

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 10222/2022

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED

DATE: 25.09.2024

SIGNATURE:

In the matter between:

MOKGALAKWENA LOCAL MUNICIPALITY

APPLICANT

-and-

MAMOLOKO CONTRACTORS CC

FIRST RESPONDENT

THE SHERIFF, MOGALAKWENA

SECOND RESPONDENT

JUDGMENT

BRESLER AJ:

Introduction:

[1] The Applicant (Defendant in the main case) applies for the rescission of the judgment granted by above Honourable Court in favour of the Applicant (Plaintiff in the main case) on the 14th of June 2023 for payment of R7,535,331.88, plus interest and costs.

[2] A provisional/ conditional payment was made to forestall execution and Part A is therefore no longer relevant.

[3] The First Respondent delivered a notice in terms of Rule 6(5)(d)(iii) in terms whereof two legal contentions were raised:

3.1 The Founding affidavit was not properly commissioned.

3.2 In the absence of a properly commissioned affidavit, there is no Founding affidavit before court.

[4] The aforesaid issue was disposed of during the hearing of the matter before the Honourable Acting Judge Makoti, who ruled that there was substantial compliance with the commissioning. He however dismissed the application for suspension of the execution contemplated in Part A of the proceedings before court, with costs. There is currently a pending appeal against this decision.

[5] Hereafter, the Applicant supplemented its papers and launched a second attempt at suspending the execution of the judgment. The second application was likewise refused and there is a pending appeal against this decision as well.

[6] As stated herein before, the Applicants have since satisfied the judgment to forestall execution. A suspension of the execution is therefore no longer necessitated, and, in this Court's view, it renders the pending appeals irrelevant.

[7] On the 12th of June 2024, the First Respondent delivered an Answering affidavit. The Applicant submits that this affidavit was delivered irregularly since they have already delivered a Rule 6(5)(d)(iii) notice. The Answering affidavit was furthermore delivered substantially out of time and not accompanied by an application for condonation. On this basis, this court should disregard the affidavit *in toto*.

[8] During argument, Adv. Tebeila also raised the issue that the pending Appeals against the orders granted in respect of Part A, prohibits the Court from making a determination on Part B. He submitted that the most favourable approach should be to suspend the application for rescission of judgment pending the finalisation of these appeals. As stated before, this Court does not agree with the submission. Once there was satisfaction of the judgment, it rendered the suspension of the execution moot. Likewise, an appeal on the suspension will in all probability then only be of academic value.

Factual Synopsis:

[9] It is apposite to briefly address the factual background of this matter before dealing with the objections of the Applicant in respect of the delivery of the Answering affidavit.

[10] The common cause facts between the parties are quite straightforward: the Applicant is allegedly indebted to the Respondent in the amounts of respectively R7,353,331.88 and R4,721,790.00 for services rendered in terms of a written service level agreement. As to amount of R7,353,331.88 the First Respondent alleges that the Applicant confirmed their indebtedness to the First Respondent. This confirmation is evidenced by a memorandum tabled by the Acting Municipal Manager, HSM Ngoepe and the Acting Manager for Technical Services, MYE Molepo.

[11] The Applicant delivered a written offer as contemplated in Uniform Rule 34 on the 25th of April 2023, which offer was accepted in writing on the 2nd of May 2023.

[12] The deponent to the rescission application is the duly appointed Municipal Manager, Mr MM Maluleka. He states that the underlying facts and circumstances that gave rise to the judgment being obtained was not within his knowledge and he had to research the position to establish how it came about. At the time when the relevant incidents transpired he was not appointed in office.

[13] The essence of the Applicant's grounds for rescission encapsulated in the papers and enunciated in their Heads of Argument as follows:

13.1 The judgment in the amount of R7,535,331.88 is premised on 14 (fourteen) invoices contained on a statement.

13.2 All the invoices (save for one) on the statement, which make up the exact amount of the judgment debt, were previously paid. The parties settled those invoices on the basis that an amount of R3,000,000.00 is to be paid to the First Respondent.

13.3 The settlement agreement included each and every one of this invoices.

13.4 It stands undisputed that the amount of R3,000,000.00 was duly paid. A day after the payment was made, the First Respondent sought to renege on the agreement. Irrespective if the agreement pertaining to the R3,000,000.00 is found to be valid and enforceable or not, the fact remains that R3,000,000.00 was paid.

13.5 Further payment were also made hereafter amounting to R1,794,998.00.

13.6 The Applicant obtained a forensic investigation report from KEP. This report confirmed that most, if not all, of the amounts were not due to the First Respondent.

13.7 The Applicant was not allowed to pay anything to the First Respondent as the South African Revenue Services issued a notice to withhold and immediately pay over to it, all available funds to the First Respondent.

13.8 The officials that consented to the judgment were not authorised to do so. The legal officer confirmed under oath that he was acting on his own and without authority and that he was mistaken and 'ill-informed'. He therefore conceded judgment in error.

[14] The First Respondent's answering affidavit, to a large extent, is premised on the remarks and findings in the judgment of Makoti AJ delivered on the 7th of August 2023.

[15] The First Respondent therefore submits that the findings of Makoti AJ is final in nature. The Court thus already found that no case was made out for rescission of the judgment.

Legal Framework:

Late filing of Answering affidavit:

[16] The *crux* of the objection raised by the Applicant as to the delivery of the Answering affidavit is the fact that the Respondent elected to file a Notice in terms of

Rule 6(5)(d)(iii), that was already disposed of and then continued to deliver an Answering affidavit considerably out of time.

[17] **Erasmus, Superior Court Practice**¹ states the following:

'Should the respondent choose not to file an answering affidavit in response to the applicant's allegations but to take a legal point only, the court is faced with two unsatisfactory alternatives should the objection fail. The first is to hear the case without giving the respondent an opportunity to file an answering affidavit on the merits, something the court would be 'most reluctant' to do. The second is to grant a postponement to enable the respondent to prepare and file an answering affidavit, a course which gives rise to an undue protraction of the proceedings and a piecemeal handling of the matter. '

[18] *In casu* this court is faced with a situation where the Answering affidavit was delivered shortly before the hearing of the matter. Counsel for Applicant, Adv. Williams SC was however willing to proceed with the matter and no substantial prejudice was argued. Having regard to how the court dealt with a similar situation in the matter of **Bader and Another v Weston and Another**² it is evident that the correct approach to be followed is to not encourage a piecemeal presentation of the matter whilst simultaneously not refuse the adjudication of the real issues to be partially frustrated by a too rigid adherence to what is essentially a rule of practice³.

[19] This Court is therefore of the view that it is in the interest of justice to admit the Answering affidavit into the record and to take its contents into consideration in determining the issues before court. This will ensure a swift and just determination of the real issues between the parties. Having found that, this Court is furthermore of

¹ Van Loggerenberg, **Erasmus Superior Court Practice** Second Edition on page D1 Rule 6 - 27

² 1967 (1) SA 134 (C)

³ See p 138 of **Bader** *supra*.

the view that a formal application for condonation will not be required. The mere fact that the Applicant does not allege any substantial prejudice suffices in justification of allowing a full adjudication of this matter.

Rescission of a judgment granted by consent:

[20] It is evident from the aforesaid factual scenario, that the current application does not fall under the auspices of Uniform Rule 42. This does not prevent the court from determining the matter against the framework of the common law.

[21] It is trite law that a consent judgment can be rescinded in exceptional circumstances. In the decision of ***Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce CO (Pty) Ltd and Others***⁴ the Supreme Court of Appeal stated:

'A transactio, whether extra-judicial or embodied in an order of Court, has the effect of res judicata. (See Western Assurance Co. v Caldwell's Trustee, 191B AD 262 at p. 270; Van Zyl v Niemann, 1964 (4) SA 661 (AO) at p. 669H, read with p. 6680; Cachalia's case, supra at p. 464; Estate Erasmus v Church, supra at p. 28.) It is obvious that, like any other contract (and like any order of Court), a transactio may be set aside on the ground that it was fraudulently obtained. There is authority to the effect that it may also be set aside on the ground of mistake, where the error is iustus. Natal Bank v R. Kuranda, 1907 T. H. 155 at p. 167; Estate Erasmus ' case, supra at p. 28; and see De Wet and Yeats, Kontraktereg, 3rd. ed., p. 192, note (u). Kersteman, Woordenboek, s.v. 'transactie', p. 549, after stating that a transactio may be set aside when "een der partyen bedriegelyk en arglistig heeft gehandelt", includes amongst the grounds for rescission

"dat 'er een erreur in calculo, de uitrekening was begaan, so eischt de

⁴ 1978 (1) SA 914 (A) at 922

reede en billykheid, dat door het vernietigen van de transactie het ongeluk en nadeel hem, die aldus bedrogen of verkort is, aangedaan, moet worden hersteld en goedgeдаан, ten ware' er over het error in calculo, erreur of tout in de uitrekening zelfs getransigeerd was."

[22] And further⁵:

'Concerning judgments entered by consent, the learned JUDGE-PRESIDENT accepted that they could, "under certain circumstances", be set aside "on the ground of just error". It appears to me that a transactio is most closely equivalent to a consent judgment. (Cf. Cachlia's case, supra at p. 464.) Such a judgment could be successfully attacked on the very grounds which would justify rescission of the agreement to consent to judgment. I am not aware of any reason why justus error should not be a good ground for setting aside such a consent judgment, and therefore also an agreement of compromise, provided that such error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise.'

[23] In **Mudzingwa v Mudzingwa**⁶ Gubbay JA (as he then was) said:

'Furthermore, it is firmly established that a judgment can only be rescinded under the common law on one of the grounds upon which restitutio in integrum would be granted, such as fraud or some other just cause, including justus error. Certainly a litigant who is himself negligent and the author of his own misfortune will fail in his request for rescission. See Voet 2.4.14; Groenewald v Gracia (Edms) Bpk 1985 (3) SA 968 (T) at 972C - D and G - H.'

[24] Gubbay CJ repeated the above principles in more detail in **Georgias v**

⁵ On 922

⁶ 1991 (4) SA 17 (ZS)

Standard Chartered Finance Zimbabwe Ltd⁷, a judgment of the Supreme Court of Zimbabwe:

'The adoption of those principles to an application to rescind a judgment given by consent enjoins the Court to have regard to:

(a) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;

(b) the bona fides of the application for rescission;

(c) the bona fides of the defence on the merits of the case which prima facie carries some prospect of success; a balance of probability need not be established.

As has been stated repeatedly too much emphasis should not be placed on any one of these factors. They must be viewed in conjunction with each other and with the application as a whole. An unsatisfactory explanation may be strengthened by a very strong defence on the merits '

[25] In **Ntlabezo and Others v MEC for Education, Culture and Sport, Eastern Cape, and Others** ⁸ the judgment of the Zimbabwe Supreme Court was referred to with approval by D van Zyl J in the Transkei High Court:

'The only question which remains is whether this finding has the result that rescission must be granted without considering factors such as the bona fides of the application for rescission. In Georgias v Standard Chartered Finance Zimbabwe Ltd (supra) the Zimbabwe Supreme Court, sitting on appeal, held that, in deciding whether to rescind a judgment given by consent, regard must

⁷ 2000 (1) SA 126 (Z) at 132G

⁸ 2001 (2) SA 1073 (Tkh).

also be had to (1) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered; (2) the bona fides of the application for rescission and (3) bona fides of the defence on the merits of the case which prima facie carries some prospect of success (at 132G - I). At 132C - D Gubbay CJ said the following:

"Although lack of consent is undoubtedly the predominant factor in the decision of whether or not to set aside a judgment purported to have been given with the consent of the parties, regard must also be had, in my view, to the factors alluded to by Blackie J and mentioned by Mr De Bourbon. I think that only where the defence offered to the action is virtually unarguable, or the delay in bringing the application inordinate and unsatisfactorily explained, should a Court decline the relief of rescission." I agree with this approach.'

[26] The aforesaid decisions were referred to with approval in the matter of ***KR Sibanyoni Transport Services CC and Others v Sheriff, Transvaal High Court, and Another***⁹.

[27] It is evident that there can be other grounds for rescission based on justice and fairness.

[28] In the matter *in casu* this Court is not ignorant of the fact that the granting of the judgment potentially caused a considerable amount of wasteful expenditure directly impacting taxpayers. Having regard to the contents of the Answering affidavit it is not in dispute that payments were potentially duplicated. There is no clear version from the Respondent as to the alleged settlement agreement that was concluded and the consequential payment of R3,000,000.00 that followed. The First Respondent merely opposed the application premised on the findings of Makoti AJ

⁹ 2006 (4) SA 429 (T)

referred to herein above.

[29] This Court is therefore satisfied that, at the very least, the *bona fides* of the defence has been shown to exist. If it is accepted that an earlier agreement of settlement was *prima facie* concluded which resulted in payment, and that further payments were made thereafter, the defence carries a *prima facie* prospect of success in that the tender was made in the mistaken belief that monies were due to the First Respondent.

[30] The Applicant explicitly indicated the circumstances under which the tender was made that resulted in the judgment being granted. The officials of the Applicant were undoubtedly ignorant and / or dismissive of the correct factual position and acted accordingly.

[31] On this basis, it is clearly in the interest of justice for a rescission of the judgment to be granted and for the parties to properly ventilate the matter before court.

[32] The Applicant submitted in its Heads of Argument that the remaining relief is not pursued (repayment) as the First Respondent is indebted to SARS and the judgment in this regard will serve no purpose. A proposed order was provided to the Court setting out the relief claimed at this stage.

Costs:

[33] There is no reason why the costs should not follow the outcome of the proceedings. Having regard to the nature of the proceedings, the duration thereof, the extent of the pleadings and the importance to the parties, it is submitted that costs to counsel should be allowed on Scale C for services performed after 10 April 2024.

Order:

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

34.1 The judgment granted by this Honourable Court on 14 June 2023 is hereby rescinded.

34.2 The First Respondent is ordered to pay the costs of the application insofar as it pertains to obtaining the rescission of the said judgment under Part B of the notice of motion, such costs to include:

34.2.1 the costs of 2 counsel on scale C; and

34.2.2 the opposed costs of the application enrolled for hearing on 20 February 2024.

**M BRESLER
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

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DATE OF HEARING

14 June 2024

DATE OF JUDGMENT

25 September 2024