



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 341/2015

In the matter between:

LA FARGE INDUSTRIES SA (PTY) LTD

Applicant

and

HIGH SIGHTS CC

Respondent

Court:	Canca, AJ
Date of Hearing:	3 November 2016
Date of Judgment:	8 November 2016

JUDGMENT

INTRODUCTION

1. In this matter the applicant ("La Farge") brought an application in July 2016 seeking the rescission of an order, granted by this Court on 24 June 2015, striking out its defence. In addition, La Farge seeks an order that the respondent ("High Sights") pay the costs should it oppose the application. An order condoning the late filing of the application is also sought. High Sights opposes the rescission application but does not oppose the condonation application. Condonation was duly granted.

2. A brief background of the facts that led to the launch of this application is appropriate. High Sights instituted an action for damages against La Farge in January 2015. The damages arose as follows. High Sights had placed an order for ready-mixed concrete from La Farge which had to be delivered at an identified delivery site on High Sights' farm on 1 June 2012. On the day in question and whilst delivering the fifth truckload of the requested ready-mixed concrete at the agreed spot, the driver of the truck lost control of same, causing it to collide with a storeroom belonging to High Sights. The resultant damages suffered by High Sights amount to R1 307 695,32. It is not necessary, for purposes of this judgment, to give a breakdown of how that amount is arrived at. It is convenient though to list what the damages comprise of.

3. The extent of the damage is set out thus in the Particulars of Claim issued by High Sights against La Farge:

“16.1 The storeroom was structurally damaged to such an extent that it has been declared to be both irreparable and unsafe by a structural engineer;

16.2 The cold room situated within the storeroom was irreparably damaged;

16.3 The movable items within the storeroom were irreparably damaged;

16.4 Plaintiff lost the use of that part of the storeroom that it had used as a workshop and had to relocate its workshop to another structure ... which it was letting out to a third party at the time of the incident;

16.5 *Plaintiff lost use of that part of the storeroom which it had been letting out to a third party for the storage of files and had to relocate said files to another smaller structure which it had been letting out to another third party at the time of the incident;*

16.6 *Plaintiff's aforesaid tenant since the incident had to store further files with Metrofile*

16.7 *A portion of the aforementioned files were damaged exposing Plaintiff to a claim for damages from the lessee/owner of the files;*

4. Following receipt of La Farge's Plea in February 2015, High Sights, during May 2015, served on La Farge's Cape Town correspondent attorneys, a Notice of Motion for Application to Compel La Farge to, *inter alia*,

1. respond to a Request for Trial Particulars, and
2. file its Discovery Affidavit, and
3. respond to a notice issued in terms of Rule 35(1) and (6). All of this had to be done within a certain time frame.

5. The Notice of Motion also sought authority for High Sights, in the event of La Farge failing to comply with the Orders sought above, to make further application to this Court, without further notice to La Farge, and on the same papers, duly supplemented, for an Order striking out La Farge's defence. An Order in these terms was granted on 8 June 2015 and was served on La Farge's attorneys the following day, 9 June 2015. When La Farge failed to comply with the said Order, High Sights sought and obtained the striking out Order on 24 June 2015.

6. The attorney for La Farge, Ms Palm, avers in the founding affidavit that she only became aware of the Order after it was granted in June 2015. Ms Palm had taken over the prosecution of this matter from her business partner, Mr Hollander. The law practice of the aforesaid attorneys evidently has an electronic logging system which allows for any action required in respect of a matter to be logged and flagged. A person dealing with the matter could then attend to what needed to be done. Ms Palm, at paragraph 23 and 24 of the Founding affidavit avers that:

“23. It is self-evident from this record [referring to a recording showing the electronic logging of action required in regard to this matter] that the matter was only transferred to me as system user on 10 November 2015 after the application to compel had been launched and an order granted in this regard. From Mr Hollander’s system note dated 9 June 2015 writer noted that the pre-trial notices were filed and incorrectly assumed when updating the document types [sic] on 7 June 2015 that the necessary action had been taken in respect of discovery and service effected by our correspondent.

24. Hollander omitted to print a hard copy of the application to compel and to place same in the physical file handed over to me by Hollander, and for this reason, I was unaware of the application having been loaded on the system prior to 7 July 2015. Hollander in turn was under the impression that I was attending to the necessary further action without realising that the physical file did not contain a copy of the application to compel and that the system user had not been changed to me.”

Ms Palm relies on these averments to contend that there was a *bona fide* oversight on her behalf. This does not disentitle the applicant to the relief it seeks, so the averments continued.

7. La Farge initially sought rescission of the order on three grounds, namely: Rule 31(2)(b), alternatively Rule 42(1)(b) of the Uniform Rule of Court , further alternatively the common law. At the start of the hearing, Ms Lombard, for the applicant, correctly in my view, abandoned reliance on Rules 31 and 42. La Farge pins its mast to the common law ground.

8. It is trite that in order for an applicant to succeed in a rescission application, good cause must be shown. For there to be good cause, the following threshold requirements have to be met:

(1) a reasonable explanation for the default;

(2) evidence that the application is made *bona fide* and

(3) a *bona fide* defence with *prima facie* prospects of success.

See Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA1 SCA at 9 C – F.

9. A perusal of the record of the actions logged by Ms Palm and Mr Hollander with regard to this matter reveals the following: (a) On 9 June 2015 an email from his correspondent attorney [I assume that the word “CORR” in the log refers to correspondent] was uploaded by Hollander on that day. Presumably this would have been the Order granted on 8 June 2015. For reasons unknown, as both the Founding

and the Replying Affidavits are silent in this regard, the electronic logging systems shows no entries for the period 10 June 2015 to 6 July 2015; (b) Ms Palm collected the physical files from her colleague on 7 July 2015; In her explanation for the default, set out in paragraph 6 above, Ms Palm avers that because the matter was only transferred to her as a system user on 10 November 2015, she was not aware of the application to compel. Hollander had omitted to print and place a copy of the original application in the physical file, so her averment continued. She also avers that Hollander was under the impression that she was attending to the requisite action.

10. I am not convinced that the explanation for the default is satisfactory. I agree with the contention by High Sights that one would have expected Ms Palm, who does not explain why she took over this matter, to have diligently scrutinised the file in order to establish the matter's history. If she had done that, she would have become aware of the striking out Order when the matter was transferred to her in July 2015. Also, Hollander, who deposed to a confirmatory affidavit, does not shed any light on this aspect of the matter. In his three paragraphed affidavit, Hollander merely avers that "I have read the affidavit of Riana Palm and confirm the contents thereof insofar as it relates to the Defendant/Respondent, its employees and/or agents." I must assume that La Farge wants to defend the action. It was clearly not at fault that judgment was obtained against it. However, *Jones AJA in Colyn supra* states that although "*the Courts are slow to penalise a litigant for his attorneys 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*"¹.

¹ At 9H

11. During argument, Ms Lombard made much of the fact that the amount of the damages was large and, given that La Farge disputed both the merits and quantum, La Farge ought to be given the opportunity to contest the matter. Whilst I might have sympathy for the position La Farge finds itself in, the inadequacy of its attorneys explanation for the default, leads me to the conclusion that this is an instance where it “*must bear the consequences of the negligence of [its] attorneys*”.

12. Even if I am wrong in finding the explanation proffered by Ms Palm weak, the defence put up by La Farge, in my view, does not have good prospects of success. Much of La Farge’s defence rests on a report by its expert witness, Mr A van der Westhuizen, who from his letterhead appears to be an accident investigator and/or a person who reconstructs accidents. Although Ms Palm avers that their expert will testify, *inter alia*, that the accident was not caused by the truck driver’s negligence, this is not borne out by Van Der Westhuizen’s report. He find that “*the driver should have been more cautious ...*”. Also, La Farge’s own internal investigation found that the accident was caused by the driver having taken an unsafe position and had exercised poor judgment. In addition, one of La Farge’s employees, Jan Brand, a site inspector, who visited High Sight’s property after the accident, assured a resident of the property that La Farge would “*sort out*” all the damages. The defence against quantum is based on Van der Westhuizen’s statement that he was not provided with proof of damage to the expensive items which formed part of the damages claim, something he found very strange.

13. I agree with Ms Ipser, for High Sights, that on the version of its own expert and on the basis of its internal investigation, La Farge’s defence is not *bona fide*. Moreover, La Farge’s attorneys of record failed to enrol the matter after receiving the

answering papers. The matter was enrolled by High Sights' attorneys, who also indexed and paginated the Court file. A further sign of the inept conduct of this matter by La Farge's attorneys.

14. In light of the above, I am of the view that La Farge has not shown good cause for a rescission order.

15. Although Ms Ipser argued for costs to be awarded against La Farge on the attorney and client scale, I am not persuaded that the actions or inaction by its attorneys warrants a deviation from the normal costs orders granted where a litigant has been successful.

16. In the result, I order a follows:

The application is dismissed with costs.

CANCA, AJ

Appearances

For the Applicant:	Adv N Lombard
Instructed by:	Palm Hollander Attorneys Gauteng

For the Respondent:	Adv M Ipser
Instructed by:	Schliemann Inc Cape Town