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

CASE NO: 2020/18385

(1) **Reportable** No
(2) **Of interest to other Judges** No
(3) **Revised:** Yes

Date:-9/11/2021

Signature.....

In the matter between:

FORMULATED IT GROUP CC Applicant
REGISTRATION NO: 2008/005399/23

And

NORTH GAUTENG MENTAL HEALTH SOCIETY Respondent

JUDGMENT

MAIER-FRAWLEY J:

1. The applicant applies for rescission of a default judgment granted against it (as respondent) in the urgent court on 12 August 2020. The respondent, in

whose favour the order was granted, opposes the relief sought. The parties will be referred to in this judgment as cited in these proceedings.

2. At the outset, I note that the applicant chose not to file a replying affidavit in the matter. Accordingly, the facts set out in the respondent's affidavit remained unchallenged and unrefuted. In terms of the principles applicable to motion proceedings, the evidence is to be approached on the basis of the *Plascon-Evans* rule.[1] This means that absent a finding that the averments in the respondent's answering papers are so palpably far-fetched or so clearly untenable that they warrant rejection merely on the papers, the matter has to be decided on the common cause facts and on the respondent's version.[2]

3. It is common cause that during 2020, the respondent launched an urgent application against the applicant in which it sought, amongst others, an order that the applicant hand over or make available the respondent's landline number to it with immediate effect, together with an order for costs.

4. Although the applicant stated in its founding affidavit that this application was being brought in terms of "Section 17(2)(b) to (f) of the Superior Courts Act, 10 of 2013, read with Rules 6 and 12 of the SCA", neither section 17 nor the 'SCA' rules find application in a matter of this sort. Section 17 governs appeals (and not rescission applications) and the rules of a higher court apply to matters launched and pending in such court. I am prepared, on a benevolent reading of the founding papers, to accept that the matter should be approached in terms of the common law.[3]

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[1] See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C, where, *inter alia*, the following was said: 'where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order...'

[2] This trite principle was restated in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

[3] A rescission application can also be brought in terms of Rule 42(1)(a), where applicable. However, where a party has had notice of the proceedings and chooses not to appear thereat, the provisions of

5. The Constitutional Court has affirmed that the requirements for rescission of a default judgment at common law are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.[4]

6. It is common cause that the applicant was in default of appearance at the hearing of the urgent application on 12 July 2020 when judgment was granted against it. Its explanation for its default was that the application (notice of motion, founding affidavit and annexures thereto) were only served on it by the Sherriff on 11 August 2020, being the same day on which the matter was set down for hearing. Due to such short notice of the hearing, the applicant was unable to obtain legal representation, prepare and file opposing papers and still appear in court the same day. The applicant took a decision to pay an outstanding amount allegedly owing by the respondent to the applicant's agent, a service provider known as Unimax, so as to enable the respondent's landline number to be ported and released back to its care. The applicant duly paid Unimax, whereafter Unimax agreed to the release the respondent's landline number which the applicant

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Rule 42(1) (a) will not avail the defaulting party. *See in this regard Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at paras 9-10

[4] Per Jafta J in *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) at par 85.

In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765D-F, Miller JA formulated the test in these terms: *"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 had reasonable prospects of success on the merits..."*

thereupon restored to the respondent on 12 August 2021. Having thus restored the landline number to the respondent, the applicant's representative did not think that the urgent application would proceed.

7. The facts alleged by the applicant were refuted by the respondent in its answering papers. The respondent put up a copy of the Sherriff's return of service in respect of the urgent application (notice of Motion, founding affidavit and annexures thereto), which reflects that the papers were served upon Mr Shaneel Ram, the deponent to the applicant's founding affidavit, on 28 July 2020, and *not* on 11 August 2020, as alleged by the applicant. According to the respondent, its attorney personally attended at the applicant's place of business on 12 August 2020 and served a copy of the court order obtained earlier in the day together with a covering letter, upon a director of the applicant, who signed for its receipt. A copy of the signed receipt of service was attached to the answering affidavit. It was only *after* service of the order, that the respondent's landline was restored to the respondent. The respondent disputed liability for any outstanding amount owing to the applicant's agent, averring that its contract with the applicant had already been cancelled on 15 June 2020, due to the admitted breach by the applicant of its obligations under the contract. The annexures to the answering affidavit appear to substantiate these averments.

8. Applying the test for rescission to the present facts, I am not persuaded that there the applicant has demonstrated sufficient cause for the judgment to be rescinded. Firstly, the applicant has failed to give a reasonable or satisfactory explanation for its default, which, on the common cause or unrefuted facts, was by its own choosing, deliberate. The applicant's version that it only obtained knowledge of the court order on 1 September 2020, when the Sherriff served a notice of taxation of costs upon it, was effectively belied by

the substantiating documentary evidence provided by the respondent. So too, the applicant's demonstrably incorrect averment regarding service of the urgent application upon it on 11 August 2020. More pertinently, the applicant failed to explain why it did not or could not contact either the respondent or its legal representatives for purposes of exploring a settlement of the matter before it was heard in the urgent court on 12 August 2020 or if unsuccessful, why it nonetheless did not appear at the hearing some two weeks and two days later. Written communications between the parties also revealed that the applicant both acknowledged and accepted that the respondent was the owner of the landline in question.

9. The requirement of satisfying the court that the applicant has a *bona fide* defence, which *prima facie* carries some prospect of success, poses a bigger hurdle for the applicant. On its own version, the *lis* which formed the subject matter of the urgent application is no longer a live controversy between the parties, requiring adjudication by court, given that the applicant on its own version, willingly restored the landline to the respondent and hence complied with the court order. I agree with the submission by the respondent's counsel that the applicant has failed to demonstrate any defence, let alone one which *prima facie* carries a prospect of success. The applicant has also not demonstrated that it enjoys a *bona fide* defence in regard to the costs order granted against it. On its own say-so, the applicant intends exercising its rights to oppose the matter on taxation, the outcome of which is yet unknown.

10. The general rule is that costs follow the result. I see no reason to depart therefrom. Accordingly, the following order is granted:

ORDER

1. The application is dismissed with costs.

A. MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	18 October 2021
Judgment delivered	10 November 2021

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 10 November 2021.

APPEARANCES:

Counsel for Applicant:	Adv. M Ndubani
Attorneys for Applicant:	R Malise Attorneys
Counsel for Respondent:	Adv.H Nkabinde
Attorneys for Respondent:	S Letshabo Attorneys