REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

4/11/16

CASE NO: 13123/15

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

04/11/16
DATE

SIGNATURE

In the matter between:

SIVUBO TRADING AND PROJECTS CC	First Applicant
DOMINIC SKUMBUZO DUBE	Second Applicant
and	
MASSBUILD (PTY) LTD	First Respondent
TUSK CONSTRUCTION SUPPORT SERVICES (PTY) LTD	Second Respondent

J U D G M E N T

TEFFO, J:

[1] The applicants seek an order for the reconsideration of the default judgments granted against them by the Registrar of this Court on 26 March

2015 and 20 April 2015 respectively in terms of Uniform Rule 31(5)(d) of this Court.

[2] They contend that the Registrar erred in granting the aforesaid default judgments against them in the face of fatal defects and omissions in the documents presented to him when the application for default judgment against them was granted. It is further contended that good cause has been shown for the setting aside of the default judgments as the applicants were not in wilful default when the default judgments were obtained against them and that they have substantial defences to the respondents' claims.

[3] The first and second respondents oppose the application.

[4] The following facts are common cause between the parties: The first respondent and the first applicant concluded a written agreement in terms of which the first applicant applied for a credit facility with the first respondent (the credit facility agreement). In terms of the credit facility agreement the first respondent sold and delivered building materials to the first applicant on credit. The second applicant who represented the first applicant when the agreement was entered into, bound himself as surety and co-principal debtor for the obligations of the first applicant towards the first respondent in terms of the credit facility agreement. The second respondent together with the first applicant also concluded a written construction support services agreement ("*the services agreement*") in terms of which the second respondent rendered construction support and administration services to the first applicant.

Simultaneously with the conclusion of the services agreement the second applicant bound himself as surety and co-principal debtor with the first applicant towards the second respondent for the due and punctual payment of all amounts which may be owing and payable or which may in the future become owing, due and payable by the first applicant to the second respondent.

[5] In terms of clause 7.1 and 7.2 of the services agreement the first applicant would pay the second respondent R15 000,00 exclusive of VAT as a preparatory services fee and R2 500,00 exclusive of VAT as a raising fee. In consideration for the administration and support services rendered by the second respondent in terms of clause 5.2 (of the services agreement) the first applicant will pay the second respondent (as remuneration for the services rendered) an administration and support fee of R81 000,00 (Eighty One Thousand Rand) exclusive of VAT (clause 7.3). This administration and support fee shall be paid to the second respondent in the following manner, a minimum of R27 000,00 (Twenty Seven Thousand Rand) exclusive of VAT per month, with the commencing date being the date of signing the clearance certificate by the legal director and thereafter on the first day of each succeeding month for the term of the project (clause 7.3). Clause 7.3 further provides that should the first applicant complete the project before the term thereof, the full balance of the total fee shall be due and payable to the second respondent on the date of the practical completion of the project as stated in the third party agreement, or on the date that the first applicant

receives the full amount owing in terms of the third party agreement, whichever date is earlier.

[6] Should material suppliers to which the second respondent gave undertakings still be owed on this specific project, although the project is completed, the second respondent shall be entitled to continue to charge the administration and support fee as set out in paragraph 7.3 of the services agreement until full settlement (clause 7.4). Clause 7.5 provides that should materials suppliers to which the second respondent gave undertakings still be owed on this specific project, although the project is completed, the second respondent shall be entitled to charge an additional fee of R1 500,00 per hour plus VAT to assist with the recovery of the supplier's exposure, where applicable. In terms of clause 7.7 should either the employer or the first applicant terminate the third party agreement before the project is completed, the second respondent shall be entitled to continue to charge the administration and support fee as set out in paragraph 7.3 of the services agreement until full settlement. Clauses 8.1 and 8.2 provide that the second respondent shall provide the applicant with the supplementary services as defined in annexure "B" and that the fees charged for administration and support services shall exclude fees for supplementary services.

[7] In terms of clause 11.4 of the services agreement the first applicant chose the address 4 Quaran Road, Bryanston as its *domicilium* address which address is different from the address used in the credit facility agreement on page 137, namely, 4 Quorn Road, Bryanston, as the second

applicant's chosen *domicilium* address whereas on page 132 of the bundle of documents, part B, the registered business address of the first applicant is recorded as 1st floor York Building, Epsoms Downs, Bryanston.

[8] The first applicant and the Development Bank of Southern Africa (DBSA) concluded a construction agreement for the construction of 100 low cost houses in certain rural areas in Elliotdale at the Eastern Cape (the third party agreement). This agreement was eventually terminated by DBSA.

[9] According to the sheriff's return of service dated 3 March 2014 the summons was served on the first applicant at 1st floor York Building, Epsom Downs Office Park, 13 Sloane Street, Bryanston being the registered business address of the first applicant by affixing copies thereof to the outer or principal door of the said premises.

[10] The sheriff's return of service dated 24 March 2015 states that the summons was served on the second applicant at 4 Quaran Road, Bryanston by affixing copies thereof to the outer or principal door at the given address.

[11] The second applicant is the sole member of the first applicant.

[12] The correct *domicilium* address of the second applicant is 4 Quorn Road, Bryanston.

The applicant's contentions

[13] Basically the granting of the default judgment against the second applicant in favour of the first respondent is challenged on the ground that the registrar was not provided with an explanation as to why the summons was not served at 4 Quorn Road, Bryanston which address appears in the credit facility agreement. It is contended that the registrar had erred in accepting that there had been proper service on the second applicant in terms of Rule 4(1)(a)(iv) of the Uniform Rules of Court and therefore granting default judgment without proof of service on the second applicant at Quorn Road, Bryanston.

[14] As regards the claim by the second respondent, the applicants also challenge the service of the summons at the second applicant's incorrect *domicilium* address as discussed above. Although it is conceded that the summons against the first applicant was served at its registered place of business, it is contended that the service was done by affixing the documents to the outer or principal door, such service was not effective as the first applicant was recorded as being unknown at the given address. The applicants contend that the respondents should have rectified the service agreement to reflect their correct *domicilium* addresses before the default judgments were obtained against them. It was also contended that the sheriff should have amended the returns of service to confirm that the summons was served at 4 Quorn Road, Bryanston as opposed to 4 Quaran Road, Bryanston which address did not exist. According to the applicants, the respondents

should have contacted their previous attorneys of record at the time and discussed their difficulties of serving the summons on them and/or could have applied for leave to serve the summons by way of substituted service. It was pointed out that the Registrar was precluded from applying his mind properly to the second respondent's application for default judgment as he relied on facts that were shown to be false. Had he known the true state of affairs, he would never have granted default judgment on the documents presented to him.

[15] It was further contended that the second respondent's claim against the first applicant is not supported by the services agreement. The amount claimed exceeds the total fee of R81 000,00 to which the second respondent was entitled under the services agreement in respect of administration and support services, so it was argued. It was submitted that the services agreement does not permit the second respondent to rely on a signed certificate as *prima facie* proof of the indebtedness to it and that any allegations made in the particulars of claim in this regard, are false. It was further pointed out that the services agreement was accompanied and secured by an irrevocable instruction to the DBSA, the first applicant's employer, to pay any payments due to the first applicant into a project specific bank account which the first applicant did not have control of. The account was placed under the sole and absolute control of the second respondent. The second respondent had the sole signing powers on the account. The second respondent has already paid itself an amount of R205 600,00 from the account. It has overpaid itself an amount of at least R124 600,00. Accordingly

the second respondent's claim against the first and second applicants as it stood at the time of the default judgment should fail, so it was argued.

[16] As regards the claim by the first respondent against the applicants it was contended that the second respondent undertook to pay the first respondent. It was argued that in granting default judgment in favour of the first respondent, the registrar erred because although the credit facility agreement supports the first respondent's claim against the applicants for payment in respect of goods sold without any set off or deduction, the parties varied the payment terms contained in the credit facility agreement by signed written payment undertakings in which the second respondent undertook to secure all payments of materials delivered by the first respondent to the first applicant. Accordingly, the first respondent's claim lies against the second respondent and not the applicants, so it was contended.

[17] The respondents are also criticised for not bringing their claims to the attention of the applicants' former attorneys at the time before they applied for default judgment against them. It was pointed out that by appointing attorneys of record, the applicants effectively changed their respective *domicilium citandi et executandi* by way of written notice in compliance with both the credit facility and the service agreements. It was submitted that if the applicants changed their respective *domicilium* addresses by way of written notice, they were not in wilful default of delivering their notices of intention to defend. The respondents did not properly serve the summons on them, so it was argued.

[18] The issue for determination is whether the default judgments granted by the registrar against the applicants should be reconsidered and therefore be set aside in terms of the provisions of rule 31(5)(d) of the Uniform Rules of court or not.

[19] Rule 31(5) provides as follows:

> "*(a) Whenever a defendant is in default of delivery of a notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.*
>
> *(b) The registrar may –*
>
> *(i) grant judgment as requested;*
>
> *(ii) grant judgment for part of the claim only or on amended terms;*
>
> *(iii) refuse judgment wholly or in part;*
>
> *(iv) postpone the application for judgment on such terms as he or she may consider just;*
>
> *(v) request or receive oral or written submissions;*
>
> *(vi) require that the matter be set down for hearing in open court:*
>
> *Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court.*
>
> *(c) The registrar shall record any judgment granted or direction given by him or her.*
>
> *(d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after such party has acquired*

knowledge of such judgment or direction, set the matter down for reconsideration by the court."

[20] The Full Bench of the WLD in *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) held that good cause does not have to be shown by the defendant in an application for reconsideration of the default judgment granted by the registrar and that there is no question of *onus*. Joffe J said the following at para [26] of the judgment:

"*Furthermore, and different to the Magistrate's Court, Rule 31(5)(d) contains a valuable safeguard to protect, in particular, the debtor. It provides for the reconsideration by the court of a judgment or a direction given by the registrar within 20 days after the party concerned has acquired knowledge of such judgment or direction. This would obviously include an order declaring specially hypothecated immovable property executable other than in the case of s 62 of the Magistrate's Court Act, the reconsideration does not cast any onus on the debtor (my emphasis). The court is required to consider the application for a default judgment de novo without any onus on the debtor. Accordingly, any order made by the registrar declaring immovable property executable, is open to reconsideration by the court, if brought to the attention of the court.*"

[21] Davis J in *Williams v Trifecta 165 (Pty) Ltd and Other* [2011] ZAWCHC 319 made the following remarks in an application for a reconsideration of a default judgment granted by the registrar:

"*It was on the basis of this dictum that I found in the application for security of costs that what was required of a court in a case such as the present, was to examine, on all of the facts available, whether default judgment was justified. There is no onus on either of the parties. What is required is for the court to analyse the factual matrix as would have been the case had the dispute come to the court initially and make the necessary determination. This process becomes*

> *important in assessing whether there is any merit in the reconsideration of this default judgment. Accordingly it is not only relevant as to whether condonation should be granted, but whether the applicant has a case for reconsideration under the factual circumstances so presented.*"

[22] In *Pansolutions Holdings Ltd v P & G General Dealers & Repairers CC* 2011 (5) SA 608 (KZD) Swain J disagreed with the decision arrived at in *Bloemfontein Board Nominees Ltd v Benbrook* 1996 (1) SA 631 (O) that a '*reconsideration*' of a default judgment granted by registrar in terms of rule 31(5) does not mean that the court substitutes its discretion for that of the registrar, and will only interfere with the judgment if it is of the opinion that the registrar has erred. In his view, the power accorded to the court is precisely that of substituting its discretion for that of the registrar. At paragraph [11] of the judgment he stated the following:

> "*I am fortified in this view by the self-evident fact that at the stage when the court is asked to reconsider a default judgment granted by the registrar, it will have before it the contentions of the aggrieved party, which in the nature of things, the registrar will have been ignorant of. The registrar may not have erred in granting judgment, on the information available to him at the time, but in the light of the further information available to the court at the time of reconsideration of the judgment, it may be apparent that the judgment cannot stand.*"

[23] At paragraph [14] of the above judgment Swain J continued to state that in his view, a court, in deciding whether to reconsider a default judgment granted by the registrar in terms of rule 31(5)(d), would cause no affront to the provisions of this rule, if it applied the criteria enunciated by the courts over many years, in determining whether an applicant has established '*good*

cause' for the rescission of a default judgment by the court. In his view a wide discretion is intended and factors relating to the reasons for the absence, the nature of the order granted and the period during which it has remained operative, will have to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. In addition, questions relating to whether an imbalance, oppression or injustice has resulted, and if so, the nature and extent thereof and whether redress is open to attainment, by virtue of the existence of other or alternative remedies, will have to be considered.

Service of summons on the applicants

[24] It is common cause between the parties that the summons was served on the first applicant at its registered place of business. Service thereof is challenged on the basis that it was affixed to the outer or principal door of the premises where the first applicant was said to be unknown. Furthermore there were other allegations that the respondents should not have chosen a *domicilium* address for the first applicant, which allegations I find irrelevant. The registered business address of the first applicant is also recorded in the credit application (the credit facility agreement). There is no evidence that this address was ever changed by the first applicant. I do not find merit in the contention that by appointing attorneys to represent them, the applicants have changed their *domicilium* address by notice. I have not seen any arrangement or agreement by the parties that the summons should be served at the business addresses of each parties' attorneys of record.

[25] Rule 4(1)(a) requires that service of any process of the court shall be effected by the sheriff (*inter alia*) "*in one or other of the following manners*":

> (iv) if the person so to be served has chosen a *domicilium citandi*, by delivering or leaving a copy thereof at the *domicilium* so chosen; or
>
> (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 law.

[26] The sheriff's return of service dated 23 March 2015 reads:

> "*On 3 March 2015 at 12:05 at 1st Floor York Building, Epsoms Downs Office Park, 13 Sloane Street, Bryanston, being the registered address of the defendant Sivubo Trading and Projects CC I duly served a copy of the summons by affixing copies of the abovementioned documents to the outer or principal door of the said premises. No other services possible after diligent search at the given address. Rule 4(1)(a)(v).*
>
> *Remarks*
>
> *The first defendant is unknown at the given address.*
>
> *The following companies were found:*
>
> 1. *Asia Direct*
> 2. *Carbon Track*
> 3. *Contour Online*

4. *Hand in hand*
5. *Innovert*
6. *VBGD Town Planners*
7. *KALL*"

[27] According to the above return of service the first applicant was not found at the address. Only the companies or businesses mentioned were found. The summons was therefore affixed to the outer or principal door at the address. It is not known at which premises' door at the address were the copies of the summons left as it appears from the return that various companies were found at the address. Even though the address is the registered address of the first applicant, the copies of the summons were not left at the outer or principal door of the first applicant's premises. The first applicant was not one of the companies found at the address. There can therefore not have been proper service on the first applicant.

[28] As regards service on the second applicant at 4 Quaran Road, Bryanston, it is common cause between the parties that this address does not exist. The correct address that is in existence and is the *domicilium* address of the second applicant is 4 Quorn Road, Bryanston. As alluded to in paragraph [7] above, the incorrect address of 4 Quaran Road, Bryanston has been recorded in clause 11.4 of the Services agreement, while the correct *domicilium* address of the second applicant namely, 4 Quorn Road, Bryanston appears in the suretyship agreement. It is important to note that the claim against the second applicant is based on the suretyship agreement. The

address that should have been used for service of the summons on the second applicant is the one that appears in the suretyship agreement. An affidavit from the sheriff dated 9 June 2015 together with an amended return of service dated 8 June 2015 has been annexed to the answering affidavit. In the affidavit the sheriff states that the summons was served on the second applicant on 24 March 2015 at 4 Quorn Road, Bryanston and not at Quaran Road, Bryanston as previously stated in the initial return of service of the summons. He further states that Quorn Road is the correct spelling of the street name. The return of service has also been amended to reflect the correct *domicilium* address.

[29] The applicants contend in their replying affidavit that as and when the registrar granted default judgment, the return of service stated that the summons was served on the second applicant at the incorrect address and that the sheriff's affidavit and the amended return of service, were not before the registrar at the time. I agree that as and when the matter served before the registrar at the time he granted default judgment, the service of the summons on the second applicant was not proper taking account that the second applicant averred that he did not receive the summons. The amendment thereof is not of assistance to the respondents in this regard.

The second respondent's claim against the applicants

[30] The second respondent contended that it was entitled to its claim in terms of clause 7 of the services agreement in excess of the amount of R81

000, 00 in respect of administration and support fees until full settlement of outstanding claims where the third party agreement was terminated before the project was completed. On the other hand the applicants contended that the claim by the second respondent was not supported by the services agreement in that the agreement does not set out an express basis for the relief sought by the second respondent and that the particulars of claim does not place any reliance on anything other than clauses 5, 7 and 8 of the services agreement in support of the relief sought by the second respondent against the first applicant. The issues raised are in my view issues that should be properly dealt with by the trial court. It was also contended that the second respondent ignored the arbitration clause by approaching this court and not referring the matter to arbitration. It is clear from the papers that the arbitration clause is only applicable to the second respondent's claim. In terms of clause 12 of the services agreement any dispute arising from or in connection with this contract shall be referred and finally resolved by arbitration. I agree with the contention by the respondents that an arbitration agreement is no automatic bar to legal proceedings in respect of disputes covered by the agreement. A defendant seeking to revoke an arbitration agreement must first enter appearance to defend and file a special plea for a stay of the proceedings pending final determination of the dispute by arbitration.

[31] The respondents have filed a substantive answering affidavit and heads opposing the application. In my view the issues raised in the application can be best dealt with by the trial court where evidence will be led and the issues will be fully ventilated.

[32] After careful consideration of all the facts before me I am of the view that default judgment against the applicants was not justified and that there is merit in the reconsideration of the default judgment granted by the Registrar.

[33] The remaining issue is the costs of the application. The applicants contended that in the light of the fatal defects in the respondents' application for default judgment, their failure to disclose critical information and documentation to the registrar, and their opposition to the application, they should be ordered to pay costs on attorney and client scale. The respondents also asked for costs on attorney and client scale on the basis of the allegations made against them by the applicants in the papers. In my view the costs of this application should be reserved for decision by the trial court which will be in a better position to determine the validity of the defence of the applicants to the respondents' claims.

[34] In the result I make the following order:

34.1 The judgment granted by default by the registrar on 26 March 2015 against the first applicant in favour of the respondents, is set aside;

34.2 The judgment granted by default by the registrar on 20 April 2015 against the second applicant in favour of the respondents, is set aside;

34.3 The applicants are granted leave to file a notice of intention to defend within 10 days of this order;

34.4 The costs of this application are reserved for decision by the trial court.

M J TEFFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicants	D Ehrich
Instructed by	Mbana Attorneys
For the Respondents	A P Ellis
Instructed by	Coetzer & Partners
Date of Judgment	4 November 2016