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

22/7/14

**CASE NO: 28866/2014**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

22/07/15

DATE SIGNATURE

In the matter between:

**TRAVELEX LIMITED** **Applicant**

and

**SEAN MALONEY** **First Respondent**

**GILLIAN MALONEY** **Second Respondent**

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JUDGMENT

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TEFFO, J:

[1] On 19 November 2013 the respondent obtained an order in this court in terms of which shares owned and registered in the name of the applicant in FX Africa Foreign Exchange (Pty) Ltd ("FX Africa") were attached *ad*

*fundandam et confirmandem jurisdictionem* an action which the respondent intended bringing against the applicant for damages for the alleged repudiation of a contract between the parties in the sum of R33 800 00,00 interest thereon and costs of suit.

[2] The order was granted in the form of a rule nisi returnable on 6 February 2014 and the applicant was given leave to anticipate the return date so ordered upon 48 hours' notice in writing to the respondents' attorneys of record.

[3] On 6 February 2014 the rule nisi was confirmed.

[4] The applicant now seeks an order setting aside the attachment order granted on 19 November 2013 under case number 69578/2013.

[5] It also seeks an order directing the respondents forthwith to deliver to it its shares in FX Africa and that the action instituted by the respondents in this court under case number 76041/2013 pursuant to the attachment of the shares in FX Africa be set aside ("the action")

[6] In the alternative it seeks an order directing that the action be stayed pending the final determination of any arbitration proceedings commenced by the respondents in terms of clause 17 of the agreement concluded between it and the respondents on 8 December 2010.

[7] The applicant bases this application on the following grounds:

7.1 This court did not have jurisdiction to attach the shares in question and or authorise the institution of an action pursuant to such attachment;

7.2 In paragraph 8.3 of the respondents' founding affidavit in their application for the attachment of its shares ("the previous application") they contended that in terms of clause 17.2 read with clause 17.1 of the agreement "any party to the agreement is entitled to require any dispute arising from or in connection with the sales agreement to be determined by arbitration in accordance with the Rules of the Arbitration Foundation of Southern Africa (" AFSA") by an Arbitrator";

7.3 Clause 17 of the agreement entitled "arbitration" indicates that this allegation in the respondents' previous application was a misrepresentation of its true effect as clause 17.2 of the agreement did not afford the parties an election to proceed either by way of an action in the High Court or by way of arbitration;

7.4 Clause 17.1 of the agreement provides as follows:

*"Any dispute arising from or in connection with its agreement shall be finally resolved in accordance with the Rules of AFSA by an arbitrator or arbitrators appointed by AFSA."*

7.5 Clause 17.3 and 17.5 further provides that notwithstanding the referral of any dispute to arbitration, it remained open to any party to the agreement to approach the South Gauteng High Court, Johannesburg for interim relief on an urgent basis pending the decision of the arbitrator;

7.6 It contends that the entitlement to require any dispute to be determined by arbitration as recorded in clause 17.2 of the agreement and relied upon by the respondents in paragraph 8.3 of their founding affidavit in their previous application was peremptory;

7.7 According to it clause 17 constitutes a written submission by the applicant to arbitration proceeding in respect of any dispute arising from or in connection there with and to the extent set out in clause 17.3, to the jurisdiction of the South Gauteng High Court, Johannesburg.

7.8 It further referred to clause 17.7 of the agreement which provides that the provisions of clause 17 constitute an irrevocable consent to any proceedings in terms hereof.

7.9 It further contends that the attachment of its shares in FX Africa is not competent in law.

7.10 The applicant further contends that because according to it the order of attachment granted on 19 November 2013 was incompetent in law, it follows that this court does not have jurisdiction to entertain the action which was improperly commenced. It also contended that the shares it has in FX Africa which forms the subject matter of this application should forthwith be delivered to it.

7.11 The applicant also challenged the previous application on the basis that the facts relied thereon as the respondents' cause of action were not established on the papers.

7.12 The applicant is a company with limited liability incorporated and registered in accordance with the company laws of England and Wales. The first respondent is a businessman of Claremont, Cape Town while the second respondent is a female person of Constantia, Western Cape. The parties concluded a contract of sale for the purchase of shares in Cape Town.

[8] The application is opposed.

[9] The respondents raised points *in limines* to the application which I deal with hereunder: –

9.1 As regard the relief sought in paragraph 4 of the application, the respondents contend that the applicant should have raised a special plea of arbitration in order to stay the proceedings and object to them further proceeding with the action they have instituted against the applicant under case number 76041/2014.

9.2 They contend that the applicant has not applied for rescission of the order granted on 19 November 2013 and confirmed on 6 February 2014 under 69578/2013 but chose to bring an application for setting aside the attachment order.

9.3 It was also contended that the applicant chose not to oppose the granting of the order obtained on 19 November 2013 and its confirmation on 6 February 2014 after it was given ample opportunity to do so by the presiding judge who ordered that the *ex parte* application be served on the applicant before he could hear it and even stood the matter down on 19 November 2013 to afford the applicant's attorneys an opportunity to be notified that the matter was being heard on that day. A *rule nisi* was also granted on 19 November 2013 which was returnable after two months on 6 February 2014.

9.4 It was submitted on behalf of the respondents that an order of court once made, cannot simply be set aside. It can only be rescinded in appropriate circumstances. The respondents contend that the applicant should have proceeded in terms of rule 42 of the Uniform Rules of Court or in terms of common law to rescind the order that was granted on 19 November 2013.

9.5 The respondent also contended that the fact that the applicant failed to oppose the previous application despite being notified about it and having sent its counsel to court during the hearing of the application, shows that it has conceded to the order and has thus waived its right to challenge the order and by reason of its consent to the granting of the order and confirmation thereof, it is estopped from doing so.

9.6 The respondents further contend that no averments and facts have been set out in the application to the effect that the order of 19 November 2013 was erroneously sought or granted in its absence, or that there is an ambiguity, or a patent error or omission in the order or that the order was the result of a mistake common to the parties.

9.7 As regards the question whether the application is a rescission application under common law, the respondents contend that in terms of paragraph 54 of Birch's founding affidavit it was only on 4 April 2014 that the cause of action upon which it relies for contending that it did not oppose the attachment application, arose (the fact that its previous attorneys gave it erroneous advice not to oppose the application). It was submitted that the application made for the main relief set out in paragraph 1 to 3 of its notice of motion in so far as it is based on common law, lacks averments necessary to sustain a cause action for the rescission of the order granted on 19 November 2013 because on its own papers the applicant became aware of the alleged erroneous advice only after 6 February 2014 and 19 November 2013.

[10] In ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 6 SA 1 (SCA)** it was held that under the common law judgment was final once given. The court went on to say the following: –

> *"Since the Judge became functus officio he or she could not thereafter alter or rescind the judgment. There were exceptions to this rule:*
>
> *(1) rescission was permissible where the judgment had been obtained by fraud or, exceptionally, justus error;*
>
> *(2) rescission of a default judgment was possible where the party in default was able to show sufficient cause, and (3) judgments could in certain circumstances be corrected, altered or supplemented (these were conveniently summarised in* ***Firestone South Afica (Pty) Ltd v Genticuro AG 1977 4 SA 298 (A) 306H - 308A.*** *There also existed an exceptional procedure under the common law which allowed a court to recall its order immediately after having given it, or within a reasonable time thereof, either mero motu or on the application of a party."*

[11] The court in the *Colyn* matter *supra* further held that it was against this background that Rule 42 of the Uniform Rules of Court, which catered for mistakes by granting the court a judicial discretion to vary or rescind orders and judgments, was introduced. Rule 42 was confined, the court held, 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)]; 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)].

[12] The court in ***Chetty v Law Society, Transvaal*** **1985 2 SA 756 (A)** said the following:

> *"In terms of common law, the court has power to rescind a judgment obtained on default of appearance provided sufficient cause therefor has been shown. The term 'sufficient cause' defies precise or comprehensive definition but it is clear that in principle and in the long-standing practice of our courts two essential elements thereof are: (1) that the party seeking relief must present a reasonable and acceptable explanation for his default and (2) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success. It is not sufficient if only one of these requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment granted against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had a reasonable prospect of success on the merits. It may be that in certain circumstances, when the question of sufficiency or otherwise of a defendant's explanation for his being in default is finely balanced, the circumstances that his proposed defence*

*carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. But this is not to say that the stronger the prospects of success the more indulgently will the court regard the explanation of his default."*

[13] It is common cause between the parties that the order dated 19 November 2013 and confirmed on 6 February 2014 which the applicant seeks to set aside, was brought *ex parte*. It is further common cause between the parties that prior to the attachment application being heard, the presiding judge insisted on the application being served on the applicant. The application was served on the applicant's attorneys who also communicated their acknowledgment of receipt of the application to the respondent's attorneys. The applicant's attorneys did not oppose the application and on 19 November 2013 the presiding judge stood the matter down to allow the applicant's attorneys to be notified that the court was hearing the application. At that time the applicant's counsel was present in court and the matter proceeded without any opposition.

[14] The court still issued a rule nisi returnable on 6 February 2014 and the applicant was granted leave to anticipate the return date upon 48 hours' notice in writing to the respondents' attorneys of record. The applicant did nothing and on 6 February 2014 the rule nisi was confirmed. Two months after confirmation of the rule nisi the applicant launched this application for the setting aside of the order on the ground that it was not competent in law and that the court does not have jurisdiction to entertain the action instituted against it by the respondents. It contends that it was

erroneously advised by its previous attorneys not to oppose the application.

[15] It is strange and unusual that the applicant did not oppose the application when it had the opportunity to do same. Its counsel was in court when the order of 19 November 2013 and confirmed on 6 February 2014 was obtained. The applicant was served with the application but decided not to oppose it. It now challenges the order that was granted without its opposition. After being confronted with a contention by the respondents that the application does not meet the requirements of rescission under Rule 42 of the Uniform Rules of Court and common law, the applicant contended in paragraph 20 of its replying affidavit that its application is not one for rescission in terms of common law but one on the basis that the court always has an inherent discretion and power to rectify the consequence of an order which never should have been issued in law. On the other hand while disputing that the basis of the application is the knowledge of the correctness or otherwise of the legal advice, the applicant contends that the application could be considered to be one as contemplated in Rule 42(1)(a) and/or (c) in that according to it, it was erroneously sought and/or that all the parties were mistaken as to the true legal position.

[16] It is trite that a judgment once given, was final. It cannot just simply be set aside. I have referred *supra* to instances when judgments or court orders can be altered or rescinded. Rescission was permissible under common law where judgment was obtained by fraud or exceptionally justus error. (***Colyn v Tiger Food Industries Ltd supra***) There is no

allegation in the papers that the order of 19 November 2013 was obtained fraudulently or under justus error. Further to the above rescission of a default judgment was possible where the party in default was able to show cause and the word "cause" has been defined in the *Chetty* matter *supra* as referring to two essential requirements, namely, (1) that the party seeking relief must present a reasonable and acceptable explanation for his default and (2) that on the merits that such party has a *bona fide* defence which, *prima facie* carries some prospect of success.

[17] It is clear from the papers that the applicant does not seek a rescission of the order of 19 November 2013. It seeks the setting aside of the order. For the applicant now to come in the back door and contend that the application could be considered as an application for rescission under rule 42(1)(a) and (c) of the Uniform Rules of Court is neither here nor there.

[18] The explanation given by the applicant for its failure to file its opposing papers in the attachment application as well as its non-appearance at court when the matter was heard is that its previous attorneys of record advised it that there was no basis in law upon which the attachment order could be successfully opposed. This advice is now according to its present attorneys of record erroneous. The applicant should have come to court and presented its case for the court to determine whether that advice was correct or not. It failed to attend court. The applicant is not entitled to the inherent discretionary powers of the court to correct a so-called defective order. It cannot be heard afterwards while it did not want to be heard when the opportunity was granted to it. It was aware of the relief

sought by the respondents and chose not to oppose it. It decided to waive its rights by not opposing the application. I agree with the respondents' contention that the applicant should be estopped from challenging the order of 19 November 2013. The applicant took the risk of an adverse order taken against it.

[19] Nowhere in the papers is there any averment that both parties laboured under a misapprehension as to the correct legal position. If that was the case the respondents would not have proceeded to obtain the order sought to be set aside by the applicant.

[20] I find the explanation given by the applicant for not opposing the attachment application not satisfactory, unacceptable and unreasonable (***Colyn v Tiger Food Industries Ltd***). I also find that the reasons given are disingenuous and cannot subsume the wilful default which was blatant. The applicant had ample opportunity to oppose the attachment application. Its actions were reckless and in wilful disregard of court rules and processes. The applicant was in reckless wilful default. The explanation thereof cannot be *bona fide*.

[21] I further do not find any averments in the application that satisfies the requirements of a rescission either under common law or under rule 42 of the Uniform Rules of Court. The application does not also meet the requisites referred to *supra* in the *Chetty* and the *Colyn* matters. It therefore falls to be dismissed with costs which include costs attendant upon the employment of two counsels.

[22] In the result I make the following order: –

22.1 The application is dismissed with costs which costs include costs attendant upon the employment of two counsels.

**M J TEFFO**
**JUDGE OF THE HIGH COURT**
**(GAUTENG DIVISION, PRETORIA)**

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| COUNSEL FOR THE APPLICANT | M J Fitzgerald SC |
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| COUNSEL FOR THE RESPONDENTS | R A Brusser SC & I Bremridge |
| INSTRUCTED BY | Ward Ward & Pienaar Attorneys |
| DATE HEARD | 4 NOVEMBER 2014 |
| DATE OF JUDGMENT | 22 JULY 2015 |