REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 93304/2019

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

17/05/2021
DATE

SIGNATURE

In the matter between:-

CHROME CRETE READYMIX (PTY) LTD	First Applicant
MARINA BIANCA HANNA	Second Applicant
DENAVAN EDWIN HANNA	Third Applicant
SILVERSTONE CRUSHERS (PTY) LTD	Fourth Applicant
and	
LAFARGE INDUSTRIES SOUTH AFRICA (PTY) LTD	Respondent

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 17 May 2021.

JUDGMENT

SKOSANA AJ

[1] In this matter, the applicants seek a rescission of the default judgment issued by the Registrar of this court on 21 February 2020. The order was for payment by the first to fourth applicants jointly and severally to the plaintiff an amount of R3 808 339-46 plus interest as well as costs on an attorney and client scale. No notice of intention to defend had been filed by any of the applicants before the default judgment was issued.

[2] In brief, the relevant facts are the following:

2.1 The respondent concluded an agreement with the first applicant on 06 June 2012 ("the principal agreement) in terms of which the respondent would sell and deliver goods to the first applicant at the latter's special instance and request. The business of the respondent was to manufacture and sell cement while the first applicant's business was to supply readymixed concrete and cement.

2.2 The terms of the agreement entitled the first applicant to order and purchase from time to time from the respondent and the respondent to deliver the goods in accordance with the terms of their agreement.

2.3 In the event of the respondent granting credit facilities to the first applicant, the first applicant would make payment within 30 days from the date of the respondent's statement of account, without deduction or set-off of any claims of the first applicant. In the event of default of payment, all other amounts due and payable by the first applicant to the respondent would become due and payable and the first applicant was not entitled to withhold payment for any reason including a dispute pending between the parties.

2.4 A certificate signed by a senior manager of the respondent would constitute *prima facie* proof (sufficient evidence) of the amount of indebtedness.

2.5 The second and third applicants simultaneously with the principal agreement signed an agreement in terms of which they bound themselves as sureties, guarantors and co-principal debtors with the first applicant in favour of the respondent for due performance of the obligations of the respondent and for the payment of any amount due in terms of the principal agreement.

2.6 The fourth applicant bound itself as a guarantor and co-principal debtor with the first applicant in favour of the respondent for the due

performance of the obligations of the first applicant and for the payments of any amounts due in terms of the principal agreement. The third applicant concluded this contract on 27 February 2013.

2.7 The first applicant and the respondent have had a long-drawn dispute between themselves in regard to payments culminating in the respondent issuing summons against the applicants in December 2019 and obtaining the default judgment as aforestated.

2.8 It is not in dispute that the first applicant only became aware of the default judgment on 18 March 2020 and that it instituted the present rescission application on 02 June 2020.

[3] There are three aspects that require my adjudication in this matter, namely, the application for condonation for the late launching of the rescission application, the application to strike out certain paragraphs of the applicants' replying affidavit and the merits of the rescission application. I deal hereunder with each of these aspects though the facts and issues relating thereto overlap to a great extent.

Condonation

[4] Although the default judgment was issued on 21 February 2020, it is common cause that it came to the attention of the first applicant about 18 March 2020, i.e. a few days before the commencement of the lockdown imposed under the State of Disaster Management Act 57 of 2002 with effect from 26 March

2020. The rescission application was instituted on 02 June 2020. It was argued on behalf of the applicants that the circumstances prevailing at the time caused great inconvenience and that legal practitioners were only allowed to travel in performance of their duties from 01 May 2020. It was further argued that voluminous documentation and invoices had to be studied and considered in consultation with legal practitioners before the rescission application could be instituted.

[5] The respondent opposes the application for condonation on the basis that it took the applicants about 2 and half months to bring the rescission application and that legal practitioners were not prohibited from performing their duties during the relevant period.

[6] In my view, although legal practitioners may not have been prohibited from performing their duties, they, like most other professions, were inhibited from doing so. Moreover, their clients were certainly restricted in their freedom of movement and therefore in their consultations and the exchange of documents especially hard copies.

[7] The advent of COVID-19 almost brought everything to a stand still at least for a couple of months and most people were not ready for it. So too were legal practitioners and their clients.

[8] Although it was unclear from the applicants' founding papers, it was clarified at least in their heads of argument that they rely on the common law grounds of rescission. That means rescission had to be instituted within reasonable time. Reasonable time could not, in my view be equated to or necessary measured against the 20 days as prescribed by Rule 31. Reasonable time as suggested by the phrase itself should be determined with consideration of the circumstances prevailing at that moment and which could reasonably have affected the applicants. The circumstances which prevailed at the time are therefore relevant.

[9] It also appears from correspondence, particularly a letter from the applicants' attorneys dated 30 March 2020 that they indicated at that stage already that they would apply for rescission but still believed that by further reconciliation of the invoices and payments, they could still persuade the respondent to consent to rescission of the default judgment. They consequently proceeded for some time in pursuance of that objective.

[10] In the result, I am persuaded that it is in the interest of justice to grant condonation in the circumstances of this case.

Application to strike out

[11] The application to strike out is aimed at certain portions of the applicants' replying affidavit, namely paragraphs 5.9, 6.2, 6.3 and 6.4 thereof. The main

ground is that these paragraphs introduced new material which and ought to have been included in the founding affidavit and that they are irrelevant and scandalous and therefore prejudicial to the respondent.

[12] The main thrust of these paragraphs is to give details of payments that were allegedly made by the first applicant and on the basis of which it is contended that the respondent's claim and therefore the default judgment is wrong because they did not take such payments into account. The pargraphs also seek to make assertions that some wrong invoices and delivery notes were attached to the application for default judgment.

[13] Rule 6 (15) provides:

> *"(15) The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted."* [My emphasis].

[14] From the accentuated portions of the above-quoted Rule, it is clear that first there must be a scandalous, vexatious or irrelevant material and, second the court must be satisfied that if such material is not struck out the respondent will be prejudiced. The matters raised in the impugned portions of the replying affidavit are certainly relevant as they relate to payments with a view to show a *bona fide* defence and that the default judgment may have been based on

incorrect invoices. It can also not be persuasively argued that they are vexatious nor was there an attempt to do so.

[15] As indicated by me during argument only the inclusion of the word '*fraudulently*' in paragraph 6.4 render a portion of those allegations scandalous. There was no need to allege or imply that the respondent acted fraudulently in claiming the money. The applicants could achieve their purpose by simply alleging that incorrect information was supplied to the Registrar. Fraud requires proof of elements which do not and need not form part of the applicants' application.

[16] This leaves me with the aspect of prejudice. I agree with the respondent that the applicants only made vague reference to these aspects in their founding papers while they could at that time make elaborate averments as they did in their reply. Such conduct is prejudicial to the respondent who had no opportunity to deal therewith.

[17] Although prejudice exists, I still hold the view that the impugned portions do not advance the applicants' case, in any event. Striking them out is therefore a mere academic exercise.

[18] To conclude under this heading, I am inclined to grant the application to strike out only in relation to the inclusion of the word '*fraudulently*' in paragraph

6.4 of the replying affidavit. Although the inclusion of the rest of the impugned portions is prejudicial, it is in my view unnecessary and serves no purpose to strike them out.

Merits of the application

[19] The applicants relied on the common law grounds of rescission. Such grounds comprise fraud, *iustus* error, new documents, default judgment and absence of a valid agreement (*iusta causa*). Only the ground under the subtitle 'default judgment' is relevant for the purposes of this case.

[20] In order to rescind a default judgment under common law, the applicants had to show good/sufficient cause.[1] This entails that the applicants must first give a reasonable explanation for their default, second, show that the application is made *bona fide* and third, show the existence of a *bona fide* defence on the merits. The failure to meet one of these requirements may result in refusal of the rescission.[2]

[21] It is common cause in the present case that the summons were properly served on the applicants at least in January 2020 and the default judgment issued on 21 February 2020. There is no irregularity raised in regard to the service of the summons as well as the process towards obtaining the default judgment.

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[1] ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*** **2003 (6) SA 1 (SCA) para [11].**
[2] ***Government of the Republic of Zimbabwe v Fick & Others*** **2013 (5) SA 325 (CC) para [85].**

[22] The explanation proffered by the applicants for their default is that there was an undertaking made by the respondent that they will not proceed with obtaining judgment as reflected in the email dated 20 January 2020 which in turn refers to an earlier telephonic discussion. The applicants further add that there were disputes and negotiations concerning reconciliation of the accounts pending between the parties. This appears to be the extent to which the applicants were able to provide an explanation for their default.

[23] Respondent's counsel pointed me to correspondence which militate against the averment of an undertaking not to proceed to obtain judgment. These include correspondence in September and October 2019 indicating that the respondent was determined to proceed to issue summons, as well as another in November 2019 stating that the respondent's attorney is instructed to proceed with legal action until or unless settlement is reached.

[24] It was further pointed out on behalf of the respondent that the correspondence on 31 March 2020 from the applicants' attorneys which was sent after they had obtained knowledge of the default judgment, did not allege any undertaking by the respondent or an agreement between the parties not to proceed to judgment. All that is stated was that the judgment was obtained while the negotiations were still on. There is also an email from the respondent dated 20 January 2020 which states in relation to one of the sureties (second applicant) that she should consult with an attorney to ensure that her rights are protected

and that appearance is timeously entered on her behalf. This further confirms the respondent's explicit resolve to proceed to judgment and, this email being sent on the same date as the one relied upon by the applicants to prove an undertaking not to proceed, conclusively refutes and cancels the latter email.

[25] In my view, the applicants have failed to give a reasonable explanation for their default. The alleged undertaking by the respondent not to proceed to judgment has not been proved when regard is had to the documentation at hand. It further does not constitute sufficient reason for the applicants not to have entered appearance the fact that there were negotiations carrying on between the parties. Such negotiations did not stop the respondent from issuing summons against the applicants in the first place. Therefore their existence could reasonably not have created an impression that the respondent would be dissuaded or prevented from proceeding to judgment. In any event, the agreement allowed them to issue the summons and to obtain judgment when it states in paragraph 3.9 thereof that "*The customer shall not be entitled to withhold payment for any reason whatsoever notwithstanding that any dispute may be pending between the parties nor shall the Customer be entitled to make any deduction from the Price or to set off any alleged claim against the amounts due by the Customer to the Company.*"

[26] The applicants having failed to provide a reasonable explanation and therefore to satisfy one of the requirements under common law for rescission of

the default judgment, the application must fail. This also means that it is unnecessary for me to deal with the issue of showing a *bona fide* defence on the merits. However, for the sake of completeness I deal shortly hereunder therewith.

[27] First, it is trite law that a party who relies on payment and settlement of a debt bears the onus to prove it. It is not sufficient for a defendant either in a rescission application or a summary judgment application to merely say that he made some payment which may constitute a defence or some defence should he be allowed to go to trial[3]. Although the defendant need not prove his defence, the alleged defence must be shown to be *bona fide* and *prima facie* carrying some prospect of success.

[28] In this case, the applicants allege that there was some payment made to the respondent towards settlement of the debt or a portion thereof. The applicants neither tender the difference nor do they clearly allege that the invoices relied upon by the respondent do not make out the total claim as contained in the default judgment. There is also no clear averment that the belatedly produced proof of deposits relate to the invoices on the basis of which default judgment was granted. It is also greatly concerning that, this being an obviously important aspect of the applicants' defence, it is only raised and produced at the tail end in their replying affidavit.

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[3] **Standard Bankof SA Ltd v El-Naddaf and Another 1999(4)SA779(W0 at 784E-H**

[29] The facts and issues in this case are compatible to those of **Nedperm Bank Ltd v Lavarack and Others**[4], where the following stamen was made:

"It is also trite law that the onus to prove valid payment rests on the debtor (Pillay v Krishna and Another 1946 AD 946 at B955).
From these basic principles of law it follows logically, in my view, that where there are two obligations to be fulfilled by a debtor, he bears the onus of proving, not simply that a payment was made, but also of proving the necessary consensus regarding which debt was paid. I agree, therefore, with the formulation of the relevant principle by Viljoen AJ in Italtile Products (Pty) Ltd v Touch of Class 1982 (1) SA 288 (O) at 290H, viz:
'Although I have myself also not found authority dealing with a case such as the present, where payment is admitted but there is dispute regarding the debt for which it was intended, I have no doubt that the onus of proving, not only that payment was made, but that the debt in question was paid, rests upon the debtor. This is in accordance with the principle that it is the party making a positive averment who bears the onus of proof. Moreover, it seems to me that the very requirement that a debtor should prove payment of a debt, in itself necessitates proof that the debt in question has been paid and not simply proof that a payment has been made to the creditor.'
As pointed out above, such onus would require proof of consensus regarding the identity of the debt being paid."[my own emphasis]

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[4] **1996 (4) SA 30 (A) at 47A-D**

[30] In the present case, the respondent has among other things also relied on a certificate of indebtedness which constitutes *prima facie* proof (sufficient evidence) of such indebtedness. The unclear facts alleged by the applicants in relation to payment do not in my view displace this *prima facie* proof or sufficient evidence. The applicants could not even say that such certificate left their alleged payments out of account.

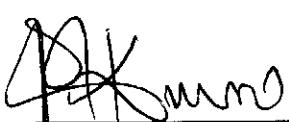
[31] Even the issue of deliveries and the delivery notes does not cross the threshold. Importantly, the applicants do not allege that the deliveries for which payment was claimed and judgment given, never occurred. All that the applicants do is to raise possible technical defences based on the delivery documentation to support their speculative assertions that the respondent did not prove that such deliveries had taken place. It seems to me that the applicants were not confident enough of their defences hence they elected not to defend but to continue to persuade the applicants through extracurial negotiations. This they did to some extent even after becoming aware of the default judgment. Clearly this constitutes willful default on their part.

[32] As to costs, the general rule is that they must follow the result. I could not find a reason to deviate from this general rule. Further, the agreement between the respondent and the first applicant stipulates that, should the respondent elect to take legal action, the first applicant shall be liable for such legal costs on an appropriate scale. The rest of the applicants guaranteed and bound themselves

liable for all the obligations arising out of the agreement including costs. The application for rescission and the opposition thereof still form part of litigation arising out of the breach of the agreement. In the circumstances, I deem a costs order on an attorney and client scale as appropriate.

[33] In the result, I make the following order:

1. Condonation for the late filing of the rescission application is granted.
2. The application to strike out is granted only to the extent of removing the word 'fraudulently' from paragraph 6.4 of the applicants' replying affidavit.
3. The application for rescission is dismissed.
4. The applicants are ordered to pay the costs of this application on a scale of attorney and client jointly and severally, the one paying the other to be absolved.



DT SKOSANA (AJ)
Acting Judge of the High Court
Pretoria

Date of hearing: 13 May 2021

Date of judgment: 17 May 2021

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