REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Reportable: No

Of interest to other judges: No

3 June 2021

Case number: 2019/36963

In the application of:

PM Africa Project Management (Pty) Ltd	**First Applicant**
Padayachee, Nalentheren Moonsamy	**Second Applicant**

and

Trencon Construction (Pty) Ltd	**Respondent**

JUDGMENT

Vally J

Introduction

[1] The first applicant applies for the rescission of a default judgment (judgment) obtained from the Registrar of this court. The respondent opposes the application and counter applies for an order against the second applicant. Should it be found that the default judgment is to be rescinded, the counter application of the respondent requires no further consideration.

Facts

[2] On 20 February 2019 the respondent issued summons against the first and second applicants claiming therein that the first applicant was bound by an acknowledgement of debt (AOD) concluded between itself and the first applicant. The AOD records that the first applicant is indebted to the respondent in the sum of R2 187 977.99. It claimed further that the second applicant found himself as surety and co-principal debtor of the debt recorded in the AOD. The AOD was concluded on 20 January 2011.

[3] The summons was not served on the second applicant. It was served on the first applicant per Sheriff on 20 February 2019 at its chosen *domicilium citandi et executandi* (*domicilium*). The return of service (return) records that the summons was served 'by delivering it at the main door'. After recording this the Sheriff remarked:

> 'Kindly note that the undersigned was informed by Mrs Portia, Cleaner that the Defendant left the given address 2013'

[4] The return was served on the *domicilium* five years after the first applicant had vacated it.

[5] No notice of opposition was received from the first applicant. Application for default judgment was made to the Registrar. It succeeded. The default judgment was granted against the first applicant on 29 June 2019. Noting from the return that the first applicant did not operate from the *domicilium* the respondent employed a tracing agent on 4 July 2019 to locate the business address of the first applicant. The tracing agent advised that it operates from [....] T[....] Close, S[....] Gardens, Broadacres (T[....] Close). The second applicant resides at T[....] Close. The respondent instructed the Sheriff on four separate occasions to serve a warrant of execution at T[....] Close on the first applicant, and on each occasion he was unable to do so as the premises were closed.

[6] On 21 August 2019 the judgment came to the attention of the second applicant. On behalf of the first applicant he instructed attorneys to apply to have the

judgment rescinded. The attorneys attempted to locate the court file, but were unsuccessful. Forty-six court days later the first applicant's application for rescission was served on the respondent. The reason given for taking this long for preparing and serving the application was that the attorneys were battling to locate the court file. Only on 20 September 2019 – one month after receipt of the judgment – did they deem it appropriate to call on the respondent's attorneys to forward a copy of the file to them. The first applicant's attorneys only briefed counsel to consider the matter on 3 October 2019, and a consultation with counsel was only arranged for 7 October 2019. Counsel took until 18 October 2019 to settle the application for rescission. The application was eventually filed on 22 October 2019, i.e. two months after the judgment came to the attention of the second applicant. Its contention is that the judgment was erroneously granted in the absence of the first applicant. Realising that it took longer than it ought to bring the application – the application should have been brought within 20 days of the judgment - the first applicant seeks condonation for its delay in bringing the application. This paragraph provides the factual basis for the condonation.

[7] The main ground for seeking rescission of the judgment is that the summons was not received by, nor did it come to the attention of, both applicants. Had they received it, both of them would have filed the necessary papers in opposition. Their opposition, as set out in the founding papers, would have been based on an allegation that there existed an oral contract between the first applicant and the respondent which absolved the first applicant from liability for the debt. In answer to this contention the respondent denied that any such oral contract was concluded. In replying to the denial of the respondent the first applicant attached certain correspondence between the second applicant, acting on behalf of the first applicant, and a Mr Dino Singh (Mr Singh). The correspondence consists of two key emails. The first one was sent by the second applicant to Mr Singh, and the second one is a response thereto from Mr Singh. The first one reads:

> 'Thank you for meeting with me on Thursday, much appreciated. Attached find the Agency agreement for the different opportunities we discussed.
> Please note the following is my thinking;

1. Lakeview Hospital; if we look at 1.5% of est. value at about R 28m, that equates to about R420k. This obviously is inclusive of any future work that we are working on together to get from the same client.
2. Gauteng Schools; if we look at 1,5% of est. Value of about R400m(conservative figure), that equates to about R6m
3. Take 6.42m less what PMA owes Trencon = R1,8m plus another R2m for your very generous help and my thanks to you for believing in me.

I trust that the above is acceptable to you and once again want to express my deepest gratitude to you in the help rendered to me when everything else seem to fail around me.

I will send you the Ethopia one shortly.' (Quote is verbatim).

The second one reads:

'No my man the only I agreed was to think about was R500k Multiplied by 3 which I am still thinking about.' (Quote is verbatim).

[8] The first applicant also supplemented its claim for the rescission by contending that the debt, which it says was no longer in existence because of the oral agreement, nevertheless had prescribed by the time summons was served. It is important to note that the replying affidavit was filed seven months after the answering affidavit was received. There is an application for condonation for its late filing. The explanation given is that the second applicant, who is acting on behalf of the first applicant as well as himself, encountered financial difficulties in paying the legal fees to prosecute the application. He claims that these have now been overcome.

[9] The respondent filed a further affidavit dealing with this new matter in the replying affidavit. The root of its case is that the applicants have no *bona fide* defence to the claim. It points out that the correspondence attached to the first applicant's replying affidavit shows that Mr Singh unequivocally stated that in his view there is no oral contract between the first applicant and the respondent. It also took issue with the applicants raising the defence of prescription for the first time in reply. It correctly pointed out that a party is not entitled to make out a new case in

reply. However, it has filed a further affidavit dealing with the allegations, including the defence of prescription, in the replying affidavit. It says in this regard that prescription, particularly in regard to the second applicant, 'was interrupted in August and/or September 2014.' This is its version on the issue of prescription. In the circumstance it cannot, and rightfully does not, claim to suffer prejudice by the inclusion of the defence of prescription.

Analysis

[10] On the issue of whether there exists an oral contract between the first applicant and the respondent, the respondent is correct in its contention that the correspondence attached to the replying affidavit does not support the applicants' claim that such a contract came to be. The applicants accept that this is so. However, it is important not to lose sight of the fact that the applicants' contention is that there is an oral contract. The documents attached to the replying affidavit merely evidences the fact that the parties were engaged in discussions regarding the liquidation of the debt. The documents do not in themselves prove that such a contract had actually been concluded, nor that it was not concluded. After all, the contract being oral would need to be proven by having recourse to oral evidence from both parties. For purposes of this application the applicants have put up sufficient evidence to show that its defence is *bona fide* and worthy of consideration. The applicants have not merely put it up to escape the consequences of the judgment. They have attached evidence showing that the parties were engaged in discussions regarding the payment of commission to the first applicant for work done by the second applicant, which payment would be set-off against the debt of the first applicant. In the result there is clearly purpose in rescinding the judgment since the outcome of the trial may well be different from the judgment issued as a result of the first applicant's default.

[11] Having found that there is a *bona fide* defence in the form of the existence of an oral contract raised by the applicants, there is no need for me to pronounce on the strength or validity of the defence. What can be said though is that it is not a frivolous one. The contention of the respondent – see [9] above - relies on factual matter that is best explored at trial.

Conclusion

[12] For these reasons, I hold that the judgment should be rescinded and set aside.

The counter application

[13] The counter application can only be considered if the judgment survived this application. Since that has not occurred the counter application stands to be dismissed.

Costs

[14] Both applicants should be liable for the costs of the condonation applications. They also failed to file their heads of argument timeously. The respondent was forced to threaten them with an application to compel them to file their heads of argument. The applicants did not set the matter down. The respondent was forced to do so. In the light of the applicants' conduct, I am of the view that they should be denied their costs for the rescission application. As for the costs of the counter application, these should be for the respondent.

Order

[15] The following order is made:

1. The application for condonation for the late launching of this application is granted.
2. The application for the condonation for the late filing of the replying affidavit is condoned.
3. The first and second applicant are to pay the costs of both applications for condonation jointly and severally the one paying the other to be absolved.
4. The default judgment issued by the Registrar on 29 June 2019 is hereby rescinded and set aside.
5. Each party is to pay its own costs for the rescission application.
6. The counter application is dismissed.
7. The respondent is to pay the costs of the counter application.

Vally J

Gauteng High Court (Johannesburg)

Date of hearing:	24 May 2021
Date of judgment:	3 June 2021
For the applicant:	K Magan
Instructed by:	Soonder Inc
For the respondents:	K Lavine
Instructed by:	Andrew Garrat Inc