Not reportable
11 SEPTEMBER 2007

IN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION)

CASE NUMBER:4632/07

In the matter between:
INNOW ARE (PTY) L TD
Plaintiff
and
LAKESHORE TRADING 10 CC
First Defendant
WERNER BERNARD VAN ZWEEL
Second Defendant

JUDGMENT

MOKGOATLHENG **J**

INTRODUCTION

1.

This is an application for an order in the following terms;

(b)

rescinding the default judgment granted against the applicants on the 2i^{h} February 2007; and

staying the process of execution, and in respect of the applicants movable property. The application is opposed.

(a)

FACTUAL BACKGROUND

(2) The respondent issued summons for the amount ofR308 248.57 against the applicants, for goods sold and delivered at the latter's special instance and request.

(3) The second applicant signed a surety pertaining to the first applicants obligations. The applicants instructed their attorneys to enter into settlement negotiations with the respondent attorneys.

The applicant's attorneys in their letter dated the 13th February 2007 made a proposal that their clients intended paying the amount ofR200 000.00 not later than the 15th March 2007, and the balance in four equal monthly instalments commencing on the 15th April 2007. Further applicants attorneys requested the respondents attorneys to "advise whether the above settlement proposal is acceptable and confirm that the dies within which our client can enter an appearance to defend will be suspended, pending a settlement of this matter."

(4) The applicants settlement proposals were not accepted by the respondent, neither was the any response to stay the dies, instead, the latter made a counter proposal encapsulated in a settlement agreement, basically requesting that the applicants should pay the amount ofR250 000.00 by the 15th Marc 2007, the amount ofR35 000.00 and the balance interest and costs by the 15th May 2007.

(5)
(6)
(7)
The respondents attorneys adviced the applicants attorneys to, "kindly have your client sign this agreement and return the original to our office within (5) days from date hereof, failing which we will proceed with further legal action."
On the 20th February 2007 the applicants attorneys indicated that they intended to consult with the applicant on the 22nd February 2007 and would revert by no later than Monday 26th February 2007.
The respondents attorney on the 26th February 2007 adviced the applicants attorney that" we further confirm that should we not receive your response on/before close of business today 26th February 2007 we hold instructions to proceed with further legal action in this matter."
(8)
On the 2ih February 2007 the respondents attorneys applied for default judgment, and same was granted by the Registrar of this Court.
(9)
On the 2ih February 2007 the respondents attorneys adviced the applicants attorneys that" Take note that your letter dated 26th February 2007 transmitted to our office at 17.42, 26th February 2007,has only now 14.15 come to my attention. We confirm, as per our clients instruction which instruction we confirmed to your office on 15th February 2007 and 26th

February 2007, that we proceeded with an application for a default judgment this morning in the light of the fact that we did not receive the signed settlement agreement. Take further note that it is our instruction to now proceed to issue a warrant and continue with the execution steps in terms

thereof.

(10)

In response, the applicants attorneys served a notice of intention to defend on the 28th February 2007, and in terms of a letter dated the 28th February 2007 requested the respondents attorneys to "under the circumstances please arrange with your clerk to withdraw the application for default judgment."

THE APPLICANT'S SUBMISSIONS

(11) The applicants contend that;

(a) the default judgment was sought and granted erroneously (b) the default judgment was granted irregularly in that it was granted on the same day it was lodged,

(c) they were not in wilful default in failing to deliver their notice of intention to defend timeously, and

(d) the Registrar was, at the time of the granting of the judgment unaware of relevant and material facts which would have precluded him from granting the default judgment,

THE APPLICABLE LEGAL PRINCIPLES

12.There are three ways in which a judgment taken in the absence of one of the parties may be rescinded, namely (a) terms of Rule 31 (2) (b), (b) Rule 42(1) or (C) at common law, Rule 31 (2)(b) provides that "A defendant may within 20 days after he or she has 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, set aside the default judgment on such terms as to at seems meet."

(13) Harms in his work "Civil Procedure in the Superior Courts"at para B31.11 defines "Good Cause" as follows,"Good cause means that - the defendant has a reasonable explanation for the default wilful default is normally fatal but gross negligence 'may be condoned. Wilful in this context cannotes knowledge of the action and its legal consequences and a conscious decision, freely taken, to refrain from entering an appearance, irrespective of the motivation."

The application must be bona fide and should not be made with the mere intention to delay the plaintiff claim. The applicant must demonstrate that it has a bona fide defence to the plaintiffs claim. The applicant only has establish a prime facia defence without necessarily dealing fully with the merits of the case in proof thereof. The applicant only has to set out facts which if established at the trial would constitute a good defence which must have existed at the time of the granting of the default judgment The Court has a wide discretion in evaluating "good cause" in order t ensure that justice is done. The courts discretion is exercised after a proper consideration of all the relevant circumstances.

(15) Rule 31 (5) provides as follows,

"(a) Whenever a defendant s in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she so wishes to obtain judgment by default, shall, where each of the claim is for a debt
or liquidated demand, file with the registrar a written application for judgment against such defendant. .....

(a) the registrar may-

(1) grant judgment as requested,"

(14) Rule 42(1) provides that, '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 of judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission,

(c) an order or judgment granted as the result of a mistake common to the parties.

THE COMMON LAW

(16) The question is whether the applicants have satisfied the common -law requirements for the relief sought. In order to succeed an applicant in an application for rescission of a default judgment must show "good cause." See *De Wet and Others* v *Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F1043A.

(17) In Colyn v *Tiger Food Industries Ltd tla Meadow Feed Mills (Cape) 2003* (6) SA 1 (SCA) ([2003]) Jones AJA a para 11 stated, "When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellant Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words .... The courts discretion must be exercised after a proper consideration of all the relevant circumstances."

"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, HDS Construction (Pty) Ltdv Wait (supra), Chetty* v *Law society, Transvaal). "*

(18) In *Silber* v *Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A, it was held that, the defendant must at least furnish an explanation of his default sufficiently, in order to enable the court to understand how it really came about, and also to assess his conduct and motives with regard thereto.

(19) In *Krizinger* v *Northern Natal Implement Co (Pty) Ltd 1973* (4) SA 542(N), the Court set a yardstick against which the sufficiency of the defendant's explanation for his default must be measured. At 546H James JP, as he then was, held that;

'To sum up, it seems to me that in a case such as the present the appellant should be held to have shown good cause if he makes allegations on oath which prima facie disclose that he has a good defence and a genuine desire to defend the action, and that the probabilities of final success are relevant only to the question whether the whole defence has been raised mala fide to delay enforcement of the plaintiff's claim. Bearing in mind that in ordinary cases the question of mala fides can only be tested at the trial, the magistrate hearing the application for rescission should, in general, leave a decision on the question of bona or mala fides for the trial court, save only in cases where the existence of mala fides emerges with convincing clarity in the papers."

(20) When the question of the sufficiency of a defendant's explanation for his being in default is considered, the circumstances that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission.

(21) In *Chetty* v *Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B-D, Miller JA defined the principle and practice of our Courts when measuring the "sufficient cause" for the rescission of a default judgment as follows:

"But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default, and

(ii) that on the merits such party has a bona fide defence which, prima facie carries some prospect of success."

(22) The applicants, in, have to show that their application has been made bona fide. They must also demonstrate that they have a substantial and bona fide defence to the respondent's claim which prima facie has some prospects of success.

(23) In essence the applicants are required to demonstrate reasonable prospects of success on the merits. **I,** in my view, the grounds of defence must be set forth with sufficient particularity and detail to enable the Court to conclude that the application is not being brought purely for the purposes of delay.

(24) In **Grant v Plumbers (Pty) Ltd 1949 (2)(0)** Brink J held that the following requirements should be complied with in order to show good cause",

"(a) An applicant 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,

(a) The application must be bona fide and not made with the intention of merely delaying plaintiff s claim, and

(b) The applicant must show that he has a bona fide defence to the plaintiff s claim. It is sufficient if he makes out a prime 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."

(25) In relation to the element of willfulness, King J. held- Maunjean t/a Audio Agencies v Standard Bank of SA Ltd 19943) SA 801 (C) that;

"(a) Willful connotes deliberateness in the sense of knowledge or the action or 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 his conduct might be."

(26) A court will not come to the assistance of a defendant whose default was willful or due to gross negligence. In Chetty v Law Society, Transvaal 1985(2)SA 756(A) at page 765 A-E Miler J A had occasion to deal with the expression "sufficient cause" or "good cause", and stated that:

"these concepts defy precise or comprehensive definition, for many and various factors require to be considered."

The learned judge stated that it is clear that in principle the two essential elements of "sufficient cause" for rescission of a judgment by default are:

"(i) that the party seeking relief must present a reasonable and acceptable explanation for his default:

(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success.

It is not sufficient if only one of these two requirements is met: for obvious reasons a party showing no prospects of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An orderly judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

THE EVALUATION OF THE EVIDENCE

(27) The second applicant contends that their attorney had requested that the time period within which, "I was to give notice of my intention to defend the action be suspended pending settlement negotiations, that the parties entered into settlement negotiations for a period of approximately two weeks." The applicant therefore argue that an agreement to suspend the dies pending settlement negotiation ensued from the 13th February 2007 to the 26th February 2007, that the dies recommenced from the *27th* February 2007 for a period of 8 court days and thus expired on the 9th March 2007. That therefore the notice of intention to defend was entered timeously on the 28th February 2007.

"as such the respondent needs to prove its claim in respect of this transaction and the other transactions in terms whereof the amount of R308 248.57 is claimed to be owing by the applicants to the respondent."

(38) The applicants contend that it is "strange and questionable why the respondent would allow the first applicant to order goods on credit to the value ofR308 248.57 whilst the application for credit facilities makes provision for credit required on a 30 day basis to the value of R150 000.00 only and also state that the respondent goods were sold and delivered to the first applicant but fails to state the period during which such goods were sold and delivered that as from 31 st January 2007 the applicants are indebted to the respondent in the amount ofR308 248.57.

(44) The applicants' contention that is the interest claimed by the respondent and granted by the registrar is above the maximum interest prescribed by the Usury Act. The respondent states that it is prepared to have the difference between the interest at the rate reflected in the judgment and the mora interest rate of 15.5% per annum.

(45) In my view the applicants are in any event liable to pay interest on the amount claimed. It is trite that a court has inherent power correct or amend the order of the registrar were he has made a patent error or mistake.

(48) The respondent is entitled to attorney and client costs in terms of the agreement and on the basis that the applicant has imputed scurullous allegations against it without any foundation, accusing the respondent of conspiring to and committing fraud without lawful justification.

(39) It is illuminating that the applicants do not categorily deny that goods were sold and delivered to the first applicant in the amount of R308 248.57.

(41) The respondent has shown in terms of Annexure R14(a) which is a comprehensive statement pertaining to the transactions between the parties commencing from the 1 st November 2005 up to the 19th December 2006, which clearly shows and records the invoices relating to goods sold and delivered and the payments made, culminating in the amount of R308 248.57 owed by the applicants to the respondent. In any event the applicant admit that they are in possession of the statement/invoices for the month of December 2006.

(42) The applicants allege that there is a factual dispute. In my view there is none whatsoever, and none was raised by the applicants before default judgment was granted.

(43) The purported agreement suspending the dies alluded to by the applicants was not initially raised in the applicants' founding affidavit, neither was it raised in the correspondence.

(40) The applicants allege fraudulent and irregular transaction, pertaining to the sale and delivery of goods, yet they have not furnished any proof thereof.

(49) In the premises I am of the view that the applicants have no bona fide prime facie defence to the respondents claim, further that the applicants have not shown good cause.

(46) It is trite that a court, has the discretion to supplement, correct vary or amend its order

(1) See *Firestone SA (Pty) Ltd* v *Gentiruco AG* 1977 (4) *SA 298 (A);*

(2) West Rand Estates Ltd v *New Zealand Insurance Co Ltd* 1926 *AD 173;*

(47) In my view the respondent is at liberty to institute an application seeking an order to vary, correct or amend the rate of interest by the registrar granted to 15.5% the application will not affect the essence of the registrars order, as interest is matter accessory to that order.

THE ORDER

(50) The application for rescission is dismissed, applicants are ordered to pay the respondents' costs on an attorney and client scale jointly and severally, the one paying the other to be absolved.

FOR THE APPLICANTS:
FOR THE RESPONDENT: