IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: ***28th April 2020*** Signature: ***(Signed) Adams J***

CASE NO: 35226/2018

DATE: 28th APRIL 2020

In the matter between:

BASITHANDILE TRADING (PTY) LIMITED t/a BTRM CIVILS AND MINING Plaintiff

and

KHUM MK INVESTMENTS CC Defendant

Coram: Adams J

Heard: 22 April 2020

Delivered: 28 April 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, being uploaded to the CaseLines system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 28 April 2020.

Summary: Practice and Procedure – application for rescission of default judgment – whether defence *prima facie* established – application for rescission granted

ORDER

(1) The defendant is granted condonation of its late filing of its application for rescission.

(2) The defendant's application for rescission succeeds.

(3) The summary judgment granted by default by this court on 14 January 2019 is rescinded and set aside.

(4) The defendant shall deliver its plea and counterclaim (if any) within twenty days from date of this order.

(5) The costs of the application for rescission shall be in the course of the main action.

JUDGMENT

Adams J:

[1]. I shall refer to the parties as referred to in the main action. The defendant is the applicant in this application for rescission and the plaintiff is the respondent.

[2]. The defendant applies for the setting aside of a summary judgment granted against it by this court (Wepener J) by default in favour of the plaintiff on the 14th of January 2019. In terms of the summary judgment the defendant was ordered to pay to the plaintiff the sum of R678 264.16, together with interest thereon and costs.

[3]. Default judgment was obtained by the plaintiff on the basis of a blasting agreement ('the agreement') concluded between the plaintiff and the defendant on the 28th of January 2016. In terms of the agreement the plaintiff was to provide 'blasting and rock drill' services to the defendant at an agreed contract price. These services were to be rendered at the Ezithobeni Heights Housing Development Project, a mixed-type housing development project of the City of

Tshwane. The plaintiff's claim was in essence for services rendered and material supplied at the special instance and request of the defendant.

[4]. It is the case of the plaintiff that by the 15th of July 2017, pursuant to the agreement, and after certain of the blasting and rock drilling services had already been rendered, the defendant had been invoiced by then for a total amount of R1 033 264.16, which amount was not paid in full by the defendant. The plaintiff in fact rendered an invoice number 007 on the 28th of November 2016 for an amount of R574 503.31 and on the 28th of June 2017 invoice number 008 for an amount of R458 760.85. The total of these two invoices amount to the aforesaid sum total of R1 033 264.16. Of this amount, according to the plaintiff, the defendant had only paid the sum of R355 000, leaving a balance of R678 264.16.

[5]. What subsequently happened was that on the 20th of July 2017, following further services rendered by the plaintiff, so it (the plaintiff) pleaded and alleged in its answering affidavit, the defendant acknowledged that it would be indebted to the plaintiff in the balance outstanding, being R678 264.16, on completion of the remaining blasting of 638 cubic meters. This agreement was reduced to writing in a document styled 'Agreement with mandatory – Acknowledgment', signed on the 20th of July 2017 on behalf of the defendant by its Project Manager, Mr Themba Tibane, after it had been signed on behalf of the plaintiff on the 14th of July 2017.

[6]. I read and interpret this document, which clearly contains a patent typographical error in that it records that invoice number 007 was issued on the 28th of November 2017 when in fact and in truth it was issued on the 28th of November 2016, to indicate that the agreed total amount due by the defendant to the plaintiff in terms of the agreement would be the R1 033 264.16 referred to above after the works had been completed. Moreover, this agreement records on the 20th of July 2017 that the defendant had paid to the plaintiff an amount of R355 000 on account of its indebtedness to the plaintiff, leaving a balance due to the plaintiff of an amount of R678 264.16, which would have been payable within thirty one days of completion of the blasting of 638 cubic meters,

representing the remainder of the works in terms of the agreement. In my judgment, the aforegoing is common cause especially if regard is had to the fact that under the heading 'Acceptance' at the bottom of this acknowledgment Mr Tibane confirms that he understood and accepted the declaration in and the contents of the acknowledgment.

[7]. The point is simply this: as and at the 20th of July 2017 the defendant acknowledged that the total amount due in terms of the blasting contract is the sum of R1 033 264.16 and that the balance due and payable on completion of the works would be the amount of R678 264.16. It needs to be born in mind that by then the agreement had been extant for a period of approximately eighteen months. At that point no mention had been made by the defendant or its project manager of any supposed defective or unsatisfactory performance on the part of the plaintiff in terms of the agreement, which would have entitled the defendant to cancel the agreement and / or to claim damages from the plaintiff for breach of contract. However, on the same day, being the 20th of July 2017, Mr Tibane had addressed an email to the plaintiff at 11:36 AM, in which he expressed the defendant's dissatisfaction with the fact that, notwithstanding its undertaking to do so, the plaintiff had not by then – Thursday, the 20th July 2017 – completed the blasting. The plaintiff was therefore requested to 'hand over the site to a new blaster'.

[8]. How does one reconcile the email from Mr Tibane on the 20th of July 2017 and the acknowledgment by him on the same day on behalf of the defendant? The answer to this question is to be found in the plaintiff's answering affidavit in which it is explained that the acknowledgment agreement was in response to the ultimatum contained in the email and the plaintiff's complaint in response thereto that their invoices were not being paid.

[9]. All the same, on the basis that the remaining job had been completed, the plaintiff sued the defendant for the said amount and subsequently obtained the judgment for the said sum.

[10]. The central issue in this application for rescission is whether the defendant disclosed a *bona fide* defence to the plaintiff's claim in the sense of

setting out averments, which, if established at trial, would entitle it (the defendant) to a dismissal of the plaintiff's claim. The question is this: has the defendant established such a defence. If so, then the application should succeed and conversely, if not, then the application stands to be dismissed.

[11]. In the founding affidavit the defendant contends that the plaintiff 'failed to render the blasting services to the [defendant] and caused [it] substantial damages which the [defendant] will claim against the [plaintiff] by way of a counterclaim'. The defendant furthermore alleges that the plaintiff was required to blast deep enough so that the sewer line could be laid, which meant that the blasting should also be level. In breach of these provisions of the agreement, so the defendant alleged in its founding affidavit, the plaintiff failed to complete the blasting in accordance with the agreement. This, as well as certain delays in the completion of the contract which the defendant laid at the door of the plaintiff, in turn caused the defendant damages, estimated at R950 000, which it (the defendant) intends properly quantifying and counterclaiming in the main action.

[12]. In its founding affidavit the defendant furthermore avers that from time to time it paid to the plaintiff certain amounts of money – some of it for actual blasting which had by then been done and some payments in advance for blasting to be done. This resulted, so the defendant alleged, in the plaintiff being 'overpaid in the amount of R1 189 549.63'. How this amount is arrived at is however somewhat of a mystery as the defendant simply states that: 'Proof of this amount will be provided'. I find this rather peculiar in view of the fact that the founding affidavit was deposed to on the 2nd of May 2019, which is some twenty months after the defendant had requested the plaintiff to stop working on the project. It is difficult to understand why details of this amount could not be provided as and at the time when the application was launched. The defendant does however provide a schedule of payments to the plaintiff from April 2016 to August 2017, which is described by the defendant as a 'schedule of some of the payments made to the [defendant]'. The sum total of the payments to the plaintiff, according to this list, is the amount of R745 000. Even this schedule of payments is not supported or corroborated in any way by documentary

evidence such as bank account statements or some other forms of electronic proofs of payment.

[13]. The overall tendency of the founding affidavit is to make of averments of a general nature, with very little, if any details relating to the particulars of such averments. So, for example, the defendant alleges that, following the cancelation of the agreement, a new contractor was appointed at a cost of R200 000 to 'remedy the [plaintiff's] defective blasting and to continue with the completion of the blasting'. No details of the new contractor are furnished and no documentary proof of the alleged payment of the amount to this new contractor is furnished.

[14]. The plaintiff disputes the defendant's defence. It denies that its performance in terms of the agreement was defective or delayed. The plaintiff insists that it 'rendered diligent and adequate services to the [defendant]' and that it had completed the blasting of the remaining 638 cubic square meters as per the agreement of the 20th July 2017. This is confirmed, so the plaintiff contends, by the fact that the defendant's foreman and its project manager had signed off on the works up to the 28th of August 2017. The documents in support of the aforegoing claim are however not explained by the plaintiff and my cursory perusal of same seems to afford corroboration for the version of the plaintiff. My reading of the said documents suggests that from the 27th of July 2017 the volume blasted amounted in total to 610.2 cubic meters, which would have been about five per centum less than what was envisaged in the acknowledgment agreement.

[15]. As regards payment by the defendant on account of its indebtedness to the plaintiff, the latter denies having received payment from the defendant of the total amount of R1 189 549.63 or, for that matter, payment of the sum of R745 000. As indicated above, it is the plaintiff's case that the total amount received from the defendant on account of its indebtedness to plaintiff was the sum of the R355 000. The version of the plaintiff on this aspect of the matter appears to be strongly supported by the written acknowledgment agreement between the parties dated the 20th July 2017. The defendant explains the

incongruity in its case by referring to the email communication from Mr Tibane to the plaintiff on the morning of the 20th July 2017, in which the following is said:

'[The defendant] will reconcile [the plaintiff's] invoices and pay what is due to [it] when the client pays.'

[16]. What the defendant therefore says is that, notwithstanding the declaration in the acknowledgment agreement that by the 20th July 2017 it had paid to the plaintiff amounts totalling R355 000, that statement is not actually true because the defendant still intended reconciling the plaintiff's accounts with a view to calculating the balance to plaintiff by the defendant. The questionability of this statement is self-evident.

[17]. The plaintiff therefore maintains that the defendant's application for rescission should be refused with costs.

The Law and its application *in casu*

[18]. The defendant's application for rescission and the setting aside of the summary judgment granted against it is in terms of Uniform Rule of Court 31 (2) (b) and the common law.

[19]. Rule 31 (2) provides as follows:-

'(2) (a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.

(b) A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon 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 it deems fit.'

[20]. In this matter the summary judgment was granted against the defendant because there was no appearance on its behalf on the day of the hearing of the application for summary judgment. The attorney for the defendant, after he

delivered notice of appearance to defend, appears to have seriously neglected his client's matter in that he did not give the necessary attention to the application for summary judgment, which had been served on their offices on the 5th of December 2018. In the notice of application for summary judgment it was indicated that the application for summary judgment would be heard in this court on 14th of January 2019. The matter was neglected, as I said, in that the notice of application for summary judgment was ignored completely. Additionally, no affidavit resisting summary judgment by the defendant was filed and importantly there was no appearance on behalf of the defendant on the day of the hearing of the application for summary judgment, hence summary judgment was granted by default against the defendant.

[21]. Strictly speaking, this application for rescission does not fall within the ambit of rule 31(2). However, it was a 'default judgment' as envisaged by rule 31(2)(b) and I am of the opinion that the circumstances in the matter are appropriate and, provided the other requirements are met, the summary judgment granted *in casu* in contradistinction to a default judgment may also be set aside in terms of the said rule.

[22]. In terms of Rule 31(2)(b) and the common law, the court has a discretion, upon good cause shown, to set aside a default judgment. 'On good cause shown', and the requirements for an application for rescission have been stated to be as follows:

(a). The applicant must give a reasonable explanation for his default. If it appears that his default was wilful or that it was due to gross negligence, the court should not come to his assistance.

(b). His application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.

(c). He must show that he has a *bona fide* defence to plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He needs not deal fully with the merits of the case, and produce evidence that the probabilities are actually in his favour.

[23]. The authority for the aforegoing trite legal principle is *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (0), which has been confirmed by numerous subsequent cases.

[24]. Generally, an applicant will establish good cause by giving a reasonable explanation for his default and by showing that he has a *bona fide* defence to the claim of the respondent which *prima facie* has some prospect of success.

[25]. As regards the defendant's explanation for its default judgment, I am of the view that in its founding affidavit the defendant gave a satisfactory explanation. As indicated above, the attorney designated at the attorneys of record of the defendant to deal with this instruction neglected the matter. This was probably due to the fact that he was in the process of emigrating at the relevant the relevant time. He did not give the matter the necessary attention and allowed the application for summary judgment to be granted by default and without notifying the defendant of the said application. The said attorney had in fact caused notice of appearance to defend to be delivered on behalf of the defendant, but failed to oppose the application for summary judgment on the 14th of January 2019.

[26]. The simple fact of the matter is that the defendant was blissfully unaware that the application for summary judgment had been served on its legal representatives. Notice of the service of such application was not brought to its attention, hence its default. It only became aware of the summary judgment *ex post facto* on the 28th of January 2019.

[27]. I am satisfied that the defendant has proffered an acceptable explanation for its default. In any event and however one views this matter, the defendant has furnished an explanation for the default, an even is such explanation was not reasonable, it would not have made a difference, in my judgment, to the final outcome of the application for rescission. That is so because a 'weak' explanation can and should be complemented by a 'strong' *bona fide* defence.

[28]. So for example Miller J in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) had the following to say:

'It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. Any ordered 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 judgment against him rescinded on the ground that he had reasonable prospects of success on the merits'

[29]. The defendant also applied for condonation for the late filing of the application for rescission, which was lodged only on the 27th of May 2019, despite the fact that the notice of the judgment came to its attention on the 28th of January 2019. Therefore, there appears to be an undue delay of about four months in the filing of the application for rescission – the uniform rule requires that the application be delivered within twenty days from the date on which the judgment debtor received knowledge of the judgment.

[30]. The defendant's explanation for the delay relates to the fact that, with its attorney's departure from South Africa and from the firm of attorneys representing it, the said firm was required to transfer the matter to another attorney in the firm. Once the new attorney had been appointed, the defendant was required to gather the necessary data and particulars so that it could instruct its legal representatives to formulate the defence, whereafter the papers were drawn up.

[31]. There existed a dispute between the defendant and the plaintiff, so the defendant's explanation continued, as to the amount of blasting which was undertaken by the respondent and whether the blasting conformed to the requirements of the agreement. A reconciliation of the amounts paid to the plaintiff as compared to the blasting undertaken by it was also required to be undertaken. It was therefore necessary for the purposes of launching the rescission application for the defendant to undertake a search for the documentation required for the purposes of the rescission application. This, so the defendant contends, is a reasonable explanation for the delay and for its non-compliance with the time period of twenty days prescribed by rule 31(2)(b) for the delivery of an application for rescission.

[32]. The explanation for the delay appears to be a *tad* light on the detail. However, in the bigger scheme of things, the said explanation may very well be tenable. Moreover, in the context of applications for condonation it is trite that an important consideration in deciding whether or not to grant such condonation is the applicant's prospects of success as regards the main application, which, in this case, is the application for rescission.

[33]. I am of the view that the applicant did not delay, more than was reasonable, the launching of the application for rescission following the granting of the judgment. Furthermore, in view of my findings relating to the prospects of success of the main application for rescission, I am of the view that the condonation should be granted.

[34]. That brings me to the most important issue before me, that being whether or not a triable issue has been raised by the defendant. In sum, the defendant disputes liability for the judgment debt on the following bases: Firstly, it alleges that it had paid to the plaintiff in total an amount of R1 189 549.63 and to date of its founding affidavit the defendant was able to identify payments totalling R745 000. In this application the evidence in support of this averment by the defendant is wholly unsatisfactory especially in the face of the contents of the agreement of acknowledgment of the 20th of July 2017. The plaintiff, on the other hand contends that the defendant had paid to it R355 000 for services rendered pursuant to the agreement. This claim by the plaintiff appears to be supported by the said agreement. On the other hand though the email from the Mr Tibane affords some corroboration for the defendant's version that the account would still have been reconciled. All things considered, I accept that on this issue the defendant has raised a triable issue. I do not think that the defendant's version on that aspect, even with its flaws, can and should be rejected out of hand.

[35]. Secondly, the defendant alleges that the plaintiff had breached the agreement by its defective and late performance, which resulted in the defendant suffering damages, which it intends counterclaiming from the plaintiff in the main action. The plaintiff disputes this.

[36]. The question therefore is whether the application for rescission of the judgment should be granted on the basis that the defendant established a *bona fide* defence. In relation thereto, see *Grant v Plumbers (Pty) Ltd* (supra) at 476 and *Chetty v Law Society* (supra) at 764I-765H. In my judgment, that question should be answered in the affirmative. As I have already indicated, the defendant has raised issues which are triable and that is so despite the fact that its case in this application has a number of notable defects, not the least of which is the dearth of particulars and details relating to those defences.

[37]. I am therefore of the view that the defendant has complied with all of the requirements for the granting of an order for the rescission of the default judgment.

[38]. The application for rescission should therefore succeed.

Costs

[39]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[40]. In this matter the defendant is the party asking for an indulgence from the court and it should therefore bear the cost of the application for rescission, at the very least the cost of the application on an unopposed basis. The defendant however contends that the plaintiff was unreasonable in opposing the application and should therefore bear the costs of opposing the application. I disagree. I have alluded *supra* to the fact that the evidence in support of the defendant's application, whilst entitling the defendant to a rescission, was unsatisfactory in a number of respects.

[41]. The ruling on the viability of the defendant's defence on paper may very well have gone against the defendant if more particulars had been furnished to the court by the defendant or, for that matter, by the plaintiff in its answering affidavit. It would therefore be innately unfair to grant a cost order at this stage against any of the parties. Who is wrong and who is right in this application for

rescission? This question cannot be answered definitively at this stage. The answer to the question will only accurately present itself after all of the evidence have been heard and a judgment given on the merits of plaintiff's claim.

[42]. In the exercise of my discretion, I therefore intend ordering the costs of this application for rescission to be in the course of the main action. Such an order, in my view, is just, fair and in the interest of justice.

Order

In the result, I make the following order:

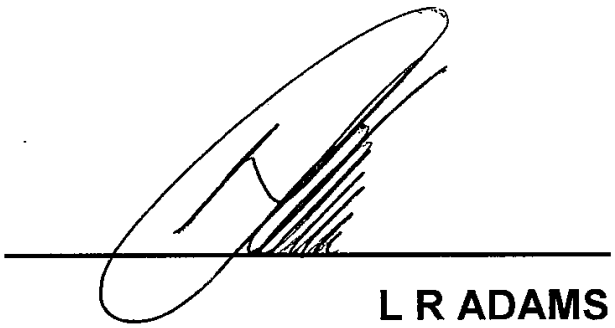
(1) The defendant is granted condonation for the late filing of its application for rescission.

(2) The defendant's application for rescission succeeds.

(3) The summary judgment granted by default by this court on 14 January 2019 is rescinded and set aside.

(4) The defendant shall deliver its plea and counterclaim (if any) within twenty days from date of this order.

(5) The costs of the application for rescission shall be in the course of the main action.



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	22 April 2020
JUDGMENT DATE:	28th April 2020
FOR THE PLAINTIFF:	Mr M W Sekgatja
INSTRUCTED BY:	Radasi Sekgatja & Associates Incorporated, Johannesburg
FOR THE DEFENDANT:	Adv C Gibson
INSTRUCTED BY:	Cuzen Randeree, Johannesburg