

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

11/8/15

CASE NO: 8229/2013

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
(4)	Signature: <i>[Signature]</i> Date: 11/08/2015

THE MINISTER OF SAFETY AND SECURITY

APPLICANT

and

EXPLORATION OMEGA COMPANY (PTY) LTD
DEFENDANT

RESPONDENT

JUDGMENT

KHUMALO J

[1] The Applicant in this matter is seeking an order rescinding and setting aside a judgment in an amount of R10 120 000 (Ten Thousand One Hundred and Twenty Thousand Rand), a portion of a claim granted by De Vries AJ (as he was then) on 21 August 2013 by default, in an action (main action) instituted by the Respondent (as the Plaintiff) against the Applicant, the Minister of Safety and Security, (as Defendant), for a loss the former suffered when its mining machinery and equipment that was located at an exploration site in Kalong, Taung ("the site") was burnt and damaged during incidents of violence ("incidents") perpetrated by certain members of the Taung community ("community") in the period March – June 2011.

[2] The Respondent cited the Applicant as Defendant in the main action in his capacity as the Minister, representative of the South African Police Service ("SAPS"), allegedly responsible for their actions.

[3] In its particulars, the Respondent claimed payment for the following:

[3.1]	loss of income and production costs	R51 381,520.00
[3.2]	costs incurred in applying for an interdict to stop the perpetrators of violence	R 550,000.00
[3.3]	costs of repairs to its front loader (JCB)	R 150,000.00
[3.4]	loss on machines and equipment damaged	R11 440,000.00

[4] De vries AJ postponed the claim in [3.1] for hearing of oral evidence and refused judgment on claims [3.2] and [3.3] on the ground that the amount in [3.2] was already decided upon in the interdict proceedings that Respondent brought against certain individuals alleged to have been involved in these incidents, whilst the amount in [3.3] was a part of the amount claimed in [3.4]. Judgment was granted on the latter claim [3.4] in the amount of R10 120 000.00 (Ten Million One Hundrend and Twenty Thousand Rand), a portion of the amount claimed. The rescission application is only in respect of the portion of the claim that was granted.

Factual background

[5] The Respondent is a community based mining company which was at the time appointed by Taung Giant Diamond Miners (Pty) Ltd ("TGDM"), the holder of a prospecting licence issued in terms of s 17 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA"), to conduct prospecting operations as a contractor at the site.

[6] Certain members of the Taung community were opposed to the exploration operations conducted on site. As soon as the Respondent moved its machinery and equipment on site in March 2011 to begin the operations, these members started orchestrating incidents of violence, disrupting the operations and damaging the machinery and equipment on site and at the Tribal Council offices in Taung.

[7] On the occurrence of the incident when Respondent's machinery and equipment were burnt members of the South African Police Service ("the police") at Taung police station were alerted by the Respondent about the threats of violence and also when the community marched to the site and started burning the machines and equipment and disrupting the Respondent's operations. The Respondent alleges that the police failed through negligence or wrongful actions, corrupt or knowingly omissions, to take steps in time or at all to prevent the violence, ignoring its calls for protection of its assets, employees and interests. The Respondent claims to have as a result suffered a loss as claimed in its particulars as the owner or alternatively the carrier of the risk on the machinery and equipment which loss also included income from involuntary stoppages because it was unable to continue with exploration activities after the damages.

[8] Further, the Respondent alleged that at all relevant time the officers were executing their duties in the course and scope of their employment with the SAPS for which the Applicant is responsible, therefore vicariously liable for their actions.

[9] On 21 November 2012, the sheriff on behalf of the Respondent, served upon the Applicant a Notice in terms of s 3 (4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2000 ("Act 40 of 2000") at its offices situated at 7th floor

Wachthuis, in Pretoria and on 8 February 2013 a summons at the offices of the State Attorney in Pretoria. Subsequently, on 30 July 2013 it served the Notice of Application for default judgment at Applicant's office in Wachthuis on one Ms Munyai from Legal Services. The Applicant failed to respond to the Notice letter, neither did it enter an appearance to defend nor did it respond or file a notice to oppose the default judgment Application.

[10] The Applicant alleges to have brought its Application in terms of s 42 (1) (a) on the basis that the judgment/order that was granted was erroneously sought in its absence and also in terms of Rule 31 (2) (b), claiming to have shown good cause by giving a reasonable explanation of its default and a bona fide defence, as well as in terms of the common law.

[11] It then before dealing with the merits raised the following *in limine* defences alleged to have resulted in the granting of the judgment erroneously that:

[11.1] this court had no jurisdiction to deal with the matter, as the incidents that gave rise to the Respondent's claim occurred in Taung, which area falls under the territorial jurisdiction of the Northwest High Court.

[11.2] the Respondent failed to comply with the provisions of s 3 (2) of Act 40 of 2000 as its cause of action is based on incidents that occurred between March and June 2011, when its Notice letter in terms of s 3 (2) of Act 40 of 2000 ("the notice") was only served on the National Commissioner on 21 November 2012, in access of the mandatory statutory period of (six) 6 months, without consent. The Respondent did not apply for condonation of the late service of the notice when applying for the default judgment. It suffered prejudice.

[11.3] the affidavits in support of the Application for default judgment upon which judgment was granted were not attested to by a Commissioner of Oaths. As they were crucial for determining liability and quantum in the default judgment application, the granting of judgment was therefore not based on evidence under oath.

[11.4] alternatively, the various claims sued upon by the Respondent are not for a debt or a liquidated demand therefore evidence should have been led to prove the illiquid claims prior to granting of the default judgment. The affidavit of Frederick Johannes Kriel that is filed by the Respondent in support of its claims does not prove any liability on the Applicant's employees on all the claims set out in the summons which are by their very nature illiquid.

[11.5] As a result the Applicant contends that in actual fact there was no evidence to prove the negligence, omission or corruption on the part of any member of the South African Police Service that was led as averred in the summons and therefore the orders granted by the court are fundamentally flawed for failure to comply with the peremptory provisions of Rule 31 (2) (a) applicable to claims that are not for a debt or liquidated claim there being no evidence led on behalf of Respondent.

Willful default (Notice of intention to defend)

[12] Turning to the merits of the Application, precisely the default of the Applicant. According to Mr Mothusiemang Kgwanype, the Station Commander at Taung Police Station

and the deponent to the Opposing Affidavit on receipt of the summons, the state attorney's office allocated the matter to Mr Mtubatuba, a senior assistant state attorney, to act on behalf of the Applicant. Mtubatuba wrote to the Provincial Commissioner and requested copies of dockets and all other documents to assess the merits. He also advised the Commissioner that they have until 11 March 2013 to enter an appearance to defend. In May 2013 Mtubatuba wrote to the Commissioner again confirming not to have received any instructions and that the *dies* for entering a notice of intention to defend, has expired. Further enquiries he made to the Commissioner's office failed to yield the necessary response except a promise that the responsible official will revert. Mtubatuba thought the matter fell under the Gauteng Provincial Commissioner and only became aware that it involves the North West Province whilst he was attending to another matter involving the same province on 23 August 2013. Default judgment was already granted.

[13] On Applicant's failure to oppose the default judgment application Kgwanype alleges that the Notice for default judgment was served on Munyai, a junior clerk who knows nothing about receiving legal processes. Munyai never reported the service of the notice to the officials responsible for receiving legal processes nor was its receipt registered in the official register kept in the office for that purpose. She also could not remember receiving the document and was totally ignorant of its legal implications. It was not found in their office. If Munyai had brought the document to the attention of Colonel Tetiwe, the section head for litigation in the office of the National Commissioner, it would have received the attention it deserved. Tetiwe only got to know of the Default Judgment after it was granted. The Applicant **however confirmed that the National office where the notice of set down was served deals with litigation of all the provinces and is the central office handling all litigation in the entire country.** Tetiwe is in charge in the National Office.

[14] Kgwanype therefore contends that Applicant's failure to defend the main action or oppose the Application for default judgment, cannot be attributed to any remissness or negligence on the part of any of its employees.

Cause of action

[15] Kgwanype denies that the loss suffered by the Respondent was as a result of any negligence, omission or corruption on the part of any member of the police deployed at Taung police station and alleges that upon receipt of the report on each of the incidences of violence, the police discharged their constitutional obligations without fear, favour or prejudice by taking necessary steps that were consistent with the resources available and under very difficult circumstances at times. He confirms that Mpho Skweit of the Respondent informed him about certain members of the community that were against the Respondent being on site. He alleges that because of the capacity of the personnel at Taung police station they never deploy specialized personnel at a site unless there are confirmed threats or intelligence reports.

[16] Further, he alleges that there has never been peaceful prospecting on that site since the members of the community were against it and have been continuing with criminal activities barricading the road notwithstanding the police removing the barricades. Apparently Taung Giant Diamond Miners that is in association with the Respondent was informed by the Department of Mineral and Energy and by the office of the Regional Manager; Mineral Regulation, North West Region Diamond Miners not to proceed with

operations. They were ordered to remove the machinery on site by 23 February 2011 until such time that they would have consulted with the interested and affected people and obtained a proper community resolution, as they were expecting another unrest situation,

[17] During the period when the incidents mentioned in the particulars of claim continued, Taung Police opened 9 (nine) case dockets of various charges between March and June 2011. On 7 March 2012 the station commander's office issued an instruction for those members of the community that were involved to be charged with public violence. The cases were handled by Taung police impartially without a complaint of dereliction of duty by the members of the SAPS, from the Respondent.

[18] In respect of the claim for damages on the machinery and equipment Kgwanype alleges that the incident took place on 15 June 2011 as an ongoing conflict between the Respondent and the community. On receipt of a call from Skweit informing him that a group of people was running amok with petrol bombs and going to attack the exploration site, he immediately mobilized the police and went to the scene. However they could not cross the river at Kalong to reach the scene due to the heavy flow of water, even though they could clearly see the group running around inside the mining site. As they tried to reach the mining site on an alternative route, a green Tipper Truck was already burning and the rioting group running to the mountains. No arrest could be effected. Most of the mining equipment was already on fire. The police rescued five (5) miners and 4 security guards. One of them Mr Gaboame identified Bakang Mankuroane and Bankie from the group involved. Another employee, Mrs Dorah Sejamoholo reported to the police that she was assaulted by Bankie and Kabelo Mathe and robbed of her belongings by the group. The police patrolled the area until things went back to normal. The dockets were referred to the NPA for the individuals arrested to be charged with public violence.

[19] It is therefore denied that the police were spectators and through-out the incident remained non-chalant as alleged by the Respondent but that they performed their constitutional obligations towards the Respondent. Also deny that they were negligent, delayed in attending the scenes or failed to prevent the members of the community from damaging the property of the Respondent.

[20] In the Respondent's opposing affidavit, it is alleged that:

[20.1] the Applicant's approach that his bringing his Application under Rule 42 (1) and Rule 31 (2) (b) as well as the common law is flawed. Its Application should only be in terms of Rule 31 (2) (b). Rule 42 is not applicable in the light of the defence subsequently disclosed notwithstanding that judgment was obtained in the absence of the Applicant.

[20.2] Applicant cannot raise his defences *in limine* prior to dealing with the jurisdictional requirements of the Application under Rule 31 (2) (b). He must first show good cause, giving a reasonable explanation for his default and showing that his application and defence bona fide before he can raise other issues/defences albeit as points *in limine*. The Applicant must first show that he is entitled to bring this application before the issues he raises challenging the granting of the default judgment can be argued and decided upon.

[21] The points *in limine* are preliminary issues/ defences that are to be resolved before the merits of the case, merely for the reason that they might be dispositive of some of the issues. They are generally procedural issues that can suspend delay or bring the matter to an end as well and therefore decided upon before dealing with the merits of the Application,

LEGAL OVERVIEW

[22] It is possible for a rescission application to be brought under both Rule 42 (1) and Rule 31 (2) (b), with the Applicant under the former proving that judgment was erroneously sought or granted in his absence and showing also even if in the alternative, that there is a good cause for the rescission, there being a bona fide defence against the judgment creditor's claim as well as under common law; *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 780H-781A; *Swart v Absa Bank* 2009 (5) SA 219 (C). However once the court holds that an order or judgment was erroneously sought or granted in the absence of a party affected thereby, **in that instance it becomes unnecessary for a party to show good cause**, the application for rescission of the judgment should be granted without any further enquiry. *Mutebwa v Mutebwa* 2001 (2) SA 193 (Tk) at 199I-J **199E-H**, *Topol v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650D-J, *Naidoo v Somai* 2011 (1) SA 219 (KZD) at 220F-G 1992. The purpose of the process under s 42 (1) being to correct expeditiously a judgment or order that is clearly wrong. It would therefore be practical and sensible for a party to first seek to apply or invoke the proceedings in terms of rule 42 (1) and on failure to then proceed under common law or try and meet the requirements of rule 31 (2) (b) where now good cause will have to be shown.

[23] Generally, in order for an Applicant to succeed in an application for rescission of judgment obtained by default, he must show good or sufficient cause. Good or sufficient cause requires that the Applicant (1) proffers a reasonable explanation for his default (2) showing that his application is sincere (3) and defence *bona fide*. However in an application brought in terms of Rule 42 (1), since the application can be brought *mero motu* or by any interested party, the reason for the default and the bona fides of the application and defence may be dispensed with. Hence even absent a reasonable explanation for a party's default and a bona fide defence judgment erroneously granted may still be rescinded. In that instance it is not necessary for the applicant to show that he was not in wilful default when judgment was granted, his absence suffices.

[24] Therefore Applicant's approach to deal with his defences *in limine* to prove that the judgment was erroneously sought or granted in terms of Rule 42 (1) might be dispositive of the requirements of showing a good or sufficient cause and therefore appropriate to decide upon them first.

[25] Applicant's first point *in limine* is that of jurisdiction, challenging the institution of these proceedings in the above honourable court instead of in the North West High Court, since the police that were involved were located in the jurisdiction of that court. The argument has no merit. An action or proceedings can be instituted either where the cause of action arose or within the area where service can be effected on the Defendant (where the Defendant is resident, chosen domicile) party. In respect of processes that are brought against a Minister in his official capacity, as in this case, in charge of the South African Police Service, service may be effected at the National Office in Pretoria or upon the Provincial Commissioner of the province in which the cause of action arose, see s 5 (1) (b) (ii) (bb) of

Act 40 of 2000. Therefore the above honourable court had jurisdiction to decide upon the Respondent's default judgment Application.

[26] The argument on the s 3 (2) Notice served nearly 18 (Eighteen) months after the incidents is very flimsy. There is no allegation that the Applicant objected to the notice prior to the service of the summons and that such objection and the reason thereof was conveyed to the Respondent. It would therefore be reasonable for the Respondent and the court to assume that there was no objection to the delayed notice. In accordance with s 3 (4) of Act 40 of 2000 the court is precluded from raising the failure of a creditor to comply with s 3 (2) *mero motu*, and an organ of state can consent to a notice that does not comply with the requirements set out in s 3 (2). The judgment was therefore neither sought by the Respondent nor granted by the court erroneously. Applicant has also neither convinced the court that it was or will be unreasonably prejudiced by the non-compliance. Therefore condonation as sought by the Respondent can be granted. The issue cannot be raised with the object of getting the judgment to be rescinded for being granted erroneously.

[27] The Applicant also raised the issue of the Affidavits filed in support of the default judgment Application, alleging that they were not commissioned at the time when the default judgment application was considered by the court and since they were crucial for determining liability and deciding quantum the court erred when it granted default judgment based on such affidavits. The allegations are of a serious nature and raise a serious concern on the legality of the whole process. This is not a procedural irregularity that can be resolved *ex facie* documents and have a potential of vitiating the whole proceedings.

[28] Lastly with regard to whether or not Rule 31 (2) (a) requires the leading of viva voce evidence before the court can grant or make any order it deems fit, the wording of the rule is of vital importance. The sub section reads:

"Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a Defendant is in default of delivery of notice of intention to defend or of a plea, the Plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the Defendant or make such order as to it seems meet.

[29] In explanation, *Erasmus' Superior Court Practice* by Farlam, Fitchard and Van Loggernberg discusses the concept in an action for damages scenario that are sustained in a motor vehicle accident, to illustrate the subsection's requirement. It stated that the Plaintiff **must** lead evidence; see *Mashifane v Sulima* 1931 TPD 329; *Elanz & Spritz Executors* 1920 TPD 93; *Knight v Harris* 1962 (2) SA 317. Therefore in delictual claims evidence should be led on the merits and damages. The extent of the evidence is dependent on the court; see *Abraham v City of Cape Town* 1995 (2) SA 319 ©. Under certain circumstances evidence of damages may be given on affidavit; see *New Zealand Insurance Co Ltd v Du Toit* 1965 (4) SA 136 (T) and *NCP Havenga v S M Parker* (TPD 26 February 1993, unreported (1993 De Rebus 483). In *Dorfling v Coetzee* 1979 (2) SA 632 (NC) it was held that that in motor collision cases the evidence **should not be confined to the quantum of damages suffered but should also establish the cause of action**, whether there has been contributory negligence and whether there should be an apportionment. So the practice in some divisions is to hear some evidence on claims for damages but the enquiry is not that

detailed. In others, the practice is to require evidence of negligence only if circumstances require such negligence (proof of the cause of action); *Havenga v Parker* 1993 3 SA 724 (T); see *Supreme Diamonds Pty Ltd v Du Bois* 1979 (3) SA 444 (W).

[30] The affidavits that were presented to the court for judgment only made assertions in respect of quantum of damages. They were silent on the liability of the Applicant, nevertheless the court found Respondent liable for a part claim and referred the remainder of the claims to oral evidence when they all arose from the same cause of action, an impractical and incorrect way of dealing with the matter. I support the view as enunciated in *Abraham supra* that it is for each presiding officer to decide for him or herself, dependent on the facts of each case, whether or not to hear oral evidence and to what extent. However where the court has made a decision that oral evidence would be required to determine liability as pleaded in the cause of action, it cannot then in a matter where the same cause of action (or set of facts) gives rise to various claims brought together, resolve liability on one claim and decide to hear oral evidence on the others. The court a quo was supposed to refer all the claims for oral evidence on liability. The Judgment granted for the part claim was in that regard erroneously granted and rescindable.

Good cause

[31] Due to the judgment court having misdirected itself as aforementioned the issue of willful default, whether or not the Applicant has a reasonable explanation for its default and a good defence is no longer decisive of whether or not the judgment should be rescinded. Applicant's explanation is tested however to determine Applicant's bona fides. Mtubatuba, an experienced legal practitioner who was authorised to act on behalf of Applicant failed to seek proper instruction from the Applicant to enter an appearance to defend only advising the Applicant how much time there still was to enter such appearance instead. Even with his knowledge of the applicable *dies* he let the *dies induciae* expire without entering an appearance or arranging with the other side to delay it whilst waiting to obtain instructions. I wonder what he interpreted his instruction to be exactly when he was given the summons by the state attorney. Mtubatuba's conduct was unacceptable, but the question is whether the explanation would have persuaded the court as reasonable. Mtubatuba's efforts were half-hearted, lacking foresight and very lax, displaying gross negligence because an attorney acting reasonably would have been more prudent to protect their client given the size of the claim. I however do not believe that the Applicant's office or that of the state attorney should be held penalized for Mtubatuba's conduct even though there are instances attorneys conduct could not excuse a party. Applicant in this case can be excused because it cannot be said he was unconcerned of the consequences of any default, or probably aware of the consequences. He therefore could not have lacked concern of the consequences of Mtubatuba's action or deliberate in his conduct; see *Maujean t/a as Audio Video Agencies v standard Bank of SA Ltd* 1994 (3) SA 801 @ at 803J].

[32] On the good cause the Applicant seems to suggest that the respondent opened themselves to the risk. Its alleged they were warned and advised not to go to the site until everything has been finalized especially the talks with the community since there were threats even before they went on site with protests taking place randomly that the police were already struggling with. Seemingly the Respondent notwithstanding the warning or notice moved on site. The Respondent in its replying affidavit confirms that they moved on

site in March 2011 whilst the talks and the go ahead was only given on April 2011. As a result the Applicant's has a prima facie defence that involves an issue that is fit for trial.

On consideration of all these grounds the Applicant is entitled to leave to defend.

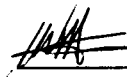
[33] All the same I still find that the Respondent's opposition of the Rescission Application was reasonable, since the Applicant failed to respond not only to the Notice and summons but also to the Application for default judgment served at their legal department. Applicant was therefore in this Application seeking an indulgence, it would therefore be fair that Respondent incur any further costs, see *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* 2000 (2) SA 1007 (C) at 1015 G-H.

[34] Under the circumstances I make the following order:

[34.1] The default judgment order granted by the court on 21 August 2013 against the Applicant/ Defendant in the main action is rescinded and set aside.

[34.2] The Applicant/ Defendant is granted leave to defend the main action and file his Plea within twenty (2) days from the date of this order.

[34.3] The Applicant /Defendant is ordered to pay the Respondent/Plaintiff's costs occasioned by this Application, which costs may be taxed independently of the costs in the action and prior to its conclusion.



KHUMALO NV

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

On behalf of the Applicant: C J Welgemoed

Instructed by: The State Attorney

Enquiries: Mtubatuba

On behalf of the Respondent: N Dukada SC

Instructed by: Van De Wall & Partners

Van Eetveldt/Idt/VAN 4625/0001