REPUBLIC OF SOUTH AFRICA

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

CASE NO. 2020/31538
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES
14 SEPTEMBER 2022

V [....] 1 Z [....] 1 H [....] L [....] **APPLICANT**

And

V [....] 2 Z [....] 2 T [....] **RESPONDNET**

In re application

In the matter between:

V [....] 2 Z [....] 2 T [....] **APPLICANT**

And

V [....] 1 Z [....] 1 H [....] L [....] **RESPONDENT**

Judgment

Thupaatlase AJ

A. Introduction

[1] This is an opposed application in which the Applicant (Mr V [....] 1 Z [....] 1) prays that the Court rescind and or set aside or alternatively vary an order granted against him on the 19 January 2021. The present Applicant was a Respondent during the said proceedings. The said order which the Applicant want to have impugned was made by an order of court following settlement agreement between the parties.

[2] It is essential that the court sketches the history of this matter in order to put in perspective the genesis of the dispute between the parties.

[3] The parties were previously married to each other; which marriage was dissolved by a divorce order on 10 May 2018. The divorce decree incorporated a settlement agreement. In terms of the divorce settlement agreement the Applicant was to make certain payments to the Respondent. In particular, the Applicant was to make payment to the Respondent in the total amount of R 3 885 392.00. The payment was to be by way of fixed instalment amounts of R 60 000.00 per month. This was for the Applicant to buy out 50% of the membership of the Respondent in the business. The said business being Akweja Accommodation CC of both parties were members.

[4] The settlement agreement also incorporated an acceleration clause in terms of which, in the event of default payment, the Applicant will by written notice be given seven days within which to remedy his default. Upon failure the amount owing together with interest would become immediately payable. Crucially the fixed property will be declared executable. The property was said to be a commercial property. This is referred to as fixed assets of the business.

[5] The Applicant fell in substantial arrears in the amount of R 248 250.00 a letter to notify the Applicant of his default was despatched as contemplated in the agreement. The Applicant failed to make the payment. The Respondent subsequently approached court for enforcement of the terms of the divorce settlement order and the Applicant filed a Notice of Intention to Oppose and following that also made a tender in terms of Rule 34(1).

[6] The matter served before the court on the 19 January 2021. The matter became settled and such settlement agreement was made an order of court. The Applicant agreed to pay the Respondent a capital amount of R 1 643 221.00 plus interest at the rate of 11.5%. In terms of terms of Rule 46(1) (a) (ii) the fixed commercial property as described was declared specially executable. The Applicant also contributed to the legal fees of the Respondent in the amount R 5000.00. The Applicant was not legally represented during these proceedings, his attorney of record having withdrawn after the Notice of Motion was served on the Applicant.

[7] It is this judgment that the Applicant is approaching the court to rescind and or set aside or alternatively to vary. As indicated at the commencement of this judgment, the application is opposed.

[8] The Applicant prays that order relating to the payment of the amount of R 1 643 221.00 payable at instalment of R 60 000.00 be substituted and that part of order declaring the property executable be deleted in its entirety.

[9] The Applicant appears to suggest that he was not able to afford legal representation and that he felt pressured and overwhelmed and that is why he signed the settlement agreement that was ultimately made an order of court on the 19 January 2021. He further states that he did not fully appreciate the effect of the property being declared executable. He states further that he was advised by the learned presiding judge on that day that if was no longer able to afford instalments he could the order varied. He opines that he had no legal experience and was not familiar with legal terminology.

[10] In her answering affidavit the Respondent does not oppose the fact that part 4 of the order be deleted. This is in respect of the declaration of the property to be executable. However, the Respondent opposes the reduction of the instalment from R 60 000.00 to R 20 000. 00. The counsel for the Applicant has argued before this court that the application is being made bona fide and that the court order is fundamentally flawed.

B. The Law

[11] The law recognises the following scenarios in which rescission or variation of judgment may be obtained after a default judgment has been granted. The two statutorily recognised scenarios are in terms of Rule 42[1] and Rule 31(2)(b)[2]. In terms of the former rescission can be granted by the court *mero motu* or by application where the judgment was obtained by error, where there is ambiguity or a patent error or omission and also where there is mistake common to the parties.

[12] In terms Rule 31(2)(b) the envisaged judgment is the one where judgment was granted in the absence of a party. In that case a party may within twenty (20) days after acquiring knowledge of a default judgment apply to court upon notice to the Plaintiff to set aside such judgment. The party approaching the court must show good cause why a rescission of such judgment should be granted. The court can grant such order on such terms it deems fit. It is clear that the Rules envisage that judgment may be rescinded or varied where such judgment was obtained in the absence of a party.

[13] The Applicant has brought the application under common law. In the case of ***Chetty v Law Society, Transvaal***[3] *the court stated as follows " The Appellant's claim for rescission of the judgment confirming its rule nisi cannot be brought under Rule 31(2)(b) or 42(1), but must be considered in terms of the common law, which empowers the Court to rescind a judgement obtained on default of appearance, provided sufficient cause therefor has been shown.(See De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 at 1042 and Childerly Estate Stores v Standard Bank of SA Ltd 1924 OPD 163). The term "sufficient cause" (or "good cause" defies precise or comprehensive definition, for many and various factors require to be*

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[1](1) 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
(a)An order or judgment erroneously sought or erroneously granted in the absence of any party affect ed thereby; [Paragraph (a) substituted by GN R235 of 18 February 1966.]
(b) 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;
(c) an order or judgment granted as the result of a mistake common to the parties.
(2) Any party desiring any relief under this rule shall make application therefor upon notice to all partie s whose interests may be affected by any variation sought.
(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied th at all parties whose interests may be affected have notice of the order proposed.

[2] *(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.

[3] 1985 (2) SA 756 (A) at 764I-765

considered. (See Cairn's Executors v Gaarn 1912 AD 181 at 186 per Innes JA). But it is clear that in principle and in the long- standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

> *(1) That the party seeking relief must present a reasonable and acceptable explanation for his default: and*
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> > *(ii) That on the merits such party has a bona fide defence which prima facie, carries some prospects of success. (De Wet supra at 1042; PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A); Smith NO v Brummer NO and Other; Smith NO v Brummer 1954 (3) SA at 357-8).*
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> *It is not sufficient if only one of those 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 a 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".*

[14] In this case the Applicant was present when a judgment by consent was granted in favour of the Respondent. He consented to it by way of settlement agreement. The Applicant therefore contractually bound himself to fulfil the terms of the agreement. Since a judgment granted against the Applicant is by consent it is clear that is not susceptible rescission or variation as contemplated by the above-mentioned Rules, the remedy provided by the two Rules are not available to him.

[15] It follows that the application must be adjudicated on common law grounds. The Applicant must show that there exist a "good and sufficient cause" in order to have the judgment by consent rescinded. In the case of ***Georgias v Standard Chartered Finance Zimbabwe Ltd***[4] the court held that **"***It was laid down that a judgment given*

[4] 2001 (1) SA 126 (ZS) at page 132

by consent may be set aside on good and sufficient cause. An enquiry to be determined in accordance with the same principles as are applicable to the grant of indulgence of rescission of a judgment given by default". The adoption of those principles to an application to rescind a judgment given by consent enjoins the court to have regard to:

> *(a) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;*
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> *(b) bona fides of the application for rescission;*
>
> *(c) bona fides of the defence on the merits of the case which prima facie carries some prospects of success; a balance of probability need not be established.*
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> *As has been stated repeatedly too much emphasis should not be placed on any one of these factors. They must be viewed in conjunction with each other, and the application as a whole." See also* ***Creative Car Sound and Another v Automobile Radio Dealers 1989 (Pty)Ltd***[5] where the following is stated *"however, the decided cases clearly shows that the applicant's rescission can still be entertained under common law on any grounds on which a restitutio in integrum could be granted by law."*

Analysis

[16] The first factor to consider is whether the Applicant has provided this Court with a reasonable explanation of the circumstances in which consent judgment was entered against him. As already alluded above, the Applicant contends that he was overwhelmed by the Court atmosphere and did not understand the legal terminology. It is true that he was undefended. It is clear from the history of the litigation between the parties that the Applicant was not appearing for the first time before Court. It was also not the first time that he had entered into a settlement with the Respondent.

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[5] 2007 (4) SA 546 (D) at para [21]

[17] The court should not lose sight of the fact that the Applicant had until the late stage of the proceedings of 19 January 2021 been legally represented. He is a businessperson who will at a bare minimum understand the import of entering into a contract. In the circumstances I am not satisfied that the Applicant has provided a reasonable explanation to why a consent judgement entered against him should be varied or rescinded. There is no evidence provided by the Applicant why he 'felt pressured and overwhelmed'. It is not clear who exerted the pressure the Applicant is referring to.

[18] The second factor to consider is the bona fides of the application. In this regard the court notes that the Applicant wants the court to assist him to renege on the agreement he concluded with the Respondent. This Applicant is doing so by bringing this application. In court the Applicant wanted matter to be referred for oral argument as alleged there were disputes of facts. The agreement between the parties is as correctly argued by counsel for the Respondent a commercial transaction and that any attempt to make it appear as an issue of maintenance matter is misconceived and disingenuous. The application is on that score not bona fide.

[19] The third factor is whether the bona fides of the defence on the merits of the case which prima facie carries some prospects of success. The defence raised by the Applicant is that of affordability as a result of the business not being profitable due to adverse operating conditions because of Covid-19 pandemic. As stated above the argument by the Applicant is misplaced. The transaction between the parties is a contractual nature. The remedy the Applicant is seeking does not fall within the purview area of the law of contract.

[20] On the 19 January 2021 Respondent approach the court due a breach of the agreement between the parties. The agreement incorporated steps that the Respondent was entitled to take in order to enforce the agreement. The Applicant has not provided a defence which prima facie carries prospects of success.

[21] The court has after viewing these factors in conjunction with each other finds that the Applicant has failed to establish that he is entitled to an indulgence to have

the consent judgment entered in favour of the Respondent on 19 January 2021 rescinded or varied.

[22] The Respondent in her affidavit conceded that the part of the judgment relating to executability of the immovable property should be deleted. As result of this concession, the Court does not consider it necessary to deal with that aspect of the application. In particular, whether the property is residential property which should be dealt under Rule 46A.

Order

1. Application for rescission and or variation of judgment in respect of part 1 of the judgment dated 19 January 2021 is hereby refused with costs.
2. Part 4 of the said judgment is hereby deleted by consent- No order as to costs.

Thupaatlase AJ

Heard on 22 August 2022

Judgment delivered on 14 September 2022

Appearances:

For the Applicant: Advocate T Carstens

For the Respondent: Advocate L van der Westhuizen

Instructed by: Klopper Jonker Inc.