Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: 1896/16

In the matter between:

KAGISANO-MOLOPO LOCAL MUNICIPALITY **Applicant**

AND

SILVEX 259 CC **Respondent**

JUDGMENT

DJAJE J

Introduction

[1] This is an application for rescission in terms of Rule 42(1) (a) of the Uniform Rules of Court as well as in terms of the common law, of an order granted on **02 February 2017**. The Applicant was the Defendant in the main action and the Respondent, the Plaintiff. For

the sake of convenience I will refer to the parties as they appeared in the main action.

Background

[2] According to the particulars of claim, on **13 December 2012** the Plaintiff was appointed by the Defendant as a contractor for the construction of internal roads and storm water drainages in the area of Bray which is in the jurisdiction of the Defendant. The following is stated in the particulars of claim:

> *"5. On or around 6 June 2014 and at Ganyesa, the Plaintiff duly represented and the Defendant duly represented entered into a written addendum to the agreement ("the addendum"). Copies of the written correspondence setting out the terms of the addendum are attached hereto marked* ***Annexure "B"***
>
> *6. The material express, alternatively tacit, further alternatively, implied terms of the addendum, inter alia, that:-*
>
> *6.1 the Plaintiff would construct a further portion of the internal and storm water drainage, which was excluded from the scope works, on Van Rooyen Street leading to the clinic which constituted approximately 220 meters ("the amended scope of work"); and*
>
> *6.2 In turn, the Defendant would pay the Plaintiff an amount of R500 000.00 (five hundred thousand rand) (excluding Value Added Tax ("VAT") upon the completion of the amended scope of work.*
>
> *7. The Plaintiff complied with the terms of the agreement and the addendum thereto by implementing and completing the project.*
>
> *8. The Plaintiff submitted a total of 18 invoices for payment by the Defendant and the Defendant paid all of the Plaintiff's above stated invoices, but for only for the following invoices:*

8.1 the retention deducted in respect of invoice no: 13B dated 12 December 2014 in the amount of R175 994.34 (one hundred rand and thirty four cents); and

8.2 the amount for work done as per the amended scope of work in the amount of R552 176.10 (five hundred and fifty two thousand one hundred and seventy six rand ten cents).

Both amounts which include value added tax were claimed by the Plaintiff in its invoice no. 17 dated 1 September 2016 which remains unpaid. A copy of the invoices is attached hereto marked as ***Annexures "C"***

9. The Defendant has failed, neglected and/or refused to pay to the Plaintiff the aforesaid amounts which total R728 170.44 (seven hundred and twenty eight thousand one hundred and seventy and forty four cents).

[3] The summons were served on a personal assistant at the offices of the Defendant on **23 November 2016**. There was no appearance to defend entered on behalf of the Defendant. On **2 February 2017** the Plaintiff approached this Court for a default judgment against the Defendant in the amount of R728 170-44 (seven hundred and twenty eight thousand one hundred and seventy rand and forty four cents). According to the deponent to the founding affidavit who is the Municipal Manager of the Defendant the summons were handed to an employee with an instruction to appoint attorneys to defend the action. It was only on **27 February 2017** when the sheriff of the court arrived at the offices of the Defendant with a warrant of execution that the Municipal Manager realised that his instruction to defend the action was not carried out. The rescission application was issued in **May 2017** and eventually heard on **14 December 2017**.

[4] It is the Defendant's case that this application is in terms of Rule 42(1) (a) of the Uniform Rules in that the judgment was erroneously sought and granted as the written addendum referred to in the particulars of claim was never entered into. The Defendant further denies that the Plaintiff did any additional work and thus no outstanding fee is owed to the Plaintiff. According to the Defendant there could also not have been any oral agreement between the parties as the Plaintiff's appointment letter stated that any variation order must be in writing and signed by the municipal manager and that the Municipality would not be liable for any additional costs not approved by the municipal manager.

[5] It has been argued by the Defendant that the Plaintiff was aware that there was no written addendum between the parties in relation to additional work. Further that despite this, the Plaintiff did not bring the true facts to the attention of the court and therefore obtained default judgment based on a non-existent written addendum. It was argued that the Plaintiff misrepresented the facts and thus obtained judgment erroneously.

[6] In contention the Plaintiff argued that the Defendant should have brought this application in terms of Rule 31(2) of the Uniform Rules of Court as they had not entered an appearance to defend. Further that the emails attached to the particulars of claim constitute a written addendum between the parties and as such there was no misrepresentation of the facts by the Plaintiff. As a result the judgment was not erroneously sought and granted. It was on this basis that the Plaintiff argued that Rule 42 is not applicable in this matter.

[7] Rule 42(1) (a) of the Uniform Rules of Court provides that:

"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;

[8] The Defendant should satisfy three requirements in order to succeed with this application. Firstly that the default judgment must have been erroneously sought or erroneously granted, secondly that such judgment must have been granted in the absence of the Applicant and that the Applicant's rights or interest must be affected by the judgment. **See: Mutebwa v Mutebwa & Another 2001 (2) SA 193 Tk HC** at page 198 F.

[9] In dealing with the meaning of erroneously granted the following was stated in the case of **Bakoven Ltd v GJ Howes (Pty) Ltd 1990 (2) SA 446 at page 471E to H**:

*"An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of 'a mistake in a matter of law appearing on the proceedings of a Court of record' (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence (Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd (supra) at 578F-G; De Wet (2) at 777F-G; Tshabalala and Another v Pierre **1979 (4) SA 27** (T) at*

30C-D). Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission."

[10] Accordingly the words *"erroneously granted"* means that the Court must have committed a mistake in law, which appears from the record of the proceedings itself.

[11] It is the Defendant's argument that the Plaintiff in its particulars of claim refers to a signed written addendum entered into between the parties and attached thereto. The Annexure B referred to and attached to the particulars of claim is emails from the consulting engineers addressed to the Defendant's officials. The subject of the said emails is *"RE: Bray Roads- Additional Funding to complete works"*. The contents thereof refers to approval of additional funds in order to plan and implement the completion of the project. In the emails there is no reference to any additional work to be done by the Plaintiff for the Defendant. The signed written addendum referred to in the particulars of claim is therefore not attached.

[12] In paragraph 12 of the answering affidavit the deponent who is the main member of the Plaintiff refers to the initial contract being amended by a verbal agreement. This is in direct contradiction to what stands in the particulars of claim that there was a written addendum. It is trite that parties are bound by their pleadings the object of which being to delineate the issues to enable the other party to know what case has to be met. **See: Gusha v Road Accident Fund 2012(2) SA 371 (SCA)** para 7.

[13] The question now is whether the default judgment granted in this matter should be rescinded in terms of Rule 42 (1) (a). The following was stated in the case of **Mutebwa (*supra*)** that:

> *"Although the language used in rule 42(1) indicates that the Court has a discretion to grant relief, such discretion is narrowly circumscribed. The use of the word 'may' in the opening paragraph of the rule tends to indicate circumstances under which the Court will consider a rescission or variation of judgment, namely that it may act mero motu or upon application by an affected party. The Rulemaker could not have intended to confer upon the Court a power to refuse rescission in spite of it being clearly established that the judgment was erroneously granted. The Rule should, therefore, be construed to mean that once it is established that the judgment was erroneously granted in the absence of a party affected thereby a rescission judgment of the judgment should be granted."*

[14] The Plaintiff approached this court for default judgment basing its claim on a written addendum which was not attached. In the answering affidavit the Plaintiff refers to a verbal agreement. This clearly indicates that the Plaintiff misrepresented the facts to this court when applying for default judgment. As a result of the misrepresentation the default judgment was granted. On this point it is my view that the Defendant has succeeded to satisfy the requirements in terms of Rule 42 (1) (a) that the default judgment had been erroneously sought and granted. In this regard as stated in the **Mutebwa** case ***supra*** there is no reason why rescission of the default judgment should not be granted in terms of Rule 42 and not Rule 31(2) as initially argued by the Plaintiff.

[15] Having considered the submissions made, I am of the view that the Defendant has made out a case for rescission of the default judgment granted on **2 February 2017** and that the matter be properly ventilated at trial.

Order

[16] Consequently, the following order is made:

1. Application for rescission of the default judgment granted on **2 February 2017** is granted;
2. Costs of the application reserved for determination by the trial court.

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DJAJE J

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	**:**	**14 DECEMBER 2017**
DATE OF JUDGMENT	**:**	**25 JANUARY 2018**
COUNSEL FOR THE APPLICANT	**:**	**ADV. MONNAHELA**
COUNSEL FOR THE RESPONDENT	**:**	**ADV. SCHOLTZ**