FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 3818/2011

In the matter between:-

SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION	Applicant
and	
KRAMER WEIHMANN & JOUBERT	Respondent

HEARD ON:	1 MARCH 2012
JUDGMENT BY:	PHALATSI, AJ
DELIVERED ON:	15 MARCH 2012

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[1] This is an application for rescission of judgment.

[2] The respondent sued the applicant by way of simple summons for the amount of R1 193 718,00 for professional services rendered by the respondent to the applicant.

[3] After the applicant filed notice of intention to defend, the respondent filed an application for summary judgment. The applicant did not file any papers resisting the application for

summary judgment. The respondent then set the matter down and served the notice of set down on the applicant's Bloemfontein attorneys. On the date of hearing of the application for summary judgment, no-one appeared on behalf of the applicant and summary judgment was granted against the applicant in the amount claimed in the summons.

[4] The respondent then issued a writ of execution pursuant thereto, which writ was served on the applicant on 17 January 2011.

[5] The applicant then filed the present application, which the respondent is opposing. The applicant's application is premised on both Rule 31(2)(b) and Rule 42(1) of the Uniform Rules of Court. Although both counsel confined their arguments only to the said rules, the common law must also be investigated, as I will show later.

[6] Rule 42(1)(a)

6.1 The applicant avers that the application for summary judgment was granted erroneously, in that the provisions of Rule 32(2) had not been complied with by the respondent. It claims that the deponent to the affidavit in support of summary judgment failed to allege that he can swear positively to the facts.

6.2 This contention is difficult to comprehend, as the deponent says

"all the facts leading up to the issuing of summons by the plaintiff against defendant fall within my personal knowledge and belief, precisely because I had acted as defendant's attorney in all the matters referred to in the summons."

6.3 I, therefore, reject this contention, and I find that the judgment cannot be rescinded based on Rule 42(1)(a).

[7] Rule 32(1)(b)

7.1 Rule 31(2)(b) states as follows:

"a defendant may within 20 days after he or she has knowledge of <u>such</u> judgment apply to court upon notice to the plaintiff to set aside <u>such</u> judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet." (my emphasis)

"Such judgment", refers to default judgment granted against defendant who is in default of delivery of notice of intention to defend or of a plea, as set out in Rule 31(2)(a).

7.2 It is clear that the default judgment granted *in casu*, is not the one envisaged in the said Rule and consequently Rule 32(1)(b) is not applicable. See **NYINGWA v MOOLMAN NO** 1993 (2) SA 508 (TK) at 509 I – 510 A.

[8] Common law

8.1 Where the application for rescission cannot be made in terms of the Rules referred to above, the court can still rescind judgment under common law as Trengove AJA, as he then was, held in **DE WET AND OTHERS v WESTERN BANK LTD** 1979 (2) SA 1031 (A) at 1042 F – 1043 A.

8.2 In the **NYINGWA**-case, above, White J said the following at 511 I – 512 A:

> "It follows that any judgment, including a summary judgment, can be rescinded under the common law. If the merits of the dispute were considered before summary judgment was granted, rescission can follow only on the grounds set out in the *Childerley* case; if the merits were not considered and the judgment was granted by default, the grounds for rescission are virtually unlimited, and the only prerequisite is that 'sufficient cause' therefor must be shown."

In **CHETTY v LAW SOCIETY, TRANSVAAL** 1985 (2) SA 756 (A) at 765 it was held that the elements of 'sufficient cause' are the following:

i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

ii) that on the merits such party has a *bona fide* defence carrying some prospects of success.

8.3 I, therefore, find that if the judgment should be rescinded in the present matter, it should be done under common law.

[9] In the present case the applicant avers that, after receipt of summons, it engaged the services of a firm of attorneys in Johannesburg (RM Attorneys) to defend the matter on its behalf. The Johannesburg attorneys appointed correspondent attorneys in Bloemfontein (Mabalane Seobe Inc) who served and filed the necessary notice of intention to defend on the respondent's attorneys and with the Registrar of the court.

[10] 10.1 On 1 November 2011, Mabalane Seobe sent a copy of application for summary judgment to RM Attorneys, whereupon RM Attorneys, by a letter dated 9 November 2011, instructed Mabalane Seobe to draw, sign, serve and file notice of intention to oppose the application for summary judgment.

10.2 On the same date (9 November 2011), the respondent served a notice of set down on Mabalane Seobe, stating that matter is set down for 24 November 2011. Mr. Seobe confirms in a supporting affidavit that they did not send the said notice of set down to RM Attorneys as their secretary had misplaced it and it never came to his attention. He fails, however, to explain why he did not carry out the instruction as set out in RM Attorneys' letter dated 9 November 2011.

10.3 This led to summary judgment being granted by default against the applicant, as there was no-one to represent it in court on 24 November 2011.

[11] 11.1 The relationship between the applicant and respondent spans a number of years, dating as far back as 1993. The respondent had been acting on behalf of the members of the applicant on a continuous basis.

11.2 The respondent sued the applicant for services rendered over a period of time, involving many matters. The applicant avers that it had been paying the respondent for such services and that respondent has also not accounted to it for payments received from other parties, where cost orders were awarded in favour of the applicant. Whereas it is clear that the applicant does not dispute its liability to respondent for professional services rendered, it is clear that the quantum thereof is in dispute. In the absence of a detailed account as to how the payments made (both from applicant and other parties) were applied, it cannot be said that the amount claimed is the correct amount. Mr. Nortje has, as a matter of fact, also conceded that the total amount of the taxed bills was R1 502 286,57 and he caused to be deducted an amount of R310 586,37 after investigation of all the cases and the payments had been allocated to the files. What he omits to state, is payments from which sources, the applicant or other parties, or both. See **TREDOUX v KELLERMAN** 2010 (1) SA 160 (C), where it was stated that where there is no detailed account as to how the payments made by a client were allocated, the attorney's account cannot be said to be a liquidated account.

11.3 I am mindful of the fact that, where the respondent in the opposing affidavit stated that by the time the summons was issued, the outstanding account was an amount of R1 193 718,00 (being the amount for which judgment was granted), the applicant in its reply thereto stated:

"I do not take issue with the contents of this paragraph."

Whilst I am not satisfied with the explanation for this apparent admission proffered by applicant's counsel during the hearing, I find that his was an inadvertent admission, as it is contrary to the whole case of the applicant and the facts.

[12] In the light of the above, I now proceed to deal with the question as to whether applicant has satisfied the elements of 'sufficient cause' as set out in **CHETTY**, above.

12.1 It is clear that it was always the intention of the applicant to defend the action and also to oppose the application for summary judgment and that its *bona fides* can therefore not be questioned, considering the steps that it had taken to instruct the attorneys to act on its behalf. It is indeed the attorney who must advise his or her client as to what step to take next and as to what instructions he or she needs at different stages of the case. The applicant can therefore not be faulted for waiting to hear from its attorneys as to what to do next.

I, therefore, find that the applicant has presented a reasonable and acceptable explanation for its default.

12.2 On the question of a *bona fide* defence, I have already stated that the question of quantum is questionable and it can only be resolved by evidence. I, therefore, find that the applicant has shown a *bona fide* defence carrying some prospects of success.

[13] **COSTS**

13.1 In this case, although I made a finding that the applicant has made a reasonable explanation for his default, it (its default) has nothing to do with the conduct of the respondent, but with the conduct of its attorneys. On the contrary, there is nothing wrong or *mala fide* with the conduct of the respondent in this matter.

13.2 Counsel for the applicant also conceded during the hearing that the decision by the respondent to oppose this application, was not unreasonable and that the applicant is asking for an indulgence from court.

13.3 In the light hereof, I find that it is just and equitable that the applicant should pay the costs of the respondent for opposing the application.

[14] I consequently make the following order:

14.1 Summary judgment granted against the applicant (defendant) under case number 3818/2011 on 24 November 2011, is hereby rescinded and set aside.

14.2 Applicant (defendant) is granted leave to defend the action.

14.3 The plaintiff must file its declaration within 15 days from the date of this order.

14.4 The applicant (defendant) must pay the costs of the application.

N.W. PHALATSI, AJ

On behalf of applicant:	Adv. N. Rali Ralikhuvhana Instructed by: Mabalane Seobe Inc BLOEMFONTEIN
On behalf of respondent:	Adv. S. Grobler Instructed by: Kramer Weihmann & Joubert BLOEMFONTEIN

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