

SOUTH AFRICA / JUDGMENT

Roda and Others v Minister of Arts and Culture (77025/2009) [2017] ZAGPPHC 694 (30 October 2017)

[2017] ZAGPPHC 694

COURT

North Gauteng High Court, Pretoria

BEFORE

Petersen

CASE / FILE NUMBER

77025/2009

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 77025/2009

Not

reportable

Not

of interest to other judges

In

the matter between:

SIPHO

DAVID

RODA First

Applicant

MORRIS

RODA

PRODUCTIONS Second

Applicant

and

MINISTER

OF ARTS AND

CULTURE Respondent

JUDGMENT

PETERSEN AJ:

[1] This is an application for rescission. At issue is an order granted by default by Ismail AJ on 14 May 2010, in the following terms:

'1. The cancellation of the contract between the plaintiff and the second defendant is hereby confirmed.

2. The defendants are ordered to pay, jointly and severally the one paying the other to be absolved, to the plaintiffs attorneys, S.S. MKETSU AND ASSOCIATES INC. a sum of R3 million within ten days from the date of this order.

The defendants are ordered to pay interests (sic) on the amount of R3 million calculated at the rate of 15% per annum from date of this order.

The defendants are ordered to pay costs of suit, jointly and severally the one paying the other to be absolved.'

[2] The application for rescission was brought within 20 days of the order in June 2010. The applicant has since failed to take steps to set down the application for hearing. The application comes before this court having been set down by the respondent. The respondent seeks an order dismissing the application for rescission. The applicant failed to appear at the time the matter was called. Mr Mojapelo for the respondent indicated to the court that he was informed by his instructing attorney that the applicant was said to be in Johannesburg with no further reasons supplied.

[3] The applicant seeks rescission of the judgment on the basis that the reason for his default was the service of summons at his chosen domicilium citandi et executandi as contained in the written agreement entered into with the respondent on 9 October 2009 rather than at the address of his legal

representatives Thomson Wilks who were representing him in a civil dispute with the respondent. Whilst the written agreement was concluded on 09 October 2009 the applicant's evidence is that the second applicant has not conducted business from the said premises since October 2009. It is evidence that he thus had no knowledge of the service of the process and consequently the subsequent default

judgment.

[4] The applicant does not specify whether rescission is sought in terms of the common law or Uniform Rule 42. Be that as it may in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at paras 5 to 6 Jones AJA held as follows regarding the proper interpretation of Rule 42 and the common law:

'It is against this commonlaw background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced.

The Rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The Rule gives the Courts a discretion to order it, which must be exercised judicially ...

Not every mistake or irregularity may be corrected in terms of the Rule...Because it is a Rule of Court its ambit is entirely procedural.'

[7] Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission (Rule 42(1)(b)); ... ; or 'an order erroneously sought or erroneously granted in the absence of a party affected thereby' (Rule 42(1)(a)).'

[5] If regard is had to the applicants' evidence and the grounds for rescission in uniform rule 42, it is clear that there is no challenge to the judgment having been sought and granted erroneously or that the judgment is vague.

[6] In terms of relief sought under the common law *Jones AJA in Colyn*, reiterated at para 11 and 12:

"11...In order to succeed an applicant for rescission of a judgment taken against him by default must show good cause (*De Wet and Others v Western Bank Ltd* (supra))...

With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiffs claim which prima facie has some prospect of success (*Grant v Plumbers (Pty) Ltd*, *HOS Construction (Pty) Ltd v Wait* supra, *Chetty v Law Society, Transvaal*).

12 ... Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account

unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success (*Melane v Sanlam Insurance Co Ltd*)."

[7] Rule 4(1)(a)(iv) of the Uniform Rules of Court provide as follows:

"Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (9A) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:

(iv) if the person so to be served has chosen a domicilium citandi, by delivering or leaving a copy thereof at the domicilium so chosen;.."

In *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) at 51, Nicholas AJA said:

"It is a matter of frequent occurrence that a *domicilium citandi et executandi* is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution ...It is a well-established practice (which is recognised by Rule 4(1)(a)(iv) of the Uniform Rules of Court) that, if a defendant has chosen a *domicilium citandi*, service at such a place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property or cannot be found..."

- [8] In a written agreement dated 09 October 2009, the applicant furnished his *domicilium citandi* as M11 CocaCola Dome, Olivenhout and Northumberland, Randburg. The applicant is his founding affidavit gives evidence that the second applicant was not conducting business from the said address since October 2009. The explanation the applicant furnishes for his default is a weak explanation when regard is had to these conflicting versions.
- [9] Notwithstanding the weak explanation for the applicant's default, the question remains whether or not the application is made *bona fide* and if the applicant has a *bona fide* defence which has good prospect.
- [10] The applicant has not pursued this application since it was struck off the roll on the 01 November 2010, prompting the respondent to set down the application. The respondent submits that the delay in excess of 6 years where the applicant has done nothing to prosecute and bring to finality the matter demonstrates that the application is not made *bona fide*. Mr Mojapelo referred this court to two decisions in this regard. *Nehawu obo Tebatso Johanna Leduka v National Research Foundation* (2017) 38 ILJ 430 (LC) where the dictum in *BP Southern Africa (Pty) Ltd v National Bargaining Council for the Chemical Industry and Others* (2010) 31 ILJ 1337 (LC) at para 10 was applied:

"The rules of this court make no specific provision for an application to dismiss when a party fails diligently to pursue a claim referred to the court for adjudication, but the court has recognized and adopted the rule based on the maxim *vigilantibus non dormientibus lex subvenit*, in terms of which a party may in certain circumstances be debarred from obtaining the relief to which that party would have been entitled because of an unjustifiable delay in prosecuting their claim...From a policy perspective, there are two principal reasons why the court should have the power to dismiss a claim at the instance of an aggrieved party where the other has been guilty of unreasonable delay. In *Radebe v Government of the Republic of SA* 1995 (3) SA 787 (N), the court said the following :

The first is that unreasonable delay may cause prejudice to the other parties...The second reason is that it is both desirable and

important that finality should be reached within a reasonable time in respect of judicial administrative decisions..."

[11] I align myself with the sentiments of Van Niekerk J in the BP case. The respondent has set down the matter for adjudication with no explanation from the applicant why he has not pursued the application for 7 years. The default judgment granted on 14 May 2010 has been stayed as a result of this inordinate delay. The sum of R3 million is public funds which has not been repaid for a period of 7 years.

[12] The terms of the written agreement entered between the applicant and the first respondent which are relevant to this application are as follows:

"3.1 The financial support granted by the Department to the Beneficiary for (hereinafter "the Project") which is to be presented in the Republic of South Africa on 07, 08 and 09 November 2009 accordance with the programme and/or having the content as set out on the application form and the Beneficiary's Terms of Reference (Annexure A hereto).

7.1 Should the project be postponed or cancelled, the Beneficiary shall inform the Department thereof within 7 working days and amounts already paid to it in terms of this agreement shall be refunded to the Department in accordance with the provisions of this agreement.

7.2 Should the Beneficiary fail to meet any of its obligations arising from this Agreement on the fixed dates or use the allocation for any purpose other than set out in this Agreement, the Department shall, without prejudice to any rights to which the Department is entitled in terms of law or by virtue of this Agreement without further notice to the Beneficiary, discontinue any further payment and cancel the Agreement immediately, and shall reclaim any amounts already paid, in which case interest a tempora morae shall be charged."

[13] It is not is dispute that the concert did not take place on 07, 08 and 09 November 2009. The applicant failed to inform the respondent of same within 7 days as agreed and the respondent submits that it was entitled to reclaim the funds paid. The defence of the applicant is premised on alleged interference in the scheduled concert by the respondent, resulting in the applicant's inability to perform in terms of the contract. The applicant's defence is found at paragraph 20 of the Founding Affidavit and reads and follows:

"Regrettably the plaintiff breached the Court order by interfering with the project. This was on account of the fact that it instructed the Department of Public Works not to make the Union Building available for the presentation of the concert and the project had to be postponed. I annex hereto marked "FAT" correspondent in this regard."

The relevant part of "FA 7" which is dated 25 November 2009 on which the applicant bases his defence reads as follows:

"The Department of Public Works: Prestige Accommodation hereby informs you that the request to use Union Buildings grounds to host the Merriam Makeba Tribute concert has been declined due to the communique received from the Department of Arts & Culture confirming they will not be part of it."

[14] The letter which the applicant relies upon is dated 25 November 2009, two weeks after the concert dates of 07, 08 and 09 November

2009. The letter which the applicant seeks to rely on without any further confirmatory evidence or objective facts from the Department of Public Works, on a reading thereof does not indicate that the respondent instructed the Department of Public Works not to make available the Union Buildings but states that the respondent would no longer be part of the project. There is no explanation why the letter dated 25 November 2009 would be of any relevance to the concert dates that had passed. The applicant is constrained to the evidence in the papers.

[15] The result is that the applicant has not shown that rescission should be granted.

[16] In the result the application is dismissed with costs.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the Applicant: No appearance

On behalf of the Respondent: Adv. M. M. Mojapelo

Instructed by: Mketsu Associates

DATE HEARD: 30 OCTOBER 2017

DATE OF JUDGMENT: 30 OCTOBER 2017

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