



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2018-42758

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

14/4/2023
DATE

J Moorcroft
SIGNATURE

In the matter between –

**STEF COR CONSTRUCTION (PTY) LTD (Registration number:
1991/024470/23)**

Applicant

And

**K2014261400 SOUTH AFRICA (PTY) LTD t/a MASEKO
ENGINEERING PROJECTS (Registration number:
2014/261400/07)**

Respondent

In re

**K2014261400 SOUTH AFRICA (PTY) LTD t/a MASEKO
ENGINEERING PROJECTS (Registration number:
2014/261400/07)**

Plaintiff

and

**STEF COR CONSTRUCTION (PTY) LTD
(Registration number: 1991/024470/23)**

Defendant

JUDGMENT

MOORCROFT AJ:Summary

Rescission of judgment – Default judgment - Good cause – reasonable explanation for default and prima facie, bona fide defence

Negligence of applicant in failing to change registered address does not amount to wilful default on the facts, but may under appropriate circumstances merit a cost order against successful applicant

Order

[1] I make the following order:

- 1. The judgment granted on 20 June 2022 under case number 2018/42758 is rescinded.*
- 2. The writ of execution issued on 18 October 2022 is set aside.*
- 3. The applicant is afforded 20 days from date of this order to deliver its plea.*
- 4. The costs are reserved for determination by the trial court.*

[2] The reasons for the order follow below.

The application

[3] The applicant seeks an order rescinding a default judgment¹ granted in this Court on 14 June 2022, or in the alternative an order that a warrant of execution issued pursuant to the

¹ CaseLines 013-1.

order be suspended pending the outcome of the rescission application in the normal court of the Johannesburg opposed motion court.

[4] The summons was served at the applicant's registered address on 17 April 2019. The notice of set down in the default judgement application was served there on 6 April 2022. Service as a registered address of a company is good service² – the address is chosen by the company and the company is responsible for changing it when the address is vacated.³ It is in the public interest that a company has an address where service of process and delivery of other documents can be effected.

[5] The applicant states that it vacated the premises in May of 2018 and was no longer carrying on business at the address in April 2019 and this borne out by the return of service where it is indicated that the security guard on duty at the premises had informed the Sheriff that the applicant had vacated the address. The applicant, despite this allegation, nevertheless proceeded to use and thus proclaim this address to third parties in an affidavit by one its directors in July 2018 and in a summons in litigation between the same parties in the Limpopo High Court in January 2020.⁴

[6] It is also alleged that the applicant informed the Companies and Intellectual Property Commission (CIPC) of the new address but there is no indication as to when this was done and why the old address remained on the CIPC records in 2022.

[7] The respondent can hardly be faulted for serving a summons and a notice of set down at this address when the applicant itself still used this address after May 2018 and when the

² Rule 4(1)(v). See Van Loggerenberg DE and Bertelsmann E *Erasmus: Superior Court Practice* RS 11, 2019, D1-25.

³ Section 23(3) of the Companies Act, 71 of 2008.

⁴ CaseLines 014-43 and 021-12.

records of the CIPC were not updated.⁵

[8] Be that as it may, it is not disputed that the summons never came to the attention of the applicant.

[9] In the action in the Limpopo High Court the applicant as plaintiff claims payment of R6 967 075.43 from the respondent as defendant. Both actions are based out of a contractual relationship between the parties and the facts relevant to the one action are also relevant to the other.

[10] The respondent filed a plea in the Limpopo Court during April 2022 and in the plea the respondent raised the defence of *lis pendens*. When the applicant made enquiries however it could not find a court file at the Registrar's office but is not clear why it was not referred to the electronic court file.

[11] Had the applicant been referred to an electronic court file on CaseLines the rescission application could have been launched already in 2022. It was however only when the Sheriff served the writ of execution on 6 February 2023 that the applicant initiated its rescission application. It did so on 6 March 2023 and the answering affidavit was due by 5 April 2023.

[12] The attorneys agreed on 16 March 2023 to schedule a round table meeting for 28 March 2023 for the purposes of settlement and to "*possibly cease litigation*". The respondent however gave no undertakings in respect of the writ and on 24 March 2023 the Sheriff arrived at applicant's premises to execute the writ. The urgent application was then launched on 31

⁵ On 10 July 2019 the respondent's attorney emailed the summons to the applicant's attorney but used the incorrect email address. It never came to the notice of the applicant's attorneys. See CaseLines 014-36 to 39.

March 2023.

[13] The answering affidavit dealing with the initial application and the urgent application was filed timeously on 5 April 2023 and the applicant replied on the 6th. The initial application is therefore ripe for hearing.

[14] In the answering affidavit the respondent admits that it is in dire financial straits. The applicant believes that if execution is allowed to proceed and the underlying judgment is set aside later, it would not be able to recoup its losses. It is also submitted that the items sought to be attached are necessary or even essential to allow the applicant to carry on business and that it will be severely prejudiced if the execution were to proceed at this point in time, only to be set aside later.

[15] I am of the view that a case is made out for the invocation of Rule 6(12). There is no prejudice to the respondent arising out of the truncation of time periods but the potential prejudice to the applicant if the writ were not set aside or suspended and the rescission were later to succeed in the normal course, is obvious.

[16] The rescission application is now also before me. If I were to consider only the application to suspend the writ another Judge will have read the same papers and hear the same argument on the merits later. This is not efficient use of the Court's time and in light of the fact that time periods were not truncated in respect of the initial application, and there was therefore no prejudice to the respondent because it had to prepare affidavits at short notice, I deal with the rescission application and not only with the application to suspend the writ. Both

the initial and the interlocutory (urgent) application were fully argued.

[17] An application for rescission of a judgment can be entertained under the common law,⁶ under Rule 31(2)(b),⁷ or under Rule 42(1)⁸ of the Uniform Rules.⁹

[18] The concept of 'good cause' is relevant to Rule 31(2)(b) and to rescission at common law.

[19] In *Grant v Plumbers (Pty) Ltd*¹⁰ Brink J was dealing with the equivalent Rule¹¹ in the Free State. He said:

"Having regard to the decisions above referred to,¹² I am of opinion that an applicant who claims relief under Rule 43 should comply with the following requirements:

(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

(b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.

(c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence

⁶ The common law also deals with rescission on the grounds of fraud, *justus error, justa causa*, and when new documents have been discovered. These grounds are not applicable in this matter.

⁷ "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."

⁸ Rule 42(1) is not applicable on the facts of this case.

⁹ See Van Loggerenberg DE and Bertelsmann E Erasmus: *Superior Court Practice* RS 20, 2022, D1-365 to 370A and 562C to 564.

¹⁰ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) 476–7.

¹¹ Rule 43 (O.F.S.).

¹² The Judge referred to *Joosub v Natal Bank* 1908 TS 375, *Cairns' Executors v Gaarn* 1912 AD 181, *Abdool Latieb & Co v Jones* 1918 TPD 215, *Thlobelo v Kehiloe* (2) 1932 OPD 24, *Scott v Trustee, Insolvent Estate Comerma* 1938 WLD 129, and *Schabert v Pocock* 1946 CPD 363.

that the probabilities are actually in his favour. (Brown v Chapman (1938 TPD 320 at p. 325).” [emphasis added]

[20] One of the cases referred to by Brink J is *Cairns' Executors v Gaarn*¹³ where Innes JA (as he then was) said:

“It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive and which it is highly desirable not to abridge. All that can be said is that the applicant must show, in the words of COTTON, L.J. (In re Manchester Economic Building Society (24 Ch. D. at p. 491)) 'something which entitles him to ask for the indulgence of the Court'. What that something is must be decided upon the circumstances of each particular application.” [emphasis added]

[21] The question that arises is whether the applicant was in wilful default because it did not change its registered address when it moved to new premises, and when continued to use the wrong address even in court documents.

[22] This conduct was certainly negligent, but an inference of wilfulness is not merited on the evidence. In *Schabort v Pocock*¹⁴ Duncan AJ granted a rescission application on the application of a defendant who was “*asking for an indulgence after extreme dilatoriness*” but ordered him to pay the costs of the application.

[23] I am satisfied that the applicant has given a reasonable explanation for its default, and turn my attention to the question whether a *bona fide* defence appears, *prima facie*, from the

¹³ *Cairns' Executors v Gaarn* 1912 AD 181 at 186.

¹⁴ *Schabort v Pocock* 1946 CPD 363 at 370.

applicant's affidavit.

[24] The respondent's plea in the action in the Limpopo High Court consists mainly of bare denials. The respondent does not deny that it is indebted to the applicant, nor does it claim that the applicant is indebted to it. The applicant's particulars of claim in Limpopo raise triable issues.

[25] The respondent was awarded a tender by a third party and sub-contracted the services of the applicant to fulfil these services. On 17 January 2018 Mr Maseko of the respondent signed a reconciliation of amounts payable and agreed that R3 249 008.62 was payable to the applicant. When payment was not forthcoming, the applicant wrote to Mr Maseko who responded as follows by email: *"Please give me the chance to satisfactorily sort this out so that afterwards there wont be anything left to chance. I am tired of this. I just want to sort out and get some rest."* The debt was not denied and *prima facie* Mr Maseko acknowledged his firm's indebtedness to the applicant in amount of more than R3 million.

[26] There was an arrangement in place whereby the respondent as principal was required to pay the applicant's suppliers directly. According to the applicant this happened because the respondent never paid its account in full and as a result the applicant was experiencing cash flow problems, and therefore required the respondent to pay its suppliers directly. It also feared that the respondent intended to leave it with large unpaid bill at the end of the project. On 18 June 2018 the applicant obtained an order against the respondent in the Pretoria High Court, interdicting the respondent from withdrawing money from its bank account pending the finalisation of its claim. In these proceedings it also became known that the respondent's publicised name of Maseko Engineering Projects (Pty) Ltd was incorrect and that true entity is and was K2014261400 South Africa (Pty) Ltd t/a Maseko Engineering Projects, inaccurately

described as Maseko Engineering Projects (Pty) Ltd on its own letterhead.

[27] The applicant deals with each of the respondent's claims in its founding affidavit, and makes averments that, if accepted (whether in the context of an onus or an evidentiary burden) at trial will constitute a defence to the respondent's claim.

[28] My conclusion is therefore that the applicant is entitled to the rescission of the default judgment. Having considered the question of costs in the context of the applicant's negligence in not changing its registered address, I am of the view that a cost order against the applicant is not justified and that costs should be in the cause.

[29] I therefore make the order in paragraph 1 above.



J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting 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 of the judgment is deemed to be **14 APRIL 2023**.

COUNSEL FOR THE APPLICANT:

L GROBLER

INSTRUCTED BY:

ALICE SWANEPOEL ATTORNEYS

COUNSEL FOR RESPONDENT:

S SINGENDE

INSTRUCTED BY:

STANFORD ATTORNEYS

DATE OF THE HEARING:

12 APRIL 2023

DATE OF ORDER:

14 APRIL 2023

DATE OF JUDGMENT:

14 APRIL 2023