IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 16244/2020

In the matter between:

ANTON COOSNER Applicant

and

PAUL HERBERT NUTTALL Respondent

Date of hearing: 24 February 2021

Date of Judgment: 08 March 2021(delivered by email to the parties' legal representatives).

JUDGMENT

PANGARKER, AJ

INTRODUCTION

[1] This is an opposed rescission application which was heard as an urgent application on 24 February 2021. Ms Morgan appears for the applicant,

instructed by Mr Barnaschone, and Mr Elliott SC, instructed by Mr Crossley, appears for the respondent. I refer to the parties as applicant and respondent. The applicant seeks to rescind an urgent Order granted under case number 17279/2020 which placed his estate under provisional sequestration.

COMMON CAUSE AND UNDISPUTED FACTS

[2] The parties in this matter are involved in a sequestration application under case number **17279/2020** ***(the sequestration application)***. The respondent in this matter is the applicant in the aforementioned sequestration application against the applicant in this matter.

[3] On 18 January 2021, De Villiers AJ granted an Order in the sequestration application by agreement as contained in **FA1**, with the following orders: granting the intervening parties, Charlene Irma Trust and APE Projects CC, leave to intervene in the sequestration application; postponing the opposed sequestration application to the semi-urgent roll of **13 April 2021**; ordering the respondent in that application (applicant herein) to deliver his answering affidavit, and simultaneously ordering the intervening parties to deliver their founding affidavits, on 12 February 2021. The remaining orders are not essential for purposes of this judgement.

[4] By 12 February 2021, the applicant had not delivered his answering affidavit in the sequestration application as per the agreed Order. Mr Barnaschone

had not communicated with Mr Crossley regarding the delay in delivery of the answering affidavit.

[5] **FA 4.1 – 4.13**, attached to the applicant's founding affidavit herein, comprises email communication between the legal representatives in the sequestration application. The respondent's claim against the applicant arises from an award of R5.4 million plus interest granted in his favour by the arbitration appeal tribunal.

[6] On 17 February 2021, the respondent deposed to a supplementary affidavit (commissioned on 18 February 2021) in support of an urgent application to be heard under case number **17279/2020** on 19 February 2021 for the provisional sequestration of the applicant with a return date of 13 April 2021 ***(the urgent sequestration application)***.

[7] At 14h44 on Thursday 18 February 2021, the respondent's attorneys served the Notice of Motion in the urgent sequestration application personally on Barnaschone Attorneys by service of the documents on a staff member, Ms Ilhaam Mitchell who placed it in the office of Ms Kokott, Mr Barnaschone's PA.

[8] On Friday 19 February 2021, Gamble J granted an urgent Order for the provisional sequestration of the applicant and issued a rule nisi calling on all persons concerned to show cause on 13 April 2021, why the applicant's estate should not be placed under final sequestration.

[9] Neither the applicant nor his legal representative was present at the unopposed urgent application hearing on 19 February 2021.

THE PARTIES' SUBMISSIONS

[10] The applicant's submissions in this rescission application are that the application is brought in terms of Rule 42(1)(a), alternatively, the common law. There was no way that Mr Barnaschone could have expected a new sequestration application; the respondent's attorney did not serve the urgent application per email as was the practice in respect of the sequestration matter **(see FA 4.1 – 4.13)**; there was nothing urgent about the application heard on 19 February 2021 in Third Division after closure of the roll; the parties had an agreement and a timetable which was encompassed in an Order granted on 18 January 2021; the new application ignores the Order and is an abuse of process; and, the applicant has a *bona fide* defence to the sequestration application.

[11] The respondent's submissions are that, not unexpectedly, no answering affidavit was filed as per the Court Order and timetable of 18 January 2021; the respondent has the real fear that the applicant is placing his assets beyond the reach of creditors, including the respondent; the applicant has no defence or opposition to the sequestration application and is merely buying time; and, the application was personally served on Barnaschone Attorneys and there is no obligation to serve her email. Mr Elliott SC submits further that Rule 42(1)(a) does not apply, and that the applicant does not overcome the hurdle of setting out a *bona fide* defence in terms of the common law grounds for rescission of judgement.

LEGAL PRINCIPLES

[12] Rule 42 (1)(a) states as follows:

> *(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
>
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
>
> *(b) ….*

[13] At common law, a judgment may be rescinded on the following grounds: fraud, *justus* error, in certain exceptional circumstances where new documents have been discovered, and where judgment was granted by default on the grounds of *justa causa* ***(De Wet v Western Bank Ltd 1979 (2) SA 1031 (A); Swadif v Dyke NO 1978 (1) SA 928 (A).*** In terms of the common law requirements, the applicant must show sufficient cause (which is synonymous with good cause) for the rescission of judgment ***(Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (D); Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 5 I – 6 B).***

[14] In terms of section 149 (2) of the Insolvency Act 24 of 1936, the Court may rescind or vary any Order made by it under the provisions of the Act. In terms of section 2 of the abovementioned Act, *'sequestration order'* includes a provisional order.

EVALUATION

[15] The Order for provisional sequestration granted on 19 February 2021 was pursuant to an urgent application in the fast lane Court before Gamble J and not on the Third Division roll as alleged by the applicant. This is evident from the respondent's answering affidavit, and the averment is not disputed in Mr Barnaschone's replying affidavit.

[16] The submission that the learned Gamble J had questions for Mr Elliot SC regarding the urgent application and was satisfied that the matter was indeed urgent, is not disputed. Similarly, it is not disputed that the Judge was satisfied that the provisional liquidation application could be heard as a matter of urgency. I agree with Mr Elliott's submission that the issue of urgency of the application of 19 February 2021, is not one which I may revisit or entertain. In any event, the applicant has not applied in terms of rule 6 (12)(c) for a reconsideration of the Order granted in his absence on 19 February 2021.

[17] Ms Morgan submits that the Order was erroneously granted (and erroneously sought) as there were facts which Gamble J was unaware of at the time he was seized with the urgent application. I point out, firstly, that a copy of De Villiers AJ's Order of 18 January 2021, postponing the opposed sequestration application, is attached as **SFA3** to the Notice of Motion and referred to in the founding affidavit. Thus, the existence of an opposed sequestration application to be heard on the semi-urgent roll of 13 April 2021 was disclosed and placed before the Court on 19

February 2021. Secondly, proof of service on Barnaschone Attorneys, is clearly indicated on page 2 of the Notice. Thus, Gamble J was indeed made aware of service of the urgent application. Thirdly, the urgent Notice of Motion indicates pertinently to the reader that the respondent (the applicant herein) was ordered to deliver his answering affidavit on or before 12 February 2021 but failed to do so. In ***Naidoo and Another v Matlala NO and Others*** ***2012 (1) SA 143 (GNP) at par 5,*** Southwood J referring to ***Nyingwa v Moolman NO*** ***1993 (2) SA 508 (Tk)*** and various authorities, states that:

> *'In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment'*

[18] Having regard to the three factors listed above, and the dictum in ***Naidoo***, it cannot be said with any conviction that there were facts, as far as the urgent application is concerned, which were not placed before Gamble J. I am satisfied that the Order granted on 19 February 2021, placing the applicant under provisional sequestration, was not one which was either granted erroneously or erroneously sought in the applicant's absence. Thus, the provisions of Rule 42(1)(a) do not find application.

[19] This brings me to rescission in terms of the common law. The applicant is required to should show sufficient cause for the Order to be set aside, which entails providing a reasonable (and thus acceptable) explanation for the default, showing that the application is *bona fide* and showing on the merits that he has a

bona fide defence which *prima facie* carries the prospect of success. I can dispense easily with the requirement relating to a *bona fide* application – there is no indication or evidence that the rescission application is brought in bad faith.

[20] On the requirement of a reasonable and acceptable explanation for the applicant's default, the submission is that the applicant did not receive proper notice as required in urgent applications. The applicant relies on the judgment of ***South African Airways SOC v BDFM Publishers (Pty) Ltd and Others 2016 (2) SA 561 (GJ)*** wherein Sutherland J sets out the steps necessary to ensure effective service in matters which are urgent. The ***South African Airways*** matter dealt with an application brought *ex parte* on an urgent basis against the respondent at 22h00 in the evening. The application was emailed to the respondent's legal representatives on 30 minutes' notice. The Notice omitted to state the venue for the hearing and Sutherland J found that the time and steps taken by the applicant were unreasonable and in fact not collegial in the circumstances. The Judge set out amongst others, that where an urgent application is brought on less than 24 hours' notice, then it is mandatory professional responsibility that an applicant's legal representative undertakes various actions to ensure that effective service of the application has occurred.

[21] The ***South African Airways*** matter is distinguishable from the urgent Order forming the subject matter of this rescission application between the parties in this matter. The urgent sequestration application was not an *ex parte* application. Secondly, while the urgent application was on less than 24 hours' notice, service thereof was effected personally on Barnaschone Attorneys. It is correct that the

parties had corresponded by email regarding the opposed sequestration application, but there is no evidence to conclude on a balance of probabilities that the parties had agreed to email service in all matters between them. In terms of rule 4 (1) (a A), Mr Crossley was entitled to effect service of the urgent application on Mr Barnaschone's office personally and did so between the hours of 07h00 to 19h00 as required by sub-rule 4(1)(b). In addition, thereto, rule 4 (10) allows a Court which is not satisfied as to the effectiveness of service to order further steps to be taken as it deems fit. There is no indication that the urgent duty Judge had issues or concerns with the service of the urgent application on Mr Barnaschone's office. In the absence of an agreement to serve per email, my view is that there was no mandatory professional obligation on Mr Crossley to serve the urgent application per email. The submission that service of the urgent application was not effective or did not occur properly, is dismissed.

[22] The next aspect is the applicant's default or absence on 19 February 2021. Mr Barnaschone's PA, received the Notice of Motion from the person who was served (Ilhaam) on the Thursday and did not read it properly or paid very little attention to it. Ms Morgan's submission is that the PA could in no way have anticipated that a new sequestration application would be brought when the opposed sequestration application was postponed by agreement in terms of an Order of Court. On a cursory reading of the first page of the Notice of Motion, any reader would see that notice is given of an application to be heard on Friday 19 February 2021 at 10h00. The day, date and time are in capital letters and in bold type font, thus unmissable. Paragraph 1 of the Notice of Motion indicates that the matter is brought *"as one of urgency in terms of Rule 6(12)*". The argument that a new

sequestration application was not anticipated does not excuse the failure to take note of the details of the Notice of Motion, at the very least, to note that an urgent application was to be heard the next morning. Certainly, the parties' names, and the case number should have alerted the PA that something was afoot in the sequestration matter.

[23] The negligence cannot, however, all be placed at Ms Kokkot's door. Mr Barnaschone arrived at his office on the 18 February 2021, after 14h44, thus after service of the urgent application. He admits being informed by the PA that documents arrived in the sequestration application and that it did not look urgent. He then informed her that he would look at it the next morning. While it could possibly be argued that he accepted her advices that the documents were not urgent and hence he did not look at it that Thursday afternoon, this does not explain why, as the attorney seized with the sequestration, he did not call for the documents on Friday morning at 10h00 when he arrived at the office. Nothing was done about the Notice of Motion until 12pm (noon) on Friday when Ms Kokkot informed Mr Barnaschone that she had re-looked at the papers and realised that it was a new sequestration. By that time, the matter had already been called and it was too late.

[24] Is the explanation that the PA overlooked the information on the urgent Notice of Motion as she did not expect a new sequestration application, a reasonable and acceptable explanation in the circumstances? Given that there was effective personal service, the applicant's legal representatives individually and cumulatively, paid little or no attention to the Notice of Motion. This occurred not once, but at least on three occasions: firstly, after receipt thereof when the PA read the first page but

paid no attention to it, when she clearly should have as it was an urgent application; secondly, when Mr Barnaschone arrived at his office on the Thursday afternoon, was informed of documents in the sequestration but did not request to read them; and thirdly, on the Friday morning (19 February 2021) when Mr Barnaschone did not request the Notice of Motion and the PA only handed it to him at 12pm. If Mr Barnaschone, being the person dealing with the sequestration application, called for the Notice of Motion on the Friday morning (at least), the situation might have been salvaged by going to Court and seeking a postponement or contacting Mr Crossley. There was a clear lack of diligence, attention and prudence by the applicant's legal representatives which, with respect, amounts to negligence. In ***Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at page 141,*** the Appellate Division as it then was stated that:

> *'There is a limit beyond which a litigant can escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered'.*

[25] There is no supporting affidavit by the applicant as to why the lack of diligence of his legal representatives to take note of the urgent application and attend to it on more than one instance between the time it was served and the morning of the hearing, should not be imputed to him. I agree with Mr Elliott's submissions and find that the applicant's explanation for the default is neither reasonable nor acceptable in the circumstances.

[26] The last common law requirement is whether the applicant has a bona fide defence which prima facie carries some prospect of success ***(see Vilvanathan***

***and Another v Louw NO** [2010] ZAWCHC 49 at page 11; **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (AD) at 764 I – 765 E).* Without revisiting the urgent application, it is evident that the respondent sets out the basis upon which the applicant should be placed under provisional sequestration. Mr Barnaschone has deposed to the founding affidavit in this rescission application, and only paragraph 57 thereof deals with the merits thereof. He makes averments that the applicant will show that there are no advantages to creditors and thus the applicant's estate cannot be sequestrated; the assets are secured to creditors with security (e.g. mortgage bond, deed of cession, pledge); and the shareholding in APE Projects CC is worthless (Clicks has cancelled contracts). There is no confirmatory affidavit from the applicant and thus the content of paragraph 57 remains unconfirmed and unsubstantiated. It cannot thus be stated, at this stage of proceedings, that the applicant has shown a *bona fide* defence which carries some prospect of success. Furthermore, there is also no answering affidavit filed in terms of the De Villiers AJ Order under case number **17279/2020**, which sets out a defence to the sequestration.

[27] In terms of Gamble J's Order **(AA1 attached to the answering affidavit),** the applicant's estate was provisionally liquidated and a rule nisi was issued calling on any parties to show cause why his estate should not be finally sequestrated. Ms Morgan submits that the applicant is entitled to oppose both stages of the sequestration. The problem, however, is that the applicant cannot expect a reconsideration of the urgent Order of 19 February 2021, because he elected not to proceed in terms of rule 6 (12) (c) but rather in terms of rule 42(1)(a). With respect, where the applicant misses the mark is in the argument that until he files his

answering affidavit in terms of the 18 January Order, there is no need to set out a defence. This argument is self - destructive because the applicant elected to apply for rescission of the provisional sequestration Order and should have anticipated that if he fails under rule 42(1)(a), then the common law requirements for rescission would apply and would have to be overcome. ***All*** the common law requirements must be met before an applicant can be said to succeed with his application for rescission of a judgment or order. Thus, the requirement of setting out a *bona fide* defence to the respondent's claim would be necessary for purposes of the rescission application. The bald, unsubstantiated averments in paragraph 57 of the founding affidavit do not, in my view, constitute a *bona fide* defence which *prima facie* has prospects of success.

[28] In conclusion, I find that the applicant has failed to prove all the requirements necessary in terms of the common law, and thus has not shown sufficient cause, for rescission of the Order granted by Gamble J on 19 February 2021. In these circumstances, there is no need to make a determination on the argument that the urgent application was an abuse of process because of the existence of the Order of 18 January 2021.

ORDER

[29] **In the result I make the following Order:**

The application for rescission of the Order granted on 19 February 2021 under case number 17279/2020 (the provisional sequestration Order), is dismissed with costs.

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M. PANGARKER
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant:	Adv. C Morgan
Instructed by:	Barnaschone Attorneys
For Respondent:	Adv. G Elliot SC
Instructed by:	Crossleys Inc.