of all the respondents, that when the summons was issued, the

applicant had failed to make regular and substantial payments towards the payment of the debt.

11 As a result of the summons, the respondents then enrolled and set down the default judgment on 4 April 2016. It is worth noting that the respondents contend that the summons and the notice of set down were served by the Sheriff on the applicant on 04 March 2016. Proof of service of the latter is confirmed by the proof of the return of service in respect of both the summons and the notice of set down.

12 I pause to mention that the applicant failed to file the notice of intention to oppose or the plea. Significantly, the summons that was served on 21 May 2014 were reissued and served again on 4 March 2016. In that regard, the notice of set down and the combined summons were served for the second time on the applicant by the Sheriff on 4 March 2016.

13 To illustrate that the applicant received the summons and the notice of set down, the first respondent avers that on 5 April 2016

he was approached by a representative of the applicant who requested to be granted an extension of time to repay the debt.

Requirements for rescission

14 A party who wishes to rely on rule 31(2)(b) must allege and prove good cause of the setting aside of the judgment. Good cause not only requires the party to prove that it was not in willful default, but also that it has a substantial and prima facie defence.

15 Where a party relies on common law for the rescission of a judgment such a party must establish that the judgment was obtained through fraud, or in exceptional cases must show that there was a Justus error.

16 For reasons that I set out later in this judgment, the applicant has not set out any basis for rescinding the judgment. In the first instance, the applicant's founding affidavit contains bald and vague allegations which fail to substantiate grounds for rescission of judgment.

17 In its founding affidavit the applicant purports to be relying on rule 42(1)(a). At paragraph 6 of its founding affidavit, the applicant boldly states that it brings the present application in terms of rule 42(1)(a).

18 Rule 42(1) provides for a few instances in terms of which a party may seek a rescission or amendment of a judgment. Later, it also purports to be relying on rule 31(2)(b). I deem it prudent to deal with both rules.

19 Rule 42 provides as follows:

> *"42 Variation and rescission of orders*
>
> *(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;*

(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 omission;

(c) An order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application thereof upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

20 Accordingly, rule 42(1)(a) allows an affected party to apply for a variation or rescission of "an order or judgment erroneously sought

or erroneously granted in the absence of any party affected thereby.

21 "Erroneously granted" refers to a judgment granted by a judge when, at the time of its issue there was, a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment. (See *Nyiwa v Moolman NO 1993 (2) SA (Tk) at 510D.)*

22 "Erroneously sought" on the other hand refers to whether or not the correct processes were followed and whether or not a party had the right to apply for said judgment. (See *Lodhi 2 Properties Investments CC and Another v Bondev Developments Pty Ltd 2007 (6) SA 87 (SCA)).*

23 It is clear from the wording of rule 42 that, where an applicant relies on the rule, in order to succeed, such an applicant must make out a case for rescission.

24 In Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352G-H, Schreiner JA enunciated the burden of proof placed on an applicant as follows:

> *"It seems clear that by introducing the words and if good cause be shown the regulating authority was imposing upon the applicant for rescission the burden of actually proving, as opposed to merely alleging, good cause for rescission, such good cause including but not being limited to the existence of a substantial defence...."*

25 In *Du Plessis v Tager* 1953 (2) SA 275 (O),at 535A, it was held that:

> "It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives."

Rule 31(2)(b)

26 On the other hand, rescission in terms of rue 31(2)(b) prescribes the timeframes within which an applicant can bring an application for rescission of judgment. In that regard, an applicant for rescission is required to bring an application within the prescribed 20 days from the date on which he/she took notice of the judgment.

27 On the applicant's own version, a copy of the court order and the writ of execution of the judgment of 4 April 2016 was brought to its attention on 22 June 2016. The respondents dispute this version and correctly point to the Sheriff's return of service in support of their contention that the applicant must have received service of the summons and the notice of set down.

28 Even if one accepts the applicant's version, it simply seems that it had to serve the application for rescission of judgment in terms of rule 31(2)(b) by no later than 20 July 2016. However, as the respondents' correctly note, the applicant's application was only served on 26 August 2016.

29 It follows then that the applicant's application for rescission was woefully out of time. It failed to comply with the timeframes set out in rule 31(2)(b). That is not all. In its founding affidavit the applicant does not even attempt to set out the reasons for the late filing of the rescission application. Instead, there is a terse assertion that the applicant has complied with the provisions of rule 42(2)(b). However, such a general averment fails to proffer an explanation or the reasons which occasioned the delay in launching its rescission application.

30 The applicant also submits that it did not file its plea or notice of intention to defend because it was still engaged in negotiations with the respondents. However, the applicant fails to divulge the nature of such negotiations. It also fails to explain why despite the respondents having initially issued summons in 2014, it failed to defend the claim when the summons were reissued in 2016. The founding affidavit is silent on the applicant's failure to defend the claim despite having received the summons.

31 For their part, the respondents contend that the applicant failed to pay the total amount claimed in the summons which was R776 331.30. They contend that the applicant's averment that it had already paid the debt was inaccurate and incorrect. They point out that after deduction of the total amount paid by the applicant after the issue of the summons, the total capital sum owing was reduced to R534 331.30. In sum, the respondents contend that when they proceeded to obtain the judgment on 5 April 2016, the amounts paid by the applicant were taken into account.

32 The applicant fails to address the allegation made by the respondents that on the date of the granting of default judgment it owed the amount of at least R524 331.30. Significantly, nowhere in its founding papers does the applicant deny or dispute liability for the capital amount claimed. On the contrary, the applicant merely alleges that it made full payment. However, it fails to account for the glaring discrepancy of the amount of R524 331.30 which the respondents allege is the outstanding capital amount that is owed by the applicant.

33 In any event, the applicant's averment that it made full payment is not supported by the evidence in the form of the invoices sent to the applicant by the respondents.

34 The applicant attacked the invoices on the basis that it requires verification of the debt. In that connection, the applicant demanded that it be furnished with "tally sheets". The respondents contended, correctly in my view, that the defence of "tally sheets" is not supported by any factual basis that would lead to a reasonable inference that the invoices it received were incorrect. The applicant does not give an explanation which supports the basis of its suspicion that the "tally sheets" would disclose a defence to its claim. It seems to me that the applicant's defence that the "tally sheets" would establish that the invoices were incorrect is based on conjecture and speculation the effect of which prejudices the respondents' claim.

35 In *Kritzinger v Northern Natal Implement Co (Pty) Ltd 1973 (4) SA 542 (N)*, at 546A-C, the court put the position as follows:

"A consideration of the various cases on the subject of good cause shows that there is an understandable reluctance to give the phrase a circumscribed and inelastic meaning and it is, I think, clear that each case must stand on its own facts. It appears, however, to be generally accepted that good cause cannot be satisfied unless there is evidence not only of the existence of a substantial defence but, in addition, of a bona fide desire by the applicant to raise the defence if the application is granted." (My emphasis)

36 In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA1 (SCA) at 9E-F, the court set the test as follows:

"...the Courts generally expect an applicant to show ggod cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence

to the plaintiff's claim which prima facie has some prospects of success....."

37 As counsel for the respondents correctly submitted, in my view, the applicant cannot obtain rescission of judgment on the basis of pure speculation. I agree with the respondents' counsel's submission that the applicant's founding affidavit is threadbare and thin on facts, and that it accordingly fails to establish a prima facie defence. At any rate, the defence proffered by the applicant is not bona fide. It fails to account for the capital amount of R524 331.30 that it owes to the respondents.

38 In my view, the applicant failed to show good cause. There was no reasonable explanation for its default. If anything, its founding affidavit contained bald and sketchy allegations that were not substantiated. In the same vein, the defence proffered by the applicant can hardly be described as bona fide. Again, the applicant's founding affidavit woefully failed to set out facts which would enable the court to see that its defence has some prospects of success.

39 Much time was taken by the applicant's counsel's submissions on the respondents' alleged non-compliance with the provisions of the Value Added Tax (VAT). In my view, I do not think the argument concerning VAT avails the applicant. As with its other defences, the facts upon which the VAT defence rests were not pleaded in the applicant's affidavit. In any event, there was no suggestion that if the respondents were to forego VAT in their claim, the remainder of the debt would ~~be~~ result in the set-off. On the contrary, the outstanding amount that is due to the respondents remains substantial.

40 It seems to me that the defences raised by the applicant do not constitute a bona fide defence. The factual basis for such defences is not only vague, bald and sketchy, but appears calculated to delay the payment of the respondents' claim. The applicant was clearly in willful default.

Costs

41 The respondents are entitled to costs on a punitive scale. That is so if one takes into account the delaying tactics employed by the applicant from the moment the summons was issued in 2014, and when they were reissued in 2016. In all instances, the applicant sought indulgence to effect the late payment of the claim. However, despite having received the summons, the applicant simply failed to file its notice of intention to defend and the plea. The defences that it later set out do not assail the respondents' claim and the capital amount sought by the respondents in their summons.

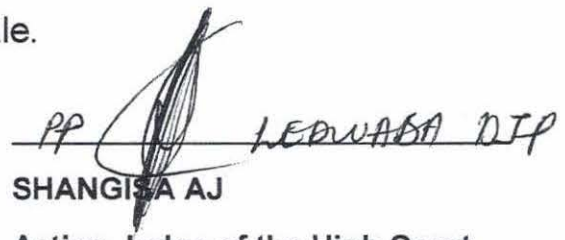
Order

42 In the circumstances, the application for rescission falls to be dismissed with costs on an attorney and client scale.

43 In the result I make the following order:

1. The application for rescission of the judgment of 4 April 2016 is dismissed.

2. The applicant is ordered to pay the respondents' costs on an attorney and client scale.



SHANGISA AJ

Acting Judge of the High Court,

Gauteng Division, Pretoria

DATE OF JUDGMENT: 06 February 2018

APPEARANCES:

COUNSEL FOR THE APPLICANT: Adv. J. VORSTER

INSTRUCTED BY: MVUNDLELA & ASSOCIATES

COUNSEL FOR THE 1st to 4th RESPONDENTS: Adv. PJ WASSENAAR

INSTRUCTED BY: VAN ONSELEN & PARTNERS