IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO. ✓
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED. ✓
7/11/2012 DATE SIGNATURE

CASE NO: 1502/2012

7/11/2012

IN THE MATTER BETWEEN:

EMPRO LETLAPE AND MULDER EDUCATION — APPLICANT

AMD PROJECT CC

AND

MARIA MAGDELENA WALLIS — RESPONDENT

T/A WIERDAPARK OUTFITTERS

JUDGMENT

PRETORIUS, J:

[1] This is application for rescission of a default judgment granted on 28 March 2012 in terms of Rule 31(2) (b) of the High Court Rules.

[2] Service of the summons was affected on 19 January 2012 at the registered address of the applicant at 110 Willem Botha Avenue, Eldoraigne. It was affixed to the principle door of the property. It is common cause that there was no problem with service on the registered address.

[3] The only reason the applicant could supply for the applicant not being aware of the summons, is that the applicant had vacated the premises as far back as June 2010. The applicant argues that the respondent had full knowledge of the current address of the applicant although it is not the registered address.

[4] The applicant became aware of the default judgment on 9 May 2012. The applicant brought the application for rescission of judgment 2 days late and requested the court to condone it, which the respondent did not oppose.

[5] The requirements which the applicant has to meet to be granted rescission of judgment is that the default must not be wilful or due to gross negligence; the application should be *bona fide* and should not be made to delay the plaintiff's claim. Furthermore the applicant has to show that he has a *bona fide* defence.

[6] Although the respondent sets out that the applicant is the creator of its own misfortune, the court cannot find that the applicant was wilful or grossly negligent.

[7] It is common cause that a fixed price for the cloths to be manufactured had never been agreed upon. This causes the applicant to argue that the agreement between the parties is void as a result of vagueness; alternatively, it is void because no fixed price was ever agreed upon.

[8] In **Silber v Ozen Wholsalers (Pty) Ltd 1954(2) SA 345 AD** at p 352 G-H Schreiner JA held:

"*It seems clear that by introducing the words 'and if good cause be shown" the regulating authority* ***was imposing upon the applicant for rescission the burden of actually proving, as opposed to merely alleging, good cause for rescission****, such good cause including but not being limited to the existence of a substantial defence (cf du Plessis v Tager, 1953 (2) SA 275 at p. 278 (O))*" (Court's emphasis)

[9] In **Kayasis v SA Bank of Athens Ltd 1980(3) SA 394 (D & CLD)** at 395 James JP found:

"*The only issue, therefore, which I have to decide, is whether the defendant has shown that he has a* bona fide *defence to the action. In other words whether he has made averments on oath which, if established at the trial, would entitle him to the relief he asks for.* ***He need not deal fully with the merits of the case or produce evidence that the probabilities are actually in his favour***." (Court's emphasis)

[10] In **Standard Bank of SA Ltd v El-Naddaf and Another 1999(4) SA 779** Marais J declared at 786 C-D:

"*Without requiring the defendant to prove her case or to show a balance of probabilities in her favour or to provide copious evidence, I would nevertheless firmly say that it must be inadequate for a defendant, required to demonstrate a* bona fide *defence, to make bald averments without giving them some of the flesh and colour provided be a degree of detail. The degree of detail must depend on the circumstances ...*:

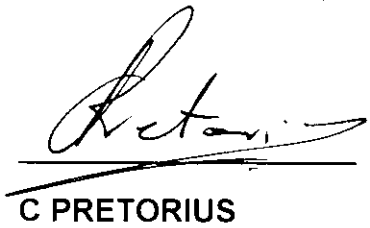
[11] The court has to find that the applicant has a *prima facie* case, which if proved at trial will be a defence in law. The court finds that the applicant has succeeded in showing a substantial defence and has a *prima facie* case.

[12] There is no evidence that the rescission application is made to delay the plaintiff's action.

[13] The order is:

13.1 The default judgment granted on 28 March 2012 is rescinded;

13.2 The respondent to pay the costs of the application.



C PRETORIUS

JUDGE OF THE HIGH COURT, PRETORIA

CASE NUMBER: 1502/2012

DATE OF HEARING: 24 October 2012

FOR THE APPLICANT: ADV. H.C. VAN ZYL

ON BEHALF OF: Van Zyl's Incorporated

FOR THE RESPONDENT: ADV. T. COLYN

ON BEHALF OF: Hartzenberg Incorporated

DATE OF JUDGMENT: 7 November 2012