



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: 1352 / 2020

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

23 March 2022
DATE

SIGNATURE

In the matter between:

MDUDUZI KHULEKANI SIBIYA

APPLICANT

And

**PERI FORMWORK SCAFFOLDING
ENGINEERING (PTY) LTD**

RESPONDENT

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 23 March 2022.

- [1] This is an application for the rescission of a summary judgment granted against the Applicant (the Defendant in the main case) by this court on 16 April 2021. The rescission application is brought in terms of common law and it is opposed by the Respondent (the Plaintiff in the main case).
- [2] Following is a brief background. Summons was issued by the Respondent against the Applicant in which the Applicant was sued for a debt arising from several transactions involving the hiring of scaffolding and formwork to MK Dube Consulting Pty (Ltd) (MK Dube Consulting) a company in which the Applicant is the sole director.¹ The Applicant was targeted because of a suretyship agreement he signed with the Respondent in which he bound himself as a surety and co-principal debtor together with his company, MK Dube Consulting.
- [3] It is necessary to lay bare the history leading up to this application in order to consider if it is able tilt the scales of minimum requirements. The summons was served on the Applicant on 30 July 2020. He filed the notice of intention to defend on 07 August 2020. With no plea forthcoming, the Respondent proceeded to serve him with the notice of bar. The Applicant

¹ See para 5.1 of the founding affidavit in support of the summary judgment on p.8 of the paginated bundle, and *Sibiya & Another v Peri Formwork* case 3334/2020 of this Division, in which the Applicant's company was placed under liquidation.

thereafter filed a plea on 16 September 2020. The application for summary judgment was launched and served on the Applicant on 30 September 2020. On 19 October 2020, the Applicant filed an amended plea and a notice of intention to oppose the application for summary judgment. The Respondent submits that there was no amendment to the plea as the document filed did not comply with the provisions of Rule 28. No further documents or pleadings were filed by the Applicant until the application for summary judgment was heard and granted on 16 April 2021. This was after a notice of set down was served on the Applicant on 17 February 2021.

- [4] In the summons (and in the summary judgment application), the Respondent made a claim of R2 533 239.96 against the Applicant. After considering the plea filed in the summons, the court granted summary judgment in a lesser amount of R2 454 493.19. No opposing affidavit was filed by the Applicant (then Respondent) in the summary judgment application.
- [5] As Gamble J noted in *Scholtz & Another v Merryweather & Another*², high courts have inherent powers of rescission under the common law, provided that 'good' or 'sufficient' cause therefor has been shown by an applicant. Our courts have often said that the phrase 'good cause' defies comprehensive definition: since it involves the exercise of a judicial discretion, it requires a flexible approach involving broad principles of justice and fairness, and a consideration of all the relevant facts and circumstances of the case as a whole. In practice, however, there have traditionally been two requirements which an applicant is generally expected to establish to succeed in a rescission application, viz a

² 2014 (6) SA 90 (WCC) para 11-13.

reasonable explanation by the applicant for the default, and a *bona fide* defence which has some prospects of success.³

- [6] These principles were applied in *Chetty v Law Society, Transvaal*⁴ by Miller JA as follows,

“It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits. The reason for my saying that the appellant's application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, or elsewhere in the papers, any reasonable or satisfactory explanation of his default and total failure to offer any opposition whatever to the confirmation on 16 September 1980 of the rule *nisi* issued on 22 April 1980.”

- [7] The judgment sought to be rescinded here was not what is commonly referred to as default judgment which is usually granted without a plea by the defendant. This was a summary judgment granted after a plea was entered and considered, but it was granted in default as it was not opposed. The Applicant knew of this application as it was served on him or his chosen legal representative with power of attorney. He also filed a notice to oppose as he did with the summons when he filed a notice of intention to defend. Like he did with the summons where he laid back until he was served with a notice of bar, no answering affidavit was filed even after he was served with a notice of set down. The default by the Applicant was therefore not just on the date of hearing of the summary judgment which is 16 April 2021, but the whole period from 30 September 2020 when the application for

³ 1985 (2) SA 756 (A) at 765B-C.

⁴ *Supra* at 765D-F.

summary judgment was served on him until 16 April 2021 when summary judgment was heard and granted. This is a period in excess of six months.

- [8] The Applicant attempts to blame his legal representative for not filing an affidavit in opposition of the summary judgment saying they defied his instructions. An attorney acts as one's agent and cannot do anything unless so mandated by the client. A client may have a legal recourse against an attorney who acts against the mandate and instructions. There is nothing in the papers filed by the Applicant that suggests that his legal representative was not acting according to his mandate and style of litigation. The Applicant's style of litigation in which he waits until last moments or until the *dies* had expired can be traced in his treatment of the summons in the main matter when the notice of bar had to be served in order to acquire a plea.
- [9] The Applicant saw no need to terminate attorneys' mandate then, opting to continue with their services even in the opposition of the summary judgment. The application for rescission is now brought with different legal representatives. There is no confirmatory affidavit from the erstwhile legal representatives nor is there any suggestion that the steps were taken against them for not acting according to his mandate. When the notice of set down was served on his legal representatives in February 2021, they brought it to his attention and even met for consultation according to him. This clearly demonstrates that the attorneys were acting on his behalf and he cannot easily expurgate that relationship now that he wants an order to suit his situation. I am therefore not satisfied that there is a reasonable explanation for the default on the part of the Applicant. On this point alone, the application is bound to fail.

[10] The scale does not get tilted in favour of the Applicant even on consideration of the second requirement. There is no written judgment by the court in respect of the summary judgment, something that is common when applications are unopposed. I am as such not in a position to tell as to what extent was the amended plea considered by the court when granting summary judgment, if it was considered at all. It is however clear that the amended plea was part of the whole pleading bundle that was placed before the court. Rescission application is not an appeal process through which this court would be expected to consider the merits that were considered by another court. Suppose the merits in the amended plea were not considered, the question would be whether the amended plea, raises a *bona fide* defence which has some prospects of success.

[11] The Applicant in his plea to the summons already admitted that he signed as a surety and co-principal debtor alongside his company, MK Dube Consulting. The defences attempted in the amended plea (which are all technical in nature) would therefore not be available in any manner to him in light of the said admissions, even if the plea was to be amended. This I state fully aware that the Applicant had over six months within which to amend the plea before the summary judgment could be heard. As for the defences in question, I refer specifically to the plea suggesting reckless lending on the part of the Respondent and a plea of non-joinder in which the Applicant suggests that he should have been sued alongside his company. After all, as alluded to above,⁵ the said company is currently under liquidation.

[12] The Applicant tried to draw similarities between himself and *Dlamini Construction Pty Ltd v Future Logistical CC*⁶ where a court granted a

⁵ See footnote 1 above.

⁶ (21429/2006) [2007] ZAGPHC 211 (14 September 2007)

rescission of a summary judgment. The facts of this case are distinguishable from *Dlamini*. The most important distinction is that *Dlamini* was decided before Rule 32 was amended by GN R842 of 31 May 2019. Prior to the amendment, Rule 32 provided that summary judgments could only be applied or granted after a notice of the intention to defend, but before a plea. Currently, summary judgment can only be considered after a plea by the defendant. In essence, this entails that summary judgment applications were heard without the version of the defendants, unless they choose to oppose them. Under the current dispensation, the court will always have the version of the defendant even when the application is uncontested, which is what happened here.

[13] In *Dlamini*, summary judgment application was heard without the side of the defendant as no opposing affidavit was filed on his behalf. Lastly, in *Dlamini*, the defendant's legal representative withdrew a day before the hearing without informing his client, and the court was not alerted of this. *In casu*, the attorney and client relationship was intact between the Applicant and his legal representative even on the date the summary judgment application was heard. It follows therefore that the Applicant cannot rely on *Dlamini* as his circumstances are different.

[14] The Respondent asked for punitive cost order against the Applicant given the manner in which the applicant conducted his litigation until now. The other reason is the clause in the suretyship agreement that makes provision for costs to be paid by the applicant on attorney and own client scale in case of litigation. Costs awards are in court's discretion. The court makes awards looking at the outcome and what appears to be fair to both parties.⁷ While the courts cannot ignore the express wishes of the litigants in a contract,

⁷ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055F-G; *ripp v Gibbon & Co* 1913 AD 354.

when parties agree on the scale to be awarded on costs, they bear the onus to convince it as to the fairness thereof because once allowed, it becomes a court order. I agree that the manner in which the Applicant conducted the whole litigation up to this stage deserves to be frowned at, the scale asked by the Respondent is too drastic, unfair and not justifiable.

[15] For the reasons above, the following order is made.

[15.1] The application for rescission is dismissed.

[15.2] The Applicant is ordered to pay costs on attorney and client scale.



TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

FOR THE APPLICANT

: ADV. FOURIE

INSTRUCTED BY

: PJ LOURENS ATTORNEYS

NELSPRUIT

FOR THE RESPONDENT

: ADV KLOPPER

: INNES R STEENKAMP

ATTORNEYS

C/O KRUGER & PARTNERS INC

NELSPRUIT

DATE HEARD : 10 FEBRUARY 2022

JUDGMENT DELIVERED : 23 MARCH 2022