REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
[TRANSVAAL PROVINCIAL DIVISION]

CASE NO: 21429/2006

DATE: 14 SEPTEMBER 2007

In the matter between:

DLAMINI CONSTRUCTION [PTY] LTD APPLICANT

and

FUTURE LOGISTICAL SOLUTIONS CC RESPONDENT

J U D G M E N T

MAKGOKA [AJ]

[1] The Applicant seeks an order rescinding summary judgment granted in default. The background thereto is that the Respondent issued summons on 5 July 2006 against the Applicant for R282 401.53

pursuant to an alleged admission of liability. The Applicant filed notice of intention to defend the matter on 31 August 2006. On 14 September 2006 the Respondent applied for summary judgment and set the application down for 3 October 2006, which application was served on the Applicant's attorneys. The Applicant failed to file an affidavit resisting summary judgment. On 3 October 2006 the matter was postponed to 17 October 2006, at the instance of the Applicant. On 16 October 2006, the day before the hearing of summary judgment, the Applicant's attorneys withdrew as its attorneys of record. On the day of the hearing on 17 October 2006, no appearance was made on behalf of the Applicant and summary judgment was granted in default against the Applicant by Hartzenberg J.

[2] This application is brought in the main, in terms of Rule 42[1] and in the alternative, in terms of Rule 31[2] of the Uniform Rules of the Court. Rule 42[1] provides:

"A court may , in addition to any powers it may have , mero

motu or upon application of any party affected, rescind or vary :

[a] An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

[3] It is worth mentioning at this stage that in terms of Rule 42[1] the Applicant does not have to show good cause. Once the court holds that an order or judgment was erroneously granted it should without further enquiry rescind same. See ***Hardroad [Pty] Ltd v Oribi Motors [Pty] Ltd 1977 [2] SA 576(W) 578F-G; Tshabalala and Another v Peer 1979 [4] SA 27(T) 30C-D. Mr Clavier***, on behalf of the Applicant, developed his argument in two – fold. The first leg of his argument rests on the competence of the deponent to the affidavit in support of summary judgment on behalf of the Respondent. The contention in this regard is that the deponent was not party to the discussions that led to the alleged acknowledgement of liability. He could not, therefore, possibly verify the cause of action as the facts around same were not within his personal knowledge. The argument

proceeds that, had the learned Judge hearing the application for summary judgment, been aware of this fact, he would have refused the application.

[4] The second leg of ***Mr Clavier's*** attack relates to the fact that the applicant was never advised of the fact that its former attorneys, had withdrawn as attorneys of record. Similarly, it is argued, had the learned Judge who heard the application for summary judgment, been aware of this fact, he would have refused to hear the application until he was satisfied that the Applicant was aware of its former attorneys' withdrawal. On this basis, the argument goes, summary judgment was thus erroneously granted as well.

Turning now to the arguments advanced on behalf of the Applicant.

[5] **Competence of deponent to depose to facts verifying cause of action.**

This argument is untenable. It goes to what could have been a probable defence had an opposing affidavit on behalf of the

Applicant been filed. In the absence of such affidavit, it is inconceivable how the learned Judge could have held otherwise than to accept the only and uncontradicted evidence before him. I am therefore unable to find an irregularity in the proceedings. This point therefore falls to fail.

[6] **Failure of Applicant's attorneys to inform Applicant of their withdrawal.**

It is common cause that the Applicant's former attorneys of record's notice of withdrawal, did not come to the attention of the Applicant. It is further common cause that the said notice did not comply with the provisions of Rule 16(4) in that it was not sent to the applicant, either by mail or in any manner whatsoever. As stated above ***Mr Clavier*** argued that on the above basis, summary judgment had been granted erroneously, the argument being, had Hartzenberg J been made aware of this fact, the learned Judge would not have granted summary judgment. The answer to that submission is to be found in ***Nyingwa v Moolman NO 1993 [2] SA 508 (Tk GD).*** On strikingly

similar facts to the present case, the same argument as advanced on behalf of the Applicant was made. White J, at 510 H-J said:

> "***In casu*** *it was manifest to the presiding Judge that the defendant's attorneys had been aware of the application for summary judgment from its inception, and the defendant had been represented by counsel at the first hearing of the application. Under these circumstances the Judge was fully justified in accepting that the defendant was a wilful defaulter, and that summary judgment should be granted. In view of the on-going efforts to defend the application by the attorneys, to whom the defendant had entrusted the defence of this case, it is difficult to envisage circumstances in which the judgement was erroneously granted. The Court would have to be satisfied that the defendant is absolved from blame for his ignorance of the application, and that the attorneys were solely to blame for not having informed him of the application and for their late withdrawal from the case."*

[7] In ***De Wet and Others v Western Bank 1979 [2] 1031 [AD], at 1038 D-E,*** Trengrove AJA [as he then was] said:

> "*In my view there is no substance whatever in this contention.*

> *The appellants cannot avail themselves of the fact that their attorney had not complied with all the requirements of Rule 16(4). There is no question of any irregularity on the part of the Respondent… [a]s far as the trial court was concerned the Rules of court had been fully complied with."*

In the present case, as would appear later in this judgment, the Applicant's former attorneys of record had no option but to withdraw, as no proper instructions were forthcoming on behalf of the Applicant. I cannot find any default on their part. On the contrary, the said attorneys went to great lengths to accommodate and assist the Applicant, in the face of a summary judgment application, with no instructions nor an affidavit from the Applicant to enable them to oppose such application. The Applicant therefore, was the author of its own misfortune.

[8] I am therefore satisfied that the second leg of the Applicant's attack, cannot be sustained. It follows then that summary judgment was not granted erroneously and therefore the application cannot be brought under Rule 42(1)(a). It was argued in the alternative, that the summary judgment should be rescinded in terms of Rule 31(2)(b). It

is trite that summary judgment granted in terms of Rule 32 cannot be rescinded in terms of Rule 31(2)(b). The main reason for the provisions of Rule 31 not being applicable to summary judgments, is because Rule 31 applies only to those cases in which a defendant "*is in default of delivering of notice of intention to defend or of a plea"*, which is clearly not the case when a summary judgment application is granted. See ***Louis Joss Motors (Pty) Ltd v Riholm 1971 [3] SA 452 (T) at 452*** and ***Briston v Hill 1975 [2] SA 505 (N) at 505 H.***

The alternative argument advanced on behalf of the Applicant, must, therefore, similarly fail.

[9] Although it was not argued before me to consider the application for rescission in terms of the common law, I will proceed to do so. In terms of common law, a court has a discretion to grant rescission of judgment where sufficient or good cause has been shown.

> *"But it is clear that in principle and in the long standing practice of our Courts two essential elements of "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 a party has a bona fide defence, which prima facie carries some prospect of success."

[See ***Chetty v Law Society, Transvaal 1985 [2] SA 756 [A] at 765 B-C.]***

[10] It is not sufficient if only one of these elements is established – [see ***Promedia Drukkers & Uitgewers [Edms] Bpk v Kaimowitz and Others 1996 [4] SA 411 (C) at 418 B]*** **.**

[11] The general approach to rescissions at common law having been established, I now turn to consider the two elements of "sufficient cause". I will do so in the light of the explanation proffered for the Applicant's default, as well as the defence disclosed on behalf of the

Applicant. The Applicant's deponent, Mr Kenneth Dlamini, [Dlamini] is the sole director of the Applicant. After receipt of the summons, he instructed an employee of the Applicant, one Dave Hudson [Hudson], to ensure that the matter is defended. Hudson duly instructed Du Toit MacDonald Inc, [Du Toit] a firm of attorneys, who in turn delivered a notice of intention to defend. Shortly thereafter, Hudson left the Applicant's employ. From there, Dlamini further states:

> "I did not give the matter anymore thought until 11 December when I received a call from the Defendant's auditors informing me that the Sheriff had attended to the premises,[which is also the defendant's registered office] with a warrant of execution, the Plaintiff having obtained this against the defendant."

[12] The above statement, in my view, is a reflection of the attitude adopted by Dlamini in this matter. It is indifferent. This means for a period of over two months, since notice of intention to defend was delivered on 31 August 2006, nothing was done on behalf of the Applicant to consult the attorneys or to enquire about the matter. Only when the Sheriff attached the Applicant's property, was

Dlamini sprung into action. On this basis alone, I am satisfied that Dlamini was negligent in his conduct. It is not surprising that the Applicant's attorneys had to withdraw.

[13] He then contacted his present attorneys of record who requested him to obtain the file from Du Toit. He attended the office of Du Toit, whereat he was informed that they had withdrawn as the Applicant's attorneys and handed him the contents of the Applicant's file. He denied that Du Toit had prior thereto, made him aware of the application for summary judgment. He further stated that Du Toit made no effort to obtain an opposing affidavit from him.

[14] On behalf of the Respondent, it was contended that the Applicant was indeed made aware of the application for summary judgment. An affidavit of the Applicant's former attorney, Mr Anthonie Johannes Du Toit was attached to the Respondent's answering affidavit. In his affidavit, Du Toit stated that Dlamini was made aware of the application for summary judgment. At least during the week of 18 or 25 September 2006, he had informed Dlamini of the

application for summary judgment. In response, Dlamini provided Du Toit with a file of documents for consultation with counsel with a view to settling an opposing affidavit. Appointment with counsel was duly arranged in Dlamini's presence, for either the week of 22 or 29 September 2006. Dlamini failed to honour the said appointment. As stated above, purpose of the said consultation was to settle an opposing affidavit to summary judgment application.

[15] Thereafter efforts to contact Dlamini were unsuccessful as he did not return messages left for him on his cell phone. Dlamini's office telephone and telefax numbers were said to be non-existent. As a result, a postponement was sought on 3 October 2006. In its replying affidavit, the above allegations were not denied on behalf of the Applicant. As indicated above, the Applicant has not given a reasonable and acceptable explanation for its default. In the light of this finding, it is strictly speaking, unnecessary to make findings or to consider the Applicant's defence. I will, however in the interest of fairness, consider the Applicant's defence. See also the approach adopted in ***Chetty v Law Society, Transvaal [supra] at 768C***.

[16] Regarding the Applicant's defence to the Respondent's claim, I need to initially set out the particulars of such claim. The Respondent issued a simple summons against the Applicant, the particulars of which read as follows:

> "1. *Payment of the sum of R282 401.53 (including VAT) for: payment in respect of an acknowledgment of liability, in terms of an oral agreement entered into by the Defendant, represented by Dave Hodsen and\or Ken Dlamini, and the Plaintiff, represented by Sam Seele and Khotso Moleko on or about 1 September 2004, in terms of which the Plaintiff undertook to repay to the Defendant the amount which the Defendant would pay to the sub-contractor for the release of the X-ray High Scan Security Unit, in the amount of R282 401.323(including Vat), as further confirmed by the Defendant's letter to the Plaintiff's agent, KM Architects, on 1 November 2004; which amount is presently due and payable and which the Plaintiff refuses to pay despite demand."*

[17] In an affidavit supporting of this application, Dlamini, on behalf of the Applicant, sets out the background that gave rise to the said

claim. In short, the Respondent and the Applicant entered into a written agreement in January 2004. The terms of the said agreement were that the applicant would perform certain construction work at the premises of the Respondent, among others, installation of a security screening machine. In mid 2004 an employee of the applicant, one Janse, fraudulently presented the Respondent with an invoice in the amount of R282 410.53, purporting to be from the Applicant in respect of monies due by the Respondent for the purchase of the screening machine and installation thereof. Unsuspecting, the Respondent paid the said amount of R282 410.53 into a bank account controlled by Janse. Janse stole the funds and did not acquire the screening machine. Subsequently, Janse was convicted of forgery and altering for which he was sentenced to a prison term, as a result of the above transaction.

[18] Payment of the same amount for the screening machine was again sought from the Respondent, and the Respondent paid the amount, this time directly to the supplier. The applicant then duly installed the screening machine and completed all work in terms of the

agreement between the parties.

[19] Before payment referred to above was made, certain negotiations took place between the parties regarding the repayment of the amount of R282 410.53 stolen by Jansen. The Respondent's attitude was that the Applicant should agree that the payment made to Janse, had settled the Respondent's obligations in respect of the screening machine and that the Applicant would reimburse the said amount to the Respondent. The Respondent alleged that such agreement was indeed reached between the parties. The Applicant denied this. In this regard, Dlamini further referred to a letter written by Hudson, on authority of Dlamini, on 1 November 2004, wherein certain proposals were made regarding the matter. The said letter was written to the Respondent's principal agent, and the penultimate paragraph thereof reads:

> "In view of the above, we would be placed in a very difficult position if we were to try and re-i*mburse the access on the contract value. We thus respectfully request if you and your client would consider giving us further work in order to pay off this*

outstanding amount."

The said letter is attached as Annexure "A" to Dlamini's founding affidavit.

[20] It is apparent from the Respondent's summons that the contents of the said letter quoted above, formed the basis of the Respondent's claim. This is confirmed in answering affidavits deposed to on behalf of the Respondent, by Robert Scott and Khotso Moleko. In the answering affidavit of Scott, the following is stated:

> "*It is the recollection and understanding of the principal agent, KM Architects, represented by Khotso Moleko, that the Respondent [sic] acknowledged liability for the payment in question and undertook the reimburse the Respondent. It is Khotso Moleko's recollection that at a subsequent meeting, the Applicant proposed that the reimbursement be made in the manner set out in Annexure "A" to the Applicant's Affidavit, the contents of which, it is submitted, are consistent with the allegations herein."*

[21] Dlamini explains the contents of Annexure "A" in the following context. The Respondent is an entity which contracts on behalf of

the South African Secret Service [SASS]. In eagerness for the Applicant to obtain further work from the State, he proposed that the Respondent award the applicant further contracts and that a portion of the value of these could be used to offset the amount sought by the Respondent. He states that this was a business decision to compromise with the Respondent. This explanation is not denied on behalf of the Respondent. On a proper construction of Annexure "A", I am unable to conclude that it constitutes an unconditional acknowledgement of liability as contended on behalf of the Respondent. At best, the said letter manifests a settlement proposal induced by business sense. Dlamini in his replying affidavit denied the allegation that he agreed to amongst others, Moleko, that the Applicant would reimburse the Respondent the amount of R282 410.53.

[22] Accordingly, I find that the Applicant has disclosed a *bona fide* defence, which *prima facie* carries some prospect of success at the trial.

[23] Having came to the above conclusion, I must still decide whether to grant the application for rescission, in the light of the finding I made in respect of the inadequacy of explanation for the Applicant's default. In ***Chetty v Law Society Transvaal, [supra***], Miller JA said the following in this regard, at 767J -768A-B:

> "As I have pointed out, however, the circumstance that there may be reasonable or even good prospects of *success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a Defendant's explanation for his being in default is finely balanced, the circumstances that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission…"*

[24] In my view, the present case is one such envisaged in the *dicta* referred to above. In the premises, I am disposed to find that the Applicant has established sufficient cause to rescind the summary judgment. With regard to costs, the Respondent was justified under the circumstances of the case to oppose this application. The Respondent's opposition to this application, in my view, is not

frivolous. Given what I have said about Dlamini's conduct, regarding inadequacy of reasonable explanation. I must mark my disapproval of such conduct with an appropriate punitive costs order.

[25] Accordingly, I make the following order:

[25.1] The summary judgment granted in favour of Future Logistical Solutions CC, as the Applicant, against Dlamini Construction [Pty] Ltd as the Respondent, dated 17 October 2006, is hereby rescinded;

[25.2] The Applicant, Dlamini Construction (Pty) Ltd, is hereby ordered to pay the costs of this application on an attorney and client scale.

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TM MAKGOKA

Acting Judge of the High Court

Heard on: 24 AUGUST 2007

For the Applicants: Adv EB CLAVIER

Instructed by: Messrs EDELSTEIN BOSMAN INC
For the respondents: Adv B BLOM
Instructed by: Messrs DENEYS REITZ
Date of Judgment: 14 SEPTEMBER 2007