IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 88160/2018

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

16.05.2022

SIGNATURE **DATE**

In the matter between:

SOMASIPHULA GENERAL TRADING CC	First Applicant
LINAH MUMSY MAHLANGU	Second applicant
(Applicant in the application to intervene)	
(Second applicant in the recission application)	

and

VAN'S AFSLAERS GAUTENG (PTY) LTD	First Respondent
M J MAHLANGU	Second Respondent
TRUSTEES FROM TIME TO TIME OF THE ADRIAAN FISHER TRUST	Third Respondent

JUDGMENT

AC BASSON, J

Recission application

[1] This is an application for the rescission of a default judgment that was granted in favour of the first respondent (Van's Afslaers Gauteng) against the applicant (Somasiphula General Trading CC) on 22 February 2019. Only the first respondent opposed this application.

Application to intervention

[2] On 1 April 2022, Mrs. Mahlangu served and filed an application to intervene in the pending recission application as the second applicant. With leave of the court, the intervention application was set down for hearing at the same time as the recission application. Mrs. Mahlangu had deposed to the founding affidavit in both the recission application and the application to intervene. Mrs. Mahlangu purports to act on behalf of the (first) applicant in the recission application. The intervention application appears to have been filed in anticipation of a point being raised by the first respondent that she does not have the necessary *locus standi* to act on behalf of the applicant in the recission application since the applicant has already been placed in provisional liquidation with provisional liquidators having already been appointed. Because both the application to intervene and the recission application are intertwined particularly in respect of the facts contained in both affidavits, the two applications were argued together.

[3] The intervention application stands unopposed as the first respondent had elected not to file any opposing papers as doing so might have caused the recission application to be postponed pending the hearing of the intervention application.

The default judgment

[4] As already pointed out, default judgment was granted as far back as 22 February 2022. That application was brought by the first respondent (Van's Afslaers) as the

applicant. The order was granted against the applicant (as the first defendant - Somasiphula), Mr. Mahlangu (as the second defendant) and the third respondent (as the third defendant – the Trustees of the Adriaan Fischer Trust). The three defendants were held liable, jointly, and severally, the one paying the other to be absolved for the capital amount of R 2 340 000.00 plus VAT.

[5] Even though default judgment was granted as far back as 2019, the second respondent (Mr. Mahlangu) at no time launched an application for rescission of the default judgment. He also does not oppose the present application to rescind the default judgment and has not filed any papers in the recission application. The third respondent has likewise not opposed the recission application.

The relevant background

[6] The first respondent (Van's Afslaers) was appointed by the third respondent (the trustees) to conduct a public sale of various properties of the third respondent. In March 2018 the applicant (represented by Mr. Mahlangu) registered as a bidder and bid on five properties of the third respondent at a public auction held by Van's Afslaers. The applicant failed to honour its obligations in terms of the contracts, which in turn led to a cancellation of the agreements and the institution of an action by the first respondent as plaintiff against the applicant as first defendant, Mr. Mahlangu as second defendant, and the trustees of the trust as third defendant. (I will refer to these five transactions collectively as "*the transactions*".)

[7] On 12 December 2018 summons was served on the applicant at the *domicilium citandi et executandi* of the applicant namely at 47 Delarey Street, Erasmus, Bronkhorstspruit. The summons was served twice (albeit on different dates): First on the applicant (Somasiphula – as the first defendant) and secondly on Mr. Mahlangu (as the second defendant). On both occasions the summons was served on a Mr. Innocent Mahlangu (the son of Mr. and Mrs. Mahlangu). According to the returns of service the summons was served on the applicant's (Somasiphula) and Mr. Mahlangu's *domicilium citandi et executandi* namely at 47 Delarey Street, Erasmus, Bronkhorstspruit.

[8] The warrant of execution on the applicant's movable property was served on Mr. Mahlangu on 19 June 2019 who attended the Sheriff's office and indicated to the Sheriff,

when payment was demanded, that he (as the second defendant in the default judgment) had no money or disposable property with which to satisfy the warrant. The return of service also notes that Mr. Mahlangu had refused to sign the *nulla bona.*

Mrs. and Mr. Mahlangu

[9] The second respondent (Mr. Mahlangu) is a 20% member of the applicant and Mrs. Mahlangu is an 80% shareholder. Mr. Mahlangu was the person who represented the applicant during the conclusion of the transactions with the first respondent. When these dealings went sour, the first respondent instituted an action against the applicant, the first and second respondents (the three defendants) which ultimately culminated in the default judgment.

[10] Mr. and Mrs. Mahlangu are still married and were married at the time when the transactions were concluded. The marriage status of the parties is relevant in these proceedings because Mrs. Mahlangu now attempts to convince this court that she and Mr. Mahlangu are separated and that this is one of the main reasons why she is bringing the recission application because she (as the majority shareholder) was blissfully unaware of the business dealings conducted by her husband (Mr. Mahlangu), who she incidentally also accuses of having been on a frolic of his own since more or less 2018. But, what is relevant is the fact that Mr. and Mrs. Mahlangu were married at the time of the conclusion of the transactions by Mr. Mahlangu with the first respondent. They were married at the time when the summons was served and when default judgment was granted. Mrs. Mahlangu claims in her papers that they are not separated but is very vague about when they were separated. There is, however, no allegation that they were separated at the time when the transactions were concluded or when the default judgment was granted.

The liquidation application

[11] Complicating matters is the fact that there is another application pending and that is an application under case number 79112/2019, which is an application by the current first respondent (Van's Afslaers) for the final winding-up of the applicant ("*the liquidation application*"). The default judgment which is the subject matter of this rescission application is the basis upon which the current first respondent (Van's Afslaers) procured an order for the provisional winding-up of the applicant. The return date has

been extended from time to time. The applicant was provisionally wound-up on 10 December 2020. The current rescission application is accordingly intertwined with the pending liquidation application (for a final order).

The two applications before this court

[12] Mrs. Mahlangu seeks to intervene on the basis that she is the majority member of the applicant and therefore an interested party and that the default judgment sought to be rescinded was granted against the applicant and the second respondent jointly and severally.

[13] Although the *nature* of the applications now before court (the intervention application and the recission application) is different and although different considerations apply to the question whether the relief should be granted, the facts set out in the affidavits in the founding affidavits in both applications are intertwined in that Mrs. Mahlangu is the deponent to both applications. Mrs. Mahlangu sets out in both affidavits similar facts as to why she and the applicant did not have knowledge of the action proceedings.

[14] Although I have decided to grant the intervention application, I have rejected Mrs. Mahlangu's contention (contained in both affidavits) that she and the applicant had no knowledge of the transactions nor of the various legal processes.

[15] In respect of the recission application, the applicant has also failed in persuading this court that it has a *bona* fide defence to the extent that there are triable issues that need to be ventilated. More importantly, on the facts I am persuaded that the applicant (as represented by Mr. Mahlangu at the time) was in willful default. I will refer to this issue as the "*service issue*" hereinbelow.

Recission application

[16] I will now proceed to briefly deal with some of the issues raised on behalf of the applicant in the recission application.

[17] The application is launched in terms of Uniform Rule of Court 42, alternatively in terms of Rule 31. The explanation for the non-compliance is that the applicant and Mrs. Mahlangu were not aware of the action and the winding-up application. As far as a *bona*

fide defence is concerned, it is alleged there was not proper service of the papers; that Mr. Mahlangu had lacked the authority to represent the respondent in the conclusion of the five transactions and that he was not authorised to sign the suretyship agreements pertaining to the transactions.

[18] The applicant also seeks condonation for the late bringing of the application. According to the applicant it only gained knowledge of the judgment and the liquidation in February 2021. The application for condonation is intertwined with the service issue and will be dealt with simultaneously.

Principles for a rescission

[19] To succeed with a rescission application, it is for the applicant to establish the following:

1. That there is a reasonable explanation for the default.
2. That there exist good cause for rescission, in that, if rescission is granted to the applicant will have some defence against the main claim; and
3. That the application is *bona fide* and not merely launched in order to delay the claim against the applicant.

The application is time barred / the service issue

[20] The high-water mark of the applicant's case as to why recission should be granted is the submission that there was not proper service on the applicant. As will be pointed out, there is no merit in this submission.

[21] Before I deal with the merits. This application is not one brought under Rule 42. The court did not grant default judgment in error. There was proper service at the registered address which is also the chosen *domicilium citandi et executandi* of the applicant. The judgment is thus not one that was erroneously sought. Moreover, the court granting the default judgment had before it documents evidencing proper service of the court processes on the registered address of the close corporation which was also the *domicilium citandi et executandi* of the applicant. Furthermore, there was personal service on the son of Mr. and Mrs. Mahlangu. It is not for a court to embark,

outside the court proceedings, on an investigation to establish whether as a *fact t*he members gained knowledge of the service of the action proceedings.

[22] Can the application succeed under Rule 31? On the applicant's own version, the application is late and beyond the time period provided for in the rule. As will be pointed out, there is no reasonably explanation given in the founding papers as to why the application was launched late particularly in light of the fact that the default judgment was granted as far back as early 2019 when Mr. Mahlangu was the face of the Close Corporation.

[23] Mrs. Mahlangu claims that she and the applicant only attained knowledge of the action, default judgment and liquidation proceedings (as well as the respective orders associated therewith) during February 2021 when she and the applicant were denied access to the applicant's bank accounts. According to her, she was blissfully unaware of any dealings by her husband on behalf of the applicant.

[24] She further claims that since having obtained knowledge of the various court processes (during February 2021) she still needed to obtain several documentation and context in order for her to assess the applicant's position and in order for her to depose to an affidavit on behalf of the applicant. She further claims that she was only able to instruct attorneys once she had gathered all the information.

[25] She also states that she was unaware of the appointment of the provisional liquidators and that she was never contacted by them and that she only became aware of their existence after she had received the answering affidavit in the rescission application. According to her, she only received the certificate of appointment of the provisional liquidators on 13 September 2021.

[26] On 5 August 2021 Mrs. Mahlangu sent an email to a Ms Cindy Bezuidenhout from her email address identified as khabolm@gmail.com enquiring about the applicant's liquidation. Ms Bezuidenhout replied to Mrs. Mahlangu on this same email address confirming that the applicant was in fact provisionally liquidated on 10 December 2020.

[27] The use of this email address by Mrs. Mahlangu to communicate is instructive: If regard is had to the agreements (more in particular the Agreement and Condition of Sale in respect of Immovable Property) that were signed by Mr. Mahlangu on behalf of the applicant, Mr. Mahlangu in writing on the agreement identified this very email address (khabolm@gmail.com) as the email address of the applicant. The fact that Mrs. Mahlangu uses the same email address when corresponding on behalf of the first applicant casts doubt on her version that she was blissfully unaware of the transactions. The written demands regarding the applicant's breach of contract were also emailed to this email address.

[28] Regarding service of the summons, Mrs. Mahlangu claims that there was not proper service on the applicant in that the summons and the particulars of claim were *affixed* to the principal gate as being the only manner of service possible. She further claims that the summons and the particulars of claim were not *in fact* received by the applicant in that the applicant has vacated the premises and were not operating from such premises anymore. Since there was not proper or effective service of the action on the applicant, it was submitted that the applicant was not *aware* of such action or able to defend such action. The address at which service was affected is 47 Delarey Street Bronkhorstspruit. As already pointed out, this is not only the applicant's registered address but also its chosen *domicilium citandi et executandi*. The fact that it did not come to her actual knowledge is neither here not there. There was proper service on the first applicant and Mr. Mahlangu. The papers were *not* affixed and were as a matter of fact served personally on the son of Mr. and Mrs. Mahlangu. From the answering affidavit in the rescission application and the replying affidavit in the winding-up application, the applicant's registered address had been utilized as the registered address of the applicant for a protracted period of time

[29] It was submitted on behalf of the applicant and Mrs. Mahlangu, with reference to the matter in *Magricor (Pty) Ltd v Border Seed Distributors CC*[1] that the service was not good. It was further submitted that the respondent and the attorneys made no effort to ensure service on an alternative address to ensure that the summons came to the *knowledge* of the applicant. I do not intend dwelling on this decision as it is distinguishable from the present situation. Firstly, in the present matter there *was*

[1] [2021] JOL 49272 (ECG).

personal service (twice) on the son of Mr. and Mrs. Mahlangu. The summons and particulars of claim were not affix to the main door of the company's registered office as claimed by counsel on behalf of the applicant. Secondly, this address was also, in addition to being the *registered* address of the applicant, the chosen *domicilium citandi and executandi* of the applicant. There can be no doubt that Mr. Mahlangu – who acted on behalf of the applicant at the time – was in willful default. (I will return to the authorization defence hereinbelow.)

[30] Not only did Mr. Mahlangu, in his capacity as a member of the applicant, clearly had knowledge of the action instituted, he also had knowledge of the liquidation application. In fact, it was he who instructed attorneys to file a notice of intention to oppose in the liquidation application.

[31] That notice was later withdrawn and the current attorneys representing the applicant came on record for the applicant as respondent in the liquidation. But it was Mr. Mahlangu, in his capacity as a member of the applicant, who had personal interaction with the representatives of the first respondent. He was also the one who requested an indulgence in order to afford the applicant an opportunity to remedy its breach of contract.

[32] On behalf of the respondent, it was further submitted that the court should reject the submissions regarding service on behalf of Mr. Mahlangu and the applicant for the following reasons:

(i) Although the applicant states that no business was conducted from 47 Delarey street, the same address – which is a residential dwelling - was coincidentally used as the registered address of a *new* company registered in 2021 – Somasiphula Logistics (Pty) Ltd - with Mrs. Mahlangu as one of the directors. It was submitted that this fact casts doubt on the contention now advanced by Mrs. Mahlangu and the applicant that no business was conducted from this premise.

(ii) From the annexures attached to the respondent's answering affidavit, it appears that the applicant is no stranger to litigation. Standard Bank Limited procured judgment against the applicant and registered a caveat

against a property registered in the name of the applicant. The respondent also refers to another judgment granted against the applicant on 23 October 2018.

[33] Regarding the defence raised in respect of the service of the summons and the particulars of claim, I am not persuaded that it was not proper. The applicant and Mr. Mahlangu clearly had knowledge of the summons and cannot now claim that they were not in willful default. At the very least, Mr. Mahlangu who was the face of the applicant at the time of the conclusion of the agreements had knowledge of the court processes.

Good cause

[34] Mrs. Mahlangu now claims that Mr. Mahlangu did not have any authority to act on behalf of the applicant and to bind the applicant in respect of the five transactions. She claims that these transactions are "*void and/or voidable*" and that she as the "*controlling heart and mind*" of the applicant was not aware of the transactions ("*the lack of authority defence*"). She also states that, because she and Mr. Mahlangu are married in community of property, Mr. Mahlangu could not have signed surety for the transactions and could therefore not have bound the joint estate to such a large amount without her written consent ("suretyship defence"). Lastly, she claims that there are triable issues that need to be ventilated and that she has shown good cause for the default judgment to be set aside and that she will be prejudiced if the order is allowed to stand.

The lack of authority defence

[35] At the relevant time when the transactions were concluded, on Mrs. Mahlangu's own version, her husband, Mr. Mahlangu, was in control of the applicant. She expressly states that she only recently took over the control of the applicant. It is inconceivable that Mrs. Mahlangu was not aware of the transactions: She and Mr. Mahlangu are the only two members of the applicant and were at all relevant times married.

[36] The fact that Mr. Mahlangu is a minority member makes no difference. As will be pointed out, a Close Corporation is bound by any action and/or representation made on its behalf a member whether or not such member was authorized or not as long as the other third party had no knowledge that the member in fact had no authority to act on behalf of the Close Corporation. Consequently, where a member (albeit a minority

member) of the applicant contracts with third parties, and unless the other contracting party is aware of a lack of authority, section 54[2] of the Close Corporation Act[3] regards such a member as a duty authorised agent of the Close Corporation in relation to any transaction entered into with a non-member. Nothing has been placed before the court that Mrs. Mahlangu has taken any steps whatsoever to restrict the authority of Mr. Mahlangu. Nothing was also placed before the court to indicate that the first respondent had any reason to doubt that Mr. Mahlangu was authorised to acquire the properties which were put up for sale.

[37] I am thus persuaded on the facts that Mr. Mahlangu had been given free rains by Mrs. Mahlangu to do effectively what he wanted to do with reference to the applicant. He was the business face of the applicant to the outside world. As already pointed out, Mrs. Mahlangu herself states in her affidavit that she had only recently taken "*control*" of the applicant from Mr. Mahlangu, who according to her had not been honouring his fiduciary duties to the applicant. For her to have taken over control, it practically means that the control must have resided with Mr. Mahlangu.

[38] It was further submitted on behalf of the first respondent, that even if - as a fact - Mr. Mahlangu did not have authority (which is denied by the first respondent) this is an instance of ostensible authority. I agree with this submission: Mr. Mahlangu was dressed up as the representative of the applicant as if he was in fact the person authorized to deal with the applicant's affairs. I am further in agreement with the submission that it is simply improbable that Mrs. Mahlangu, given the long passing of time (the transactions were concluded in 2018) and their marital regime, would not have been aware what her husband had been doing. The alleged contemplation of divorce is in any event only a recent one. Because an image was created to the outside world that Mr. Mahlangu had authority to transact on behalf of the applicant, it is now not open to either Mrs. Mahlangu or the applicant to deny Mr. Mahlangu's authority.

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[2] "***54 Power of members to bind corporation***

(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.

(2) Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power."

[3] Act 69 of 1984

Suretyship defence

[39] Regarding the submission that the parties are married in community of property and therefore Mr. Mahlangu could not have signed surety for the applicant, the court in *Amalgamated Banks of South Africa v De Goede & Another*[4] held that a suretyship signed by a spouse married in community of property, without the consent of the other spouse, is valid because a member of a close corporation is legally a co-manager of the Close Corporation and his business is therefore to manage the corporation. It was irrelevant to the court in this matter that the particular member was not involved in the day-to-day management of the corporation. In the result there is no merit in the attempt on behalf of the applicant, to argue that the suretyship is invalid, because Mrs. Mahlangu had not given consent

Conclusion

[40] The first and second applicants have failed to show good cause for the rescission: The applicants have not provided an adequate reasonable explanation given for the default, particularly in light of the fact that the agent and member of the applicant knew about the court proceedings and failed to do anything to avoid the granting of default judgment. The default was willful. It is just too convenient for Mrs Mahlangu, also a member of the applicant, to now pretend that she knew nothing about the orders. The applicants have also not persuaded the court that they have a *bona fide* defence to the first respondent's claim. In the event the application to rescind the default judgment must fail.

[41] In light of the above, the following orders are made:

In the matter between:

LINAH MUMSY MAHLANGU Applicant

And

SOMASIPHULA GENERAL TRADING CC First Respondent

[4] 1997(4) SA 66 (HHA).

VAN'S AFSLAERS GAUTENG (PTY) LTD Second Respondent

M J MAHLANGU Third Respondent

TRUSTEES FROM TIME TO TIME OF THE ADRIAAN FISHER TRUST Fourth Respondent

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ORDER: IN THE APPLICATION TO INTERVENE

IT IS ORDERED THAT:

1. The applicant is granted leave to intervene as the second applicant in the rescission application instituted under case number 88160/2018.

2. The accompanying affidavit of Linah Mumsy Mahlangu is used as the second applicant's affidavit in support of the rescission application.

3. The applicant to pay the costs of this application.

In the matter between:

SOMASIPHULA GENERAL TRADING CC First Applicant

LINAH MUMSY MAHLANGU Second applicant
(Applicant in the application to intervene)
(Second applicant in the recission application)

and

VAN'S AFSLAERS GAUTENG (PTY) LTD First Respondent

M J MAHLANGU Second Respondent

TRUSTEES FROM TIME TO TIME OF THE ADRIAAN FISHER TRUST Third Respondent

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ORDER: IN THE RESCISSION APPLICATION

IT IS ORDERED THAT:

1. The application to rescind the default judgment granted on 22 February 2019 is dismissed.
2. The first and second applicants to pay the cost of this application, jointly and severally the one paying the other to be absolved.

A.C. BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16 May 2022.

Date of hearing
3 May 2022

Appearances

For the first and second applicants

Adv L de Wet

Instructed by Ian Levitt Attorneys

For the first respondent

Adv MP van der Merwe SC

Instructed by Tim Du Toit & Co Inc