


**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)**

Case Number: 43838/07

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
<i>12 Nov. 2013</i> DATE	 SIGNATURE

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 JUDGE'S SECRETARY
2013 -11- 12
REGISTERS KLERK PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOE HOF, PRETORIA

In the matter between:

RAMASUPA JACONIA KEKANA

APPLICANT

and

CASHBUILD (SOUTH AFRICA) (PTY) LTD

RESPONDENT

IN RE:

CASHBUILD (SOUTH AFRICA) (PTY) LTD

PLAINTIFF

and

RAMASUPA JACONIA KEKANA

DEFENDANT

Coram: **HUGHES J**

JUDGMENT

Heard on: 21 October 2013

Delivered on: 12 November 2013

HUGHES J

1. The applicant is a defendant in an action instituted by the respondent/plaintiff, where an order was granted in his absence on 30 October 2012. The applicant seeks to rescind the order striking out his defence due to lack of compliance to file his discovered documents.

BACKGROUND

2. The respondent on 20 January 2012 served upon the applicant its Rule 35(1), (6), (8) and (12) notices ("Discovery Notices"). These Discovery Notices were served upon the applicant's correspondents attorneys in Pretoria, Messrs Grove, Deyssel & Partners duly instructed by Mahapa & Montani Attorney, the applicants attorney in Mokopane.

3. On 28 February 2012 an incorrect notice in terms of Rule 30A was served on the applicant's correspondent. Correspondence followed from the respondent advising the applicant's correspondent that the incorrect notice was served and the correct notice in terms of Rule 35(7) will be served. The latter was served on 15 June 2012, advising that the application to compel discovery would be heard on 23 July 2012. On 23 July 2012 the applicant was ordered to file its discovery within 10 days of the order. The dies for filing would have expired on 6 August 2012.
4. On 26 September 2012 a further Rule 35(7) for the striking out of the applicant's defence for non-compliance was duly served, on the correspondent advising that the application would be heard on 30 October 2012.
5. On 30 October 2012 the application was heard and the applicant's defence was struck off. However, the court postponed the application for default judgment to 5 December 2012 to enable the respondent to file the necessary damages affidavit. The notice of set down for 5 December 2012 was served on the correspondent on 31 October 2012. The application of 5 December 2012 was postponed to 14 February 2013 to enable the applicant to file his rescission application papers.

6. The applicant submits that on 1 October 2012 the correspondent attorney sent a fax to his attorneys advising of the discovery notices, the Rule 35(7) notice and the fact that the matter was set down for 30 October 2012. However, the fax was sent to the wrong fax number, it was sent to fax number 015 491 6621 whereas the fax number is in fact 015 491 1959.
7. Be that as it may, on 23 October 2012 the correspondent discovered the error and on 29 October 2012 the applicant's attorney advised the respondent that he had just been advised of the matter being heard on 30 October 2012. Applicant states that no reply was fourth coming from the respondent and on 31 October 2012 the correspondent advised the applicant's attorney of the notice of set down for default judgment served on their office on 31 October 2012.
8. To place things into perspective, on 29 October 2012 the applicant advised the respondent by telefax as follows:

"We have just noted with dismay from a letter we received from your correspondent attorney that the matter is on the roll on the 30th October 2012. It was on the 23rd October 2012 at around 16H28. Then on the 24th October 2012 we forwarded our letter to

them advising them that we have since receive, the last pleadings from them on the 18th March 2008.

In light of the above we would like to advise you that we would not be able to proceed with the matter and as such we are requesting your goodselves to understand our predicaments and remove the matter from the roll, alternatively attend to postponement of the matter.

Kindly but, urgently convey this letter to your instructing attorney and revert to us"

THE LAW

9. An application for rescission and reinstating an action must be brought in terms of Rule 31(2)(b), Rule 42(1) and the Common Law. Refer to **De Wet and Others v Western Bank Ltd 1979(2) SA 1031(A)** at 1038A and **Athmaram v Singh 1989(3) SA 953 D&CLD** at 954 D - F.
10. Rule 31(2)(b) provides that one can bring a rescission application if a defendant fails to deliver a notice of intention to defend or plea. Rule 42(1)(a) states that a rescission application can be brought if it was "*erroneously sought or erroneously granted*".

Whilst under the common law rescission is sought on "*a sufficient cause*" shown. See **De Wet and others *supra*** at 1042 - 1043

11. It is common cause that this application for rescission is brought under the common law. Now it is trite that under the common law the focus is on the conduct of the applicant. To this end reference is made to **Chetty v Law Society, Transvaal 1985(2) SA 756(A)** at page 765 where it was held:

"The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require 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 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 party has a *bona fide* defence which, *prima facie*, carries some prospect of success. (*De Wet's case supra* at 1042; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357 - 358.)"

12. The explanation advanced by the applicant as regards his default in my view is not reasonable and acceptable for the reasons I set out below:

12.1 The applicant puts the blame squarely at the doors of his attorneys and from the confirmatory affidavit filed by the correspondent attorney the attorneys accepted the blame.

12.2 What is telling is that the applicant's attorney becomes aware on 23 October 2012 at 16H28 that the matter is on the court roll for 30 October 2012. What do they do? They forwarded a letter to the correspondent on 24 October 2012 requesting all the latest pleadings from 18 March 2008. There is no explanation why the applicant and his attorney failed to follow up with the correspondent attorney since 18 March 2008;

12.3 Having made the request to its correspondent, the attorney for the applicant only corresponded with the respondent on 29 October 2012, that is three working days and a weekend (Saturday and Sunday) later. No explanation is advanced as to the delay in corresponding with the respondent;

- 12.4 To make matters worse, from the fax transmission slip on the correspondence dated 29 October 2012, it is noted that this correspondence was sent at 13:53 pm. No explanation is advanced as to why it was sent so late knowing full well that the matter was to be heard on 30 October 2012, the very next day. Further, at such a late hour the applicant seeks of the correspondent attorney, of the respondent, to convey the contents of the letter to the instructing attorney and revert;
- 12.5 Having received no response from the respondent as regards to the applicants correspondence of 29 October 2012, the applicant does not advance any explanation why his instructing attorney or the correspondent attorney failed to appear in court on 30 October 2012 in at attempt to circumvent the order sought;
- 12.6 On 31 October 2012 the applicant is advised that the default judgment application is set down for 5 December 2012. On this date the applicant's representative eventually surfaces at court. No explanation is advanced as to why, as far back as 31 October 2012, the applicant having become aware that the order to strike off his defence was granted, the applicant did not attempt to rescind the order, but instead, waited the entire month of

November 2012 to eventually appear at court on 5 December 2012.

13. The applicant filed and served his initial plea on 14 December 2007. In this plea he denies that he was employed as an Merchandise End Controller as alleged by the respondent. He puts up his employment contract and further states that for the period October 2005 to June 2006 he worked as a cashier and later a sales coordinator. The alleged value of the damages is disputed and the applicant alleges he does not have any knowledge of these damages. He further states that he reported any irregularities to Mr Leon Vessles who promised to investigate. Lastly, he admits having only acted as an "end controller for the period 2002 and 2004" and during these periods no loss or damages are claimed by the respondent.
14. It is common cause that an amended plea was not properly served and filed upon the respondent. However nothing turns on this as the gist of the amended plea is along the same vein of the plea initially served. What is of importance is the defence set out as per paragraph 13 above.
15. It is trite that a court has to find both wilful default and non-existence of a triable case to refuse rescission of an order or

judgment in terms of the common law. Refer to **Harris v ABSA Bank Ltd t/a Volkskas 2006(4) SA 527 (T)** at 530 A - F and 532 H - I.

16. The respondent places relies on a disciplinary notification served on the applicant wherein his position of employment reflects that he was an "end controller". The notice is dated 26 April 2006, for misconduct in the form of gross negligence, the applicant having caused the respondent a loss of R1 108 000.00 as a result of stock shortage, fraud and misconduct of fellow employees. From this document it would seem that it is the disciplinary notification in respect of the same claim that the respondent instituted proceeding against the applicant.
17. That being the case, even though the applicant can be faulted for being in wilful default, to my mind, it cannot be said that he does not have a *boni fide* defence to the action that is triable.
18. I disagree with the respondents contention that the defence raised by the applicant that he was not an end controller is untrue in light of the notice of 26 April 2006. In my view the disciplinary notification with the applicant's position set out is not to my mind conclusive proof that he was appointed in that position permanently. The applicant has given an explanation that he from

time to time acted in that position. In addition no contract of employment has been put up by the respondent to substantiate the allegation that the applicant was indeed employed as an end controller.

19. All things considered it would be just and fair to exercise my discretion in favour of the applicant and set aside the previous order.

COSTS

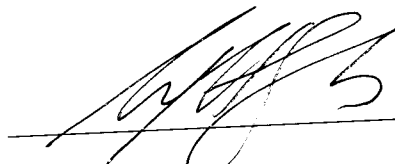
20. Considering the applicant's conduct in these proceedings and the fact that the applicant seeks an indulgence, it was not unreasonable for the respondent to resist this application of rescission. Therefore in these circumstances I deem it appropriate that the applicant be ordered to pay the respondents costs.

21. Accordingly I make the following order.

21.1 The order of 30 October 2012 striking out the applicant's defence is hereby rescinded;

21.2 The applicant is ordered to comply with Rule 35(1), (6), (8) and (12) notice by filing its discovery affidavit within 10 days of this order;

21.3 The applicant is ordered to pay the respondent's costs on a party and party scale.



W. Hughes Judge of the High Court

Heard on: 21 October 2013

Delivered on: 12 November 2013

Attorney for the Applicant/Defendant:

MAHAPA & MONTANI ATT
c/o GROVE DEYSEL SCHEEPERS ATT
Charter House 6th Floor
179 Bosman Street
Pretoria
Ref: S DEYSEL/ig/MA0583

Attorney for the Respondent/Plaintiff

VAN DEN HEEVER & ASS
c/o DU PLESSIS & KRUYSHAAR
Offices 2, 118 Sovereign Drive

Route 21, Corporate Park

Pretoria

Ref: R KRUYSHAAS