REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2312/2018

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

28/06/2019

SIGNATURE **DATE**

In the matter between:

MBITA CONSULTING SERVICES CC Applicant

and

MAN FINANCIAL SERVICES SA (PTY) LTD Respondent

JUDGMENT

MATOJANE J

[1] This is an application for the rescission of a default judgment granted against the applicant and ancillary relief.

[2] The respondent claimed the return of certain motor vehicles that were rented to the applicant in terms of a rental agreement concluded between the parties that the applicant has breached.

[3] The applicant contends that the default judgment was obtained improperly, as a settlement agreement was negotiated by its erstwhile attorney and the applicant considered the matter to be settled. The applicant states further that due to certain payments that it made in the spirit of the settlement negotiations the settlement was 'implemented', and as a result, the settlement agreement was 'finalised'.

[4] In terms of the proposed settlement agreement, the applicant was obliged to settle the full arrears in six monthly instalments commencing from 31 May 2018. It has breached the terms of the proposed agreement by failing to make payments in terms thereof. Therefore, it cannot be said that the parties have acted in accordance with the provisions of the settlement agreement.

[5] In regard to the question of whether the parties had actually concluded a settlement agreement, and whether the default judgment was improperly obtained, it is necessary to detail the events leading up to the order being granted.

[6] On 3 May 2018, the respondent sent an email to the applicant's previous attorneys of record attaching a schedule showing the outstanding balances, arrears and instalment amounts, and enquiring how the applicant intended to settle the arrears. The applicant was informed that upon receipt of his advice, a completed settlement agreement would be forwarded to it.

[7] On 4 May 2018, the applicant's erstwhile attorney of record advised the respondent that the applicant intended to pay up the arrears within the proposed period of six months, and requested the inclusion of a provision that the applicant be given a period of at least 21 working days to remedy any default under the settlement agreement. It was also requested that the agreement be amended to reflect that each party must pay its legal costs incurred in respect of the matter.

[8] On 8 May 2018, the respondent provided the applicant's erstwhile attorneys with a draft settlement agreement. The applicant was informed that it would be afforded seven working days, not 21 working days as it requested, to remedy any breach of the settlement agreement. The respondent was informed further that if it was not satisfied with the terms as set out, the respondent would proceed to court to obtain judgment against the applicant.

[9] On 11 May 2018, the applicant's erstwhile attorneys advised the respondent to deal directly with the applicant as they intended withdrawing as its attorneys of record. On the same day Mr Mbiza, on behalf of the applicant, addressed correspondence to the respondent requesting an amended draft settlement agreement incorporating the proposals made by his erstwhile attorneys in the email of 4 May 2018, which had already been rejected by the respondent.

[10] On 17 May 2018, the applicant was advised by the respondent to sign the initial settlement agreement before the close of business. The applicant was warned that the respondent would proceed to obtain default judgment if it did not sign the settlement agreement. The respondent served a notice of set down to the applicant via email on 17 May 2018, informing it that the matter was set down for 28 May 2018. It further caused the notice of set down to be served by the Sheriff at the applicant's chosen *domicilium* on 18 May 2018.

[11] On 25 May 2018, the applicant's current attorneys served a notice of substitution as attorneys of record on the respondent. These attorneys had already communicated with the respondent on 23 May 2018, informing the respondent that it acted for the applicant, and asking for a copy of the settlement agreement.

[12] On the date of the hearing, 28 May 2018, the applicant's attorneys requested the applicant to stand the matter down or to postpone the hearing *sine die* to enable them to take instructions to oppose the application. This request was sent via fax and was received by the respondent at 09:21 AM. The applicant refused to have the matter postponed, and judgment was obtained by default.

[13] An applicant for rescission of a judgment must show good cause, both at common law and in terms of Rule 31(2)(*b*) of the Uniform Rules of Court. Rule 31(2)(*b*) provides that a defendant may, within 20 days after he has knowledge of the judgment against him by default, apply to court on 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.

[14] In these circumstances, '…the Courts generally expect 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...'[1]

[15] In the present matter, the application was brought after the 20 day period had passed. No condonation application was made and no bona fide defence is raised by the applicant. The applicant has the initial draft settlement agreement in its possession but because it does not accept the terms thereof, has not signed it. The settlement agreement did not come into force, and the applicant cannot rely upon it to seek rescission of the judgment. The applicant has thus failed to show good cause as to why the judgment should be rescinded.

[16] The applicant cannot rely on the provisions of Rule 42(1)(*a*) either, which empowers the court to set aside a default judgment erroneously sought or erroneously granted in the absence of a party. The applicant was represented by a new attorney at the time the default judgment was granted. The respondent had communicated to the applicant that it did not intend to deviate from its proposed terms in the settlement agreement and that if the applicant did not sign the agreement, it would proceed to court to obtain judgment. The applicant was also aware of the time and date of the hearing, yet the applicant and its attorney elected not to come to court on that day. The judgment was neither erroneously sought nor erroneously granted.

[17] In the result, the application for rescission must fail.

ORDER:

1. The application is dismissed with costs.

K E MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

[1] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) 9E-F.

Date of hearing:	19 June 2019
Date of judgment:	28 June 2019

Appearances:

Counsel for the Applicant:	Adv. R Essack
Instructing Attorneys:	Leonard Attorneys
Counsel for the Respondent:	Adv. N Alli
Instructing Attorneys:	Jay Mathobi Incorporated