IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 12667/2014

In the matter between:

TRINITY ASSET MANAGEMENT (PTY) LTD Applicant

[Registration No. 1996/010864/07]

And

GRINDSTONE INVESTMENTS 132 (PTY) LTD Respondent

[Registration No. 2004/021971/07]

JUDGMENT DELIVERED ON 18 FEBRUARY 2015

GAMBLE, J:

INTRODUCTION

[1] On 18 July 2014 the Applicant ("Trinity") lodged an application in this court to provisionally wind-up the Respondent ("Grindstone"). The matter was set down for hearing on the ordinary motion court roll on 28 July 2014. The application

was opposed on that day and by agreement between the parties postponed to 7 October 2014 for hearing on the semi urgent roll, with a timetable for the filing of papers.

[2] Grindstone's answering affidavit was filed on 25 August 2014 and Trinity's reply on 7 September 2014. On 25 September 2014 Grindstone's Johannesburg attorney, M J Hood & Associates (locally represented by a Mr Nirenstein of Knowles Husain Lindsay Inc.), filed an urgent application to be heard during recess on Wednesday, 1 October 2014 in which Trinity was sought to be compelled to provide security for costs in the liquidation application in the amount of R200 000.00.

[3] On 2 October 2014 Saldanha J granted an order by agreement between the parties that security as requested in the sum of R200 000.00 be put up. The effect of paragraph 2 of that agreed order was to automatically suspend the application for winding-up and so the matter did not proceed on 7 October 2014 as originally intended.

[4] A month went by without Trinity putting up the agreed security. On 5 November 2014 Trinity launched an urgent application (to be heard on 7 November 2014) to rescind the order of Saldanha J. The matter was postponed by Riley AJ on that day. A tight timetable was fixed, but the parties managed to keep to it and the matter was heard by this court on 4 December 2014 with Mr A R G Mundell SC appearing for Trinity and Mr D van Reenen for Grindstone.

BACKGROUND TO THE ORDER OF SALDANHA J

[5] Two days after the filing of the answering affidavit, Mr Hood gave notice in terms of rule 47 to Trinity's erstwhile attorneys (represented by Ms Garella of Pietermaritzburg) for security in the sum of R200 000.00. The grounds for the demand were set out as follows in the notice:

> "*1. Applicant [i.e. Trinity] is a private company duly incorporated as such in terms of the company laws of the Republic of South Africa, and is required to give security for costs if at any time during the proceedings it appears that there is reason to believe that the company or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the Respondent [i.e. Grindstone] if successful in its defence;*
>
> *2. Respondent has reason to believe that Applicant will be unable to pay the costs of Respondent if Respondent is successful in its defence;*
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> *3. In support of the aforegoing, Respondent refers to its averment in paragraph 11.2 of its answering affidavit, namely that the South African Revenue Services has a judgment against Applicant in the sum of R382 693,00, which remains unsatisfied;*

4. Applicant, in its replying affidavit has in effect admitted the said judgment, and that it is unsatisfied".

[6] Shortly thereafter Mr Hood wrote to Ms Garella informing her that in the event that Trinity conceded that it was liable to put up security but disputed the amount, the matter would have to be referred to the Registrar for determination of the amount in terms of rule 47. A response was requested within 48 hours to avoid the launching of an urgent interlocutory application.

[7] On 16 September 2014 Ms Garella responded indicating that she had only received Mr Hood's letter the previous day and bemoaned the fact that her offices had been without electricity for a large part of that day. She undertook to revert on 18 September 2014 after consulting with her client.

[8] Ms Garella complied with her undertaking, and on that day, sent a without prejudice letter to Mr Hood in which she said, *inter alia*:

"*2. We have consulted with our client and counsel and our instructions are to advise you that our client does not accept liability and is disputing that he has to put up security for costs as called for by you. However, to avoid protracting the matter, we have been instructed to tender R50 000.00;*

3. The amount of R200 000.00 is excessive in the circumstances;

4. *Kindly take instructions and revert as a matter of urgency. If your client is not amenable to our tender the matter has to go before the Registrar*".

[9] The tender of R50 000.00 was rejected and on 26 September 2014 Grindstone launched an urgent application for security: this is the matter that came before Saldanha J on 1 October 2014. After the parties had negotiated the resolution of their dispute, an order was taken by agreement before Saldanha J.

[10] As I have said, the agreed security was not immediately forthcoming. On 27 October 2014, Mr George, a director of Trinity, was consulting a certain Mr Korber, an attorney in Cape Town, about an unrelated matter. There was evidently discussion in passing about the security application during which Mr Korber offered Mr George certain gratuitous advice *viz.* that he held the view that Trinity was not liable to put up security on the basis requested by Grindstone.

[11] The upshot of that discussion was that Mr Korber interceded as the attorney of record in place of Ms Garella in both the liquidation and security applications, and immediately set about corresponding with Ms Garella's local correspondent, Mr Watson of Gunstons Attorneys, in an attempt to procure the reversal of the order of Saldanha J. This was not achievable and the current rescission application was then launched, as I have said, as a matter of compelling urgency on only two days' notice.

TRINITY'S ALLEGATIONS REGARDING THE SECURITY APPLICATION

[12] Mr Mundell SC argued (much in line with the points taken by Mr Korber in correspondence) that the basis for Grindstone's demand for security was legally flawed, in that it purported to be based on the redundant provisions of section 13 of the repealed Companies Act of 1973 ("the Old Act").[1] That section was not carried through to the Companies Act, 71 of 2008 ("the Companies Act") and the position currently is that any application for security for costs involving a company, is to be determined according to common law principles.[2]

[13] In Maigret I followed the decision of Thring J in Ramsamy[3], and held that in an application for security under the common law it was not sufficient to simply allege that security was warranted because of the mere inability of a plaintiff or applicant to satisfy a potential costs order: something more was required. I have no reason to deviate from that view, which seems to be the view of other courts too.

[14] A reading of the notice in terms of rule 47 in this case leaves one with little doubt that it was intended to be based on the provisions of section 13 of the Old Act – the wording is almost identical and, in addition, there is no suggestion of "*something more*" (e.g. vexatiousness or recklessness) that justifies the application. It

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[1] The section reads as follows:

"*13. Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondents if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given*".

[2] Ngwenda Gold (Pty) Ltd and Another v Precious Prospect Trading 80 (Pty) Ltd [2011] ZAGPJHC 217 (14 December 2011); Siemens Telecommunications (Pty) Ltd v Datagenics (Pty) Ltd 2013 (1) SA 65 (GNP); Maigret (Pty) Ltd(in liquidation) v Command Holdings td and Another 2013 (2) SA 481 (WCC); Nielson v Rautenbach N.O. and Others 2014 (3) SA 17 (GNP).

[3] Ramsamy N.O. and Others v Maarman N.O. and Another 2002 (6) SA 159 (C) at 172-3.

seems then that Mr Hood was oblivious of the repeal of section 13 of the Old Act. I say "*seems*" because Mr Hood has not filed an affidavit in these proceedings explaining the Rule 47 notice.

[15] In the founding affidavit in the rescission application Mr George complains that he was wrongly advised by Mr Watson, then acting as Ms Garella's correspondent, as to the correct legal position:

> "*36.2 The instructions referred to by Watson in his aforesaid e-mail of 29 September were the same instructions as those set out in Garella's e-mail to Hood of 18 September 2014, save that they were no longer limited to R50 000.00 which had been rejected by Grindstone. This was on the advice of Watson who, like Garella before him, did not advise me of, and seemed to be oblivious to, the fact that the law pertaining to security for costs by a company ostensibly unable to pay the costs of an adverse costs order had changed as a result of the repeal of the 1973 Companies Act and, with it, section 13 thereof.*
>
> *36.3 At the risk of stating the obvious, had I known that the security application was a non-starter, I would <u>not</u> have agreed to take the advice of Watson (or Garella) which was predicated on ignorance of the correct legal position*".

BASIS FOR THE RESCISSION APPLICATION

[16] While various points were raised in the heads of argument, Mr Mundell SC limited his submissions in the rescission application arguing that the application fell to be determined either under rule 42(1)(a) or the common law. Mr van Reenen adopted the stance that the order of Saldanha J was the product of a negotiated settlement in which an expedient decision had been taken by both parties to enable the main litigation to progress. He argued that, while both sets of attorneys may have been mistaken as to the basis for the application, an agreement of compromise was reached after both sides had considered their options to enable the liquidation application to be speedily disposed of.

RULE 42(1)(a)

[17] Mr Mundell SC referred to the court's power under this rule to rescind or vary:

> "*(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby*".

[18] He argued, on the strength of a number of authorities[4] that where an order of court was legally incompetent or lacked a legal foundation, it was capable of being rescinded under this rule.

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[4] Athmaram v Singh 1989 (3) SA 953 (D); Marais v Standard Credit Corporation Ltd 2002 (4) SA 892 (W); Seale v Van Rooyen N.O. and Others; Provincial Government, North West Province v Van Rooyen N.O. and Others 2008 (4) SA 43 (SCA) and Silver Falcon Trading 333 (Pty) Ltd and Others v Nedbank Ltd 2012 (3) SA 371 (KZP).

[19] I am prepared to accept, without deciding, that the basis for the application before Saldanha J was a piece of repealed legislation of which Mr Hood was unaware. That, however, is not sufficient to warrant rescission in the present case because Trinity has not established that the order was taken "*in the absence of the party affected thereby*", i.e., itself.

[20] It is true, as claimed in the affidavits, that neither Mr George nor Mr Watson were present at court when the order was made by Saldanha J, who, it seems, heard the matter in chambers given that it was court recess. The papers do not reflect which party's counsel presented the order to Saldanha J – just Trinity's, or Grindstone's as well? I shall assume for purposes of argument that the order was presented by Grindstone's counsel alone – it was after all the party seeking security and the party armed with an agreement to take the order by consent. In such circumstances, Trinity clearly waived the right to be before the presiding judge having satisfied itself that this was not necessary in light of the parties' agreement. That much is common practice in this Division where matter are settled and only one legal representative , with the consent of his/her opponent, sees the presiding judge in chambers.

[21] In such circumstances, I am not persuaded that Trinity has established the criterion of "*absence*" as contemplated under rule 42(1)(a).

COMMON LAW

[22] In relying on the court's common law power to rescind the order made by Saldanha J, Mr Mundell SC argued with reliance in the main on Kruisenga.[5] In a detailed and well-researched judgment Van Zyl J was required to deal with an application for rescission of a judgment granting a damages claim due to a veld fire in which the defendant (the MEC) had conceded the merits on certain of the plaintiff's claims. In seeking to set aside those parts of the judgment where the MEC had conceded the plaintiff's claims, the defendant's only point was that the State Attorney lacked the requisite authority to concede the merits to agree to pay those heads of damages which he had purported to concede.

[23] Although the application for security for costs in this matter was an interlocutory proceeding, the parties accepted that Saldanha J's order constituted a final judgment. The dispute around the provision of security or not, and the amount thereof, was accordingly *res judicata* between the parties.

[24] After an extensive analysis of the remedy of *restitutio in integrum* as it has devolved from the Roman Dutch authorities, Van Zyl J made the following observations at 280D *et seq*:

> "*[33] The grounds for restitution (causae iustae) are said to be fear, fraud, absence, minority, justifiable mistake (justus error), and what Voet describes as the 'general clause' to the praetor's edict, namely, 'any good and sufficient*

[5] MEC for Economic Affairs, Environment and Tourism v Kruisenga and Another 2008 (6) SA 264 (CkHC).

> *cause'. All of these grounds do not apply to each and every juristic act to which the remedy extended. Restitutio is granted on a lawful ground (iusta causa) founded or recognised in law, i.e. a reason that has been held to be sufficient so as to justify an order for restitution in any particular case. At common law, any cause of action that is relied on as a ground for the setting aside of a final judgment must have existed at the date of the judgment. There must be some causal connection between the circumstances which gave rise to the claim for rescission and the judgment*". [Footnotes omitted.]

[25] Van Zyl J considered that there were essentially three categories of judgment which fell to be considered. Firstly, the court found that a judgment granted after the hearing of evidence and argument was capable of rescission on very limited grounds only. Secondly, there were judgments which have been granted without going into the merits of the dispute, e.g. through default of appearance of the defendant. In those instances, the court's powers of rescission are far wider.

[26] Finally, there is the category with which we are dealing here – what is customarily referred to as a "*consent judgment*". Reliance was placed on Gollach & Gomperts[6] in which the Appellate Division dealt at length with the concept of a

[6] Gollach & Gomperts v Universal Mills & Produce Co. 1978 (1) SA 914 (A).

transactio[7] whose purpose it was said was not only to put an end to existing litigation, but also to prevent or avoid looming litigation.[8]

[27] Miller JA observed that it appeared to him that a *transactio* was:

> "*most closely equivalent to a consent judgment … Such a judgment could be successfully attacked on the very grounds which would justify rescission of the agreement to consent to judgment. I am not aware of any reason why justus error should not be a good ground for setting aside such a consent judgment … provided that such error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise*".[9]

[28] The learned Judge of Appeal quoted with approval the following extract from Williston on Contracts 3rd ed vol. 13 para 1543 pp 75-76, in which the learned authors, recognising that mistake would in appropriate cases render contractual transactions voidable, cautioned as follows:

> "*However, there must be excluded from consideration mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk. With respect to any matter not made a basic assumption of the contract, the parties take their chances.*

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7 "*An agreement between litigants for the settlement of a matter in dispute*" (921B).
8 921C.
9 922H.

> *Thus, where a compromise is made, the fact that one or both parties were under a mistake in regard to the claim which was the subject of compromise affords no grounds for relief.*
>
> *It should be observed, however, that even a compromise may be based on the assumed existence of some fact, and then may be set aside for mutual mistake as to such basic assumption like any other contract*".[10]

[29] And, concluded Miller JA:

> "*Voluntary acceptance by parties to a compromise of an element of risk that their bargain might not be as advantageous to them as litigation might have been is inherent in the very concept of compromise. This is a circumstance which the Court must bear in mind when it considers a complaint by a dissatisfied party that, had he had laboured under an erroneous belief or been ignorant of certain facts, he would not have entered into the settlement agreement*".[11]

JUSTUS ERROR

[30] In the founding papers in this application for rescission, Mr George speculates as follows in an attempt to set up a common mistake:

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[10] 923A-B.
[11] 923D.

"*14. It can only be inferred that Grindstone's attorneys were similarly unaware of the fact that section 13 of the 1973 Companies Act was no longer of application and that it was accordingly not legally competent for Grindstone to seek, or for the Court to make, the order of 1 October 2014. In the event, I submit that:*

14.1 there was no true consensus between the parties who were both operating under the incorrect assumption or mistaken supposition that section 13 of the (old) Companies Act was still in operation when it had been repealed (and not re-enacted) with effect from 1 May 2011 when the new Companies Act came into operation;

14.2 Trinity's ostensible consent to the security order was vitiated by its mistake regarding the applicability of section 13 of the 1973 Companies Act, which mistake arose because of the manner in which Grindstone framed the security application and the advice it received from its erstwhile attorneys …".

[31] In the answering affidavit filed on behalf of Grindstone, these allegations are met with the following denials:

"***Ad para 14***

31. I deny the content of this paragraph. There is [*sic*] *ample legal authorities to support Respondent's position that security for costs can be demanded and should be provided.*

Ad para 14.1

32. I deny that there was no consensus between the parties.

33. I refer to the email from Garth Watson a director of Gunston Attorneys dated 29 September 2014 which is self-explanatory, attached as annexure "B".

34. This is an agreement entered into between two duly admitted attorneys, who are practising in the above High Court".

[32] Earlier in the affidavit Grindstone's Mr Cunningham-Moorat points out, firstly, that George's allegations regarding a lack of consensus are not confirmed under oath by either Ms Garella or Mr Watson, Trinity's erstwhile attorneys. He goes on to say that:

"*8. I am advised that it will be argued at the hearing of this matter that the issue of the provision for costs in respect of an incola company has been settled and that this court,*

and any High Court has a discretion whether to compel the provision of security for costs.

9. *It will be argued further, that parties can agree to the provision of security for costs and that such agreement is not an illegal or immoral agreement and that it constitutes an enforceable agreement*".

[33] Further, Grindstone says that:

"*26. … [Its] request for security for costs was premised on the discretion conferred upon the above court in terms of the common law applied to the facts set out in the application for the provision of security.*

27. Furthermore, the Respondent and Applicant's respective legal representatives entered into an agreement to provide security for costs.

28. I deny that an incola company cannot be compelled to provide security for costs".

[34] If one has regard to Ms Garella's contemporaneous letter to Mr Hood of 18 September 2014 (referred to in paragraph 8 above), it is apparent that it is not common cause that Trinity's erstwhile attorneys held the view (now said to be a mutually mistaken view) that it was obliged to put up security by virtue of believing that it was bound to do so under section 13 of the Old Act. Rather, its concession appears to be predicated on a decision driven by expediency in line with the exceptional situation referred to in Williston.

[35] These are motion proceedings for final relief and in the event of a dispute of fact Grindstone's allegations must carry the day.[12] I am therefore not persuaded that Trinity has established the mutual mistake relied upon in paragraphs 14.1 and 14.2. It follows therefore that it cannot be said that the agreement was concluded under *justus error*.

ORDER OF COURT

[36] In the circumstances the application for rescission is dismissed with costs.

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GAMBLE, J

[12] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C.