REPUBLIC OF SOUTH AFRICA

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

CASE NO: 14/24467

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

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DATE SIGNATURE

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY Applicant

And

AFRICAN MOON TRADING 52 CC Respondent

J U D G M E N T

MASHILE J:

[1] The Applicant seeks to rescind and set aside a judgment of this court granted in default in favour of the Respondent on 23 January 2015. The

amount of the judgment is the sum of R10 592 339.96. The application is brought in terms of Rule 42(1)(a), 31(2)(b) and common law. The Applicant's attention was drawn to the judgment against it on 10 February 2015 when the Sheriff attended at its premises to execute the judgment.

[2] For purposes of the common law, the application was brought within a reasonable time from the date on which the Applicant acquired knowledge of it. Furthermore, the Applicant launched the application within the period envisaged in Rule 31(2)(b). There are therefore no issues of lack of compliance in so far as both the common law and rules are concerned.

[3] Perhaps I should mention that there were other ancillary minor applications dealing mainly with cosmetic procedural matters. The parties were urged to settle those such that this court became seized with this application only.

[4] The facts from which this application emanates are briefly that the Respondent was awarded a tender. The estimated value of the tender was R62 745 188.50. After the exhaustion of the amount of the tender, the Applicant, however, continued to engage the Respondent to do further work under the same tender and paid for the service that the Respondent rendered. Needless to add that the estimated tender amount was exceeded by a considerable amount.

[5] When the Applicant realized that the tender amount had been exceeded, it refused to pay on the basis that its employees should not have authorised any amount beyond the estimated tender amount. This prompted the Respondent to institute an action against the Applicant for services rendered. The Applicant defended the action and on 23 October 2013 it launched an application in terms of Rule 35(12) wherein it required the Respondent to produce 10 documents referred to in the Respondent's founding papers for inspection.

[6] On 10 November 2013, the Respondent partially complied with the Applicant's request to the extent that it did invite the Applicant to its attorney's offices to inspect and/or make copies of 5 of the 10 of the documents that the Applicant had requested and declined to furnish the balance. The Applicant was not satisfied with the answer that it received from the Respondent and for that reason the parties began exchanging correspondence with the Applicant persisting on the Respondent making the balance of the documents available for inspection and/or copy. At the time when the judgment was granted the Rule 35(12) application was still pending.

[7] This application to rescind the judgment must be understood against the backdrop of the facts described above. The Applicant asserts that the judgment is rescindable in terms of Rule 42(1)(a) or 31(2)(b) or the common law. It has set out to establish this in its papers. I shall discuss the three basis in the order in which they appear. It makes sense to begin with Rule 42(1)(b) because it could be dispositive of the whole matter if I find that the

judgment was indeed granted in error.

[8] The Respondent has contended that it had complied with the Applicant's request but a perusal of the Respondent's answer thereto demonstrates that it had left approximately four documents from the list of documents that the Applicant needed. The Applicant persists that it did not receive all the documents that it needed hence it went the route of compelling the Respondent to do so.

[9] The court is to decide whether the Respondent was entitled to judgment against the Applicant while the Rule 35(12) application was still pending. Should I find that the correct procedure would have been to dispose of the Rule 35(12) first, logically the judgment would have been erroneously sought and erroneously granted.

[10] Rule 42(1)(b) provides:

> "*(1) The court may, in addition to any other powers it may have, mero motu or upon the 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*."

[11] It is trite that where a court finds that a judgment was sought and granted by mistake, the Court must immediately rescind and set aside such judgment. In that event the court will not require an applicant to proceed to

show good cause why the judgment should be rescinded or give reasonable explanation why he allowed a default judgment to be taken against him. See in this regard, the judgment of this court in *De Sousa v Kerr* 1978 (3) SA 635 (W) where the court quoted the case of *De Wet and Others* v *Western Bank Ltd* 1977 (4) SA 770 at 777, with approval. It was held in the *De Wet & Others* case *supra* that if the requisites of Rule 42(1) are present, a Court is empowered to grant the relief of setting aside a judgment, notwithstanding the fact that good cause is not shown.

[12] In *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) this court held that Rule 42(1)(a) does not specifically require that good cause be shown before a judgment can be rescinded or varied. It was further held that pparagraph (a), however, requires that the judgment must have been erroneously sought or “erroneously granted.

See also *Topol and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W).

[14] Insofar as Rule 35(12) is concerned, it was held in *Unilever PLC v Polagric (Pty) Ltd* 2001 (2) SA 329 (Q) that the litigant who has delivered a notice in terms of Rule 35(12) cannot be told to plead before seeing the documents requested in terms of the sub rule or to wait for pleadings to close before being provided with such documents.

[15] It is common cause that the Respondent did on one occasion successfully set the main application down on an unopposed basis for hearing on 28 November 2013. The application was removed from the unopposed roll as the presiding judge directed that the Rule 32(12) application had to be decided before the main application could be heard. When the Respondent set the main application down for hearing and subsequently obtained judgment against the Applicant for the second time, it appears that it erroneously believed that it had complied with the Rule 35(12) application and that the Applicant was in default with the delivery of its answering affidavit.

[16] For as long as there is no order or decision on the fate of the Rule 35(12) application, it cannot be said to have been finalised. Accordingly, no further step towards the conclusion of the main appliccation should have been allowed to occur.

[17] I am unable to decipher what persuaded the presiding judge to grant the default judgment the non-compliance with the Rule 35(12) notwithstanding. That said though, it is apparent that the presiding judge must have thought that the Rule 35(12) was out of the way and that the Applicant had failed to deliver its answering affidavit. It is obvious that had he known that the Rule 35(12) application was still outstanding he would not have granted the judgment. I agree therefore that the judgment was indeed granted in error as envisaged in Rule 42(1)(a) and the cases to which I have referred above.

[18] The granting of the judgment was in error and in the circumstances there is no need to canvass further requisites for the rescission of default judgments such as good cause and reasonable explanation why no steps were taken to prevent it being entered against the party concerned. In the premise the application must succeed. I need to point out that this outcome has nothing to do with the merits of the main application. It is purely based on the fact that the judgment was granted in error.

[17] That said, the court makes the following order:

1. The judgment entered against the Applicant is rescinded and set aside;

2. The Rule 35(12) application must be finalized prior to the Applicant delivering its answering affidavit;

3. The Respondent is to pay the costs of this application including those of a junior counsel, if any.

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B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Applicant: Adv K Tsatsawane

Adv. X Mofokeng

Instructed by: Bongani Khoza & Associates Inc.

Counsel for the Respondent: Adv R S Mothibe

Instructed by: P L Samuels Attorneys

Date of hearing: 28 October 2015

Date of delivery of Judgment: 11 NOVEMBER 2015