



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

CASE NO: 4554921

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

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DATE: 22 NOVEMBER 2022

In the matter between:

ESKOM HOLDINGS SOC LIMITED

Applicant

And

AKGWEVHU ENTERPRISE (PTY) LTD

Respondent

JUDGMENT

VILJOEN AJ

[1] This is an application for the rescission of a judgment granted by default against the applicant on 4 January 2022. In terms of the judgment, the

applicant was ordered to pay the respondent an amount of R506,936.00 plus interest thereon and costs.

[2] The facts are briefly as follows:

[3] In August 2018, the applicant requested a quotation *inter alia* from the respondent. The applicant sought to acquire 220 units of what is described in the request as “KIT, CABLE JOINT: 3C; 11 KV; 95-185; XLPE”.

[4] The respondent presented the applicant with a quote dated 20 August 2018. On 19 September 2018, the applicant issued a purchase order ordering 220 of the abovementioned cable joints in the total amount of R507,936.00.

[5] The respondent’s deponent states that she telephoned the applicant’s procurement office upon receipt of the purchase order. By her admission, she did not know “*where [she] was supposed to obtain the goods from, the description on the RFQ was frankly meaningless to [her]*”. She states that the applicant’s procurement officer referred her to Idube Electrical (Pty) Ltd (“Idube”), which was an Eskom-approved vendor of the items ordered.

[6] The respondent’s version does not entirely accord with the documentary evidence. The respondent had already obtained a quote from Idube for the required items by 16 August 2018. Not much turns on when precisely the respondent approached Idube. However, the respondent’s lack of comprehension of what it was supplying the applicant is, of some moment, as I shall point out.

[7] According to a delivery note, the applicant’s order was delivered on 14 November 2018.

[8] On 19 November 2018, Mr Khadi, an employee of the applicant, telephonically and by email informed the respondent's deponent that the kits that had been delivered were incomplete. Some required modules and ferrules were not included, according to Mr Khadi. The respondent's deponent confesses that she did not know what the applicant's complaint meant. She, therefore, queried the matter with Idube. The latter indicated that the price they quoted the respondent did not include ferrules. This is consistent with the quote dated 18 August 2018 that Idube sent the respondent.

[9] The respondent then bought the required ferrules from Idube at a total price of R189,446.40 and delivered them to the applicant on 23 November 2018.

[10] On 26 November 2018, the applicant discovered that the kits still needed to be completed in that an insufficient number of earthing braids and outer sleeves was included. It alerted the respondent of that fact by email.

[11] The respondent's deponent replied on 27 November 2018, stating:

"I went to Idube and they found out that their manufacturer gave us the incomplete kits and they were told please do something by this morning."

[12] The respondent obtained the missing earthing braids and outer sleeves from Idube at R341,786.05 and supplied them to the applicant.

[13] The applicant paid the respondent's initial invoice of R507,936.00.

[14] The applicant refused to pay the respondent for the ferrules, the earthing braids, and the outer sleeves. The applicant contends that the kits ordered from the respondent were incomplete without these items. The respondent,

in turn, argued that the kits specified in the quotation request excluded the ferrules, the earthing braids, and the outer sleeves.

[15] The applicant's refusal resulted in the respondent instituting motion proceedings for payment. The main application was served on the applicant on 5 October 2021. The applicant neither filed a notice of intention to oppose nor an answering affidavit, a default that resulted in the respondent obtaining judgment on an unopposed basis on 4 January 2022. (There appear to be discrepancies between the claim amount set out in the founding affidavit, the notice of motion and the eventual court order. Nothing turns on those for present purposes.)

[16] A writ of execution was served on the applicant on 17 March 2022. After that, the applicant appointed its present attorneys. An exchange of letters followed on 29 and 30 March 2022. The application for rescission was served on 22 April 2022.

Basis for rescission

[17] According to the founding affidavit, the applicant applies for the rescission of the judgment granted by default based on rule 42, alternatively, rule 31(2)(b) of the Uniform Rules.

[18] I doubt whether the applicant's papers place it within the ambit of rule 42. The subsequent disclosure of a defence does not transform an order validly obtained into an erroneous order.¹ For the view I take of the matter, it is

¹ *Lodhi 2 Properties Investments CC and another v Bondev Developments* 2007 (6) SA 87 (SCA) at [27]

unnecessary to determine whether the order was erroneously sought or granted.

[19] As to the second ground of rescission, the respondent argues that rule 31(2)(b) does not apply to judgments obtained on an unopposed basis in motion proceedings. I agree.

[20] There is nothing in the wording of rule 31(2)(b) to suggest that that rule finds application beyond the type of judgment referred to in rule 31(2)(a): namely a default judgment granted by the court in action proceedings where a defendant is in default of filing a notice of intention to defend or a plea. The applicant's counsel could refer me to no authority to support the proposition that rule 31(2)(b) finds application in the present circumstances.

[21] At common law, a default judgment may be rescinded on sufficient cause.² "Sufficient cause" and "good cause" are used interchangeably.³ The papers for both sides deal extensively with good cause, albeit in the context of rule 31(2)(b). The requirement of good cause as the basis for rescission of a default judgment is no different in the context of the common law than in the context of rule 31(2)(b). In both instances, an applicant must show a reasonable and acceptable explanation for its default and a *bona fide* defence to the claim with *prima facie* prospects of success.⁴

[22] The applicant's papers do not expressly raise the common law as a basis for the application. Its heads of argument, however, do. It seems overly pedantic

² *De Wet and others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F to 1043B

³ See *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765A

⁴ *Chetty. Supra.* At 765B to C

to disallow reliance upon the common law in circumstances where good cause was fully dealt with in the papers and in argument. This approach will aid the interests of justice without causing the respondent any prejudice.

Explanation for default

- [23] The sole explanation for the applicant's failure to oppose the matter is the illness of a staff member in its legal department, Mr Bongani Maqungo. Mr Maqungo, to whom this matter was allocated, is said to have been ill for an extended period. As a result of his illness, Mr Maqungo was on prolonged sick leave on three occasions during the latter part of 2021 and the early part of 2022.
- [24] At the time of the service of the application on the applicant on 5 October 2021, Mr Maqungo had recently returned from sick leave. He was again absent from work from 28 October 2021 to 7 December 2021. The order was granted, as I said, on 7 January 2022.
- [25] These time frames suggest that there was more than enough opportunity for Mr Maqungo to have taken appropriate steps to oppose the application despite his lengthy absences from work. The papers do not explain why he did not do so. It is explained that the applicant's legal representatives could not consult with Mr Maqungo because of his illness. This accounts for the absence of a more comprehensive explanation for Mr Maqungo's inaction.
- [26] The respondent argues that the applicant should be expected to have taken steps to redistribute Mr Maqungo's workload among his colleagues.

- [27] There is much to criticise in the applicant's explanation for its failure to oppose the matter. Had it not been for my view on the applicant's defence, I might have refused rescission solely based on the deficient explanation.

Bona fide defence

- [28] The dispute between parties concerns their agreement on the properties of the cable joint kits the applicant ordered. It contends that the description, "*KIT, CABLE JOINT: 3C; 11 KV; 95-185; XLPE*", includes all the ferrules, earthing braids, and outer sleeves that are required to render the kits fit for purpose. The respondent contends that the applicant's request for quotation had incorrectly described the items ordered and that it delivered what was ordered.
- [29] The applicant did not describe the kits, purpose, or manner of use. The respondent's deponent does not know what the respondent provided the applicant with. I have, therefore, insufficient evidence adequately to assess the required composition of the kits.
- [30] *Prima facie*, however, the respondent's conduct is inconsistent with its version that the kits excluded specific components required to make the kits fit for purpose. It appears that the respondent considered itself bound to remedy the situation, suggesting that it realised that it did not deliver what was agreed upon.
- [31] When the first problem was identified, the respondent delivered the missing ferrules and rendered a delivery note that indicated a purchase price of R0.00. Compared to its earlier delivery note for the kits wherein the agreed purchase

price was stated, the respondent did not intend to charge the applicant for the ferrules.

[32] When the second problem was identified, the respondent's deponent, in an email to the applicant, stated: "*I went to Idube, and they found out that their manufacturer gave us the incomplete kits....*" She apologises for "*this whole mess*" and requests time to rectify "*this horrible mistake*".

[33] Further, even if the respondent is correct that the ferrules, earthing braids and outer sleeves constituted the supply of additional goods, it does not appear that the parties reached an agreement on purchasing these other goods. The applicant denies the conclusion of such agreement, and the respondent's case does not allege an additional agreement. There is no quotation from the respondent or purchase order from the applicant to suggest any meeting of the minds. If the applicant's averments regarding the conclusion of a further agreement are established at the trial, it would be entitled to the dismissal of the respondent's claim.

[34] The applicant succeeded in making out a *bona fide* defence that appears to have good prospects of success.⁵ I find the applicant's prospects to be sufficient to justify the rescission of the judgment against it.

Costs

[35] I intend to order the costs of the rescission application to be costs in the main application as Mr Van der Berg for the respondent suggested.

⁵ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 to 477

Stay of the writ of execution

[36] The applicant launched an application for the stay of a writ of execution issued against it. It did not pursue this application on an urgent basis resulting in the application for rescission and the application for the stay of the writ being heard on the same day. However, if rescission is granted, the application to stay the writ becomes academic; if rescission is refused, there is no basis to stay the writ.

[37] On either eventuality, the costs for the application to stay the writ of execution are wasted. I propose to order the applicant to pay the costs of this application.

Conclusion

[38] In the above premises, I grant the following order:

- 1) The judgment granted on 4 January 2022 in favour of the respondent is rescinded;
- 2) Costs of the application for rescission are to be costs in the main application;
- 3) The application for the stay of the writ of execution is dismissed;
- 4) The applicant is to pay the costs for the application for the stay of the writ.


H M VILJOEN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Date of hearing: 11 October 2022

Date of judgment: 22 November 2022

Appearances:

Attorneys for the first applicant: SEANEGO ATTORNEYS INC

Counsel for the first applicant: ADV M VIMBI

Attorneys for the respondent: VAN VEIJEREN INC

Counsel for the respondent: ADV P VAN DER BERG SC