



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
DATE 28-09-2018	SIGNATURE 

Case no.: 47675/15

In the matter between:-

AURALITE LED LAMPS (PTY) LTD

Applicant

And

GOLDENWOOD INVESTMENTS (PTY) LTD

Respondent

JUDGMENT

NKOSI AJ

INTRODUCTION

1. On the 4th September 2017, this Court heard an application for the rescission of judgment which incorporated an application for condonation. Both applications were heard and considered simultaneously. On the 18th September 2017, judgment was handed down in terms of which both applications were dismissed with costs.
2. This, therefore, is an application for leave to appeal brought in terms of Section 17(2)(a) of the Superior Courts Act 10 of 2013 ("the Act"). The application is opposed.
3. In considering the application for rescission of judgment, I had before me a bundle of documents which contained various material annexures including annexures "AA1", "GW1", Combined Summons, Founding Affidavit and others. These documents were referred to by both counsels during the hearing of this application. Where applicable, I shall refer to these documents in detail later in this judgment.

THE ACT

4. Section 17(2)(a) of the Act states that:

"Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or if not readily available, by any other judge or judges of the same court or Division."

5. Section 17(2)(a) has to be read in light of the provisions of section 17(1) which provide that:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

6. The Applicant’s submissions centre around the provisions of Section 17(1)(a) only. There was no argument raised to suggest that the other provisions of Section 7(1) namely, subsection (b) and (c) are relevant to this application for this Court to consider. I would deal with Section 17 (1)(a) later in this judgment when I make my finding whether the appeal would have a reasonable prospect of success or whether there is some other compelling reason why the appeal should be heard.

DISCUSSION

7. The Applicant brought an application for rescission of judgment under rule 42(1)(a), alternatively the common law, and argued that rescission of judgment ought to have been granted under both, section 42 (1)(a) and common law.

8. In terms of rule 42(1)(a), the Court has a discretion whether or not to grant an application for rescission under this sub rule.¹ The purpose of the rule is to correct expeditiously an obviously wrong judgment or order.² The Court does not however, have a discretion to set aside an order in terms of the sub rule where one of the jurisdictional facts contained in paragraphs (a) – (c) of the sub rule does not exist.³

9. The applicant contends that the jurisdictional fact outlined in rule 42(1)(a) does exist and the Court has to exercise its discretion and grant the application. In support of its contention, the applicant argues that the parties to the loan agreement are not the same parties to the main action instituted by the respondent. It further argues that the Court of first instance erred in granting judgment by default because had it been made aware of this error, it would not have granted judgment. It alleges that the loan agreement was between AURALITE (PTY) LTD and GOLDENWOOD 2 (PTY) LTD.

10. I do not agree with the applicant's contentions. Mr George Geer, the deponent to the founding affidavit in support of the application for the rescission of judgment states on paragraph 1:

"I am a major male businessman and the sole director of the applicant herein".

¹ *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 777F–G; *Theron NO v United Democratic Front (Western Cape Region)* 1984 (2) SA 532 (C) at 536G.

² *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E–F; *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417B–I; *Kili v Msindwana in Re: Msindwana v Kili* [2001] 1 All SA 339 (Tk) at 345.

³ *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T) at 702H; and see *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C) at 222B–C.

The applicant referred to is AURALITE LED LAMPS (PTY) LTD. In terms of Annexure "AA1" or "GW1" the same Mr Geer gave instructions to GOLDENWOOD 2 (PTY) LTD to deposit R 1,350,000.00 into AURALITE LED LAMPS (PTY) LTD. The loan agreement between the parties was later rectified by the court of first instance to reflect GOLDENWOOD INVESTMENTS (PTY) LTD as the plaintiff. Mr Geer, the sole director of the applicant, was the active party in securing a loan of R1,350,000.00 for his company. He has failed to explain his relationship with AURALITE (PTY) LTD, if indeed he was acting for AURALITE (PTY) LTD when securing the loan. Just as he has declared in his founding affidavit, I would have expected him to state that he is also a director of AURALITE (PTY) LTD and that he had the necessary authority to represent it in the loan negotiations and to direct how the loan amount should be paid. However, he elected to withhold these material facts which indeed would have shed light to his contention. As the matter stands, I am hardly persuaded that AURALITE (PTY) LTD was a party to the loan agreement.

I am consequently not persuaded that the applicant is entitled to rescission of judgment under rule 42(1)(a). In my view, the procedure followed when judgment by default was sought and granted cannot be faulted.

11. I now turn to deal with the issue regarding the service of summons commencing action. It was argued by the applicant that the summons did not come to its attention before judgment was granted although it was served at its registered address. It is not disputed that the applicant subsequently changed its registered address at the Companies and Intellectual Property Commission after the summons had already been served by the sheriff.

12. Rule 4(1)(a) of the uniform rules of court provides:

“4(1)(a) Service of any process of the Court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be affected by the sheriff in one or other of the following manners:

(i)...

(ii)...

(iii)...

(iv)...

(v) In the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the Court's jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business or in any manner provided by law,”

13. The sheriff's return of service of the summons commencing action reads as follows:

“On 25th day of June 2015 at 15:59 at 323 Lynwood Road, Menlo Park, being the registered address of AURALITE LED LAMPS (PTY) LTD, defendant, I duly served a copy of combined summons with all Annexures upon Mrs. Tumy Kekana (Receptionist of Shelf Company Warehouse) after the original was shown and the nature and contents thereof explained. The said person who is apparently older than sixteen years of age and apparently in charge at the given address accepted copies of the document on behalf of the defendant (rule 4(1)(a)(v))”

14. It was correctly conceded by the applicant that the summons was correctly served at the applicant's registered address before the applicant changed its address. The only issue raised by the applicant regarding service is that the summons was not brought to the attention of the applicant in time to enter an appearance to defend.

15. The service effected by the sheriff accords with rule 4(1) (a) (v). Otherwise, where else was the sheriff required to serve the summons besides at the applicant's registered address. In *Arendsnies Sweefspoor CC v Botha*⁴ Leach JA had this to say:

"(28) Essentially service at the registered address of a corporation is sufficient to amount to service on the corporation. As was correctly conceded by counsel for the appellant, as a regular practice the courts accept as effective the service of a summons upon an employee of a firm of accountants or auditors whose office is used as a corporation's registered address, but sought to distinguish those cases from the present basis of a link between the accountants or auditors and the corporation which is missing in the present case. In my view this misses the point. The importance is the fact that service at the registered address of the corporation, even if not on one of its employees, is regarded as substantial compliance with the rules."

16. The Court went on to state that:

"The Court a quo expressed the view, with which I agree, that a corporation –

'Which fails to ensure that there is a responsible person present at the premises appointed as its registered address, does so at its peril and should not be allowed to bemoan its lot should the process not come to its attention'. Be that as it may, there was substantial compliance with the rule relating to service upon a corporation, and the high court correctly dismissed the special plea."⁵

⁴ *Arendsnies Sweefspoor CC v Botha* 2013 (5) SA 399 per Leach JA

⁵ *Arendsnies Sweefspoor CC v Botha* supra at 30

17. Having made a finding that the applicant was a contracting party to the loan agreement, in my view it was obliged to advise its creditors known to it in particular the respondent of the change of its registered address, but it failed to do so. This failure has proven to be costly to the applicant. When the change of address was effected, judgment had not been entered. In all probabilities judgment by default would have been prevented had the respondent been made aware of the change registered address. The new address would have assisted the respondent to serve the notice of set down at the applicants address alerting the applicant to enter an appearance to defend.

18. The fact that the summons was properly served does not auger well for the applicant's quest for rescission of judgment under common law and the condonation application. The applicant never gave a reasonable explanation why it failed to enter an appearance to defend except merely to state that the summons did not come to its attention. I do not accept this explanation. It is not reasonable and it fails to take the Court into the Applicant's confidence. The sheriff's return of service does indicate the name of a person who received the summons at the Shelf Company yet there is no confirmatory affidavit by such person explaining how she dealt with the summons. It cannot be speculated that the summons did not come to the applicant's attention. Both parties are not ad idem in so far as this issue is concerned. The sworn statement of the person who received the summons is material and yet not before the Court.

19. I am satisfied that there was substantial compliance with rule 4(1)(a)(v) and that the court of first instance was entitled to accept the service when hearing the application for default judgment. I therefore find that there is no reasonable explanation why the applicant failed to enter an appearance to defend and why it delayed to bring the application for rescission of judgment.

20. It is common cause that the respondent paid an amount of R1,350,000.00, into the applicant's bank account as a loan. The court of first instance ordered the applicant to refund the said amount with interest. In light of the above, I find it strange that the applicant after being made aware of the judgment decided to negotiate settlement with the respondent rather than immediately launching an application for rescission of judgment. If indeed it was not a party to the loan agreement, surely there would be nothing to negotiate but to challenge the judgment. From the onset, Mr Geer is the one who negotiated for a loan and gave instructions that it be paid over to his company, the applicant. That explains why he was uncomfortable to immediately defend the action or bring an application for rescission of judgment.

21. Mr Geer states in paragraph 14 of his founding affidavit:

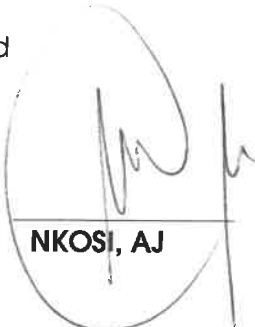
"I further pointed out to him that at no stage before summarily walking away from our "conversion to shareholding" arrangement did he make demand for delivery of the actual share certificate and as such he was not entitled to cancel the "share conversion".

This version is inconsistent with what Mr Geer stated in Annexure "AA1". He states clearly that the loan shall bear interest and at the sole discretion of the respondent be convertible into shares in AURALITE (PTY) LTD. The loan was not intended for AURALITE (PTY) LTD, but for the applicant to enable it to immediately effect payment to its subcontractors. There is no clear indication on record to persuade me that the loan was intended for and received by AURALITE (PTY) LTD.

22. I cannot therefore, agree with counsel for the applicant that the party to be sued is AURALITE (PTY) LTD and that the respondent's course of action against the applicant should be based on enrichment and not breach of contract for the reasons I mentioned in paragraph 19 above. Further, there is no supporting affidavit by AURALITE (PTY) LTD to corroborate the Applicant's version that the loan was between AURALITE (PTY) LTD and the respondent or another entity as contended by the applicant. I am not able to conclude that the application for rescission of judgment is bona fide when the applicant has not taken the Court into its confidence. The defences raised prima facie do not bear prospects of success.

23. In conclusion I find that the Applicant has failed to prove the jurisdictional facts Prescribed in Section 17 (2) (a) of The Supreme Courts Act 10 of 2013. I therefore make the following order

- i. The application for leave to appeal is dismissed
- ii. The applicant has to pay the costs.



NKOSI, AJ

DATE OF HEARING : 19 JULY 2018

DATE OF JUDGEMENT : 1 OCTOBER 2018

FOR APPLICANT : ADV U LLOTTER

Instructed By : Trevor Swartz Attorneys

FOR RESPONDENT : ADV K TSATSAWANE

Instructed By : Cliff Dekker Hofmeyer Attorneys