

REPUBLIC OF SOUTH AFRICA



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

Case Number: **2021/43349**

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

22 NOVEMBER 2024

DATE

In the matter between:

R1 SECURITY CC

Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Respondent

Summary:

Civil Procedure – application for rescission of judgment in terms of Uniform Rule 42(1)(a) alternatively, 31(2)(b) – application for condonation of late filing of the application for rescission – whether default judgment has been erroneously sought and granted – whether the applicant has provided a reasonable explanation for the delay, the application has prospect of success and granting condonation is in the interests of justice – whether the applicant is not in wilful default and has a *bona fide* defence. Held: all questions answered in the negative. Application is dismissed.

JUDGMENT

MODIBA, J

Introduction

- [1] On 07 February 2022, this court per Mahomed AJ granted default judgment against the applicant in the following terms:

“1. Judgment by default is granted against the Defendant;

2. The Defendant is ordered to pay the Plaintiff the following:

2.1 Payment of the sum of R18 909 011.57 (eighteen million nine hundred and nine thousand and eleven rand and fifty seven cent);

2.2 Interest of the claimed amount at the legally prescribed interest rate calculated from date of demand to date of payment;

2.3 Cost of suit”

- [2] The applicant applies in terms of uniform rule 42, alternative uniform rule 31(2)(b) to have the default judgment rescinded. To the extent it brings the application in terms of uniform rule 31(2)(b), he seeks condonation in terms of uniform rule 27(3) for failing to launch this application within 20(days) after it became aware of the default judgment.
- [3] The respondent opposed the application on various grounds which I will detail shortly. Essentially, its case is that the applicant has failed to make out a proper case for the rescission.
- [4] I set out the background to the application below, followed by the applicable legal principles. Then, I briefly deal with the applicant’s request for condonation.

Thereafter, I determine the merits of the application, followed by the costs of the application. An order concludes the judgment.

- [5] It is important to mention at this early stage of the judgment that the respondent fully answered to the allegations in the founding affidavit in its answering affidavit. Having failed to file a replying affidavit, the applicant made absolutely no attempt to reply to the respondent's version. The respondent's version is therefore undisputed. During oral argument, counsel for the applicant attempted to raise further factual allegations and/or grounds of defence from the bar, contending that a rescission application is determined on the four corners of the papers before court and the issues he raises appear *ex facie* the documents filed before court.
- [6] By making this contention, counsel for the applicant acknowledged that he was arguing the applicant's case beyond the case set out in the applicant's founding affidavit. The respondent should not be expected to troll through the papers filed in the application for default judgment to decipher any conceivable grounds for rescission that the applicant may raise. It is for that reason that I confine this judgment to the applicant's case as set out in its founding papers.
- [7] Even more disturbing is the applicant's failure to disclose to this court that the default judgment has been successfully executed and that having become aware of the execution process while it was still in progress, it took absolutely no steps to interdict it. This fact is disclosed by the respondent in its answering affidavit, contending that the application is moot. As already stated, the applicant failed to reply to this allegation.

Background

- [8] The background facts are largely common cause. On 9 September 2021, the respondent issued a combined summons against the applicant out of this court. It caused the sheriff of this court to serve the summons on the respondent. The sheriff did so by effecting service on a Tshepo Motaung (Motaung). Motaung is a respondent's employee. The sheriff subsequently issued a return of service describing the manner of service and specifying the uniform rule in terms of which

service was effected. I deal more fully with the contents of the return of service when I consider whether the applicant has shown good cause for the default.

- [9] The applicant having failed to enter an appearance to defend, the respondent took default judgement against it as aforesaid.

The applicable legal principles

- [10] The legal principles that regulate an application for rescission in terms of uniform rule 42(1)(a) are trite. The applicant must show that the default judgment has been erroneously sought or erroneously granted. If the applicant successfully establishes that the default judgment was erroneously sought or granted, this court should, without more, grant an order rescinding the default judgment.¹ When an application for rescission is brought in terms of this sub-rule, it is not necessary for the applicant to show good cause.²
- [11] Generally, a judgment is erroneously granted if there existed at the time of its issue a fact which the court was unaware of, 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.³
- [12] The Court enjoys a discretion in an application for rescission of judgment granted by default.⁴
- [13] Uniform rule 31(2)(b), provides that:
- “A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.”

¹ See *De Wet and Others v Western Bank Ltd* 1977(4) SA 770 (T) and *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471G.

² *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA (ECP) at 597I-598B.

³ See *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 153C.

⁴ *Georgias v Standard Chartered Finances Zimbabwe Ltd* 2000 (1) SA 126 ZS at 132G-I.

- [14] It is trite that to succeed in a rescission application brought in terms of uniform rule 31(2)(b), the applicant must establish that he is not in wilful default. It must also establish that it has a *bona fide* defence to the applicant's claim.
- [15] Since the applicant failed to bring the application within 20 days of becoming aware of the default judgment, it seeks condonation in terms of uniform rule 27 (3) for bringing this application out of time. To succeed, in such an application, it ought to provide a full explanation for the delay. It must also establish that it has prospects of success in the main proceedings. The interests of justice are an overriding consideration in the later enquiry. These legal principles, as they apply in condonation applications, are trite.

Condonation application

- [16] The applicant has failed to make a proper case for condonation. According to the applicant, its legal department became aware of the default judgement when the warrant of execution was served on the applicant's office administrator on 26 of April 2022.
- [17] It concerns me that the applicant was dilatory in its response to the warrant of execution, especially when regard is had to the high amount of the monetary order granted in terms of the default judgment. It was only on 19 May 2022 that it instructed its attorneys in this matter. It contends that it did so after making internal enquiries. No details are given regarding the enquiries made and why it took the applicants' attorneys 17 days before instructing its attorneys. Its attorneys accepted the instruction on 20 May 2022. They only addressed a letter to the respondent's attorneys on 24 May 2022 requiring access to Caselines. Their tardy response to the applicant's urgent instructions, given the execution process in progress, is unexplained. It does not seem that the applicant's staff took issue with the tardy response by the applicant's attorneys. Otherwise, the founding affidavit would reflect this.
- [18] The applicant notably does not take this court into its confidence regarding when the rescission application was instituted, probably because it lacks a reasonable

explanation for its further dilatory conduct. The application could not have been instituted earlier than 25 August 2022, the date of its notice of motion. This constitutes a further unexplained delay of approximately 66 days.

[19] In the absence of a full explanation for the delay in bringing this application, the applicant has failed to place this court in a position to properly enquire into the reasonableness of the delay. I am therefore constrained to find that its explanation for the delay was not reasonable.

[20] It is trite that the ultimate consideration whether good cause is shown for the delay is the interests of justice. To determine whether it is in the interest of justice to excuse the applicant's delay in bringing the application, it is necessary to traverse the merits. In a rescission application, the interests of justice would be served if an applicant establishes that he has a *bona fide* defence to the respondent's claim. As I find in the merits section of the judgment, it has failed to discharge this onus. Therefore, I must find that condoning its delay in bringing the application is not in the interest of justice.

[21] For these reasons, the applicant's request for condonation fails.

Wilful default

[22] The explanation the applicant set out for its default in defending the action in its founding is that according to the sheriff's return of service, the summons was served on the applicant's head office on 9 of September 2021. At the time, the applicant's offices ...

"were still on a rotational in office working schedule". This would mean that the full complement of staff is not available every day. This was implemented in the workplace to combat the spread of the COVID-19 virus ... whilst the COVID-19 restriction had eased at the time of service the applicant had members that tested positive from time to time and would have to stay at home from isolation in terms of the COVID-19 protocols."

[23] The applicant went on to explain that:

“The above may have led to a lack of staff, particularly the legal department, on the date of service of the summons and particulars of claim resulting in the documents being served upon Mr Tshepo Motaung a driver employed by PRASA, who may have not appreciated the importance of the documents, leading to them being misplaced.”

- [24] As contended on behalf of the respondent, the summons was properly served at the applicant's head office as contemplated in the court rules. The applicant relies on an unsubstantiated explanation that its driver, on whom the summons was served may not have appreciated its importance, resulting in the summons being misplaced. This explanation clearly amounts to speculation. As contended on behalf of the respondent, the applicant made no effort to enquire from the person on whom the summons was served, what he did with them. This person is named in the summons and is known to the applicant.
- [25] The attempt by counsel for the applicant to impugn the manner of service from the bar is inappropriate. He submitted that the summons was not properly served in terms of the uniform rules because they were not served on a person in charge of the applicant's premises as the driver is not such a person. As contended on behalf of the respondent, by not raising this issue in its founding papers, the applicant also neglected to obtain an explanation from the sheriff regarding the basis on which he determined that the person on whom he or she served the summons oversaw the applicant's premises. It also denied the respondent an opportunity to answer to this allegation.
- [26] It is not the applicant's case that when the summons was served and before the *dies* for filing opposing papers expired, its entire legal complement was not in the office, either due to being on rotation or due to being infected with the corona virus. Details in respect of this averment is completely lacking. The averment is vaguely made. It is highly unlikely that the applicant's legal department was completely not staffed during the relevant period.

[27] I therefore find that as set out in the sheriff's return of service, the summons was properly served at the applicant's premises in terms of the uniform rules and that the applicant has failed to establish that it is not in wilful default of defending it.

Bona fide defence

[28] The applicant contends that it has a *bona fide* defence. It relies on the following grounds:

- (a) Non-compliance with uniform rule 18(10);
- (b) The particulars of claim are excipiable because they fail to set out a cause of action against the applicant;
- (c) The respondent did not comply with section 3 of the Act 40 of 2002 as they failed to give the applicant notice of the legal proceedings;
- (d) Most of the claims that constitute the plaintiff's cause of action have prescribed.
- (e) The summons is premature because the agreement between the parties makes provision for an arbitration clause.

[29] In what follows, I determine the above grounds.

Non-compliance with uniform rule 18(10)

[30] This rule provides as follows:

"A party who in his or her pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

[31] The applicant contends that the respondent relies on two contracts to establish its alleged cause of action namely, the Master agreement attached to the particulars of claim (master agreement) and an extension of this agreement (extension agreement). It further contends that the applicant's particulars of claim fail to comply with this uniform rule because:

(a) The applicant alleged that the term of the Master agreement was twelve months. After it expired, it was extended on a month-to-month basis until on or about April 2020. Clause 39.1 of the Master agreement stipulates that no amendment of the agreement shall be binding unless recorded in a written document signed by the parties. The applicant fails to attach the extension agreement;

(b) The applicant fails to state the name of the party who represented the applicant when the alleged extension agreement was concluded. It also failed to plead when the extension agreement was pleaded and what its terms were.

[32] Therefore, the applicant further contends, the respondent's particulars of claim fail to disclose a cause of action.

[33] To bolster its case in this regard, the applicant relies on *Moosa and Others NNO v Hassam*⁵, where the court held that when respondents base their cause of action against the applicants upon the written agreement, the written agreement is a vital link in the chain of the respondents' cause of action. For the respondents' cause of action to be properly pleaded, it is necessary for the written agreement relied upon to be annexed to the particulars of claim. In the absence of the written agreement, the basis of the respondents' cause of action does not appear *ex facie* the pleadings.

[34] These defects are not fatal to the respondent's cause of action for reasons set out below. In the main proceedings, the respondent's case will be that the extension agreement was concluded orally. Therefore, uniform rule 18(C) will not assist the applicant

[35] The point in respect of clause 39.1 of the master agreement will also not sustain the applicant's defence in the main proceedings because it is pertinently clear from both what the respondent has pleaded in its particulars of claim and in its answering affidavit that throughout the period of the extension contract, the applicant never

⁵ 2010 (2) SA 410 (KZP) at 413B–414B.

took issue with the validity of the extension. The applicant has also not alleged in its founding affidavit, that it took issue with the validity of the extension agreement.

- [36] The applicant went to the extent of negotiating a price increase with the respondent and other security service providers. It did so on two occasions. The rate of increase was agreed to in writing on or about 12 May 2014 by a letter authored by the applicant's Jama Makatama (the Makatama letter). The increase would be based on prevailing PSIRA rates for 2024. The respondent sought condonation for not attaching the Makatama letter to its particulars of claim because it is no longer in its possession. A further increase in rates was agreed following meetings between the applicant's representatives and the representatives of the applicant's security providers on 17 and 18 July 2018. After this meeting, the applicant's Stephene Mafemane Nkhuna (Nkhuna), Security Manager for Corporate Services addressed an email to the respondent and applicant's representatives expressly or tacitly acknowledging the applicant's liability to the respondents for PSIRA annual price escalations (the Nkhuna email)
- [37] It is pertinently clear from the particulars of claim that at no point during the period of extension agreement did the applicant take issue with its validity, raising the issues it advances in this application. It placed the applicant in service, accepted the respondent's service and paid for them. The respondent's cause of action in the action is solely based on the PSIRA increases which it contends, notwithstanding the matakama letter and Nkhuna emails, that the applicant has failed to pay.
- [38] The applicant has not established a *bona fide* defence based on the applicant's failure to comply with the uniform rule 18(6) because it has failed to reply to these allegations.
- [39] During oral argument, counsel for the applicant tried to advance a completely new case from the bar, alleging that the extension agreement does not comply with the applicable procurement laws and regulations and for that reason, the applicant seeks to have it set aside. No grounds for the intended review are set out in the applicant's founding affidavit. Therefore, the applicant has not established

prospects of success in the review. Its reliance on *Tasima*⁶ is not sustainable because there is no basis on the papers for even the smallest suspicion that the applicant enjoys prospects of success in review proceedings in respect of the master and extension agreements.

The particulars of claim are excipiable because they fail to set out a cause of action against the applicant

[40] This ground of the basis for the applicant's purported *bona fide* defence is the most bizarre. The applicant contends that the respondent has failed to set out a cause of action because, having averred at paragraph 6.2 of the particulars of claim that it duly submitted its invoices for security services it rendered to the applicant, it fails to allege that the applicant has breached the agreement. The respondent further averred that the respondent certified that the invoices that were submitted were correct, and they were accordingly paid as presented. Therefore, the applicant fulfilled all its obligations under the agreement. But it is very clear from the allegations in paragraphs 7 and 8 of the respondent's particulars of claim that the basis for the respondent's claim is an annual price increase of a maximum of 7% or at least a CPIX percentage increase for the period April 2015 to September 2018. It amounts to R18,909,011.57 as set out in annexure RS3 of the particulars of claim. This amount represents the difference between monthly invoices rendered and paid and the alleged price increase calculated based on the applicable CPIX rate during each month. The respondent's claim is not based on failure to pay invoices for services rendered.

[41] The highwater mark of the applicant's purported defence to this claim is the respondent's alleged non-compliance with uniform rule 18(6), which I have dealt with above. The applicants has set out absolutely no *bona fide* defence to the respondent's claim based on the agreement to increase the fees for the services rendered as alleged by the respondent.

⁶*Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at paragraphs 36 to 42 and 103 to 194.

The respondent did not comply with section 3 of the Institution of Legal Proceedings against Certain Organs of State Act⁷ as it failed to give the applicant notice of the legal proceedings;

- [42] The applicant alleges that the respondent failed to give the applicant notice of legal proceedings as contemplated in section 3 of Act 40 of 2002. This ground of defence was devoid of any merit. An allegation that the respondent gave the applicant the said notice is set out in paragraph 9 of the particulars of claim. The notice is attached to the particulars of claim as annexure RS4.

Most of the claims that constitute the respondent's cause of action have prescribed

- [43] In absence of a reply to the averment in the particulars of claim that the Matakama letter and Nkhuna email represent an express or tacit acknowledgement of the applicant's liability to the respondent in respect of the PSIRA annual increases, this ground of defence is also devoid of merit.

The summons is premature, the agreement between the parties makes provision for the arbitration clause

- [44] Lastly, the applicant contends that the summons is premature as the Master agreement contains an arbitration clause. It did not reply to the respondent's answer that the arbitration clause does not apply to its cause of action. It only applies in the event of a dispute between the parties. The applicant having acknowledged its liability to the respondent, there is no dispute between the parties.

Conclusion

- [45] For reasons set out in this judgment, I find that the applicant is in wilful default. It failed to advance a reasonable explanation for the default. I also find that the

⁷ Act 40 of 2002.

applicant also lacks a *bona fide* defence to the respondent's claim and filed this application to frustrate the applicant's action.

Cost

[46] The applicant has advanced no reason as to why costs should not follow the cause. The respondent's quest for costs on the attorney and client scale was not pleaded in its answering affidavit. It is not made in its heads of argument. It is therefore not properly made.

[47] In the premises, the following order is made:

Order

The application is dismissed with costs inclusive of costs consequent upon the employment of counsel.



L.T. MODIBA
JUDGE OF THE HIGH COURT
JOHANNESBURG

Appearances

For the Applicant:

P Ngutshana SC

Instructed by Leepile Attorneys Inc

For the Respondent:

MP Van der Merwe SC

Instructed by Albert Hibbert Attorneys

Date of Hearing:

15 October 2024

Date of Judgment:

21 November 2024

MODE OF DELIVERY: This judgment is handed down virtually on the MS Teams platform and transmitted to the parties' legal representatives by email, uploading on Caselines and release to SAFLII. The date and time for delivery is deemed 10:00am.