REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: 69945/11

15/8/2013

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

15/08/2013 .... DATE .... SIGNATURE

In the matter between:

SP ENVIRONMENTAL – AMEREX SA (PTY) LTD Applicant

and

SILVER LAKE TRADING 119 (PTY) LTD Respondent

J U D G M E N T

MAKGOKA, J:

[1] This is an application for rescission of an order of this court granted on 31 January 2012 in terms of which the applicant was ordered to pay R2 287 207.58 to the respondent. The order was granted in default on an unopposed basis as the applicant had not delivered any notice of intention to oppose. The application is opposed by the respondent.

[2] The dispute between the parties originates from a contract concluded in June 2008 between the applicant and Arcelor Mittal South Africa (Pty) Ltd (Arcelor Mittal) for the construction and installation of a sinter gas treatment plant in Vanderbijlpark. In turn the applicant concluded an agreement with the respondent in terms of which the respondent was employed to do certain specialist work in the course of construction of the plant, for the ultimate contract price of R19 189 317. Of this, R14 791 was paid by the applicant, leaving a balance of R4 397 760.

[3] On 5 April 2011 the applicant offered in writing to pay R2 287 207.58 in full and final settlement of its indebtedness to the respondent. The offer was accepted by the respondent in writing on 7 April 2011, resulting in the settlement agreement between the parties, constituted by the two letters. It was a condition of the settlement agreement that payment would be made by the applicant once it received payment of 'the major portion' from Acelor Mittal. During July 2011 Acelor Mittal paid R14 051 036.06 to the applicant. Despite this, the applicant did not pay the respondent as agreed.

[4] On 18 August 2011 the respondent, through its attorneys, demanded payment of R2 287 207.58 from the applicant. There was no response to the letter. On 7 December 2011 the respondent lodged an application for payment of the amount. The application was served on the applicant's principal place of business on 14 December 2011. The applicant having not given notice to oppose, judgment was sought, and granted, in the unopposed motion court on 31 January 2012. It is this order that the applicant seeks to rescind in the present application.

[5] The respondent subsequently caused a writ of execution to be authorised, which was served on 21 February 2012 at the applicant's then principal place of business

on its manager, a Mr. Rossouw. The deputy sheriff attached office furniture and equipment of the applicant with an estimated value of R26 700. On 26 March 2012 the respondent instructed the sheriff to remove and sell the attached goods and proceeded to advertise the sale in execution.

[6] The assets were removed by the deputy sheriff on 2 April 2012 and sold in execution on 10 May 2012. The net amount of the sale in execution of the movable assets was R6 844.48. As a result, the respondent instructed the sheriff to again serve the writ of execution, which was done on 21 May 2012 at the applicant's then principal place of business on Mr. Pircon, the sole director of the applicant.

[7] On enquiry from the deputy sheriff, Pircon declared that the applicant had no money or disposable property to satisfy the writ and no disposable assets were pointed out to the deputy sheriff. Despite a diligent search and enquiry by the deputy sheriff, no such assets could be found at the given address. Pircon was further requested to declare whether the applicant owned any executable immovable property, to which he replied that the applicant owned no such property. As a result, the deputy sheriff made a *nulla bona* return.

[8] In the meanwhile, a third party, Kentz (Pty) Ltd, another creditor of the applicant, made application for the liquidation of the applicant in the High Court Johannesburg, which application was opposed by the applicant. On 11 July 2012 the respondent made an application to intervene in the liquidation proceedings and to join as a co-applicant for the liquidation of the applicant, based on the *nulla bona* return referred to above. On 17 September 2012 the applicant lodged the present application.

[9] So much of the factual background, and now to merits of the application. I understand the basis of the application for rescission, to be two-fold, one primary

and the other, secondary. The primary ground is that the settlement agreement was concluded on a mistaken basis, for two reasons (which were discovered subsequently). The first is that the respondent had breached the original agreement as it went outside the contract between the parties and carried out work directly with Arcelor Mittal, the applicant's contracting party.

[10] The second primary contention is that the applicant was never indebted to the respondent. The applicant contends that the variation orders in respect of an engineering contract, on which the respondent's claim was based, were issued by one Michael Fell, who had no authority to bind the applicant to any financial obligation, as he was merely a site manager with no contractual authority. This resulted in an increase in the respondent's claim of approximately R3.7m, which was considerably greater than the amount of the offer.

[11] The deponent to the applicant's affidavit, Mr. Brian McMahon, states that he made the above discoveries in the course of investigations that he conducted into the affairs of the applicant pursuant to the opposition by the applicant to the intervening application (referred to in para [8] above).

[12] Secondarily, the applicant contends that that the respondent did not make out a case for the relief it obtained as condition of the settlement agreement (payment from Acelor Mittal) had not been fulfilled, as full payment had not been received.

[13] On the basis of all of the above, it is contended that the order was erroneously sought and granted. I turn now to consider the applicant's contentions. By asserting that the order was wrongly granted, the applicant locates its application in terms of rule 42 of the Uniform Rules of Court, which provides for rescission or variation of an order or judgment erroneously sought or granted in the absence of any party

affected thereby. The other instances for rescission are where there is ambiguity or patent error omission, or the order or judgment having been granted as the result of a mistake common to parties.

[14] In the present case, the error that the applicant purports to rely on consists of facts not before court when the order was granted. It is now well-settled that a subsequently disclosed defence, cannot lay the foundation for an application for rescission in terms of rule 42(1). The error as intended by rule 42(1) is not established if the Judge at the time of granting the default judgment was unaware of the facts that the applicant for rescission relies on. In *Lodhi II Properties Investment CC v Bondef Developments* 2007 (6) SA 87 (SCA) the following was stated at 95E-F:

> '...in a case where the plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment granted cannot be said to have been granted erroneously in the light of a subsequent disclosed defence ...'. 'the existence ... of a defence on the merits is an irrelevant consideration and if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.'

[15] I therefore conclude that the applicant's reliance on rule 42(1) is misplaced. It is quite clear from the facts of the case that the circumstances envisaged in rule 42 are not present. Another rule which could possibly be applicable is rule 31(2), in terms of which a default judgment may be set aside upon 'good cause' shown. The time frame prescribed in rule 31(2) is constricting to the extent the application has to be brought within 20 days of becoming aware of the judgment, which the applicant has not. As a result, the application cannot be considered in terms of rule 31(2), either.

[16] I shall therefore consider the application at common law, in terms of which a judgment can be set aside where it had been granted by default, provided the applicant shows 'good cause' (*De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) and *Colyn Tiger Foods Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA)) and the application is made within a reasonable time (*Genticuro AG v Firestones SA (Pty) Ltd* 1972 (1) SA 589 (A); *First National Bank of SA Ltd v Van Rensburg NO & Others* 1994 (1) SA 677 (T) at 681H).

[17] The jurisdictional requirement of 'good cause', entails two essential elements. First, a reasonable and acceptable explanation for default, and second, a demonstration of a *bona fide* defence. In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765 B–C, the following was stated:

> 'But it is clear that in principle and in the long standing practice of our courts, two essential elements of "sufficient cause" for rescission of a judgment by default are:
>
> (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
>
> (ii) that on the merits such a party has a *bona fide* defence which *prima facie* carries some prospect of success.'

[18] Having established the above approach, I turn now to consider the two elements of 'good cause'. The applicant fails at the first hurdle, as it does not proffer any explanation for its failure to oppose the application. That is where it should start, to satisfy the first requirement of reasonable and acceptable explanation for its default, as stated above. In principle this should be the end of the enquiry, and the application be dismissed on this basis alone, as it is not sufficient if only one of the above stated elements is established – see *Promedia Drukkers & Uitgewers (Edms)*

Bpk v Kaimowitz and Others 1996 (4) SA 411 (C) at 418B. See also *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 and *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300F-301C; *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 711E-I.

[19] There might be argument that in the light of the applicant's explanation that the facts relied on to rescind the order became known only after judgment was granted, it would be unfair to expect the applicant to explain its default. But this is not true of all its grounds for rescission. As stated earlier, one of those grounds is that the condition of the settlement agreement had not been fulfilled, as it had not received payment from Acelor Mittal. This fact would have been known to the applicant when it received the application. There is no explanation why the application was not opposed on that basis, at the very least.

[20] Besides, the applicant is still expected to explain its inaction after it became aware of the judgment. From the objective facts, the judgment would have come to the attention of the applicant on any of the following three dates: on 21 February 2012 when the writ of execution was served on its manager, Rossouw, or on 2 April 2102 when its moveable assets were removed, or on 21 May 2012 when the writ of execution was re-served on Pircon, the only director and controlling mind of the applicant. Whichever date, there is no explanation why this application was not brought immediately after, or within a reasonable time of the last of those dates. The present application was brought almost seven months after judgment was granted.

[21] It has often been said that one of the considerations which the courts will take into account in the exercise of their discretion to determine whether or not good cause is shown is whether a party's default was 'wilful'. See for example, *Harris v*

ABSA Bank Ltd, above, at 530E. Before a party will be regarded as being in wilful default, the following must be established: (i) the person must have knowledge of the fact that the action is being brought against him/her; (ii) the person must have deliberately refrained from entering appearance to defend; and (iii) the person must have a certain mental attitude towards the consequences of the default (Farlam and Others, *Erasmus, Superior Court Practice*, B1 – 202).

[22] The test for wilfulness is whether the default was deliberate. Where the defendant to an action, with full knowledge of the circumstances as well as the risks of her/his default, makes the decision to refrain from taking any steps to oppose the action it will be considered to be 'wilful default' (*Maujean t/a Audio Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 804C; *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 427 (T) paras [4] – [6]).

[23] From the factual background, it is clear that the applicant was throughout aware of the nature of the respondent's claim for payment, the judgment and its enforcement. In not opposing the application, despite having a purported defence when the application was served on it, and in acquiescing in the execution of the judgment for almost nine months, the applicant was, in my view, clearly wilful. Moreover, the period between the applicant acquiring knowledge of the judgment against it and the launching of the application for rescission is such that the application cannot be said to have been made within a reasonable time. There is no explanation at all for this lapse of time. The application falls to be dismissed on these considerations.

[24] If the above conclusion is wrong, I turn now to the applicant's defences, to determine whether they are '*bona fide*'. McMahon states that he became aware that

the variation orders were placed by Fell only after the judgment had been granted. In other words, it is not in dispute that McMahon was aware of the variation orders – only that he did not know that they had been placed by an unauthorised Fell. With respect, I do not see how this can affect the respondent. Fell, as the site manager, had ostensible authority to bind the applicant. The reason why McMahon was unaware (assuming he was) resulted from the applicant's own weak internal reporting procedures, and had nothing to do with the respondent. It cannot, therefore, serve as a basis to nullify legitimately placed variation orders.

[25] McMahon however fails to clarify in the replying affidavit his professed ignorance that the variation orders were placed by Fell. He does not state who he believed had placed or authorised the variation orders. If this was so important for him at that stage, surely he would have ensured that the variation orders were placed by someone with the necessary authority? If only he had the authority, then clearly he would have known already at that stage that they were not authorised. On the probabilities, Fell was authorised by Pircon. It is revealing that Pircon has not deposed to an affidavit denying that the he had not authorised Fell. I therefore conclude that there is simply no merit in this defence.

[26] In any event, it is not open for the applicant to resile from a validly concluded settlement agreement on the basis it purports to. The error that the applicant has to rely on to escape the settlement agreement has to be a *justus error*, which implies misrepresentation by the other party. Therefore, in the absence of any misrepresentation or other misconduct by the respondent inducing the settlement agreement, the applicant is not entitled, at law, to resile from a binding agreement. (*Hlobo v Multilateral Motor Vehicle Accident Fund* 2001 (2) SA 59 (SCA) para 13.

[27] I agree with the respondent's counsel that, having regard to the history of the matter, the applicant accepted the default judgment and acquiesced in its execution - but only when the liquidation application was lodged, did the applicant make this application for rescission. Counsel further argued that it was inconceivable that the applicant's staff and its functionaries, including Pircon and McMahon were unaware of the sheriff's removal of its furniture and assets. I agree. McMahon, both in his founding and replying affidavits, has not dealt with this issue at all. That, in itself, casts serious doubt upon the *bona fides* of this application.

[28] I therefore conclude that on any of the above grounds, either severally or cumulatively, the application for rescission has to fail. With regard to costs, Mr. *Leeuwener,* counsel for the respondent, urged me to order the applicant to pay the costs on attorney and client scale, contending that the applicant was spurious in its application. Although I take a view that the application was hopelessly without merit, I do not deem that sufficient enough to mulct the applicant in a punitive costs order. I have therefore decided that costs shall be ordered on the normal scale.

[29] In the result the following order is made:

1. The application for rescission of the order of this court made on 31 January 2012 is dismissed with costs.

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING : 25 MAY 2013

JUDGMENT DELIVERED : 15 AUGUST 2013

FOR THE APPLICANT : MR. K.J. VAN HYUSSTEEN

INSTRUCTED BY : FLUXMANS ATTORNEYS, JOHANNESBURG

FOR THE RESPONDENT : ADV. P. G. LEEUWENER

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