

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCA 15/2017

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
Signature <i>[Handwritten Signature]</i>	
Date <u>3/11/2017</u>	

In the matter between:

RAINBOW FARMS (PTY) LTD

APPELLANT

and

CROCKERY GLADSTONE FARM

RESPONDENT

JUDGMENT

MAKGOBA JP

[1] This is an appeal from a decision of a single Judge (Muller J) in the Limpopo Division, Polokwane refusing an application for the rescission of a judgment. The appeal is with leave of the Court *a quo*.

[2] The question to be decided is twofold, namely:

- 2.1. Whether the Appellant was in default despite the attendance of its Counsel in Court when judgment was granted; and
- 2.2. Whether the Appellant whose application for rescission of judgment was dismissed by single Judge of this Division had made out a case for the relief sought.

[3] The judgment sought to be rescinded was granted on 2 August 2016 when M G Phatudi J refused an adjournment sought by the Appellant's Counsel and granted judgment in the absence of any answering affidavits by the Appellant and on the Respondent's version alone.

[4] On or about June 2016 the Respondent served on the Appellant the main application. That application sought to set aside and have declared *void ab initio* the Appellant's termination of a written agreement between the parties. On 15 June 2016 the Appellant's attorneys emailed a letter to the Respondent's attorneys and informed them that the Appellant intended opposing the application. A Notice of Opposition was served and filed on 22 June 2016.

[5] On 29 July 2016 the Appellant's attorneys emailed a letter to the Respondent's attorneys proposing a method of settling the matter. Of importance in this matter the last paragraph of the said letter reads as follows:

"This offer is open for consideration for a period of seven (7) days from date of receipt hereof at which point the offer will lapse. Having regard to the fact that the application is set down for 2 August 2016, we require your undertaking, in writing, by no later than close of business today, that the matter will be adjourned sine die, alternatively adjourned to the opposed roll for argument in the event that your client is not accepting the offer, with costs reserved."

On the 1st of August 2016 the Respondent's attorneys had not yet reverted to the Appellant's attorneys.

[6] Later that afternoon and after the Appellant's attorney, Mr Avenant, had made a further enquiry about the settlement proposal, one Mr Maketa, of the Respondent's attorneys informed the Appellant's attorney that they were still attempting to contact their client to take instructions on the settlement proposals. As regards the appearance in Court the next day Mr Maketa said to Mr Avenant that the Appellant should not worry about it as it "would be sorted out". In those circumstances the Appellant's attorney believed that if the settlement proposals were not accepted by 2 August 2016, the application would be adjourned by consent.

[7] Early on the 2nd of August 2016 the Appellant's attorney called the Respondent's attorneys' office. He was given Mr Maketa's cellphone number and called it three times between the hours of 8 and 9 but it was not answered. The Appellant's attorney, acting through his correspondent attorney briefed Advocate Marc Schnehage to appear on behalf of the Appellant in order to attend to a postponement by agreement. At about 11h00 that morning the Appellant's attorney was informed by his correspondent that at the hearing in Court the Respondent had sought a judgment and had opposed an application for adjournment notwithstanding the history as set out above.

He was informed that the Presiding Judge had granted the application after refusing adjournment.

[8] It is common cause that the legal representative of the Respondent at the hearing on 2 August 2016 did not inform the Presiding Judge of all the relevant facts, in particular that settlement proposals were still pending and the fact that Mr Maketa pronounced the previous day that the matter or issue "would be sorted out". Advocate Schnehage who appeared for the Appellant on 2 August 2016 was briefed for a postponement and was not aware that there were any settlement proposals pending

[9] As a basis for its application for rescission of judgment the Appellant contends that had the Presiding Judge been properly informed by, *inter alia* the Respondent (who was obliged to do so but did not) at the hearing on 2 August 2016 of the facts and circumstances leading up to the Appellant's failure to have an answering affidavit and / or formal postponement application ready at the time and the agreement to postpone if it was not settled, he would not have granted the judgment. The Appellant furthermore contends that, despite the Appellant's Counsel (Advocate Schnehage) being present at Court on 2 August 2016 the judgment was by default in the sense that it was granted

despite a notice of intention to oppose but in the absence of any evidence by way of the Appellant's answering affidavit.

[10] The Court *a quo* decided that the judgment was not a judgment taken on default of appearance by the Appellant. It did so on the basis that the Appellant's Counsel was present in Court when the Order was made. The Court *a quo* erred in this regard. This matter was an application and the presence or absence of a party can only be determined by whether that party has submitted affidavits or not. The presence of the actual party and / or Counsel in Court is irrelevant to that issue. In the absence of any affidavits (bearing in mind that there is no option available for the party to testify at such a hearing) it is logical to conclude that that party is in default of appearance when the Order was made notwithstanding that Counsel may have been in Court.

[11] In my view where opposing papers have not been filed there is a "default" even if the Respondent in the matter or his legal representative is present in Court. See: **Morris v Autoquip (Pty) Ltd 1985 (4) SA 398 (WLD); First National Bank of SA Ltd v Myburgh and Another 2002 (4) SA 176 (CPD).**

[12] The question of what is meant by “default” was considered in **Katritsis v De Macedo 1966 (1) SA 613 (A)**. In this matter the Appellate Division (as it then was) held that “default” which then as is the case now is not defined in the Rules or the Act, meant a default in relation to filing the necessary documents required by the Rules in opposition to the claim. *In casu* the judgment was granted in the absence of an opposing affidavit by the Appellant and was therefore a “default judgment” even if it was not a default in the sense of the absence of the party.

[13] Rule 31(2)(b) of the Uniform Rules of Court provides that a party against whom default judgment has been granted may, within 20 days after he or she has knowledge of the default judgment, apply to Court to set it aside. The Court may, on good cause shown, set that judgment aside. It is established law that Courts generally require an applicant for rescission of judgment to show good cause by

- (a) giving a reasonable explanation for the default;
- (b) showing that his / her / its application for rescission is made *bona fide* and not made merely with the intention to delay the Plaintiff’s claim; and
- (c) showing that he / she / it has a *bona fide* defence to the Plaintiff’s claim which *prima facie* has some prospect of success.

See: **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills**
(Cape) 2003 (6) SA 1 (SCA) at 9E – F.

Regarding the last-mentioned requirement, it is trite law that an Applicant for rescission of judgment is not required to illustrate a probability of success, but rather the existence of an issue fit for trial.

See: **Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd 1980**
(4) SA 573 (W) at 575H – 576A – D.

[14] The common law requires “sufficient cause” to be shown before a default judgment may be set aside. Rule 31(2)(b) of the Uniform Rules of Court requires “good cause” to be established before the rescission of a default judgment may be granted. The phrases “good cause” and “sufficient cause” are synonymous and interchangeable. See: **Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352H – 353A.**

[15] A default judgment may also be set aside in terms of Rule 42(1) of the Uniform Rules, the relevant part of which provides:

“(1) The Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby..... ”

- [16] In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment.

See: **Nyingwa v Moolman NO 1993 (2) SA 508 (TK)**

If fraud is committed, that is if the facts are deliberately misrepresented to the Court, the order will also be erroneously granted.

- [17] In the present case the Appellant was in default in the sense that it had not presented its opposing affidavit before M G Phatudi J. Its defence had also not been presented by way of affidavit or oral evidence and the learned Judge therefore granted judgment without having had the opportunity of considering the merits of the case. This Court must therefore in this appeal decide whether there was an error that induced the learned Judge to grant the default judgment on 2 August 2016.

- [18] As far as Rule 42 is concerned, all what the Court *a quo* had to find was that the Order was erroneously sought and granted. "Good cause" does not have to be shown. See: **Naidoo v Somai 2011 (1) SA 219 (KZN) at 220F – G; Topol Group Management Services (Pty) Ltd 1988 (1) SA 639 (W) at 650D – J.**

- [19] The initial judgment of 2 August 2016 was granted pursuant to the refusal of the postponement which left only the Respondent's version before M G Phatudi J. The refusal of the postponement was granted because of certain facts placed before MG Phatudi by the Respondent's Counsel which were wrong and incomplete in that what was discussed and agreed upon by the parties' legal representatives the previous day was not disclosed to the Court.
- [20] The real facts were that on 1 August 2016 the Respondent's and the Appellant's attorneys talked and the Respondent's attorney told the Appellant's attorney that they were still attempting to contact their client to take instructions on the settlement proposals. As regards the appearance the next day Respondent's attorney told Appellant's attorney not to worry as it would be sorted out. That however, was not conveyed to M G Phatudi J at the time of the hearing.
- [21] I accordingly make a finding that had the real and true facts been disclosed or given to M G Phatudi J, the learned Judge would not have granted default judgment in the circumstances. The Court *a quo* should have found that the default judgment was granted erroneously or by mistake common to the parties. The appeal should therefore succeed.

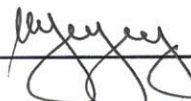
[22] I grant the following orders:

- (a) The appeal is upheld.
- (b) The judgment granted before this Court by MG Phatudi J in case number 1395/2016 on 2 August 2016 is hereby set aside.
- (c) The Appellant (Respondent in the main application) is directed to deliver its answering affidavit to the main application within 10 (ten) days of the Order set out above.
- (d) The Respondent herein pays the costs of the rescission application, the application for leave to appeal and this appeal.



E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

I agree,



M F KGANYAGO
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

I agree,



M S SIKHWARI
ACTING JUDGE OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE

APPEARANCES

Heard on : 27 October 2017

Judgment Delivered : 07 November 2017

For Appellant : Adv. Pitman

**Instructed by : Eversheds Sutherland Inc
c/o Marnewick & Greyling Attorneys
Polokwane**

For Respondent : Adv. M E Manala

**Instructed by : Mahowa Incorporated
Polokwane**