

SOUTH AFRICA / JUDGMENT

FPM Business (Pty) Ltd t/a FPM Security Services v Masakhane Mining Supply and Construction t/a Masakhane Megawell Services (301/22) [2024] ZANWHC 43 (20 February 2024)

[2024] ZANWHC 43

COURT

North West High Court, Mafikeng

BEFORE

A Reddy

CASE / FILE NUMBER

301/22

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION – MAHIKENG

CASE

NO: 301/22

REPORTABLE:

NO
CIRCULATE
TO JUDGES: NO
CIRCULATE
TO MAGISTRATES: NO
CIRCULATE
TO REGIONAL MAGISTRATES: NO
In
the matter between:-
FPM
BUSINESS SOLUTIONS (PTY) LTD t/a
FPM
SECURITY SERVICES
APPLICANT
and
MASAKHANE
MINING SUPPLY AND
CONSTRUCTION
T/A MASAKHANE
MEGAWATT

SERVICES
RESPONDENT
In
re: CONSTRUCTION
T/A MASAKHANE
MEGAWATT
SERVICES
PLAINTIFF
And
FPM
BUSINESS SOLUTIONS (PTY) LTD T/A
FPM
SECURITY SERVICES
DEFENDANT
ORDER
(i) The
default order granted against the defendant in favour of the
plaintiff under Case Number 301/2022 on 21 July 2022 be and is
hereby
rescinded.
(ii) The
defendant shall deliver its plea within(20) twenty days from date of
the granting of this order, being 20 February 2024.
(iii) The
respondent is ordered to pay the costs.

JUDGMENT

REDDY AJ

Introduction

[1] This is an opposed application for a rescission of judgment within the purview of Rule 31(2) (b) of the Uniform Rules of Court, pursuant to a default order granted by Djaje J (as she then was). The applicant (defendant) is FPM Business solution (Pty) Ltd t/a FPM Security Services. The respondent(plaintiff) is Masakhane Mining Supply and Construction CC t/a Masakhane Megawatt Services. For purposes of brevity, I propose to follow the citation of the parties as framed in the main action.

Background

facts

[2] The dispute between the parties arises out of an agreement that was concluded on 25 October 2019 at Witbank (now Emalahleni), Mpumalanga Province. The plaintiff duly represented by Mr Ashraf Ali Gani and the defendant by Mr Jacob Lesetja Thelele(“Thelele”)

concluded a written agreement. The fulcrum of this agreement was that the defendant would act as an independent subcontractor to assist in the provision of a Tactical Response Task Team to the Kusile Power Station in Witbank, for the plaintiff's client Eskom Generation. The written agreement encompassed specific material express, alternatively, implied, further alternatively tacit material terms. For the present purposes it is unnecessary to exploit these

terms. Notably, the concluded agreement was not subject to the provisions of the National Credit Act 34 of 2005.

- [3] The plaintiff complied with its obligations under the agreement. The defendant breached the agreement by failing to make payment to the plaintiff in respect of generated invoices for the security detail provided. On 27 October 2021, the defendant made a partial payment in the sum of R 200 000.00. As at 10 November 2021, the indebtedness of the defendant totalled R 679 585.14. On 24 February 2022, the summons was served on the defendant at its chosen domicilium citandi et executandi. Deputy Sheriff Schoeman records that the summons was served "by affixing it to the main principal door as no one could be found at the address. The premises seems to be occupied."
- [4] On 21 July 2022, Djaje J (as she formally was) granted default judgment in favour of the plaintiff against the defendant for:
- (i) Payment in the sum of R679 585.14.
 - (ii) Interest at the prescribed rate of interest a tempore mora to date of payment.
 - (iii) Costs of the suit.
- [5] This default judgment was brought to the attention of the defendant by an email transmitted by Mr Hanief Ebrahim of the plaintiff.

Good cause

- [6] The defendant contends that it was not in wilful default. Firstly, the letter of demand of 10 November 2021, could not have come to the explicit knowledge of the defendant as the incorrect email addresses had been used. Secondly, addressing Deputy Sheriff's Schoeman's return of service of the 24 February 2022, the defendant avers that the domicilium address where service was alleged to have occurred is a property that is permanently manned by security controllers of the defendant for the entire day.
- [7] To simply put it, it has security detail for twenty-four (24) hours a day. Due to the presence of security the main door of the domicilium address can only be accessed when the access gate to the perimeter fence is opened by the security officers on duty. Given

this two-pronged attack on the services of the court processes, the defendant asseverates that there had been no wilful default.

- [8] On 12 July 2012, the sole director and shareholder of the applicant Miss/Mrs Fredah Mothepana Masilo (“Masilo”) established and registered the defendant as a hundred per cent (100%) female black owned company and funded its start-up capital. Around October 2015, Thelele was appointed as an Operations Manager of the defendant. Thelele had been narrowly involved in the negotiation of the agreement that forms the substance of the current dispute.
- [9] The defendant asserts that around September 2018, Thelele fraudulently established his own registration as a director of the defendant by falsifying Masilo’s signature on a purported resolution of the defendant and COE39 document with the Companies and Intellectual Property Commission (“CIPC”). Several legal challenges were launched by Thelele which focused on him being the lawful director of the defendant.
- [10] At some point, pursuant to orders of court obtained by Thelele, Masilo was interdicted and restrained from executing her duties as director. Through court process Masilo was declared to have been the sole lawful director and shareholder of the defendant since its inception. Ultimately, Thelele was dismissed from the employ of the defendant through a due and proper disciplinary process, with criminal investigation at the Rustenburg SAPS still pending.
- [11] The defendant avers that the plaintiff’s particulars of claim are excipiable for being vague and embarrassing and/or not disclosing cause of action due to two annexures to the agreement namely: annexure A and annexure B not forming part of the summons. The absence of these two annexures were material to the agreement and the collective absence would have been material to the plaintiff’s cause of action.
- [12] The defendant further contended that the wheeling and dealing of Thelele was to the financial prejudice of the defendant. Altered invoices caused additional debt to the plaintiff. During January to June 2012 whilst Masilo was stripped of her authority as a director, original invoices regarding transport rendered by the plaintiff to the defendant were based on increased invoice amounts and were paid to the plaintiff by the defendant as overseen by Thelele. These alterations to the transport invoices which reflected increased amounts resulted in increased debt of R201 572.00 on the defendant’s statement of account with the plaintiff.
- [13] In September 2022, Masilo had a spreadsheet drawn up reflecting the result of an in-house audit in respect of invoices rendered to the defendant by the plaintiff and payments made by the defendant to the plaintiff. This exercise exhibited over-payments totalling R130 485.17 made by the defendant to the plaintiff. The defendant contends that it was not indebted in any amount or in the amount of the default judgment granted. The defendant asserts not only the existence of a bona fide defence but also the existence of a substantial counter claim for monies overpaid by the defendant to the plaintiff.

Legal Backdrop

- [14] An application for a rescission of judgment is primarily ensconced in Rule 42, alternatively Rule 31(2)(b), and further alternatively the common law.
- [15] Turning to Rule 31(2)(b) and the common law, an applicant for rescission is required to show good or sufficient cause. Good cause encompasses a reasonable explanation for the default as well as a bona fide defence. See the cases referred to by Van Loggerenberg and Bertelsmann Erasmus: Superior Court Practice 2022, Vol 2, D1-564 to 565, footnotes 33 and 49.

[16] In *Grant v Plumbers (Pty) Ltd* 1949

- (2) SA 470 (O) 476–7, the following was postulated in dealing with good cause:

“(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross

negligence the Court should not come to his assistance.

- (b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.
- (c) He must show that he has a bona fide defence to plaintiff's claim. 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. (*Brown v Chapman* (1938 TPD 320 at

p. 325).”

- [15] In *Cairns' Executors v Gaarn Cairns' Executors v Gaarn* 1912 AD 181 at 186, the difficulty when defining good cause was addressed as follows:

“It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive and which it is highly desirable not to abridge. All that can be said is that the applicant must show, in the words of COTTON, L.J. (In re Manchester Economic Building Society (24 Ch. D. at p. 491)) 'something which entitles him to ask for the indulgence of the Court'. What that something is must be decided upon the circumstances of each particular application.”

- [16] Good cause therefore includes but is not limited to the existence of a substantial defence. See: *Silber v Ozen Wholesalers (Pty) Ltd* 1954

- (2) SA 345 (A) 352G. It is therefore necessary to determine whether there is a satisfactory explanation of the default, and whether the defendant raised a bona fide and substantial defence.

[17] Finally, 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 [2021] ZACC 28, the Constitutional Court restated the two requirements for the granting of an application for rescission that need to be satisfied under the common law as being the following:

‘First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that it has a bona fide defence which prima facie carries some prospect of success on the merits. 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.’

[18] Integral to the explanation for the default, the defendant must show that it was not in wilful default. Given the terse facts regarding service of the summons on the defendant, the explanation provided by the defendant is not convincing. This does not signal the denouement of the defendant’s application. The defendant’s application can still be revived by the demonstration of the bona fide defence. The present application is a textbook example of same. See *Harris v ABSA Bank Ltd t/a Volkskas* 2006

(4) SA 527 (T) at paragraph [16], *Melane v Santam Insurance Co Ltd* 1962

(4) SA 531 (A) at 532C-F.

[19] The enquiry that forms good cause entails that the defence raised must not only be decided against the backdrop of the full context of the case but must also be bona fide. It is expected that the nature of the grounds of the defence and the material facts relied upon must be fully disclosed. See: *Standard Bank of SA Ltd v EI-Naddaf* 1999

(4) SA 779 (W) at 784 D-F.

[20] To this end, the defendant has established the existence of a substantial defence and not necessarily a probability of success. To my mind, defendant has prima facie raised triable issues. Put simply, the defendant has met the legal threshold for the granting of a rescission of judgment.

Costs

[21] It is trite that costs are at the discretion of the court. There are no bases to deviate from the general rule that costs follow the result.

Order:-

(ii) The defendant shall deliver its plea within 20 (twenty days) from date of the granting of this order, being 20 February 2024.

(iii) The respondent is ordered to pay the costs.

A REDDY

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

Applicants Counsel: Advocate JJ GREEF

Applicant's Attorneys: C/O M.E. Tlou Attorneys Inc

No 43, Cnr Baden Powel &

Visser Street

Golf View, Mahikeng

Respondent's Counsel:

Advocate B. Riley

Respondent's Attorneys: Gielie Benade Attorneys

Shop 2A

Mahikeng

Date of Hearing: 02 February 2024

Date of Judgment: 20 February 2024

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Prepared on 11 October 2026 · Esheria