REPUBLIC OF SOUTH AFRICA

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

CASE NO: 14/30906

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

....
DATE SIGNATURE

In the matter between:

MBELENGWA CC First Applicant

TSHILILO KENNETH TSHITHATHAVHANA Second Applicant

And

CROSSOVER FINANCE (PTY) LTD Respondent

J U D G M E N T

MASHILE J:

[1] On 25 November 2014, this court per Moshidi J, granted default judgment against the Applicants and Mecca Power Construction (Pty) Ltd in

favour of the Respondent. Mecca Power Construction (Pty) Ltd did not challenge the action against it and is also not seeking the rescission of the judgment that the Respondent obtained against it on 25 November 2014.

[2] The background facts on which the judgment was granted is that:

2.1 The Respondent issued summons against the Applicants and Mecca Power Construction (Pty) Ltd on 21 August 2014 for the recovery of:

CLAIM A

2.1.1 An amount of R1 386 077.33, which the Respondent advanced to the First and the Second Applicants in terms of a partly written and partly verbal loan agreement.

CLAIM B

2.1.2 An amount of R72 000.00 being for the project management services provided by the Respondent to the First Applicant and Mecca Power Construction (Pty) Ltd.

CLAIM C

2.1.3 The sum of R17 892.85 that pertained to payroll management services, which the Respondent provided to the First Applicant and Mega Power Construction (Pty) Ltd.

CLAIM D

2.1.4 An amount of R3500.00 for administrative services rendered by the Respondent to the First Applicant and Mecca Power Construction (Pty) Ltd.

[3] The Second Applicant signed a suretyship agreement wherein he bound himself as both a surety and co-principal debtor with the First Applicant and Mecca Power Construction (Pty) Ltd for the due and punctual performance by the First Applicant and Mecca Power Construction (Pty) Ltd.

[4] According to the return of service, the sheriff served the summons upon the First Applicant and Mecca Power Construction (Pty) Ltd at their joint *domicilium* address being 174 Gibson Drive, Springfield, Buccleuch as per the loan agreement on 25 August 2014. On 22 August 2014 the sheriff attended upon the address of the Second Applicant at 1821 Mogoai Street, Munsieville, Krugersdorp to serve the summons but was told by a neighbour that the Second Applicant had left the given address a few months earlier.

[5] On 12 September 2014, the sheriff served the summons upon the Second Applicant by handing it over to a site manager, M Radebe, at Driezek Extension 9, Kwekwezi Street, Orange Farm, being the Second Applicant's place of employment. The Second Applicant concedes that the summons came to his attention during mid October 2014.

[6] None of the parties took steps to defend the claim and the Second Applicant even lost the summons. He completely forgot about it until he received a copy of the default judgment at the end of November 2014 or early December 2014. The default judgment shows that judgment was entered against the Applicants and Mecca Power Construction (Pty) Ltd on 25 November 2014.

[7] The application for the rescission of judgment is on the basis of Uniform Rule of Court 42(1)(a) or common law. Rule 42(1)(a) provides:

> "*(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.*"

[8] The Applicants assert that they are entitled to a rescission because had Moshidi J been aware that the summons was not served in accordance with the provisions of Uniform Rule of Court 4(1)(a)(v) he would not have granted the judgment. The Rule stipulates:

> "Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:
>
> *(v) in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner."*

[9] To the extent that such address was neither the First Applicant's registered nor principal place of business , the service was in breach of the provisions of Rule 4(1)(a)(v) of the Uniform Rules of Court. Furthermore, service upon the Second Applicant should have been effected at the address of the First Applicant because, so the argument continues, he was in the employ of the First Applicant.

[10] Accordingly, Moshidi J must have labuored under the impression that the service of the process was consistent with the provisions of Uniform Rule of Court 4(1)(a)(v) when he granted the judgment. Had he been conscious that the service was defective for lack of compliance with the Rule, he would not have granted judgment against the Applicants and Mecca Power Construction (Pty) Ltd. In the circumstances, conclude the Applicants, the judgment stands to be rescinded and the Applicants granted leave to defend.

[11] Insofar as the common law rescission is concerned, the Applicants argue that the court has a discretion whether to grant it or not. The Applicants submitted that the court should always lean in favour of an applicant that seeks to overturn a default judgement where sufficient or good cause is

established. The justification for the adoption of that approach being that default judgment by its very nature is innately unconstitutional and offends against the rules of natural justice in particular, the *audi alteram partem*.

[12] The Applicants believe that they have shown good cause why the judgment should be rescinded under common law. They maintain that they have established such good cause by showing that they have a bona fide defence and that they have a good and reasonable explanation for their default for not delivering their Notice of Intention to Defend and thereafter their plea.

[13] The Applicants' defence to the claim appears to be that the amount claimed by the Respondent is incorrect and that the documents upon which the claim is based are incorrect insofar as the Second Applicant denies having signed a suretyship agreement binding himself as surety and co-principal debtor with the First Applicant and Mecca Power Construction (Pty) Ltd for the due and punctual performance by the First Applicant and Mecca Power Construction (Pty) Ltd. The Second Applicant further denies that while he signed the loan agreement it is not binding on him and the First Applicant because the document does not cite the names of the parties to the agreement.

[14] The Respondent on the other hand has ardently contended that the evidence furnished by the Second Applicant cannot sustain a relief under Rule 42(1)(a) or the common law. Against that backdrop, the issue to be

decided is simply whether the Applicants are entitled to have the judgment against them rescinded or not.

[15] The legal position concerning rescission based on Uniform Rule of Court 42(1)(a) is that a party wishing to rescind a judgment must establish that the judgment was erroneously sought and erroneously granted in the absence of the affected party. See *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W). Once a court pronounces as aforesaid, it will grant or vary a judgment without the affected party being required to show good cause or giving reasonable explanation for the default in not taking any steps to prevent the granting of judgment as is the position in the case of Uniform Rule of Court 31(2)(b) and common law. See the *Hardroad* case *supra* and *Topol and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W).

[16] *For the purposes* of common law, an applicant must establish good cause. Good cause will consist in:

16.1 Demonstrating that it has a bona fide defence;

16.2 proving that it has a good and reasonable explanation for its default in not delivering a notice of its intention to defend or having been barred after the delivery of such notice, failed to deliver a plea;

16.3 Satisfying the court that good prospects exist that the main case will succeed.

[17] To turn then to the Applicant's first contention. A judgment will have been granted in error if a court would not have granted it had it been aware of the existence of an irregularity in the papers. The First Applicant was served with the summons at its chosen *domicilium* address, as per the loan agreement, being 174 Gibson Drive, Springfield, Buccleuch. An attempt to serve upon the Second Applicant was made at his address, Munsieville, in Krugersdorp without success. The sheriff was told that the Second Applicant had vacated the address a few months earlier.

[18] Faced with this difficulty, the Respondent established that the Applicant was engaged in a project at Orange Farm and instructed the sheriff to serve the summons upon him at that location. The Second Applicant admits in his answering affidavit that he received the summons. Having received it, he put it away and completely forgot about it and was only reminded when he received notice of the default judgment the following month.

[19] The Applicants' argument pertaining to Rule 4(1)(a)(v) is misguided because the summons was served on the *domicilium* address of the First Respondent while the other was served upon him at Orange Farm being a construction site of the First Applicant and besides, he confirms that he received it. There cannot be any talk of a judgment granted in error under these circumstances. Moshidi J would have granted judgment against the Applicants anyway had these facts been exposed to him, as they were.

Accordingly, the Applicants' reliance on Rule 42(1)(a) is dismissed as devoid of any merit.

[20] Insofar as common law is concerned, the Applicants claim that they have *bona fide* defences which if proved at the trial are likely to succeed. These defences are:

20.1 The amount claimed is possibly incorrect;

20.2 The Second Applicant did not sign a suretyship agreement binding himself as surety and co-principal debtor with the First Applicant and Mecca Power Construction (Pty) Ltd; and

20.3 The loan agreement is defective insofar as it does not mention the parties to the agreement.

[21] The Second Applicant has acknowledged his indebtedness to the Respondent and this is evident from his own testimony set out in the founding affidavit. After becoming aware of the judgment, he sought to negotiate terms on which he could liquidate his indebtedness to the Respondent. Why would a party seek to make arrangements to settle an amount if he does not owe it? This ostensive defence stands to be dismissed as not bona fide whose main objective is to delay the Respondent from embarking on execution.

[22] The Applicants' second defence is that while he concedes having signed the loan agreement, he did not sign a suretyship agreement the effect

of which was to bind him as surety and co-principal debtor with the First Applicant and Mecca Power Construction (Pty) Ltd for the due and punctual performance by the First Applicant and Mecca Power Construction (Pty) Ltd. On perusal of the loan agreement, which the Second Applicant admits having signed, the conclusion of a cession and suretyship agreements are condition precedents. As proof that the condition precedents were complied with, the Respondent has attached copies of both agreements to the summons. The Second Applicant's lack of knowledge of the suretyship agreement must therefore be disregarded.

[23] The Applicants' third defence is that the loan agreement is defective insofar as it does not make any reference to the borrowers. It is true that there is no mention of the borrowers in the loan agreement. However, the Second Applicant signed the loan agreement and initialled all the pages including the annexures. The question is, why did he sign if he was oblivious of the parties to the loan agreement? The answer is, in my opinion, simple. He knew who the parties are and that he was signing on his own behalf and on behalf of the other parties to the agreement. Besides, why did he acknowledge indebtedness to the Respondent if he wished to make lack of reference to the parties an issue?

[24] In the result, all the supposed defences of the Applicants as described above are not bona fide and their objective is palpably to delay the Respondent executing the writ against them. They are for that reason rejected.

[25] Turning to the furnishing of good and reasonable explanation for the default in not delivering a notice of their intention to defend. On the Second Applicant's own version, he willfully ignored to defend the claim. He received the summons in October 2014 and did nothing about it until receipt of the default judgment notice. One would have expected that a party that has multiple defences to a claim, as the Second Applicant avers, would have immediately upon receipt of the summons, have served and filed his notice of intention to defend alternatively, would have contacted his attorneys for advice.

[26] As confirmation that the Applicants did not have bona fide defences, the Second Applicant embarked on negotiating suitable payment arrangements with the Respondent. His actions constitute an acknowledgment of his indebtedness to the Respondent and explains why he deliberately ignored the summons. A party that puts away a summons and forgets about it in this situation cannot claim to have a good and reasonable explanation for his or its failure to defend an action. The conclusion that the Applicants willfully failed to defend the action is inescapable.

[27] A rescission of judgment at common law must be brought within a reasonable period. The Respondent obtained judgment on 25 November 2014. Knowledge of the default judgment came to the Applicants shortly thereafter yet this rescission application was only launched in April this year. There is no explanation of the inordinate delay in launching it. In the absence

of such explanation this court finds that it was not brought within a reasonable time.

[28] A further hurdle that the Applicants must overcome is the presence of good prospects of success if the court were to grant him the relief that he seeks. On the evidence put forward by the Second Applicant, prospects are extremely poor that the Applicants will succeed if they were to be given leave to defend the main action. I have already shown that all their defences are not bona fide. How then will they succeed if they were to be afforded an opportunity to defend the main case?

[29] In the premises, I make the following order:

1. The application is dismissed with costs.

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B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Applicant: Adv. N J Zwane

Instructed by: Rasegote & Associates Inc.

Counsel for the Respondent: Adv F J Nalane

Instructed by: Tony tshivhase Inc.

Date of hearing: 30 October 2015

Date of delivery of Judgment: