THE HIGH COURT OF SWAZILAND

MELUSI QWABE

Applicant

And

BUILD PLUMB AFRICA (Pty) Ltd

1st Respondent

CHARLES THWALA N.O.

2nd Respondent

In Re:

BUILD PLUMB AFRICA (Pty) Ltd

Plaintiff

And

MELUSI QWABE

Defendant

Civil Case No. 1490/2003

Coram	S.B. MAPHALALA - J
For the Applicant	MR. M. MABILA
For the Respondent	MR. K. MOTSA

JUDGEMENT

(05/03/2004)

The applicant before court seeks to have a default judgement entered by this court on the 25th July 2003, against him rescinded on the basis that the same was erroneously sought and erroneously granted.

The Applicant in his founding affidavit avers further that he seeks to have the judgment rescinded on the basis that he was never served with the summons when the same was granted and also states that he has a good defence to the action instituted by the 1st Respondent against him
more particularly because he has a counter claim against it.

The founding affidavit further reveals that the present application for rescission is being done in terms of Rule 42 (1) (a), Rule 31 (3) (b) and also in terms of the common law.

The founding affidavit outlines in great detail the substantial facts in support of this application. At

paragraphs 7 to 10 the background of the matter is related. At paragraphs 12 to 14 averments are made in support of an application for rescission in terms of Rule 42 (1) (a). At paragraphs 15 to 17 averments are made under Rule 31 (3) (b) of the Rules. At paragraph 18 to 19 facts are advanced under the common law.

Pertinent annexures are filed in support of the founding affidavit, viz annexure "MQ1" being a certificate of incorporation of a company called "J. F. L. Construction (Propriety) Limited", annexure "MQ2" (a) and "MQ2 (b)", being a Memorandum of Association of the said company, annexure "MQ2 (c)" being Articles of Association of the said company.

The Respondent opposes the application and the answering affidavit of its Director one Edwin Mvubu is filed in opposition thereto. The affidavit attempts to answer all the issues raised by the Applicant in his founding affidavit. A number of points in limine are raised as follows:

"3.1. The remedies in terms of Rule 31 (3) (b), Rule 42 (1) (a) and in terms of the common law, are mutually exclusive and can therefore not be brought simultaneously in the same application on the same set of facts;

3.2. The Applicant has not disclosed the basis of the application to the Honourable Court and is clearly on a fishing expedition, which with all due respect cannot be countenanced;

3.3. As the Applicant has not disclosed the nature of the alleged authorisation to enter into any agreement on behalf of JFL Construction (Pty) Ltd, has not shown that he is a Director of the company, as claimed by him, and by virtue of the office held by him, that he had the right to bind the company in terms of its articles of association, he is therefore in terms of the turquant rule, estopped from denying that he acted in his personal capacity and alleging that he had in fact entered into a credit agreement with the Respondent on behalf of JFL Construction (Pty) Ltd; and

3.4. The Respondent is unsure of what the case is. He has to answer to and humbly pray that the Applicant's application therefore be dismissed with costs".

When the matter came for arguments it was argued as a whole. There are a number of issues for determination in this case viz, 1) whether the Applicant has made a case under Rule 31 (3) (b) of the Rules; 2) under Rule 42 (1) (a); 3) common law rescission; 4) estoppel and 5) whether the Turquant rule applies in casu.

Before addressing the issues I shall proceed to sketch a brief history of the matter. The Applicant purchased certain building materials from the Respondent over a period of time. The Applicant however did not make payment of the accounts and summons was issued against him. According to the Applicant the summons was served on one Mr. Themba Kunene and not him personally, however Respondent allege that summons were served on the Applicant personally, in this regard the Deputy Sheriff for the High Court has deposed to an affidavit.

Subsequently to judgment having been taken the Applicant attended to the offices of the Respondent's attorneys of record and paid an amount pf E5, 000-00 being a first instalment to avoid his assets being executed upon. The Applicant, however did not pay any further amounts as agreed upon with the attorney, who has also deposed to an affidavit in this regard. The defence advanced by the Applicant in casu is that he does not owe the money personally, but that he entered into the agreement for credit on

behalf of a "clearly identifiable principal". On the other hand the Respondent avers that the fact that the Applicant is a subscriber to the Memorandum does not make him a Director as he describes himself. At no stage did the Applicant intimate to the Respondent or to his attorney that he was only acting on behalf

of the company of which he is a Director. The accounts were not opened in the name of the company nor is there any indication that he acted in a representative capacity.

I now revert to the points for determination and I shall address them ad seriatum, thus:

1. Rule 31 (3) (b).

In terms of Rule 31 (3) (b) application for a rescission can be made under the following circumstances:

"A defendant may, within twenty-one days after he has had knowledge of such judgment, apply to court upon notice to the Plaintiff to set aside such judgment and the court may upon good cause shown and upon the defendant furnishing to the Plaintiff security for the payment of the costs of the default judgment and of such application to a maximum of E200, set aside the default judgement on such terms as to it seems fit.

The Applicant has to show that there is "good cause" to have the judgment rescinded. In the case of Buckle v Kotze 2000 (1) S.A. 453 (W) the following pertinent remarks were made:

"The question rather being whether or not explanation for default and accompanying conduct of the defaulter, whether wilful, negligent or otherwise, giving rise to probable inference of no bona fide defence, and thus that application for rescission not bona fide"

In casu the Applicant avers at paragraph 17 of his founding affidavit as follows:

"Furthermore, it is my humble submission that I have shown sufficient cause as it is quite apparent that I was never served with the summons at any stage herein and I am not liable to the 1st Respondent for the amounts owed by the company in which I am a Director".

5

However, in my assessment of the affidavits I come to the conclusion that the
Applicant was clearly in wilful default as the summons were served on him personally
by the Deputy Sheriff of the court who has declared under oath that the summons was so served. He chose to ignore them. "Wilful default" in this context connotes deliberateness in the sense of knowledge of the action and its legal consequences and a conscious decision, freely taken, to refrain from entering an appearance, irrespective of the motivation (see Mavjean t/a Audio Video Agencies vs Standard Bank of S.A. Ltd 1994 (3) S.A. 801).

In this regard, I agree with the submissions made on behalf of the Respondent that the Applicant has further not shown that there is any bona fide defence to the claim for which judgment was given. The Applicant's defence is that he did not act in his personal capacity but on behalf of a separate legal entity. It is trite law that to represent another legal entity proper authorisation must be given. In casu there is no resolution from the company confirming the Applicant's authority or confirming the defence as alleged by the Applicant. The invoices attached to the answering affidavit clearly are in the name of the Applicant personally. There is no indication that he is acting on behalf of another legal entity.

Furthermore, under this head the Applicant must, at least furnish an explanation of his default sufficiently full to enable the court to understand how it came about and to assess his conduct and motives. Prejudice and convenience are not factors to be considered (see Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) S.A. 345 (A) at 353 (A); Evander Caterers (Pty) Ltd vs Potgieter 1970 (3) S.A. 313 (T) at 315; Cavalinia's vs Claude Neon Lights S.A. Ltd 1965 (2) S.A. 649 (T) at 651, Metje & Ziegler BPK vs Gresse 1959 (3) S.A. 698 (SWA) at 702; and Weare vs Absa Bank Ltd 1997 (2) S.A. 212 (A)).

For the above reasons Applicant cannot succeed under Rule 31 (3) (a). 2. Under Rule 42 (1) (a).
The case for the Applicant in this regard is found in paragraphs 12, 13 and 14 of the founding affidavit. Essentially, the contention in this regard is, had the court been

aware that he was acting for and on behalf of the company when he dealt with the 1st Respondent, it would not have entered the default judgement as ft is clear that he was acting for a "clearly identifiable principal" which has legal capacity. Secondly, that he was not served with the summons personally.

In terms of Rule 42 (1) (a) application for a rescission can be made under the following circumstances;

"42 (1) the court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind on vary:

a) An order or judgment erroneously granted in the absence of any party affected thereby..."

According to the dicta in the case of Deary vs Deary 1971 (1) S.A. 227(C) and at 230 H an Applicant must satisfy the court that the judgment was granted, not only in his absence, but erroneously.

Although it is common cause that the judgment was indeed granted in his absence there is no indication of same having been granted erroneously.

Further, in the present case, the Applicant has not set out sufficient facts which, if established at the trial would constitute a good defence, which must have existed at the time of the judgment. (see Sanderson Technitool (Pty) vs Intermenua (Pty) Ltd 1980 (4) S.A. 573 (W)).

Therefore, Applicant cannot succeed under Rule 42 (1) (a). 3. Common law rescission.
Under the common law as well, the Applicant for rescission must show good cause before a judgment can be rescinded. In Nyingwa vs Moolman No. 1993 (2) S.A. 508 (TK) at 509 1 - 510D White J, after reviewing the authorities, came to the following conclusion at 511 J- 512:

"It follows that any judgement, including a summary judgment, can be rescinded under the common law. If the merits of the dispute were considered before summary judgement was granted, rescission can follow only on the grounds set out in the Childerley case; if the merits were considered and the judgement was granted by default, the grounds for rescission are virtually unlimited, and the only prerequisite is that "sufficient cause" therefore must be shown.

In the instant case the Applicant has not furnished the court with an adequate reason for not opposing the matter and has not shown that he has a bona fide defence to the matter. The Applicant's defence is that he acted on behalf of a separate legal entity, but provides no proof that he was in fact authorised to do so and is estopped from denying that he acted in his personal capacity.

The Applicant therefore cannot succeed under the common law. 4. Estoppel.
In the case Northside Development (Pty) Ltd vs Registrar General (1990) 170 CLR 146 the following was said:

"If the company has not held the agent out, the agent has no authority from the company to misrepresent his own authority; he cannot bind the company by his own statements of his authority and any loss suffered by the other party cannot be sheeted home to the company".

In the present case the Applicant has not shown that he derives his authority to bind the company from the articles, nor has he shown that he has been authorised to bind his principal nor has the principal ex post facto ratified the actions of the Applicant. It is trite law that a Director cannot bind a company/principal of which he is a Director without either deriving the authority from the articles or having express authority to do so.

The Applicant had at no stage indicated that he was acting as a representative of his principal. He has not attached a resolution to the effect that he is to enter into a credit agreement on behalf of his principal, notwithstanding being called upon to do so by the Respondent. The account with the Respondent is clearly in the personal name of

the Applicant. There is no indication on the documentation that it is on behalf of any other party but himself.

All in all, in this regard, I am in total agreement with the Respondent that the Applicant must be estopped from denying that he acted in his personal capacity.

5. Whether the Turquant rule applies in casu.

The Applicant is relying on the Turquant rule in that he intends to prove in a trial that he, as a Director could bind the company, and the fact that he did in fact not have such authorisation would, nevertheless bind the company in this regard.

The principle known as "the rule in Royal British Bank vs Turquand (1856) 6E & B 327" provides inter alia that if directors in terms of the Articles have power to bind the company, but the articles require that certain preliminaries should be gone through before that power can be duly exercised, then a person contracting with the Directors is not bound to investigate in order to discover whether such preliminaries have been observed (see also Mahomed vs Ravant Bombay House (Pty) Ltd 1958 (4) S.A. 704 (T); Gibson, South African Merchantile & Company Law (6th ED) at page 346; and L. C. B. Gower, Gower's Principles of Modern Company Law (5th ED) page 179.

In casu, clearly the above does not apply. The Applicant has not shown that he has any bona fide defence in the matter. There is no reason for this court to draw the inference that he was in fact acting as a representative of a "clearly identifiable principal" when the only thing that is clear is that he acted in his personal capacity. The Turquant rule does not apply in the circumstances of the present case. The Applicant is estopped from denying that he acted in his personal capacity.
In the result, the application is dismissed with costs.

S.B. MAPHALALA

JUDGE