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

CASE NO: 8553/2019

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED YES/NO
28/8/2020

In the matter between:

RIEKS TOWING (PTY) LTD	FIRST APPLICANT
LOUWRENS RIEKERT SNR	SECOND APPLICANT
And	
WILLEM CHRISTIAAN NIENABER	FIRST RESPONDENT
THE SHERIFF OF THE ABOVE HONOURABLE COURT, TSHWANE NORTH	SECOND RESPONDENT

JUDGMENT: APPLICATION FOR RESCISSION OF JUDGMENT

VUKEYA AJ

[1] This is an application for rescission of a judgment granted by default against the First and Second Applicants in favor of the First Respondent on 05 June 2019. The Applicants approach this court for relief in the following terms:

> *1.1 That the order granted on 05 June 2019 under Case Number 08553/2019 by the Honorable Justice Siwendu, be rescinded or set aside;*
>
> *1.2 That the Warrant of Execution issued by the Registrar of this Court under the same Case Number be rescinded and set aside;*
>
> *1.3 That the removal of any assets /items in the Warrant of Execution referred to above and/or itemized in the Sheriff's inventory, be suspended pending the finalization of the Rescission Application;*
>
> *1.4 That the Applicants be granted condonation to institute and prosecute the Application;*
>
> *1.5 That the Costs of this Application be costs in the cause, unless any Party elects to oppose the relief sought herein, in which event, costs will be sought against such an opposing Party.*

[2] The Parties are at loggerheads with each other because of an oral Lease Agreement which, according to the Respondent, was concluded between him personally and the Applicants. The alleged Lease Agreement was in respect of a property described as Remaining Extent [....] of Ponoma Estate Agricultural Holdings, Pomona Kempton Park, situated at [....] Hawthorne Avenue, Pomona, Kempton Park.

[3] It is common cause that the First Applicant was to act as the Lessee in respect whereof it would pay for occupation and rent in the amount of R25 000, 00 per month. It was disputed that the Agreement was to be cancelled on a month's written notice however the plaintiff avers that he gave a month's notice that the premises would be vacated by Rieks Towing in April 2018.

[4] The Applicant alleges that the indebtedness claimed accrues from outstanding invoices for the period December 2016 to March 2019 in the amount of 350 000, 00. It also relates to unpaid invoices for the period 1 April 2018 to 1 March 2019 amounting to 300 000, 00 plus a claim for refuse removals and water and sewerage fees.

[5] On or about 05 June 2019 the matter was placed on the Roll for hearing and the Applicants went to Court on that day seeking a postponement of the main Application. When their Application for a postponement was refused the First Respondent (Applicant in the main Application) obtained an Order by Default against the Applicants.

[6] The Honorable Justice Siwendu granted an Order against the Applicants, in the following terms:

> *1. Payment in the sum of R350 000, 00 (Three Hundred and Fifty Thousand Rand), in respect of arrear rent; and*
>
> *2. Payment in the sum of R5 646.15 (Five Thousand Six Hundred and Forty Six rand and fifteen cents) in respect of outstanding refuse removal and water sewerage (sic) account;*
>
> *3. Interest on the aforesaid sum at the prescribed rate of interest, a tempora morae calculated from 06 March 2019 to date of payment, both days inclusive;*
>
> *4. Costs of the Application on an Attorney Client scale.*

[7] It is important to note at this stage that rescission of judgment has been conceded by the First Respondent in respect of the Second Applicant. The First Respondent only seeks a punitive cost order against the Second Respondent for launching the Application.

[8] After the Judgment was obtained against the First and Second Respondents, it took them eight (8) months to bring an Application for rescission of judgment and this, according to the First Respondent, was after the Sheriff attended to their property to remove attached assets.

[9] The Applicants state that they bring this Application in terms of rule 31 (2); alternatively Rule 42; and alternatively, the common law.

[10] The provisions of Rule 42 (1) are as follows:

> *"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:*
>
> *An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
>
> *An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
>
> *An order or judgment granted as a result of a mistake common to the parties".*

[11] And Rule 31 (2) (a) provides that:

> *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 sub-rule (4) for default judgment and the court may, after hearing the evidence, grant judgment against the defendant or make such order as to it seems meet.*
> *b) A defendant may within 20 days after he has 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 to it seems meet.*

[12] It is clear from the above that Rule 32 (2) (a) and Rule 42 have no application in the present matter because the judgment was not granted erroneously against the Applicants or as a result of a mistake common to both parties and neither is there an ambiguity, or a patent error or omission in the granting of the judgment. It is common cause that the judgment was obtained in the absence of the Applicants because on the date of the hearing, 05 June 2019, the First and Second Applicants only sent counsel to seek a postponement and when their Application was unsuccessful, the First Respondent obtained judgment against them. Judgment was obtained against the First and Second Applicants by default and therefore, I will deal with the Application for Rescission of the judgment in terms of the common law.

[13] When bringing an Application for rescission of judgment in terms of the common law, the applicable principles are clearly set out in Erasmus (B1 – 307) as follows:

> *"at common law a judgment can be set aside on the following grounds: fraud, Justus error (on rare occasions), in certain exceptional circumstances when new documents have been discovered, when judgment had been granted by default and, in the absence between the parties of a valid agreement to support the judgment, on the grounds of Justus causa"*

[14] In *Vilvanathan and another v Louw NO* 2010 (5) SA 17 (WCC), it was held that:

> *"The Appellate Division and the Supreme Court of appeal have laid down that at common law 'it is clear that in principle and in the long standing practice of our courts' that there are two 'essential elements of "sufficient cause" for rescission of a judgment by default'.*
> *These* are – *That the party seeking relief must present a reasonable and acceptable explanation for his default; and*
> *That on the merits (i.e. of the action) such party has a bona fide defence which, prima facie, carries some prospect of success.*
> *Both these elements must be present".*

[15] The Court has discretion, at common law, to set aside or rescind a judgment obtained by default if sufficient cause or good cause has been shown. In *Chetty v Law Society, Transvaal* [1985] 2 ALL SA 76 (A) sufficient cause was said to include a reasonable and accepted explanation for the default and that on the merits the party has a bona fide defence which carries prima facie prospects of success. See also *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411(C) at page 417. In *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 354 (A) at 352 – 353A it was held that the explanation for the default must be sufficiently full to enable the court to understand how it came about and to assess the Applicant's conduct and motives.

[16] The Applicants state in an affidavit deposed to by Louwrens Riekert that they were not in willful default. Counsel had been briefed on 05 June 2019 to seek a postponement of the main Application and when a postponement was refused default judgment was granted. The Applicant's new attorneys of record requested a transcription of the proceedings during August 2019 and in September they received an incomplete transcription. Their Attorneys again requested another transcription which unfortunately, they never received. A follow up was made during December 2019 and in February 2020; the transcript had still not been received. These hiccups made it impossible to be advised whether to take the judgment on appeal, or whether to apply for rescission of the judgment. The Applicants submitted that the delay is not undue; and further that they have a bona fide defence which should justify the setting aside of the judgment.

[17] The First Respondent submits that the Applicants have failed to explain in detail the delay and that their reliance on the inability to obtain the transcribed record is insignificant because the record was not necessary for purposes of applying for rescission of judgment. According to the First Respondent, the Applicants failed to deal with the delay between 5 June 2019 and 16 August 2019 when they first requested for the transcript; they also failed to explain the delay between 06 September 2019 and 04 December 2019 and the delay between 4 December 2019 and 7 February 2020.

[18] The First Respondent argues that the current application was only prompted when execution was pursued by the First Respondent and that the First Applicant's failure to answer to the merits of the main Application is an indication that the Applicants are employing delaying tactics pointing at the absence of bona fides.

[19] In *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) Brink J held that in order to show good cause an Applicant should comply with the following requirements:

a) He must give a reasonable explanation of his default;
b) His application must be made bona fide;
c) He must show that he has a bona fide defence to the plaintiff's claim.

[20] It is clear from *Chetty v Law Society(supra), Transvaal; Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others (supra)* that in terms of common law Rescission Applications, the Court has a wide discretion in determining whether the Defendant has given a reasonable explanation for his default, and it is also accepted that "good cause and sufficient cause are used interchangeably". The First Respondent's contention is that the Applicants have failed to satisfy the requirements in *Grant v Plumbers* as they have not shown sufficient cause for the granting of the Application and their Application is not bona fide.

[21] It is common cause that the Rescission Application was instituted approximately 8 months after judgment was obtained. It can be reasonably concluded or presumed that the Applicants became aware of the judgment obtained against them on the same day of the judgment being granted. Such can be deducted from the explanation that Counsel went to court on 5 June 2019 to ask for a postponement which was refused. The applicants explain how they went through a string of attempts to get the record transcribed without success. The explanation given is that they were waiting for the transcript in order to decide whether they would appeal the judgment or whether they were going to bring a Rescission Application.

[22] Except for stating that their new Attorneys requested a transcription of the record on 16 August 2019, the applications have given no explanation regarding the

dates from 05 June 2019 to 16 August 2019; 06 September 2019 and 04 December 2019 and the delay between 4 December 2019 and 7 February 2020. During the period between 05 June 2019 and 16 August 2019 the Applicants should have opted to apply for a rescission of the judgment even without the transcripts because all they needed to do was to show that they were not in willful default; their application was bona fide and that they had a bona fide defence to the claim like they did eight months later.

[23] I am inclined to agree with the First Respondent that the Application was prompted by the Warrant of Execution and the attachment of the property of the Applicants by the Sheriff. The Applicants did not show much enthusiasm to pursue the Application for rescission of judgment and they showed a certain level of laxity until the Applicant set the writ in motion. The First Applicant submitted that in order to show that his Application is bona fide, he tendered to pay the entire judgment debt into a trust account of his Attorney so as to furnish security for the claim but the First Respondent refused the offer. In my view, that should have been done soon after the Applicants learned of the judgment granted against them then pursue the Application.

[24] The Applicants relied on the following defences to show that they have a bona fide defence to the plaintiff's claim

> 24.1 *The First Respondent does not have the necessary locus standi in iudicio to institute the main application.*
>
> > 24.1.1 According to the Applicants, the Lease Agreement was not concluded with the First Respondent in his personal capacity, it was in fact concluded with the First Respondent's daughter and the First Respondent only acted in a representative capacity. In response to the above defence is that the Respondent submits that it has been the First Respondent's version from the beginning that his daughter Linda Nienaber is the registered owner of the immovable property and that she provided him with the right and authority to use and lease the property at his absolute discretion. It is also the Respondent's version

that invoices were rendered in the name of the First Respondent and monies paid for rental were also paid in the First Respondent's personal account. The Applicants have chosen to ignore this averment in the founding affidavit of the First Respondent and argue that there is some confusion regarding the identity of the lessor.

24.1.2 It is trite that a party who institutes proceedings must allege and prove its *locus standi* and the onus of establishing that onus rests on that particular Applicant. The First Respondent is the Applicant in the main Application and avers that from the beginning he disclosed that his daughter is in fact the registered owner of the property but that he had the right to use and lease the property at his absolute discretion. In order for a litigant to have *locus standi*, such litigant must have a direct and substantial interest in the subject matter of the proceedings. It cannot therefore be validly argued that because the First Respondent is not the registered owner of the property then he does not have *locus standi* even though he has a direct and substantial interest in the matter by virtue of the rights conferred upon him by his daughter. I find that the Applicant's locus *standi defence* is not a *bona fide* defence.

24.2 *The indebtedness claimed in respect of the lease agreement is not due, owing and payable;*

24.2.1 The Applicants allege that the Agreement was cancelled in March 2018 where after the Applicants vacated the premises allegedly during April 2018; alternatively, the First Applicant no longer occupied the leased premises as of December 2018 and at best, the First Respondent could only claim for 8 months' arrear rental (although the applicants do not concede to these) as opposed to the 14/22 months claimed by the First Respondent. Regarding the second defence of the Applicants i.e. cancellation of the agreement by the Second Applicant on behalf of the First Applicant, the First Respondent submits that the Applicants have failed to state how,

when and where the conveyance of the cancellation took place. As a result, the cancellation defence is to be found to be vague, laconic and evasive, confirming the absence of bona fides on the part of the Applicants. According to the Respondent, the Applicants remained in occupation of the property until December 2018.

24.2.2 In Joob Investment v Stocks Mavundla Zek 2009 (5) SA 1 (SCA) Van Loggernberg J stated that:

> *"all that the court enquires, in deciding whether the defendant has set out a bona fide defence, is (a) whether the defendant has disclosed the nature and grounds of his defence; and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law".*

24.2.3 The Applicant has disclosed the nature and grounds of his defence and such facts, in my view, do set out the facts upon which the Applicant relies. The fact that the Respondent disagrees with the Applicant only confirms that there is a clear dispute of facts which can only be cleared by going to trial. I am convinced that there is a reasonable possibility that the Applicant's defence of cancellation may succeed on trial.

24.3 The actual terms of the oral agreement between the parties are not common cause; therefore the true extent of the parties' rights and responsibilities can only be established if the terms are established. The Applicants submit that there is a dispute of facts herein.

24.3.1 It is the Applicants' defence that the amount claimed for outstanding refuse removals and water sewerage account, is an obligation for which no legal basis exist as it was never a term of the agreement that those amounts be paid by the First Applicant. According to the Respondent, the Applicants have made incorrect

assertions, misconstrued facts and provided the court with a version that is riddled with falsities and such a version stands to be rejected.

24.3.2 If a verbal agreement has been concluded between parties, it is often very difficult to prove the terms of such a contract. Both parties may agree that there is indeed an agreement, albeit verbal, but may disagree on its terms. Often the parties will aver that the one party is misrepresenting facts or is making incorrect assertions. Indeed so, such incorrect assertions can be cleared through cross examination in a trial. The Applicants have presented a defence which is valid in law. They deny that they had an obligation in terms of the agreement to pay for refuse removals which the Respondent has claimed for. This again confirms a clear dispute of facts and I find that it is a bona fide defence.

[25] It is trite that in cases such as these, an Application who seeks an indulgence from the Court for his default, must give a full and satisfactory explanation for whatever delays have occurred and such explanation must cover the entire period of delay. See *Ferreira v Ntshingila* 1990 (4) SA 271 (A) and *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC)

[26] In my view the Applicant failed to give an explanation to cover the whole period of his default. The explanation given that the applicants were waiting for the transcribed record of the proceedings of the 5th of June 2019, does not cover fully the period of the delay, especially the period between 05 June 2019 and 16 August 2019. The explanation does not also carry much weight in favor of the applicants because the order would have been obtained by presenting to the court facts contained in the main Application, nothing more and nothing less. I therefore find that the First Applicant has failed to give a reasonable explanation for his default.

.

[27] In *Zealand v Malborough* 1991 (4) SA 836 (SECLD) at 838 D the following remark was made by Jones J:

> *"A measure of flexibility is required in the exercise of the court's discretion. An apparently good defence may compensate for a poor explanation…"*

[28] The reasons for the default should not be looked at in isolation, but must also be viewed in light of the nature of the defence relied on. The circumstances of the case as a whole also play a role in making a determination whether the Applicant has shown good cause for the granting of rescission. This is one of those cases where the First Applicant has failed to explain sufficiently its default but has good defences to the Respondent's claim. I have no doubt that from the beginning the Applicants intended to apply for rescission of judgment in order to defend the main Application but they were lax and dragged their feet probably with the hope that the First Respondent would not obtain a warrant of execution against their property.

[29] In *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at para [10] and [11] it was held that:

> "*A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation. Instead the explanation, be it good, bad or indifferent, must be considered in the light of the nature of the defence, which is an important consideration and in the light of all the facts and circumstances of the case as a whole"*

[30] I exercise my discretion and conclude that despite the fact that the applicants did not fully explain the delay as required, they have good defences in law. Having accepted that the Applicants have good defences to the Respondent's claim I am also of the view that there is a clear dispute of facts between the parties and that the Applicant has shown good cause for the granting of rescission.

Application to strike out

[31] With the Application for rescission of judgment also came an Application by the First and Second Applicants to strike out certain paragraphs in the Respondents' Answering affidavit in terms of Rule 6 (15) of the Uniform Rules of Court on the grounds that such are irrelevant, alternatively scandalous, further alternatively

vexatious as they include hearsay evidence which is not confirmed or substantiated by confirmatory affidavits.

[32] Rule 6 (15) of the Uniform Rules of Court provides that:

> "*The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted"*

[33] There are two requirements to be satisfied before the Court can grant the striking out of any matter from an affidavit and these are:

1. The matter to be struck out is scandalous, vexatious or irrelevant;
2. The applicant must satisfy the court that he will be prejudiced if the matter is not struck out.

(See *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733 –B)

[34] The Applicant avers that the paragraphs listed in the Rule 6 (15) application stand to be struck out as the utterances such as that the applicant lied under oath are a personal attack on the Second Applicant; some are repetitive in nature and contain arguments utilizing vindictive, intimidatory and vexatious language and therefore they stand to be struck out with costs against the Respondent.

[35] The Respondent submitted that allegations of untoward conduct, dishonesty and the abusive nature of the Application are relevant as to the bona fides of the Applicants. They are an integral element of any rescission application which have to be taken into account in determining the Application. According to the Respondent, none of the alleged offensive paragraphs constitute hearsay evidence as alleged by the Applicants and therefore the Application to strike out stands to be dismissed with costs.

[36] The Applicant prays for the striking out of paragraphs 21; 24 -27; 31 – 38; 44-45; 53 – 56; 59; 61; 63; 72; 76; 83; 85; 91; 93; 94; 97 – 112 of the Respondent's

Answering Affidavit. Except for generally pointing out that these paragraphs must be struck out for the reasons mentioned above, the applicant does not particularly mention the cause of concern for each one of them.

[37] What stands out from rule 6 (15) and the most important consideration is whether the Applicant will be prejudiced in his case if the offending paragraphs are allowed to stand. First the Court must find whether these paragraphs are indeed scandalous vexatious and irrelevant as alleged by the Applicant.

[38] Scandalous matter was defined as allegations which may or may not be relevant but which are so worded as to be abusive or defamatory and Vexatious matter are allegations which may or may not be relevant but are worded as to convey an intention to harass or annoy. Irrelevant matters are allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter. (See *Tshabalala-Msimang v Makhanya* [2007] ZAGPHC 161; [2008] 1 ALL SA 509 (W) at 516; *Breedenkamp v Std Bank of South Africa* 2009 (5) SA 304 GSJ at 321 C-F).

[36] I am not persuaded that paragraphs 24 -26; 31 – 37; 44 – 45; 53; 55; 61; 63; 72; 83; 85; 91; 93; 94; 97; 98; 101 – 112 contain any matters that are scandalous, vexatious or irrelevant to the issues in this case. The statements made by the Respondent in the above paragraphs are fair and essential in the conduct of his case. I therefor exercise my discretion to refuse the Application to strike these particular paragraphs out.

[37] I find paragraphs 21; 27; 38; 54; 56; 59; 76 and 100 to be scandalous and vexatious because they in general insinuate an element of dishonesty on the part of the Applicant and that they are abusive in nature as they also suggest that the Applicant pays no heed to the oath. I find that these statements are prejudicial to the applicant in that he is already depicted as a person who is not trustworthy and who lacks credibility even before credibility findings are made in a Court of law. These paragraphs are struck out by reason of being scandalous and vexatious.

[38] In the circumstances I make the following order:

38.1. The Judgment granted against the First and Second Applicants on 05 June 2019 under case number 08553/2019 is hereby rescinded;

38.2. The warrant of execution issued by the registrar of this Honourable Court under case number 8553/2019 is hereby rescinded and set aside;

38.3. The removal of any items /assets in the warrant of execution referred to above, itemized in the Sheriff's inventory is hereby suspended;

38.4. The Applicants are granted condonation to institute this application;

38.5. The application to strike out is partially granted and partially dismissed, as per paragraphs 36 and 37 of this judgment.

38.6. The Applicants shall pay the costs of the Rescission application and such costs shall exclude costs for the Rule 6 (15) application, for which the court orders that each party pays its own costs.

VUKEYA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION - JOHANNESBURG

Heard: 28 July 2020
Delivered: August 2020

Appearances:
Counsel for the Applicants: J De Beer
Applicant's Attorneys:
Couzyn Hertzog & Horak
Brooklyn

Pretoria
E-mail: oosthuizen@couzyn.co.za
Ref: Mr Oosthuizen/ ME/R364

Counsel for the respondents: Van der Merwe

First Respondent's Attorneys:
Minnie and Du Preez Inc
Tel: 012 391 0871/3
C/O Legal Serve centre
Johannesburg (North Office)
Charmaine Girbens Attorneys
Tel: 011 333 1054
Mobile: 074 543 7552
Email: marius@minnieattorneys.co.za