REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2010/02957

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

27/6/2014
DATE

SIGNATURE

In the matter between:

CONEKT BUSINESS GROUP (PTY) LTD Applicant

and

NAVIGATOR COMPUTER CONSULTANTS CC Respondent

In re:

NAVIGATOR COMPUTER CONSULTANTS CC Plaintiff

and

CONEKT BUSINESS GROUP (PTY) LTD Defendant

J U D G M E N T

FISHER AJ:

[1] This case concerns an application in terms of Rule 31(2)(b) for the rescission of a judgment taken by default.

[2] The judgment in question was handed down by this Court under case number 10/02957 on 20 April 2010 for payment of R393 607.80, together with interest thereon and costs.

[3] The Applicant initially claimed also that the Respondent be ordered to furnish pleadings, notices, returns of services, and any judgments and/or orders granted in the action. This relief was sought on the basis that difficulty was experienced by the Applicant's attorneys in obtaining copies of the judgment and other relevant documents required for the purposes of bringing the application for rescission. The contention is that these documents could not be obtained from the court file as they were missing. The Applicant alleged that the Respondent's attorneys were uncooperative in that they would not furnish copies of the relevant documents when requested to do so. The claim for the documents subsequently became redundant, in that copies of the required documents were obtained by the Applicant's attorneys subsequent to the delivery of the application.

[4] I was addressed in relation to this claim only on the question of costs. It was argued by Mr Pretorius, who appeared for the Applicant, that on the basis of the alleged lack of cooperation of the Respondent's attorneys, the Respondent should be ordered to pay the costs. Mr Shepstone, who appeared for the Respondent, argued that the Applicant's attorneys were advised that the Respondent's attorney,

Mr Walbrugh did not have the requested documents and that, as it was not competent to seek an order for documents that were not in Mr Walbrugh's possession, the application was of no merit. He contended that there was no basis to disbelieve Mr Walbrugh in his assertion that he did not have the documents and that the application must, on general principles, be decided on the version of the Respondent. Accordingly, both parties seek the costs of this claim.

[5] I agree with Mr Shepstone that, strictly speaking, it should have been anticipated that the relief, framed as it was, was unlikely to meet with success. On the other hand, it cannot be said that the approach of the Respondent's attorneys to the numerous requests by the Applicant's attorneys for documents emerges as a model of cooperation. A number of the requests simply went unanswered and, even in the absence of the formal documentation, one would have thought that it would have been possible for information relating to how the cause of action had been framed in the summons to be proffered so that the drawing of the application for rescission could have been facilitated. It appears that Mr Walbrugh was, at least, in possession of this information and could easily have furnished it. A relatively substantial part of the argument was taken up in arguing these costs and a large part of the papers is devoted to this claim. In my view, each party should pay its own costs relating to this claim.

[6] I now turn to deal with the application for rescission. Mr Shepstone contended, on behalf of the Respondent, that the Applicant had not met the requirement that it show good cause, in that:

a) it had failed to establish that it was not in wilful default; and

b) it had failed to establish that it had a *bona fide* defence to the Plaintiff's claim.

[7] The Applicant contends that its default was not wilful. The following emerges in relation to this aspect:

1. A letter of demand dated 18 January 2010 was sent by the Respondent's attorneys to the Applicant in respect of the claim made in the summons. The Applicant, at this stage, engaged the services of its attorneys, who replied to the letter on 25 January 2010. In terms of this reply, it was stated that the Applicants denied any indebtedness to the Respondent.

2. Thereafter, further correspondence ensued between the respective attorneys in relation to the debt. The clear implication of the exchange of such correspondence at this stage was that the Applicant would resist the claim.

3. The Respondent's attorneys then caused a summons to be served at the Applicant's registered address, being the business address of the Applicant's auditors. This occurred on 28 January 2010. Whilst the

Respondent's attorneys were entitled to deliver the summons to the registered office, the question does arise as to why, given the fact that there were attorneys on both sides, the courtesy of furnishing the summons to the Applicant's attorneys was not extended. Such a facility would probably have obviated the need for these proceedings.

4. In the event, it is alleged on behalf of the Applicant by Mr Trevane Paul a director of the Applicant, that the Applicant's auditors did not bring the summons to the attention of the Applicant.

5. The Applicant alleges that the judgment only came to the Applicant's knowledge on 21 July 2010 when a routine request was made for a business credit report.

6. Reference to the return of service shows that service took place at the Applicant's auditors on Ms Tessa Grace, a receptionist in their employ.

7. Mr Paul alleges that upon acquiring the return of service he made enquiries of the auditors and established that they had no record of the service of the summons. He alleges further that Ms Grace denied receipt of the summons.

8. An attempt was allegedly made to obtain the confirmatory affidavit of Ms Grace to this effect. Ms Grace is alleged to have refused to sign

the confirmatory affidavit in relation to her involvement in the matter, despite having undertaken to do so.

[8] In my view, it is not implausible that the auditors failed to notify the Applicant of the summons. There is no basis for rejecting the assertions of Mr Paul that it was not brought to the attention of the Applicant. It is furthermore not inconceivable that a person in the position of the Ms Grace, who is recorded as having taken delivery of the summons, may wish to distance herself from this state of affairs in the circumstances. This lack of cooperation should not be laid at the door of the Applicant.

[9] Furthermore, the fact that the Applicant had engaged attorneys to deal with the dispute (which attorneys were in correspondence with the Respondent's attorneys a matter of days prior to the service of the summons) indicates an intention to enter into a defence even before the summons was served. It thus appears unlikely that the summons would simply have been ignored.

[10] All that is required of an applicant in regard to the establishing that his default is not wilful is that he set out the reasons therefor in a manner which is sufficiently full to enable the Court to understand how it really came about and to assess the applicant's conduct and motives.[1]

[11] On this basis I am satisfied that the Applicant has gone far enough to establish that it did not wilfully default.

[12] I now turn to examine the defences set out in the application. The Applicant raised three defences, being:

1. that the contractual terms upon which the Respondent relies are disputed on valid grounds;

2. that a substantial portion of the Respondent's claim has become prescribed;

3. that the Applicant has a counterclaim for damages. (The contention appears to be that these alleged damages arose from the unlawful interference by the Respondent with a contract between the Applicant's client, Masana, and the Applicant.)

[13] The last defence was not pressed in argument by the Applicant. In fact, a tender was made by the Applicant, which does not take into account this alleged defence. (I will deal with this tender below.) In the circumstances, I do not propose dealing with the alleged damages claim. It appears that it is not a defence that is seriously contended for in the context of this application.

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[1] See **Silver v Ozen Wholesalers (Pty) LTd** 1954 (2) SA 345 (A) at 353 A

[14] The following emerges in relation to the defence on the contract:

1. The Applicant's main business consists of general management and consulting in the field of information and communication technology. This includes the placement with client of individuals who provide specialist services at an agreed hourly rate.

2. It is contended that, during the latter part of 2006, the parties entered into an agreement in terms of which the Respondent placed two such individuals with the Applicant.

3. There is a dispute between the parties in relation to the respective charge-out rate that was agreed in respect of each of the two individuals.

4. In summary, the Applicant's defence on the contract is that the Respondent has charged it a higher rate than that agreed.

5. It is pertinent that the Applicant concedes that, on its version of the contract, payment of the amount of R290 986.71 is due.

[15] As aforesaid, the Applicant raises a claim of prescription in relation to portion of the Respondent's claim. In this regard the following is relevant:

1. On the Respondent's version, the cause of action arose between January 2006 and March 2007.

2. Invoices dated 26 January 2007 sent by the Respondent to the Applicant reflect due payment in the respective amounts of R64 190.55 and R79 871.25. The total amount reflected on these invoices, as being due as at 26 January 2007, is thus R144 061.80.

3. On the basis that service of the summons took place on 28 January 2010, the Applicant's contention is that, on the face of it, a claim for this amount has prescribed.

4. The Respondent counters this assertion by placing reliance on section 14(1) of the Prescription Act, 68 of 1969 (which provides for an interruption of prescription by acknowledgment of liability). It contends that the Applicant has, on more than one occasion, acknowledged liability for the debt claimed. The Applicant disputes that the occasions named by the Respondent constitute acknowledgement for the purposes of section 14.

[16] As aforesaid, the Respondent contends that the defence made out on the merits and in relation to the special plea of prescription are not made out in a manner which is *bona fide*.

[17] I was pointed by counsel for the Respondent to certain inconsistencies between the version of the Applicant in relation to the contract and certain of the annexures to the affidavits. I was urged to find that the Applicant's version could not be sustained in the circumstances.

[18] Whilst it is true that there are, on the documents, certain aspects of the case which may, in due course, require some explanation, this does not mean that the the requirements for a rescission are not met. The requirement that the Applicant for rescission must show the existence of a substantial defence does not mean that he must show a probability of success. It suffices if he can show a *prima facie* case or the existence of a triable issue.[2]

[19] On the aforesaid basis I am satisfied that the Applicant has shown the existence of triable issues in relation to the contractual dispute and in relation to a special plea of prescription in respect of part of that claim.

[20] This brings me to the tender. As aforesaid, the amount of R290 986.71 is conceded by the Applicant to be due on its version of the contract. The Applicant has made a tender to pay this amount, less the amount that it contends has prescribed. The tendered amount thus calculated is R146 924.91 (which includes VAT but not *mora* interest).

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[2] See **PLJ van Rensburg & Vennote v Den Dulk** 1971 (1) SA 112 (W); **Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd** 1980 (4) SA 573 (W)

[21] In light of the concession (and the consequent tender) the Applicant has, on its own version, made out a defence for only part of the judgment.

[22] The question arises as to whether the judgment can be rescinded in part. There are differing lines of cases on this question.

[23] Rule 31(2)(b) provides that the court is empowered, upon good cause being shown, to "*set aside the default judgment on such terms as to it seems meet*". There is a line of cases which holds that the rule does not, on a literal reading thereof, permit of a setting aside of part of the default judgment[3].

[24] In this Court in **Terrace Auto Services Centre (Pty) Ltd v First National Bank of South Africa Limited**,[4] Rubens AJ in dealing with an application for rescission under the common law, indicated *obiter* that, had he been faced with an application in terms of Rule 31(2)(b), he would have followed such line of cases[5].

[25] However, in **Silky Touch International (Pty) Ltd and Another v Small Business Development Corporation Limited**[6] Flemming DJP, when dealing with an equivalent provision in the Magistrate's Court,[7] referred to the aforesaid *obiter* pronouncement and declined to follow the line of cases which precluded a partial

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[3] See **Kavasis v South African Bank of Athens Limited** 1980 (3) SA 394 (D); Gründer **v Gründer** 1990 (4) SA 680 (C); **Zealand v Milborough** 1991 (4) SA 836 (SE).
[4] 1996 (3) SA 209 (W)
[5] At p214
[6] [1997] 3 ALL SA 439 (W)

rescission. He stated in this regard[8]:

> "*I find myself in disagreement with the reasoning in the* ***Zealand*** *case and subscribe to the opposite interpretation of the Supreme Court Rule. That also implies that although there is only one judgment even when plaintiff succeeded on five contracts, a defendant need not be given rescission on five causes of action if he has a defence only on one contract. (In this case there are distinct causes of action for capital, for mora interest, and for agreed costs). As is by now predictable I conclude that similar wording in the Magistrates Court Act bears a similar meaning.*"

[26] Flemming DJP further entrenched this finding in **Revelas and Another v Tobias**[9] in which he stated the following[10]:

> "*Insofar as the question arises whether the Court in deciding on rescission of orders is bound to an all or nothing approach, I mention two aspects. Firstly, Court Rule 31(2)(b), in authorising an order rescinding a default judgment 'on such terms as to it seems meet', to my mind authorises qualified or conditional orders. That sets the tone for rescinding the order striking out a defence, especially if one assesses the matter in the context of a Court's inherent jurisdiction to govern matters in the interests of effective administration of justice. (Both the striking out of the defence and the eventual judgment ordering defendants to pay an amount were default judgments.) Secondly, I have expressed views (which I still hold) in the matter of* ***Silky Touch International (Pty) Ltd and Another v Small Business Development Corporation Ltd*** *[1997] 3 B All SA 439 (W).*"

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[7] Section 36, Rule 49
[8] at p445
[9] 1999 (2) SA 440 (W) at 447
[10] At p447

[27] In the **Silky Touch** case *supra*[11] Flemming DJP cited with approval the approach taken in two Namibian cases: **Maia v Total Namibia (Pty) Ltd**[12] and **SOS Kinderdorf International v Effie Lentin Architects.**[13]

[28] The reasoning adopted in the **SOS Kinderdorf** case is indeed instructive in interpreting the rule. Levy J stated as follows in this regard[14]:

> *"The Rules of Court constitute the procedural machinery of the Court and they are intended to expedite the business of the Courts. Consequently they will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible.*
> ...
>
> *There is no reason why this pattern should be deviated from where a plaintiff has already obtained a default judgment in respect of more than one but separate claims, and the defendant shows a defence to some of plaintiff's claims, or to a part of the claim, which is divisible from the whole. For example, where a plaintiff is granted default judgment in respect of the payment of a sum of money as well as delivery of certain goods, and the defendant can show a bona fide defence to one or the other, there is no reason why the plaintiff should not be entitled to judgment in respect of the claim which defendant cannot defend. The essential question is whether the claim or claims in respect whereof default judgment has been given is divisible."*

[29] In relation to an argument raised to the effect that the words "*on such terms as to it seems meet*", refer only to matters ancillary to the default judgment, such as

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[11] At p445
[12] 1991 (2) SA 188
[13] 1993 (2) SA 481 (NM)
[14] At p491

costs or periods of time within which to file subsequent pleadings, Levy J held as follows[15]:

> *"I fail to see any reason for limiting the meaning of these words and the Judge's discretion. In the interpretation of statutes words receive their ordinary grammatical meaning.* ***Ebrahim v Minister of the Interior*** *1977 (1) SA 665 (A); Volschenk* ***v Volschenk*** *1946 TPD 486 at 487. In* ***Kavasis'*** *case the learned Judge failed to consider these words.*
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> *In* ***De Wet and Others v Western Bank Ltd*** *1979 (2) SA 1031 (A) the Court considered the common law in regard to the Court's powers in the setting aside of default judgments generally, and the headnote of that case reads, inter alia:*
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> > *'Under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the Courts. This discretion extended beyond, and was not limited to, the grounds provided in Rules of Court 31 and 42(1) ...'*
>
> *In the absence of an express or clear statement to the contrary, a Court will not assume that its powers are curtailed.* ***Minister of Law and Order and Others v Hurley and Another*** *1986 (3) SA 568 (A) at 584A. Those words therefore must be interpreted to mean that a Court is not in any way limited in setting aside a part of a default judgment."*

[30] Levy J furthermore embarked on an examination of judgments of the Zimbabwean Appellate Division[16] and an English decision[17] where similar provisions to Rule 31(2)(b) were interpreted on the basis that a partial rescission was

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[15] At pp491-492

[16] See **GD Haulage (PVT) Ltd v Mumurgwi Bus Service (PVT) Ltd** 1980 (1) SA 792 (ZRA) at 737

competent.

[31] He thus concluded as follows[18]:

> *"Consequently, where a defendant has a defence of, say prescription, in respect of part of a claim for goods sold and delivered by not in respect of the balance, it is permissible to set aside the default judgment for that part which can be defended. The plaintiff, however, would be entitled to judgment in respect of that part of the claim for which there is no defence."*

[32] In all the circumstances I am respectful agreement with Flemming DJP that a Court is empowered in terms of Rule 31(2)(b) to rescind part of a judgment[19].

[33] The aforementioned pronouncements of Flemming DJP and Levy J, notwithstanding their wide interpretation of the rule, appear to accept that, for a partial rescission to occur, the judgment should be capable of being divided into discrete parts so that the part in respect of which there is a possible defence can be discerned. Thus, if a defence is made out which is not capable of quantification in this way or which cannot be dealt with on the basis that it can be related in some manner to a distinct part of the judgment, it would appear that a partial rescission would not be permissible. This would be the case even if it were apparent that there was no defence to the entire claim. The rationale behind this is probably the impracticability of such an approach in circumstances where there is no delineation

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[17] See **Re Mosenthal, *ex parte* Marx** [1910] 54 Sol J 751
[18] At p492
[19] see also **Securiforce v Ruiters** 2012(4) 522 (NCK) at para [40] pg264

in relation to how the partial defence would relate to the claim. What then of a situation where a defence of this nature is established to what appears to be a proportionately small part of the judgment? It is likely that, in such a case, a court would have resort to the relatively wide powers afforded by Rule 31(2)(b) to impose such "*such terms as to it seem meet*" so as to achieve a situation where the respective rights of the parties were, in some manner, accommodated.

[34] In *casu*, I consider the fact that the prescription defence and the partial defence on the merits are capable of calculation which permits of the division required to allow for a partial rescission. The prescription scenario is furthermore specifically mentioned by Levy J in the **SOS Kinderdorf** case as creating the necessary division.[20]

[35] I am, in all the circumstances, minded to rescind the judgment in part. The costs and interest components of the judgment, although ancillary to the capital judgment as contained in paragraph 1 of the order (part of which will remain in force) are best left to the trial court.

[36] As to the costs of the application for rescission, an application of this nature is an indulgence and, in the normal course, the Applicant would be ordered to pay the costs thereof unless the Respondent's opposition thereto was unreasonable. I do not find the Respondent's opposition to have been unreasonable. Furthermore, the Respondent's opposition has achieved some success.

[37] I make the following order:

1. The judgment handed down on 20 April 2010 under case number 10/02957 is rescinded, save to the extent of R146 924.91 of the amount granted in terms of paragraph 1 thereof, in respect of which amount such judgment remains in force and effect.

2. The parties shall each bear their own costs in respect of Claim A of the Notice of Motion.

3. The Applicant shall pay the costs of the application for rescission (i.e. Claim B).

DC FISHER
Acting Judge of the High Court

APPEARANCES:

For the Applicant:

Mr JF Pretorius, instructed by Sim & Botsi Attorneys. (Tel no: 011-880 4075)

For the Respondent:

Mr RS Shepstone, instructed by SR Walbrugh Attorneys. (Tel No: 011-501 4790)

DATE OF HEARING

28 May 2014

DATE OF JUDGMENT

27 June 2014