IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

NATAL PROVINCIAL DIVISION

CASE NO: 8137/2007

In the matter between:

BRANGUS RANCHING (PTY) LIMITED **Applicant/Defendant**

and

PLAASKEM (PTY) LIMITED **Respondent/Plaintiff**

JUDGMENT

MSIMANG, J:

This is an application for rescission of judgment obtained by the respondent against the applicant (defendant in the action) in terms of Rule 31(5) of the Uniform Rules in the absence of the applicant.

The original amount of the claim was R433 625,57 which was alleged to be due by the applicant to a certain company called UAP Agrochemicals KZN (Pty) Limited (UAP). This amount apparently represented a purchase price for certain chemicals sold by UAP to the applicant during the period between 1 October 2004 and 28 February 2005. During the year 2005, in Case No. 2131/2005 and out of this Court, UAP instituted proceedings against the applicant for payment of the said amount of R433 625,57. The action was defended and the

applicant, in its plea, pleaded that the amount of the claim fell to be reduced by R64 197,32 to R369 478,25. In addition, the applicant filed a claim-in-reconvention against UPA for payment of the amount of R12202 798,00 alleging that UAP had held itself out to be an expert in the field of agricultural chemicals, that pursuant to that representation and acting on the advice of UAP or its representatives, the applicant had purchased herbicides from UAP and applied them in its farming operations at a rate per hectare recommended by UAP. The maize crop was, however, damaged resulting in the failure of the crop and causing the applicant to suffer certain damages. The said amount of the claim-in-reconvention therefore represented the amount of those damages and, in its plea, the applicant pleaded that it was not obliged to pay the said amount of R369 478,25 to UAP as the latter was indebted to it in the amount of the counter-claim. Indeed, at a subsequent Rule 37 conference the parties agreed that UAP would reduce its claim to the amount of R369 478,25. On 14 September 2007 UAP, however, withdrew the action and tendered costs thereof, without withdrawing its defence to applicant's claim-in-reconvention which, to date, remain extant.

On or about 24 August 2004 and 3 January 2005 UAP and the respondent in this matter (plaintiff in the action) concluded a written agreement in terms of which UAP ceded to the respondent its rights in and to the indebtedness by the applicant to UAP as at 3 January 2005 which cession was accepted by the respondent. It was on the basis of this cession that, on 27 September 2007, the respondent instituted action against the applicant for payment of the said amount of R369 478,25 plus interest and costs. On 1 November 2007, in default of delivery by the applicant of a notice of intention to defend and in its absence, the Registrar of this Court granted judgment against the applicant in terms of Rule 31(5) for payment of the said amount of R369 478,25 and it is this judgment that the applicant seeks rescinded and set

aside, relying on the provisions of Rule 42(1)(a) of the Uniform Rules or, alternatively, on the provisions of Rule 31(2)(b) of those Rules or, further alternatively, on the common law.

A return of service upon which the Registrar granted judgment against the applicant in this matter stated that the summons and the particulars of claim had been served:

> "……upon Mrs. K Abrahams, a person apparently over the age of 16 years and apparently in charge of the premises for the withinnamed defendant, **Brangus Ranching (Pty) Limited,** at its principal place of business, 218 Boom Street, Pietermaritzburg, at the same time explaining to her the nature and contents thereof."

Rule 4(1)(a)(v) of the Uniform Rules provides that, in the case of a corporation or company, service of any process of the Court directed to the Sheriff shall be effected by the latter by :

> "….. delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law."

It was then submitted on behalf of the applicant that the return of service which was before the Registrar when he or she granted the default judgment herein declared that the summons and the particulars of claim had been served upon a person over the age of 16 years and apparently in charge of the premises at the applicant's principal place of business. This declaration, the argument proceeded, had not complied with the provisions of the Rule which decree that the process should be served by delivering a copy thereof to a responsible employee at the principal place of business of the applicant or, if there be no such employee willing to accept such service, by affixing a copy thereof to the main door of the place of business. *Ex facie* the said return therefore service of the process did not constitute proper

service and the Registrar ought not to have granted a default judgment on the basis of such a defective return. The Court was then urged to find that the default judgment had been erroneously sought and was erroneously granted and that it stood to be rescinded in terms of Rule 42(1)(a) of the Uniform Rules. In making such a determination, the argument continued, the Court is confined to the record of the proceedings. That the address where the process was served *in casu* could well have been the applicant's registered office is accordingly immaterial as that fact is not apparent on the record of the proceedings. Once an applicant, in an application of this nature, has pointed to an error in the proceedings, he is, without further ado, entitled to rescission, the argument concluded.

Not so, argued Mr. **Gorven** on behalf of the respondent. Relying on the decision in **President of the RSA v Eisenberg & Associates**[1] he submitted that, in making a determination in terms of Rule 42(1)(a), the Court is not confined to the record of the proceedings. The respondent is entitled to introduce additional facts designed to show that, notwithstanding the defect in the contents of the return, service of the process was a lawful one. In *casu,* Mr. **Gorven** continued to argue, it had been demonstrated that the address at which the summons and the particulars of claim had been served was, in actual fact, the registered office of the applicant. It therefore accordingly follows that, notwithstanding the defect in the return, service has been shown to have been a good one. It therefore stands to reason that the provisions of Rule 42(1)(a) do not apply as the default judgment had not been erroneously sought or granted.

There are indeed conflicting decisions as to the approach to be adopted in making a determination in terms of Rule 42(1)(a), one approach favouring a view that an error must be

1 2005 (1) SA 265 (CPD);

apparent from the record of the proceedings[2] and the contrary view permitting the introduction of external evidence of an error.[3] Dealing with these conflicting views Jones AJA had the following to say in **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)[4] :-**

> "The conflict seems to me to obscure the real issue, which is to determine the nature of the error in question. This judgment concludes that what happened in this case did not amount to an error in terms of the Rule, regardless of whether or not it manifested itself in the record of the proceedings. It is consequently unnecessary for present purposes to say anything more about the conflict."[5]

Commenting on the judgment of McEwan J[6] Shakenovsky AJ pronounced himself as follows in **Topol and others v L S Group Management Services (Pty) Ltd[7]** :-

> "It is clearly implicit in this judgment that, in a case where there had been defective service and the party affected thereby was in default, such a case could have fallen within the purview of the provisions of 'erroneously' being 'granted' under Rule 42(1)(a). On the facts of that case, however, McEwan J found that it was not so."

In the present case, the summons gave the address of service upon the applicant as 218 Boom Street, Pietermaritzburg being applicant's principal place of business. In terms of Rule 4(1)(a)(v) of the Uniform Rules service had to be effected on the applicant's responsible employee at the said principal place of business. The return which was rendered subsequent to the said service and on the basis of which the default judgment was granted, however, declared that the summons had been delivered upon a person in charge of the premises at the said principal place of business. Clearly therefore, *ex facie* the said return, service was defective and the judgment which was sought or granted on the basis thereof

2 e.g. Bakoven Ltd v G T Howes (Pty) Ltd 1992 (2) SA 466 (E);
3 e.g. Eisenberg (supra);
4 2003 (6) SA 1 (SCA);
5 Ibid. at 9A-B;
6 In Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd 1977 (2) SA 576 (W);
7 1988 (1) SA 639 (W) at 649 E-F;

was granted in error.

This is, however, not the end of the matter. Having found that the judgment was erroneously sought and granted, the Court has a discretion whether or not to grant the application for rescission in terms of Rule 42(1)(a).[8]

In the applicant's founding affidavit applicant's sole director confirmed that a Ms Kathleen Mary Abrahams upon whom, in terms of the return, the summons had been delivered was, at the time of such delivery, a bookkeeper who worked at 218 Boom Street, Pietermaritzburg, which was the administration office for various companies with which the said director was associated. Though the director denies that the address constituted the applicant's principal place of business, a group legal advisor, who deposed to an answering affidavit on respondent's behalf, testified to a CIPRO company search which had been conducted under the applicant's registration number on 8 November 2007 which revealed, *inter alia,* that the applicant had its registered address for the purpose of Section 170 of the Companies Act at 218 Boom Street, Pietermaritzburg. This allegation is not disputed in the applicant's replying affidavit. It must accordingly be accepted that, though the contents of the return do not comply with the relevant Rule, the process was, in actual fact, served at the registered office of the applicant. In my judgment, this constituted substantial compliance with the Rule and I have accordingly concluded that it would not be proper to exercise my discretion in favour of the granting the application for rescission.

Applicant's director deposed that on 23 November 2007 he heard, for the first time, that a default judgment had been taken against the applicant and that, when he enquired from Ms. K

8 Theron NO v United Democratic Front and others 1984 (2) SA 532 AD at 536 G; Tshivase Royal Council v Tshivase; Tshivase v Tshivase 1992 (4) SA 852 (AD) at 862 J- 863 D;

M Abrahams as to the fate of the summons, her response was that she had no recollection of seeing such a summons and that she could not locate the same in the office. The director is, however, adamant that the said summons had not come to his attention.

All that the respondent could say in the face of this positive assertion was that it is probable that Ms. Abrahams gave the summons to the director or at least that she did mention it to him. The only legitimate finding which can therefore be made on these facts is that the director has shown, at least, on a preponderance of possibility that, prior to the granting of the default judgment, the summons had not been brought to his notice. The applicant has accordingly given a reasonable explanation for its default.

Regarding a *bona fide* defence the existence of which should be demonstrated by the applicant, Brink J formulated the requirement as follows:-

> "It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."[9]

The requirement was qualified as follows in the later decision of **Standard Bank of SA Ltd v El-Naddaf and another**[10]

> "But I find a degree of contradiction in the statement by Brink J that on the one hand the applicant must show that he has a *bona fide* defence and his statement that it is sufficient if the applicant sets out 'averments which, if established at the trial, would entitle him to the relief asked for'. It seems to me that the question of whether the applicant has shown that he has a *bona fide* defence must be decided against the background of the full context of the case. In a case such as this, where the applicant for rescission admits having signed a clear suretyship, I feel that it cannot be sufficient

9 Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476-7;
10 1999 (4) SA 779 (WLD) at 784 C-F;

> to establish *bona fides* if she baldly states 'the plaintiff misled me as to the contents of the document I was signing' without saying how the plaintiff misled her. I am at a loss to understand how, if so bald and sketchy an averment is made, a court can be satisfied as to the *bona fides* of an applicant who is in a position to set out much more clearly (without requiring massive detail) how she was misled and by whom on behalf of the plaintiff."

and in **Tiger Food Industries (supra)** Jones AJA added :-

> "…. the Courts generally expect an applicant to show good cause …… (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success."[11]

The cogency of the defences which the applicant has proffered in its founding papers must accordingly be tested against the above exposition of the law.

Mr. **Hunt** submitted that two lines of defence were taken by the applicant in its founding affidavit, the first one attacking the validity of the cession between the respondent and UAP and in respect of which he referred the Court to paragraphs 13 and 18 of the founding affidavit. In paragraph 13 the applicant alludes to the fact that UAP had instituted proceedings under Case No. 2131/2005 in which it claimed the full amount of R433 625,57, relying on the invoices all of which were in the name of UAP, notwithstanding the dates of delivery. Furthermore, statements for the full amount were sent regularly to the applicant by UAP and, at no stage, prior to 26 March 2007, was there any suggestion that the respondent was in any way involved in the matter or entitled to payment for the supply of any of the goods. The theme is repeated at the end of paragraph 17 of the founding affidavit where the deponent declares that, at no stage prior to March 2007, was applicant or any of its officials

11 Tiger Food Industries (supra) at 9 E;

advised of the alleged cession of its claim by UAP to the respondent. In sub-paragraphs 11.1 and 11.3 of its replying affidavit it is stated, for the first time, that the applicant would place the effect and validity of the "purported cession" in issue in respect of which attack the applicant states that it would make use of the provisions of Rule 35 to gain access to certain books. The same theme is repeated in sub-paragraph 11.3.

From the analysis of these passages in the founding affidavit it is evident that no averments are made therein which, if established, would entitle the applicant to any relief. Not even a bald statement to the effect that the cession is not valid is made in the founding affidavit. At best a fair construction which can be placed on the relevant paragraphs of the founding affidavit is that the contents raise a suspicion that there is something amiss regarding the cession, which concern is elaborated upon in the replying affidavit where it is stated that the validity of the cession would be placed in issue, without giving the grounds for such an attack. The applicant is only content with an undertaking that it will utilise the provisions of Rule 35 to investigate the matter further. That this cannot constitute a *bona fide* defence, is clear from the passages quoted above.

The second defence is based on the applicant's claim-in-reconvention for damages. Though in the founding affidavit the applicant contends that the same defences are available against a cessionary as would be available against a cedent, thus suggesting that the said claim-in-reconvention would be available as a defence to respondent's claim, it would appear that, during argument, the applicant had abandoned this position and had accepted the true legal position to the effect that our law does not enable a debtor to assert against a cessionary an

illiquid claim it has against a cedent.[12] The applicant, however, persisted with an argument based on the law as set out in the Digest[13] and formulated as follows in **LTA Engineering Co. Ltd v Seacat Investments Ltd[14] :-**

> "It would, therefore, appear that D3.3.34 is part of the Roman-Dutch law, that it has been received in South Africa, that it has not been abrogated by disuse, and that the principle of *stare decisis* is no obstacle to its continued recognition. It applies to cession in its modern form, and requires a cessionary to 'defend' the cedent, if he was party to the cedent's *mala fide* intention to deprive the debtor of his right to raise a *contra*-claim by way of reconvention."

Paragraphs 15, 17 and 18 of the founding affidavit, to which I was referred by Mr. **Hunt,** do not appear to contain averments sufficient to sustain a defence based on the law as restated in the Digest. All what is stated in paragraph 18 about the matter is that it would be grossly unfair and contrary to the laws of cession to preclude the applicant from airing these issues in defence to the claim brought by the respondent. That is a far cry from alleging that the cession was concluded with an intention to frustrate the applicant's efforts to prosecute its claim-in-reconvention and that the respondent was party to this *mala fide* intention. Consequently, as it is the case in the first line of defence, I have been driven to the conclusion that the averments made in respect of this defence did not disclose the existence of an issue which is fit for trial.

A constitutional issue was raised for the first time in the applicant's replying affidavit. It is trite law that an applicant must make his or her case in the founding affidavit and that, save in exceptional circumstances, he or she will not be allowed to make or supplement his case in his/her replying affidavit. It is for this reason that I have concluded that, *in casu,* the

12 National Bank v Marks and Aaronson 1923 TPD 69; Mannesmann Engineering and Tubes (Pty) Ltd v LTA Construction Ltd 1972 (3) SA 773 (W);
13 D3.3.34;
14 1974 (1) SA 747 (A) at 771H – 772A;

applicant must stand or fall by the allegations made in its founding affidavit and that the new issue of a constitutional flavour introduced in the replying affidavit cannot be taken into account.

One of the requirements for the rescission of a judgment under common law is that an applicant must show good cause.[15] Defining the term 'sufficient cause' Miller JA remarked as follows in **Chetty v Law Society, Transvaal[16]:-**

> "The term 'sufficient cause' defies precise or comprehensive definition, for many and various factors require to be considered …… But is clear that in principle and in the longstanding practice of our Courts two essential elements of 'sufficient cause' for rescission of 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 prospects of success ……."

I have already found that the applicant has given a reasonable and acceptable explanation for its default but that it has failed to demonstrate the existence of a *bona fide* defence.

I accordingly dismiss the application with costs.

For the Applicant/Defendant: Adv. C P Hunt SC (instructed by von Klemperers)

For the Respondent/Plaintiff: Adv. T R Gorven SC (instructed by Venn Nemeth

15 Mutebwa v Mutebwa and another 2001 (2) SA 193 (TK HC) at 198 F;
16 1985 (2) 756 (A) at 765 A-B;

& Hart Inc.)

Date of hearing: 23 May 2008

C A V

Judgment delivered: 4 June 2008