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

**CASE NO: 2022/7483**

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

14/6/2023
DATE

SIGNATURE

In the matter between –

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|---|---|
| **SIBINDI, KHULEKHANI** | **APPLICANT** |
| and | |
| **TIGER CONSUMER BRANDS LTD** | **RESPONDENT** |
| *in re* | |
| **TIGER CONSUMER BRANDS LTD** | **PLAINTIFF** |
| **And** | |
| **SIBINDI, KHULEKHANI** | **DEFENDANT** |

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**JUDGMENT**

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**MOORCROFT AJ:**

*Summary*

*Rescission of default judgment under common law – Reconsideration in terms of Rule 31(5)(d) – must show good cause*

Order

[1] I make the following order:

1. *The application is dismissed;*
2. *The applicant is ordered to pay the costs, including the wasted costs incurred on 22 May 2023.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for the rescission of a judgment granted by the Registrar on 26 August 2022. The matter was on the roll on 22 May 2023 but due to an error by the applicant's attorneys, counsel was not briefed to appear. The matter was then postponed to 25 May 2023 for argument.

[4] The defendant relied on the common law and on Uniform Rules 31(5)(d) and 42(1). The application was brought within the time limits prescribed in Rule 31(5)(d) and within a reasonable time in terms of the common law.

Rule 31(5)(d) and the reconsideration of a judgment granted by the Registrar

[5] The plaintiff's claim was for a debt or liquidated demand and default judgment was granted by the Registrar of the High Court in accordance with Rule 35(5)(a). Rule 31(5)(d)[1] provides for a reconsideration of the judgment by the Court. The sub-rule reads as follows:

> *"(d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court."*

[6] When a default judgment is granted by the Court and not by the Registrar, a defendant is entitled to apply for the setting aside of the judgment on good cause shown rather than for a reconsideration. Does this now mean that the tests for a reconsideration of a default judgment granted by the Registrar in terms of Rule 31(5)(b) and for a rescission of a default judgment granted by the Court under Rule 31(2) are different? In *Pansolutions Holdings Ltd v P&G General Dealers & Repairers CC,*[2] Swain J said that the power of the Court under this Rule is that of substituting its discretion[3] for that of the Registrar. He continued:

> *[12] The anomalous position therefore arises on the clear wording of the relevant rules, that a different standard applies when a default judgment granted by the court is sought to be set aside, as opposed to a default judgment granted by the registrar.*
> *[13] It seems to me however that the conflict is more apparent than real, for the following reasons:*
> *[13.1] It is clear that a court, in evaluating 'good cause', has a wide discretion in order to ensure that justice is done. Wahl v Prinswil Beleggings (Edms) Bpk 1984 (1) SA 457 (T).*

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1 See Cilliers, Loots and Nel *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa,* 2009, p 23-39 and 40.

2 *Pansolutions Holdings Ltd v P&G General Dealers & Repairers CC* 2011 (5) SA 608 (KZD) para 11, also reported at [2011] JOL 26977 (KZD).

3 Contra *Bloemfontein Board Nominees Ltd v Benbrook* 1996 (1) SA 631 (O) 633H – I, also reported at [1996 ] 2 All SA 79 (O). The *Benbrook* judgment was given in an unopposed application by the *plaintiff* who had set the matter down for reconsideration, and was criticised by Swain J in *Pansolutions.* The latter case was followed in the Gauteng Division in *Steenkamp v Sasfin Bank Limited and Another; In re Sasfin Bank Limited and Another v Steenkamp and Another* [2023] ZAGPPHC 99 para 9. See also *Pretorius and Others v Iliad Africa Trading (Pty) Ltd* [2017] ZAFSHC 85 para 4 and *SA Taxi Impact Fund (RF) (Pty) Limited v Maluleka; SA Taxi Development Finance (Pty) Limited v Ndaba; SA Taxi Finance Solutions (Pty) Limited v Ngqukumba; Potpale Investments (Proprietary) Limited v Ntong* [2020] ZAGPJHC 219 paras 14 and 19.

> *[13.2] The courts have declined to frame 'an exhaustive definition of what would constitute sufficient cause to justify the grant of an indulgence'. Per Innes J in Cairns' Executors v Gaarn 1912 AD 181 at 186.*
>
> *[13.3] The enquiry in both instances is directed at establishing the reasons for the aggrieved parties' absence. In the case of rule 31(2)(b) it is incumbent upon the applicant to show that the default was not wilful.*
>
> *[13.4] That an applicant is bona fide in bringing the application, and has a bona fide defence to the claim, as required as part of the obligation to show 'good cause' in terms of rule 31(2)(b) is equally embraced by the concept of determining whether an imbalance, oppression or injustice has resulted from the judgment granted by the registrar in terms of rule 31(5)(d)."*

Good cause

[7] The 'good cause' requirement is the same[4] in applications under the common law, and under both Rule 31(2) and Rule 31(5)(b).[5] The concept stands on two pillars, namely a reasonable explanation for the default and a *bona fide* defence to the claim.

[8] The concept of 'good cause' or 'sufficient cause' has received the attention of the Courts over many years.[6] In *Grant v Plumbers (Pty) Ltd*[7] Brink J was dealing with an older Rule[8] that also required good or sufficient cause in the Free State Division of the High Court. He said:

> *"Having regard to the decisions above referred to,[9] I am of opinion that an applicant who claims relief under Rule 43 should comply with the following requirements:*

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4 The 20-day time period apply in Rule 31(2) and (5) in the Rules and the common law requirement that applications must be brought within a reasonable time.

5 *Pretorius and Others v Iliad Africa Trading (Pty) Ltd* [2017] ZAFSHC 85 para 4.

6 See the cases referred to by Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* 2022, Vol 2, D1-564 to 565, footnotes 33 and 49.

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

8 Rule 43 (O.F.S.).

9 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 *Schabort v Pocock* 1946 CPD 363.

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

[9] One of the cases referred to by Brink J is *Cairns' Executors v Gaarn*[10] 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]

[10] Good cause includes, but is not limited to the existence of a substantial defence.[11] It is therefore necessary to determine whether there is a satisfactory explanation of the delay, and whether the appellant raised a *bona fide* and substantial defence.

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[10] *Cairns' Executors v Gaarn* 1912 AD 181 at 186.
[11] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) 352G.

The explanation for the failure to file a plea and to react to the notice of bar

[11] The summons was served on 25 February 2022 and the plea was due by 1 April 2022. On 12 July 2022 the plaintiff's attorneys requested delivery of the plea not later than 18 July 2022. On 19 July 2022 a notice of bar was delivered. The defendant was *ipso facto* barred by 26 July 2022. On 28 July 2022 the defendant's attorney requested an indulgence to deliver the plea and on 2 August 2022 the plaintiff's attorneys advised that no indulgence would be granted. On 8 August 2022 the defendant's attorney requested a copy of the application for default judgment and this was provided on the same day The defendant's attorneys delivered a notice of intention to oppose the application for default judgment instead of applying for the lifting of the bar.

[12] Default judgment was therefore properly granted and no case is made out for rescission under Rule 42(1). Judgment was not sought or granted erroneously; there was no ambiguity or parent error or omission; and judgment was not granted as a result of a mistake common to the parties.

[13] The reason why the plea was not filed, was not due to anything the defendant did, but the failure of his attorneys to file a plea and subsequently to apply for the bar to be lifted.

[14] In *Buckle v Kotze*[12], Van Oosten J said:

> *"It can furthermore not be expected of a lay client who has entrusted the defence of his case to a qualified and competent attorney to sit on his attorney's shoulders and to check whether technical aspects like time limits have been observed."*

The defences relied upon

[15] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*[13] the Supreme Court

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[12] *Buckle v Kotze* 2000 (1) SA 453 (W) 457J-458A. See also *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (A) 23C.

[13] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA). See also *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A)

of Appeal pointed out that a weak explanation for the default may be cancelled out by a strong *bona fide* defence.

[16] The defendant's explanation for the cause of the failure to file a plea timeously and later to apply for the lifting of the bar would be acceptable if a *bona fide* defence were shown.

[17] The defendant raised a number of defences to the claim. The first defence raised relates to the alleged breach of the plaintiff's relocation policy. The defendant denies breaching the plaintiff's relocation policy by failing to obtain the defendant's executive management's prior approval in relation to his own personal rental expenditure. He however does not allege that he did indeed obtain the prior approval of the executive management as required in clauses 2.3, 2.4 and 2.5 of the plaintiff's relocation policy. He alleges that the expenditure was authorised by officials in the Department of Human Resources and that this was done verbally.

[18] The second defence relates to furniture purchased by the defendant. He alleges that a 'relevant official' of the plaintiff had recommended the purchase thereof. The identity and authority of the relevant official is not disclosed nor does he say why the unknown official recommended the purchase.

[19] The third defence is a *res iudicata* defence. The defendant contends that the subject matter of the action had been dealt with in the CCMA (the Commission for Conciliation, Mediation and Arbitration) and settled in terms of a settlement agreement. He does not disclose in his affidavit that in terms of clause 4.1.1 of the agreement the parties specifically agreed that an amount of R617 221.56 could not be released to the defendant because of the dispute in this very action. The settlement agreement dealt with the present action and the amount retained in terms of Section 37D of the Pension Funds Act, subject to allegations of theft, dishonesty, fraud or misconduct. The present dispute was specifically excluded from the settlement and *res iudicata* plays no role.

[20] The fourth defence is that the jurisdiction of the High Court is disputed. In expressly excluding these proceedings from the settlement in the CCMA, the defendant has however submitted himself to the jurisdiction of this Court and the Labour Court in any event as concurrent jurisdiction with the Civil Courts in respect of any matter concerning a contract of

employment.[14] The plaintiff's case against the defendant is one for the breach of contract.

[21] The defendant also alleges that the claim was not for a liquid amount and he denies that the amount was properly calculated. The manner in which the plaintiff's claim was calculated is set out in the schedule annexed to the particulars of claim and in the founding affidavit in this rescission application the defendant does not dispute or deal with the plaintiff's quantification. He lays no basis for the allegations but contends himself with bald and sketchy averments.

[22] The defendant also alleges non-compliance with Rule 41A. A notice in terms of Rule 41A forms part of the papers and it is dated 21 February 2022. While the Rule has the laudable objective of promoting mediation and settlements, parties can in any event not be compelled to mediate.

[23] It is also alleged that the summons did not comply with Rule 18(1) as it has not been signed by an attorney with right of appearance or by an advocate of the High Court. Notice of intention to defend was delivered early in March 2022 and no notice in terms of Rule 30(2) was delivered within 10 days as required. The particulars of claim annexed to the summons were signed by an attorney claiming right of appearance under Section 25 of the Legal Practice Act, 28 of 2014, and also by and on behalf of the plaintiff's attorneys.

[24] Lastly the defendant seeks to rely on the provisions of the National Credit Act, 34 of 2005. The Act is not applicable as the claim is not based on a credit agreement.

[25] Even if it is assumed, as I do, that the defendant's delay and failure to file a plea and to defend the matter is due entirely to the negligence of his attorneys, the defences raised are not *bona fide*.[15]

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

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[14] Section 77(3) of the Basic Conditions of Employment Act, 75 of 1997.

[15] Compare *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) 227G to 228A and *Standard Bank of SA Ltd v El-Naddaf and Another* 1999 (4) SA 779 (W) 785G to 786F.

**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 June 2023**.

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|---|---|
| COUNSEL FOR THE APPLICANT: | M S Sikhwari |
| INSTRUCTED BY: | Nemukangwe Attorneys (Pretoria)<br>Mariba Attorneys (Johannesburg) |
| COUNSEL FOR THE RESPONDENT: | D Van Niekerk |
| INSTRUCTED BY: | Cliffe Dekker Hofmeyr Inc |
| DATE OF THE HEARING: | 22 & 25 May 2023 |
| DATE OF JUDGMENT: | 14 June 2023 |