REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No.: 7408/2017

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

18/06/2021

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DATE MNGOIBISA-THUSI J

In the matter between:

FRED VAN HEERDEN 1st Applicant

IMPORT EXPORT 2020 (PTY) LTD 2nd Applicant

and

BERNIE HAMBSCH Respondent

In re:

BERNIE HAMBSCH t/a RHODES & HAMBSCH CIVILS AND PLANT HIRE Plaintiff

and

FRED VAN HEERDEN 1st Defendant

WARMBAD WATERFRONT (PTY) LTD	2nd Defendant
IMPORT EXPORT 2020 (PTY) LTD	3rd Defendant

JUDGMENT

MNGQIBISA-THUSI J

[1] The applicants seek on the basis of Uniform Rule 42(1)(a), alternatively, Uniform Rule 31(2)(b), alternatively, the common law, the setting aside of an order granted on 18 September 2018. The order sought to be rescinded was granted by agreement between the parties. The applicants further seek condonation for the late filing of this application.

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

> "A 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".

[3] This means that the applicant has to show that the court in granting the default judgment had committed an error "in the sense of a mistake in a matter of law appearing on the proceedings of a Court of record[1]. If the applicant can prove the error committed by the court, it is not necessary for him to explain his default.

[1] *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (ECD).

[4] Rule 31(2)(b) provides that a defendant may within 20 days after he has knowledge of a judgment against him by default apply to court upon notice to the plaintiff to set aside such judgment, and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet. In terms of Rule 31(2) (b) an applicant for rescission of a judgment must show good cause. This means that the applicant has to give a reasonable explanation for the default, must show that his application is bona fide, and be able to show that he has a bona fide defence to the respondent's claim which *prima facie* has some prospect of success[2].

[5] Under the common law, in order for the court to grant an order rescinding a previous order or judgment the applicant has to show sufficient cause. In *Chetty v Law Society, Transvaal*[3] the court held that:

> "But it is clear that in principle and in the long standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:
>
> (i) That the party seeking relief must present a reasonable and acceptable explanation for his default; and
>
> (ii) That on the merits such party has a bona fide defence, which *prima facie* carries some prospect of success."

[6] It is common cause that during August 2007 the first applicant and the respondent concluded an agreement in terms of which the respondent would provide civil and engineering services for the construction of roads and storm-

[2] *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) (2003) 2 ALL SA 113, at para 11.
[3] 1985 (2) SA 756(A) at 765 B-C.

water sewerage infrastructure in respect to a project known as Warmbad Waterfront at Belabela. The first applicant defaulted by failing to pay certified amounts in terms of certificates of payments issued by a certain Mr De Kock, a civil engineer. As a result, on 8 December 2008 the respondent issued provisional sentence proceedings under case number 57647/08 against the first applicant for payment of outstanding amounts. However, the provisional sentence proceedings were withdrawn and on 18 December 2008 the parties concluded a settlement agreement in terms of which the first applicant undertook to pay to the respondent the sum of R1, 491,016.93 by 31 January 2009, subject to the registration of a mortgage bond by Investec over property owned by the first applicant.

[7] Subsequent to the settlement agreement of 18 December 2008 and due to the first applicant defaulting on payments due to the respondent, several subsequent settlement agreements[4] were concluded between the parties in order to re-arrange the payment schedule of the applicant, culminating in the conclusion of the settlement agreement concluded on 4 December 2015. In terms of the settlement agreement of 4 December 2015, the first applicant undertook to make full payment of amounts still outstanding by 15 December 2016 to the respondent. Further the first applicant undertook to pay certain instalment amounts and the second applicant and Warmbad Waterfront (Pty) Ltd bound themselves as sureties and principal co-debtors for the debt owed by the first applicant to the respondent. However, the first applicant again defaulted on its payments to the respondent which led the respondent instituting

[4] Settlement agreements were concluded on 13 November 2013; 15 May 2015; 4 December 2015.

an action against the applicants. By the time the action was instituted, Warmbad Waterfront (Pty) Ltd was already placed under provisional liquidation.

[8] Even though the applicants had filed their plea to the respondent's action, the parties engaged in settlement negotiations which resulted in the 4 December 2015 settlement agreement being amended in order to extend the due date for final payment to the respondent. The amended settlement agreement culminated in its being made, by agreement between the parties, an order of court, which is the subject-matter in these proceedings.

[9] Subsequent to the order of 18 September 2018, the first applicant duly paid the required instalments until March 2019. In his founding affidavit the first applicant alleges that after March 2019 he was unable to make any payments. As a result, he consulted with his current attorneys, and on advice, launched this rescission application.

[10] The applicants seek the rescission of the order of 18 September 2018 on the following grounds:

10.1 that the settlement agreement which was made an order of court is a credit agreement as envisaged in s 8(4)(f) of the NCA [5] falling under the ambit of the National Credit Act 34 of 2005 ("the NCA"). It is the applicants' contention that, as the settlement agreement provides for the

[5] Section 8(4)(f) of the NCA which provides that: "An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is – (f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of- (i) the agreement; or (ii) the amount that has been deferred."

deferment of payment of the capital amount subject to interests being payable, the settlement agreement qualifies as a credit transaction;

10.2 that the respondent, as a credit provider was obliged, in terms of s 40(1)[6] of the NCA to register as a credit provider;

10.3 that since the respondent was not so registered at the time the settlement agreement was concluded in 2015, the settlement agreement is in terms of s 89(2)[7] of the NCA unlawful and the respondent is precluded, from enforcing any rights emanating from such settlement agreement; and

10.4 that since the settlement agreement is a credit agreement, the respondent was obliged to comply with the requirements of s 129[8] and s 130 of the NCA[9].

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[6] "(1) A person must apply to be registered as a credit provider if- (a) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1)".

[7] Section 89(2)(d) of the NCA reads as follows: "…a credit agreement is unlawful if at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered."

[8] Section 129 reads as follows: "*If the consumer is in default under* a *credit agreement, the credit provider- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to* a *debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on* a *plan to bring the payments under the agreement up to date; and (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before- (i) first providing notice to the consumer,* as *contemplated in paragraph (a), or in section 86 (10),* as *the case may be; and (ii) meeting any further requirements set out in section 130."*

[9] Section 130 provides in relevant part as follows: (1) *Subject to subsection (2) a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and- (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (10), or section 129 (1), as the case may be; (b) in the case of a notice contemplated in section 129(1), the consumer has- (i) not responded to that notice; or (ii) responded to the notice by rejecting the credit provider's proposal; and (a) in the case of an instalment agreement, secured loan or lease, the consumer has not surrendered the relevant property to the credit provider in terms of section 127… (3) Despite any provision of law or contract to the contrary, in any proceedings commenced in* a *court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that- (a) in case of proceedings to which sections 127, 129 and 131 apply, the procedures required by those sections have been complied with; …(3) In any proceedings contemplated in this section if the court determines that- …(b) the credit provider has not complied with the relevant provisions*

[11] In support of their grounds for seeking the rescission of the order, the following submissions were made on behalf of the applicants. It is the applicants' contention that when the May and December 2015 settlement agreements were concluded, the agreements provided for the novation of previous agreements. It is the applicants' further contention that the 2007 agreement was no longer extant and since the settlement agreements, as conceded by the respondent, were credit agreements as contemplated in the NCA, in that payment was deferred and interest was payable. In this regard the applicants rely on the decision in *Du Bruyn and Others v Karsten*[10] that the respondent was obliged to register as a credit provider under the NCA and to comply with the provisions of s 129 and s 130 of the NCA.

[12] On behalf of the respondent it was contended that the underlying cause to the settlement agreement concluded on 4 December 2015 was not a credit agreement as contemplated under the NCA but a non-credit provider-non-consumer agreement between a civil contactor and an employer and thus does not fall within the ambit of the NCA as a credit agreement and that the respondent was not a credit provider and was not obliged to register as a credit provider. It was contended on behalf of the respondent that the underlying causa, being the 2007 agreement, remained extant even though subsequently several settlement agreements were concluded.

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of this Act, as *contemplated in subsection (3)(a), …*(a) *the court must- (i) adjourn the matter before it; and (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed."*

[10] (929/2017) (2018) ZASCA 143 (28 September 2018).

[13] It is the respondent's contention that the NCA was not intended to apply to settlement agreements. In this regard the respondent rely on the decision of *P S Ratlou v MAN Financial Services (Pty) Ltd*[11] where a settlement agreement was concluded after negotiations took place with regard to default rentals which ended up with MAN confiscating some of the trucks it had leased to Ratlou's company, PTN. With regard to the interpretation of s 8(4)(f) of the NCA the court stated that:

> "A purposive interpretation and not a literal interpretation of section *(4)(f) of the Act is required because it is clear that the Act was not aimed at settlement agreements. Its application to them will have devastating effect on the efficacy and the willingness of parties to conclude settlement agreements and thereby curtail litigation."

[14] The court held that in the case where the underlying agreement to a settlement agreement is not covered by the provisions of the NCA, such settlement agreement cannot be regarded as a credit agreement. The court went further to hold that:

> "[27] Having found that the legislature never had the intention that the NCA be applicable to all settlement agreements in terms which accord with the determination of credit transactions, in particular to the agreement concluded by the parties in this case, it is not necessary to deal with the alternatives to MAN's main argument. I may, however indicate, in respect thereof as well, that the effect of the sudden unintended conversion of a non-consumer/non-credit provider relationship into one governed by the NCA and the chill effect that would have on settlement of disputes would still hold considerable weight. As

[11] (1309/2019) (2019) ZASCA 49 (1 April 2019).

was submitted on behalf of MAN, parties who were never credit providers, such as a once off lessor, would suddenly find themselves unable to enforce the terms of their settlement agreement, for want of registration or due assessment or a lessee for creditworthiness."

[15] Even though the applicants seek to argue that because some of the settlement had provisions which indicated that the agreement was a novation of the original agreement (2007 agreement), this is not convincing in that without the initial underlying agreement there would have been no need for the settlement agreements to have been concluded. The settlement agreements were concluded as a result of the first applicant's default in paying for the civil contracting work the respondent did in the Warm Waterfront project. The applicants cannot deny that the civil contractor agreement is not a credit agreement and would not have fallen within the ambit of the NCA. Therefore, in light of the decision in the *Ratlou* matter (*supra*), and in view of the fact that the initial agreement was not a credit agreement and the subsequent settlement agreements and such initial agreement were interdependent, such settlement agreements cannot be credit agreements. I am therefore of the view that the applicants, even taking into account the decision in the *Du Bruyn* matter, has no bona fide defence to the respondent's claim. Further, I am also of the view that the respondent was not obliged to comply with the requirements of s 129 and 130 of the NCA.

[16] The applicants have relied on uniform rule 42(1) and 31(2) and the common law for the rescission of the order. The applicants' claim that the order was granted in their absence is disingenuous when one has regard to the letter from

their erstwhile attorneys dated and sent to the respondent's legal representatives which reads in part that:

> "2. The First and Third Respondents agree to an order in accordance with the draft order attached hereto".

[17] There is no doubt that the applicants consented to the settlement agreement being made an order of court. The fact that they were not represented in court on the day the order was granted is of no consequence as a Notice of set-down was sent to the applicants' attorneys on 24 August 2018. The applicants cannot therefore claim that the order was granted in their absence.

[18] The applicants do not allege that their erstwhile attorneys of record had no instructions to consent to the settlement agreement being made an order of court. In fact, the applicants acquiesced to the order made on 18 September 2018 by making payments to the respondent in accordance with the terms of the order. This is indicative of the fact that the applicants were aware of the circumstances leading to the order being made as they do not even dispute that a notice of set-down was delivered to their attorneys of record. I cannot therefore find any default on their part.

[19] Distilling the principles set out in *Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills (Cape)*[12] and *Lodhi 2 Properties Investments CC and another v Bonde Developments (Pty) Ltd*[13], in *Kgomo and another v Standard Bank of*

[12] [2003] 2 All SA 113 (SCA).
[13] 2007 (6) SA 87 (SCA).

South Africa and others[14] the court held in relation to the application of rule 42(1)(a) that:

> "[11.1] the rule must be understood against its common law background;[15]
>
> [11.2] the basic principle at common law is that once a judgment has been granted, the judge becomes *functus officio,* but subject to certain exceptions of which rule 42(1)(a) is one;[16]
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> [11.3] the rule caters for a mistake in the proceedings;[17]
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> [11.4] the mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment; [18]
>
> [11.5] a judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment; [19]
>
> [11.6] the error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court;[20] and
>
> [11.7] the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).[21]

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[14] 2016 (2) SA 184 (GP).

[15] *Colyn* above at paras 1-5.

[16] *Colyn* above at para 4.

[17] *Colyn* above at paras 5 and 9.

[18] *Lodhi* above at paras 24 and 26.

[19] *Lodhi* above at paras 17 and 27.

[20] See the wording of the rule. See also *De Wet & Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038 E-H.

[21] See para 47 below.

[21] In terms of Uniform Rules 42(1)(a) and 31(2)(B) I am satisfied that the order was not granted erroneously or was granted in the absence of the applicants.

[22] Further in *Chetty*[22] (supra), the court stated that:

> "As I have pointed out, however, the circumstances that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a Defendant's explanation for his being in default is finely balanced, the circumstances that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission…"

[23] Taking into account my finding that because the underlying causa did not fall within the ambit of the NCA and that the settlement agreement which was made a court order does not qualify as a credit agreement under s 8(4)(f) of the NCA, I am of the view that the applicants have not shown that they have not shown that their defence has reasonable prospects of success and I find that they have not shown sufficient cause for the order to be rescinded.

[24] In view of my conclusion that the applicants have not shown sufficient cause for the rescission of the order of 18 September 2018, I am of the view that it is not necessary to deal with the issue of condonation for the late filing of this application.

[22] At 767J-768 A-B.

[25] With regard to costs, I am of the view that the circumstances of this case do not justify the imposition of punitive costs.

[26] In the result the following order is made:

‘The application is dismissed with costs.’

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NP MNGQIBISA-THUSI
Judge of the High Court

Date of hearing: 20 August 2020
Date of Judgment: 18 June 2021

For applicants: Adv JS Stone (instructed by Hattingh & Ndzabandzaba Attorneys)
For respondent: Adv DK Nigrini (instructed by Hartman & Associates Attorneys)