HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

Case No.: 3840/2022

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED: NO	
09 January 2025	[redacted]
DATE	SIGNATURE

In the matter between:

SOCIAL HOUSING REGULATORY AUTHORITY N.O. (In its capacity as the administrator of Emalahleni Social Housing Company – EHC)	Applicant
And	
CSC SECURITY SERVICES (Pty) LTD	First Respondent
EMALAHLENI LOCAL MUNICIPALITY	Second Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 09 January 2025 at 10:00.

Date heard: 19 November 2024

JUDGMENT

BHENGU AJ

Introduction

[1] This is an opposed application for rescission of judgment granted by default against Emalahleni Housing Company ("EHC") for an amount of R4,792 354.96 dated 20 January 2023.

Background

[2] The applicant is acting in its capacity as the administrator of EHC. EHC was the respondent in the main application and has since been placed under administration in terms of a court order dated 9 June 2023. The second respondent, Emalahleni Local Municipality is cited as an interested party. There is no relief sought against it. Any reference to the respondent refers to the first respondent.

[3] On 15 September 2021 the respondent, as a "Contractor", entered into a written contract with EHC to provide security services to certain designated properties that were managed by EHC. The said contract was for a minimum period of one year commencing on 12 August 2021, with a provision for annual automatic continuance on the terms agreed to by the parties[1].

[4] The dispute between the parties relates to one of the properties described as Uthingo Park. This dispute emanated from an alleged breach of contract on the part of EHC. On 22 February 2022 EHC sent a letter to the respondent advising that *"Uthingo Park belongs to Emalahleni Local Municipality and the Municipality is taking over the management thereof"*[2]. In this letter, EHC further indicated that they were doing away with security component manning Uthingo Park as they were no longer managing agents for the property.

[1] Security Service Contract Memorandum of Agreement Clause 1
[2] Annexure "SL7" Letter from EHC to the respondent dated 22 February 2022 para 1 and 4

[5] The respondent in turn launched the main application against EHC for breach of contract and the recovery of payments due to the respondent for the duration of the minimum contract period. EHC failed to oppose the matter, resulting in the respondent obtaining judgment by default.

[6] The applicant seeks to rescind the judgment in terms of Rule 42(1)(a) and alternatively common law. The issue before this court is whether the applicant has met the requirements prescribed in terms of rule 42(1)(a) or the requirements for common law rescission.

Preliminary issues - Peremption

[7] The respondent contended that the applicant was prohibited by the principle of peremption from bringing the application for rescission of judgment as it had acquiesced to the judgment. The first ground for this contention is that the respondent furnished the applicant with all the documents relating to the application at the request of the applicant before judgment was granted. The respondent contended that the applicant's failure to intervene at the early stage of the process despite having knowledge of the impending unopposed hearing, proves that the applicant acquiesced to the granting of the default judgment.

[8] The second ground relied upon by the respondent is that the parties were engaged in settlement discussions since the judgment was granted. The respondent referred to the round table discussions between the parties and to a letter from the applicant's attorneys dated 16 November 2023 where the applicant indicated its intention to settle its indebtedness to the respondent and requested an indulgence until 24 November 2023.

[9] The respondent's counsel relied on the Appeal Court decision in Hlatshwayo v Mare and Deas[3] where the court held that "*no person can be allowed to take up two positions inconsistent with one another, or as is*

[3] Hlatshwayo v Mare and Deas 1912 AD 242 at page 259

commonly expressed to blow hot and cold, to approbate and reprobate." He argued that the applicant was fully aware of the application for payment and elected not to oppose the application. This according to the respondent is wilful default and the applicant may not be allowed to opportunistically endorse two conflicting positions.

[10] In response, the applicant contended that the relief of peremption is incompetent in that the respondent failed to show an express and unequivocal act on the part of the applicant which is inconsistent with the intention to contest the judgment. The applicant contended that it never accepted liability and correctness of the order for an amount of R4.7 million. The applicant's counsel, also relying in Hlatshwayo and Jusayo v Mudau NO and 2 Others[4] submitted that the applicant can only be precluded from bringing the rescission application if it had unconditionally and unreservedly offered to comply with the order. He referred to a letter emailed to the respondent on 26 July 2023[5] as proof that even though the applicant admitted the terms of the agreement, it had always disputed that the respondent was entitled to the amount of R4,7 million and had reserved its right to launch a rescission application.

[11] In considering the respondent's contention that the applicant failed to oppose the application despite being aware of the impending unopposed application, I take note of the common cause fact that the applicant was appointed as the administrator of EHC on 09 June 2023, after the default judgment was granted. I accept the applicant's contention that even if it was aware of the impending application, the applicant was not legally authorized to defend any legal proceedings instituted against EHC. For this reason, I am of the view that the applicant's failure to intervene before judgment was granted cannot be construed to be acquiescence to the judgment.

[4] Jusayo v Mudau N.O and Others (2008) 7 BLLR 668 (LC)
[5] Annexure AA7 – Letter to the respondent dated 09 June 2023.

[12] The letter dated 16 November 2023 relied on by the respondent as the second ground for the relief of peremption recorded the following: -

> "…Citynet are to advise SHRA of the amount to settlement or proposition in so far EHC intends to settle your client's claim including the terms of payment for your client to consider same for acceptance.
>
> Having regards to the aforesaid we kindly request your indulgence our client until the 24th November 2023 as we believe the aforesaid period will suffice to allow Citynet to make recommendation alternatively an offer, which will require authorisation SHRA's executive prior to our tender.
>
> I trust you find the above in order and our client's rights are reserved in facts, in law and in toto."[6]

[13] On proper reading of the above letter, it appears that the applicant's attorney asked for an indulgence in order for Citynet to advise the applicant on the amount of settlement or to make recommendations for settlement. Further, the applicant's attorney stated that their client's rights remained reserved. It appears that the respondent perceived this letter to be accepting indebtedness for the whole amount as per the court order. I am of the view that the contents of this letter fall short of the requirements for peremption which is unequivocal admission of liability. It is also apparent from various correspondence exchanged between the parties that the computation of R4.7 million was always in dispute.

[14] In Hlatshwayo judgment referred to by both counsels, the Appeal Court held that: -

> "Now it is clear that the onus of proving acquiescence lies upon him who alleges it, and in as much as the effect of such proof is to deprive a person of a right conferred upon him by law, the evidence in support of it must be clear and irresistible. If the facts proved are of such a nature that more than one inference may fairly be drawn from them, then in my opinion the party who sets up the case that there has been acquiescence must be held to have failed to discharge the onus cast upon him."[7]

[6] Annexure "AA14" Letter dated 16/11/2023 from the applicant's attorneys to the respondent
[7] Hlatshwayo v Mare and Deas 1912 AD 242 at page 256

[15] In this regard, I am of the view that the respondent has failed to discharge its onus in proving any clear and unequivocal act on the part of the applicant that they admit liability for the whole amount. In this regard, the respondent's reliance on the doctrine of peremption should fail.

Failure to bring the rescission application within reasonable time

[16] The respondent further contended that it took the applicant more than 14 months of obtaining knowledge of the default judgment to launch the rescission application. The respondent contended that the applicant's failure to explain the inordinate delay in bringing the application and its failure to bring an application for condonation is fatal to the rescission application.

[17] It is common cause that the application for rescission of judgment was launched on 08 March 2024, 14 months after the default judgment was granted. In an affidavit explaining delay in bringing the application, Ms Molefe on behalf of the applicant stated that although the administration order was granted on 09 June 2023, an application for leave to appeal was brought by an intervening third party which had an effect of suspending the execution of the order pending the appeal. The applicant then successfully brought an application for an order in terms of section 18(3) of the Superior Courts Act, no.10 of 2013 for the execution of the order on 11 September 2023. She further stated that: -

> *"*"It was only during September 2023 that the applicant started formally investigating the affairs of the EHC…The applicant appointed Big Bell Investment T/A Citynet. However, the Head Office of EHC has already been vandalized, computers stolen and hijacked, thus making it impossible to retrieve records relating to the existing debts and creditors or pending litigation by or against the NHC.
>
> The default by the EHC lies in the fact that the company just existed in the air, there was no one running the company, with the board having dissolved, with only two (2) directors remaining and the company being left with only two (2) employees, (company secretary & credit controller) who had no authority to act on behalf of the company, even if the application was received" [8]

[8] Applicant's founding affidavit – para 20 & 72.

[18] In an application for rescission of judgment under common law, there are no time frames within which to bring the application, however, the application should be brought within a reasonable time. I am inclined to accept the explanation provided by the applicant that it had no legal standing to intervene in the proceedings before September 2023. This fact then limits the number of months from 14 months referred to by the respondent to just under 6 months.

[19] I have also considered the chronology of events from 11 September 2023 to 11 January 2024 when the respondent indicated its intention to proceed with an application for liquidation of EHC. I am of the view that the amount of time taken to do a proper investigation of the affairs of EHC and launching the application for rescission is reasonable under the circumstances where there was no proper management of the company or company records.

[20] I now turn to deal with the merits of the application for rescission.

[21] Rule 42(1)(a) provides that the court may, mero motu or upon application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected by the judgment. For the applicant to succeed in terms of Rule 42, the applicant must satisfy the court that the judgment was erroneously sought or erroneously granted in its absence.

[22] In Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others[9] the Constitutional Court held that an applicant seeking rescission in terms of Rule 42(1)(a) must show that the judgment against which they seek a rescission was erroneously granted because: -

[9] Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others [2021] ZACC 28 at para 62

"There existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment".

[23] The applicant's counsel contended that based on the applicant's defence, the respondent was not entitled to charge EHC for the months of March to August 2022 as the municipality had taken over the management of uThingo Park and EHC was no longer the managing agent. He contended that the respondent was not entitled to an order of R4.7 million but was entitled to an amount of R813 847.96. He contended that these facts, if they were known to the court when the application was heard, the court would not have heard the matter and eventually granted the judgment by default. He submitted that accordingly, the order was erroneously sought and or erroneously granted.

[24] The respondent contended that the applicant's reliance on Rule 42(1)(a) is incorrect as the applicant failed to show any mistake made by the court or irregularities in the proceedings. The respondent's counsel argued that no facts contained in this application existed at the time of granting the judgment, which if the court was aware of, would have precluded the granting of the judgment. The respondent further argued that the defence raised by the applicant that the quantum of the applicant's claim is incorrect must be rejected as it is not supported by evidence.

Analysis

[25] In Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd[10], the SCA held that: -

"Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to

[10] Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) at para 27.

defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."

[26] It is common cause that there existed a contract between the parties which was valid for a minimum period of one year. It is also not in dispute that in a letter dated 22 February 2022, EHC sought to change the terms of the agreement by doing away with security component manning Uthingo Park, (which is the source of the dispute). The respondent proved that the process was served on EHC's domicilium address and that they failed to oppose the application.

[27] I am of the view that even though the applicant in the rescission application may have raised a defence, which if successful will have the effect of decreasing the amount obtained by the respondent in the judgment, such defence does not render the judgment to have been granted erroneously and or erroneously sought. This is so because in a rescission application, the applicant is not required to prove that it will be successful in the main application but only need to show a prima facie defence to the claim[11]. The applicant, besides stating what their defence is on the claim, has failed to demonstrate any facts proving that the judgment was granted in error or erroneously sought. In this regard I agree with the respondent's counsel that the Rule 42 route is misplaced and that the application in terms of Rule 42 should fail.

Common Law

[28] Common law empowers the court to rescind a judgment obtained on default of appearance on sufficient or good cause shown justifying the rescission order. The applicant's counsel relied on the Constitutional Court decision in Zuma[12] where the court quoted from Chetty v The Law Society,

[11] Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at page 345
[12] Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others [2021] ZACC 28 at para 71

Transvaal[13] the following trite requirements for common law rescission of judgment: -

> "the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind."

Explanation for the default

[29] It is common cause that the main application was served at EHC's head office by affixing on 23 November 2022. The sheriff's return indicated that the "place was locked and empty." The applicant denied that the application was received by EHC as its head office was hijacked. The applicant also stated that it only became aware of the application and judgment in favour of the respondent in July 2023 when the applicant was conducting preliminary investigations.

[30] The respondent disputed that the applicant was not aware of the impending proceedings against the EHC. The respondent referred this court to the emailed correspondence exchanged between the applicant and the respondent on 17 January 2023. In this email, the applicant stated the following: -

> "this refers to the above matter on the unopposed roll to be heard on the 20th January 2023 before the Honourable Judge Mphahlele DJP… We are writing to you as the regulatory authority to inquire about the details. All facts of the matter, since Emalahleni Housing Company is the social housing institution under our regulation.[14]

[31] Counsel for the applicant, when confronted by this e-mail conceded that it appears that the applicant knew of the proceedings against EHC before judgment was granted. This therefore means that the applicant's contention that it only became aware of the judgment in July 2023 is

[13] Chetty v The Law Society, Transvaal 1985 (2) SA 756 (A)
[14] Annexure "AA1" – Email from applicant to the respondent dated 17 January 2023.

incorrect. It is clear from the papers that the applicant was in constant contact with the remaining employees of EHC since 01 December 2022.[15] The applicant was receiving constant reports from EHC and had a meeting with two remaining employees of EHC on 17 January 2023 to discuss the situation at EHC.*[16]* This letter enquiring about the unopposed application was addressed to the respondent on the same day of the meeting. I agree with the respondent's counsel that a reasonable inference can be drawn that EHC also had knowledge of the impending unopposed application even if the process was served by affixing.

[32] In Harris v Absa Bank Ltd t/a Volkskas[17] the court stated the following regarding wilful default: -

> "Before an applicant in a rescission of judgment application can be said to be in "wilful default" he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions.
>
> A decision freely taken to refrain from filing a notice to defend or a plea or from appearing, ordinarily will weigh heavily against an applicant required to establish sufficient cause."

[33] Having rejected the applicant's contention that they were not aware of the unopposed application, I take note of the applicant's counsel's submission that even if it is proved that the applicant was aware of the proceedings, the applicant was not authorized to intervene in the application as they were only appointed as Administrators of EHC in June 2023. I accept this submission on the basis that the applicant in this rescission application was not a party to the original litigation and that it acquired locus standi by virtue of the court order dated 09 June 2023. I also accept the uncontested version by the applicant that at the time that judgment was granted, EHC's board of directors had been dissolved and the two remaining employees

[15] Applicant's founding affidavit – para 64.
[16] Applicant's founding affidavit – para 68.
[17] Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) para 8 - 9

had no authority to act on behalf of the company even though they bore knowledge of the application against EHC. For these reasons, I find that there was no wilful default.

[34] The absence of wilful default alone does not entitle the applicant to a rescission order. The applicant must still show that they have prospect of success on the merits justifying the order rescinding the judgment. The court in Chetty[18] held that: -

> "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 against him, no matter how reasonable and convincing the explanation of his default."

Bona fide defence

[35] The applicant contended that it has a bona fide defence in the main application which prima facie carries some prospects of success. Although the applicant admitted the terms of the security services contract, it disputed that its indebtedness to the respondent amounts to R4.7 million awarded by the court. According to the applicant, the respondent was not entitled to charge EHC for security services rendered at Uthingo Park for a period of 6 months from March to August 2022 after the respondent was advised by EHC that uThingo Park was taken over by the Emalahleni Municipality. According to the applicant some invoices indicate an incorrect charge of double the normal monthly fee for Uthingo Park. The applicant contended that EHC should be liable for an amount of R813 847.96 after deducting the disputed amounts.

[36] In response, the respondent contended that the applicant's defence that the respondent was not entitled to invoice EHC from March 2022 to August 2022 is in breach of their agreement in that the agreement could only be terminated after the minimum period of one year. The respondent

[18] Chetty at 764J, 765A–D).

contended that the consideration payable by EHC was agreed in terms of the contract and was payable as per quotations which formed part of the contract, monthly in advance, free of any deduction. He contended that there is no basis in law to support such contention that the amounts were incorrect. He contended that the respondent was entitled to the order.

[37] The respondent argued that the applicant was bound by the fundamental law of contact principle of *pacta sunt servanda* which holds that contracts are binding upon the parties that entered into the contract. Counsel for the respondent contended that the applicant provided no basis why EHC was entitled to renege on the provisions of the contract.

[38] Regarding the question whether the applicant had shown a bona fide defence to the respondent's claim, I have considered the fact that it is common cause that the Municipality took over the management of Uthingo Park from the period of March 2022 to August 2022, which is a period during which the disputed amount was raised. Whilst the respondent claims that the termination of the security component manning Uthingo park was in breach of contract, the applicant on the other hand claims that EHC advised the respondent as early as 22 February 2022 of the predicament it was facing relating to the management of Uthingo Park. The applicant further contends that the respondent unreasonably withheld its consent to the cession of the rights and obligations in respect of Uthingo Park to the municipality.

[39] In this letter the EHC stated the following: -

> Uthingo park belongs to Emalahleni Local Municipality and the municipality is taking over the management thereof. As managing agent, since September 2018, EHC has been facing rental boycotts at Uthingo Park... Several legal battles have been fought to retain the management of Uthingo Park and numerous meetings have taken place between EHC and the municipal manager, in an attempt to ensure that proper service is rendered to the residents of Uthingo Park with no success, in fact the municipality has demanded the return of the complex.

… EHC has agreed to hand over Uthingo Park to Municipality. As from 01 March 2022 EHC is no longer responsible for Uthingo Park and Municipality has clearly indicated that it takes responsibility.

Our intention is not to cancel the Security Services Contract between CSC and EHC but rather to do away with the security complement manning Uthingo Park (normal guards and the tactical team). The security complement stationed at our other complexes will continue…"[19]

[40] It is important to mention that this court is not called upon to determine whether the applicant's defence will be successful, but rather whether the defence raised demonstrate a triable issue which should be ventilated at a proper forum. Taking into account that this defence raised by the applicant is consistent from the correspondence exchanged between the parties before the default judgment was granted, I am of the view that the defence raised a triable issue, whether the respondent's rejection of the applicant's proposal dated 22 February 2022 and 23 March 2022 constituted unreasonable withholding of consent in terms of clause 10 of the agreement dealing with assignment of the contract. This clause was referred to by both parties and records the following: -

"No Party shall have the right to assign or cede this agreement, transfer or make over any of its rights or obligations hereunder, without the prior written consent of the other Party, which consent shall not be unreasonable withheld."

[41] The respondent's counsel denied that the letter referred to by the applicant constituted a request for consent for the assignment of EHC's obligations to the municipality. I'm of the view that this question should be decided at a proper forum. A decision on this issue will determine whether the respondent was entitled to charge the EHC for the 6-month period from March 2022 to August 2022.

[19] Annexure "AA10" Letter dated 22 February 2022 from EHC to the respondent.

Conclusion

[42] Having found that rescission under Rule 42(1) does not find application in this case, the applicant was required to satisfy the requirements for rescission under common law as expressed in Chetty, that the applicant must provide a reasonable and satisfactory explanation for its default and also show that it has a bona fide defence on the merits which prima facie carries some prospect of success. I am satisfied that the applicant has satisfied both requirements for rescission of judgment under common law.

Costs

[43] The applicant asked that the respondent be ordered to pay the costs of this application for opposing the rescission application or alternatively for costs in the cause. The respondent on the other hand had asked for costs against the applicant on a punitive scale as between an attorney and client due to the alleged abuse of court process. I am of the view that the respondent has failed to make out a case for a punitive cost order as I found no conduct of the applicant amounting to an abuse of court process.

[44] The question of costs is at the discretion of the court. I consider the argument by the respondent that there has been a major delay in bringing this application for rescission through no fault of the respondent. This has resulted in prejudice to the respondent that has a judgment in its favour and is interested in the finality of its judgment. I am of the view that even though the applicant is successful in the rescission application, the respondent was entitled to oppose the application and as such the applicant is liable to pay the respondent's wasted costs for obtaining the default judgment and for this application for rescission of judgment on a party and party scale B.

[45] In the result, I make the following order: -

1. The default judgment dated 20 January 2023 is hereby set aside.

2. The applicant is granted leave to oppose the main application within 10 days of this order.

3. The applicant is ordered to pay the wasted costs of the first respondent in respect of the default judgment and the rescission application on a party and party scale B.

[redacted]_____

JL BHENGU AJ
ACTING JUDGE OF HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, (MIDDELBURG)

Appearances

For the Applicant:	Adv VJ Chabane Briefed by Z & Z Ngogodo Inc C/O GFT Pistorius Inc
For the Respondent:	Adv B.D. Stevens Briefed by BLR Attorneys C/O Vicky Janse Van Noordwyk Attorneys Inc
Date of Judgment:	09 January 2025