THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case No: 1129/2016

In the matter between:

EH HASSIM HARDWARE (PTY) LTD **APPELLANT**

and

FAB TANKS CC **RESPONDENT**

Neutral Citation: *Hassim Hardware v Fab Tanks* (1129/2016) [2017] ZASCA 145 (13 October 2017)

Coram: Shongwe AP and Molemela and Fourie AJJA

Heard: 22 August 2017

Delivered: 13 October 2017

Summary: Rescission of default judgment — Uniform Rules of Court 31(2)*(a)* and *(b)* –court of appeal may only interfere if power not properly exercised – court a quo erred - bona fide defence – carries prima facie reasonable prospects of success – appeal succeeds with costs.

ORDER

On appeal from Gauteng Division of the High Court Pretoria (Siwendu AJ sitting as court of first instance):

1 The appeal succeeds with costs.

2 The order of the court a quo is set aside and replaced with the following order:

'The application for rescission of judgment is granted. Costs to be costs in the cause.'

3 The appellant is directed to file its Notice of Intention to Defend within 7 (SEVEN) days from the date of this order.

JUDGMENT

Molemela AJA (Shongwe AP and Fourie AJA concurring):

[1] This appeal concerns a refusal by a single Judge of the Gauteng Division of the High Court, Pretoria (Siwendu AJ) to rescind a default judgment obtained against the appellant by the respondent arising from the appellant's failure to file a Notice of Intention to defend.

[2] The appellant is a supplier of building materials and related products to various builders in the construction industry and its operations are based in Limpopo Province. The respondent is a registered company involved in the supply of water tanks.

[3] The salient facts and circumstances which gave rise to the application for rescission of judgment in the court a quo are as follows. On 25 September 2013, the respondent submitted a quotation to Segabokeng Construction

(principal contractor) for the manufacture, delivery and erection of a tank which was to be installed at Malipsdrift SAPS as part of the building project of the Department of Public Works. The quotation in question embodied the terms and conditions for the supply and installation of the tank and indicated the estimated and/or expected delivery period of five to seven weeks.

[4] On 11 October 2013, the appellant was replaced as the purchaser of the tank and therefore became a sub-contractor of the principal contractor. The appellant requested the respondent to send a pro forma invoice in accordance with a quotation it had initially sent to the principal contractor. The respondent duly forwarded the *pro forma* invoice to the appellant. On acceptance of the terms, the appellant paid to the respondent a deposit in the amount of R484 585.50 which constituted 50 per cent of the contract price. The payment terms entailed, inter alia, that the appellant pay to the respondent 40 per cent of the price on delivery of the material, 5 per cent after the erection of the tank and a further 5 per cent after the testing or three months after the erection of the tank.

[5] It was common cause between the parties that delivery was effected in April 2014 and thus outside the delivery period of five to seven weeks. The respondent conceded the late delivery and attributed it to a larger than expected number of orders. A review of the correspondence exchanged between the parties reflects that the appellant had consistently registered its unequivocal dissatisfaction with the delay but did not cancel the contract. Prior to delivery and installation of the tank, the respondent had issued the appellant with an invoice dated 31 March 2014 in respect of the balance of the contract price. Further invoices were subsequently issued. It is also common cause that subsequent to the payment of the 50 per cent deposit, the appellant did not make any further payments to the respondent. The balance owing subsequently became the subject of the default judgment obtained against the appellant.

[6] It is clear that prior to the launch of the action proceedings instituted by the respondent against the appellant in the court a quo, the appellant and the

respondent were embroiled in a dispute about the outstanding balance of the contract price. The appellant was initially represented by Bresler Becker Attorneys. Due to the closure of that firm, the appellant's files were transferred to Mr Oberholzer of the firm De Bruin Oberholzer Attorneys. Pursuant to Mr Oberholzer's involvement in the matter as the appellant's legal representative, the appellant persisted in the denial of liability on account of the late delivery of the tank and certain defects subsequently found on it. When the respondent's attorneys threatened to take legal action against the appellant, Mr Oberholzer apprised them that the appellant would defend any action they intended bringing and requested them to serve any court processes intended for the appellant at his firm. It is common cause that summons commencing action against the appellant was served at Mr Oberholzer's firm on 23 April 2015.

[7] In the intervening period Mr Oberholzer took ill from 25 March 2015 and was hospitalised in intensive care on 8 April 2015 for a month. He was only able to return to work on 11 May 2015. Mr Oberholzer deposed to an affidavit in support of the application for rescission of the judgment, confirming that he was hospitalised. He averred that during his absence the administration of the affairs of his office were entrusted to Mrs Mariaan Bresler, the erstwhile attorney of the appellant, as well as a professional assistant in his office and an article clerk. The erstwhile attorney was to supervise the appellant's files. It was only after a call by the appellant's deponent on 20 May 2015 enquiring about the appellant's adverse credit listing that Mr Oberholzer became aware of the service of summons by the respondent. He filed a notice of intention to defend on the same day. He later learnt that default judgment had been granted the day before he filed the appearance to defend. The respondent's attorneys refused to consent to the rescission of the judgment. The appellant then launched a substantive application for rescission of judgment, which the respondent opposed.

[8] Although the court a quo found that the appellant was not in wilful default of entering an appearance to defend the action, it concluded that the appellant had not shown a bona fide defence. Curiously, having

acknowledged that the triable issues relied upon by the appellant flow from the alleged breach of the contract on which the respondent's claim is based, the court a quo found that those issues 'are not necessarily germane to the claim the applicant [appellant] may have against the respondent in respect of the counterclaim'. It further found as follows:-

'Stated conversely, the facts giving rise to the counterclaim which is in its nature contractual damages, can and does constitute a separate cause of action. In this sense, it cannot be construed to constitute a defence that goes to the heart of the respondent's claim. In my view, the requirement of a bona fide defence means a defence that provides the kind of answer that addresses the heart and merits of the respondent's claim.'

The court a quo concluded that the appellant had not satisfied the requirements for the granting of rescission of judgment and dismissed the appellant's application with costs. Aggrieved by that decision, the appellant applied for leave to appeal against the whole judgment of the court a quo. This appeal is with leave of that court.

[9] The central issue to be determined in this appeal is whether the appellant satisfied the requirements for the granting of rescission of judgment as contemplated in rule 31(2)*(b)* of the Uniform Rules of Court. An ancillary issue is whether the counterclaim raised in respect of the penalties constituted a bona fide defence to the respondent's claim.

[10] Before this Court, the appellant contended that it had shown that it had a bona fide defence against the respondent's claim. It contended that it had demonstrated that it had a counterclaim that served to extinguish the respondent's claim and this accordingly constituted a bona fide defence against the respondent's claim. The appellant also asserted that the court a quo's finding that the appellant was not in wilful default falls outside the purview of the appeal, since it had not attacked that finding in its Notice of Appeal. It is the appellant's case that the respondent was aware of the fact that, should it act in breach of the agreed delivery times, the appellant would suffer damages as it would be exposed to payment of penalties raised against the main contractor. The appellant further submitted that since it had to pay

another supplier for the remedying of the respondent's defective performance, the amount paid to that supplier ought to have been deducted from the amount reflected in the respondent's invoice for the supply and assembly of the tank. According to the appellant, the court a quo erred insofar as it granted default judgment on the full amount claimed by the respondent. The appellant further contended that since the principal contractor had levied the penalties on it for the late delivery of the tank, it had a counterclaim against the respondent in respect of the penalties charged. The basis for that counterclaim, so it was argued, was the contractual damages in respect of the penalties levied, which fell within the contemplation of the parties.

[11] The respondent conceded that the court a quo considered the explanation proffered on behalf of the appellant to be reasonable and accordingly found that there was no wilful default on its part. The respondent, however, contended that since this appeal is directed against the whole judgment of the court a quo, this Court will have to make its own determination as to whether the appellant's explanation for the default is reasonable. The respondent further argued that none of the requirements for the granting of a rescission of judgment had been satisfied. It further pointed out that there was no merit to the appellant's counterclaim as there was no agreement that penalties would be levied. It further averred that there was no legal basis for the counterclaim, as the appellant relied on an unliquidated claim that was not capable of set-off.

[12] Rule 31(2)*(b)* of the Uniform Rules of Court provides that a party against whom default judgment has been granted may, within 20 days after he or she has knowledge of that default judgment, apply to court to set it aside. The court may, on good cause shown, set that judgment aside. It is established law that the courts generally require an applicant for rescission of judgment to show good cause by (a) giving a reasonable explanation for the default; (b) showing that his/her/its application for rescission is made bona fide and not made merely with the intention to delay the plaintiff's claim; (c) showing that he/she/it has a bona fide defence to the plaintiff's claim which

prima facie has some prospect of success.[1] Regarding the last-mentioned requirement, it is trite law that an applicant for rescission of judgment is not required to illustrate a probability of success, but rather the existence of an issue fit for trial.[2]

[13] Equally trite is the principle that even when all the requirements set out above have been met, it is still within the discretion of the court whether or not to rescind the judgment. That discretion must be exercised judicially in light of all the facts and circumstances of the case.

[14] As regards the requirement pertaining to the explanation proffered for the default, it is not in dispute that the appellant's attorney, Mr Oberholzer had been hospitalized for some time. It is also not disputed that he had personally arranged with the respondent's attorneys to serve any processes and pleadings intended for the appellant on his firm. It is common cause that the summons issued by the respondent against the appellant was served on Mr Oberholzer's firm while he was hospitalised. Mr Oberholzer's assertion regarding the arrangement that he had made with Mrs Besler pertaining to the supervision of the appellants' files was confirmed by the latter. As stated before, it was only when the appellant's deponent personally contacted Mr Oberholzer, after the latter's return to the office, that Mr Oberholzer discovered that summons instituting action against the appellant had been served on his firm and that default judgment had also been granted against the appellant.

[15] I am satisfied that Mr Oberholzer put enough measures in place to look after the appellant's interests in his absence and therefore disagree with the respondent's contention that Mr Oberholzer's firm's failure to file a notice of intention to defend constituted negligence that should be imputed to the appellant. I am of the view that the circumstances of this case do not warrant that the appellant be penalised for the shortcomings of the staff members of

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[1] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (*Cape*) 2003 (6) SA 1 (SCA) at 9E–F.
[2] *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (W) at 575H–576A.

its legal representative's firm. It must be borne in mind that it was at the instance of Mr Oberholzer that summons was served at the latter's firm and not on the appellant. The appellant was not aware of the service of the summons and only learnt about it after default judgment had already been granted against it. Under these circumstances, the respondent's assertion that the appellant failed to make any enquiries regarding the progress of its case or showed disinterest in how its legal representative was conducting its case is devoid of any merit. I am satisfied that the appellant's explanation of the default is satisfactory.

[16] It is evident from the bulk of correspondence exchanged between the parties that the appellant has unequivocally displayed a firm intention to defend any court action instituted by the respondent in relation to this matter. I am therefore satisfied that the appellant's application for rescission of judgment was bona fide and not merely intended as a delaying tactic.

[17] What remains for consideration is whether the appellant has sufficiently succeeded to make out a bona fide defence which has prospects of success. As correctly contended by the respondent, for the appellant to be successful in its application for rescission of judgment, it needs to set out averments which, if established at the trial, would entitle it to the relief asked for. It need not deal fully with the merits of the case and produce evidence that shows that the probabilities are actually in its favour.

[18] The papers reveal sufficiently detailed allegations of fact pertaining to the late and defective delivery of the tank. With regards to defective performance, the appellant averred that leaks were found on the tank subsequent to its installation and that the respondent refused to cure these defects, as a result of which it commissioned another supplier to remedy the defects. The respondent contended that the appellant had not stated the basis on which the leakages were being attributed to it. Significantly, the correspondence exchanged between the parties revealed that at the time when the respondent was notified about the leakages and warned that the appellant would resort to engaging the services of another contractor for the

necessary repairs if the respondent did not do so, the latter did not dispute the defects on the tank but merely stated that it would attend to such defects only if its invoice was settled. The appellant duly appended the invoice presented to it by the contractor who attended to the repairs on the tank to its founding affidavit.

[19] With regards to the penalties, the appellant claimed that it was being held liable for payment of penalties due to the late delivery of the tank having impacted on all water-dependant construction, which in turn delayed the finalisation of the entire project. The progress-payment form and the Reconciliation Statement dated 13 April 2015 and presented to the appellant by the principal contractor formed part of the appellant's papers. These two documents reflected an amount of R446 978.00 as 'penalties for late completion'. I am satisfied that the allegations made by the appellants are substantiated and evince the existence of triable issues.

[20] It is undisputed that at the time of the hearing of the rescission application, the appellant had not yet issued any summons against the respondent in respect of the costs of repairs of the tank or the penalties. The appellant indicated that its counterclaim pertaining to that claim would be filed simultaneously with the plea as soon as the judgment of the court a quo has been rescinded.

[21] The respondent's assertion that the essence of the appellant's counterclaim is that of damages which are unliquidated and that such damages cannot be set off against a liquid claim seems to have found favour with the court a quo. In my view, this assertion simply fails to take into account that first, rule 31(2)*(a)* and *(b)* specifically cater for the setting aside of a default judgment in respect of a claim that is 'not for a debt or liquidated demand'. Secondly, it is permissible for a defendant, by way of a plea, to raise the existence of an unliquidated counterclaim as a defence.[3] Brand JA in *Soil*

[3] *Stassen v Stoffberg* 1973 (3) SA 725 (C) at 729A-C.

Fumigation Services v Chemfit Technical Products[4] endorsed the principle that if it is permissible for a defendant in its plea to raise the existence of an unliquidated counterclaim as a defence to the plaintiff's claim, then similarly, it should be equally permissible to raise that defence by way of affidavit in summary judgment proceedings.

[22] In response to the appellant's submission that there is no reason why the same reasoning cannot be adopted in the context of an application for rescission of judgment, the court a quo stated as follows:-

'Unlike in a case of a defence to a summary judgment, the procedure envisaged in Rule 22(4) does not apply to cases where a judgment already exists. Thus, an applicant faced with a rescission of default judgment cannot apply for a rescission of a default judgment to enable it to deliver a counterclaim. . . Materially, an assessment of the bona fides of a defence in an application for summary judgment occurs prior to the granting of judgment thereof. Nevertheless, one of the time honoured principles which applies to the furtherance of the administration of justice is that there must be finality to litigation.'

[23] It is evident from the provisions of rule 22(4) that the *pari passu* determination of a claim in convention and a counterclaim cannot be claimed as of right. The court has a discretion whether or not to postpone the claim in convention so that both the claim and the counterclaim are heard simultaneously. In making a general statement that rule 22(4) does not apply in cases where a judgment already exists, the court a quo failed to consider that even though the court's discretionary power to rescind a judgment is sparingly exercised in the interests of having finality in litigation,[5] that general discretion is, in appropriate circumstances, exercised in favour of the party seeking rescission of judgment. Appropriate circumstances would be where the facts and circumstances of the matter cry for the exercise of the discretion in favour of the applicant. Thus, the mere fact that a default judgment has already been granted should not, without more, preclude the determination

[4] *Soil Fumigation Services Lowveld CC v Chemfit Technical Products* 2004 (6) SA 29 (SCA) at 34E-F.
[5] *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A).

whether a counterclaim may be accepted as a bona fide defence in an application for rescission of a default judgment in appropriate circumstances.

[24] Where a counterclaim is raised as a defence, rule 22(4) becomes part of the broader consideration of good cause and one of the questions that occupies the court's mind is whether the claim in convention and reconvention ought to be adjudicated upon in the same hearing. Without in any way limiting the wide discretion allowed to a court when considering rule 22(4), the following remarks made by the court in *Vaughan & Co Ltd v Delagoa Bay Engineering Co Ltd*[6] are apposite:-

'Of course there are cases, such as for instance, where, in answer to a bill of exchange, the defendant sets up a libel action, having nothing to do with it, in which the magistrate would exercise his discretion in not refusing to stay the action, but, in a case like the present, where the claim in reconvention, the counterclaim, arises out of the very contract on which the claims in convention are based, it does seem to me it would be unjust to require those matters to be debated in two separate actions in two separate Courts.'

[25] In *Soil Fumigation*[7] this Court, having endorsed the principle that a counterclaim can constitute a defence in a summary judgment application, went on to consider whether that counterclaim was bona fide. It, however, warned that a court should be less inclined to exercise its discretion in favour of a defendant where the answer to the plaintiff's claim is raised in the form of a counterclaim as opposed to a plea. It pointed out that a court can only exercise its discretion in favour of a defendant on the basis of the material placed before it. I can find no reason that precludes a similar approach in an application for rescission of judgment in appropriate circumstances.

[26] In the present matter, the averments made, which have already been discussed earlier in this judgment, prima facie suggest some malperformance on the part of the respondent. It is also clear that the alleged delayed and defective performance are, in essence, allegations of a breach of the very

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[6] *Vaughan & Co Ltd v Delagoa Bay Engineering Co Ltd* 1919 TPD 165 at 171.

[7] *Soil Fumigation* fn 4 at 34E-F.

contract which forms the basis of the respondent's claim. This inter-connectedness counts heavily in favour of the simultaneous hearing of the claim in convention together with the appellant's counterclaim, instead of a piecemeal consideration of a multiplicity of claims. Although the amount the appellant had to pay in respect of the respondent's defective performance accounts for a small percentage of the respondent's claim, the claim in respect of the penalties resulting from delayed performance accounts for the balance of the respondent's claim. The counterclaim, if proven, could therefore extinguish the respondent's entire claim. Under these circumstances, a judicial exercise of the court a quo's discretion should have leaned in favour of hearing the respondent's claim and the appellant's counterclaim in the same proceedings.

[27] Instead, the court a quo found that the issues raised by the appellant in respect of the respondent's alleged defective and delayed performance were not germane to the action brought by the respondent against the appellant. It concluded that such issues gave rise to a counterclaim based on contractual damages that did not go to the heart of the respondent's claim and constituted a separate cause of action. Those findings are not supported by the facts alluded to earlier in this judgment and are therefore erroneous.

[28] It is trite law that an applicant in an application for rescission of judgment need only make out a prima facie defence in the sense of setting out averments which, if established at trial, would entitle her or him to the relief asked for. Such an applicant need not deal fully with the merits of the case and produce evidence that shows that the probabilities are in its favour.[8] That is the business of the trial court. The object of rescinding a judgment is to restore the opportunity for a real dispute to be ventilated.[9] I am satisfied that the appellant raised triable issues and sufficiently disclosed the nature and the grounds of its counterclaim. It has also shown that these triable issues have reasonable prospects of success. The appellant has also shown that its

[8] Erasmus, *Superior Court Practice***,** (looseleaf) D1-365 – D1-370.
[9] *Lazarus & another v Nedcor Bank Ltd, Lazarus & another v ABSA Bank Ltd* 1999 (2) SA 782 (W).

counterclaim is bona fide. All the requirements for the granting of rescission of judgment have been satisfied.

[29] Considering all the material placed before the court a quo, it ought to have exercised its discretion in favour of granting an order rescinding the judgment. Its failure to do so was on account of a wrong appreciation of the facts and legal principles. Its discretion was therefore not judicially exercised.[10] It follows that the appeal must succeed.

[30] I therefore grant the following order:

1 The appeal succeeds with costs.

2 The order of the court a quo is set aside and replaced with the following order:

'The application for rescission of judgment is granted. Costs to be costs in the cause.'

3 The appellant is directed to file its Notice of Intention to Defend within 7 (SEVEN) days from the date of this order.

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M B Molemela
Acting Judge of Appeal

[10] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited & another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 88.

Appearances

For the Appellant:	S G Gouws (with him L W De Beer) Instructed by: De Bruin Oberholzer Attorneys, Pretoria Symington & De Kok Attorneys, Bloemfontein
For the Respondent:	M Basslian SC Instructed by: Hogan Lovells (South Africa) Inc, Pretoria McIntyre Van der Post, Bloemfontein