IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

28-01-2022

DATE SIGNATURE

CASE NO: 16238/09

DATE: 28 JANUARY 2022

In the matter between:-

MV SEREBRO Applicant

(Respondent in the rescission application)

AND

L VISSER Respondent

(Applicant in the rescission application)

JUDGMENT

SKOSANA AJ

[1] In this matter the applicant, Mr Visser, seeks a rescission of judgment granted by Judge Potterill on 17 May 2020[1]. The rescission application is opposed by the respondent, Ms Serebro whose surname is now Lipman due to her re-marriage in October 2015. For the purposes of this judgment and notwithstanding the manner in which the parties are cited in the papers, I refer to Mr Visser as the applicant and Ms Lipman as the respondent.

[2] In view of the conclusion I reach in this matter, there is no need to detail the entire background facts in this matter. Nonetheless the brief historical background of this matter is as follows:

[2.1] The applicant was involved in the business of importing diesel electric generators from China for resale in South Africa. During April 2008, the applicant and the respondent concluded an oral agreement in terms of which some generators were to be

[1] The uncertainty about the date of the default judgment is groundless

purchased and imported by the applicant for the respondent from China.

[2.2] The applicant has set out the terms of such oral agreement, some of which are in dispute as appears from the respondent's answering affidavit. Such disputes however do not have a bearing on the conclusion I have reached.

[2.3] In line with such oral agreement, the respondent paid to the applicant certain amounts for the purchase of the generators which, according to the respondent, never reached her hands. The applicant alleges that the goods which were purchased for the respondent were lost during shipment to their destination in South Africa and despite enquiries, could not be found. Such loss, according to the applicant fell on the respondent's lap as the applicant was only acting as an agent for the respondent in that transaction.

[2.4] The respondent on the other hand alleges that there is sufficient evidence to prove that the applicant received the goods but never handed them over to the respondent.

[2.5] Following disagreement between the parties in regard to this matter, the respondent instituted motion proceedings in this Division wherein he sought relief against the applicant. It is important for the purposes of this case to quote the notice of motion in that application ("the main application"). The relief was couched in the following terms:

"1. *That the defendant render a full account, supported by vouchers, source documents for the sale of electrical generators imported from China for the period 29 April 2008 until the date of this order within 30 days of the date of this order.*

2. *Debatement of such account within 30 days after receipt of the account referred to in prayer 1.*

3. *Payment to the applicant of whatever amount appears to be due to the applicant upon debate of the account.*

4. *Interest a tempore morae on the amounts for which the respondent is liable from the date upon which the respondent received the respective amounts until the date of payment.*

5. Costs of suit".

[2.6] The main application was opposed by the applicant who also filed an answering affidavit thereto. After the pleadings had been closed, the parties agreed that the application had to be referred for hearing of oral evidence as a result of which an order was made by Mavundla J on 21 October 2010 referring the main application for oral evidence. It is clear from such order that it was made by agreement between the parties.

[2.7] The notice of set down was duly served on the then applicant's attorneys, MD Swanepoel Attorneys, on 14 June 2011 for the set down of the matter for hearing of oral evidence on 17 May 2012. However, a month before such hearing, on 12 April 2012, MD Swanepoel Attorneys filed a notice of withdrawal as attorneys of record for the applicant. There is no allegation that the applicant did not receive this notice of withdrawal. However, the applicant did not attend the proceedings of 17 May 2012 with the result that a default judgment was granted against him.

[3] Importantly, the default judgment was granted in the following terms:

"1. Payment of R875 000-00;

2. Interim a tempore morae from the first payment made by the applicant to the respondent that is the 4th of June 2008 and the costs of the application."

[3.1] During February 2020, the applicant received summons through the Sheriff to appear before the Magistrate Court. This was a notice in terms of section 65A(1) of the Magistrates Court Act 32 of 1944 ("the section 65A notice"). In this notice the applicant was required to appear before the Magistrate Court on 16 April 2020. This notice also indicated that the judgment granted by a court of Pretoria against the applicant on 17 May 2012 for the payment of R 875 000-00 and the costs as well as interest thereon would be part of the enquiry before the Magistrates Court.

[3.2] According to the applicant, he did not understand that this notice was referring to the judgment granted in respect of the main application. However, his attempt to attend court on 16 April 2020 were not successful due to the lockdown restrictions.

[3.3] The applicant then states in his affidavit that he only became aware of the default judgment on 16 March 2021 when the Sheriff served

him with the notice of attachment. Soon after that he made various enquiries with the respondent's attorneys which culminated in the institution of the application for rescission on his behalf. In his heads of argument which were filed on behalf of the applicant during July 2021, counsel for the applicant, Mr Alli alluded to the fact that there was a substantive discrepancy between the remedy sought by the respondent in the main application and the ultimate order granted in the default judgment by Judge Potterill on 17 May 2012. Although the issue was not raised on the pleadings between the parties, I am satisfied that the applicant's heads which were filed a while before the respondent's, constituted adequate notice to the respondent that this ground would be relied upon. This court is therefore entitled to adjudicate upon it.

[4] As quoted above, the notice of motion in the main application sought relief that was substantially different from the one that was ultimately granted. First, the notice of motion in the main application sought an order directing the respondent to render a full account including vouchers and source documents for the sale of the generators. Such account would be rendered after a court had been granted and within 30 days thereof. Second, after such account had been rendered and received, debatement had to take place within 30 days. In other words, the parties had to deliberate upon and if possible agree on such account.

[5] Further, in terms of paragraph 3 of the notice of motion in the main application payment to the respondent would be payment of an amount which would become due to the respondent after the debate of the account. Even the interest would be calculated from the date upon which receipt by the applicant of such amounts after the debatement had taken place.

[6] The order granted by Potterill J on 17 May 2012 is a far cry from the relief sought by the respondent in the main application. There is no evidence and it seems to be common cause that no such account was rendered by the respondent nor did any debatement take place in relation to the amount granted in the default judgment. In any event the substantial difference between the notice of motion and the subsequent court order is an irrefutable demonstration of an order granted erroneously or sought erroneously in the absence of the applicant.

[7] It is trite law that if it is established that the order was erroneously granted or erroneously sought in the absence of the aggrieved party, the rescission must be granted. There is no need to establish good cause for the default on the part of the applicant[2].

[2] **Mutebwa v Mutebwa & Another 2001 (2) SA 193TKAC para 16**

[8] Even if I am wrong in the above analysis, it is my view that the applicant has established the existence of a *bona fide* defence, namely that he never received the goods from China. Counsel for the respondent was at pains in trying to show me, through documents annexed to the papers, that there is evidence establishing that the applicant would have or may have received the goods but kept them to himself and never gave them to the respondent.

[9] It is clear that the documentation referred to by Mr Carstens who acted for the respondent, is inadmissible on the basis of hearsay evidence. Such documentation was not authored by any of the persons who filed affidavits in this matter nor was it argued that they should be admitted as an exception to the hearsay rule. It follows therefore that as matters stand, there is no tangible evidence that the applicant received the goods in question from China and failed not transmit them to the respondent. Consequently, it cannot be gainsaid that the applicant has established a *bona fide* defence.

[10] As regards the delay in bringing the rescission application, first, the common law rescission or the Rule 42(1) need only to be brought within reasonable time after the applicant has become aware of the existence of the judgment. After MD Swanepoel Attorneys had withdrawn as attorneys of record for the applicant in respect of the main application, the applicant

had no one to enquire from in relation to the matter. The contention that he could have made enquiries with the respondent's attorneys is not impressive. This is also evident from the alleged altercation and threats that ensued when the applicant tried to enquire from the respondent's attorneys after he had received the Writ of Attachment in March 2020.

[11] The section 65A notice, though it refers to a court order of 17 May 2012, does not specify as to which court or which division of the High Court granted such order nor is the High Court case number mentioned therein. This taken together with the discrepancies between the original relief sought and the eventual default judgment, makes this notice difficult to comprehend especially for a lay person. In any event the applicant would not reasonably have expected an order for a payment of a fixed amount from the main application without the rendering of the full account and the debatement thereof as referred to above. There is also no explanation from the respondent as to why steps to execute the default judgment only commenced in 2020, i.e. about 8 years after the default judgment had been granted.

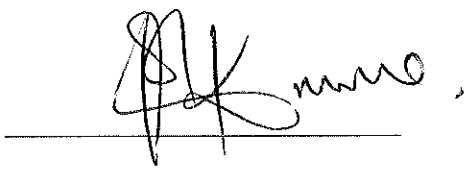
[12] As regards costs, I am not inclined to grant costs in favour of the applicant notwithstanding the conclusion I have come to. There is no explanation as to how the discrepancies between the relief sought and the default judgment came about nor can the blame for such eventuality be justifiably

placed at a door of the respondent. After all, the respondent was armed with a judgment in her favour and was entitled to oppose the endeavour to rescind it especially after such an extended period of time. Moreover, the basis upon which I am granting the rescission did not form part of the original papers of the applicant.

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

[1] The default judgment granted by Judge Potterill on 17 May 2012 is hereby rescinded;

[2] There is no order as to costs.



DT SKOSANA

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant (Respondent in rescission):	Adv JC Carstens
Instructed by:	AJ Van Rensburg Inc.
Counsel for the Respondent (Applicant in rescission):	Adv N Alli
Instructed by:	Thomson Wilks Attorneys
Date heard:	25 January 2022
Date of Judgment:	28 January 2022