REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(PRETORIA DIVISION)

CASE NO: 26690/2016
DOH:18 FEBRUARY 2022

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

18/8/2022

SIGNATURE DATE

In the matter between:

MAKOLE RESOURCES (PTY) LTD **APPLICANT**

And

HERMAIN JURIE WESSELS **RESPONDENT**

J U D G M E N T

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE ANDTIME OF HAND DOWN SHALL BE DEEMED TO BE 18 AUGUST 2022

MALI J

1. The applicant seeks an order for rescission of default judgment granted by this honourable court on 3 October 2016. The order is for payment of the sum of R 491 650 with costs, in respect of claim for damages against the applicant. The claim arose as a result of the veld fire which took place on 15 May 2015, allegedly due to the negligence of the applicant. The fire commenced on the prospecting area in the immovable property of the applicant. The fire destroyed the possessions of the respondent. The summons was served on the address of applicant's auditors. The applicant did not to enter appearance to defend hence the default judgment.

2. The issue for determination is whether the applicant is entitled to rescission of default judgement. The application is in terms of Rule 31 (2) (b) of the Rules of the court, alternatively in terms of common law.

3. Judgment obtained by default under common law can be rescinded by court if the applicant has shown, sufficient cause for rescission. Rule 31 2(b) provides;

> *"A defendant may within 20 days after acquiring knowledge of such judgment 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 it deems fit."*

4. In the matter of *Harris v ABSA Bank Ltd Volkskas* 2006 (4) SA 527 (T) ("***Harris***") in a Full Court decision Moseneke J (as he then was) said the following:

> *"8. Before an applicant in a rescission of judgment application can be said to be in "wilful default" he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step*

which would avoid the default and must appreciate the legal consequences of his or her actions. A decision freely taken to reform from filing a notice to defend or a plea or from appearing would ordinarily weigh heavily against an Applicant required to establish sufficient cause."

5. The second stage of the inquiry is whether the applicant has raised a *bona fide* defence to the action against him. In paragraph 9 and 10 of the Harris decision, Moseneke J stated thus:

"9. A decision freely taken to refrain from filing a notice to defend or a plea or from appearing, ordinarily will weigh heavily against an applicant required to establish sufficient cause. However, I do not agree that once wilful default is shown the applicant is barred; that he or she is then never entitled to relief by wat of rescission as he or she as acquiesced. The Court's discretion in deciding whether sufficient cause has been established must not be unduly restricted. In my view, the mental element of the default, whatever description in bears, should be one of the several elements which the Court must weigh in determining whether sufficient or good cause has been shown to exist. In the words of Jones J in De Witts Auto Body Repairs (Pty) Limited v Fedgen Insurance Co. Limited 1994 (4) SA &05 (E) at 708 G, '..... the wilful or negligent or blameless nature of the defendant's default now becomes one of the various considerations which the courts will take into account in the exercise of their discretion to determine whether or not good cause is shown'.

10. A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation.

'Instead, the explanation, be it good, bad or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole'."

6. The applicant 's version is that the it did not receive the summons as they were served on Ms Du Preez, the company secretary of the applicant's auditors. This is supported by the email attached in the founding affidavit marked annexure "*NLM3*" sent by the respondent's attorneys on 6 October 2020 to the applicant. The attorney wrote as follows:

   "…….. Subsequently a warrant for execution was issued as is evident from the copy attached hereto. The warrant was delivered at the registered address of the company, but it turned out that it is the address of the company's auditors. I have now obtained the address of the place of business of the company……"

7. The applicant does not deny that the address of its auditors is its registered address. From the conduct of respondent's attorneys by their own admission, although the admission pertains to the warrant for execution; it is reasonably possibly true that the auditors did not bring the summons to the applicant's attention. In this regard I find that the applicant was not in wilful default.

8. It is trite that an applicant for rescission must demonstrate an existence of a substantial defence and not necessarily a probability of success. It is sufficient that in his evidence he shows a *prima facie* case which raises triable issues.

9. In the present it has been submitted on behalf of the applicant that on the day of the fire, it was very windy and the grass was tall. The drill rig was barricaded and drilling operations were underway. The applicant's drilling operations were fenced off and two fire extinguishers were placed strategically inside the working area. A fire started on the respondent's

property and the cause of same was unknown to the applicant and its subcontractors. The applicant's employees and subcontractors attended to the fire using the watercraft and fire extinguishers to try and doze the fire, nevertheless the fire moved quickly beyond their control. Neighbouring farmers also assisted. Furthermore, it is the applicant's case that the respondent failed to prepare firebreaks on the applicant's side of the boundary and he neither failed to discuss fire breaks with neighbours.

10. There is an explanation in this matter. It is not for this court to determine whether the explanation is good or bad. In applying the principles laid down above, I have considered the explanation in the light of the applicant's defence. I am persuaded that the applicant has demonstrated a substantial defence and that the defence is *bona fide*. I therefore conclude that that the rescission application must succeed.

In the result

ORDER:

1. It is hereby ordered that the judgment granted by this court on 3 October 2016 be and is hereby rescinded and set aside.

2. The costs are hereby reserved for the main action.

N.P. MALI
JUDGE OF THE HIGH COURT

APPEARANCES

On behalf of the Applicant:

Adv. TM Modise	Instructed by Moorosi Inc Attorneys

On behalf of the Respondent:

Adv. DC Du Plessis	Instructed by Johan Du Preez Attorneys