**IN THE HIGH COURT OF SOUTH AFRICA**
**MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)**

**CASE NO:2595/2018**

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

23/01/2024 [redacted]
DATE SIGNATURE

**In the matter between:**

**FERRET COAL (KENDAL) (PTY) LTD** **APPLICANT**

**AND**

**SOLOMON MAHYATHELA SENGWANE** **RESPONDENT**

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**JUDGMENT**

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**LANGA J:**

Introduction and facts

[1] The matter arises out of an incident in which the Plaintiff's son was allegedly injured at a mine owned by the Defendant. On 25 November 2019 the court granted judgment in favour of the Plaintiff on the liability of the Defendant for the damages suffered by the Plaintiff's son on 10 September 2017 to the extent that the Plaintiff can prove such damages in due course. On 15 January 2020 the Applicant brought this application rescission of the said order. The Applicant further brought an application for the filing of a

supplementary affidavit which the Respondent opposed. The Applicant in this application is the defendant in the action and the Respondent is the plaintiff.

Application for the filing of a supplementary affidavit

[2] It is common cause that on 3 June 2021 after having obtained judgment and while the application for the rescission was still pending, the Respondent brought an application for leave to amend the particulars of claim concerning the address of the Defendant. The application for amendment was not opposed and was subsequently granted and the amendment effected on 19 October 2021. On 28 October 2022 the Applicant brought an application to file a supplementary affidavit which application was opposed by the Respondent. After the Respondent filed the answering affidavit in response to the application the Applicant failed to file the replying affidavit.

[3] Although it is accepted that as a general rule only three sets of affidavits are permitted. This is however not a hard and fast rule as a court in empowered in terms of Rule 6(5) of the Uniform Rules of Court to allow the delivery of further affidavits if good cause is shown why a supplementary affidavit should be permitted. In the founding affidavit the Applicant contends that when the judgment was granted on 25 November 2019 the Respondent failed to disclose to the court that the address of the mine (the Defendant) was not correct in particulars of claim. It contended further that the court would not have granted the judgment by default had the defect been brought to its attention. The Applicant further averred that it was not aware that the Respondent intended amending the particulars of claim especially as the judgment had already been obtained.

[4] The Respondent contended that the Applicant has failed to demonstrate that there are grounds for the filing of the supplementary affidavit. The Respondent’s contention is that the Applicant not only failed to object to the amendment of the pleadings but also

failed to raise the issue it seeks to address in the application for rescission. The Respondent contended further that the Applicant cannot be prejudiced by the evidence presented at the trial of the amendment which in any event has already been effected. The Respondent argued therefore that this application serves no purpose.

[5] While Rule 6(5) (e) empowers a court to permit a fourth set of affidavits, it is only in exceptional circumstances that this will be allowed where special circumstances exist where something unexpected or new emerged from the applicant's replying affidavit. See *South Peninsula Municipality v Evans* 2001 (1) SA 271 (C). In this case the Applicant was unable to explain what special circumstances were present to justify a fourth set of affidavits. What is however even more disconcerting is that the Applicant does not explain why it failed to file a replying affidavit in this application. Further, the Applicant failed to explain why it did not deal with the issue it wants to address earlier when the Respondent launched an application to amend the particulars of claim in respect of the same issue of the address of the Defendant. Despite the fact that the Applicant was aware of the application for amendment it chose not to oppose it.

[6] As matters stand now the particulars of claim have been amended and the Applicant cannot be prejudiced by the amendment. I am not satisfied that the Applicant has made out a case for the granting of the leave to file a supplementary affidavit. The applicant is therefore dismissed with costs.

Application for Rescission

Legal principles

[7] It is trite that a judgment granted in default may be rescinded in terms of common law if the applicant can show that there is a reasonable explanation for the default, that the application is *bona fide* and further that he has a *bone fide* defence with some *prima*

*facie* prospects of success. See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 SCA at paragraph 11.

The Concise Facts

[8] The Respondent in this matter instituted an action on behalf of his son against the Applicant for damages resulting from the injuries sustained by the minor child in the alleged incident as a result of the alleged negligence of the Applicant. The action was defended by the Applicant and on 2 May 2019 during the Judicial Case Management hearing it was enrolled for hearing on 25 November 2019. In paragraph 2.1 of the of the Pre-Trial minute it is indicated that the roll call will commence at 8h45. It is common cause that on 3 May 2019 the Respondent filed a notice of set down in terms of which the matter was set down for hearing at 10h00 on the same date (25 November 2019).

[9] On 27 November 2019 after the roll call the matter came before Brauckman AJ who granted the default judgment after the hearing of the matter commenced at approximately 09h29 according to undisputed evidence. It is common cause that the Applicant's legal representative only pitched at around 10h00 and found that the default judgment had already been granted in his absence. The Applicant then brought an application for rescission (first application) on 15 January 2020 but withdrew it apparently because of short notice to the Respondent. Although in the heads of argument the Respondent avers that the first application was to be heard on 27 January 2019 this cannot be correct as the judgment was granted only in November 2019.

[10] The Applicant, however, subsequently brought the current application for rescission which was set down for hearing on 17 August 2020. When the matter came before court on 17 January 2022 the Defendant brought an application for the condonation of the late filing of the application for rescission which was granted in due course. The court,

however, erroneously also granted the rescission application which was not yet before court. The rescission order was subsequently set aside on application by the Respondent. The Applicant has now brought the application for the rescission of the judgment.

[11] The Respondent initially raised two points *in limine*. The first was that as the Applicant had withdrawn the first application it was not entitled to bring the current application. The second point was that the Applicant failed to comply with the time limits prescribed by the Rules of court for applications for the rescission of judgments. I must pause to mention at this stage that the Respondent has since stated in the supplementary heads of argument that it is no longer pursuing the second point *in limine*. I will accordingly only deal with the first point *in limine*.

[12] The Respondent's contention that the Applicant is not entitled to bring the same rescission application is apparently based on the matter of *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC). This proposition by the Respondent is incorrect as this is not the correct legal position. Nothing prevents the Applicant from bringing the second and current application. In the *Germishuys* matter it was decided that where a party withdraws its action or application the other side is entitled to costs. This seems to be acknowledged by the Respondent. In this case the Applicant correctly tendered costs when it withdrew the first application, and the matter ends there. The Applicant is however not barred from bringing the current application. Based on the above, this point in limine, which is the only the remaining one after the abandonment of the second, should be dismissed.

The Requirements for rescission

[13] I now turn to the question whether the Applicant has complied with the requirements for rescission. In other words, the inquiry is firstly whether the Applicant has given a

reasonable explanation for its default and secondly whether it has demonstrated that the application is bona fide.

Default

[14] It is common cause that the date and time set for the hearing of the matter was, according to the Case Management order, 25 November 2019 at 08h45 for the roll call. It is further common cause that during the roll call and when the matter was later called for hearing at approximately 09h20 the Applicant was still not present. the parties are also in agreement that the Respondent has also issued a notice of set down for the same matter which indicated the time of commencement to be 10h00. It is further not disputed that the Applicant's legal representative did pitch up at about 10h00 after the default judgment was granted and claimed that he was present at court waiting for the matter to be called at 10h00 in line with the notice of set down issued by the Respondent.

[15] In arguing for the dismissal of the application the Respondent is placing a lot of reliance of the order made by court for the roll call to start at 08h45 and submitted that the Applicant's legal representative should have known that he was expected to be at court at that time. This is despite conceding that the Respondent did issue a notice of set down showing tie time to be 10h00. The Respondent strongly argued that there us no excuse for the Applicant coming late.

[16] On the question of default I hold the view that order of court cannot be viewed in isolation. Put differently, the notice of set down by the Respondent cannot be ignored. While the court set the time for 08h45, the Respondent threw the spanner in the works by introducing another starting time totally different from the 08h45 set by the court. The Respondent concedes that the notice which was served on the Applicant was incorrect as the time is wrong but at the same time contended that the Applicant is bound by the time

set by the court. It is not clear why the Respondent is now saying the Applicant was wrong in relying on the time set by the Respondent in a subsequent and formal court process. What is clear though is that the Respondent has caused an unnecessary confusion which it cannot run away from. The Applicant not surprising is relying on this confusion to make out a case for the granting of the rescission.

[17] While the paragraph 2.1 of the Directive is peremptory as the Respondent correctly argued, the Respondent cannot be allowed to benefit from the chaos which it caused by issuing a notice with a wrong time. The Respondent is not an innocent party here as it positively misled the Applicant, albeit by mistake. This issue of time is obviously important particularly if one considers that the Applicant was present at court at the time stipulated in the notice of set down. The Respondent is correct in the interpretation of the reasons for the time frames set out in the Practice Directives. The Respondent is, however, also to blame for issuing a wrong notice and thereby causing a confusion. In my view it will be harsh and unfair to put the blame only on the Applicant when the Respondent is also at fault. The Respondent acted against the Court Directive by issuing and conflicting notice of set down which it caused to be served on the opposing side to its detriment. One would be correct to conclude that the court would not have granted the default judgment had it been made aware of the date in the notice of set down.

[18] The argument therefore that Mr Labe has no explanation cannot be correct. The notice of set down is the explanation. It is clear that he was at court even before 10h00 as the Respondent conceded. To argue therefore that the reliance of the notice of set down is a ruse cannot assist the Respondent in this instance. This was clearly not a case where a party is not interested in its case and decided not to attend court. This is no different to a situation where a party erroneously find themselves in a wrong court room when their case is called. The facts do not support a conclusion that the Applicant was in wilful

default. In the result I am satisfied that the Applicant has advanced a satisfactory explanation for its default. What needs to be determined is whether the Applicant has a bona fide defence.

Bona fides

[19] The Respondent contended that the Applicant was not bona fide in this application. One of the reasons advanced in this respect is that the Applicant was not cooperative when the Respondent requested an inspection in loco at the mine. The second reason is that the Applicant withdrew the application and only brought the current one after a long time. I have already dealt with this last argument by the Respondent. In the supplementary heads of argument, the Respondent alleged that the first application was to be heard on 27 January 2019 but was withdrawn. This is incorrect as the application for rescission could not have been brought before the judgment was made on 25 November 2019. It is therefore incorrect to argue that the current application was brought after a long time based on these incorrect dates. In any event it cannot, on the basis of this alone be said that the Applicant was *mala fide* and brought the current application just for the sake of delaying the finalization of the Respondent's claim.

[20] Furthermore, the Respondent contended that the Applicant is male fide as it refused to amend its plea which in the Respondent's view does not raise a defence. It is however clear from the plea that the Applicant denies that the injuries were sustained on its property and that it did not place safety measures in place. The defence raised in my view is not a general denial as the Respondent alleges. It is in my view is a proper and full defence if upheld. It calls upon the Respondent to prove that the injuries were sustained at the Applicant's premises. To say that the Applicant has been barred from amending its plea and therefore does not have defence is incorrect. The court is not called upon at this stage to evaluate the merits of the defence. argument by the Respondent in this respect

falls to be rejected. I am therefore satisfied that the Applicant has shown that it has a bona fide defence.

Conclusion

[21] In the light of the above I am persuaded that the Applicant has made out a case for the granting of the application for rescission. The application for rescission therefore ought to succeed. Lastly there is no reason why the costs should not follow the result.

Order

[22] In the result I make the following order:

The application for rescission is granted with costs.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

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| For the Applicant: | Advocate DD Mosoma |
| For the Respondent: | Advocate TP Kruger SC |
| Date heard: | 03 October 2023 |
| Date of judgment: | 23 January 2024 |

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 23/01/2024 at 16h20.