



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG.**

CASE NO: 38292/2021

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

13 November 2024

DATE

SIGNATURE

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Applicant

and

CHANGING TIDE SECURITY SOLUTION (PTY) LTD

Respondent

JUDGMENT

KEKANA AJ

Introduction

[1] This is an application for rescission of a default judgment granted in favour of the respondent on 14 March 2022. The facts leading to the application for rescission are that on or about 12 August 2021 the respondent served combined summons on the applicant to which the applicant failed to reply to and subsequently the respondent notified the applicant of its application for default judgment. The notice was then served on the applicant on or about 07 March 2022 and later a default judgment was obtained by the respondent.

Background

[2] The parties entered into an agreement (Master Agreement) on 5 November 2010, which was for a period of 12 (twelve) months.¹ The agreement was extended from time to time until 30 April 2020. All invoices issued for services rendered during this period were required to be certified correct by both parties' and all invoices certified correct which were paid by the applicant. The respondent then submitted new antedated invoices with increased amounts later after the contract was terminated which according to it were annual increments which were discussed between the parties and accordingly due and payable.

Issues

[3] Central to the issues for determination is whether the Applicant has made out a case for the rescission of judgment in terms of Rule 31(2)(b), alternatively common law rescission in terms of Rule 42(1)(a) of the Uniform Rules of this Court.

Submissions and contentions by the parties

¹ See para 6 of the Applicant's Heads of Arguments.

[4] The applicant alleges inter alia in its application for rescission in terms of Rule 31(2)(b), alternatively common law rescission in terms of Rule 42(1)(a) of the Uniform Rules of this Court that:

- 4.1 it was not in wilful default;
- 4.2 that the plaintiff's particulars of claim fail to make any cause of action and therefore excipiable;
- 4.3 the respondent's non-compliance with section 3 of the Act 40 of 2002;
- 4.4 the majority of the claims forming the substance of claim one in the particulars of claim has prescribed;
- 4.5 that the summons were premature as the agreement between the parties makes provision for arbitration.

[5] The applicant further submits that there was no proper service as the combined summons was served on the assistant HR manager and not its legal team, again, that the notice for the application for a default judgment also was served on its driver and not its legal team. Furthermore, that the respondent by own admission is not suing for breach of contract but rather it wants to unilaterally adjust invoices which were certified correct by both parties and paid for by the applicant. Also, that it was not in wilful default as the summons was served during the period of Covid-19 where many of its employees were not coming to office and those testing positive had to be in isolation and offices had to be closed for decontamination.

[6] The applicant continues to submit that the respondent has failed to refer the dispute to arbitration as preferred by the terms of the Master Agreement. That the invoices in dispute were surprisingly brought once the contract between the applicant and the respondent was terminated and these increases were not reduced to in writing as required by the Master Agreement. Also, that the respondent's particulars of claim are excipiable in that they fail to comply with Rule 18(6) of the Uniform Rules of the Court as the agreement referred to by the respondent was not attached.

[7] In retort the respondent contents that there was wilful default on the part of the applicant in that it fails to explain what happened with the summons served on its assistant manager, again it failed to attend Court after being notified of the default application. That

section 3 of Act 40 of 2002 was complied with and that non-compliance with Rule 18(6) does not render the Particulars of Claim excipiable.² As regard failure by the respondent to refer the dispute to arbitration, the respondent contends that the applicant had acknowledged liability and for that reason there was no dispute to refer to arbitration. The respondent further contents that the order was not erroneously sought or granted and as such Rule 42 is not applicable.³

Legal principle and analysis.

[8] As regards the application for condonation as brought by the applicant, I agree with Eksteen AJA in *Van Heerden* at para [11]⁴ where it is stated that:

“even peremptory provisions of the rules may, in appropriate circumstances, be condoned. The test, it seems to me, is whether any potential prejudice results to a party affected.”

[9] Upon careful analysis of the entire case I am of the view that the applicant’s explanation for late application is reasonable and further that the respondent may be prejudiced as the amount in dispute is such that the applicant may suffer a huge financial loss, and it for this reason that I will respond in affirmative and condone the application.

[10] With regard the submission by the applicant that there was no proper service of both the combined summons and the notice for default judgment, I disagree with counsel for the applicant who claims that proper service could only be service to its legal team. It was held by Van Zyl J, (writing for the full court) in *Brangus Ranching (Pty) Ltd* para [15]⁵ that:

“Service at the registered office of a company, in the absence of a responsible employee thereof, by delivery of the document to be served to a person at such address.....willing to accept such service, has been recognised as a good and proper service which is preferable to merely attaching the process, for instance, to the outer principal door of the premises”.

² See para of the Respondent’s Head of Arguments.

³ See para 43 of the Respondent’s Head of Arguments.

⁴ *Van Heerden v Bronkhorst* (Case no 846/19) [2020] ZASCA 147.

⁵ *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd* 2011 (3) SA 477 at 481 (KZP).

[11] The combined summons was served on an assistant manager of PRASA, who considering the seniority of his position it is expected of him to have understood the seriousness of what he was signing when receiving the summons and the concomitant obligation to immediately notify and avail the summons to the legal team. The notice of default application was also served on the driver employed by the PRASA, drivers are foresters when it comes to ensuring delivery of items and documents from one place to the other, understands the importance of making sure that the documents in their possession timeously reach the intended recipient. The submission by the applicant that there was no proper service cannot be entertained. What can be entertained is whether was the default wilful or not.

[12] The question that follows is whether the respondent was in wilful default or not. While the applicant claims Covid-19, it fails to show and explain how the person who received summons was affected by Covid-19. The reason why he did not alert the legal team about the summons nor what happened with those summonses. There is no affidavit to that effect and therefore this explanation cannot stand.

[13] In the main the success of a Rule 42 application is whether the order was erroneously sought or granted. In terms of Rule 42(1)(a)⁶ the Court must be satisfied that:

an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[14] Generally, a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.⁷ As such I had no option but to take a closer look at what was presented before me and what was presented and relied upon by the Court which granted the default judgment. Accordingly, a thorough perusal of the Plaintiff's Particulars of Claim was inviting. The Plaintiff Particulars of Claim refer to services rendered, and invoices issued which were not paid but nowhere does it refer to what was presented before me which is invoices issued were certified correct by both parties and paid for by the Applicant.⁸

⁶ Uniforms Rules of the Court.

⁷ *Nyingwa v Moolman NO* 1993 (2) SA 508 (TK) at 510D-G; *Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 (GNP) at 153C.

⁸ See paras 6.1 to 6.3 of Plaintiffs Particulars of Claim.

[15] My Sister Khampepe J in *Zuma* at para [57]⁹ where she states that:

A party must be absent, and an error must have been committed by the court. At times the party's absence may be what leads to the error being committed. Naturally, this might occur because the absent party will not be able to provide certain relevant information which would have an essential bearing on the court's decision and, without which, a court may reach a conclusion that it would not have made but for the absence of the information.

[16] In the case before me there are facts showing that respondent at the time of seeking the default judgment consciously decided not to disclose to the Court that the invoices issued and certified correct by both parties were paid. This to me is not just the case of an error which could have been corrected by the applicant's presence, but the respondent was duty bound to disclose these facts as they are the genesis of this dispute. Failure by the respondent to disclose resulted in it completely misleading the Court. I do not think my Sister Khampepe J had in mind an instance where the court was deliberately misled or where information or facts were deliberately withheld by the litigant seeking a default judgment when she mentioned "conclusion reached by a court that the court would not have made but the absence of information."

[17] In my view if when hearing of the rescission application there appears evidence and facts which the respondent had but elected not to place before Court granting the default judgment, which facts are so material that if presented on their own even in the absence of the other party (defaulting party), default judgment would not have been granted, the conclusion is strong that the judgment was erroneously sought or erroneously granted. Especially if those facts are so central to the dispute.

[18] I find it idiosyncratic that the respondent consciously decided not to attach the aforesaid invoices it claims were due and payable to its Particulars of Claim allegedly due to the voluminous nature thereof, it is my view that even if not all but a few of those invoices could have been attached to the Plaintiff's Particulars of Claim to enable the Court to ascertain their validity and authenticity, particularly as those invoices are fundamental and crucial in this matter. As per the Master Agreement the invoices issued

⁹ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28.

must be certified correct by both parties, it is only when certified correct by both parties that a debt arises. The respondent withheld and decided not to attach invoices as they knew that the aforesaid invoices were not certified correct by both parties and that those that were certified correct by both parties were settled.

[19] In the circumstances I can conclude that the respondent was meritoriously not entitled to the relief which it obtained (the default judgment). My conclusion is strong that the Court granting the default judgement was not only unaware of facts, misled and if possessed with these facts even in the absence of the applicants could have decided differently or at least it is my conclusion that the order was erroneously sought or granted as there exists facts which the Court was not aware of.

[20] I agree with the respondent and its authority that for the applicant to succeed in a rescission application it must satisfy the Court that it has a bona fide defence to the Plaintiff's Particulars of Claim.¹⁰ Eksteen AJA¹¹ held that:

...An applicant for rescission of judgment taken by default against him is required to show good cause. Whilst the courts have consistently refrained from circumscribing a precise meaning of the term 'good cause', generally courts expect an applicant to show 'good cause' (a) by giving a reasonable explanation of his default; (b) by showing that his application is bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which, prima facie, has some prospect of success.

[21] The absence of a written agreement authenticating the invoices submitted by the respondent after the contract was terminated as required by the Master Agreement, opens a possibility for the applicant to raise a defence and contest their validity. If the respondent felt that it is entitled to the increases, it should have submitted invoices reflecting those increases during that time of the periodic extensions. The respondent had multiple opportunities from the month immediately after the lapse of the 12 months contract and every month immediately thereafter to submit invoices reflecting the aforesaid increments but chose not to do so. These renders the conduct of the respondent suspicious particularly as it continued not include the aforesaid increments for a period of three to four years and

¹⁰ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-477.

¹¹ *Van Heerden v Bronkhorst* (Case no 846/19) [2020] ZASCA 147 (13 November 2020)

only chose to raise the issue about price increases it claims to be legally entitled to only after the contract was terminated. I am satisfied that the applicant has demonstrated a bona fide defence. The applicant has shown to the Court that he has a reasonable prospect of success if he is allowed the opportunity to defend the matter.

[22] Furthermore, the applicant can argue that it was entitled to assume that upon paying the invoices presented, which were certified correct by both parties there was no debt outstanding due to the Respondent. I am of the view that the respondent's conduct of not issuing increased invoices immediately after the lapse of the 12 months contract deprived the applicant of the right of choice to apply its mind to the increases, the applicant could have if not happy with the increments instantaneously exercised the option it always had to terminate the contract. This accentuates the point I raised above that the applicant has bona fide defence to the respondent's claim.

[23] As regards the submission by the applicant that the summons was served prematurely in that the respondent failed to refer the dispute between it and PRASA to arbitration as required by the Master Agreement. I find that this creates another lacuna in the legitimacy of respondent's claim and the method it opted to use to resolve the dispute between the parties. A complete disregard of such a clause in the agreement may in future render the inclusion of such clauses in agreements expendable. An arbitration clause in the Master Agreement should be interpreted to mean and effectively to be a one-stop shop to determine all the disputes between the parties. I am satisfied that the summons was served prematurely since arbitration as the preferred dispute resolution mechanism provided for in the Master Agreement was not exhausted.

[24] The applicant also submits that it intends to raise prescription as a defence on the alleged antedated invoices, in this regard the applicant need not provide evidence to prove that it will be successful in its defence of the matter but must only make out a prima facie defence to the plaintiff's claim. Taking into consideration the number of years that lapsed with the respondent being silent about these increases is claiming now, there is the possibility that the applicant may succeed in its defence of prescription.

[25] Lastly, the respondent contends that the applicant was or had the willingness to enter into a negotiation, the willingness to negotiate is not per se an agreement as there

are no terms to enforce unless there is an agreement which as per the Master Agreement must be reduced in writing. Even with the willingness to negotiate, the fact is that there was no specific percentage agreed yet raises a question of whether there is an existing ascertainable and quantifiable debt. Consequently, there is a possibility that the amount as granted in the default judgment may or is likely to vary with what the parties would agree to assuming an agreement was to be reached out of these negotiations.

Conclusion

[26] I am satisfied that the applicant has made out a case for the rescission of the judgment in terms of Rule 42(1)(a) in that the applicant was able to explain its absence and that the default judgment was erroneously sought or granted. Again, the applicant has demonstrated a bona fide defence and prospects of success as such, this application must succeed.

[27] I grant the following order:

1. *The default judgment of 14 March 2022 is rescinded.*
2. *The execution of the default judgment referred to above is stayed pending the outcome of the main action.*
3. *The respondent to incur the costs of this application on scale B.*




Kekana ND

Acting Judge of the High Court.
Gauteng Division, Johannesburg.

Counsel for the applicant:	S Kunene
Instructed by:	Leepile Attorneys Inc.
Counsel the for respondent:	M P Van der Merwe SC
Instructed by:	Albert Hibbert Attorneys
Date of the hearing:	21 October 2024
Date of judgment:	13 November 2024