IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

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

12 / December / 2019

CASE NUMBER: 15755/ 2018

In the matter between:

FUGRO EARTH RESOURCES (PTY) LTD **APPLICANT**

and

EXTREME MINING AND CONSTRUCTIONS CC **RESPONDENT**

JUDGMENT

MAVUNDLA J;

[1] The applicant seeks an order in the following terms:

1.1 an order declaring that the default judgment granted against Extreme Mining and Construction CC granted against it on 14 June 2018 is a nullity and of no legal force and effect;

1.2 the default order granted against Extreme Mining and Con be rescinded and be set aside;

1.3 that all steps taken in execution of the default order granted against Extreme Mining and Construction cc ON 14 June 2018 be set aside;

1.4 the respondent be ordered to pay the costs of the application on attorney and client scale only in the event of opposition hereof.

[2] The application is brought in terms of Rule 42(1)(a) of the Uniform Rules of Court on the basis that:

2.1 there is no registered entity such as Extreme Mining and Construction CC;

2.2 the application was brought against Extreme Mining and Construction CC is accordingly a nullity, as is the default order granted against such non-entity;

2.3 the respondent also erroneously sought and obtained an order for rental in an amount of R55 161. 29;

2.4 the default order was erroneously sought and granted;

2.5 in the circumstances there is no need to show good cause.

APPLICANT'S VERSION.

[3] According to the applicant:

3.1 the respondent launched an application against Extreme Mining and Construction CC under case number 15755/2018 during February 2018 for payment of an amount of R287 758.06, allegedly due and payable by Extreme Mining and Construction CC to the respondent in terms of a lease agreement, together with interests thereon and costs;

3.2 The application was apparently served on Extreme Mining and Construction CC by affixing copies thereto at the main front gate of Heuwelzicht Office

Park, 204 Buffeldoom Road, Klerksdorp and to main front door of 16 Abrahamson Street, Klerksdorp on 14 March 2018;

3.3 The address Heuwelzicht Office Park, 104 Buffeldoom Road, Klerksdorp was stated to be its principal place of business and the address 16 Abrahamson Street, Klerksdorp was stated to be its registered address respectively;

3.4 The respondent set the application down for hearing on the unopposed roll of 17 April 2018;

3.5 Teffo J apparently requested clarification regarding the agreements between the parties, and specifically why the agreement annexed as annexure "F1" to the founding affidavit of the main application was not signed, from the respondent on 17 April 2018. It appears that the application was postponed *sine die*;

3.6 The respondent filed a supplementary affidavit on 01 June 2018. The application was once more set down on the unopposed motion court role of 14 June 2018. The notice of set down was served on Mrs P de Jager, the receptionist for Van Sitttert Accountants at Heuwelzicht Office Park, 104 Buffeldoom Road, Klerksdorp and on Ms Pepler at Abrahamson Street, Flarmwood, Klerksdorp on 16 May 2018 respectively. The respondent apparently obtained the default order against the Extreme Mining and Construction CC on 14 June 2018 for the amount of R287 758.06.

[4] The applicant first became aware of the default order on 12 September 2018 when Mrs Gerhard van Der Walt, previous member of the applicant, was confronted with a warrant of execution by the sheriff. The applicant instructed its attorneys of record to investigate the matter, Ms Lelanie du Preeze, after investigating the matter, informed the applicant of the default order of the 14 June 1018.

[5] It was thereafter that the applicant instructed the attorneys of record to bring the application for rescission of the default order. The application was brought within reasonable time after the applicant acquired knowledge of the default order.

EXPLANATION OF THE DEAULT

[6] The applicant ceased trading from the address Heuwelzicht Office Park 104 Buffeldoom Road Klerksdorp on or around 30 September 2017 and commenced trading from the premises situated at 12 Venter Street Potchefstroom on 1 October 2017. The applicant did not receive the application and the notice of set down as the premises were occupied by a certain Ms Pepler during May 2018 as the applicant had left the said address.

[7] The applicant further contended that it has a *bona fide* defence and a counterclaim against the respondent in that:

7.1 the written lease agreement would have terminated on 8 December 2017, however the respondent charged rental up until 18 December 2017 when it was not entitled to do so and should have instituted a damages' claim for any use of the equipment beyond 8 December 2017.

[8] The application is brought in terms of rule 42(1)(a) of the Uniform Rules alternatively in terms of common law. In terms of rule 42(1)(a) the applicant must show that the judgment was erroneously sought or erroneously granted in his absence.

[9] The applicant contends further that Extreme and Construction is merely the applicant's trading name and is not a separate juristic person, and that Extreme Mining and Construction CC is not a separate jurisdiction person and a non-existing entity and accordingly the proceedings and order granted against such non-existing entity is a nullity.

[10] It further contended that the respondent erroneously sought and obtained an order for rental in the amount Of R55 161. 29 (10 x R4 828.71 + VAT @ 14%). The respondent's claim should be reduced by the amount of R55 161. 29;

[11] On the respondent's own version, it agreed to pay 50% of the maintenance and repair costs of the D12 and D28. The costs would have been subtracted from the monthly rental of R150 000. 00. The maintenance and repair costs amounted to R20 407.90 and the respondent is liable for 50% thereof being the amount of R10 203.95. Copies of the tax invoice paid by the applicant in this regard are annexed as annexure "I". The respondent's claim should be reduced by. a further R10 203.95.

[12] It was also an express alternatively tacit further alternatively implied terms of the agreement between the parties that the applicant would not be liable for any entire period during which the equipment rented from the applicant is not in a working order and condition. In an email dated 21 November 2017, the General Manager of the Respondent, Mr. Riaan Brink, confirmed that a credit of R5 000. 00 per day would be given for days that the compressor and or rig was on breakdown. The equipment was not in a working order and condition, and thus on breakdown for a total number of 19 days during October and November 2017. The breakdowns were communicated to the respondent via sms by Mr Arie Willem Johannes Jansen. The phone on which the sms were sent was unfortunately stolen. The respondent however failed to issue credit notes to the applicant in respect of such breakdowns. The respondent's claim should accordingly be reduced by a further amount of R108 300. 00 (R5 000. 00 x 19 + VAT @ 14%). The respondent's claim amount of R287 758. 06 should be reduced with at least with the amount of R173 665.24. The applicant intends to raise the aforesaid defences to the respondent's claim in the amount of R287 758. 06 should it be instituted against it, which, it is submitted are bona fide fences.

[13] The parties further agreed that the duration of the agreement between them would be from 12 October 2017 until March 2018, as is evident from the agreement forming part of annexure "F5" to the founding affidavit.

[14] The applicant further contended that it had a counter claim against the respondent in that the parties agreed that the duration of the agreement between them would be from 12 October 2017 until 30 March 2018 as reflected in annexure "F5" attached to the founding affidavit. The respondent repudiated this agreement by purporting to cancel the agreement under circumstances not permitted by law. The applicant was therefore left with no alternative than to accept the repudiation and cancel the agreement. The applicant issued several quotations for water well-drilling, which quotations were accepted by clients, date of acceptance of the quotation, the quotation amount, contact numbers and quote number is annexed as annexure "K". From the said list the amount of R861 100 would have been generated from such drilling work. The applicant would have made a net profit of approximately R344 440. 00 from such drilling work, calculated at a 40% profit rate.

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[15] In opposing the application for rescission, the respondent field an answering affidavit deposed to by one Mr Andraan Louw Brink who described himself as the businessman and manager of the respondent.

[16] It was contended on behalf of the respondent that, the applicant purported to be Extreme Mining Solutions CC. Should the applicant persist with its contention that it is a different entity to the respondent in the main application namely Extreme Mining and Construction CC then it does not have locus *standi* to bring this application. Then the respondent maintains that Extreme Mining Solutions CC and Extreme Mining and Construction CC are one and the same entity, in so far as the respondent in the main application has been incorrectly described, then Fugro Earth Resources (Pty) Ltd (Fugro") will consent to a variation of the default judgment alternatively counter-applies for a variation of the default judgment to

properly describe the judgment debtor as Extreme Mining Solutions CC trading as Extreme Mining and Construction.

[17] Fugro was under the bona fide but mistaken impression that the name of the debtor was Extreme Mining and Construction CC. The name was inserted to the written lease agreements headed "subcontract confirmation" attached to the founding affidavit followed by (Pty) Ltd. The applicant represented by Mr Johan van den Berg then signed the agreement attached as F5 without correcting the name of the entity with whom Fugro was contracting.

[18] The judgment granted is against an entity with registration number 2009/ 000088/23. It would be noted that at page 36 of the main application, Johan van den Berg signs the agreement on behalf of an entity known as Extreme Mining and Construction but also claims to be a director Should it be that the contention of the applicant that the name was incorrect, same should have been rectified.

[19] The respondent further contended that the registered address of the applicant the registered address of the applicant is 16 Abraham Street, Flamewood Street, Krugersdorp (annexure A of the founding affidavit. Annexure F8 to paginated page 43 of the founding affidavit in the main application reflects in the letter head sent on 30 January 2018 the address of the applicant *in casu* being Heuwelsig Office Park Number 104 Buffeldoring Road, Klerksdorp.

[20] Under rule 42(1)(a) the court has a discretion to grant or refuse the application for rescission.; vide First *National Bank of SA Ltd v Van Rensburg NO and Others*[1].. The application must be brought within a reasonable time, from the date upon which the applicant gained knowledge of the default judgment. It needs mentioning that, in *casu*, the applicant first became aware of the default order on 12 September 2018. Its attorneys were instructed to investigate the matter. Thereafter Ms. Du Preeze was instructed to launch the application. However, the founding affidavit

[1] 1994 (1) SA 677 (TPD) at 681F-G.

was only deposed to on 12 December 2018, three months later. In terms of rule 31(2) rescission must be brought within 20 days upon becoming aware of the default judgment. In terms of rule 42(1) the application must be brought within a reasonable time. For purposes of calculating a reasonable time the period of 20 days is regarded to be the required reasonable time applicable in respect of rule 42(1). vide *Roopnarain v Kamalapathy and Another (D & CLD).*[2] The applicant does not explain why it took three months to investigate the circumstance of the default judgement, after the warrant of execution was brought to the applicant's attention. I assume that the warrant of execution contained, *inter alia*, the relevant case number as well as the particulars of the attorneys who caused the warrant of execution to be issued. A mere telephone call would have solicited whatever further information was required. In my view, under such circumstances, a period of three months was an inordinate delay, warranting that this court should dismiss the application purely on this ground alone.

[21] I shall, nonetheless consider whether the order was erroneously granted. The applicant relies on rule 42(1)(a), namely that the order was erroneously sought and granted against a non-existing entity.

[22] The respondent contended that Johan van den Berg signed annexure F1 to the main application below the trade name of the applicant. In this regard it needs mentioning that the chosen domicile *ex cutandi* address for Extreme Mining and Construction was its principal place of business Heuwelzicht Office Park, 104 Buffeldoom Road, Klerksdorp, North West as reflected at paginated page 35 and 36 of the Subcontract Confirmation of the Water well drilling and equipment rental signed by JB Van den Berg on behalf of Extreme Mining Construction.

[23] The applicant further contended that the order was granted against an entity with registration number 2009/000088/23 named Extreme Mining and Construction CC which it claimed to be a non-existing entity. The applicant further contended that

[2] 1971 (3) SA 387 at 391B-D.

Extreme Mining and Construction is merely the applicant's trading name. In my view, where an entity is sued in its trade name, which it bandies to all and sundry with which it is commonly known, such an entity can hardly raise as a defence that it has been cited in its trade name which is a non-existent entity. It is clear from the documents against whom the action is directed. The applicant can hardly contend that it has been prejudiced when it is cited in its trade name; *vide Cupido v Kings Lodge Hotel*[3] and the authorities therein cited. I therefore conclude that the order was not erroneously sought and granted. This defence by the applicant that the judgment is a nullity therefore stands to be dismissed. Consequently, I deem it not necessary to traverse the rest of the applicant's defences. In so far as its alleged counterclaim, the applicant is free to institute its own action, if so advised.

[24] The respondent has further prayed that, in view of the respondent's own admission, that it is Extreme Mining Solutions CC, and Extreme Mining and Construction CC is its trade name, the order sought to be rescinded, be varied to reflect that the judgment debtor is Extreme Mining Solutions. Rule 14 of the uniform court rules is a mechanism designed to expeditiously and without non-suiting a party who has erroneously cited an entity with its trade name, to effect the necessary corrections of the proper name of such an entity. I am of the view, that *in casu*, the relief sought by the respondent should be granted.

[25] In the result, the following order is issued:

1.1 That the application for condonation and rescission is dismissed with costs;

1.2 That the order of 14 June 2018 under case number 15755/2018 is varied to reflect that the judgment debtor to be Extreme Mining Solutions CC REG NO: 2009/000088/23.

[3] 1999 (4) SA 257 (ECD) at 263B-C.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 12 / 12 / 2019

APPLICANT'S ADV : ADV. WILLS (ADV JE KRUGER prepared the heads)

BRIEFED BY : OOSTHUIZEN DU PLOOY ATTORNEYS

RESPONDENTS ADV : ADV ROSS SHEPSTONE

INSTRUCTED BY : TREND RICHMOND KOKINIS INCORPORATED