

**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 1199/2020

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

In the matter between:

CAPRICON DISTRICT MUNICIPALITY

APPLICANT

And

MGABABA TRAVEL AGENCY

FIRST RESPONDENT

SHERIFF POLOKWANE

SECOND RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicant had awarded the first respondent a tender for the provision of physical security services at nominated premises and properties rented or owned by the applicant. There was dispute in relation to payment of a certain invoice issued by the first respondent. That led to the first respondent instituting an action against the applicant for the recovery of the amount as stated on the invoice.

- [2] The combined summons were served on the applicant by the second respondent on 25th February 2020 in the registry department on one Ms Morifi an employee of the applicant. The applicant failed to enter an appearance to defend the first respondent's action. On 6th August 2020 the first respondent obtained a default order against the applicant for the amount claimed in the combined summons.
- [3] The applicant had brought an application for rescission of the default order in terms of Rule 31(2)(b), alternatively Rule 42(1) of the Uniform Rules of Court (Rules). The applicant submit that upon receipt of the summons, they handed them to the corporate service department for them to appoint attorneys on the panel established to assist the applicant after due compliance with the supply chain management processes. It is the applicant's contention that the supply chain process took longer than it was expected, and that the national lock down for the entire period of March 2020 to September 2020 contributed to the delay as the applicant's staff was working on a skeleton staff.
- [4] The applicant submit that their failure to enter an appearance to defend was due to the disruption in the normal operations of the applicant by the pandemic which engulfed the whole world. The applicant avers that on 6th August 2020 when the default order was obtained, its employees were still at home and not back at work except those in the essential services. The applicant submit that they became aware of the default order on 7th September 2020 when the second respondent visited its premises to attach the goods.
- [5] The applicant dispute that it is indebted to the first respondent. The applicant submit that the amount which the first respondent is claiming, was for the period during which the applicant had suspended the services of the first respondent due to the respondent's inability to render the required services. It is the

applicant's contention that for the month of February 2019 the first respondent did not render any services to it and therefore there was no amount that is due and owing by the applicant to the first respondent. The applicant further submit that the first respondent had failed to attach an invoice to its particulars of claim, and therefore the order sought was incompetent of being granted without supporting vouchers. The applicant has also made an application for condonation for late filing of its rescission application.

[6] The first respondent is opposing the applicant's rescission application. In its answering affidavit, the first respondent has raised a point in limine alleging that the commissioner of oaths who had commissioned the applicant's founding affidavit has failed to state the place where the declaration was made. However, the first respondent had abandoned this point in limine at the commencement of the hearing of the applicant's application.

[7] On the merits of the application the first respondent has stated that the summons were served on the applicant on 25th February 2020, and the country went into national lockdown on 26th March 2020. Further that during May 2020 the alert levels of the lock down were eased, but despite that, the applicant continued doing nothing about the action until September 2020 when the second respondent made an attachment. The first respondent has submitted that its action proceedings is clear, in that the applicant had acted in breach of contract by suspending its services during the month of February 2019. The first respondent further submit that its failure to provide security to the applicant should have been resolved in terms of clause 8 of the service level agreement (SLA). The first respondent avers that even though the necessary invoice was not attached to its particulars of claim, the honourable court on the date of the

hearing of the default judgment, had specifically requested the invoice from its attorneys which was provided to the court and that same had formed part of the record.

- [8] The applicant in its replying affidavit has stated that the first respondent's legal representative were not in possession of the first respondent's invoice, and that they only requested it after they were made aware by the applicant's attorneys that the said invoice was not attached to the first respondent's summons. The applicant had attached copy of an email dated 15th September 2020 from the first respondent's attorneys requesting copy of the invoice.
- [9] The applicant has brought its rescission application under both Rules 31(2)(b) and 42(1) of the Uniform Rules of Court (Rules). Under Rule 31(2)(b) a party wishing to apply for a rescission of judgment must do so within 20 days of acquiring knowledge of such judgment upon good cause been shown. Rule 42(1) provides that the High Court may, in addition to any other power it may have, mero motu or upon application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of a party affected thereby.
- [10] The applicant had acquired knowledge of the default order on 7th September 2020 when the second respondent visited its premises in order to execute the writ of execution. The applicant had launched its rescission application on 29th September 2020 within the 20 days period as provided for in Rule 31(2)(b). In my view, condonation application is not necessary in this matter as the rescission application was brought within the stipulated 20 days period.

[11] In *Chetty v Law Society, Transvaal*¹ Milner JA said:

“But it is clear that in principle and in the long standing practice of our Courts two essential elements of “sufficient cause” for rescission of a default judgment are:

- (i) that the party seeking relief must present a reasonable explanation for his default; and
- (ii) that on the merits such party has bona fide defence, which prima facie carries some prospects of success.

[12] It common cause that the applicant was duly served with summons in this matter a month before the country went into national lock down. Therefore, the explanation of relying on national lock down for its failure to defend the respondent’s action is not a reasonable explanation. From March 2020 to September 2020 the alert levels of the national lock down were relaxed several times, and even if the applicant was working on a skeleton staff, they were expected to attend to priority matters like defending the respondent’s action, however they have failed to do so. There is no plausible explanation given by the applicant why this matter was not prioritised. In my view, the applicant has failed to present a reasonable explanation for its default.

[13] However, that is not the end of the matter, a poor explanation for the default may be cured by good and strong prospects of success. The respondent does not dispute that its services during February 2019 were suspended by the applicant. The first respondent submit that the applicant had acted in breach of contract by suspending its services during the month of February 2019. What this entails is that there was a dispute between the parties in relation to the said suspension and also the invoice submitted for the period during suspension.

¹ 1985 (2) SA 756 (A) at 765B-C

[14] Clause 10 of the SLA read as follows:

“10.1 In the event of a dispute arising from this contract, the parties shall meet at the municipality’s place of business within seven (7) days from date on which the dispute arose to promptly and in good faith attempt to resolve the dispute.

10.2 If the dispute remains unresolved, either party may approach a tribunal or any competent authority to adjudicate on the matter.”

[15] The applicant had notified the first respondent per its letter dated 19th March 2019 that it will not honour the first respondent’s invoice as services were not rendered for the entire period of the month of February 2019. The first respondent instead of invoking the provisions of clause 10.1 of the SLA, responded by issuing a letter of demand. The first respondent in its answering affidavit has conceded that the provisions of clause 10.1 were not complied with before it instituted action against the applicant. However, the first respondent seems to blame the applicant for failure to comply with clause 10.1 without stating what role the applicant had played to prevent compliance with clause 10.1 of the SLA. The first respondent does not state what steps it took to comply with clause 10.1 of the SLA.

[16] The provisions of clause 10.1 of the SLA are peremptory, and failure to comply with them, render the first respondent’s action to be premature as internal remedies were not yet exhausted. It does not seem that it was brought to attention of Mdhluli AJ before she granted the default order that internal remedies were not yet exhausted or that the court after perusing the SLA, had enquired from the first respondent’s counsel whether internal remedies were exhausted before granting a default order.

[17] In *Occupiers, Berea v De Wet*² Mojaelo AJ said

“...the High Court did not discharge its duty to enquire into all the relevant circumstances. This resulted in the Court being unaware of essential issues of fact when granting the order. The Court was for instance not aware that there were 180 occupants who were absent when it granted the eviction order. The Court was further not aware that those who purported to confirm the agreement on the side of the applicants had no mandate to bind the absent 180 applicants. The basis for granting the eviction order was that all the parties had consented thereto. The 180 absent applicants had however not consented thereto and were not bound by anybody present in court. The eviction order was thus erroneously granted in the absence of the 180 applicants.”

[18] The basis upon which the default order was granted was that the applicant despite been duly served with summons had failed to defend the action, and also that the internal remedies as provided for in the SLA has been exhausted. Had the court been aware that internal remedies have not yet been exhausted, I doubt whether it would have granted the default order. The applicant in my view, on merits has a bona fide defence which had some prospects of success. The default order granted on 6th August 2020 was therefore erroneously granted in the absence of the applicant.

[19] Turning to costs, it is trite that the award of costs is within the discretion of the trial court. The applicant only gave this matter its urgent attention only after a visit by the second respondent despite been duly served with the summons seven months prior to the visit by the second respondent. I have already found that the applicant has failed to present a reasonable and acceptable explanation for its default. The applicant is thus not entitled to the costs against the first respondent. The first respondent was also aware that internal remedies

² 2017 (5) SA 346 (CC) at 366F to 367A

have not been exhausted, and should have not persisted with its opposition to the applicant's rescission application. They also do not deserve to be awarded costs in their favour. The appropriate order will be each party to pay its own costs.

[20] In the result I make the following order

20.1 The default order granted against the applicant on 6th August 2020 is hereby set aside and rescinded.

20.2 Each party to pay its own costs.

KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

Counsel for the applicant	: Mangena M
Instructed by	: Maboku Mangena attorneys
Counsel for the first respondent	: Adv Nkoana L
Instructed by	: Henstock van den Heever attorneys
Date heard	: 30th August 2021
Electronically delivered on	: 4th October 2021