Fcl4/6

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

14/6/05

Date :14 June 2005 Case number: 33120/2003

UNREPORTABLE

In the matter between:

DIPALESENG MUNICIPALITY **APPLICANT**

and

MUL TIPROJECTS MACHINE HIRE **RESPONDENT**

Bar – removal of - not justified in the circumstances - good cause not shown - amendment of *tender not permitted* as *contended for by applicant - no prospects* of *success in main action*

Van Rooyen AJ

[1] This is an application for the removal of a bar served by the Respondent on the Applicant in an action for damages instituted by the Respondent (Plaintiff) against the Applicant (Defendant).

[2] Multiprojects acted as a contractor for Dipaleseng Municipality ("DM") after a Multiprojects tender was approved by DM. The tender was for meter readings, grass cutting and the like. Certain time periods were agreed upon for payment and-DM failed to pay the amounts at the times agreed upon. Multiprojects issued summons against DM and two summary judgments were granted in favour of Multiprojects. A third claim was, however, for damages resulting from breach of

contract. OM filed a notice of opposition against this summons, dated 26th November 2003, on the 5th December 2003. It is the proceedings which followed upon this notice of opposition which ultimately led to a notice of bar against OM.

[3] OM's Acting General Manager, Mr Moshoadiba ("Moshoadiba"), who deposed to the founding affidavit, instructed OM's attorney to enter into settlement negotiations with Multiprojects. In fact, according to Moshoadiba, such settlement negotiations commenced even before summons was issued. Moshoadiba referred the court to two letters which were sent to the attorney dated 8 October 2003 and 2 December 2003. The last letter referred to the summons and requested the attorney to "intervene". On the 25th February 2004 the attorney reported back and *inter alia* stated what amount Multiprojects required as damages under claim 3. The attorney, in a telephone discussion with Moshoadiba, assured Moshoadiba that he was doing his best to settle claim 3. On the 18th February the notice of bar was served (which was extended to midday 27 February 2004 in a letter of the Multiprojects attorneys, dated 26 February 2004). Moshoadiba states that the attorney never mentioned anything to him about a plea against the third claim and neither did he consult with him in this regard. Moshoadiba only heard of the judgments against OM on the first two claims on the 11th March 2004 when the Sheriff attended the offices of OM. The first two claims were paid; the third remained in dispute.

[4] Thereafter Moshoadiba, intermittently until the beginning of August 2004, had several telephone conversations with the attorney. When he asked about the defence against the third claim the attorney assured him that he was dealing with

it to the best of his professional capabilities. Moshoadiba states that he is a layman as to the law, is not knowledgeable about the finer details thereof and trusted that the attorney would act in good faith to his client. As from approximately July 2004 he spoke to the attorney "less and less" since the attorney had moved his offices from Balfour to Germiston and gradually scaled down his work in Balfour. Nonetheless, when they discussed the summons which forms the subject of the present proceedings, the attorney did not mention anything about a notice of bar to him. He was advised at the time of deposing to the present affidavit, that the attorney did have to file a plea, a matter which was never brought to the attention of Moshoadiba. On the 20th August 2004 Moshoadiba received a call from the attorney who informed him that certain papers pertaining to the matter between OM and Multiprojects were served on his office. He did not elaborate as to the nature of the papers. The attorney undertook to drop the papers off at the home of Moshoadiba that day, but never did so. While Moshoadiba was in Natal, the papers were dropped off at the offices of OM. It was an application for default judgment based on the third claim. The attorney never explained the contents of these documents to Moshoadiba and he handed it to a Mr Rosslee, the Acting Exceutive Manager Corporate Services of OM. He handed the documents to the current attorneys of OM. On the 23rd August the current attorneys explained the nature of the application to Mr Rosslee, who again conveyed the nature of the application to Moshoadiba. Mr Moshoadiba submits that he did everything in his power to "police" the first attorney and that OM was not in wilful default.

5] As to a *bona fide* defence in the main action, he submits that OM has a bona fide defence against the third claim. He refers to an agreement between OM and Multiprojects, which applied for the term 1 July 2002 to 30 June 2003. By virtue of the applicant's failure to make payments in time, Multiprojects cancelled the agreement on the 31st October 2003. As a result of the fact that through non payment the applicant "forced" the respondent to cancel the agreement, it suffered damages in the form of loss of income for November 2003 up to end June 2004. Moshoadiba denies that a further agreement was concluded for the term 1 July 2003 to 30 June 2004. The agreement was, however, extended at the OM Council meeting in July 2003 on a quarterly basis with a one month cancellation clause. This resolution was explained to Multiprojects at a meeting held on the 7th August 2003.

[6] Multiprojects denied that the 7th August meeting dealt with the new “quarterly” arrangement. The discussion related to payments which had not been made and the price structure for July 2003, which was indicated by the representative for the regional councils to be on the new level according to the new tender. It is denied that the documentation in support of the allegation that a new quarterly arrangement had been conveyed to Multiprojects represents the true minutes of that meeting. The alleged minutes had also not been signed or confirmed at a later meeting. In a letter dated 19 August 2003 it was pointed out to OM that the quarterly arrangement was in conflict with the tender which had been awarded for the year (1 July 2003- 30 June 2004). In Replying Affidavit Moshoadiba states that Multiprojects had not, in its answering affidavit, denied that the tender

was on a quarterly basis. I do not agree: Multiprojects clearly rejected the allegation that the tender was renewed on a quarterly basis only.

[8] When a Court decides on an application to lift a bar it must, on the one hand, uphold a procedure which has been developed over decades so as to ensure the proper administration of justice and respect for such procedures. On the other hand, it must also prevent a possible injustice where a defendant is not permitted to plea to the particulars of claim of a plaintiff and would then have to go to trial on such particulars or simply be subjected to a default judgment where, once again, the particulars of claim of the plaintiff would form the sole basis of the evidence led in terms of Rule 31 (2) so as to prove the damages.

[9] In *Grant v Plumbers (Pty) Ltd* 1949(2) SA 470(0) Brink J held at 476 that an applicant should comply with the following requirements so as to show "good cause":

"(a) He must give a reasonable explanation of his default. If it appears that his default was willful or that it was due to gross negligence the court should not come to his assistance.
(b) His application must be *bona fide* and not made with the intention of merely delaying plaintiffs claim.
(c) He must show that he has a bona fide defence to plaintiffs claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."

[10] It has been pointed out by Smalberger J (as he then was) in *HDS Construction (Pty) Ltd v Wait* 1979(2) SA 298(E) at 300 that the Appellate Division has, when dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments, refrained from attempting an exhaustive definition of their meaning in order not to fetter in any way the wide discretion

implied in these words.[1] Smalberger J agreed with the view expressed in *Saraiva Construction(Pty) Ltd v Zululand Electrical and Engineering Wholesalers(Pty) Ltd 1975(1) SA 612(0) at* 615 that while a court may well decline to grant relief where the default has been willful or due to gross negligence, it cannot be accepted "that the absence of gross negligence in relation to the default is an essential criterion or an absolute prerequisite, for the granting of relief under Rule 31 (2)(b)" (which deals with the setting aside of a default judgment on "good cause").

In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) Jones AJA states the following at para [11]:

"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 plaintiff's claim which prima facie has some prospect of success (Grant v Plumbers (Pty) Ltd, 20 HDS Construction (Pty) Ltd v Wait supra, 21 Chetty v Law Society, Transvaal)."

[11] In so far as the element of absence of "willfulness" is concerned, it has been held by King J in *Maujean t/a Audio Video Agencies v Standard Bank* of *SA Ltd* 1994(3) SA 801 (C) that

"Willful connotes deliberateness in the sense of knowledge of the action and its consequences , ie its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend (or file a plea), whatever the motivation for this conduct may be."

The learned Judge points out that the additional requirement of perverseness or obstinacy in the word "willfulness" is not required. He also says that although the requirement of "good cause" does not, "in terms, require that the conduct of the applicant be not willful, ... it is clearly an ingredient of the good cause to be shown

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1 *Cairns' Executors* v *Gaarn* 1912 AD 181 at *186;Silber* v *Ozen Wholesalers (Pty) Ltd* 1954(2) *SA 345(A) at 352-3.*

that the element of willfulness be absent" (at 803). In *Hainard v Estate Dewes* 1930 OPD 119 it was held that although the *test* of willfulness is applicable, "unconcern or insouciance" would be more appropriate terms.

[12] The defence alleged must *prima facie* have some prospect of success. The Supreme Court of Appeal has also held that "good cause" includes, but is not limited to, the existence of a substantial defence (*Silber v Ozen Wholesalers (Pty) Ltd* 1954(2) SA 345(A) at 352). Ultimately the allegations should indicate that the applicant honestly intends to place before a court a set of facts, which, if true, will constitute a defence *(Saphula v Nedcor Bank* 1999(2) SA 760fV) at 79C-D).

In *Colyn (supra)* the following statement is also significant:

"[12] I have reservations about accepting that the defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a reasonable explanation. While the Courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys (Saloojee and Another NNO v Minister of Community Development). 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 Santam Insurance Co Ltd).

[13] The defendant has not been able to put up a defence which has good prospects of success. Indeed, his prospects of success are so remote that it cannot, in my view, be said that he has a bona fide defence. The claim is for payment of the price of cattle fodder concentrate sold and delivered to the defendant. The defence is that the plaintiff's product was contaminated, and that after it had been mixed with other ingredients and fed to his dairy herd it caused illness and death. The defendant intends to C counterclaim for damages, which are provisionally assessed at about R1 ,5 million. His founding affidavit alleges that the cattle fodder concentrate was infested with ergotamine poisoning. In two supplementary affidavits he alleges that it could also have been infested with botulism. I am satisfied that the defendant has no prospect whatever of establishing either of these defences."

Adjudication of the Dispute

[13] Whether the cause for the utter neglect in the present matter lies with the

attorney or with Moshoadiba or with both is, to my mind, irrelevant in the present matter. Fact is that even when the attorney of Multiprojects afforded the OM attorney an opportunity to rectify, albeit within a short time, by filing a plea, nothing happened. Moshoadiba, on the other hand, paid insufficient attention to a matter which he knew was at his attorney, trusting the attorney. Even if it is accepted that only the OM attorney is to blame (according to the Multiprojects deponent the attorney blamed Moshoadiba) then the *Colyn* matter *(supra)* is sufficient authority for the proposition that even when only an attorney is to blame, there are circumstances where such blame must also apply to the detriment of the client. This is such a case. Ultimately, inaction had become the style of both the attorney and Moshoadiba, whether because of absence of knowledge or because the one was waiting upon the other.

[14] What is more, the tender contract is ex *facie* the contract for a year, No provision is made that anyone of the parties may amend the term of the tender. Once the tender is accepted, OM finds itself in the same position as that of a private contracting party and it would be unthinkable that a Municipal Council could amend the contract as a result of its authority as an organ of state. Section 217 of the Constitution, in any case, provides that organs of state must conclude contracts for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost effective. A unilateral amendment by OM of a tender contract is not authorised by the tender contract and it would be in conflict with transparency and fairness if OM could, as a result of some hidden authority, amend the term. I am, in any case, not convinced that such an

authority existed.

[15] The following statement in *Premier, Free State, and others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at 428 et seq conveys the spirit within which contracts of this nature must be adjudicated:

> "[29] But I do not think that the case is to be decided upon the basis of Mr Pillay's views. To do so would be to ignore the parol evidence rule in a fundamental way. It is not for him to tell us what the Board intended, when the Board has expressed its intentions in words that are capable of ready interpretation. One must ask oneself what was expressed to be intended when the acceptance referred to 'a contract ... signed by the province and Firechem'. This expression must be read together with the statement that: 'This letter of acceptance constitutes a binding contract. .. ، If the contract brought into being by this acceptance was to bind, then the further contract envisaged could not be one which contradicted it.
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> [30] Support for this interpretation is provided by the presumption that a lawful contract, one in accordance with the Act and proper tender procedures, was intended. Having regard to the prior history, the delivery contract was certainly not one in accordance with the Act or such procedures. That is so because to allow a tender board to withhold from the body of tenderers its intention to conclude a secret agreement with one of them, an agreement which the others have never seen and have had no chance to match, would be entirely subversive of a credible tender procedure. One of the requirements of such a procedure is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender. One of the results of the adoption of a procedure such as Mr McNaught argues was followed is that one simply cannot say what tenders may

> or may not have been submitted, if it had been known generally that a fixed quantities contract for ten years for the original list of products, and some more, was on offer. That would deprive the public of the benefit of an open competitive process. It is not to be assumed that the Board intended to visit the iniquities that I have mentioned upon the body of tenderers or upon the public generally. Indeed the contrary is to be presumed - that in referring to 'a contract' a lawful contract was intended."

[16] In the result it is clear that OM has no bona fide defence in the main action. It was clearly bound by the tender contract which was for a year. The parties are clearly at loggerheads as to the existence of the amendment. The best evidence is, however, para 100.05 of the contract which reads: " The contract period is 1 year commencing between 1 July 2003 to 30 June 2004". No resolution of the OM council could amend the said term.

My conclusion is that the attorney of OM as well as Moshoadiba were both guilty of insouciance as to the action against OM. Even the notice of bar itself did not inspire the attorney to action and, in so far as Moshoadiba is concerned, he should at least have inquired as to what the status of the third claim was. It was OM that contested the third claim. Moshoadiba knew of the claim, yet did nothing to inquire properly as to the status of the matter. He trusted his attorney, which is no excuse in the present circumstances. The attorney is also guilty of utter neglect in this regard, conduct which should not be condoned by a Court. In any case, there are no prospects of success in the main action.

The application for the removal of the bar is accordingly dismissed with **costs.**

JCW van Rooyen……
Acting Judge of the High Court

14 June 2005

For the Applicant: adv K Swanepoel

For the Respondent: adv A Botha