IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:
Of Interest to other Judges:
Circulate to Magistrates:

Case number: **3868/2022**

In the matter between:

GLOBAL GROUP DEMOLITION CONTRACTORS(PTY)LTD
APPLICANT

and

BUKA HATTINGH KATLEGO SECURITY SERVICES (PTY) LTD
RESPONDENT

CORAM: BOONZAAIER AJ

HEARD ON: 29 FEBRUARY 2024

DRAFT JUDGMENT BY: BOONZAAIER AJ

DELIVERED ON: 26 MARCH 2024

INTRODUCTION:

1.1 This is an application for rescission of a default judgment which was granted against the Defendant, Global Group Demolition Contractors (Pty) Ltd (Applicant *in casu*) by this court on **20 April 2023**, in the main action.

2. The cause of action in the main action was damages suffered due to the non-compliance of an agreement to render security services and payment to be made accordingly.

FACTUAL BACKGROUND:

3. On **15 April 2012** at Welkom the parties entered into a partially written and partially oral agreement for security services to be rendered by Respondent to the Applicant.

4. The written part of the agreement consists of a quotation from the Respondent to the Applicant reflecting the costs of services to be rendered which was accepted by the Applicant.

5. The oral terms of the agreement consist of the following:

    i) The Respondent would continue to render security services and place guards at the premises chosen by the Applicant on a monthly basis until the agreement is terminated by either of the parties

    ii) The Respondent would invoice the Applicant on a monthly basis, which amount would vary from month to month as the

need for services and guards to be placed at the behest of the Applicant, varied.

a. The Applicant would pay the Respondent`s invoices during the month in which the invoices were rendered**.**

6. The Respondent allegedly complied with its obligations in terms of the agreement between the parties to the satisfaction of the Applicant until **02 August 2022,** when the Applicant fell into arrears.

7. The Respondent demanded payment from the Applicant, the latter allegedly promised to make payments but failed to keep its commitment. The Respondent also caused a notice of termination of the agreement which was sent to the Applicant.

8. Summons was issued **16 August 2022** and the Applicant filed a Notice of Intention to Defend on the **19th January 2023,** however it failed to plead to the Respondent`s particulars in the main action.

9. The Respondent was entitled to apply for default judgment on these premises and there was nothing that would have precluded the court from granting the default judgment only on that basis.

APPLICANT:

10. It is the Applicants case that it is evident, that the default judgment which was granted by this Court on **20 April 2023** arises as a result that the order was granted in the absence of the Applicant and it was erroneously sought.

11. The Applicant argued that in terms of rule R 42(1)(a) the court in **Zuma v Secretary of Judicial of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others**,[1] held that the word “absence” exists to protect litigants whose presence was precluded, not those whose absence was elected.[2]

12. The Applicant further submitted that in the Zuma case supra, the court emphasized the requirements which Applicant is required to prove under to succeed with rescission under the common law. The Court held:

[1] [2021] ZACC28; 2021(11) BCLR 1268(CC) at para47.

[2] At 7 supra para 61

> "The requirements for rescission of a default judgement are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for his default. Second, it must show that on the merits it has a *bona fide* defence which *prima facie* carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in a refusal of the request to rescind."[3]

13. Applicant sets out the background to the judgment having been granted.

i) On **16 August 2022** summons was issued by the Respondent. After receipt of the summons Applicant secured the services of an attorney and properly instructed

[3]At 7 supra para 71

them to defend the action. Notice of intention to defend was filed but the attorney failed to execute the Applicant`s instructions to deliver a plea.

ii) This failure came to the knowledge of the Applicant on **11 May 2023** when the Applicant's representative attempted to make a telephonic enquiry and ultimately attended the offices of the Attorneys firm.

iii) Applicant thereafter took all the necessary steps to give instructions and to appoint a new attorney to deal with the matter.

iv) Applicant was not present when the judgment was granted and only received notice of the default judgment having been granted on **17 May 2023.**

v) The original attorney that was appointed was struck from the role of attorneys by the LPC.

14. The Applicant submitted that it is evident that the Applicant meets both the requirements of Rule 42(1)(a) namely that the judgment was granted in its absence and that the Applicant provided a reasonable and satisfactory explanation for its failure to file its plea.

15. The Applicant is of the contention that the Respondent did not place all the terms of the oral agreement before the court. There are specific terms in the oral agreement which need to be ventilated. It is clear that the Respondent has not placed all the relevant terms to its claim. This confirms the selective manner in which the Respondent had placed the terms of the agreement before the court.

16. By failing to disclose relevant terms of the agreement and by failing to provide the court with insight into the fact, that the Respondent failed to perform in terms of the agreement, thereby misleading the court. The Respondent caused the court to issue judgment based on incomplete facts and an incorrectly pleaded agreement.

17. The Applicant, placed all the relevant terms of the oral agreement before the court to indicate that:

i) It was agreed that the Respondent will be liable for any damages to the Applicant`s assets.

ii) It was agreed that set off will be applied between the parties of any amounts indebted to either party.

iii) The Applicant has a counterclaim against the Respondent which he did not have the opportunity to institute.

iv) Consequently, the judgment was granted erroneously and ought to be set aside in terms of Rule 31(2)(b) alternatively R42 of the Uniform rules of Court or alternatively in terms of the Common Law.

APPLICANT`S GOOD CAUSE (AND A TRIABLE CASE WITH *PRIMA FACIE* PROSPECTS OF SUCCESS IN THE MAIN ACTION):

18. Applicant indicated that due to the following he has a good cause:

i) it is important that he requires at least the opportunity to defend the case, because there is a triable case.

ii) He did not have the opportunity to institute a counterclaim, or to plead to the accusations, which was not due its own fault.

19. It is further contended that the Applicant advanced a satisfactory explanation why he needs to come onboard, notwithstanding the Respondent contention that good cause is absent to justify the rescission.

RESPONDENT:

20. The Respondent on the other hand is adamant that the rescission was granted properly and correctly in terms of the Uniform Rules of Court.

21. It is Respondent`s main issue that an order is erroneously granted if it was legally incompetent for the court to have made such an order, if there was an irregularity in the proceedings or if the court was unaware of a fact, if known to it would have precluded it from a procedural point of view from making the order or granting the judgment.[4] Also if a party is procedurally entitled to judgment, the fact the court was unaware of a "defence" which the Defendant could have raised does not mean that the judgment is erroneously granted.[5]

[4]Harms, Civil Procedure in the Superior Courts 42.4; Athmaram v Singh 1989(3) SA 953(D) 956D-E.

22. The Respondent argues that the Applicant does not allege that the court was not legally competent to grant the default judgment, that there was any irregularity in the proceedings, nor that the court was unaware of a fact, that if known to it, would have precluded it from a procedural point of view from the granting of the judgment.

23. Applicant alleges that it has a counterclaim for damages that can stand as a valid defence against the claim of Respondent, hence the question in this regard is whether the existence of the said counterclaim constitutes a fact which if known to the court precluded it from a procedural point of view from granting the Default Judgment.

24. It was submitted by Respondent that the existence of a counterclaim, valid or not, does not imply, that there was any misdirection as regards to procedure.

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[5]Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007(6) SA 87(SCA).

25. Respondent argued further that it is clear from the Applicant`s Founding affidavit that although it applied for rescission in terms of Rule 42, the facts set out in the Founding Affidavit constitute an attempt to satisfy the requirements for rescission of judgment in terms of Rule 31(2) (b) or in terms of the common law.

28. Mr. Grundling counsel for Respondent submits that under this rule, the Applicant must show good cause for the rescission of judgment. Good cause means that the Applicant:

i) has a reasonable explanation for its default;

ii) that the application is *bona fide* and not with the intention to delay the Respondent`s claim.

iii) can show that it has a *bona* fide, prima *facie* defence to the Respondent's claim and that it has a *bona fide* intention to raise the defence if the application is granted.

27. In terms of the common law, a court is entitled to rescind a judgment obtained in default of appearance if good cause can be shown. What constitutes good cause is that the Applicant can explain that it has a reasonable and acceptable explanation for the default and that on the merits, it has a *bona fide* defence.

28. The Applicant submits that it is not indebted to the Respondent in the amount on which default judgment was obtained due to its entitlement to set off its damages claimed in terms of the counterclaim against the said amount. Respondent argues that Applicant is mistaken as to operation of set off.

29. Respondent argued that if Applicant is so resolute in pursuing its counterclaim against the Respondent, it should institute a separate action to recover said damages from the Respondent.

30. Respondent further conceded that in the case **of Flacodor 109 CC t/a Bell Foods v Agri Poultry (Pty)Ltd t/a Day Break Farms,**[6]it was held by Daniso J in this Division that that a counterclaim is a valid ground for rescission of a judgment. Respondent however is of the view that the mentioned decision did not take other decisions form other Divisions into account which clearly stated that a counterclaim does not justify the rescission of a default judgment.[7]

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[6][2018] JOL 40437(FB)

[7]Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd and Another 1984(2) SA693(C); Goodwin Stable Trust v Duohex (Pty)Ltd and another 1998(4) SA 606 (C); P & Sons Builders v Amatole District Municipality [2006] JOL 18596(E).

31. Hence the Respondent is still entitled to the default judgment.

THE LAW:

32. *Stare decisis:* The doctrine that courts will adhere to the precedent in making decisions. The court can depart from a previous decision of their own only if satisfied that that decision was clearly wrong. This court is bound by the doctrine of *stare decisis* and departure from the doctrine is not justified. [8]

33.In **Ruta v Minister of Home Affairs,**[9]the court held that:

[8] Ayres and Another v Minister of Justice and Correctional Services and Another {2021] ZACC12.

[9] [2018] ZACC 52;2019(3) BCLR383(CC) at para 21.

> "[R]espect for precedent, which require courts to follow the decisions of coordinate and higher courts, lies at the heart of judicial practice. This is because it is intrinsically functional to the rule of law which in turn is foundational to the Constitution. Why intrinsic? Because without precedent certainty, predictability and coherence would dissipate. The courts would operate without a map or navigation, vulnerable to whim and fancy. Law would not rule."

34. The High Court has inherent powers to protect and regulate its own process, taking into account the interest of Justice, as envisaged in **Section 173 of the Constitution of the Republic of South Africa**

35. It is trite that a court may set aside a judgment by default in the event that just cause is shown. The court at the same time retains a discretion to do so.

LEGAL PRINCIPLES GOVERNING RULE 42:

36.**Rule 42** states:

"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 judgement 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 therefore upon notice to all parties whose interests may be affected by any variation sought.

3. The court shall not 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."

37. The legal principles governing the rescission of judgment under rule 42 have long been settled by the courts. In terms of rule 42(1)(a), a judgment may be rescinded on the basis that the it was erroneously sought or erroneously granted in the absence of any party thereby."

The legal principles as follows:

1. The rule must be understood against its common law background.

2. The basic principle of common law is that once a judgment has been granted, the judge becomes *functus officio,* but subject to certain exceptions of which rule 42(1)(a) is one.

3. The rule caters for mistakes in the proceedings.

4. The mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgement.

5. A judgment cannot be said to have been granted erroneously in light of a subsequently disclosed defence which was not known or raised at the time of default judgment.

6. The error may arise in the process of seeking the judgment on the part of the Applicant for default judgment or in the process of granting default judgment on the part of the court.

7. The Applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission, as it was held in **Kgomo and Another v Standard Bank of**

South Africa and Others[10] It has been stated that the purpose of the rule is to 'correct expeditiously and obviously wrong judgment or order. In order to succeed in an application to rescind the judgment, the applicant must meet the jurisdictional requirements contained in rule 42(1) (a)-(b). **Bakoven Ltd v GJ Howes (Pty) Ltd.**[11]

[10]2016(2)] SA184(GP)

[11]9.1992(2) SA 466(ECD)at 471 G-H

38. It is trite that an Applicant who invokes this rule must show that the order sought to be rescinded was granted in his or her absence and it was erroneously granted or sought. Both grounds must be shown to exist. **See: Zuma v Secretary of the Judicial Commission of Enquiry into allegations of State Capture, Corruption and Fraud in the Public Sector Including organs of State and Others.**[12]

39. Once the Applicant meets these jurisdictional requirements the court has a discretion whether or not to rescind its own order.

Was the order erroneously sought and erroneously granted?

[12] [2021] ZACC 28.

40. Generally, a judgment would have been erroneously granted if there existed at the time of its issue a fact of which the court was not aware of which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.

41. In **Promedia Drukkers & Uitgewers(Edms) Bpk v Kaimowitz** [13] it was explained as follows:

> *"First applicant contends that she is entitled to a rescission if it existed at the time of the issue of a judgment a fact which the judge was unaware of, which would preclude the granting of a judgment…*

[13] 1996(4) SA 411(C).

…. She states that if her defenses were disclosed, the judge who heard the matter would not have granted the summary judgement."

She further argued that *'the judgments were granted erroneously because certain facts of which the judge who granted the judgments were unaware would have precluded him from granting the judgments had he been aware of such facts.'*

42. **Lodhi 2 Properties Investment CC v Bondev Developments (Pty) Ltd 2** which the Respondent referred the court to, supports the above view of the court.[14]

43. The Supreme Court of Appeal held that rule 42(1)(*a*) was essentially a restatement of the common law. The position of the courts in

[14] 2007 (6) SA 87(SCA) at 94E**.**

interpreting the Rules had been to vary and expand their application as little as possible. Rule 42(1)(*a*) was intended to provide for rescission of an order that had been erroneously sought or erroneously granted.

44. On whether the judgment was erroneously sought or granted, the Supreme Court Appeal held that the rule properly applied, depended on the nature of the error and not whether the error appeared from the record of the proceedings. The error had to be one related to the proceedings themselves. [own emphasis]

45. An application for rescission on common law grounds must be brought within a reasonable period. For the Applicant to succeed with the application for rescission on common law grounds, the Applicant must show good cause or sufficient cause by giving a reasonable explanation for delay and showing that application for rescission was *bona fide* and showing a *bona fide* defence to the claim with a *prima facie* prospect of success.

46. The Appeal court dealt with the concept of “sufficient cause” or “good cause” stated that, “these concepts defy precise or comprehensive definition, for many and various factors require to be considered.” The learned Judge stated that “it is clear that in principle the two essential elements of “sufficient cause” for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success.

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospects of success on the merits will

fail in an application for rescission of a default judgement against him, no matter how reasonable and convincing the explanation of his default. An orderly judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgement against him rescinded on the ground that he had reasonable prospects of success on the merits." As it was held in **Chetty v Law Society, Transvaal.**[15]

CONCLUSION:

[15] **1985(2) SA 756(A) at 765 A-E.**

47. From both the parties' arguments it is clear that there are numerous allegations, terms and facts which the parties place in dispute and needs to be ventilated at a trail.

48. The court is still required to determine whether the Applicant has a raised a *bone fide* defence or not. I need to stress that insofar as this is concerned that it is not for this Court to determine whether or not a trial court will make a finding in favour of the defendant in respect of any of the defences it has raised.

49. That is a determination to be made by the trial court. It is sufficient at this stage that the defences set out averments which, if they are established at a trial, could lead to a Court holding in favour of the Applicant. In other words, it is sufficient if the Applicant makes out a *prima facie* defence, that is raises an issue which is triable.

50. It is obvious that whether such issue is triable or not will depend on the nature of the defence that has been raised and each situation will have to be judged according to its own merits.

51. It follows from what transpired that the Applicant has succeeded in showing that the defences that it has raised may lead to a different result to the default judgment that has been granted.

52. This leads me to the *bona fides* of the application. It should be apparent from what has been submitted before that judging by what has transpired and on the basis that the Applicant has immediately launched an Application for Rescission of judgment when it became aware of the Default Judgment that it cannot be said that the Applicant was *mala fide.*

53. I am satisfied that the Applicant has shown good cause for the rescission of the judgment.

54. I am also satisfied that this court is bound by the doctrine of *stare decisis* and departure from the doctrine is not justified.

COSTS:

55. The general rule is that costs should follow the event and this rule should be departed from only when there are good grounds to do so.

ORDER:

56. The following order is made:

i) The Default Judgment granted against Defendant (Applicant *in casu*) on 20 April 2023 be rescinded and set aside.

ii) The Applicant be afforded 10 (ten) days from date of this order to file its subsequent pleading.

iii) The Respondent be ordered to pay the costs of the application on a party and party scale.

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A.S
BOONZAAIER, AJ

ON BEHALF OF APPLICANT: ADV J FEREIRA
INSTRUCTED BY: NOORDMANS ATTORNEYS

04 SEVENTH STREET, ARBORETUM

BLOEMFONTEIN

ON BEHALF OF RESPONDENT: ADV JJ GRUNDLING
INSTRUCTED BY; WEBBERS ATORNEYS
96, CHARLES STREET
BLOEMFONTEIN