REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH,

NORTH GAUTENG DIVISION, PRETORIA

CASE NO: 59583/2012

DATE: 31 MAY 2017

In the matter between:

EMFULENI LOCAL MUNICIPALITY Plaintiff

and

KING AND ASSOCIATES ENGINEERING AND

PROJECT MANAGERS CC

(REGISTRATION NUMBER: 2007/216964/23) First Defendant

K K KHUMOENG

(REGISTRATION NUMBER: [8...]) Second Defendant

JUDGMENT

MSIMEKI J,

INTRODUCTION

[1] There are two applications before the Court. The first is and application for rescission of judgment in terms of **Rule 42(1)(a) of the Uniform Rules of Court** ("the Rules") and the second concerns the setting aside of the respondents' Notice of set down as an irregular proceeding. Costs of the application are sought in the applications. The plaintiff, in the setting aside application, seeks costs on an attorney and client scale alternatively *de bonis propriis.*

[2] It will be convenient to refer to the parties as the plaintiff and the defendants.

BRIEF BACKGROUND FACTS

[3] The plaintiff instituted an action against the first and second defendants seeking an order that:

> *"1. Tender no. 8112008G and/or 11/2008/81C, awarded to the First Defendant be declared invalid and unenforceable;*
>
> *2. The First and Second Defendants be ordered to pay an amount of R536 361.61 to the Plaintiff with interest at 15.5% commencing from 23 March 2012 until the amount is paid in full, jointly and severally, the one paying the other to be absolved;*
>
> *3. Costs of suite;*
>
> *4. Further and/or alternative relief."*

[4] The defendants entered their appearance to defend but did not plead until they were barred by a Notice of Bar dated 30 November 2012 served on them on 5 December 2012. The defendant's plea was delivered within the stipulated time on 11 December 2012. This simply means that the matter should have then proceeded to trial.

[5] It is noteworthy that the plea was served on the correspondents of the plaintiff's attorneys in Pretoria.

[6] The plaintiff's attorneys claim that the service of the plea on their correspondents never came to their notice. This, according to them, resulted in their applying for default judgment.

[7] In the meantime, the defendants discovered that they were registered on ITC. This led the defendants' attorneys to enquire from the plaintiff's attorneys as to what had happened as, according to them, the defendants had pleaded.

[8] The plaintiffs attorneys responded by way of a letter dated 28 October 2014 saying in paragraph 3 of their letter:

> *"3. We are not aware as to how your client got registered on ITC; please note*

that this was not done by our offices."

[9] The plaintiffs attorneys, on 26 September 2014 withdrew their application for default judgment. The withdrawal Notice was served on the defendants' correspondent attorneys on 29 September 2014.

[10] I must mention that the case number on the Notice of Bar is 5958/3/2012. This resulted in the plea bearing case number 5958/2012. The plea, however, according to the receipt note on page 6 thereof, shows that the plea was duly served. Both case numbers are incorrect.

[11] The plaintiffs attorneys withdrew their application for judgment by default once they were informed that the defendants had delivered their plea. The step was appropriate and made sense.

[12] Despite the plaintiffs attorneys' withdrawal of their application for default judgement, the draft order seems to have been lodged on 10 June 2014 and the default judgment granted on 3 November 2014. It is noteworthy that default judgment was granted after the defendants had pleaded.

[13] The plaintiffs withdrawal bears the correct case number. Paragraph 2 of the letter dated 28 October 2014 from the plaintiffs attorneys confirms the withdrawal and states:

"2. We advise that a notice of withdrawal of Default Judgment was served on your offices 29th of September 2014." (my emphasis).

[14] Up to this page, it is clear that the parties realised the mistake and then decided and intended to rectify it. This much is clear and has been the plan of both parties.

[15] It is significant to mention that the plaintiffs attorneys confirmed that they themselves received the defendants' plea which was forwarded to them directly. They, however, state that they did not receive a copy of the plea which was served on their correspondent attorneys. What is not said by them, however, is that they dispute the signature of the person who received the plea when it was served on their correspondent attorney or that

there was no service at all. This informs us that there was nothing wrong with the receipt of the plea by their correspondent attorney and that service of the plea on their correspondent attorney was proper.

[16] What I find strange is that the plaintiffs attorneys, in their letter dated 21 January 2015, still wanted to verify if their correspondent attorney had, indeed, received the plea. It is obvious the plea was received by their correspondents and they signed for it.

[17] They then, in the same letter, invited the defendants to bring an application to have the default judgment rescinded because of the fact that both parties were aware that a mistake had been made. One would have thought that the application would not be opposed. That was not to be because the plaintiff opposed the application on 19 March 2015. I find this very strange indeed as the plaintiff's attorneys could have brought the application which was simply to remove their mistake. **Rule 42 (1)(a)** provides:

> ***"42 Variation and Rescission of Orders***
>
> *(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"* (my emphasis).

The judgment was erroneously sought and granted in the absence of the defendants.

[18] As Mr Davis correctly pointed out, this case is fraught with mistakes which I shall deal with shortly.

[19] Firstly, the plaintiff discovered the mistake and correctly withdrew the Notice of Application for Default Judgment. The plaintfif, however, opposed the application for rescission of judgment knowing full well that the intention of the withdrawal was to correct its own mistake. I find this strange.

[20] Secondly, the plaintiff in its Notice of Bar, introduced case number, 5958/3/12 and the case number, as a result, ended up being 5958/12 on the defendants plea. This case

number appears on the defendants' plea and accounts for the absence of the plea in the Court file, if it was not there.

[21] Thirdly, I need to point out that this matter, indeed, has a comedy of errors. Some documents have 58593/2012 as the case number while others have 59583/2012 as the case number. I have already in paragraph 20 above referred to case numbers 5958/3/12 and 5958/12. The mistakes never end.

[22] The matter had to be removed from the roll because it had been placed on the unopposed motion roll. Instead of a proper Notice removing the matter from the unopposed roll, the defendants introduced a Notice of Withdrawal calling themselves plaintiff when they were not.

[23] Fourthly, the defendants said that the plaintiff was withdrawing the Notice of Application for rescission of judgment in terms of **Rule 42(1)(a)** against the defendant (which was wrong) *"due to the fact that the matter is now opposed"*.

Notwithstanding the mistakes, the intention to remove the matter from the unopposed motion roll remains clear. It must be remembered that the Notice was prepared by the defendant's attorneys and not by the defendants themselves. I do not think that blaming the defendants in this instance will be proper. It is very clear that the mistake was definitely unintended. *"due to the fact that the matter is now opposed"* speaks volumes. It is, in my view, clear that the matter was being removed from the roll, however; the language seems to have failed the drawer of the Notice. To prove that an error was committed, this was followed by the correct removal notice dated 26 March 2015 stating:

> "Take notice that this matter was set down on the unopposed motion roll on 30 March 2015 is hereby removed from the roll."

This should put the matter to rest.

[24] Although the withdrawal of the Notice of Withdrawal dated 20 March 2015 by a Notice may not have been the correct procedure, regard must be had to the fact that it was the

removal of the matter from the unopposed motion roll that was intended. This much is very clear. This distinguishes this case from the matters of **Roupell v Metal Art (Pty) Ltd and Another 1972 (4) SA 300 (W)** and **Sivuyile Bukula v Clientele Legal Case number 4236/2010 of the Free State High Court, Bloemfontein** which the Court was referred to by the plaintiff's Counsel. The facts of the present matter clearly demonstrate that there was an error which both parties became aware of and which they both wanted rectified. It was indeed, a simple issue out of which the plaintiff now incorrectly makes a mountain of a problem.

[25] I indicated above, that the parties were *ad idem* that default judgment ought not to have been granted. For that reason, the plaintiff withdrew the application for judgment by default. The defendants, barring the mistakes, intended to remove the matter from the unopposed motion roll as the matter was by then opposed. This is what Mr Davis, in their heads of argument, meant when he said that the errors related to *"form and not substance".* I agree.

[26] The plaintiff's attorneys' approach in this matter, in my view, is unhelpful. The plaintiff's attorneys, from the word go, were aware that they had even withdrawn the application for default judgment. They again confirmed this in writing yet they deemed it fit to oppose the application for rescission of judgment which they themselves could have launched to rectify the error that had been committed by them before the defendants committed their errors. It was unnecessary for the plaintiff to take the steps that it took knowing full well the exact state of affairs.

[27] The plaintiff did not deliver its answering affidavits notwithstanding the fact that it opposed the rescission application. In view of the nature of the case, in my view, it is and was unnecessary for the applicant to deliver its answering affidavit. The plaintiff's application for condonaiton and postponement documents were handed up. The **Rule 30** Notice was served a day late. The plaintiff applied that the matter be postponed to allow

them to file their answering affidavit in the rescission application. This, as I alluded to above, is unnecessary as it would merely waste time unnecessarily.

[28] The application for rescission of judgment was set down for hearing on the unopposed motion roll of 15 June 2015. The application in terms of **Rule 30** seeking an order setting aside the defendants' Notice of set-down filed on 4 May 2015 was also set down for hearing on 15 June 2015.

[29] For the reasons I have given above, the application for condonation and postponement should fail and the applicantion in terms of **Rule 30** should also fail.

[30] For the reasons I have also referred to above the application for rescission of the default judgment should succeed.

ORDER

[31] **The following order is made:**

1. **The plaintiff's application for condonation and postponement is dismissed with costs.**
2. **The plaintiff's application in terms of Rule 30 is dismissed with costs.**
3. **The default judgment granted against the defendants on 3 November 2014 is rescinded.**
4. **The plaintiff is ordered to pay the costs of the application.**

M. W. MSIMEKI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION OF THE HIGH COURT,

PRETORIA