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

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

7/8/2019
DATE

SIGNATURE

Case No: 89831/2018

In the matter between:

THE SOUTH AFRICAN NATIONAL ROAD AGENCY (SOC) LTD — **APPLICANT**

and

LONEROCK CONSTRUCTION (PTY) LTD — **RESPONDENT**

REG NO. 2007/004925/07

JUDGMENT

1. **INTRODUCTION**

1.1. The Respondent (as Plaintiff) initiated action proceedings in this Court on 13 December 2018 against the Applicant (as Defendant), in terms of which the Respondent claims payment in the amount of R5 257 790,48, plus VAT.

1.2. The combined summons was served on the Applicant at its principal place of business on 13 December 2018.

1.3. Regard being had to the *dies non*, the time period for entering appearance to defend expired on 11 February 2019.

1.4. The Applicant failed and omitted to file and deliver its notice of intention to defend the Respondent's claim timeously, i.e. on or before 11 February 2019.

1.5. The Respondent subsequently prepared an application for default judgment, in accordance with the provisions of Rule 31(5)(a) of this Court's rules. The aforementioned application for default judgment was signed by the Respondent's attorney on 14 February 2019.

1.6. It is common cause that the Registrar of this Court granted default judgment in the Respondent's favour on 18 February 2019, in the amount of R5 257 790,48, together with interest on the aforementioned amount at the prescribed legal rate calculated from 10 September 2015 until date of payment and costs of the suit in the amount of R650,00 plus Sheriff's fees.

2. THE APPLICANT'S CASE

2.1. It is the Applicant's case that the judgment that was granted by the Registrar of this Court on 18 February 2019 was erroneously sought and erroneously granted, as envisaged in Rule 42(1)(a) of this Court's rules.

2.2. It is the Applicant's contention and case that the Respondent granted it an indulgence on 15 February 2019. The Applicant's in-house legal advisor, Mr Vulindlela Matai, addressed an e-mail to the Respondent's attorney on 15 February 2019 in which the following was placed on record:

> *"Our telephonic conversation of earlier today as well as your **indulgence** to serve our notice to defend refers.*
>
> ***There was a slip up in our procurement unit and as a result the attached notice to defend was not prepared on time**.*
>
> *We are in the process of appointing attorneys through our procurement unit and that process will finalise by Tuesday the 19th of February 2019.*
>
> *Your favourable **consideration** of our request is highly appreciated."*

2.3. Mr Matai prepared a notice of intention to defend dated 15 February 2019, which was dispatched to the Respondent's attorney later (at 14h21) on the same day.

2.4. Mr Matai, however, failed and omitted to file the notice of intention to defend at the office of the Registrar of this Court. The notice of intention to defend was also not delivered at the offices of the Respondent's attorney, in accordance with the provisions of Rule 19 of this Court's rules.

2.5. Rule 19(5) comes into play. This rule provides for the following:

> *"Notwithstanding the provisions of subrules (1) and (2) a notice of intention to defend may be delivered even after expiration of the period specified in the summons or the period specified in subrule (2),* ***before*** *default judgment has been granted :* ***provided that the Plaintiff shall be entitled to costs if the notice of intention to defend was delivered after the Plaintiff had lodged the application for judgment by default.***"

2.6. The Applicant appointed an attorney to represent it in this matter. The Applicant's attorney filed and delivered an *"appearance to defend"* on 20 February 2019. This notice of *"appearance to defend"* was filed at the office of the Registrar of this Court on 21 February 2019.

2.7. The Registrar of this Court granted default judgment on 18 February 2019.

2.8. The Respondent's attorney addressed an e-mail to Mr Matai on 21 February 2019 in which the following was placed on record:

> *"Save to place on record that our offices did **not** agree to provide your offices with any indulgence to file a notice of intention to defend, we take note of the remainder of your e-mail."*

2.9. The Respondent's attorney furthermore addressed a letter on 22 February 2019 to Mr Matai and the Applicant's duly appointed attorney in which the following was placed on record:

> *"2. We wish to place on record that our offices did **not** agree to grant any indulgence to the Defendant to deliver its notice of intention to defend, nor did our offices agree to the exchange or service of notices by means of electronic mail.*
>
> *3. In fact, writer advised your Mr Matai that the Plaintiff had already applied for default judgment on 13 February 2019 and it was not in a position to uplift the application at such a late stage on Friday afternoon.*
>
> *4. Mr Matai was advised that his attorneys would need to deliver any notice of intention to defend physically and swiftly, in order for the application for default judgment to be uplifted. The*

Defendant failed to serve and file its notice as required in terms of Rule 19 of the Uniform Rules.

5. *As a result of the Defendant's willful default, an order was granted on Monday, 18 February 2019."*

3. In summary:

3.1. The application for default judgment was presented and filed at the office of the Registrar of this Court on 14 February 2019;

3.2. The Applicant's legal advisor, Mr Matai, prepared a notice of intention to defend which was dispatched to the Respondent's attorney electronically (via e-mail) on 15 February 2019;

3.3. The aforementioned notice of intention to defend was not *"filed and delivered"* as provided for in Rule 19 of this Court's rules, in that it was not filed at the office of the Registrar's Court and delivered at the offices of the Respondent's attorney of record;

3.4. The Respondent's attorney *"ignored"* the notice of intention to defend and nobody informed the Registrar of this Court of the Applicant's intention to defend the action; and

3.5. The Registrar of this Court consequently entered default judgment in favour of the Respondent on 18 February 2019.

4. It is evident that Mr Matai laboured under the misconception that the notice of intention to defend which was dispatched to the Respondent's attorney on 15 February 2019 would suspend the application for default judgment in terms of Rule 31(5)(a) of this Court's rules. Neither Mr Matai, nor the Respondent's attorney informed the Registrar of this Court of the Applicant's intention to defend the action.

5. On the evidence before me I am satisfied that:

5.1. the Applicant intended to defend the action that was initiated by the Respondent in this Court on 13 December 2018;

5.2. the Respondent did **not** provide an indulgence to the Applicant; and

5.3. there was no obligation or responsibility on the Respondent's attorney to alert the Registrar of this Court in respect of the notice of intention to defend dated 15 February 2019.

6. The Applicant's notice of intention to defend was *"delivered"* after the expiration of the period specified in Rule 19(2), but **before** default judgment was granted by the Registrar of this Court.

7. The Applicant furthermore submits that two default judgment applications were filed, which contains various inconsistencies, namely:

   7.1. The dates in respect of the Court stamp differs on the two applications for default judgment;

   7.2. The Court stamp location is different on both applications;

   7.3. The date on the Court stamp was hand-edited without an initial by the Registrar of this Court;

   7.4. A portion of prayer "c" on one application was deleted without an initial by the Registrar of this Court; and

   7.5. The application was allegedly filed on 13 February 2019, yet it was executed on 14 February 2019.

8. The purpose of this judgment is not to pronounce on the merits, or the lack thereof, pertaining to the aforementioned discrepancies. The discrepancies complained of by the Applicant are unfortunate, but not decisive. The fact of the matter is that the Applicant intended to defend the action which was initiated by the Respondent, but the Applicant's legal advisor (Mr Matai) did not comply with the requirements provided for in Rule 19 of this Court's rules.

9. **RATIO OF THIS JUDGMENT**

9.1. The authorities relied upon by the Applicant in its heads of argument are trite. This Court has a wide discretion to rescind or to set-aside orders which were granted by default in the absence of one of the parties, including orders which falls within the ambit of Rule 42(1)(a).

9.2. The Respondent submits that the Applicant does not have a *bona fide* defence, in that the Applicant has been aware of the dispute since 9 September 2015, when the Respondent issued a contractor's dispute notice. Mediation between the parties was concluded on or about 26 March 2018 and it is therefore, so the Respondent submits, evident that the Applicant has no *bona fide* defence and is playing for time. The Applicant is, so the argument goes, applying delaying tactics and attempting to avoid the unavoidable.

9.3. There might be merit in the Respondent's argument, but this Court should only *"close the door for the Applicant"* in the event that it is crystal clear that the Applicant does not have a *bona fide* defence and is implementing delaying tactics. On the evidence before me I am not in a position to make such a finding.

9.4. I am therefore satisfied that this applications falls within the ambit of Rule 19(5) of this Court's rules. The judgment which was granted by default on 18 February 2019 should therefore be rescinded and set-aside.

10. **COSTS**:-

10.1. The Applicant could have done more to avoid default judgment. Mr Matai laboured under the misconception that the notice of intention to defend would suspend the process that was initiated by the Respondent on 14 February 2019, when the Respondent submitted its application for default judgment to the Registrar of this Court in accordance with the provisions of Rule 31(5)(a) of this Court's rules.

10.2. In hindsight Mr Matai should have done more to avoid default judgment being granted against the Applicant. Hindsight is a perfect science, but Mr Matai should have filed the notice of intention to defend at the office of the Registrar of this Court prior to the granting of default judgment. The Registrar of this Court was unaware of the Applicant's intention to defend the action and the Registrar therefore granted default judgment in favour of the Respondent.

10.3. The Respondent's conduct cannot be criticized. The Respondent complied with the rules of this Court and the Respondent should therefore not be mulcted with the costs occasioned by this application.

In the premise I make an order in the following terms:

1. **The order that was granted by default by the Registrar of this Court on 18 February 2019 is hereby rescinded and set-aside; and**

2. **The Applicant is ordered to pay the costs of this application on the party and party scale.**

F W BOTES

ACTING JUDGE OF THE HIGH COURT