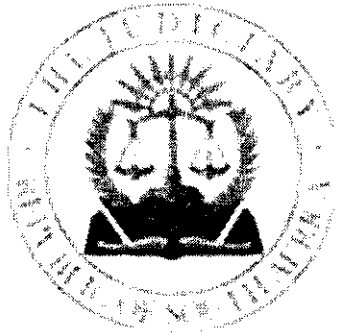


REPUBLIC OF SOUTH AFRICA



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

Case no: 22501/2014

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: NO

(1) OF INTEREST TO OTHERS JUDGES: NO

(2) REVISED

28 March 2017

DATE

SIGNATURE

In the matter between:

AVENTE MINERAL RECLAIMERS CC

APPLICANT

AND

JUST COAL KENDAL CC

RESPONDENT

Heard: 05 December 2016

Delivered: 28 March 2017

JUDGMENT

Molahlehi J

Introduction

- [1] This is an application to rescind the summary judgment made by this court on 5 August 2014, in terms of which the applicant was required to pay the respondent the amounts of R2 874 038 .27 and R272 046.03 with the prescribed interest rate. The summary judgment was made in default of the applicant.
- [2] The respondent has applied for condonation for the late filing of its answering affidavit. Considering all the relevant factors and taking into account the interest of justice I see no reason why condonation should not be granted.
- [3] The dispute between the parties arose from a credit facility which the respondent had granted to the applicant during January 2014.
- [4] On 18 March 2014 the respondent issued summons against the applicant and thereafter filed the application for the summary judgment on 14 April 2014.
- [5] The first issue in this matter is whether the application for summary judgment was served on the applicant and if so, has the applicant provided a satisfactory explanation for the default in opposing that application.
- [6] The attorney of record of the applicant was Mr Saleem Ebrahim, practising as such in Johannesburg. It was for this reason that a correspondent based in Pretoria was appointed

as the proceedings were instituted in that jurisdiction. The correspondent attorney was Linky Schutte Inc (Linky Schutte)

[7] The reasons for not opposing the summary judgment are set out in the applicant's founding affidavit as follows:

"14. This document was never brought to my attorney of record and appears to have been misplaced, alternatively misfiled, alternatively, never received. I pause to point out that there is a very likely possibility that the document was emailed to my attorney of record but never received as my attorney of record's IT infrastructure was overhauled entirely during the latter part of the second week of April 2014. Their entire IT was upgraded including all computers and laptops in order to make their offices more efficient and to upgrade their internet facilities, as well as migration to a new Legal Operating System, namely "Legal Suite". I am advised which advice I accept as correct that during the period of the upgrade of their IT infrastructure that numerous "teething" problems were experienced and several emails were never received on various matters."

- [8] According to the applicant it did not oppose the summary judgment because it was not aware of the application, otherwise, it would have opposed it. It states in its founding affidavit that it became aware of the summary judgment on 29 September 2014, when so informed by the respondent's attorneys.
- [9] In relation to the issue of a *bona fide* defence, the applicant states that it had encountered problems with the respondent's account's department, which included incorrect pricing and failure to allocate payment timeously. It is further stated that the respondent was aware that the applicant disputed the amount alleged to be owing.

Evaluation

- [10] It is trite that in order to succeed in an application for rescission the applicant needs to show good cause. The requirements for good cause are the following; (a) a reasonable explanation for the default; (b) brought on *bona fide* grounds and; (c) the applicant has *bona fide* defence.
- [11] In the present matter it is not disputed that the application for summary judgment was served on the applicant's attorney of record on 14 April 2014 via the Pretoria correspondent.

- [12] The explanation of Mr Wilking, the deponent to the founding affidavit, can be summarised as follows; "(the application) appears to have been misplaced, alternatively misfiled, alternatively, never received."
- [13] In my view the explanation by Mr Wilking is highly speculative and is not based on facts as to what happened to the application for summary judgment which was served on Linky Schutte. It has not been disputed that the application was served on the correspondent in Pretoria. There is no evidence dealing with this fact in the founding affidavit.
- [14] The explanation of Mr Ebrahim, the attorney of record of the applicant, which is set out in the confirmatory affidavit is that he experienced problems in receiving emails during April 2014. Whilst this has not been disputed and may be accepted as a fact, it does not, however, deal with what happened at Linky Schutte's office once the service was effected. It has to be noted that this was the office chosen for service by the applicant.
- [15] There is no evidence in the founding affidavit that upon receipt of the service Linky Schutte forwarded the same to Mr Ebrahim. There is also no confirmatory affidavit attached to the founding affidavit from Linky Schutte.

- [16] In my view, the only reasonable inference that can be drawn from the above is that upon receipt of the application for the summary judgment, Linky Schutte sat back and did nothing. The issue that then arises from this inference is whether the applicant, as client, should take responsibility for the inaction or negligence of Linky Schutte.
- [17] Whilst accepting that a client should not suffer as a result of the inaction or negligence of his/her attorney, it is not enough for the client to blame the attorney and hope for the indulgence by the court. In this context the client in seeking the indulgence of the court has to make out a case for such indulgence.
- [18] It is trite that there is a limit beyond which a litigant cannot escape the results of his/her attorney's lack of diligence or insufficiency. This approach is based on the basic principle that clients choose their legal representatives and so an innocent party should not be prejudiced by the choice he or she had no say or control over. The approach to be adopted when dealing with a client that blames his or her attorney for failure to comply with the rules or the law was set out in **Saloojee and Another NNO v Minister of Community Development**,¹ as follows:

¹ 1965 (2) SA 135 (A) at P136

"To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordian* should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of the failure to comply with the Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

- [19] The other reason why the court would in general not readily indulge in a situation such as the present is that the applicant is not without a remedy. A remedy lies against the negligent attorney.

[20] It is important to note that in the present matter there is no application for the condonation of the tardiness of Linky Schutte.

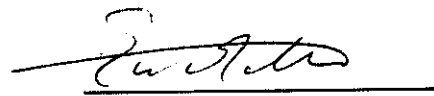
[21] In my view, even if the above was to be found to be incorrect the application would still fail on the ground that the applicant has not made out a case for a *bona fide* defence. In this respect not only does Mr Wilking fail to attach the summons of the respondent to his founding affidavit but also, that does not feature in the applicant's papers. This creates a difficulty for the court in evaluating whether a *bona fide* defence justifying the rescission of the summary judgment exist.

[22] The second defence raised in the heads of argument on behalf of the applicant is that, whilst accepting that it owes money to the respondent it was not all that which appears in the summons. This does not assist the applicant's case as it is a trite principle of our law that the applicant has to make out its case in the founding affidavit and further that the applicant stands or fall by what is stated therein. The authorities are also in agreement that the applicant who fails to make out a case in the founding affidavit is not entitled to the relief sought in the notice of motion.

[23] In my view, there is no basis to consider the two defences raised by the applicant in its heads of argument. It thus follows from the above reasons that the applicant's rescission application stands to fail.

Order

[24] In the premises the applicant's application is dismissed with costs.



E.M Molahlehi

Judge Gauteng High

Court: Johannesburg

APPEARANCES

APPLICANT: Adv A Rawhani

Instructed by Mboweni Attorneys

RESPONDENT: Adv K Hopkins

Instructed by Haasbroek & Boezaart Inc.