IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO. 1916/2018

In the matter between:

KUKHANYA CIVIL ENGINEERING CONTRACTORS **Applicant**

And

ZMCK CONSULTING ENGINEERS **1st Respondent**
MCINSELI ZWANE N.O. **2nd Respondent**

In re:

ZMCK CONSULTING ENGINEERS **Plaintiff**

And

KUKHANYA CIVIL ENGINEERING CONTRACTORS **Defendant**

Neutral citation: *Kukhanya Civil Engineering Contractors v ZMCK Consulting Engineers & another In re: ZMCK Consulting Engineers v Kukhanya Civil Engineering Contractors* (1916/2018)) *[2019] SZHC 260* (21 September *2023)*

Coram **:** **T. Dlamini J**

Delivered : 21 September 2023

[1] ***Civil Procedure – Default judgment – Application for rescission – Rescission requirements considered***

Summary: ***Before court is an application for rescission of an order granted for defaulting to file a notice of intention to defend an action proceedings. The notice to defend was however, filed way out of time when the matter had been set down for a default judgment, and no application for condonation of the late filing was made.***

Held: ***That there was no error on the part of the court in granting the default judgment.***

Held further: ***That no reasonable and acceptable explanation has been given for the default, and that the defence tendered is evasive and carries no prospects of success. Application for rescission is dismissed with costs and the interim order staying execution of the order granted on 22 March 2019 is discharged.***

JUDGMENT

T. Dlamini J

[1] For determination is an application for rescission of a default judgment granted by this court for failure to file a notice to defend an action proceedings. The applicant *in casu* is the defendant in the action proceedings while the first respondent is the plaintiff. For convenience, I will refer to the parties as cited in the action proceedings.

[2] The plaintiff sued out a summons against the defendant claiming payment of the sum of seven hundred and ninety-five thousand six hundred and sixty-six emalangeni and sixty-eight cents (E795, 666.68). The claimed amount is allegedly in respect of MR3 maintenance design and construction services rendered by the plaintiff at the instance and request of the defendant. Payment for the services is alleged to be due and owing but the defendant is either failing, refusing or neglecting to pay notwithstanding demand by the plaintiff.

[3] According to the return of service, the summons were served upon the defendant on 05 February 2019. In terms of the summons, a notice to defend was to be filed within ten (10) days of service of the summons upon the defendant. This *dies* is in compliance with *Rule 19 (1)* of the *High Court (Amendment) Rules* which provides that "*the defendant in any civil action shall be allowed at least ten days after service of summons on him (and where he resides more than eighty kilometres from the seat of the court at least fourteen days) within which to deliver a notice of intention to defend either personally or through his attorney*".

[4] The ten days period elapsed on 19 February 2018 but the defendant did not file a notice to defend. On the 18 March 2019 the plaintiff filed an application for judgment by default in terms of *Rule 31 (3) (a)*. The rule provides that "*Whenever a defendant is in default of delivery of a notice of intention to defend or of a plea, the plaintiff may set the action down … for default judgment and the court may, where the claim is for a debt or liquidated demand, without hearing evidence … grant judgment against the defendant or makes such order as to it seems fit*." The application for judgment by default was set down for 22 March 2019, a date upon which this court granted the default judgment.

[5] On 28 March 2019 the defendant filed an application under a certificate of urgency seeking, *inter alia*, the prayers listed below:

> i) Rescinding the Default Judgment granted by this Honourable Court on the 22nd of March, 2019 in the main matter herein;
>
> ii) Staying the execution of the Court Order granted in the main matter herein on the 22nd of March, 2019, pending final determination of this interlocutory application;
>
> iii) Staying the attachment and/or removal of the assets of the Applicant pursuant to a Writ of Execution issued in the main matter by the 1st

Respondent on or about the 27th March 2019 pending final determination of this interlocutory application; and

iv) Costs of suit.

[6] The court issued an interim order staying execution of the default judgment pending a determination of the application for rescission. The application for rescission, according to the defendant's heads of argument, is premised on *Rule 42 (1) (a)* of the High Court Rules; whereupon the defendant states that "*Before this Honourable Court is a Rescission Application being brought in terms of Rule 42 (1) (a) of the High Court Rules*".

[7] *Rule 42 (1) (a)* of the *Rules of the High Court* provides what is quoted hereunder:-

Variation and Rescission of Orders

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 or vary:

(a) an order or judgment erroneously granted in the absence of any party affected thereby;

[8] The application is thus premised on the reason that the order was erroneously granted by the court in the absence of the defendant. For this to obtain, the court therefore, ought to find that the order was erroneously granted in the absence of the other party.

[9] The undisputed facts of this case are that a simple summons was issued against the defendant on the 07 December 2018 and was served upon it on 05 February 2019, per the return of service. In terms of the summons, and as per the provisions of *Rule 19 (1)*, the defendant had ten days to file a notice of intention to defend. The ten days period elapsed on 19 February 2019 but the defendant did not file the notice to defend. On 18 March 2019, which is about a month following the period on which a notice to defend ought to have been filed, the

plaintiff filed an application for judgment by default. The application was set down for 22 March 2019.

[10] The defendant thereafter filed a notice to defend on the 21 march 2019 and it was served upon the plaintiff at 3:20 pm on 21 March 2019. The file was already in the Presiding Judges' Chambers and the notice to defend was not filed in the Judge's file for the Judge's attention. A default judgment was therefore entered in favour of the plaintiff. It was entered in terms of *Rule 31 (3) (a)* which provides what is quoted hereunder:-

> *Judgment on Confession and by Default*
>
> 31. (1) …
>
> (2) …
>
> (3) (a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in sub-rule (5) for default judgment and the court may, where the claim is for a debt or liquidated demand, without hearing evidence, oral or documentary, and in the case of any other claim, after hearing such evidence as the court may direct, whether oral or documentary, grant judgment against the defendant or make such order as to it seems fit.

[11] On the basis of the facts set out in paragraphs [9] and [10] above, considered together with the provisions of *Rule 31 (3) (a)*, the court did not grant the default judgment by error.

[12] A number of judgments have considered the question of what constitutes an error for the purposes of *Rule 42*. It was held in *Dawson & Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd 1993 (3) SA 397 at 402-403* that an error in the name under which the defendant is cited will not necessarily constitute a ground for rescission of an order obtained against the defendant under that

name if it is clear that the correct party has been sued. The court will rectify the name of the defendant and uphold the validity of the order granted against it.

[13] The courts, however, have rescinded judgments on the ground of a mistaken belief on the part of the court that the defendant knew of the hearing when in fact he did not. In *Topol & Others v L S Group Management Services (Pty) Ltd 1988 (1) SA 639*, the court granted an application for rescission of an order refusing leave to appeal. The application for leave to appeal was heard in the absence of the applicant who had no knowledge of the set down. The Judge who heard the application for leave to appeal proceeded on the basis that notice had been given and the applicant was in default. *See also: De Sousa v Kerr 1978 (3) SA 635*.

[14] The courts have also rescinded orders on the ground that the capital amount claimed had already been paid by the defendant. *See: Nyingwa v Moolman NO 1993 (2) SA 508 at 510* and *Frenkel, Wise & Co (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd 1947 (4) SA 234.* Levinson J held in *First National Bank of SA Ltd v Jurgens & others 1993 (1) SA 245 at 247* that *Rule 42 (1) (a)* has operation only when the applicant had sought an order different from that to which it was entitled under the pleaded cause of action and the sought order was granted.

[15] In *Bakoven Ltd v G J Howes (Pty) Ltd 1992 (2) SA 466 at 471* Erasmus J held that a judgment may be set aside in terms of *Rule 42 (1) (a)* on the basis of being granted in error if the court made a mistake in a matter of law appearing in the proceedings of the court of record. He further held that in deciding whether the judgment was erroneously granted, the court is confined to the record of the proceedings. *In casu*, the notice to defend was inordinately filed

out of time and was not in the Judges' file when the Presiding Judge considered the default judgment application. Having been filed out of time, it was not accompanied by an application for condonation of the late filing as provided by *Rule 27*. There is therefore no good reason, in my view, for the court to grant a rescission when the notice to defend is sneaked into the Judge's file following the grant of the default judgment.

[16] On the basis of what I set out in the paragraphs above, the application for rescission based on *Rule 42 (1) (a)* does not succeed. The order sought to be rescinded was not granted in error but on the basis of the defendant's default. The court has a discretion of whether or not to grant an application for rescission under *Rule 42 (1) (a)*. *See: Theron NO v United Democratic Front (Western Cape Region) & others 1984 (2) SA 532 at 535*.

[17] Further to the above, the rescission application cannot succeed even when considered on the basis of *Rule 31 (3) (b)* or the common-law grounds for rescission. Under these grounds for rescission, the applicant must establish 'good cause' or 'sufficient cause'. This entails providing to the court a reasonable and acceptable explanation for the default, and satisfying it that on the merits of the case the applicant has a *bona fide* defence which carries some *prima facie* prospects of success. *See: De Wet & others v Western Bank Ltd 1979 (2) SA 1031 at 1042*

[18] There is no attempt by the defendant to give an explanation, whether reasonable or acceptable, for filing the notice to defend inordinately out of time. The default in filing timeously is not explained anywhere. The averment made is that "*pursuant to the enrollment of the matter for default judgment as stated above, the Applicant duly filed and served its notice of intention to defend on*

*the 1st Respondent and attended to filling same within the High Court Civil registry on the **21st March 2019***". This is stated in paragraph 7.1 of the defendant's founding affidavit.

[19] A defence which the defendant makes in paragraph 12 of the founding affidavit is that "*the sums as claimed by the First Respondent are not yet due and payable on the basis that the various interim payments certificates upon which the Applicant believes the claim is based upon are yet to be honoured by the project owner, this being the basis upon which the First respondent would be entitled to institute proceedings for recovery of any sums that may be due to it*."

[20] In the answering affidavit, the plaintiff responded in paragraph 14.2 thereof to the averment made by the defendant, in the words quoted below:-

> It is false that the money is not yet due … the applicant has misled this court. The applicant knows that the money was paid to it by the client. For applicant to come to court under oath, and tell a lie to the fact that the monies are not yet due and payable is contemptuous. It is actually an abuse of court process. I attach hereto minutes of the site meeting held on the 4th April 2017. Representing the applicant were Mr. F Matahwa and Mr. S. Ngcamphalala, in attendance for the 1st Respondent was myself and Mr. A Vilakati. There was also a representative from ministry of Public Works and Transport, Mr. Linda Magagula. As the minutes will reflect on page 5, the issue of payment certificates was deliberated on. As it is reflected all 12 certificates were paid by Government being certificate no.1 to 12. The court will see on the column written status, it reflects paid.

[21] In the replying affidavit, the defendant reiterates what it stated in paragraph 12 of its founding affidavit. Furthermore, the defendant states what is quoted below:

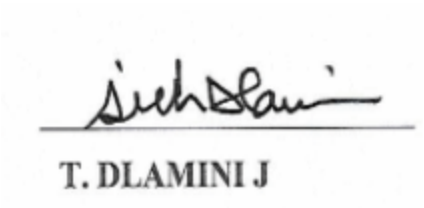
> I state further that the minutes referred to by the 1st Respondent make no reference to payment having been paid for the benefit of the 1st Respondent. It is apposite to point out that the 1st Respondent (plaintiff) were not the only persons who were engaged on the project and as such the payments as reflected in the minutes have no correlation to funds which may be due to the 1st Respondent.

[22] It is not in dispute that the minutes referred to by the plaintiff, at page 5 thereof, reflect that certificates numbers 1 up to 12 were paid. The minutes are signed on behalf of the plaintiff, the defendant and the Ministry of Public Works and Transport (the project owner).

[23] The defendant pleaded in clear and unambiguous terms in paragraph 12 of its founding affidavit that the sums claimed by the plaintiff are not yet due and payable because the various interim payment certificates upon which the claim is based are yet to be honoured by the project owner; and that this is the basis upon which the plaintiff would be entitled to institute proceedings for recovery of the sums owing. The plaintiff has placed evidence before the court showing that certificates numbers 1 up to 12 were paid. In the replying affidavit, the defendant has shifted the goal posts and states that the minutes referred to make no reference to that the payments were made for the benefit of the plaintiff. The defendant goes on to state that the plaintiff was not the only person who was engaged on the project and therefore the payments referred to have no correlation to the funds which may be due to the plaintiff.

[24] *Rule 18 (5)* requires a party who denies an allegation to do so not evasively but to answer the point of substance. In my considered view, the defendant is evasively denying that the amount claimed is due and payable; and is evasively denying that the certificates upon which the claim is premised were paid. It does not inform the court however, about the type and nature of the necessary correlation that must exist in order to link the funds paid to the amounts due to be paid to the plaintiff. I therefore find that the defendant also failed to show that it has a *bona fide* defence that *prima facie* carries some prospect of success.

[25] For the reasons considered in the above paragraphs, the application for rescission of the order issued on 22 March 2019 is unsuccessful, and is dismissed with costs. The interim order staying execution of the order granted on 22 March 2019 is accordingly discharged.



JUDGE – HIGH COURT

For Applicant : Mr. F. Tengbeh

For Respondents : Mr. S.G. Dlamini