IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2616/11

In the matter between:-

VAN WYK BREAKDOWN SERVICES (PTY) LTD	**Applicant**

and

FIDELITY SECURITY SERVICES (PTY) LTD	**Respondent**

In re:

FIDELITY SECURITY SERVICES (PTY) LTD	**Applicant**

and

VAN WYK BREAKDOWN SERVICES	**Respondent**

Neutral citation: *Van Wyn Breakdown Services (PTY) Ltd v Fedelity Security Services (PTY) Ltd* (2616/11) [2012] SZHC 69 (13th April 2012)

Coram: HLOPHE J

Heard: 7th March 2012

Delivered: 13th April 2012

For the Applicant: Miss Boxshall- Smith

For the Respondent: Mr. S. Dlamini

JUDGMENT

[1] This is an application in terms of which the Applicant who is the Defendant in the main matter, seeks an order of this court rescinding a default Judgment issued or entered by this court against the Applicant on the 10th February 2012. The Applicant further seeks an order of this court staying or suspending the execution of the writ issued pursuant to the said default judgment pending the finalization of the rescission application. The other reliefs are common reliefs in an application of this nature and need not be mentioned herein.

[2] In the Founding Affidavit, one Charles Van Wyk, who claims to be the Managing Director of the Applicant Company, avers that on the 19th January 2012, he was given the summons in this matter by one Lindiwe Fakudze, who was employed by the Applicant as an Administrator apparently in order to action same. He says that at the time of its service, which the record reveals was the 5th January 2012, he was not in the country and his staff members did not know what to do with the summons.

[3] I mention in passing at this stage that this latter averment is very strange given that the summons concerned, spells out very clearly on its face what the recipient or the Defendant had to do upon its receipt, which is simply to file a Notice of Intention to Defend within the prescribed period.

[4] Without disclosing much, Mr. Van Wyk on behalf of the Applicant, avers that whilst thinking that he had much time, he handed the summons over to his Attorney for action. His Attorney filed a Notice of Intention to Defend but was soon to discover after engaging his counterpart that a Judgment had already been obtained as a Default Judgment which he claims was done on the 10th February 2012. I notice that no disclosure is made on when Mr. Van Wyk handed the summons to Applicant's Attorneys for action and I reject his contending that he thought he had sufficient time because the summons in question what had to be done when.

[5] The effect of the Default Judgment was that Applicant was ordered to pay Respondent a sum of E 47 881.54 for services rendered, being security services, together with interest at 11% per annum as well as costs of suit.

[6] The rescission sought is alleged to be on the basis of Rule 42 (1) of the Rules of this court; Rule 31 (3) (b) as well as the Common law. As regards rule 42 (1), it is contended that the court granted the judgment in error whilst on the basis of rule 31 (3) (b) and the Common law, the contention is that there exists good cause on the basis of which the Default Judgment ought to be rescinded.

[7] According to the Applicant the error complained of is in that the Respondent instituted proceedings and obtained judgment against the wrong party because it did so against what it calls a firm, in the name of Van Wyk Breakdown Services. The Applicant claims that it is a company called Van Wyk Breakdown Services (PTY) LTD, which is

how it contends the citation should have been. Because of the omission of the words "(PTY) LTD" from its name, the Applicant contends that the judgment concerned ought not have been granted as the relief sought was against a non- existent person or entity. I will return later on to this aspect of the matter.

[8] As concerns Rule 31 (3) (b) and the Common law, it is contended that the Applicant has established good cause to the relief it seeks because it has allegedly established that there exists both requirements of good cause which are the reasonable and acceptable explanation as well as a *bona fide* defence.

[9] Regarding the reasonable and acceptable explanation as one of the two requirements of good cause, the Applicant avers that at the time the summons were served the deponent to the Founding Affidavit, the Managing Director of the applicant was not in the country but upon arrival, he thought he had sufficient time when he instructed his attorneys to defend the matter. I have already made known my attitude to this latter averment.

[10] From the facts alleged, although it is averred that the Applicant's Managing Director arrived in the country on the 19th January 2012, it is not clear when he instructed his attorneys to defend the matter, although it is clear that the said attorneys filed a Notice of Intention to Defend on the 8th February 2012, that is thirteen court days later, whilst the Judgment was itself entered on the 10th February 2012.

[11] It is an indisputable fact that when the Notice of Intention to Defend was filed, it was not accompanied by an application for an extension of time and condonation for the late filing of the Notice of Intention to Defend.

[12] Although admitted in Applicant's favour that the service of the summons, although served on the 5th January 2012, it could only start reckoning from the 16th January 2012, which is the date on which the legal year commences in terms of the rules, there is no doubt that, the 10 days within which a Notice of Intention to Defend had to be filed, had lapsed even prior to the day of the Judgment being granted. I will revert later to this aspect of the judgment.

[13] On the existence of a *bona fide* defence as the other requirement of good cause, the Applicant claims that he has a defence in the form of a counter claim if I understand it well. This is because it claims that the Respondent breached the contract they had concluded between themselves. The contract concerned, it is alleged was for the rendering of security services by the Respondent to the Applicant through the use of a Security Guard engaged by Respondent.

[14] It is alleged that notwithstanding this being present or available on the premises, the Applicant had his goods or items stolen which were reported at the Lobamba Police. Respondent, it was contended, had been notified that it could not be paid because of its failure to guard against the theft at the Applicant's premises.

[15] The Respondent did not file an affidavit in opposition but simply filed what it termed a "Notice to raise points of law" where several points raised were listed. These included, a contention that urgency was not properly pleaded as required by Rule 6 (25) (a) and (b); that the stay of execution could not be granted because there were no prospects of success among other contentions; that the application did not disclose a cause of action because the error alleged is non -existent or if it does exist, it is not a matter of law appearing *ex facie* the record of proceedings" and lastly that the Applicant failed to give a sufficient explanation on why he did not file the Notice to defend timeously. It was also contended that the Applicant application is based on technicalities which this court is not bound to uphold in keeping with the modern judicial approach to such matters as courts now insist on substance more than on form.

[16] I will now try to deal with the points raised *ad seriatim*.

Urgency:

[17] Whilst the Respondent contended that the matter is not urgent in so far as there was no compliance with Rule 6 (25) (a) and (b), the Applicant contended otherwise. There can be little doubt that the Applicant moved by way of urgency because it feared that subsequent to the Default Judgment obtained, the Respondent would issue a writ or warrant of execution and execute same against its moveables which would be prejudicial. This is what one would decipher upon reading the application concerned.

[18] I do not agree with Mr. Dlamini that the Applicant failed to set out explicitly the requirements of an interdict. The substance of the affidavit in my view does disclose that the matter is urgent. This means that the matter ought to be entertained. Without derogating from the authorities cited by the Respondents Counsel on the requirements of urgency, it is important to remember that each matter ought to be dealt with in terms of its own circumstance. The proposition referred to herein was well put in ***Sikwe v S. A. Mutual Life and General Insurance Co. LTD 1977 (3) SA 438*** in the following words:-

> *"Specific averments of urgency must be made and facts upon which such averments are based must be set out in the affidavit where it is not otherwise apparent that the matter is urgent. It does not follow that an application is necessarily defective if the form referred to in the Rules is not strictly adhered to. It is the substance of the affidavit, and not its form, which will weigh with the court; if an affidavit sets out facts upon which a court can decide that an Applicant is entitled to the relief, in terms of the sub rule, the court will entertain the application. If the only reasonable inference from the facts set out in the affidavit is that the matter is one of urgency, then an applicant will have complied with the requirements of the sub rule, even though he does not make a specific averment of urgency".*

[19] I am convinced that sufficient material has been placed before this court from which it could be construed that the matter is urgent. I have no hesitation that if I would insist on the Applicant pleading or alleging certain specific words even though the application establishes urgency on its facts, I cannot do so without placing emphasis more on the form than on substance.

[20] In any event the observations of Judge Ota in the ***Savannah N. Maziya v GDI Concepts and Project Management (PTY) LTD unreported civil High Court case no. 905/2009 at page 7*** become apposite when she stated:-

> *"Courts across jurisdictions have long departed from the era when justice was readily sacrificed on the Alter of Technicalities. The rationale behind this trend is that justice can only be done if the substance of a matter can be considered. Reliance on technicalities tends to render justice grotesque and has the dangerous potential of occasioning a miscarriage of justice".*

[21] This approach has also been confirmed in this jurisdiction by the observations of the Supreme Court of Appeal in ***Shell Oil Swaziland v Motor World (PTY) Ltd t/a Sir Motors case no. 23/2006*** where it was stated that the modern trend in matters of this nature does not allow technical objections to interfere in the otherwise expeditious and inexpensive decision of cases on their real merits.

[22] I therefore cannot agree that this matter is not urgent and I dismiss the point *in limine* concerned.

No circumstances justify stay of execution.

[23] Having considered all the circumstances of the matter, it seems to me, that it cannot be denied that the real and substantial justice required that a stay of execution in this matter be granted pending finalization of the matter. Whether or not such an order has to be confirmed is rather an issue to deal with when one determines whether a case has been made

for a rescission. This approach I adopt so as to avoid dealing with the matter on any other basis than on its substance. Accordingly it suffices for me to say that it was proper for this court to grant the interim stay so that all the material be placed before the court for it to decide whether or not a case has been made. I have no doubt that potentiality of an irrepairable harm was apparent in the matter unless a stay of execution was granted. Furthermore no prejudice was to be suffered by the Respondent if the stay was granted.

[24] In ***Shrine vs Shrine 1983 (4) SA 850 (C)*** the court made it clear that the court has a discretion to exercise so as to determine whether or not to grant a stay of execution. It was emphasized that the court will generally speaking grant a stay of execution where real and substantial justice requires it to be granted. The upshot of the consideration being whether or not injustice will not be done. I am not convinced an injustice was to occur if a stay was being granted.

[25] For the foregoing reasons, particularly the fact that no injustice would be done if the stay of execution, at least pending the finalization of the matter was not granted, I cannot uphold the point raised in the stay of execution.

The application does not disclose a cause of action.

[26] In my view, this point, whilst it could stand as one of law, is not necessarily one *in limine* but goes to the merits of the matter as it cannot be resolved without resort to the evidence filed of record. The

evidence contained *ex- facie* the file is one sided in the sense that it is as given by the applicant. The Respondent did not file any affidavit disputing or clarifying or giving a different dimension from that given by the Applicant or on its behalf.

[27] The Respondent contends that the Applicant has not established a cause of action for the reliefs sought; which is mainly the rescission in terms of Rule 42 (1) alternatively Rule 31 (3) (b) or the Common law.

[28] According to the Applicant the error that entitles it to rescission was that the default Judgment was obtained against a wrong party because there is no firm by the name of Van Wyk Breakdown Services but instead there was only a Company called Van Wyk Breakdown Services (PTY) LTD, which did not trade as Van Wyk Breakdown Services.

[30] I fail to appreciate what this error is. The rules of court define what a firm is, which includes a Business carried on by a Body Corporate (or Company) under a name than its own. That the name cited by the Applicant can be taken to be the name of the business can be found from the fact that the Applicant itself is aware that a possible warrant of execution shall be executed against it hence it's running to court to seek an interdict or staying of execution. For me there is no confusion of who the citation referred to such that the Applicant has gone to great lengths or extents indicating why it was not liable to pay the amounts sought and has not said that he knew nothing about the matters giving rise to the claim. Clearly the bringing of the proceedings in the manner done, has not prejudiced Applicant in anyway and if it has not I cannot agree there was an error committed by this court at the time it granted

the Default Judgment. Furthermore, if this was an error, it then does not arise *ex facie* the record of proceedings which is what the error contemplated in terms of Rule 42 (1) is. See ***Bokoven v GJ Horves (PTY) Ltd 1992 (2) SA 467 (E)***.

[31] The closest to an error contemplated by the rule in this matter is shown to have occurred, when there was filed albeit out of time, a Notice of Intention to Defend on the 8th February 2012 which was two days before the grant of the Default Judgment on the 10th February 2012.

[32] The Respondent is not shown as having dealt with the notice but is shown as having ignored it when the Default Judgment was obtained. The court itself does not appear to have dealt with the Notice as it appears to have ignored the Notice of Intention to Defend and entered the Default judgment.

[33] The legal position is settled that the court should not ignore such a notice even if it is filed out of time. Herbestein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition page 430, comments as follows on the old South African position which is similar to our current position:-

> *"In the past, where the Notice (to defend) has been delivered late, the position was that the plaintiff could not regard it as a nullity, but had to apply to have it set aside as an irregular proceeding".*

It shall be noted that the legal position in South Africa has since been amended which is why the learned Author refers to the position in previous terms.

[34] The position referred to above was put succinctly in the headnote of ***Bank Van Die Oranje- Vrystrat BPK v Cronje 1966 (4) SA 4*** where the following is stated:-

> *"A Notice of Intention to Defend, which is ex facie late but which has been filed with the Registrar cannot be disregarded as it is not necessarily irregular. When a pleading is filed late and a party objects thereto on the ground that it is irregular then he must not proceed with the action as if the pleading does not exist. He must apply to court, in terms of Rule of court 30, for the setting aside thereof."*

[35] The point being made here is that by granting the default judgment without first dealing with the Notice of Intention to Defend there was committed an error contemplated by Rule 42 (1) (a) of the rules of this court. The position is that once an error is established the court should rescind the judgment on the basis of rule 42 (1) (a) of the Rules of this court. In ***Bakoven LTD vs GJ Horves (PTY) Ltd 1992 (2) SA 467 (E) at 471 G*** the position was put as follows:-

> *"Once the Applicant can point to an error in the proceedings, he is without further ado entitled to rescission."*

[36] Having considered the circumstances of the matter, it seems to me that the error concerned should not signal the end of the matter though on the grounds that even if the judgment were to be rescinded, it would still get to the same position given that I do not believe the Respondent has a defence. To overcome this, I observe that a rescission on the basis of Rule 42 (1) is a discretionary remedy and if it is so, it then

means that one has to eventually consider whether he would exercise such a discretion in favour of an Applicant who has no defence or who has no sound reason for this default? I think not. This means that I cannot exercise my discretion in favour of the Applicant on the facts of this matter as in rescinding the judgment can I only delay finalization of the matter and may unnecessarily escalate costs. See in this regard ***Tshivase Royal Council v Thsivase 1992 (4) SA 852 at 862 J- 863A***.

[37] If then I cannot grant rescission under Rule 42 (1) can I grant it under Rule 31 (3) (b) or the Common Law. The position is that a party who seeks a rescission of a judgment of this court under Rule 31 (3) (b) and the Common Law, needs to establish good cause. Good cause has been interpreted in judgments of this court to mean the existence of two requirements namely a reasonable and acceptable explanation as well as a *bona fide* defence carrying prospects. For a party to succeed both these requirements should coexist. See in this regard ***Nyingwa v Moolman N.O. 1993 (2) SA 508(TK)*** as well as ***Leornard Dlamini vs Lucky Dlamini High Court Civil Case no. 1644/97***.

[38] I now need to establish whether or not the Applicant can be said to have met the requirements of good cause. I have to commence from examining if the very first hurdle has been overcome, which is whether or not a reasonable and acceptable explanation has been established.

[39] The Applicant does not deny that the summons was properly served on it. It does not dispute further that the summons carried on the face of it very clear directives on what the recipient of same had to do with it,

which is to say it had to file a notice of intention to defend within a period set out in the said summons.

[40] The Applicant says that its employees did not know what to do with the summons, irrespective of the summons spelling out clearly what should be done upon their receipt. Notwithstanding that the Applicant's Managing Director would have been out of time as at the time he received the summons from his Administrator, given its having been served on the 5th January 2011, were it not for the legal position that court days commenced on the 16th January 2012, the Applicant still failed to deal with the matter with the necessary speed. This failure by the Applicant to deal with the summons so as to file a Notice of Intention to Defend within the time stipulated was not in my view reasonable in the circumstances. If it was not reasonable in the circumstances it was also not acceptable. If this was the case it simply means that a rescission of judgment is not possible.

[41] The position is worsened by the fact that in the matter at hand there does not seem to be a defence. This I say because other than contending that a sum of E 5 000.00 can be taken to be in dispute on whether or not it was settled, the other amounts are not being denied by the Applicant other than trying to establish that it has a counter claim against the Respondent which would be set off against the outstanding amount. The E 5000.00 itself alleged to have been paid is not supported by any proof in my view. I am therefore of the view that it is open to the Applicant to institute a claim against the Respondent if it believes it has a case against it. This however cannot justify the rescission of a

judgment particularly where the judgment debt is a liquid amount as is the case herein.

[42] I can just comment in passing that the Applicant is not bound to suffer any prejudice when considering that its claim against the Respondent is shown to be still under processing by the Respondent's insurer.

[43] I accordingly make the following order:-

(i) The Applicant's application for rescission be and is hereby dismissed.

(ii) The Applicant is to pay the costs of this application.

Delivered in open Court on this the ……day of April 2012.

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N. J. HLOPHE

JUDGE