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

Case Number: 2545/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
XX/12/2024 _____	
DATE	SIGNATURE

In the matter between:

SELECT M STORES (PTY) LTD

APPLICANT

and

ADIDAS (SOUTH AFRICA) PTY LTD

RESPONDENT

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 19 December 2024.

JUDGMENT

MANAMELA, AJ

Introduction

[1] This is an opposed application for rescission of a default judgment granted in terms of rule 31(5) of the Uniform Rules of Court (“the Rules”). The application is brought in terms rule 42(1) (a).

[2] Default judgment was granted by the Registrar of the High Court on 26 April 2022 in favour of the respondent. The order sought to be rescinded is in the following terms –

- “1. Payment of the amount of R 503 893.35.
2. Interest thereon at the rate of 24% per annum as from 29 February 2020 until date of final payment.
3. Costs on attorney and client scale.”

[3] The respondent seeks the dismissal of this application with punitive costs including costs *de bonis propriis* against the applicant’s attorneys.

Factual Background

[4] The respondent, Adidas (South Africa) Pty Ltd, instituted legal action against the applicant, Select Stores (Pty) Ltd for an amount of R 503 893.35 together with interest, based on a contract for supply of goods sold and delivered to the applicant based on a written contract concluded on 4 March 2008.

[5] As a result of failure to make payment of those goods, the respondent instituted legal action against the applicant based on breach of contract. A written demand was issued on 4 November 2021.

[6] Summons was issued on 25 January 2022 and served by affixing to the main entrance of the registered address of the applicant on 17 February 2022, at 4[...] Q[...] Road, I[...], Gauteng. The same address is noted on CIPC records as the residential address of the applicant’s director Mr. Phashwana Stephen Ratlou (“Mr. Ratlou”).

[7] The time within which the applicant had to file a notice to defend expired on 4 March 2022.

[8] The only common cause fact between the parties is that default judgment was granted against the applicant.

Issues for Determination

[9] The main issue of determination is whether the applicant has made out a case for rescission of judgment in terms of rule 42(1)(a) of the Rules.

[10] Secondly, whether summons was served properly by the respondent.

[11] Whether business rescue proceedings were deemed to commence in respect of the applicant, and whether a moratorium on legal action against the applicant was applicable.

The applicant's case and grounds for rescission of judgment

[12] The applicant launched an application for rescission on 22 February 2024 and contended it did not wilfully disregard the legal process by not responding to the legal action. The applicant's director states that he only became aware of the judgment when he could not access the bank account held in the applicant's name around June 2022.

[13] The applicant relies on two grounds for rescission. The first is that the respondent was not permitted to issue summons commencing action, take judgment by default and proceed with execution steps against the applicant during the course of business rescue proceedings by reason of the operation of section 133 of the Companies Act.¹ The second ground is that the service of the summons does not

¹ 71 of 2008 ("the Companies Act").

comply with rule 4(1)(a)(v) of the Rules, in that the address of service was apparently not the registered address or the principal place of business of the applicant.

[14] The applicant argues that the respondent relied on an outdated CIPC report dated 29 September 2021 when commencing action, when the applicant's address was changed on 17 December 2021.

[15] Based on the above the applicant contends that the default judgment was erroneously sought and granted in favour of the respondent.

The respondent's case for opposing rescission of judgment

[16] The respondent contends that the applicant's grounds for rescission lacks merit in that –

- a. firstly, the business rescue proceedings relied upon have not been deemed to commence due to the applicant's non-compliance with the service and notification provision of the Companies Act;
- b. secondly, that the applicant admitted liability towards the respondent's claim; and
- c. thirdly, the respondent used the same address that was used by the applicant in its business rescue application for service of the summons a few days before changing the address.

[17] The respondent argues that the applicant served this rescission application by email on the respondent on 6 December 2022 – six months after obtaining knowledge of the judgment without providing any explanation for the delay.

[18] The respondent points out that the applicant failed to demonstrate a *bona fide* defence, and that the applicant's intention is to frustrate and delay the respondent's lawful claim.

[19] The respondent argues that the applicant had the same director and the same registered address since 2012, in terms of a company search report attached to the business rescue application which the applicant uses to seek rescission of judgment,

which report confirms the registered address of the applicant as the address at which summons in this matter was served by respondent.

[20] Further, that the applicant relied on business rescue proceedings that have not been deemed to commence due to the applicant's non-compliance with the service and notification provisions of the Companies Act.

Legal Framework

[21] 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.²

[22] In a rescission of judgment application in terms of rule 42(1)(a), a court may –
“[1] [i]n addition to any other power it may have, *mero motu* or upon the application of any party affected, rescind or vary;
(a) [a]n order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby.”

[23] The law governing rescission under rule 42(1)(a) is trite. The applicant must show that the default judgment or order had been erroneously sought or erroneously granted.³ It is based on two elements, namely, that the applicant must set forth a reasonable explanation or show good cause for the default, and secondly that the applicant must demonstrate a *bona fide* defence(s).

² See *Van Heerden v Bronkhorst* [2020] ZASCA 147; see also *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; *Rossitter v Nedbank Limited* [2015] ZASCA 196 at para 16 (“*Rossitter*”); *Thomani and Another v Seboka NO and Others* 2017 (1) SA 51 (GP) at 58C-E; *Occupiers, Berea v De Wet NO and Another* [2017] ZACC 18; 2017 (8) BCLR 1015 (CC) 2017 (5) SA 346 (CC) at 366E-367A.

³ *Rossitter* above at para 16. See also *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E); and *Elia and others v Absa Bank* [2023] ZAGPHJC 649.

[24] In the matter of *Chetty v Law Society*,⁴ Miller JA clarified the test for rescission that:

“The Appellant’s claim for rescission of judgment confirming the rule *nisi* cannot be brought under Rule 31 (2) or Rule 42 (1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown...

The term ‘sufficient cause’ (or ‘good cause’) defies precise or comprehensive definition, for many and various factors are required to be considered. (See *Cairn’s Executors v Gaarn* 1912 AD 181 at 186 per Innes JA) But it is clear that in principle and in the long-standing practice of our Courts two essential elements ‘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 party has a *bona fide* defence which, *prima facie*, carries some prospect of success.”⁵

[25] It is not sufficient if only one of these two requirements is met. For obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment.

[26] *Silber v Ozen Wholesalers (Pty) Ltd*⁶ remains authority for the proposition that an applicant’s explanation must be sufficiently full to enable the court to understand how the default came about and assess the applicant’s conduct.

Service of legal process

[27] Rule 4(1)(a)(v) provides that –

⁴ *Chetty v Law Society*, Transvaal 1985 (2) SA 756 (A) (“*Chetty*”); See also *De Wet and Others v Western Bank* 1979 (2) SA 1031 (A) at 1042 and *Childerly Estate Stores v Standard Bank SA Ltd* 1924 OPD 163.

⁵ *Chetty* above at 764J-765C, that court referencing *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 799 (A) and *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357-8.

⁶ 1954 (2) SA 345 (A) at 353.

“(1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:

...

(v) in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court’s jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law.”

[28] Section 23(3)(b) of the Companies Act states that every company must “register the address of its office, or its principal office if it has more than one office”. In terms of notice 3 and 5 of Practice Note 2 of 2012: Interpretation and Application of Section 23 of the Act and Regulation 43 of the Regulations⁷ “a company’s registered address must be the address of an office maintained by the company and not the office of a third party”.

Business rescue requirements

[29] In terms of section 132(1)(b) of the Companies Act, business rescue proceedings commence when an affected person applies to the court for an order placing the company under supervision in terms of section 131(1).

[30] Section 132 (1) stipulates that business rescue proceedings begin when –
“(a) the company—
(i) files a resolution to place itself under supervision in terms of section 129(3);
or
(ii) applies to the court for consent to file a resolution in terms of section 129(5)(b).”

⁷ Interpretation and Application of Section 23 of the Act and Regulation 43 of the Companies Regulations, 2011: *Sibakhulu Construction (Pty) Ltd V Wedgewood Village Golf and Country Estate (Pty) Ltd*: Practice Note 2 of 2012, GN R667 GG 35618 of 24 August 2012.

[31] Section 133 of the Act regulates the institution of legal proceedings against the company and the enforcement of any action against the company during business rescue. This is commonly referred to as the “statutory moratorium” or “stay” that is placed on a company from the moment that business rescue proceedings commence.

[32] During business rescue proceedings, no legal proceedings (legal or arbitration proceedings), including enforcement action (execution of a court or other order) against the company or in relation to its property, that belongs to it, or which is lawfully in its possession, may be commenced or proceeded with in any forum (court or arbitral forum).

[33] There are certain instances in which one would be able to commence or proceed with legal proceedings or enforcement action against the company, in terms of section 133(1)(a) to (f), namely – (a) with the written consent of the practitioner; (b) with the leave of the court; (c) as a set-off against any claim made by the company in any legal proceedings, irrespective as to whether those proceedings commenced before or after business rescue proceedings began; (d) the criminal proceedings against the company or any of its directors or officers; or (e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or (f) proceedings by a regulatory authority in execution of its duties after written notification to the business rescue practitioner.”

Analysis

Erroneously sought and granted default judgment

[34] Before a person can be said to be in wilful default the following must be shown - (a) knowledge that the action is being brought against him; (b) a deliberate refraining from entering appearance though free to do so; and (c) a certain mental attitude towards the consequences of the default.⁸ The applicant is obliged to disclose the reasons for his default because it is relevant to the question whether the applicant’s default was wilful or not.

⁸ *Formulated IT Group CC v North Gauteng Mental Health Society* [2021] ZAGPJHC 651.

[35] The test for whether a default judgment may be granted in terms of rule 42(1)(a) or the common law was dealt with in *Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*.⁹ Rescission under the common law requires that good cause to be shown. To establish good cause, an applicant must set forth a reasonable explanation for the default and a *bona fide* defence relied upon.

[36] An order may be said to have been erroneously granted if at the time of its issuing there was a procedural irregularity or error made during the proceedings which is patent in the record.¹⁰

[37] In the *Zuma* case, the court summarised the legal position and correct approach as follows:

“[53] It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that the court ‘may’, not ‘must’, rescind or vary its order – the rule is merely an ‘empowering section and does not compel the court’ to set aside or rescind anything. This discretion must be exercised judicially.”

[38] The Constitutional Court put the position as follows:

“Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42 (1) (a). And, it certainly cannot have the effect of having an order granted *in absentia*, into one erroneously granted.”¹¹

[39] An element of the explanation for the default is that the applicant must show that he or she was not in wilful default. If the case the applicant makes out on wilful

⁹ [2021] ZACC 28 (CC); 2021 (11) BCLR 1263 (CC) (“*Zuma*”).

¹⁰ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* [2003] ZASCA 36; 2003 (6) SA 1 (SCA).

¹¹ *Zuma* above n 9 at para 61.

default is not persuasive, that is not the end of the enquiry – the applicant’s case may be rescued if a *bona fide* defence is demonstrated.¹²

[40] In his founding affidavit the applicant’s director gave an account of events leading to the legal action taken by the respondent up to becoming aware of the existence of the default judgment. The applicant states that the respondent relied on an outdated company search report to establish the applicant’s registered address. Summons were served in February 2022 at Isando when the address was changed to Lynnwood, on 17 December 2021.

[41] Some three days before the service of the summons, on 14 December 2021, the applicant deposed to a founding affidavit attached to business rescue proceedings. In that same application, the applicant used the Isando address.

[42] The respondent argues that the applicant fails to inform the court that the same address where summons was served has always been the deponent’s residential address. The respondent argues that the place of business where all invoices and delivery of goods was effected is the principal place of business of the applicant, in Isando.

[43] It is trite law that a company’s registered address must be the address where a company may be found and the place where it conducts business. Section 23 of the Companies Act does not set out the requirements for such a registered office and so one must look elsewhere in the Act for such requirements. However, this section does use the word “office” which indicates that the registered office must at least be a physical space which is capable of being occupied and that cannot be a PO Box or empty piece of land somewhere.

[44] A material distinction between a “registered office” under the 2008 Act and its predecessors, however, is that under the current Act the registered office must be the company’s only office, alternatively, if it has more than one office, its “principal office”. The term “principal office” is not specially defined in the statute. It seems from

¹² *Harris v ABSA Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at paras 8–10.

the context – more particularly, the requirements of what must be kept or accessible there – that it is intended to denote the place where the administrative business of the company is principally conducted, in the sense of being the place where the company's general administration is centred.¹³

[45] It is clear from the above that one must carefully consider the address of a company's registered office when registering a company, and that the company must ensure that its registered office is kept up to date with the CIPC as it must maintain the registered office in terms of section 23(3)(a) of the Companies Act. Using a convenient address such as, for example, the incorporator's residential address or the company's auditor's address (as has in the past been common practice) is not permitted under the Act. It is found that the use of the attorney's address is a complete breach of the Companies Act 71 of 2008 Regulations.

Whether business rescue proceedings were deemed to commence in respect of the applicant, and whether a moratorium on legal action against the applicant was applicable

[46] The applicant launched business rescue proceedings on 14 December 2021.

[47] The contention around commencement of business rescue proceedings can be clarified as follows: the time or date referred to section 129 and section 131 respectively refers to the mode or process by which business rescue begins, being either by means of a resolution of the board of directors of the company (section 129) or, alternatively, through successful application to the High Court by an affected person (section 131). Of particular relevance to this application - an affected person applies to the court when (a) a business rescue application is launched or presented to the Registrar of the court to be issued, (b) a copy thereof served on the Commission (CIPC), and (c) each affected person has been properly notified of the

¹³ *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd* [2011] ZAWCHC 439.

application, with the ultimate order placing the company in business rescue operating retrospectively from the date of such defined application.¹⁴

[48] The respondent provided further evidence that the applicant failed to serve the business rescue proceedings. The applicant also failed to effect service upon the Commissioner of the CIPC, as the email was transmitted to an incorrect address, and by way of a disappearing transmission “we transfer” mode. It is evident that the affected parties were not properly notified of the business rescue proceedings.

[49] This interpretation is challenged under section 131(4) of the Companies which explicitly states that the business rescue proceeding begins upon the granting of a court order by the court. The determination of which section holds the judicial determination ground was discussed in the cases such as *Investec Bank Ltd v Bruyns*¹⁵ and *Taboo*. However, in the *Sundays River Citrus*¹⁶ case the determining clarity was sought and the court held that business rescue proceedings commence on the granting of a court order and not when the initial application is lodged.

[50] Despite considering various factors, the court’s decision ultimately hinged on a purposive interpretation of the Companies Act, the sequence of events following the commencement of business rescue, and the business rescue practitioner’s role. The primary purpose of business rescue proceedings is to provide a legislative framework for a business rescue practitioner to assist financially distressed companies, following their appointment subsequent to the initial order of court. Thus, interpreting the proceedings as commencing only on a court order aligns with the Act’s purpose, ensuring proper supervision from the outset. Treating the proceedings as commencing on the date of application, when no practitioner could yet be appointed, appeared to be in conflict with this purpose.

[51] A business rescue application is thus only to be regarded as having been commenced with once the application has been lodged with the Registrar, duly

¹⁴ *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC; Joubert v Pro Wreck Scrap Metal CC* 2013 (6) 141 (KZP) at para 11.4 (“*Taboo*”).

¹⁵ 2012 (5) SA 430 (WCC).

¹⁶ *Sundays River Citrus Company (Pty) Ltd and Another; In re: Bouwer v Lonetree and Another* [2024] ZAECPHC 59.

issued, a copy thereof served on the Commission, and each affected person has been properly notified of the application and the order is granted by the court.

Conclusion

[52] Having considered the applicant's case, particularly the explanation leading to the default and the grounds for rescission, I find that the applicant failed to demonstrate a *bona fide* defence and does not have *prima facie* prospect of success on the merits, and as such, the applicant has failed to prove necessary elements and the requirements for rescission of judgment

Costs

[53] I now turn to consider the aspect of costs. The respondent seeks a punitive cost order against the applicant including cost *de bonis propriis* based on the fact the application is premised on legal principles.

[54] The respondent's counsel argues that the entire application is premised upon either the inability or refusal to properly construe or abide by the relevant principles of the Companies Act regarding the issues surrounding "the commencement of business rescue proceedings" and "moratorium on legal proceedings". That if one accepts that the process of reasoning upon which this application is based vis-à-vis the business rescue provisions of the Companies Act, then there has been a reckless failure by the applicant's attorneys to properly consider the legal position before advising their client to launch and persist with an entire rescission application which is a waste of court resources and an abuse of process.

[55] A party incurs wasteful costs when their attorneys cause them to spend money they should not have to. Cost *de bonis propriis* applies when the party's legal representative are ordered to bear the costs of the legal proceedings.

[56] In support of an argument for costs *de bonis propriis* against the applicant's attorneys, the respondent's counsel argues that the applicant's attorneys have implicated themselves by participating in the applicant's breach of company laws and

regulations of South Africa, in allowing the applicant to change its registered address from Isando, to the attorneys address, some few days, after deposing to an affidavit disclosing the same address, in support of a business rescue application. The respondent argues that the attorneys remained silent despite this issue being raised more than once.

[57] The respondent further points out that since filing of the replying affidavit, the applicant has not taken any step to advance its rescission application.

[58] The respondent relied on *CB v HB*¹⁷ at where it was stated that it is settled law that generally a court would only grant a costs order *de bonis propriis* against an attorney in cases that involve gross incompetence or gross disregard of professional responsibilities, dishonesty, wilfulness, or negligence of a serious degree.

[59] It is common cause that a written agreement between the parties contemplates costs to be paid on an attorney and client scale in the event of a breach of the agreement. I am of the view that this costs scale is sufficient to penalise the wrong party in this case.

[60] It is trite law that that the basic notion underlying an award of costs *de bonis propriis* is a material departure from the responsibility of office including negligence in a serious degree, a want of *bona fides* or unreasonable conduct. It comes as a last resort when the court exerts a displeasure about the conduct of an attorney, and not necessarily when such attorney simply enables its client to evade the law. I find that there is no need to extend the hammer to the attorneys in this case.

Order

[61] Consequently, I make the following order:

- a. The application for rescission of judgment is dismissed with costs on attorney and client's scale.

¹⁷ [2020] ZASCA 178; 2021 (6) SA 332 (SCA) at paras 19–21.

P N MANAMELA
ACTING JUDGE OF THE HIGH COURT,
JOHANNESBURG

Hearing: 11 September 2024

Judgment: 19 December 2024

Appearances:

For the Applicant : CA Kriel

Instructed by: Machobane Kriel Inc. Attorneys

For the Respondent: R Blumenthal

NVDB Attorneys