REPUBLIC OF SOUTHAFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 81501/2014
DATE:4/3/2016

CITY **OF TSHWANE METROPOLITAN MUNICIPALITY** **APPLICANT**

AND

MNAPE'S CONSTRUCTION CC & LEBOTHAKGA BUILDING AND CONSTRUCTION CC **RESPONDENT**

JUDGMENT

THOBANE,AJ

[1] This is an application for rescission of a judgment obtained by default on the 14th January 2015 before Makgoba J. The judgment ordered the following;

1.1. Judgment against the Defendant for payment of the sum of R 855 535-80 being the principal sum outstanding;

1.2. Interest on the amount of R 855 535-80 at the rate of 15.5% per annum, calculated and compounded monthly from the 20th November 2013 to date of full payment;

1.3. The respondent to pay costs;

1.4. That the Respondent to pay an amount of R 855 535-80 together with interest calculated and compounded monthly at the rate of 15.5 % per annum from the 20 November 2013 to date of full payment directly into the trust account of TP Phahla Attorneys, Account number [6…], First National Bank.

[2] This application, which according to the applicant, is brought in terms of Rule 42 of the Uniform Rules, is opposed by the respondent, who, over and above opposing the application on the merits has raised a point *in limine* to the effect that the applicant has failed to apply for condonation.

BACKGROUND FACTS

[3] The respondent issued summons against the defendant for payment of the sum of R 855 535-80. The genesis of the claim is an award of a tender by

the applicant to the respondent for construction of roads and storm water systems in Block R, Soshanguve.

[4] According to the summons, the respondent performed work and submitted invoices for the work already done. The respondent was subsequently paid for the work done.

[5] Thereafter, the respondent on or about the 5th June 2013, submitted a schedule of quantities or a statement to the applicant for the amount in respect of which default judgment was requested and granted. The respondent contends that it duly ,performed and complied with the provisions of the agreement in respect of which the work was performed and that the applicant failed to make payment for the work done.

[6] The respondent further submitted that despite delivery of a statement detailing all the work performed as well as the monies due and payable, demand in respect thereof, meetings held between the parties and eventually a notice of intention to institute legal proceedings, the applicant failed to make payment in the amount claimed or in any other amount.

[7] On the strength of such failure, the respondent issued summons against the applicant based on the cause of action as aforesaid.

ISSUES

[8] The following are issues for determination;

8.1. Whether the point *in limine* as raised is sustainable;

8.2. Whether the applicant has met the requirements of Rule 42(1)(a).

THE LAW

[9] Rule 42(1)(a) provides that:

> *"(1) The court* may, *in addition to any other powers it may have, mero motu or upon 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."*

[10] In light of the above, the prerequisites that the applicant is required to satisfy under this sub-rule are the following:

10.1. the default judgment must have been erroneously sought or erroneously granted;

10.2. such judgment must have been granted in the absence of the applicant; and

10.3. the applicant's rights or interest must be affected by the judgment.

[11] It can be taken as established that the judgment was obtained in the absence of the applicant and also that the order affects the applicant's rights or interests. This is common cause. What remains is for the applicant to discharge the *onus* resting upon it, of establishing that the default judgment was erroneously granted or obtained. See ***Mutebwa v Mutebwa and Another 2001*** *(2)* ***SA 193 at page 199*** **F; *Bakoven Ltd v*** **G** ***J Howes (PTY) Ltd 1990 (2) SA 446 at page 469 8.)***

SUBMISSIONS

[12] The respondent in support of the contention that the applicant ought to have applied for cpndonation, sketches the following picture;

12.1. Judgment was obtained by default on the 14th January 2015;

12.2. The applicant was made aware of the judgment under cover of a letter dated the 19th January 2015;

12.3. The parties entered into discussions which included a request by the applicant for the respondent to abandon judgment. The respondent declined such a request;

12.4. That on the 5th March 2015 they were served with the application for rescission of judgment, supported by an affidavit which, *ex facie,* had been commissioned on the 4th March 2015;

12.5. That on their calculation the application for rescission of judgment was 11 (eleven) days out of time.

12.6. That absent consent for filing the application for rescission of judgment out of time or an application to court condoning such late filing, the application for rescission of judgment falls to be dismissed.

[13] The contention by the applicant is that in terms of Rule 42 of the Uniform Rules, all that the applicant needs to show is that the application has been brought within a reasonable time and that what amounts to a reasonable time would depend on the circumstances of each case. Further, that the lapse of 11 days was not in these circumstances unreasonable and that the submission with regard to an application for condonation is misplaced.

[14] It was further argued on behalf of the applicant that the timeframes self evidently did not point to an unreasonable delay in launching the application for rescission and that the counter argument raised was dispositive of the point *in limine* raised.

[15] If we accept as contended by the applicant that this application is brought in terms of Rule 42, then in that event the question which arises is whether this application was brought "within a reasonable time". The common law phrase "reasonable time" is generally applied in the context of contractual disputes and does not admit of a single legally determinative meaning.

The determination of what constitutes a reasonable time is a fact-bound inquiry. See ***Strachan & Co Ltd v Natal Milling Co. (Pty) Ltd 1936 NPD 327 at 333; Cardoso v Tuckers Land and Development Corporation (Pty) Ltd 1981(3) SA 54 (W) 63 E.***

[16] The parties, after the respondent had notified the applicant about the default judgment, discussed, if only briefly, the possibility of abandonment of judgment on the part of the respondent. The respondent was of the view that an application for default judgment be served or that the matter be settled along certain lines, which they outlined in correspondence. It is obvious that the, settlement discussions did not succeed hence this application. I do not believe the period of 11 days, being the number of days applicant's application is out time, in the circumstances of this case, given that there was an attempt at settlement, is unreasonable.

WAS JUDGMENT ERRONEOUSLY GRANTED OR OBTAINED

[17] The respondent issued summons which were served on the applicant on the 14 November 2014. The *dies induciae* was due to expire on the 12 December 2014.

[18] On the 12 December 2014 the applicant attempted to serve a notice of intention to defend at the offices of the respondent's legal representative without success. The Candidate Attorney who had attempted to serve the

notice then deposed an affidavit and filed same along with the notice of intention to defend with the registrar of this court. The appearance to defend bears a court stamp of the 12 December 2014.

[19] The affidavit explained that there was an attempt to serve the appearance to defend on the respondent's legal representatives but that their offices were found locked. Upon inquiry at a neighboring office they were advised that the respondent's legal representatives were closed for the year. The affidavit was thereafter prepared and filed together with the appearance to defend.

[20] On the 14 January 2015 the respondent applied for default judgment on the unopposed basis, which judgment was granted. During argument I asked counsel for the respondent how it was possible to apply for default judgment in circumstances where at the very least, the appearance to defend as well as the affidavit filed to explain the non-service of the appearance, ought to have been in the court file. He responded by stating that he was in charge of the matter on the day and that they had requested the registrar to prepare a duplicate file which was populated with copies. This explanation is also contained in the opposing affidavit. The judgment therefore was granted on a duplicate file which explains why the Judge that handled the matter would not have been aware that an appearance to defend had been entered.

[21] The question thus arises what is the meaning of the words *"erroneously granted".* This is dealt with in ***Bakoven Ltd v G J Howes (Pty) Ltd 1990 (2) SA 446 at page 471 E-H,*** where it is stated:

> *'/!\n order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of* 'a *mistake in* a *matter of law appearing on the proceedings of* a *Court of record' (The Shorter Oxford Dictionary). It follows that* a *Court in deciding whether* a *judgment was 'erroneously granted' is, like* a *Court of Appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2){b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and* a *bona fide defence* ***(Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd (supra) at 57BF-G; De Wet (2) at 777F-G; Tshabala/a and Another v Pierre 1979 (4) SA 27 (T) at 30C-D).*** *Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission."*

[22] Put differently, a judgment would be erroneously granted if there existed at the time of issue thereof, a fact of which a Judge was unaware, which would have precluded the granting of said judgment, and which would have induced the Judge, if aware of it, not to grant the judgment. See ***Nyingwa v Moo/man NO 1993 (2) SA 508 (Tk)*** where White J, in dealing with an

application for rescission brought in terms of Rule 42 (1)(a), stated as follows at 510 G:

> *"It therefore seems that* a *judgment has been erroneously been granted if there existed at the time of its issue* a *fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment."* See also ***Naidoo v Matlala NO 2012 (1) SA 143 (GNP).***

[23] Finally, an order or judgment is erroneously granted if there was an irregularity in the proceedings. See ***Tshabalala v Peer 1979 (4) SA (T) at 30H-31A; National Pride Trading 452 (Pty) Ltd v Media 24 Ltd 2010 (6) SA 587 (RCP) at 539F-5941.***

[24] The question that inadvertently arises in the circumstances of this case and in light of the aforementioned authorities is two pronged and can be couched as follows;

24.1. Is there a fact of which the Judge was not aware at the granting of judgment which had he been aware of, would have precluded him from granting the default judgment?

24.2. Was there an irregularity in the proceedings?

[25] I take the view that had the Judge been aware that there was an appearance to defend filed in the Court file, albeit without proof of service, but with an affidavit explaining the failure to serve the notice of intention to defend on the respondent, he would have handled the matter differently. For a start, the Judge would have sought to establish if, in light of the appearance to defend, a notice of set down had been served on the applicants. Secondly, the file that was presented when default judgment was sought, was a duplicate file. This explains the absence of the appearance to defend in the court file, thus depriving the Judge, without apportionment of fault on the respondent, an opportunity to deal with the matter in accordance with the law.

[26] I consider filing of the appearance to defend with the registrar in circumstances where same has not been served on the respondent to be an irregular step. I am fortified in that view by what is said in ***Herbstein & Van Winsen on "The Civil Practice of the High Courts of South Africa", fifth edition, Vol 1, page 512;***

> "**.....** a *notice of intention to defend will be irregular if:*
>
> *(1) It has not been properly delivered.*
>
> *(b) A notice of intention to defend will be irregular if the defendant, having filed the original notice with the registrar, fails to serve* a *copy on the plaintiff or attorney. By analogy with the former Cape practice, it is submitted that in the event of such failure, the plaintiff will be entitled to assume that*

notice of intention to defend has not been given. If, however, the plaintiff does so and moves for judgment, the court will not grant judgment, but will order the defendant to pay the wasted costs occasioned by the omission."

See ***R O Investments (Pty) Ltd v Consolidated Press of SA Ltd 1949 (4) SA 454 (C)*** and ***Ingle v Andrew 1924 CPD 40.***

[27] The applicant identifies an irregularity as being the failure of the respondent to serve a notice of enrollment on them, in light of the fact that the matter had become defended. The folly in that argument is that the respondent could not have been aware that the matter is defended as they were not served with the notice of intention to defend. The defendant would have been aware only if the notice was served on them or if the original appearance to defend was in the court file.

[28] The defendant denies that the steps they took namely, to apply for default judgment on the unopposed roll was irregular. I agree with their contention. They were fully entitled to approach court and apply for judgment however had the original file been available, they would not have been granted judgment.

[29] I am accordingly of the view that;

29.1. Filing of the appearance to defend with the registrar and the failure to serve same on the respondent was an irregular step. The proceedings are therefore tainted with an irregularity.

29.2. Had the Judge been aware, which awareness he would have gained had the original file been presented to him, that appearance to defend had been filed, albeit not served on the respondent, he would not have granted default judgment.

[30] The parties have in detail dealt in the papers with the merits of the matter. Once an error has been identified, as is the case, the applicant is without further ado entitled to rescission. I therefore do not believe that the merits of the case need further attention.

COSTS

[31] The applicant is praying that any party that opposes the application be directed to pay the costs of this application and in the alternative, that costs be costs in the proceedings under case no. 81501/2014. The respondent seeks a cost award in its favour but goes further to pray for a cost order on a higher scale. Respondent contends that the applicant or its attorneys were negligent, that they have advanced no *bona fide* defence to the claim and that they have failed to show good cause why judgment must be rescinded. I have pointed out the *dicta* from ***Bakoven Ltd v G J Howes (Pty) Ltd,*** in 21 *supra,*

that a *bona fide* defence and good cause are not considerations in an application brought in terms of Rule 42(1)(a). The basis for arguing for a higher cost order is therefore misplaced.

[32] Ordinarily costs follow the event. In the circumstances of this case, the applicant would have been visited with a cost order, had the original court file been available, for having acted irregularly in not serving the notice of intention to defend on the respondent or its legal representatives. I do not believe that the respondent should be burdened with the costs of the application for default judgment and the rescission application.

[33] I therefore make the following order;

33.1. The point *in limine* is dismissed;

33.2. The judgment granted by default on the 14th January 2015 is rescinded;

33.3. The applicant is granted leave to deliver its plea within 10 days of this order and;

33.4. The applicant is directed to pay the costs of this application, save for the costs of the 31 August 2015.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

ATTORNEYS FOR THE APPLICANT	:GILDENHUIS MALATJI INC.
COUNSEL FOR THE APPLICANT	:ADV. MANALA
ATTORNEYS FOR THE RESPONDENT	: TP PHAHLA ATTORNEYS
COUNSEL FOR THE DEFENDANTS	:ADV. KANYANE