REPUBLIC OF SOUTH AFRICA

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

CASE NO: **13/19729**

(1) REPORTABLE: [redacted] / NO
(2) OF INTEREST TO OTHER JUDGES: [redacted] /NO
(3) REVISED.

SIGNATURE ..... DATE 9/6/16

In the matter between:

DLAMINI ADVISORY SERVICES (PTY) LIMITED **FIRST APPLICANT**

ZOLILE ABEL DLAMINI **SECOND APPLICANT**

and

DOBSA SERVICES CC **RESPONDENT**

JUDGMENT

REYNEKE AJ

REYNEKE AJ

[1] This is an opposed application for the rescission of a default judgment granted against the applicants on 1 August 2013. On 5 December 2013, the applicants, by way of an urgent application, obtained an order for the stay of the writ pending this application. The costs of the urgent application were reserved for determination in the rescission application.

[2] In respect of the reserved cost order, the determining factor rests on the issue whether the noting of an application for rescission automatically suspends the operation of the writ for execution.

[3] The principles governing an application for rescission were repeatedly discussed in a long and steady line of decisions. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape 2003 2 ALL SA 133 SCA 113,* par 11: it was held that:

'The court expects an applicant to show good 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 prospect of success. *(Grant v Plumbers (Pty) Ltd, 1949 2 SA 470 O.)'*

[4] The phrases 'sufficient cause' and 'good cause' are synonymous and interchangeable. The applicant bears the onus of establishing "sufficient cause". *(Silber v Ozen Wholesaler (Pty) Ltd 1954 (2) SA 345 (A) at 352H-353A.) (Harris v ABSA Bank Ltd t/a Volkskas 2006 (4) SA 527 at 528 par 4.)*

[5] Good cause is shown by giving a reasonable explanation for how the default came about, by showing that the application is made bona fide and lastly, by showing there is a prima facie prospect of success. (*PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A); Smith NO v Brummer*1954 (3) SA 352 (O) at 357 – 8, *De Wet, supra* at 1042.)

[6] Having highlighted all the above principles in law, I turn to the facts. The respondent issued summons containing three claims for payment of services rendered and one for damages following breach of contract. The applicants received the summons on 19 June 2013. The second applicant telephonically informed their long standing attorney, Mr Barry Aaron, about the summons and was

instructed to forward it by email. On 28 June 2013 it was forwarded as an attachment to a note, sent to an email address of Aaron. (FA 1, P 23.) In addition the summons was also forwarded to two other addresses known to be their attorney's contact addresses. The applicant attached proof of these emails. The contents of the emails do not identify the attachment as a summons. On 23 October 2013 the applicants became aware that a judgment was entered against them. They discovered that the summons had not been received by their attorney as it had been sent to the wrong email address.

[7] The second applicant gave an extensive explanation about how it came that the summons was forwarded to a wrong email address. Dlamini stated that Aaron has been his personal attorney and that of his auditing firm for approximately fifteen years and that he has complete faith in him, based on the manner in which Aaron had dealt with his legal affairs in the past. Aaron has a general mandate to pursue their legal affairs as needed. Aaron also responded to the demand that was received pursuant to the summons.

[8] In my view the applicants did what is reasonably been expected from a litigant in following the cause of his legal matter as being pursued by his attorney. I regard the proof of forwarding the summons to Aaron, with the date of 28 June 2013 as sufficient proof of the *bona fides* of the applicants. I find that the applicants are not in wilful default.

[9] I proceed to the matter of a *bona fide* defence. There should be evidence of the existence of a substantial defence. (*Galp v Transley, N.O. and Another 1966 (4) SA 555 C on 560 B).* It is not necessary for the applicant to actually proof his case. (*Federated Timbers Ltd v Bosman NO and Others 1990 (3) SA 149).*

[10] The applicants have a contract with the Provincial Government. The applicants subcontracted the respondents to render certain services that commenced in November 2010, which required *inter alia* certain forensic investigations to be recorded in a report. The first invoice was rendered and various payments were made by the first applicant to the respondents. Council for the respondent contended that the respondent only needs to submit invoices to claim payment. However, the

contents of the invoices are in dispute. The applicants attached various documents in support of their defence that the first respondent was overpaid in the amount of R7 652. (Par 23). The applicants case further rests on a defence of *exceptio non adimpleti contractus;* that the agreement between the parties is bilateral with reciprocal obligations on both sides. The argument as I understand it, is that the respondent failing to submit a report for the balance of January 2011 and thereafter not having rendered services from February 2011, is not entitled to payment irrespective of whether or not it submitted invoices.

[11] In regards to the second claim applicants stated that the respondent performed further services in January 2011. The applicant also rendered further services to the Provincial Government but was not paid by the latter, resulting in the non-payment of the respondent. The respondents in turn refused to provide the complete monthly forensic report for January 2011 until such time as the respondent had received payment of the amount due to it in respect of the November/December services. The applicants averred that the respondent is aware that the applicants had defined deliverables, which would be incomplete in the absence of the withheld forensic report. Still the respondent refused to provide its report. The applicant appointed another forensic accountant to conduct the forensic investigations and the services of the respondent was consequently terminated. The applicant adjusted the respondent's January claim and paid the adjusted amount. I understand the short facts of this defence to be that the refusal by the respondents to submit the January 2011 report, resulted in non-payment.

[12] As to the third claim, the defence is that the respondents are not entitled to payment, as no monthly progress reports were delivered. The duty to submit monthly progress reports is in dispute, resulting in a further dispute about the manner in which the hourly rates has to be calculated. A further dispute arises, on the question whether the duty to submit the monthly progress reports amounts to a variation of the written contract, which contains a non-variation clause.

[13] Concerning the fourth claim for damages, the applicant averred that the particulars of claim discloses no cause of action and is excipiable. Both counsel presented long arguments on the matter of exception, the law on fixed contracts and

the termination thereof, the assessment of damages, and other matters which may have a bearing on such a claim, supported by references to various authorities. My view about the fourth claim is that there is obviously a dispute of fact, which will have a bearing on the quantification of damages. The applicant's defence, which need not to be proven at this stage, *prima facie* carries some prospects of success.

[14] The agreement provides for arbitration. The applicants submitted that these Court proceedings are premature. Counsel for respondent contended that the body that is to conduct the arbitration, i.e. the Arbitration Association of South Africa, does not exist and that a litigant has the right to choose his forum. Arbitration in regards to the dead lock did not commence, also due to the non-appointment of an arbitrator. The parties addressed the reasons for the failure to have an arbitrator appointed in their affidavits. This kind of plea resorts under a special plea, as the adjudication there of may lead to it being finalized, at least in this court. In so much as the arbitration clause is still binding on the parties that constitutes in my mind, a good reason in its own, why the applicant should obtain relief.

[15] I am satisfied that the applicant had showed the existence of a *bona fide* defence on all four claims which, if proven at a trial, may lead to the dismissal of the claims.

[16] There remains another matter. On 21 May 2014 judgment was reserved and postponed till 9 June 2014. On 30 May 2014 the respondent filed a document titled "Respondent's further relevant Authorities." It is said in the introduction, that the purpose of the authorities cited below is to assist the Court in arriving at a correct decision by referring the Court to further relevant authorities. In response, the applicant also filed further submissions.

[17] A respondent has the right to address the Court after the applicant's reply was submitted, on authorities and legal principles only. This is part of the ordinary court procedure. This case was argued in an open court and judgment was reserved. A party does not have an automatic right to file a reply in this instance. While the reference to authorities can certainly assist the Court, I do not deem the filing of a reply without the permission of the court appropriate. Having said that, the applicant may certainly respond after receiving notice of the respondent's further reply.

COSTS

[18] This application for rescission was noted, where after the respondent caused a writ of execution to be served on the applicants on 26 November 2013. Attachment took place. The applicants approached the Court on an urgent basis, successfully requesting the stay of the warrant for execution. The costs of the urgent application were reserved for determination by this Court.

[19] The issue was raised whether the noting of this application for rescission suspended the execution of the writ and if so, it will follow that the respondent by threatening to execute the writ, compelled the applicants to approach the court on urgent basis for relief. The decision on this issue will point towards the party who should bear the costs of the urgent application.

[20] Rule 49 (11) of the Uniform Rule, which deals with the noting of an appeal, was discussed in various decisions of this Court. Rule 49 (11) provides:

'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.'

[21] The respondent referred me to *Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier, SA Polisie, Noord-Transvaal 1970 (4) SA 350 (T).* That matter deals with the setting aside of a writ in attachments of movable property issued by a magistrate's court. It is not applicable to these circumstances.

[22] In *United Reflective Converters (Pty) Ltd v Levine 1988 (4) SA 460 (W)* (per Roux J) held that there is not a substantive rule of law that an application to vary or second an order or judgment automatically suspends its operation. The Court noted that Rule 49(11)(a) is valid in so far it suspends the operation or execution of an order appealed against, as it merely restates the substantive law and regulates the procedure with which to apply the law. The learned judge reasoned that, since the

Uniform Rules of Court can only relate to matters regulating procedure, and the provisions of rule 49(11)(a) serves to create a substantive rule of law, the words 'or to rescind, correct, review or vary' as they appear in Rule 49 (11)(a) are of no force or effect.

[23] In *Khoza and Others v Body Corporate of Ella Court, 2014 (2) SA 112 (WLD)* the Court (per Notshe AJ) came to the conclusion that the decision in *United Reflective Converters*, "that the provisions of rule 49(11) have no force and effect in so far as they relate to the rescission application, save insofar as it relates to the noting of an appeal", is clearly wrong and as such the Court was not bound to follow it. (Par 13 - 16). The Court further held that rule 49 (11) is not a substantive rule of law, but a procedural rule, which is accordingly fully operational. At par 28 the Court held the view that if there were no common-law rule suspending the operation of the order upon noting of a rescission application, the common law would be severely lacking in that regard. On the basis that the high court possesses 'an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice' *(Universal City Studios Inc and Others v Network Video 1986(2) A SA 734 (A))*, the Court concluded by developing a procedural rule, suspending the operation of an order upon application for rescission thereof.

[24] Vally J, *in Case No 34 819/13 (GLD), in the matter between Peniel Development (Pty) Ltd and another and Isak Pietersen and five others*, on 26 September 2013 (unreported as yet), also disagreed with the judgment in *United Reflective Converters*. The learned judge also expressed the view that, if the judgment in *United Reflective Converters* is correct, there is a need to develop the common law in this area. The Court in *Peniel Development* gave recognition to the development of the rule as per the *Khoza* matter.

[25] The result of the decision in *United Reflective Convertors* is that an applicant for rescission of a judgment has to lodge another application to stay the writ for execution. (At 463H-464A.) This is not a unique or isolated matter. It seems that, perhaps due to uncertainty in this regard, applicants in lower and high courts, compelled by the specific circumstances or sometimes as a mere precautionary measurement, frequently brought applications to stay a writ even though an

application for rescission or variation of the order had been noted. I respectfully agree with the reasoning of Vally J, more particularly as set out in par 14. The decision in *United Reflective Convertors* indeed results in a proliferation of applications.

[26] In this instance, the writ was issued after the rescission application has been launched. The applicant cannot be faulted for lodging an urgent application to stay the writ, as the respondent was not inclined to halt after the goods were attached, pending the finalization of the application to rescind and contrary to the decisions of *Khoza* and *Peniel Developments.*

[27] The applicants successfully approached the court requesting the indulgence of the court. It has been held in numerous cases that the applicant for the indulgence should pay all such costs as can reasonably be said to be wasted because of the application, such costs to include the costs of such opposition as is in the circumstances reasonable and not vexatious or frivolous. (*Meintjies v Administrasieraad van Sentraal-Transvaal 1980(1) SA 283 T, Iveta Farms (Pty) Ltd v Murray 1976 (1) SA 939 T).*

[28] Where the opposition is fair and reasonable the respondents ought not to be put into a position where they oppose the granting of an indulgence at their peril. (*Zarug v Parvathie 1962(3) SA 872 D on 885).* In general it will be unfair to hold the respondent responsible for costs occured due to the applicant's failure to timeously enter a notice to defend, even though the explanation for the failure, in hindsight, might be acceptable.

[29] The applicants submitted that the respondent's opposition has been grossly unreasonable. I take into consideration that the summons was properly served. In regards of claim 2, it is common cause that the applicants did not pay the respondent, albeit for various reasons. I find that the opposition was not unreasonable.

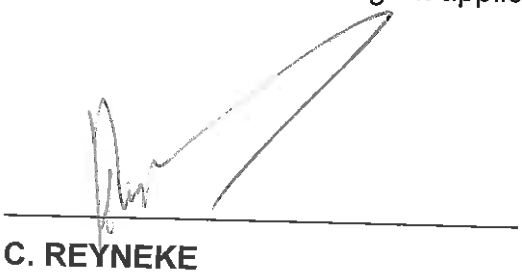
ORDER

1. The default judgment entered on 1 August 2013 is rescinded.

2. The respondent is to enter appearance to defend within 10 days of the date of this order.

3. The costs of this application to be paid by the applicants.

4. The costs of the urgent application to be paid by the respondent.



C. REYNEKE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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Date of Hearing: 21 May 2014

Date of Judgment: 9 June 2014