REPUBLIC OF SOUTH AFRICA

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

CASE NO: 71943/2016

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

SENYATSI ML **13-08-2021**

SIGNATURE **DATE**

In the matter between:

GP SMITH LETTING CC **Plaintiff**

And

JACOBUS & VAN ASWEGEN PROPERTY DEVELOPERS CC **First Defendant**

HENK GERHARDUS ASWEGEN **Second Defendant**

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 13 August 2021*

SENYATSI J:

[1] In this action, this court is asked to set aside its order on the basis that the underlying arbitration award which was the subject of a settlement agreement was actuated by fraud allegedly perpetrated by the defendants.

[2] It should be stated that the parties were involved in a protracted litigation in the arbitration proceedings. This litigation ensued in 2014 when the defendants sued the plaintiff for alleged repudiation of a joint venture agreement involving a development project at Bendor, Polokwane in Limpopo.

[3] The plaintiff avers that it agreed to a settlement principally due to misrepresentations by the defendants, who intimated to it that the bulk of the amount claimed was an invoice of R1.2 million from Vikna Consulting ("Vikna"), a consulting firm which provided certain services to the defendants when in fact the amount was not yet due and payable. The plaintiff relies on a letter written by Vikna to the South African Revenue Service (“SARS”) which claims that no value added tax input was claimed by Vikna in its books as the invoice was *proforma* used in the course of arbitration proceedings between the parties in these proceedings.

[4] The court order that the plaintiff seeks to set aside has not been appealed against. In other words, the court order is still valid and has not been complied with.

[5] The issue that requires determination is whether this court is competent to set aside its own order. Put differently, can the court entertain an action such as this on common law grounds.

[6] The plaintiff submits that the court is competent to do just that whilst the defendants contend that this court is not competent to do so. The defendants contend that once the award is made an order of court, the court becomes *functus officio* and cannot reopen its own judgment under common law. The only basis upon which the court can set its own judgment aside is for reasons such as fraud if the judgment was obtained by default and not when the judgment is the result of a compromise agreement obtained in acrimonious litigation that led to the agreement being made an order of court.

[7] In order to decide on the issues, it is important to have consideration of the legal principles. The law is settled regarding a contract concluded on the basis of fraud.

[8] The brief background to this litigation is set out herein. The parties concluded a joint venture for a township development at Bendor, Polokwane during 2006. The first defendant was a developer who contributed its expertise to the project. The plaintiff was the owner of the land to be developed and its contribution was the land itself. The first defendant engaged the services of various professionals for the project one of which was Vikna which was tasked to do the design of the stands, roads, and bulk services. The services were to be rendered at risk, in other words, Vikna would only be paid once the funding for the project was

secured from the financial institutions. The defendants contend that the designs were done and thus the value of the property increased and thus making the amount of the invoice due and payable. In disputing this submission the plaintiff contends that the amount reflected on the invoice was never due and payable as the project did not continue.

[8] However, following the financial meltdown during 2008, no funding could be secured leading to the plaintiff cancelling the joint venture agreement during March 2011. Following the cancellation, protracted litigation ensued through the arbitration process which led to a settlement between the parties. The settlement agreement was made the arbitration award and subsequently and order of this court.

[9] The plaintiff contends that following its investigations after the settlement, it came across information that the amount on the invoice prepared by Vikna had never been due and payable when the settlement agreement which led to arbitration award was concluded. It contends that it was induced by fraud to agree to the settlement. The basis of its contention is that the significant feature of a claim against it at the arbitration was an amount of R1.2 million allegedly owed by the first and second defendants to Vikna for professional services rendered. The plaintiff furthermore contends that in fact when the compromise was reached, only R250 000 was the amount that Vikna would be entitled to if the joint venture proceeded and that that amount was agreed to with the defendants before the compromise agreement was signed.

[10] The principles governing the rescission of a court order have been settled in our law. If the court order is granted by default, it may be rescinded in terms of either Rule 31(2) (b) or Rule 42 of the Uniform Rules of Court or under common law on good cause shown.[1]

[11] The basis upon which a judgment may be rescinded is limited to two grounds, namely where the judgment was induced by fraud on the part of the successful litigant or fraud to which the successful litigant what party to or on the basis of *justus* error.[2]

[12] In *Moraitis Investments (Pty) Ltd v Mentic Security (Pty) Ltd*[3], on dealing with a judgment granted subsequent to an agreement and not in respect of the merits of a dispute and that the existence of the judgment was subject to the validity of such an agreement, the Court stated the following:

> *"There are two difficulties with this statement. First, the distinction it draws, between judgments 'not passed on the merits of a dispute' and other judgments, lacks any foundation in our jurisprudence. There is no difference in law between an order granted in the case of a default judgment; an order pursuant to a settlement prior to the conclusion of opposed proceedings; or the order in a judgment pronounced at the end of a trial or opposed application.*
>
> *In the case of a default judgment, an order pursuant to a settlement prior to the confusion of opposed proceedings, or the order in a judgment pronounced at the end of a trial or opposed application. As the Constitutional Court has said, it is an order 'like any other'. Second, the proposition is over-board and*

[1] See De Wet & Others v Western Bank Ltd 1979 (2) SA 1031 (A)
[2] See Makinga v Makinga 1955 (1) SA 388 (A)
[3] [2017] ZASCA 54 at para [16]

inconsistent with the authorities discussed above. Were it correct a material, but non-fraudulent, misrepresentation justifying rescission of an agreement of compromise would also justify the rescission of the judgment granted pursuant to that compromise, but that is not the case. Its defect lies in approaching the question from the direction of the judgment. The letter is the correct approach because the judgment operates as res judicata and precludes a claim based on the agreement. Unless and until the judgment has been set aside, they can be no question of attacking the compromise agreement. It follows that the necessary starting point for the enquiry must be whether there are grounds upon which to seek rescission of the court order. Only then can there be any issue regarding the rescission of the compromise."

[13] The principle that a judgment procured by the fraud if one of the parties cannot be allowed to stand has been a feature of our law from time immemorial.[4]

[14] In *Rowe v Rowe*[5] The court had the following to say about the term of fraud

"... it is trite that fraud as a ground for the rescission of an order may take any form and it is not limited to perjured evidence provided that the party concerned was privy to it and the facts presented to court diverged from the truth to such an extent that the court would have given a different of judgment had it known the true state of affairs."

[15] The onus to prove fraud is on the plaintiff.[6] The plaintiff must allege and prove the following:[7]

[4] See Schierhent v Union Government 1927 AD 94 at 98
[5] 1997 (4) SA 160 (SCA) at para 12
[6] See Geary & Son (Pty) Ltd v. Gove 1962 (1) SA 434 (A); Standard Bank of SA Ltd v Coetzee 1981 (1) SA 1131 (A)
[7] See Erasmus: Superior Court Practice 2nd ed D1-564

(a) the successful litigant was a party to the fraud;

(b) the evidence was in fact incorrect;

(c) That it was made fraudulently with the intention to mislead;

(d) That it diverged to such an extent from the true facts, that the court would, if the true facts had been placed before it, given a judgment other than that it was induced by incorrect evidence given.

[16] It is prerequisite to obtaining restitution in *intergrum* on the ground of fraud that the document had not been available to the party who seeks restitution before an order was made.[8] The position is the same in a case where fraud is committed in a manner other than falsifying documents.[9]

[17] The court will grant relief if the evidence that was fraudulently considered and came to light after the conclusion of the trial which would have entitled a party to a different judgment head this evidence been procured, provided that a party can show weighty reasons by which he was prevented from producing such evidence at trial.[10] The party seeking restitution must therefore show that it was not through his own fault that a document was discovered before the order was made.[11]

[18] In *Colman v Dunbar*[12] it was held that it is essential that there should be finality to a trial and that if the aggrieved party elects to stand by the evidence which

[8] See Makinga v Makinga 1958 (1) 338 at 347
[9] See Port Edward Town Board v Kay and Another [1994] 1 All SA 246 (D) at 262
[10] See Schierhont v Union Government 1927 AD 94 at 102
[11] See Booth v Collins 1916 CPD 453
[12] 1933 AD 141 at 161

he adduces, he should not be allowed to address further evidence except in exceptional circumstances.[13]

[19] If consideration is given to the evidence adduced by the plaintiff, reliance was made on a letter said to have been written between Mr Spotwood's attorney Mr Koos Geyser to the South African Revenue Services ("SARS") and the Hawks, this letter is to the effect that the invoice was a *proforma* and that the VAT input out of the R1.2 million was not claimed. The letter was not written at the request of the defendants or on their behalf. Mr Spotwood was not called to testify about this letter or for that matter the invoice itself.

[20] The mere production of the communication regarding the invoice from Vikna and of the plaintiff and leading evidence on it by Mr Smith on behalf of the plaintiff is not conclusive of the facts set out in the letter as he was not the author thereof. The submission on behalf of the plaintiff that the communication relied on evidence that proved without doubt that indeed the invoice was never owing is in my view misguided as no direct evidence was led by the author thereof. I will later show the additional reasons why the letter is not conclusive to prove fraud. Accepting the letter as conclusive evidence of the facts it attempts to prove will, in my view be in direct violation of the law on hearsay. More importantly, the parties in these proceedings have not agreed to the admission of such hearsay evidence.

[13] See Colman v Dunbar, above at page 161

[21] The principles of hearsay evidence are regulated by s3(1)(b) and (c) of the Law of Evidence Amendment Act 45 of 1988 provides as follows:

> *"(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-*
>
> *(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
>
> *(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
>
> *(c) the court, having regard to-*
>
> *(i) the nature of the proceedings;*
>
> *(ii) the nature of the evidence;*
>
> *(iii) the purpose for which the evidence is tendered;*
>
> *(iv) the probative value of the evidence;*
>
> *(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
>
> *(vi) any prejudice to a party which the admission of such evidence might entail; and*
>
> *(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."*

[22] I have not been persuaded on any basis upon which the authors of the letter, and in particular why Mr Stopwood could not be called as a witness to confirm that the sum of R1.2 million was invoiced by Vikna to the first defendant was indeed never due and payable. There is no factual or legal basis that has been

advanced by way of evidence by the plaintiff why it is in the interest of justice that such hearsay evidence should be admissible.

[23] This matter started three years earlier before trial commenced in 2019. It would not have been impossible for the witnesses who played a central role in ensuring that a crucial letter forming the basis of an alleged fraud perpetrated by the defendants on the plaintiff to testify. It should be remembered that the defendants were not the authors and that the letter was written to address the value added tax issues with SARS.

[24] In *S v Mpofu*[14] it was held that before admitting evidence of the hearsay nature, the court has to be satisfied that it can safely eliminate the risk of falsification of a document or deliberate reconstruction thereof. In *Makhathini v Road Accident Fund*[15] it was held that the court should not lightly decide in favour of allowing hearsay evidence on controversial issues on which conflicting evidence has already been given.

[25] The evidence contained in the letter, if it were to be admitted as hearsay, will not be in the interests of justice and will likely be to the prejudice of the defendants as they have not agreed to have it admitted because they have consistently denied the allegation of fraud. Furthermore, it would be in the interests of justice that the author testify and be subjected to cross-examination to test his credibility. I have heard evidence from Mr Van Aswagen on how the

[14] 1993 (1) All SA 161 (N)
[15] 2002 (1) All SA 413 (SCA)

plaintiff laid charges of fraud based on the letter and how the charges found no joy with the prosecution authorities.

[26] The plaintiff contended that it failed to call Mr Spotswood to testify about the letter because Mr Spotswood was the defendants' witness. This contention has no legal or factual basis. A party in the civil proceedings is entitled to call any witness to assist the court to prove his/ her case. The evidence on the letter to prove fraud is relied on by the plaintiff and not the defendants. It was only prudent that the plaintiff called Mr Spotwood to testify to support what was contained in the letter mainly that the sum of R1.2 million was never due and payable as Vikna rendered the services is at risk. It is insufficient to simply state that the attempts to serve Mr Spotwood with a subpoena were unsuccessful.

[27] In *Coch v Lichtenstein*[16] the court held that the mere production of evidence which makes the existence of facts probable does not in itself shift the onus though it may go a long way towards satisfying it. In *Pillay v Krishna*[17] the court held that the use of the word onus is the duty that is cast on a particular litigant, in order to be successful or finally satisfying the court, that he is entitled to succeed on his claim, or defence, as the case may be and not in the sense merely of his duty to adduce evidence to combat a *prima facie* case made by his opponent.

[16] 1910 AD 178
[17] 1946 AD 946 at 952

[28] The facts in the circumstances surrounding the statements contained in the letter were not made by the defendants, but by Mr Spotwood. He has direct knowledge of what was contained in the letter. He should have been called so that his evidence could be tested. the content of Mr Spotwood's letter, in my view, should not be attributed to the defendants as they did not write it nor did they consent to the letter being written on their behalf.

[29] It follows in my respectful view that by failing to call Mr Spotwood, who is such a crucial witness, to testify the plaintiff failed to discharge the onus to prove the fraud.

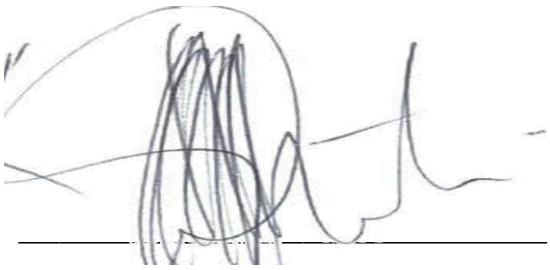
[30] There exists no basis to therefore set aside the order of the court emanating from the arbitration award.

ORDER

[31] The following order is made:

(a) The claim to the settlement agreement is dismissed with costs.

(b) The claim for damages is dismissed.



SENYATSI ML

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

REPRESENTATION

Date of hearing: 1 October 2020

Date of Judgment: 13 August 2021

Plaintiff's Counsel: Adv GM Young

Instructed by: Mathee Attorneys C/O Christo Coetzee Attorneys

First and Second Defendants' Counsel: Ms S van Aswagen

Instructed by: VA Attorneys and Conveyancers