REPUBLIC OF SOUTH AFRICA

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

CASE NO: 54095/2013

24/11/2016

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

24-11-2016
SIGNATURE DATE

In the matter between:

CATHOROS COMMODITIES (PTY) LTD Applicant

and

ANGLO OPERATIONS (PTY) LTD Respondent

In re:

ANGLO OPERATIONS (PTY) LTD Plaintiff

and

CATHOROS COMMODITIES (PTY) LTD Defendant

J U D G M E N T

MSIMEKI J,

INTRODUCTION

[1] The applicant, in this application, seeks an order:

1. Rescinding the judgment granted by the Registrar against it on 24 November 2014;

2. Costs only in the event of opposition;

3. Further and/or alternative relief.

The application is opposed.

BRIEF BACKGROUND FACTS

[2] The parties concluded two agreements: one written on 15 January 2013 and the other oral in about April 2013. In terms of the agreements, as disclosed by the simple summons, the respondent sold and delivered coal to the applicant which had to pay to the respondent an amount of R10 919 675 68 (ten million nine hundred and nineteen thousand six hundred and seventy-five rand and sixty-eight cents). The respondent sued the applicant on 30 August 2013 on two claims arising from the two agreements that the parties

concluded. Claim 1 is for payment of the amount of R8 046 129 00 while claim 2 is for payment of the amount of R2 873 546 68. In respect of claim 1, the applicant contends that the respondent sold coal to the applicant which included rocks. In respect of claim 2 the applicant's contention is that it was standard practice that the respondent would furnish it with "*log sheets*" and "*weight slips*", which according to the applicant, were not annexed to the respondent's declaration. The applicant denies that it collected the tonnages which the respondent's invoices reflect. The applicant entered an appearance to defend the respondent's action. The respondent, after the applicant entered its appearance to defend, brought an application for summary judgment which was opposed by the applicant. The defence which the applicant disclosed in its affidavit resisting summary judgment convinced the respondent to grant the applicant leave to defend its action and the Court, accordingly, made an order in terms of the respondent's decision. It is submitted on behalf of the applicant, that it is strange that the respondent, after finding it fit to grant the applicant leave to defend the action in its summary judgment application, now opposes the rescission of judgment application. This, because, the stance that the respondent took when it granted leave to defend the action ought to remain the same in this application.

[3] Advocate L. S De Klerk SC ("Mr De Klerk") and with him Advocate A. S. L Van Wyk ("Mr Van Wyk") and Advocate D. L Uys ("Mr Uys") represented the applicant and the respondent when the matter was argued.

[4] It was submitted, on behalf of the respondent, that the application does not refer to any specific rule. This does not seem correct. Mr Emmanuel Nzuma, the managing director of the applicant, in his founding affidavit in support of the application for rescission of judgment, in paragraph 3.5, specifically states:

> *"It is important to note that this application for rescission of judgment was sought and granted erroneously by the registrar. I will become clear hereunder that the Judgment could not have been granted ex facie the application for default judgment (and declaration), in fact the Registrar ought to have refused the default judgment application alternatively refer the application to open Court. I will nonetheless hereunder explain the delay in bringing of this application to unequivocally indicate to this Honourable Court our bona fides in launching this application."* (my emphasis).
>
> It is common cause that the Rule which deals with this aspect is **Rule 42(1)(a) of the Uniform Rules of Court.**
>
> **Rule 42(1)(a)** states:
>
> ***" 42. Variation and rescission of orders***
>
> *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 affected thereby".* (my emphasis).

[5] The applicant's heads of argument in paragraph 2 specifically mentions that the applicant's application is based on **Rule 42(1)**.

[6] I need to set out the chronological sequence of events in this matter.

1. The respondent instituted the action by way of a simple summons.

2. It delivered its declaration on 27 August 2014.

3. The applicant entered its appearance to defend the action.

4. On 16 October 2014, the respondent, in a letter, called upon the applicant to deliver its plea within 5 days from date of receipt of the letter failing which the applicant would be barred. A notice of bar was served on the applicant on 27 October 2014.

5. After barring the applicant, the respondent, on 18 November 2014 served an application for default judgment upon the applicant.

6. The registrar of the court granted default judgment on 24 November 2014.

7. On 18 December 2014 the respondent's attorneys advised the applicant that default judgment had been granted against it.

8. On 18 March 2015 the application for rescission of judgment was issued.

POINTS *IN LIMINE*

[7] The applicant and the respondent raised points *in limine*. In addition the respondent, in its opposing affidavit in particular paragraph 4 thereof, required the applicant to provide security for costs.

[8] On behalf of the applicant, it was submitted that the respondent served the Notice of its intention to apply for default judgments on 18 November 2014 and that the Notice fell short of the peremptory 5 days which the Rule makes provision for. It was further submitted that the registrar had acted *ultra vires* his powers in terms of **Rule 31(5)(e)** when he awarded "*costs of suit*".

[9] The respondent contends that the applicant's application ought to be dismissed with costs as the applicant failed to comply with **Rule 31(2)(b)** which requires the application for rescission of judgment to be filed within the prescribed time period of 20 days after the applicant obtained knowledge of such judgment.

ISSUES

[10] The issues, *inter alia*, are:

1. Whether the application should be in terms of **Rule 31(2)(b) of the Uniform Rules of Court** or **Rule 42(1)(a)**.

2. Whether a party's failure to comply with **Rule 31(5)(a)** is of any consequence.

3. Whether the applicant needed condonation for bringing the application outside the time period prescribed by **Rule 31(2)(b)** as the application, according to the respondent, had to be filed by 20 January 2015.

4. Whether the applicant must furnish security for costs as contended for by the respondent.

5. Finally, whether the applicant has made out a case for the relief it seeks.

[11] Before endeavouring to resolve the issue, it is important to refer to the relevant Rules.

Rule 31(2)(b) provides:

"31 Judgment on Confession and by Default

...(2) (b) A defendant may within 20 days after he has 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 to it seems meet." (my emphasis).

Rule 31(5)(a) provides:

"(5) (a) Whenever a defendant is in default of delivery of 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. (my emphasis).

Rule 31(5)(d) provides:

"(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". (my emphasis).

Rule 31(5)(e) provides:

"(e) The registrar shall grant judgment for costs in an amount of R200 plus the sheriff's fees if the value of the claim as stated in the summons, apart from any consent to jurisdiction, is within the jurisdiction of the magistrate's court and, in other cases, unless the application for default judgment requires costs to be taxed or the registrar requires a decision on costs from the Court, R650 plus the sheriff's fees. (my emphasis).

[12] It was submitted, on behalf of the respondent, that the applicant was aware of the application for default judgment. The applicant, according

to the respondent, if the notice fell short of the required time period, should have defended same or filed a **Rule 30** Notice to complain about the premature set down. To this, the applicant's response is that **Rule 31(5)(a)** uses the word "*shall*" and that therefore the Rule is peremptory. The applicant's submission is, indeed, correct. The effect thereof, according to the submission, is that the judgment was prematurely and erroneously sought. Because the registrar had no power to condone this, the submission proceeds, the judgment was erroneously granted. This seems correct. The registrar, the submission proceeds, does not have an inherent discretion to regulate its proceedings. It must only comply with the Rules. The registrar, the submission further proceeds, ought to have known better that the judgment should not have been granted as **Rule 31(5)(a)** had, not been complied with. The short service, according to the applicant, should not have been condoned as the registrar had no power to do so. This is correct. Clearly, the judgment was erroneously sought and granted. On this ground alone, as correctly submitted by Mr De Klerk, the application for rescission should be granted.

COSTS

[13] **Rule 31(5)(e)** is clear when it involves costs where the registrar is called upon to grant judgment by default. The rule, too, is peremptory. If the value of the claim in the summons falls within the jurisdiction of the magistrate's court i.e.: apart from any consent to jurisdiction, the registrar "shall" grant judgment for costs in an amount of R200 plus the

Sheriff's fees. In other cases, the registrar "*shall*" grant judgment for costs in an amount of R650 plus Sherriff's fees unless the application for default judgment requires costs to be taxed or the registrar requires a decision on costs from the Court. (See: **Bloemfontein Board Nominees Ltd v Benbrook 1996 (1) SA 631 (O); Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)**).

[14] If the registrar was entitled to grant default judgment and costs the need was there for him to comply with **Rule 31(5)(e)**. He, clearly, acted ultra vires his powers in terms of the Rules. The registrar was not empowered to grant "*costs of suit*".

[15] The registrar granted the following order in favour of the respondent/plaintiff on 24 November 2014, namely, for:

"1. Payment in the amount of R10 919 675 68;

2. Interest on the aforesaid amount at 15.5% a temporae mora calculated daily compounded monthly in arrears from date of demand to date of payment;

3. Costs of suit".

[16] On behalf of the applicant, it was submitted that the application for rescission of the default judgment should be granted with costs as **Rule**

31(5)(a) and Rule 31(5)(e) were not complied with by the respondent, its attorneys and the registrar.

CONDONATION

[17] The respondent raised the issue that **Rule 31(2)(b)** requires the applicant to bring the application within the time period stipulated therein and that condonation was required as the Rule had not been complied with. The application, according to the submission, ought to have been filed by 20 January 2015. This submission, as shown above, loses sight of the fact that the application is based on **Rule 42(1)(a)**. **Rule 42(1)(a)** unlike **Rule 31(5)(a)** or **Rule 31(2)(b)** has no provision which specifically stipulates when the application should be launched. **Rule 42(1)(a)** speaks of "*may*" which, according to the applicant, means that the application has to be brought "*within a reasonable time*". It was submitted on behalf of the applicant that "*the time frame within which the applicant brought the application was not unreasonable*" and that "*any delays have been explained*". It was further submitted that a proper explanation regarding the lapsed time between the granting of the default judgment and the launching of the rescission application which explanaition was acceptable was given by the applicant. The point *in limine*, according to the applicant, should be dismissed with costs.

SECURITY FOR COSTS

[18] The respondent's submission is that the applicant has no immovable property, has no known address and may "very well be unable to pay

costs should it be required to." The applicant denies that it is liable to pay costs.

[19] **Rule 47** deals with circumstances under which security for costs may be requested. Under common law an *incola* plaintiff (company) could not be compelled to give security for costs. The new **Companies Act 71 of 2008** makes no provision for security for costs by companies. **Section 13** of the **Companies Act 61 of 1973** provided the Court with a discretion to order a plaintiff company to furnish security for costs where it reasonably believed that the company would not be able to pay the defendant's costs. Under common law, an *incola* plaintiff may not be compelled to give security but the court still has the discretion to order the furnishing of security where it is of the opinion that the proceedings are vexatious. (See: **Siemens Telecommunications (Pty) Ltd v Datagencies (Pty) Ltd 2013 (1) SA 65 (GNP); Nielson v Rautenbach N.O and others 2014 (3) SA 17 (GNP) and Boost Sport South Africa (Pty) Ltd v South African Breweries Ltd 2014 (4) SA 343 (GP)**).

[20] It was submitted, on behalf of the applicant, that there was nothing in this matter which demonstrates that these proceedings are vexatious or without merit. That no security was furnished in this matter, according to the applicant, should not persuade the Court to dismiss the application on that basis alone. There is merit in the submission.

[21] The applicant has based the application on the following:

1. The respondent's failure to comply with **Rule 31(5)(a)** by failing to give the applicant at least 5 days' notice;

2. The agreement between the applicant and the respondent contains a peremptory arbitration and/or dispute clause which impels them to first refer the dispute to arbitration before approaching the Court; and that

3. The respondent attached wrong invoices in respect of the wrong sites to its declaration and summons demonstrating that it has failed to prove its claims and therefore is not entitled to the judgment.

[22] **Rule 31(5)(d)** enables a dissatisfied party to set the matter down for reconsideration by the Court, within 20 days after the party has acquired knowledge of a judgment or discretion given by the registrar, with which the party is unhappy. It was submitted on behalf of the applicant that the Rule speaks of *"any party may"*. The sub-rule, according to the applicant, is not peremptory and that the applicant was within its right to exercise and employ any remedy it might have had at the time and that **Rule 42(1)(a)** was such a remedy. I agree.

[23] It has been said that "*sufficient*" or "*good cause*" must be shown. "*Sufficient cause*" in **De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A) at 1042 and Childerly Estate Stores v Standard Bank of**

SA Ltd 1924 OPD 163 and Cairns Executors v Gaarn 1912 AD 181) has been said to defy precise or comprehensive definition as many and various factors need to be considered.

However, the two essential elements of "*sufficient cause*" are:

1. That the party seeking relief must present a reasonable and acceptable explanation for the delay;

2. That on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success (See: **De Wet's case (*supra*) at 1042; P. E Bosman Transport Wks Com v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A); Smith N.O v Brummer N.O and Another 1954 (3) SA 352 (O) at 357-8**).

[24] It was submitted that the applicant was in wilful default and that it had no *bona fide* defence. The submission was that the applicant would have filed a plea and counterclaim had it intended to as, according to the submission, the applicant had been given enough time to do so. Further, it was submitted that Mr Khoza, the applicant's attorney, in his affidavit, did not explain *"why the papers and reports were not ready when the applicant was called upon to file its papers"*. Lastly, it was submitted that it was irrelevant whether the applicant could get hold of Mr Khoza as the applicant finally got him when it needed him to depose to the affidavit.

applicant had to tread very cautiously. Indeed, the amount involved is huge. According to the applicant, it initially appeared that the reports pertaining to the calorific value of the coal would easily be obtained. This was not so because, according to the applicant, the experts who were to assist it with the reports did not want to assist because the respondent was doing business with them. This, indeed, the applicant could not control. This, according to the applicant, delayed the filing of the plea and the counterclaim.

[26] The applicant could not easily get its attorney when it needed him because he had lost his father. The attorney too, according to the applicant, was also sick. Indeed, this is not something that the applicant could have control over. Mr Khoza deposed to an affidavit explaining all the factors which gave rise to the situation. The applicant has also explained that it terminated its mandate that it had given its previous attorney adding that its new attorney is now carrying out its mandate. The applicant, in my view, appears to have done everything possible in the circumstances of this case. It appointed its present attorneys of record shortly before the annual Christmas holidays when the legal profession virtually comes to a standstill as *dies* do not apply during the time. The applicant contends that it always had the intention to file a plea and counterclaim and that it, as a result, was never in default in failing to file its plea and counterclaim

[27] The applicant contends further that it has a bona fide defence against the respondent's claim as-:

1. The coal that the respondent provided was unusable and unfit for the purpose for which it was purchased;

2. The parties concluded an agreement in terms of which the price of the coal would be reduced in relation to the carolific value of the coal. It is common cause between the parties that the coal that the applicant received was mixed with rocks which had no calorific value at all. The applicant contends that it tendered return of the unusable material. The Kromdraai agreement was amended to cover the calorific value.

[28] It was submitted that the respondent had failed to prove that the applicant was in wilful default by failing to prove all three elements necessary to prove it, namely,

1. Knowledge that the action was being brought against it;

2. A deliberate refraining from filing its plea and counterclaim; and

3. The necessary mental attitude towards the consequences of the default.

(See: **Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O); Rose and Another v Alpha and Secretaries Ltd 1947 (4) SA 511 (A) and**

Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd 1980 (4) SA 573 (W)).

[29] It was submitted as shown above, that the applicant had demonstrated that the judgment was erroneously sought and granted and that the applicant was entitled to the rescission of the judgment. It was further submitted that in an application based on **Rule 42(1)(a)** the applicant "*need not show good cause*". It was further submitted the "*good cause*" was, in any event, sufficiently demonstrated and that that entitled the applicant to the rescission of the judgment. The further submission was that "*should the defences raised by the applicant succeed at trial the applicant will be entitled to the relief it sought*". The submission is, in my view, correct.

[30] It was submitted correctly, in my view, that the respondent failed to properly "deal with the allegations contained in Annexure "E" to the applicant's founding affidavit", stating that it will not deal with each and every allegation contained therein. Annexure "E" is the respondent's/defendant's opposing affidavit in the summary judgment application. As shown above, the respondent gave the applicant (defendant) leave to defend the respondent's (Plaintiff's) action. The respondent's decision cannot simply be ignored as it is also key in this matter. It was

[31] It was submitted that if the applicant was allowed to defend the matter that would only relate to claim 1 and not claim 2. I do not agree. It is my view that judgment should be rescinded in respect of both claims.

[32] It was submitted that whatever the decision, the Court ought to award the costs of the application to the respondent. I again do not agree. Having regard to the facts of the case, I am of the view that costs should be costs in the cause.

ORDER

[33] **The following order, as a result, is made:**

1. **The judgment granted by the registrar against the applicant on 24 November 2014 is hereby rescinded.**

2. **Costs will be costs in the cause.**

M. W. MSIMEKI
JUDGE OF THE HIGH COURT OFSOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA