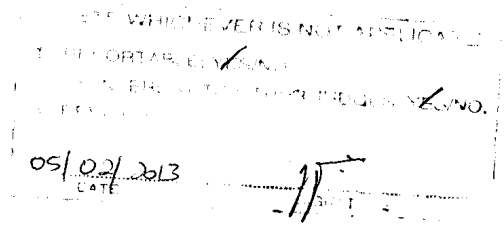
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

5/2/2013
CASE NO: 27483/2010



In the matter between:

NASPOTI CONSTRUCTION CC Applicant

and

PIENAAR'S AIR-CONDITIONING AND REFRIGERATION (PTY) Ltd Respondent

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JUDGMENT

MNGQIBISA-THUSI J

[1] The applicant is seeking relief on the following terms:

1.1 condonation for the late filing of this application;

1.2 rescission of a default judgment granted on 21 June 2011;

1.3 costs.

[2] The applicant is basing its application for rescission on the provisions of rule 31(2)(b) of the uniform rules of court.

[3] The Rule 31(2)(b) provides that a defendant may within 20 days after he has knowledge of a judgment against him by default 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 it seems meet. This means that the applicant has to give a reasonable explanation for the default, must show that his application is bona fide, and be able to show that he has a bona fide defence to the respondent's claim which *prima facie* has some prospect of success. *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O); *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).

[4] The respondent is opposing the application for rescission.

[5] The applicant has conceded that summons was served at its chosen *domicilium* address. However, it is the applicant's submission that the summons did not come to its attention as at the time of service, it had

relocated and was conducting business at another place. Further, the applicant submits that it only became aware of the default judgment on 18 August 2011 when the sheriff attempted to execute a writ of execution. The applicant had instructed its attorneys to file an application for the rescission of the judgment. The applicant's attorneys had on the same day written a letter to the respondent's attorneys informing them about the applicant's intention to apply for the rescission of the default judgment and requesting the documentation relating to the case. It appears from the papers that the parties did attempt to reach settlement but during September 2011 the respondent's attorneys had rejected the applicant's proposal. However, papers in these proceedings were only served on the respondent on 9 March 2012.

[6] It is the respondent's contention that the applicant has not given a proper explanation for its lateness in filing its papers in this application.

[7] It is common cause that the application was filed way beyond the period prescribed by Rule 31(2) (b). Further there was service which

was effected at the applicant's chosen domicilium address. Rule 4(1)(a) provides that service on a company or a close corporation can be effected at its registered address or principal place of business. The section is peremptory and not obligatory. The applicant has moreover chosen the address at which process should be served on it.

[8] Although the applicant has not given a proper explanation for the delay in the filing of this application, given the fact that it was clear to it from September 2011 that it would be necessary to file the rescission application, I am satisfied that the applicant was not in wilful default. The summons never came to his attention.

[9] On the issue of whether the applicant has a bona fide defence to the respondent's claim, it is the applicant's contention that, inasmuch as he does not dispute the respondent's claim, he has a counter- claim against the respondent which should be dealt with at the same time as the respondent's claim.

[10] The parties concluded two agreements, the Riverpark contract and the Coffee Break contract. The respondent instituted actions against the

applicant with regard to both contracts. In the Coffee Break matter (under case number 76963/09) the parties reached a settlement which was made an order of court and which in part reads as follows:

> "3. The defendant reserves its right to institute arbitration proceedings against the plaintiff (if so advised) for any damages or losses which the defendant may have suffered arising from the nominated subcontract agreement concluded between the parties on 6 November 2008 and/or the principal building agreement concluded between the defendant and Coffee Break investments (Pty) Ltd on 20 May 2008."

[11] It was submitted on behalf of the applicant that in terms of the Coffee Break agreement, the respondent was supposed to have completed the work it was doing on behalf of the applicant on 15 March 2009. Due to some unforeseen circumstances it appeared that the respondent would not be able to complete the work on due date. The respondent was given an extension to complete the work and a new date for completion was set for 5 May 2009. However, the respondent only completed the work on 27 July 2009. In view of the non-completion of the work by due date, being 5 May 2009, the agreement provided for penalties at R10 000.00 per day for the late completion. As a result the penalties which the applicant was entitled to recover from the respondent amounted to R616 000.00 but that it had levied

penalties of only R249 000.00 against the respondent. This is the amount the applicant is intending to launch proceedings against the respondent as a counterclaim to the respondent's claim which it could have pursued if necessary through arbitration as provided for in paragraph 3 of the order of 1 November 2011. In this regard the applicant is relying on Rule 22(4) of the Uniform Rules of Court which reads as follows:

> "22(4) If by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of the claim or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention. Judgment on the claim shall, either in whole or in part, thereupon be so postponed unless the court, upon the application of any person interested, otherwise orders, but the court, if no other defence has been raised, may give judgment for such part of the claim as would not be extinguished, as if the defendant were in default of filing a plea in respect thereof, or may, on the application of either party, make such order as to it seems meet."

[12] The respondent is opposing the application on the ground that the applicant does not have a bona fide defence to its claim. It was contended on behalf of the respondent that the issues pertaining to the Coffee Break agreement were finally settled when the order was made

and that if the applicant had intentions to claim the penalties resulting from the delay in the completion of the contract by way of damages, it was bound by the court order which provides that it could do so through arbitration. Further, it was contended that, in terms of the contract, the penalties could only be claimed within 14 days of the issue of the payment certificate and the applicant had not done so.

[13] I am of the view that the respondent is not correct in asserting that because the court order of 1 November 2011 stated that any damages the applicant sought to claim would be through arbitration and nothing else. The fact that there is agreement that the applicant would, if necessary, pursue any claim though arbitration, is no bar to the applicant seeking redress in court. Further, I am also satisfied that the applicant has shown that it has a *prima facie* counterclaim against the respondent which, in the interest of justice and in fairness to both parties it should be allowed to pursue its claim.

[14] With regard to the issue of costs, I am of the view that it was not necessary for the respondent to have opposed this application particularly as it was aware that the summons had not come to the

attention of the applicant and bearing in mind that at the time it instituted its claim, it could be liable for penalties for late completion of the contract.

[15] Accordingly the following order is made:

1. The plaintiff is granted condonation for the late filing of its application.
2. The default judgment granted on 21 June 2011 is hereby rescinded.
3. The respondent to pay the costs of this application.

NP MNGQIBISA-THUSI
Judge of the North Gauteng High court