




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

Case No: 19176/2019

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<u>05 May 2021</u> DATE	 SIGNATURE

In the matter between:

CMTI CONSULTING PROPRIETARY LIMITED

Applicant

and

KING PIE (PTY) LTD (Nabuvax Pty Ltd)

First Respondent

KING PIE HOLDINGS Pty Ltd

**Second Respondent (Intervening Party/
Joinder)**

JUDGMENT ON RESCISSION

FRANCIS-SUBBIAH, AJ:

- [1] The Applicant, CMTI, seeks rescission of default judgment granted on 7 August 2019. Default judgment was sought by the Respondent with a combined summons and particulars of claim as King Pie Holdings (Pty) Ltd. However the court order is made out incorrectly to King Pie (Pty) Ltd with a different company's registration number, namely 'Nabuvax Pty Ltd.'
- [2] In seeking rescission the Applicant seeks an order that the court order be corrected to replace King Pie (Pty) Ltd with King Pie Holdings (Pty) Ltd and therefore King Pie Holdings is joined as an intervening Respondent. The test for joinder is whether a party has a direct and substantial interest in the subject matter of litigation which may prejudice the party that has not been joined. In ***Gordon v Department of Health, Kwazulu-Natal*** it was held that "if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those parties have a legal interest in the matter and must be joined."¹
- [3] In the matter at hand the error occurred not in determining the interested parties but at the stage of submission of the draft order when default judgment was

¹ 2008 ZASCA 99

granted. The draft order incorrectly cited the plaintiff (Respondent). No reasonable basis for the error is given by the Respondent, save to say that, it is a typographical / clerical error. The Respondent failed to take any steps within a period of seven to eight months to correct the error and concedes that King Pie Holdings clearly has a direct and substantial interest in the relief that is being sought. Consequently, refusing joinder will have the impact of prejudice on the parties and further delay the proceedings. As a practical measure the joinder is confirmed and the order corrected. The Respondent will further be referred to as King Pie Holdings.

- [4] It is trite that rescission of default judgment must establish in terms of Uniform Rule 31(2)(b) firstly, the reasons for absence or default. And secondly, the Applicant must satisfy the court of his grounds of defence to the main action by showing good cause in terms of the Uniform Rule or sufficient cause according to the common law which defence must have some prospect of success, establishing triable issues. According to **Swart v ABSA Bank Ltd**² good cause must be proved.
- [5] The basis for rescission of judgment is the Applicant bears the onus of proving:
- 5.1 that there was no wilful default; and
 - 5.2 that there is a *bona fide* defence to the Respondent's claim.

² 2009 (5) SA 219 (C)

- [6] The Applicant's complaint is that the sheriff on 22 March 2019 served the summons on CMTI by affixing the summons to the door of the premises which was no longer occupied by the Applicants. As a result the summons did not come to their attention resulting in the default judgment. Had they been aware of the summons they would have certainly defended the matter. The Respondent contends that the summons was served on the registered business address of the Applicant and therefore it is deemed proper service.
- [7] The Applicant concedes that the company's auditors had failed to update their new business address in the CIPC's records. However the Respondent was fully aware that the Applicant had moved business premises. The Respondent collected the pie vending machine from the new business premises of the Applicant. As a result, I find that Applicant has not been grossly negligent and there is no willful default on the part of the Applicant for not defending the matter.
- [8] Turning to consider whether the Applicant has a *bona fide* defence, requires an understanding of the nature of the business between the parties. King Pie Holdings concluded an agreement with CMTI to design and develop a functioning pie vending machine to be commercially utilised by King Pie Holdings. The uniqueness of this vending machine is to provide and dispense a selection menu of pies. Once the customer selects a pie, pays for it, receives change in notes and or coins, the selected pie is removed from cold storage, heated through by a microwave oven and dispensed to the customer.

- [9] The main issue between the parties is the terms of their oral agreement and the incompletely manufactured pie vending machine. The vending machine did not function as originally planned. This resulted in delays, unexpected problems, various re-designing and re-working that included a different fridge for cold storage, additional microwaves for heating, extended time periods for testing to enable delivery of the end product - a warm pie from a vending machine.
- [10] The Respondent aggrieved by the non-performance of the Applicant submits that the matter is a fairly straightforward contractual dispute in which the technical details play an insignificant role in the adjudication of the dispute.
- [11] However it is common cause between the parties that there are at least six disputes between them. CMTI submits that there are three separate phases to the oral agreements between the parties. They submit that they have performed on certain phases of the deliverables and should therefore retain their monetary compensation for it.
- [12] According to the parties there was no time frame agreed upon between them for the design and the development of the pie vending machine. However by November 2018 the Applicant had given another undertaking to deliver a fully functional machine and yet again the Applicant failed to deliver.
- [13] The Respondent concedes that even though no specific time period was agreed upon, it is trite that in any commercial contract where no specific time period is agreed upon, the Court should consider a reasonable time period in the

circumstances. It is submitted that a period of more than three years, by no stretch of the imagination, could not be considered as a reasonable time period. A reasonable time period can only be deducted by taking into account a variety of factors including a rational connection between the measure and the plan to achieve something. A haphazard conclusion cannot be made without a consideration of the relevant factors. These factors may well be triable issues.

- [14] Additionally the Applicant did not provide the Respondent with a “*performance guarantee*.” However, it is trite that throughout the correspondence exchanged between the parties, the Applicant repeatedly confirmed its commitment to deliver a fully functional machine thereby accepting such obligation.
- [15] The issue related to utilising the services of Delphius Technologies (Pty) Ltd as a third party was also a factor for consideration. According to the Respondent the introducing of Delphius Technologies to them was indicative of the Applicant’s lack of necessary expertise and skills and possible delays in the completion of the machine. This is a further issue that raises factual dispute where evidence led will in fact clear up whether the Applicant lacked the necessary expertise and skills to perform as agreed.
- [14] The next issue raised is that the Applicant was prevented from completing the machine because the machine was collected by the Respondent on 11 December 2018 after demanding collection on 10 December 2018. The Respondent threatened to lay criminal charges against the Applicant if the machine was not released.

- [15] The Applicant contends that certain programming of the machine was outstanding and requested an opportunity to complete the programming and perform in terms of the agreement. The Respondent's view is that King Pie Holdings cannot be blamed for, after a period of three years, demanding performance and in the absence of the Applicant performing, cancelling the agreement and collecting the non-functioning machine as the Respondents had lost faith in the Applicant's abilities. As there are two viewpoints on this issue the leading of evidence relating to the technicalities and technology will reveal to what extent there was performance by the Applicant or not.
- [16] In the result the Applicant makes out a bona fide case for rescission.
- [17] The following order is made:
- 17.1 The Intervening Party is allowed to intervene as the Second Respondent.
 - 17.2 The Court order granted on the 7 August 2019 be corrected by replacing the name of the Plaintiff, incorrectly cited as "King Pie (Pty) Ltd (Registration number: 2012/050518/07)" with the name of the Second Respondent 'King Pie Holdings (Pty) Ltd (Registration number: 1997/008676/07)" as Plaintiff.
 - 17.3 The order granted by the honourable court on 7 August 2019 be and is hereby rescinded.
 - 17.4 The Applicant is granted leave to defend the main action and deliver a plea within the prescribed days in accordance with the uniform rules of court.

17.5 Costs of this application are costs in the cause.

A handwritten signature in black ink, appearing to read 'R. Francis', is written over a horizontal line.

R. FRANCIS-SUBBIAH
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

APPEARANCES

Counsel for the Applicant:

Adv C Gibson

Counsel for the Respondents:

Adv J A Venter

Date of Hearing:

20 April 2021

Date of Judgment:

05 May 2021