

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

In the matter between:

Case No: CA 21/2018

Date Heard: **17 September 2018**

Date delivered: **15 January 2019**

MEC FOR THE DEPARTMENT OF PUBLIC WORKS

First Appellant

MEC FOR THE DEPARTMENT OF HEALTH

Second Appellant

and

IKAMVA ARCHITECTS CC

Respondent

JUDGMENT

Goosen J:

[1] This is an appeal against the dismissal of an application for rescission of judgment by Hartle J. The appellants prosecute the appeal with leave of the court a

quo. As an adjunct to the appeal, there is before this court an application by the respondent to declare the appeal as lapsed in terms of Rule 49(7)(b) and an application for condonation for the late prosecution of the appeal by the appellants. Given the nature of the issues raised in these applications and the appeal it is appropriate to set out the litigation history in some detail.

Litigation History

[2] The respondent instituted action against the first and second appellants by summons sued out of the Bhisho High Court on 15 August 2008. The respondent claimed payment of an amount of R44 040 032. 00 for damages arising from the alleged breach of a contract concluded between the parties. Both appellants filed notices to defend the action and in due course delivered their pleas¹. On 17 February 2009 the respondent filed a notice in terms of Rule 35(1) calling for discovery to be made within twenty days. The appellants failed to comply and an order compelling discovery was made on 9 July 2009. The appellants thereafter filed their discovery affidavit. On 12 October 2010 respondent filed a notice in terms of Rule 35(6) calling upon the appellants to make available for inspection certain specified documents. It is common cause that the appellants failed to comply with the notice. As a result, the respondent launched an application to compel compliance with the notice.

[3] The application to compel was heard by Majiki AJ (as she then was). The learned judge granted an order on 10 November 2011 compelling the appellants to make discovery. She further ordered that in the event that the appellants do not

¹ The pleas were delivered on 28 November 2008 and 24 November 2008 respectively.

comply that their defences be struck out. The appellants did not comply with the order. The respondent then gave notice of its intention to seek default judgment on 7 November 2012. This resulted in a notice of opposition as well as a notice in terms of Rule 30A. The matter eventually came before Dukada J. The learned judge decided that the terms of Majiki J's order required that an application be made to strike out the defences and accordingly dismissed the application for default judgment with costs, including costs of two counsel. The respondent, aggrieved by this decision, sought leave to appeal.

[4] The appeal was heard by the Full Bench of this Division on 18 August 2014. Plasket J, writing for the unanimous Bench, found that the terms of Majiki J's order were clear. The effect of the order was that upon failure to comply with the order compelling discovery, the appellants' defences were struck out. The learned judge, having made certain *obiter* comments regarding the desirability of such orders, pointed out that the appellants could, if they so desired, purge their contempt of the order and apply for reinstatement of their defences.

[5] The appellants then launched an application to reinstate their pleas. They did not, however, comply with the discovery order nor explain their default. When the application came before Lowe J on 18 June 2015 the appellants abandoned their reinstatement application. What remained in issue was the scale of costs payable by the defendants. On 19 June 2015 Lowe J delivered judgment on this issue. The learned judge trenchantly criticised the appellants for their repeated and on-going contumacy in relation to the order to compel discovery.

[6] The respondent thereafter enrolled the matter for default judgment. On 1 December 2015 the case came before Malusi AJ (as he was then). The appellants

were represented at the hearing by counsel who indicated that he was present to assist the court. No application was made to enable counsel to make submissions. Malusi J decided to deal with the matter upon receipt of affidavit evidence dealing with the quantification of the respondent's claim. The learned judge granted judgment in favour of the respondent in the sum of R41 031 279. 58 together with interest and costs. The learned judge thereafter furnished his reasons for judgment on 21 April 2016. Following the granting of default judgment the appellants commenced an application for leave to appeal the order. The application for leave was filed conditionally on 21 February 2016 since by then no reasons for the order had been furnished. On 9 May 2016 the appellants supplemented their application for leave to appeal. The rescission application was commenced on 14 June 2016. An application for leave to appeal was heard on 14 July 2016 and on 2 August 2016 Malusi J refused leave. He did so on the basis that the appellants had filed an application for rescission of the judgment on substantially similar grounds and that the rescission application should be disposed of before it could be said that the order is final.

[7] This application for rescission of judgment was heard by Hartle J on 18 May 2017. The learned judge dismissed the application on 19 September 2017. Hartle J however granted leave to appeal against her judgment on 7 December 2017.

[8] As is apparent from the foregoing the matter has a long and torturous history. For reasons relevant to submissions advanced in this appeal it is apposite to record that it is not in dispute that since the lapse of the time period provided in Majiki J's order, the appellants have failed to comply therewith. The appellants' contumacy then elicited trenchant criticism. Plasket J described the appellants' contumacy as "shocking, particularly given the size of the claim". Lowe J, in his

judgment addressing the costs of the abandoned application to reinstate the appellants' defences, referred to the appellants said non-compliance as egregious.

The prosecution of the appeal

[9] The Notice of Appeal, dated 15 December 2017, was filed with the Registrar of the Court at Grahamstown on 18 December 2017. It was served on respondent on the same date. The Registrar (Grahamstown) however refused to accept the Notice and directed that it be filed at the Court from whence the appeal originates. According to Mr *Basson*, appellants' attorney, this was done.

[10] On 15 January 2018, Mr *Basson* wrote to the Registrar, Bhisho requesting that the original court file be dispatched to the Registrar, Grahamstown to enable the appeal record to be prepared. On 22 January Mr *Basson* was advised that the file could not be transferred in the absence of a court order to that effect. The Registrar indicated that the matter would be taken up with the Deputy Judge President.

[11] On 31 January 2018 the appellants filed an application for a date for hearing of the appeal. In it, it was stated that the Record of Appeal would be filed upon its receipt from the Bhisho High Court. On 6 February 2018 Mr *Basson* travelled to Bhisho to uplift the court file. He was referred to the Deputy Judge President, Van Zyl DJP, who advised that full bench appeals emanating from Bhisho are to be heard in Bhisho.

[12] Mr *Basson* uplifted the record and commenced preparation of the Record of Appeal. On 27 March 2018 respondent's attorney contacted Mr *Basson* to enquire as to when the record would be filed. At that stage the index was being prepared. It

transpired that no replying affidavits were amongst the papers. As a result Mr *Basson* spoke to Mr *Stirk*, respondent's attorney. This resulted in Mr *Basson* discovering that the court file upon which the record was being prepared did not include the papers which had served before Hartle J, i.e. the papers in the matter under appeal. Mr *Basson* was able to secure the appropriate bundle of documents and finalized the record.

[13] On 30 March 2018 the draft index was sent to Mr *Stirk*. It was also dispatched to appellants' lead counsel. On 3 April 2018 appellants' counsel advised that certain documents, more particularly those which served before Malusi J on 1 December 2015 had to be included in the appeal record. These documents were incorporated into the record which was filed and served on 18 May 2018.

[14] It will be seen from what is set out above that the Record of Appeal was not filed simultaneously with the Notice of Prosecution of the Appeal as is required in terms of Rule 49(7)(a). It is also apparent that the record was filed outside of the prescribed period of 60 days from date of delivery of the Notice of Appeal, as provided for in Rule 49(6).

[15] The appellants' failure to file the Record of Appeal in accordance with the prescribed time periods, prompted the respondent to launch an application, in the Grahamstown Court, for an order that the appeal had lapsed in terms of Rule 49(7)(d). This application was commenced on 10 May 2018 under case number 1368/2018. The appellants opposed the application and filed an answering affidavit on 22 May 2018.

[16] The application came before Lowe J on 4 September 2018. An order was then made by agreement between the parties:

1. THAT the appeal in the above matter, insofar as it may still be pending in this Honourable Court, be and is hereby withdrawn, as the appeal will be heard by the Full Bench in the Bhisho High Court on 17th September 2018.
2. THAT the application under case number 1368/2018 (the main application) be and is hereby transferred to the Full Bench of the Bhisho High Court to be heard on 17th September 2018 together with the appeal.
3. THAT the applicants are to pay the costs of this application, together with any wasted costs occasioned by the prosecution of the appeal and the prosecution of the main application in the Eastern Cape High Court, Grahamstown."

[17] The reference to the 'main application' is a reference to the application launched by the respondent in terms of Rule 49(7)(d). The appellants' application for condonation (in which essentially the same averments are made as in the answering affidavit filed in the main application) was initiated in the Bhisho Court.

[18] Before turning to deal with these applications, it is appropriate to address an issue that plainly occasioned some confusion, namely the court in which the appeal was prosecuted. Mr *Smuts S.C.*, for the respondent, correctly submitted that the 'confusion' itself does not account for the delay. As is apparent from the outline of the events following leave to appeal being granted, appellants' attorneys filed a Notice of Appeal at Grahamstown, the seat of the Court. The effect was to

commence prosecution of the appeal before that Court. Section 6(4) of the **Superior Courts Act**² provides that:

“(4) If a Division has one or more local seats-

- (a) the main seat of that Division has concurrent appeal jurisdiction over the area of jurisdiction of any local seat of that Division, and the Judge President of the Division may direct that an appeal against a decision of a single judge or of a Magistrates' Court within that area of jurisdiction may be heard at the main seat of the Division;
- (b) the Judge President of that Division must compile a single court roll for that Division; and
- (c) the Judge President of that Division may assign all the judges of that Division within the Division as he or she deems fit.”

[19] Mr *Basson* was subsequently advised that the appeal was one to be heard by a Full Bench sitting in Bhisho. Mr *Basson* thereafter proceeded to prosecute the appeal before that Court. To compound matters no Notice of Appeal appears to have been filed with the Bhisho Court. The respondent, no doubt acting on the basis that the appeal was being prosecuted before the Grahamstown Court, brought its application in terms of Rule 49(7)(d) before that Court. When that application came before the Court it was transferred in terms of s 27(1)(b) of the **Superior Courts Act** but – curiously – the appeal before that Court was withdrawn, presumably on the basis that an appeal had separately been instituted before the Bhisho Court.

² Act No, 10 of 2013

[20] It seems to us that there is presently considerable scope for unnecessary confusion. The practice in the Grahamstown and Port Elizabeth Courts of this Division is that all appeals (whether from a single judge or from the Magistrates' Court) are prosecuted at the seat of the Division. This is despite the fact that s 6(4) of the **Superior Courts Act** confers concurrent appeal jurisdiction upon the court at the main seat of the Division.

[21] A practice has recently developed in terms of which appeal matters emanating from the area of jurisdiction of the Mthatha and Bhisho local seats of the Division, are heard in Mthatha and Bhisho respectively. There is however no Practice Directive which determines that such matters may only be prosecuted before the local seats. Nor is there a Directive which precludes prosecution of an appeal at any of the local seats.

[22] In our view this is an undesirable state of affairs which gives rise to considerable scope for confusion in practice, and significant logistical difficulties in the compilation of a single court roll in the face of limited judicial resources. In the present matter it may have contributed to the problems encountered in prosecuting the appeal. The appellants were plainly within their rights to prosecute the appeal before the main seat of the Division, and having done so, the respondents were entitled to insist upon proper prosecution of the appeal before that court³. Once so prosecuted the appeal could be removed to another seat in terms of s 27(1)(b) but it could not be done without an order to that effect.

[23] It is not altogether certain in our view that the appeal has – as a matter of fact – been properly prosecuted before this Court. We shall accept that it was so

³ It is not without significance that an earlier appeal in this case was prosecuted at the seat of the court.

prosecuted. We do so in order to reach the question whether the appeal has lapsed and whether, in the circumstances, it should be reinstated. We take this course because both parties accepted that the appellants have sought to prosecute the appeal before this court following a directive to that effect given by the Deputy Judge President.

The lapsing of the appeal

[24] Rule 49(7)(a) provides that:

- “(7) (a) At the same time as the application for a date for the hearing of an appeal in terms of subrule (6) (a) of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if-
- (i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or
 - (ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.”

[25] It is common cause that the appellants made written application to the Registrar for a date for hearing of the appeal on 31 January 2018, within sixty days after the filing of their Notice of Appeal. It is also common cause that the appellants did not, as required by Rule 49(7)(a), file the requisite copies of the Record. In the Notice of Prosecution of the Appeal it was stated that the appellants would “file the

requisite copies of the record upon receipt of the original record from Bhisho High Court which, despite requests, is still being awaited.”

[26] On 6 March 2018 respondent’s attorney contacted the Registrar of the Bhisho High Court to enquire as to the progress regarding the provision of the court record. Mr *Stirk* was informed that the court file had been uplifted by appellant’s attorney, Mr *Basson*, on 6 February 2018. Mr *Stirk* endeavoured to contact Mr *Basson*, to no avail. On 27 March 2018 Mr *Basson* wrote to advise that the index to the appeal record was being prepared.

[27] An exchange of email correspondence ensued relating to whether a replying affidavit had been filed in a certain interlocutory application. On 5 April 2018 Mr *Basson* wrote to advise respondent’s attorney that appellant’s counsel had suggested certain amendments to the index and that same would be furnished shortly. In response Mr *Stirk* enquired whether the record had been provided to the Registrar so that a date for hearing could be allocated. It was pointed out that the delays in finalising the matter were unacceptable and that the litigation had already extended over a 10 year period.

[28] On 10 May 2018 the respondent launched an application, sued out of the Grahamstown High Court, for an order declaring the appeal to have lapsed by reason of the late filing of the Record of Appeal. In the opposing affidavit the delay is explained in the following terms.

(a) Prior to the filing of the Notice of Appeal on 31 January 2018 the appellants’ attorney encountered difficulties in obtaining the court file from the Registrar of the Bhisho High Court. He was apparently

advised that the file could not be made available unless the matter was 'transferred to the Grahamstown Court'.

- (b) On 6 February 2018 Mr *Basson* travelled to Bhisho to uplift the court file. He was referred to the Deputy Judge President who advised him that Full Bench appeal matters emanating from Bhisho were to be heard in the Bhisho Court.
- (c) Upon preparing the appeal record based on the content of the court file supplied to him, Mr *Basson* discovered that certain documents were not included. It transpired that the court documents related to earlier, abandoned proceedings.
- (d) Once the court documents were obtained a draft index was prepared. On 30 March 2018 a copy was furnished to respondent's attorney. By then a master copy of the record had been prepared.
- (e) On 3 April Mr *Basson* was advised by counsel to amend the record and index so as to ensure that the record included the pages and documents which served before Malusi AJ on 1 December 2015.
- (f) Mr *Basson* undertook to amend the index and record. He completed the task on 17 May 2018 and filed the record with the Registrar of the Bhisho High Court on 18 May 2018.

[29] In his affidavit Mr *Basson* explains that apart from the delay occasioned by the difficulties in obtaining the correct court documents, the task of preparing the record was bedevilled by illness suffered by him. He states that he sought medical advice in February 2018. He was then diagnosed with a depressive disorder and chronic fatigue, for which medication was prescribed. He further states that in the period

between April and the filing of the record in May 2018 he suffered a relapse. It was this, he said, which further delayed the filing of the record.

[30] The appellants not only oppose the respondent's application made in terms of Rule 49(7)(d); they seek by way of a substantive application an order condoning the late filing of the Record of Appeal. The two applications are inextricably interlocked. In considering whether or not to grant condonation this court is required to consider the reasons advanced for the appellants' default; whether good cause in relation thereto is demonstrated and the prospects of success on appeal.

[31] It was argued by Mr *Smuts*, for the respondent, that the court ought to take into consideration the history of the litigation. This history demonstrates serial non-compliance with the Rules of Court and a failure to explain such default. It was submitted that the present failure to comply with the Rules relevant to the prosecution of the appeal demonstrate a disregard for the rights of the respondent and a lack of *bona fides*. In consequence, it was submitted that the respondent's interests in the finality of the judgment has been disregarded and that the respondent continues to suffer prejudice thereby.

[32] Mr *Smuts* further argued that, in relation to the merits, the appeal enjoys no prospect of success inasmuch as the appellants have still failed to offer an explanation for their default; have no defence to the respondent's claims and are precluded from advancing any defence by reason of their contumacy. Mr *De Bruyn S.C.*, for the appellants, argued that for purposes of the application for condonation the prior default of the appellants is not relevant. It was submitted that the relevant period to be considered is that following the granting of leave to appeal. In relation to this period it is apparent that the appellants undertook the necessary procedural

steps to prosecute the appeal. The default lies therein that the record of appeal was not filed timeously. Mr *De Bruyn* submitted that an explanation for this default is provided and that same is reasonable. It was submitted that the period of delay is not so excessive as to warrant dismissal on that ground alone. In relation to the prospects of success Mr *De Bruyn* submitted that the appeal is at least arguable. Indeed, Hartle J accepted that there are reasonable prospects of success upon the narrow grounds advanced by the appellants. In the context of the application for condonation that is all that is required.

[33] I agree with Mr *De Bruyn* that for purposes of the application for condonation of the late filing of the record the appellants' prior conduct of the litigation is not strictly relevant. Whilst the litigation history paints a poor picture there is nothing to suggest that the appellants' attempt to prosecute the appeal was not *bona fide*. In my view a reasonable explanation has been furnished. Mr *Smuts* accepted that Mr *Basson's* illness would have played a role. We can also not lose sight of the fact that there was some confusion as to the court in which the appeal was to be prosecuted.

[34] In addition to the explanation of the default it is necessary to establish prospects of success. This would necessarily involve consideration, to an extent, of the merits of the appeal. For present purposes however, it suffices to have regard to the reasons set out by Hartle J in her judgment on leave to appeal. The learned judge expressed the view that another court may reasonably consider that the appellants are not required to provide an explanation for the default that resulted in the defence being struck out. The learned judge considered that another court might reasonably conclude that the challenge based on the 'legality' of the order of Malusi J was sufficient to give rise to a reasonable defence in the context of a rescission application.

[35] The argument advanced by Mr *De Bruyn* was that the question of rescission was to be approached on the basis of an assessment whether the material placed before Malusi J could sustain the order made. If it is found that the evidence did not sustain the judgment or order then it falls to be set aside whether or not an adequate explanation for the default has been advanced. The argument, based upon the assertion of the principle of legality, is akin to one based on the competence of the order.

[36] In **Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others**⁴ the principle was established that a judgment obtained upon a summons not disclosing a cause of action falls within the ambit of a judgment or order 'erroneously' granted. Where it is sought to set aside a judgment on that basis, it is not necessary to establish 'good cause' and accordingly the reason for the default plays little or no role. Although **Promedia Drukkers**, unlike the present matter, involved a rescission application brought in terms of Rule 42(1)(a) it cannot be said, for purposes of deciding whether or not to grant condonation, that the argument advanced by the appellants enjoys no prospect of success.

[37] In the circumstances I am satisfied that the appellants have made out a proper case for the reinstatement of the appeal. I shall address the costs of the respondent's application hereunder.

The merits of the appeal

[38] The appellants' appeal lies against the judgment of Hartle J dismissing an application for rescission of a judgment granted by default, of Malusi J. The

⁴ 1996 (4) SA 411 (C)

appellants seek an order that the appeal be upheld; that the default judgment and order granted on 1 December 2015 be rescinded; and a further order that the appellants be granted leave to defend the matter on the basis that the contract relied on by the respondent is void for vagueness. In respect of the quantum of the claim an order is sought that the respondent has failed to prove that it had suffered damages or failed to prove the quantum of its loss.

[39] This further relief sought on appeal is amplified in the heads of argument filed on behalf of the appellants inasmuch as it is sought to substitute the order of Hartle J with, *inter alia*, an order declaring the agreement upon which the respondent relied to be void for vagueness; that the suspensive conditions set out in said agreement have not been fulfilled and that the contract is void; and that the respondent has not proved its damages. In the alternative the appellants seek leave to defend the matter on this basis.

[40] It will be noted from this that the relief sought on appeal extends beyond that which would ordinarily flow from an order rescinding the judgment of 1 December 2015. The relief contemplates a determination of that which would be the subject of the revived action flowing from the setting aside of the judgment. The relief amounts to the determination, by this court, of that which would fall to be decided by the court dealing with the action in due course.

[41] Mr *Smuts* pointed out, correctly in my view, that the granting of such relief would impugn not only the judgments of Hartle J and Malusi J but indeed that of Plasket J. The effect of the declaratory relief would be to introduce and determine a defence to the action which was not pleaded. The alternative relief similarly bears upon the judgment of Plasket J (and indeed that of Lowe J) since it would have the

effect of permitting the introduction of a defence to the action in circumstances where the appellants' defences have been struck out and where the appellants have abandoned an attempt to reintroduce a defence. All of this would be achieved in circumstances where the appellants have not sought to provide an explanation for their default which gave rise to the striking out of the pleaded defences.

[42] In my view this extended relief cannot competently be granted in these appeal proceedings. At best the appellants would be entitled, if successful, to an order setting aside the order of Hartle J and substituting it with an order rescinding the order of Malusi J granted on 1 December 2015. That would leave the parties in precisely the same position they were in immediately prior to the order made on 1 December 2015 i.e. in circumstances where the appellants have no pleaded defence to the respondent's claim.

[43] In order to succeed the appellants must necessarily establish that Hartle J's judgment is assailable on the basis of error or misdirection. The notice of appeal sets out a number of respects in which it is contended that the judgment is tainted by error or misdirection. Properly considered however the appeal is prosecuted upon a narrow basis, it being the appellants' case that the application for rescission is premised upon errors and/or irregularities which arose in the application for default judgment which served before Malusi J on 1 December 2015. On this basis, since the order made by Malusi J is not an order which could competently be made, the appellants need not (i) explain the reason for their default nor (ii) reinstate their struck out pleas. To the extent that Hartle J considered that the appellants were obliged, in seeking rescission, to explain and/or purge their contumacy, it is contended the learned judge was wrong. It is also contended that the learned judge

misdirected herself in holding that the appellants were not *bona fide* in seeking rescission in circumstances where they had no intention of addressing their default.

[44] The appellants' application for rescission of judgment was brought in terms of Rule 31(2)(b) and the common law; alternatively, in terms of the court's inherent jurisdiction to control its affairs. No reliance was placed on Rule 42(1)(a) either before the court *a quo* or before this court.

[45] The court *a quo* accordingly was required to determine whether the appellants had satisfied the requirements for rescission of judgment in terms of Rule 31(2)(b) or the common law. It was not called upon to, nor did it, consider the matter in the context of Rule 42(1)(a). This is important since it is by now well established that a party seeking rescission of judgment in terms of Rule 42(1)(a), on the basis that a judgment is either erroneously sought or erroneously granted in the absence of a party, need not establish 'good cause' for the granting of such relief.⁵ The Rule is principally directed at irregularities in the proceedings; or where the court lacked legal competence to have made the order; or was unaware of facts which, if known to it, would have precluded the granting of the order. As noted in **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)**:⁶

"[6] Not every mistake or irregularity may be corrected in terms of the Rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law. That is why the common law is the proper context for its interpretation. Because it is a Rule of Court its ambit is entirely procedural.

⁵ See **Promedia Drukkers** (supra) at 417B-I

⁶ 2003 (6) SA 1 (SCA) at par [6]-[8]

[7] Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission (Rule 42(1)(b)); or an order resulting from a mistake common to the parties (Rule 42(1)(c)); or 'an order erroneously sought or erroneously granted in the absence of a party affected thereby' (Rule 42(1)(a)). In the present case the application was, as far the Rule is concerned, only based on Rule 42(1)(a) and the crisp question is whether the judgment was erroneously granted.

[8] The trend of the Courts over the years is not to give a more extended application to the Rule to include all kinds of mistakes or irregularities. This is illustrated by the facts of *De Wet and Others v Western Bank Ltd*, which is a decision of this Court.”

[46] No doubt no reliance was placed on the Rule because no procedural irregularities occurred, the appellants having received due and effective notice of the proceedings. Furthermore, the judgment granted by Malusi J was not granted in the absence of the appellants. This bears emphasis because it is common cause that in order to obtain rescission whether under Rule 31(2)(b) or the common law, the appellants were required to establish ‘good’ or sufficient cause and a *bona fide* defence which carries some prospect of success. Both requirements must be established.⁷

[47] In **Harris v Absa Bank Ltd t/a Volkskas**⁸ it was held that:

⁷ **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A); **Government of the Republic of Zimbabwe v Fick and Others** 2013 (5) SA 325 (CC) at 350D

⁸ 2006(4) SA 527 (T) at para [10 and [11]

[10] A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation.

'Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole.'

De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd (supra) at 711D.

[11] In amplifying the nature of the preferable approach in an application for rescission of judgment, I can do no better than quote Jones J with whose *dicta* I am in respectful agreement:

'An application for rescission is never simply an enquiry whether or not to penalise a party for failure to follow the rules and procedures laid down for civil proceeding in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties. . . . He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should

never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised and heard.'

Also see *Mnandi Property Development CC v Beimore Development CC* 1999 (4) SA 462 (W) at 464G - 466B; *Buckle v Kotze* 2000 (1) SA 453 (W) at 458D *et seq*; *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) at 1180J - 1181E.

[48] This approach was endorsed in *Fick*⁹ and *Scholtz and Another v Merryweather and Others*.¹⁰ It is with these general principles in mind that we turn to consideration of the essential basis of the appeal.

[49] In regard to the merits of the appeal, the first point to decide is whether good cause is to be demonstrated with reference to what was before Malusi J, i.e. that it was not necessary for the appellants to purge their default in respect of the failure to discover or at least to offer a reasonable explanation therefor. Hartle J found that it was necessary. This was premised upon a finding that the rescission can only be granted in accordance with the court's common law jurisdiction to do so. The learned judge dealt with the legal effect of the striking out of the appellants' defences, finding that in the absence of the defences being reinstated, the appellants would be left with no defence at the re-opened trial. The court *a quo* took the view that the effect of a striking out is to create a *sui generis* procedure. The judgment by "default" is not one obtained pursuant to Rule 31. Instead such matter properly conceived proceeds in accordance with Rule 39(1) and (2). This, in my view, appears to be correct. It is

⁹ (supra)

¹⁰ 2014 (6) SA 90 (WCC) at 96B

however not necessary to pronounce definitively upon this. It suffices to note that Hartle J approached the application on the basis of the common law requirements for rescission of judgment. In this, the learned judge cannot be faulted. Indeed the very basis upon which the appellants framed their application for rescission was that it was necessary to establish good or sufficient cause, and a defence which enjoys reasonable prospects. This much is clear from the founding affidavit filed in the rescission application which served before Hartle J.

[50] Dealing with the requirements to be satisfied Hartle J said the following:

"32. The term "sufficient cause" defies a precise comprehensive definition, but it is clear that in principle and the long-standing practice of our courts two essential elements are: (1) that the party seeking relief must present a reasonable and acceptable explanation for the default, and (2) that on the merits that party has a *bona fide* defence which, *prima facie*, carries some prospect or probability of success. The phrases "good cause" and "sufficient cause" are synonymous and interchangeable. In the context of an applicant who applied for the rescission of a default judgment obtained subsequent upon the striking out of his defences, the default requiring explanation is in my opinion that which was casual to the striking out order. On the issue of a defence, I expect that he will be entitled to refer to his pleaded defence which was struck out, and possibly even to an amended plea that he might have raised but for the fact that his defence was struck out and his participation in the further conduct of the proceedings cut short thereby, or wishes to still pursue in the event of the trial being reopened. I do not agree with the submission made on behalf of the respondent in this regard that the extensive matter marshalled by the applicants in their founding affidavit by way of "defences on merits and quantum" is "legally irrelevant" because their defence have been struck out and never resurrected, the

application that might have revived their position having been withdrawn. While that is indeed a factor in the overall consideration of the matter that they are in this unfortunate position, they must be entitled to persuade the court, in this unique scenario – not to be equated with the situation where a defendant is in default of appearance in the sense contemplated in rule 31 (2) which has its own distinct features, how the outcome of the litigation might have been different if their defences which were struck out were in fact given consideration in a trial in which they fully participated. It is perhaps more correct to say that the applicants’ supposed defences are rendered redundant, in effect, by the fact that they remain irrevocably struck out.”

[51] In addressing the first of these requirements Hartle J found that the appellants “have not even tried to present a reasonable and acceptable explanation for their default . . .” This finding, based on a reading of the founding affidavit in the application, cannot be assailed. If, as the authorities indicate, it is a requirement that a reasonable and acceptable explanation be given for the default, then that must be the end of the matter.

[52] Mr *De Bruyn* however sought to develop an argument highlighting the centrality of the principle of legality¹¹. It was submitted that a legality challenge is open to a party notwithstanding such party’s prior non-compliance with the Rules of Court or an Order of Court. Such a legality challenge is tantamount to a challenge as to the competency of the order sought to be impugned. The argument proceeded on the basis that if it is established that, on the basis of what was before Malusi J, the

¹¹ See ***South African National Road Agency Pty Ltd v Cape Town City*** 2017 (1) SA 468 (SCA) ; see also ***Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*** 2002 (6) SA 573 (C)

order ought not to have been granted, then it ought to be rescinded whether or not the default was explained.

[53] In my view this would conflate two separate requirements for rescission of a judgment of the court and would be tantamount to dealing with the rescission of the judgment as if it was an appeal against the judgment sought to be rescinded. Hartle J was alive to this, noting in a footnote to the passage cited above, that the need to address the default does not apply in circumstances of an appeal. There is, so far as I have been able to establish no authority which in terms provides support for the proposition that it is necessary to explain the default where reliance is placed upon the common law grounds for rescission of judgment. The common law gives expression to the principle of finality of judgments.¹² The mechanism of a rescission of judgment seeks to place the parties in the position they were in before the judgment i.e. the status *ante quo*. It does so by setting aside the judgment so that the parties may pursue their respective claims. Since the mechanism seeks to do justice to the parties, it is the party who is in default of compliance with procedural requirements who must satisfy the court that the status *ante quo* ought to be restored to allow that party to defend the action. In dealing with the second requirement, namely whether a *bona fide* and reasonable defence is disclosed, Mr *De Bruyn* submitted that the agreement relied upon by the respondent is void for vagueness and not enforceable. It was submitted that the learned judge had failed to consider, *mero motu*, whether the agreement as pleaded was enforceable.

[54] Mr *Smuts* argued that the appellants cannot now raise this issue because it amounts to a “lawyer’s point” lacking in *bona fides* and that, in any event, the effect of striking out of the defences pleaded by the appellants and the subsequent

¹² See *Conlyn* (*supra*)

abandonment of the application to reinstate the defences was such as to preclude the appellants from now seeking to raise a defence which was not before Malusi J.

[55] Mr *Smuts* argued that the pleaded agreement as set out in the particulars of claim must necessarily be approached on the basis that there is no defence to the respondent's claims. In this regard reference was made to **Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd**¹³ where it was held:

"[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."

[56] In regard to the pleaded case Mr *Smuts* relied upon a passage in **Baliso v Firstrand Bank Ltd t/a Wesbank**¹⁴ where the court held:

"[12] In terms of our civil procedure, default judgment for a debt or liquidated demand is granted on an acceptance of the allegations as set out in

¹³ 2007 (6) SA 87 (SCA) at par [27]

¹⁴ 2017 (1) SA 292 (CC) at par [12]

the summons, without any evidence. Where the claim is not for a debt or liquidated demand, the court may, after hearing evidence, grant judgment. This is usually only evidence on the amount of unliquidated damages. The reason for not hearing evidence on the other factual allegations made in the summons or particulars of claim is that, because the claim is not opposed, it may be accepted that those allegations are admitted or not disputed.”

[57] On the basis of this it was submitted that Malusi J had correctly accepted the cause of action as being established requiring only the presentation of evidence as to the pleaded damages.

[58] Mr *De Bruyn* argued that the appellants are not precluded from raising this issue as a basis for rescission of judgment even at the stage of the appeal. He referred to the following passage *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another*:¹⁵

“The learned judge added that a 'judge is an administrator of justice' who has to see that justice is done. While these remarks were made in the context of a criminal trial, they are equally applicable in civil proceedings and, in my view, accord with the principle of legality. The essential function of an appeal court is to determine whether the court below came to a correct conclusion. For this reason the raising of a new point of law on appeal is not precluded, provided the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed. In fact, in such a situation the appeal court is bound to deal with it as to ignore it may 'amount to the confirmation by it of a decision clearly wrong', and not performing its essential function. This, in turn, would infringe upon the

¹⁵ 2014 (3) SA 96 (SCA) at 103A-D

principle of legality, which was explained by Ngcobo J in *CUSA v Tao Ying Metal Industries* as follows:

'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law.'

[59] Mr *De Bruyn* further argued that the fact that the agreement was concluded and repudiated, as alleged, does not necessarily establish that the respondent is entitled to damages. Such damages still have to be proved in order to obtain judgment. Accordingly the court hearing the default judgment ought to have considered whether the damages are indeed proved and also reasonable. In this respect reliance was placed upon the basis of the calculation set out in the affidavits filed in the application for default judgment. It was submitted that the damages were calculated upon the basis of the Coega Development Corporation document which reflects several phases of the projects which had not yet been approved. Furthermore the loss was calculated upon the inclusion of those unapproved amounts in the total value of the project. It was further submitted that the calculation was done on the basis of the value of the works as opposed to the cost of the works.

[60] Mr *De Bruyn* submitted that a court is obliged to consider, *mero motu*, whether the agreement relied upon is enforceable. He placed reliance on *Mansell v Mansell*¹⁶ and on *Coppermoon Trading 13 (Pty) Ltd v Government of the*

¹⁶ 1953 (3) SA 716 (N)

Province of the Eastern Cape and Another¹⁷. The reliance on **Mansell** is, in my view, misplaced. That matter dealt with circumstances in which a court will make an agreement an order of court. It finds no application in the present case. The **Coppermoon** matter similarly concerned the question of the enforceability of an agreement sought to be made an order of court.

[61] It was submitted that the letter of appointment of the appellants referred to specifications still to be determined and that the costs of the project has yet to be approved. On this basis it was argued that the agreement constituted no more than an agreement to agree. It could therefore not found a claim such as advanced by the respondent. Mr *Smuts* argued that this “defence” had never been raised, did not form the basis of the erstwhile defences struck out and that the appellants are precluded from relying upon such “defences”. In any event, the agreement and its repudiation are established on the uncontested allegation in the particulars of claim and are confirmed in the evidence placed before the court at the stage of judgment.

[62] Mr *Smuts* further submitted that the nature of the agreement was one involving costs which were yet to be determined, that the agreement had been repudiated and accordingly that the costs could not be determined. Since the project had proceeded with Coega the best available evidence in circumstances of the appellants’ failure to discover relevant documents establishing the actual cost, are those set out in that document and that the only basis for determining the loss was to take the value of the project less the expenses which would reasonably be incurred in carrying out the project. These, he submitted, were only determinable on the basis set out in the affidavits filed in the application for default judgment. It was accordingly

¹⁷ Case No. 451/2009 ECB Unreported, 16 April 2015

submitted that Malusi J was entitled to deal with the matter on affidavit and that the affidavits fairly established the pleaded loss.

[63] In my view the contentions advanced by the respondent must be upheld. Firstly, whilst it is so that a court dealing with a matter, even by way of default, is required to satisfy itself that the cause of action is established, it does so mindful of the principles to which reference have been made in the Lodhi and Baliso matters. In this context the pleaded agreement and its repudiation required no evidence to be led. Secondly, in relation to those aspects in respect of which evidence was required Malusi J exercised a discretion in permitting those aspects to be addressed by way of affidavits.¹⁸

[64] It is to be emphasised that what was before Hartle J was an application for rescission of a judgment to which well-established principles apply. The essence of the learned judge's reasons for dismissing the application came down to this: the appellants had failed to demonstrate good cause or sufficient cause and a *bona fide* defence to the action. Although it was submitted that the court *a quo*'s conclusion was wrong, I am unable to find that it was inasmuch as I am unable to find that the appellants had established the requirements for rescission of the judgment.

[65] It follows that the appeal cannot succeed. There is no reason why the costs should not follow the result and that said costs should include the respondent's costs of the application in terms of Rule 49(7)(d). It will be recalled that the facts establish that the appellants had not complied with the requirements of Rule 49. The Record of Appeal was filed on 18 May 2018 after the respondent had launched the Rule 49(7)(d) application. The appellants only filed a condonation/reinstatement

¹⁸ See Colarossi v Gerber [2005] JOL 15118 E; see also Abraham v City of Cape Town 1995 (2) SA 319 (C)

application thereafter. In the circumstances it will be fair and just if appellants be ordered to pay these costs. The costs of two counsel are clearly warranted given the nature of the appeal and the importance of the matter.

[66] I therefore make the following orders:

1. The appeal is reinstated.
2. The appellants are ordered to pay the respondent's costs in respect of the application in terms of Rule 49(7)(d), such to include the costs of two counsel.
3. The appeal is dismissed with costs, such costs to include the costs of two counsel.

G.G. GOOSEN

JUDGE OF THE HIGH COURT

Nhlangulela, DJP

I agree.

Z. NHLANGULELA

JUDGE OF THE HIGH COURT

Stretch, J

I agree.

I. T. STRETCH

JUDGE OF THE HIGH COURT

Appearances:

Obo the Appellants: *Adv De Bruyn S.C. assisted by Adv Nyangiwe*

Instructed by *State Attorneys, East London*

Ref: Mr S Mgujulwa

Tel: (043) 706 5100

Obo the Respondent: *Adv Smuts S.C. assisted by Adv Dugmore S.C.*

Instructed by *Stirk Yazbek Attorneys*

Ref: G.J. Yazbek

Tel: (043) 726 8310