

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



CASE NO: 32806/2014

DATE OF HEARING: 13 MAY 2015

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| (1) | <u>REPORTABLE: YES / NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES: YES/NO</u> |
| (3) | <u>REVISED.</u> |

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DATE

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SIGNATURE

In the matter between:

VUNENE MINING (PTY) LTD

Applicant

and

VB MINERALS (PTY) LTD

Respondent

In Re:

VB MINERALS (PTY) LTD

Plaintiff

and

VUNENE MINING (PTY) LTD

Defendant

J U D G M E N T

AVVAKOUMIDES, AJ

1. The applicant is the defendant in the main action between the parties, against whom default judgment was granted against it by the registrar of this court in the sum of R4 621 140.07 together with interest and costs.
2. The plaintiff issued summons against the defendant for payment in the sum of R4 621 140.07 being in respect of mining services rendered in terms of a written contract. The plaintiff's claim is based on the alleged breach of this contract. The plaintiff's claim, despite being based on the breach of the contract, is also alleged to be based upon a partly written and partly oral agreement in the particulars of claim. Furthermore the plaintiff relies on express alternatively tacit, further alternatively implied terms of the contract, the terms of the latter two which are not evident in the particulars of claim.
3. In any event the contract relied upon by the plaintiff contains a so called non-variation clause, which prohibits the amendment of the agreement without it being reduced to writing and signed by the parties thereto. Thus, in the absence of pleading the implied or tacit terms of an oral agreement, one cannot rely on such terms.
4. The applicant chose its domicilium address in the contract which coincided with the applicant's registered office address as well. The summons was served on this address and the sheriff's return of service indicates that the summons was affixed to the principal door of the address for service. It is common cause that this address is also

the address of the controlling shareholder in and to the applicant company.

5. The applicant alleges that at the time of the service of the summons, namely 21 May 2014, the applicant had already moved its business operations from the said address and consequently did not receive the summons on the date of service thereof. The applicant says that it only became aware of the summons and default judgment on when the sheriff attached the applicant's banking account and upon the applicant's bank manager contacting the applicant's representative.
6. The applicant alleges that it had given instructions to its attorneys to change the registered office address during August or September 2013 but this had been delayed. The respondent on the other hand argued that the applicant had chosen its domicile address in the contract and it was bound to this address and nothing more could be expected of the respondent to do, when serving the summons.
7. Whilst this may be true the summons issued by the respondent does not rely on a domicile address but rather the registered office address of the applicant. The mere fact that both these addresses are the same does not necessarily mean the same thing. The respondent says that because this address was the domicile address the respondent acted properly and if the applicant did not receive the summons it is not the fault of the respondent. This argument is rather misplaced under the circumstances. In order for the applicant to

succeed with the rescission it must overcome two hurdles, namely to give a reasonable explanation for not having reacted to the summons and secondly to set out a *bona fide* defence to the respondent's claim.

8. On the facts before me and with due regard to the learned author Harms – Civil Procedure in the Civil Superior Courts at paragraph B31.11 and the case of *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 D & CLD I cannot find that the applicant was in wilful default. In the latter case it was held that despite gross negligence by the party's legal representatives, this was not fatal to the application.
9. In my view it is frankly irrelevant whether the summons was served at the correct address. The issue is really whether the applicant received the summons or not and if so, what the applicant did about the summons. The respondent was not able show that the applicant had indeed known of the service of the summons. The respondent argued that because the controlling shareholder occupied the same building at the same address as the applicant's registered office address and domicilium address, I must accept that such shareholder would have received the summons and drawn the applicant's attention to the summons. This argument is also with respect, misplaced.
10. The applicant argued that it was common cause on the papers that the respondent was aware that the applicant's operations had moved from

the said address at the time of service of the summons, and this being the case, I do not believe that there is any merit to further delve into whether there was wilful default on the part of the applicant. I am satisfied that the applicant has overcome this hurdle on the facts before me.

11. The second requirement for the applicant to show that it has a bona fide defence to the respondent's claim.
12. The applicant alleges that the contract was concluded on the premise that the respondent's principal "*is in the business of providing project management consulting services to the mining industry*" and "*has all the necessary expertise to provide such services.....*". The responsibilities, duties and the like are detailed in the contract. The parties submitted that it was common cause that the respondent's principal member would, in the course of rendering services to the applicant, also undergo certain training in the particular industry.
13. The applicant submitted that the contract and the conclusion thereof is suspect because, as it turned out, the respondent's principal member had no experience in the particular industry and the applicant suspects that it was fraudulently concluded alternatively inappropriately. In either event the applicant is of the view that it could cancel the contract, which it did in terms of a letter dated 31 March 2014 whilst relying on clauses 1.2 and 9.2 of the contract.

14. The respondent submitted that because the applicant had in fact paid the respondent for services rendered from the date of conclusion of the contract to the date of cancellation, the applicant should be estopped from relying on the absence of expertise on the part of the respondent's principal member. At this stage of the proceedings there can be no mention of estoppel. This is something the respondent would have to canvass at trial stage and of course, plead estoppel.
15. On the facts before me and having had sight of the default judgment application it is firstly inconceivable how the registrar could have arrived at the claim amount without any supporting documentation to show calculation thereof, and secondly the default judgment so granted by the registrar goes further than to merely grant default judgment. The remaining prayers of the judgment are declaratory in nature and the registrar does not possess the authority to have made such an order.
16. In the circumstances I am satisfied that the applicant has set out a *bona defence* and has made out a case for rescission the default judgment. I was advised by counsel for both parties that when the sheriff attached the applicant's banking account, the applicant had set security in order to prevent the sheriff from continuing with the execution steps. Such security was set by paying the whole claim amount into the trust account of the respondent's attorneys of record

and Mr Engelbrecht SC confirmed that such amount has been invested in accordance with the provision of section 78 2 A of the Attorneys Act.

17. On the question of costs the applicant submitted that the opposition of the application was frivolous and unreasonable. Again on the facts before me, and in particular having regard to the allegations made by the respondent regarding the alleged wilful default and the absence of a *bona fide* defence, I am of the view that the opposition of the application was indeed unreasonable.

18. I accordingly make the following order:

18.1 The default judgment granted against the applicant under case number 32806/2014 on 6 August 2014 is hereby rescinded.

18.2 All warrants/writs of execution issued pursuant to the default judgment are hereby set aside.

18.3 The security set by the applicant in the sum of R4 621 140.07 plus all accrued interest on the investment in terms of section 78 2 A of the Attorneys Act shall be repaid by the respondent and/or its attorneys of record to the applicant within 7 days of the date of this judgment.

18.4 The applicant is ordered to file its plea within 10 days of the date of this order.

18.5 The respondent is ordered to pay the costs of this application.

AVVAKOUMIDES, AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Representation for Applicant:

Counsel Adv: J. D. Maritz

Instructed by: Nelson Borman Attorneys

Representation for the Respondent:

Counsel Adv: J. Engelbrecht SC

Adv S. S. Green

Instructed by Van Antwerp Attorneys