REPUBLIC OF SOUTH AFRICA

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

CASE NO: 23359/2018

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

13 MARCH 2020 **N ADAM**

In the matter between: -

SOUTH AFRICAN MUNICIPAL WORKERS UNION **APPLICANT**

and

PAMBILI DOCUMENT SOLUTIONS (PTY) LTD **FIRST RESPONDENT**

SUNLYN RENTALS (PTY) LTD **SECOND RESPONDENT**

JUDGMENT

ADAM AJ:

[1] This is an application in terms of the provisions of rule 42 of the uniform rules of court, alternatively, in terms of the common law, to rescind the judgment and order

granted by default on 23 October 2018. The applicant contends that the first respondent did not disclose all material facts of the matter to the court and was not entitled to the judgment.

The applicable legal principles

[2] The general rule, in the words of Trollip JA in *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306H, is that once a court has duly pronounced a final judgment or order, its jurisdiction in the case has been fully and finally exercised and has ceased. A court can rescind its own judgment only if all the requirements for a rescission in terms of the common law, rule 42(1) or rule 31(2)(b) are present. This application was launched outside the time limits of rule 31(2) and there is no application for an extension of those time periods. The application will therefore be dealt with in terms of rule 42(1) and the common law.

Rule 42(1)

[3] Rule 42(1) provides that this court may, in addition to other powers it has, upon the application of an applicant rescind or vary a judgment on three separate and distinct grounds. These grounds are stipulated in the sub rules 42(1)(a), 42(1)(b) and 42(1)(c). The applicant does not indicate in the founding affidavit which sub rule it relies on. However, based on the contention that the first respondent "did not disclose all material facts of the matter to the court" together with brief reference to 42(1)(a) in its heads of argument as well as my interpretation of rule 42(1)(a) this is the only sub rule of rule 42 that would be applicable.

[4] In terms of rule 42(1)(a) the court may upon application rescind a judgment or order erroneously sought or erroneously granted in the absence of the party affected thereby. A judgment has been 'erroneously sought or erroneously granted' if there was a fact of which the judge was unaware, which would have precluded the granting of the judgment; or a fraud was committed by the deliberate misrepresentation of the facts (*Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 (GNP)). Neither of these situations are present in this application. In the circumstances, the application fails under rule 42(1)(a).

The common law

[5] The common law empowers the court to rescind a judgment obtained by default of appearance. For a rescission of a default judgment to be considered in terms of the common law, the court must be satisfied that 'sufficient cause' therefore has been shown. Miller JA held that in principle and in the long-standing practice of our courts two essential elements of 'sufficient cause' for the rescission of a judgment by default are (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and (ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success (*Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) from 764 J). He went on to state that:

> "..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. And 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 has reasonable prospects of success on the merits."

Explanation for default

[6] Mr S Mathe (the General Secretary of the applicant), on behalf of the applicant, states that he instructed his Deputy General Secretary, Mr Moses Miya who was part of the initial communication and dealings with the first respondent to determine the amounts due and payable to the first respondent. He confirms that the summons was served on the applicant on a Mr B Maphisa who immediately delivered the summons to Mr Moses Miya to handle the matter further based on the fact that he was the official assigned to resolve the matter. A confirmatory affidavit from Mr Maphisa confirms this. It is further stated that Mr Moses Miya was suspended in September 2018. The applicant has not provided an explanation for the period from June 2018 until September 2018 when Mr Moses Miya was placed on suspension. The court is left with no explanation for the default. I am unable to find in the founding affidavit, or elsewhere, any reasonable or satisfactory explanation of the applicant's default and failure to offer any opposition to the summons. In the circumstances, and absent an explanation to the contrary, I am of the view that the applicant was in wilful default.

[7] Mr De Haan, on behalf of the applicant referred me to the matter of *Nedbank Limited v Sipho Albert Mziako* (1010/09) [2010] ZANWHC 45 (28 December 2010) where the Court said:

> "In deciding whether the reason for the default is reasonable and acceptable the courts usually have regard to whether the applicant was in wilful default or not. Wilful or gross negligence does not necessarily constitute an absolute bar to the grant of

rescission; it should rather be a factor, albeit a weighty one, to be taken into account, together with the merits of the defence raised to the plaintiff's claim in determining whether sufficient cause for rescission had been shown."

[8] Bearing this in mind, the defence raised by the applicant must be considered.

The applicant's defence

[9] The applicant states that there was a finance agreement structured in the form of a rental agreement as well as a service and maintenance agreement concluded. It is further alleged that ownership of all 57 copiers passed to the applicant on payment of the amount financed by the second respondent. He further states that the first respondent did not disclose to the court that the term of the maintenance agreement was 48 months and not 60 months, which affects the amount the first respondent is entitled to claim in the particulars of claim. It is also alleged that the rental agreement was between the applicant and the second respondent and such rental was payable to finance the amount financed for the purchase of the copier machines. In the circumstances, the applicant asserts that the right to collect rental did not pass from the second respondent to the first respondent.

[10] On the other hand the first respondent (in paragraph 6.1 of its answering affidavit) states that the Master Rental Agreement was held with the second respondent and ownership was reserved in favour of the second respondent. The first respondent continues (in paragraph 6.2 of the answering affidavit) by saying that it acquired ownership of the machines in terms of clause 1 of the addendum to the Supply Agreement. The first respondent further states that the applicant did not become owner of any of the machines and challenged the applicant to refer to a

provision in the agreements that provided otherwise. The applicant did not file a replying affidavit and has failed to respond to the challenge raised by the first respondent. The court is unable to make a finding on the ownership of the 57 machines. In any event, the first respondent asserts that ownership does not provide a defence to the payment claimed in terms of the S & M agreement.

[11] Counsel for the applicant referred to *Grant v Plumbers (Pty) Limited* 1949 (2) SA 470 (O) at 476 where the Court held that:

> "An applicant who claims relief under this rule, should comply with, inter alia, the following requirements. His application must be bona fide and not made with the intention of merely delaying plaintiff's claim and he must show that he has a bona fide defence to the 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 need not deal fully with the merits of the case or produce evidence that the probabilities are actually in his favour."

[12] In addition to the defence as stated above, the applicant indicates that at the time of removal of the copiers from its premises each machine was valued at R80 000.00 and as a result the applicant intends to raise a counterclaim of R1 840 000.00 against the first respondent.

[13] In *Hassim Hardware v Fab Tanks* (1129/2016) [2017] ZASCA 145 (13 October *2017) it was held:*

> "Where a counterclaim is raised as a defence, rule 22 (4) becomes part of the broader consideration of good cause and one of the questions that occupies the court's mind is whether the claim in convention and re-convention ought to be adjudicated upon in the same hearing. Without in any way limiting the wide discretion allowed to a court when

considering rule 22 (4), the following remarks made by the court in Vaughan and Co Ltd v Delagoa Bay Engineering Co Ltd are apposite :-

'of course there are cases, such as for instance, where, in answer to a bill of exchange, the defendant sets up a libel action, having nothing to do with it, in which the magistrate would exercise his discretion in not refusing to stay the action, but, in a case like the present, where the claim in reconvention, the counterclaim, arises out of the very contract on which the claims in convention are based, it does seem to me it would be unjust to require those matters to be debated in two separate actions into separate courts.'

...an applicant need not deal fully with the merits of the case and produce evidence that shows that the probabilities are in its favour. That is the business of the trial court. The object of rescinding a judgement is to restore the opportunity for a real dispute to be ventilated."

[14] In the circumstances, I am of the opinion that taking into account the averments set out above, if established at the trial, this would entitle the applicant to the relief asked for. Bearing in mind the *Nedbank v Mziako* matter above, I intend to rescind the judgement and restore the opportunity for the dispute to be ventilated notwithstanding the lack of a reasonable explanation for the default.

Costs

[15] This is a matter in which, despite the applicant's success to rescind the default judgement granted against it, the indulgence sought from the court and the applicant's conduct to date justifies an adverse cost order. The applicant has unreasonably dragged its feet and delayed the finalisation of this matter. The default judgment was obtained in October 2018 and the Sheriff attended at its premises to attach goods to satisfy the judgment on 20 November 2018. On 6 December 2018 the Sheriff attended at the premises to remove the attached movables and he was

informed that they intended to launch this rescission application. The rescission application was only initiated on 11 March 2019, almost 5 months after the default judgment was granted. Subsequent to the delivery of the first respondent's answering affidavit, the applicant has to date omitted to file a replying affidavit. The first respondent delivered its heads of argument on 24 May 2019 and brought an application to compel the applicant to deliver its heads of argument on 18 July 2019. The applicant eventually advised that its heads of argument had been filed but on the initial date of set down on 21 October 2019, the matter had to be removed from the roll as the applicant's heads of argument were not in the court file. The first respondent has suffered immense prejudice due to the applicant's conduct.

[16] In *Myers v Abramson* 1951 (3) SA 438 (C) at 455 the court held:

> "It does not appeal to me as being fair and reasonable that the opponent to an applicant for an indulgence should be put in a position that he opposes the granting of the indulgence at his peril in the sense that if the amendment is granted he cannot recover his costs of opposition or may even have to pay such costs as are occasioned by his opposition. It seems to me that the applicant for the indulgence should pay all such costs as can reasonably be said to be wasted because of the application, these costs to include the costs of such opposition as is in the circumstances reasonable, and not vexatious or frivolous."

Order

The following order is made:

1. The default judgment granted by this court on 23 October 2018 under the above case number is rescinded and set aside.
2. The applicant (defendant) is afforded 20 (twenty) days from date hereof to file its plea in the main action.

3. The applicant is to pay the costs of this application as well as all wasted costs occasioned by the rescission of the default judgment, taxable and payable immediately.

N ADAM
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	***ADV L DE HAAN***
APPLICANT'S ATTORNEYS	***MAENETJA ATTORNEYS***
COUNSEL FOR RESPONDENTS	***ADV JP COETZEE SC***
RESPONDENTS' ATTORNEYS	***VILJOEN-FRENCH & CHESTER INC***
DATE OF HEARING	***9 MARCH 2020***
DATE OF JUDGMENT	***13 MARCH 2020***