IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

2014·08·22
DATE

SIGNATURE

CASE NUMBER: 2161/13

DATE: 22 August 2014

SOUTHERNERA DIAMONDS INCORPORATED — Applicant

V

SAN CONTRACTING SERVICES CC — Respondent

JUDGMENT

MABUSE J:

[1] This is an application for rescission of a default judgment granted by the Court in favour of the Respondent against the Applicant on 22 August 2013. In the main action the Applicant was the defendant and the Respondent was the

plaintiff. In this judgment I will refer to the parties as the Applicant and Respondent.

[2] The Applicant is a company duly registered in accordance with the company laws of Canada with its principal place of business located in Toronto. The core of its business consists in mining, development and production of diamonds. It operates as a subsidiary of Mwana Africa PLC, which itself operates from its principal place of business situated at First Floor, Block B, South Sandton Place, Sandton. The Respondent is a close corporation duly registered in terms of the Close Corporation Act 69 of 1984 and as such a company in accordance with the company statutes of this country. Its place of business is situated at 26 to 28 Berg Street, Rustenburg in the Province of North West.

[3] In launching this application, the applicant relies entirely on the affidavit of one Barry Victor Tooth ("Tooth") the General Manager of the applicant's Klipspringer Diamond Mine in Mokopane. According to him, he was not aware of any litigation between the parties until 15 November 2013 when the sheriff of Court Sandton approached the Applicant with a writ of execution. He immediately contacted one Iain Cochrane ("Cochrane"), the Director of the applicant who spoke to the sheriff and told him that they were not aware of the summons or any existing litigation between the parties. Furthermore Cochrane informed the sheriff that all the assets at that place where the sheriff sought to execute the writ of execution belonged to Mwana Africa PLC and not the Applicant.

[4] Immediately thereafter Tooth contacted one, Mairead Edwards (Edwards"), an attorney who had been employed by the applicant's attorney of record. Edwards was previously employed by the applicant's previous attorneys. He undertook to uplift the relevant file from the applicant's previous attorneys. It took time for him to do so due to the fact that the applicant's previous attorneys, Perrot van Niekerk, Woodhead, Matyolo Incorporated ("PVWM") had closed their office on 31 July 2013. He was nevertheless able only on 25 November 2013 to uplift the relevant file. On 27 November 2013, Edwards was furnished with copies of all the relevant documents relating to the litigation. These documents included the respondent's application for default judgment, copies of the summons and the sheriff's return of service.

[5] Having received and perused copies of the aforementioned documents, it was discovered from the sheriff's return of service that a copy of the summons in the matter was served on 3rd Floor, East Wing, Standard Bank Building, Alice Lane, Sandton. Service of the summons was, according to the return of service, served by affixing a copy thereof to the door of the premises at Alice Lane. Service at the said address was, according to the applicant, invalid due to the fact that during June 2012, the applicant moved its operation premises to First Floor, Block B, Sandton Place 100 West Street / 68 Wierda Road East, Sandton. Because the premises or the address where the copy of the summons was served no longer served at its address, the summons never came to the knowledge of the applicant. Consequently the applicant did not take any steps to file any notice of intention to defend the respondent's action

within the prescribed time or at all. On this basis, the applicant contends that it was not in wilful default.

[6] During 2006, the applicant and the respondent entered into an oral labour supply agreement in terms of which the respondent undertook to supply labourers to the applicant in accordance with its operational requirements. In turn the applicant undertook to pay an administrative fee, each labourer's wage, which included leave pay, notice pay, overtime, transport and miscellaneous statutory costs such as contributions to the Unemployment Insurance Fund, Skills Development Levy and contribution to the Compensation Commissioner. In terms of the said oral agreement, the applicant had reserved its right, and was entitled, to request the respondent, depending on its operational requirements, to reduce the number of labourers supplied to it.

[7] During December 2011, the respondent directed a letter of demand to the applicant. In the said letter of demand, the respondent had demanded from the applicant payment of some amounts relating to severance pay payable to its employees whom it had retrenched as a consequence of the applicant having requested the respondent to reduce the number of the employees which it supplied to it on account of its operational requirements.

[8] On 13 January 2012, the applicant duly responded to the said demand by the respondent. In its response, which was crafted by Tooth, the applicant disputed that the applicant was liable to pay for any termination of service of the

respondent's employees whether on the basis of misconduct, operational requirements or otherwise. The applicant also made it clear that they would not concede the demands for payment of severance pay.

[9] In the first paragraph of the said letter, Tooth had clearly indicated that he did not intend addressing each and every allegation contained in the respondent's letter of demand. He had furthermore indicated that his failure to respond to each and every allegation in the respondent's letter should under no circumstances be regarded as an admission of any aspect in the respondent's letter that he had not dealt with. Ever since the response of 13 January 2012, the applicant did not hear anything further from the respondent until on 5 November 2013 when the sheriff came to their place of business, armed with a writ of execution.

[10] All these constitute the facts on the basis of which the applicant contends that it has, a *prima facie*, defence against the respondent's claim. On that basis, the applicant has submitted firstly that it has furnished a reasonable and bona fide explanation for its failure to defend the respondent's claim. It is submitted furthermore that it was not in wilful default and lastly that it has established a *prima facie* defence to the respondent's claim.

[11] The cardinal issue between the applicant and the respondent is whether the applicant has established good cause. The applicant must, in its affidavit, fully set forth its reasons for its failure to defend the action against it and the grounds of its defence. It must show that the application for rescission is *bona fide* and

not designed as a dilatory tactic to delay the respondent's claim. It is of paramount importance that the party that seeks to rescind default judgment sets out reasons for its failure as these reasons are crucial in the determination of whether or not its conducts was wilful.

[12] The respondent opposes the application solely on two grounds only firstly that a copy of the summons was not served at a wrong address. The respondent contends that a copy of the summons was served at the registered address of the applicant and that the applicant had failed to amend the registered physical address in the records of the Registrar of Companies when it vacated its registered office. It was furthermore contended by the respondent that the applicant acted in wilful disregard of its knowledge that it moved away from its registered office. On this basis Counsel for the respondent submitted that as service of a copy of the summons was effected on the applicant in accordance with the provisions of Rule 4(1)(a)(v) of the Uniform Rules, in the circumstances, the applicant is deemed to have gained knowledge of the summons on the day of service. He submitted furthermore that the applicant had not shown good cause. The second ground raised by the respondent against the application was that the applicant had not put up any bona fide defence against the respondent's claim.

[13] Both the counsel were *ad idem* with regard to the test that is applicable in applications for rescission of default judgment. In the cause of his argument, counsel for the respondent referred the court to the cases of **Naidoo v Matlala**

N.O. 2012(1) SA 143 (GNP) at page 152 paragraph 5 and Grand v Plumbers (Pty) Ltd 1949(2) SA (O) at page 476 where the court had the following to say:

"*Where an applicant who claims relief under Rule 43 should comply with the following requirements:*

(a) He must give a reasonable explanation for his default; if it appears that default was wilful or that it was due to gross negligence, the court should not come to its assistance."

In Saraiva Construction (Pty) Ltd v Zululand and Electrical and Engineering Wholesalers (Pty) Ltd 1975(1) SA D and CLD 612 at 613 the court refused to adopt the approach as set out in Grande's case. In doing so it stated that:

"*However, I do not read Grand's case ... as laying down that an application for relief such as this can never succeed if it was due to gross negligence.*"

[14] On the other hand while he conceded that a copy of the summons was properly served at the applicant's registered office, counsel for the Applicant argued that the applicant was not aware of the action and for that reason did not deliver its notice of intention to defend. He continued and developed his argument and told the court that the applicant only became aware of the action as set out in Tooth's affidavit. He submitted that the applicant's default arose in essence from an administrative error and furthermore that no room existed, in the circumstances, for a finding that the applicant deliberately and wilfully refrained from taking the necessary steps. In support of the applicant's case he referred the Court to the authority of Harris v. Absa Bank Ltd t/a Volkskas 2006 (4) SA

527 (T) where the principles of applicable to applications for rescission of judgment were summarised as follows:

"*4. ...This application for rescission of judgment was brought under common law. The applicant ... bears the onus of establishing 'sufficient cause'. Whether or not 'sufficient cause' has been shown to exist depends upon whether:*

(a) the applicant has presented a reasonable and acceptable explanation of her default; and

(b) the applicant has shown the existence of a bona fide defence, that is one that has some prospects of success.

5. The test whether 'sufficient cause' has been shown by a party seeking relief, is dual in nature, it is conjunctive and not disjunctive. An explanation of the default must co-exist with evidence of reasonable prospects of success on the merits...

6. The common law requires 'sufficient cause' to be shown before a default judgment may be set aside. Rule 31(2)(b) of the Uniform Rules of Court requires 'good cause' to be established before the rescission of a default judgment may be granted. The phrases 'good cause' and 'sufficient cause' are synonymous and interchangeable ... The absence of 'wilful default' does not appear to be an express requirement under Rule 31(2)(b) or under the common law. It is, however, clear law that an enquiry whether sufficient cause has been shown is inextricably linked to or dependent upon whether the applicant acted in wilful disregard of Court rules, processes and time limits. While wilful default may not be an

absolute or independent ground for refusal of a rescission application, a display of wilful neglect or deliberate default in preventing judgment being entered would sorely co-exist with sufficient cause …

8. *Before an applicant in a rescission of judgment application can be said to be in 'wilful default' he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions …*

The Court's discretion is deciding whether sufficient cause has been established must not be unduly restricted. In my view, the mental element of the default, whatever description it bears, should be one of the several elements which the court must weigh in determining whether sufficient or good cause has been shown to exist …

10. *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.'

De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd (supra) at 711D.

11. *In amplifying the nature of the preferable approach in an application for rescission of judgment, I can do no better than quote Jones J with whose dicta I am in respectful agreement:*

'An application for rescission is never simply an enquiry whether or not to penalise a party for failure to follow the rules and procedures laid down for civil proceeding in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide ..."

[15] In the first place, s. 23(3) of the Companies Act provides as follows:

"*3. Each company or external company must –*

(a) continuously maintain at least one office in the Republic; and

(b) register the address of each office, or its principal office if it has more than one office –

(i) initially indicates of –

(aa) a company, by providing the required information on each notice of incorporation; or

(ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee."

Section 23 does not require a company to establish a place of business as it was the case with section 1(1) of the Old Companies Act 1973. It merely requires the company to register the address of its office or principal office. This is the place where the company may be found and a place where it conducts its business; a place where court processes may be served. People who want to transact with the company and to serve court processes are entitled to know where the company can be found and where court processes should be served. The registered office of the company serves the same purpose as a *domicilium citandi et executandi.* By registering an office or a principal office in accordance with the provisions of s. 23(3), a company indicates clearly where it can be found for any purposes or where legal processes can be served. It says services of any legal processes will only be valid if served at the registered office or principal office. It guarantees that in the event of it changing its registered office, it will notify the public by filing a proper notice as required by s. 23(3)(b)(ii). It is aware that when the public wishes to know where it is situated it will find the information at the Cipro office. It will file the notice of change of address at the Cipro Office.

[16] Rule 4.1(a)(v) of the Uniform Rules of Court provides that:

"*Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (OA) any document initiating the application proceedings shall be effected by the sheriff in one or other of the following manners:*

(v) in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the Court's jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by the law."

Service of legal process at the registered office of that company will be effective. It is clear that Rules 4.1(a)(v) offers two places as alternative for service. The **Federated Insurance Co Ltd v Malawana 1986(1) SA 751 (A) at 759 E-G** stated the effect of Rule 4(1)(a)(v) as follows:

"*Giving the words in question, their ordinary meaning, I am of the opinion that the effect of Rule 4(1)(a)(v) can be stated as follows:*

(a) a summons may always be served upon a company at its registered office, wherever that may be situated;

(b) if a company has no place of business within the court's jurisdiction, the summons would have to be served at its registered office;

(c) if a company has only one place of business within the court's jurisdiction, that would be regarded as its principal place of

business within the area, and the summons could accordingly be served there; and

(d) *if a company has more than one place of business within the court's jurisdiction, the summons would have to be served at the company's chief or principal place of business within that area, unless, off cause, it is served at its registered office."* See also **Arendsnes Sweefspoor CC v Botha 2013/5 339 SCA.** Accordingly where service of a process is effected in terms of Rule 4(1)(a)(v) the company is deemed to be aware of the process and to be in wilful default if it fails to act accordingly.

[17] I now turn to examining the conduct of the applicant to establish whether it was in wilful default. It must be recalled that the bedrock of the applicant's case is that the respondent's summons was *"served at the incorrect address, that is, at 3rd Floor, East Wing, Standard Bank Building, Alice Lane, Sandton. Applicant moved premises to 1st Floor, Block B, Sandton Place, 100 West Street/ 68 Wierda Road East, Sandton during June 2012."* This is all that was placed before the court by way of an explanation of the applicant's default. Tooth does not deny that the address where the Sheriff served a copy of the summons is the applicant's registered office. Even worse nowhere in his affidavit does he state that the address to which the applicant moved during June 2012 is the applicant's registered office or principal office or principal place of business. The Applicant offers no explanation at all why the said address was, as on 24 January 2014 or even before, still recorded in the registers of Cipro as its

registered office nor does he explain why more than one year and six months after the applicant had relocated to new premises nothing was done to notify Cipro of its new registered office. There was a duty imposed on the applicant by the provisions of s.23(3)(a) to continuously maintain at least one office in this country or to file a notice of registered office as required by s.23(3)(b)(11) of the Companies Act.

[18] It is clear from the judgment of Saraiva above that the Court refused to endorse "gross negligence" as the ground for refusing an application for rescission. It deemed that as an interference with the discretion of the Court. It put in the following manner that:

"*However, I cannot accept that the absence of gross negligence in relation to the default is an essential criterion, or an absolute prerequisite for the granting of relief under 31(2)(b). Apart from placing an unwarranted limitation on the Court's discretion, it seems to me that the introduction of this factor as an essential ingredient of a case for relief is singularly unhelpful, for it raises the difficult problem of defining "gross negligence" ".*

What one has learnt from the judgment of Harris supra is that an explanation, whether it be good, bad or indifferent must be considered in the light of the nature of the defence which the applicant has placed before the Court. In the circumstances I am satisfied though that the applicant's representatives were grossly negligent in the manner in which they failed to update their records at Cipro. However, I am inclined to hold that their conduct was neither wilful nor

reckless. I do not think that their negligence was so gross as to prevent them from obtaining, on this basis alone, the relief they seek in this application.

[19] I have pointed out in paragraph 8 supra that the applicant denied that the parties had agreed that the applicant would be responsible for a payment of the respondent's employees' severance packages. Counsel for the Applicant argued that the Applicant disputed the agreement in terms of which the respondent had claimed payment in terms of invoice annexed to the respondent's Particulars of Claim as "P2". Furthermore he referred to the correspondence that dated 13 January 2013 from the applicant to the respondent. Lastly with regard to annexure "P1" to the respondent's Particulars of Claim, he argued that the said annexure contained amounts that the respondent had calculated on the basis of the oral agreement for which the applicant was not responsible. It was, according to him, for this reason that only the sum of R493,830.52 was paid by the applicant.

[20] Before dealing with the issue relating to bona fide defence, it is only apposite if I refer to the Respondent's Particulars of Claim, for the respondent's counsel, apart from submitting that the Applicant has failed to show a bona fide defence, submitted that the Court may uphold part of the judgment or amount in respect of which the applicant has not raised any *bona fide* defence.

[21] The respondent had claimed, and had been granted, judgment against the applicant as follows (a) firstly, payment of a sum of R493,830.52, being the difference between R901,526.32, the original invoiced amount and

R407,695.80, representing what the respondent regarded as part payment. This claim was contained in paragraph 4.3 of the Respondent's particulars of Claim; and (b) secondly payment of a sum of R1,868,53.85 proof of which was contained in Invoice INI00725 to, and paragraph 4.5 of, the Respondent's Particulars of Claim. The applicant's defence to the respondent's claim was set in paragraph 17 of the founding affidavit as follows:

> "*In response to this demand [for payment of amounts relating to severance pay-see paragraph 16], the Applicant refuted that it was liable for the Respondent's retrenchment costs and, in particular, the severance pay of Respondent employees as it was not their employer and no agreement had been reached between the parties that it would be liable for these costs.*"

[22] Firstly he contended that, as it stood, the applicant's purported defence was a bare denial which fell grossly short of the test required for the purposes of an application for rescission. He developed his argument and told the Court that the applicant's denial of an agreement to pay retrenchment costs and severance pay was confined only to what the respondent had pleaded in paragraph 4.5 of its Particulars of claim. According to him the purported defence did not relate to the items referred to in paragraph 4.3 of the Respondent's Particulars of Claim and, this is crucial, the applicant has not put up any defence for the respondent's claim for payment of the balance of the amount of R493,830.52 set out in invoice INI00182. He submitted that the application should fail in relation to paragraphs 1,2 and 4 of the judgment. By this submission he meant that the Court may make a finding that the applicant has

shown that it has a bona fide defence in respect of claim 3 of its particulars of Claim and should grant rescission only of that claim while it upheld the judgment in respect of the other claims. There is no doubt that doing so would result in the court setting aside only part of the judgment.

[23] The judicial authority that I have consulted seems to be against the Court setting aside part of the judgment. In **Terrace Auto Services Centre (Pty) Ltd And Others v. First National Bank of South Africa 1996 (3) SA 209 (WLD)** the Court grappled with the same issue of whether in the circumstances of that case it should rescind the entire judgment or it should exercise its discretion to rescind it in part only. The Court per Rubens AJ, adopted the approach of the Court in **Kavasis v. South African Bank of Athens Ltd 1980 (3) SA 394(D)**, in which James JP held that Rule 31(2)(b) does not permit partial rescission of a default judgment. This is what James JP had said in the said case at page 396A-C that:

" Unlike the provisions of Rule 32 dealing with summary judgment, Rule 31(2) does not give the Judge power to allow the applicant to defend only a portion of the claim.

.....It seems to me if the defendant establishes a bona fide defence against a portion of a plaintiff's claim he is entitled to a rescission of the whole judgment. If the plaintiff then considers that the defendant has no reasonable defence against the balance of his claim he can thereafter endeavour to dispose of it in summary judgment proceedings." See also the authorities cited in the case Terrace case above. The contrary view was however expressed by the court in Revelas And Another v Tobias 1999 (2) SA 440 in which the Court also had to decide, and in fact did so, whether to rescind only part of the judgment. The circumstances of this case

differ markedly from the circumstances of the current case and the other cases I have referred to *supra.* This is where the difference lies as set out on page 447C-D;:

" Secondly, I have expressed views (which I still hold) in the matter of Silky Touch International Ltd and Another v Small Business Industries Development Corporation [1997] 3 All SA 439(W). That approach has since been applied, inter alia, in regard to a divorce case in which the defendant who was in default and did not wish to remain married (and the plaintiff had in the meantime remarried) but who was entitled to rescission because of absence of fair opportunity to defend, was given rescission in order to have only the actual dispute go forward , patrimonial feature." When the court said what appears above it did not lay an all embracing panacea to similar situations but indicated the nature of the issues it was dealing with at the time. In terms of our law every case has to be decided on its own peculiar facts. In this matter I have chosen to adopt the approach set out in the Terrace case. For the reasons set out in the said case the submission by counsel for the respondent that partial rescission of the default judgment granted against the applicant be granted is not a plausible proposition and such an application cannot succeed.

In the result the application is granted and the following order is hereby made:

[1] The default judgment granted by this Court against the Applicant on or about 22 August 2013 in case No. 2161/2013 is hereby rescinded.

[2] The respondent is hereby ordered to pay the costs of this application.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicants:	*Adv. Daniels*
Instructed by:	*Mervyn Taback Inc.*
Counsel for the respondents:	*Adv. Korf*
Instructed by:	*AJ Stone Attorneys*
Date Heard:	*18 August 2014*
Date of Judgment:	*22 August 2014*