

**IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

CASE NO 19783/2008

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

5 March 2010

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SIGNATURE

In the matter between

PAM GOLDING PROPERTIES (PTY) LIMITED

APPLICANT

and

**INDUSTRIAL DEVELOPMENT CORPORATION
OF SOUTH AFRICA LIMITED**

FIRST RESPONDENT

**SIROMA PROPERTIES CC t/a PAM GOLDING
PROPERTIES JOHANNESBURG EAST**

SECOND RESPONDENT

ROBERT BUTHELEZI

THIRD RESPONDENT

SIMISO HELLOID SEBITSO

FOURTH RESPONDENT

MASHUDU JUSTICE RATOMBO

FIFTH RESPONDENT

J U D G M E N T

VAN OOSTEN J:

[1] This is an application for rescission of a default judgment granted against the applicant (as the fifth defendant) in an action instituted by the first respondent (as plaintiff) (IDC) against the applicant (Pam Golding) and the second to fifth respondents (as the first to fourth defendants). IDC's cause of action against the second respondent (the principal debtor) was based on a

written loan agreement concluded between the IDC and the principal debtor. The third, fourth and fifth respondents (who were the members of the principal debtor) as well as Pam Golding were sued as sureties and co-principal debtors of the principal debtor.

[2] The summons in the action was served by the deputy sheriff on Ms C Mota, who was Pam Golding's national franchise manager. No appearance to defend was entered and judgment by default was granted against Pam Golding as well as the second to fifth respondents, jointly and severally for payment of the sum of R541 212.74, interest thereon and costs on the attorney and client scale. The judgment capital amount in respect of Pam Golding was incorrectly granted for double the amount claimed by IDC in the summons. IDC however quite correctly so, has abandoned that portion of the judgment exceeding the amount of its claim which brings the amount of the judgment against Pam Golding to R270 606.37. This is the judgment Pam Golding now seeks to be rescinded. The application for rescission is opposed by IDC.

[3] The parties are in agreement that the common law principles are to be applied to this application. Those principles are well-entrenched. The court's discretion under the common law extends beyond, and is not limited to the grounds provided for in Rules 31 and 42(1) (see *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) 1042H–1043A). The basic requirement remains that "good cause" must be shown. As much was recently re-affirmed by Jones AJA in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para [11] where it was held:

'I turn now to the relief under the common law. In order to succeed an applicant for rescission of a judgment against him by default must show good cause. The authorities emphasise that it is unwise to give a precise meaning to the term 'good cause'. As Smalberger J put it in HDS Construction (Pty) Ltd v Wait:

'When dealing with words such as "good cause" and "sufficient cause" in the other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order to abridge or fetter in any way the wide discretion implied by

these words. The Court's 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." (references omitted)

[4] I turn to deal firstly, with the explanation tendered by Pam Golding for its default. It is stated that the summons was "handed" to Ms Chareen Mota, who had then been recently employed by Pam Golding as its national franchise manager. This of course is incorrect. The summons was not merely "handed" to her: it was as I have indicated, served on her and the deputy sheriff's return of service further reflects that he in addition explained to her the "nature and contents thereof". Be that as it may, the explanation continues that Ms Mota reported the service of the summons to her superior, Mr Patrick Maingard, who at the time was a director of Pam Golding Franchise Services (Pty) Ltd (the franchisor in the franchise agreements referred to below) and who had overall responsibility for all franchise related matters which included responsibility for litigation. Mr Maingard, who it is stated is no longer employed in the Pam Golding group of companies, "misunderstood the facts relating to the summons and their legal consequences". The misunderstanding is alleged to have been the following: "Mr Maingard did not understand that applicant itself had been served and was under the mistaken impression that it was only second to fifth respondents that had been served".

[5] The explanation is in a number of respects unsatisfactory. Apart from the hearsay nature of Maingard's understanding (although no case has been made out for the admission of this hearsay evidence under s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, I propose to deal with it on the basis that it is allowed) there is simply an absence of any evidence as to when and how his understanding was made known to Pam Golding. The explanation turns on his "understanding" which in any event in my view is not an explanation at all: it simply makes no sense.

[6] Compounding the difficulty Pam Golding is facing is its further somewhat faint reliance on so called “settlement discussions” between IDC and the franchise owners (to which Pam Golding was not a party) “prior to that” which in the context the words were used, must have occurred prior to the service of summons on Pam Golding. It is alleged that Maingard was “assured” by the franchise owners that “settlement arrangements had been concluded and were being implemented” which led him to “assume” that it was not necessary for Pam Golding to take any steps in defending the action. IDC has convincingly and conclusively shown that this version is devoid of all truth: the only settlement negotiations that were conducted were those conducted only after the judgment by default had been granted and then with the third respondent who had undertaken to pay the judgment debt in instalments which he eventually defaulted in. In view hereof IDC undertook not to execute the judgment against Pam Golding pending due payment of the judgment debt by the third respondent.

[7] One further observation: I have been unable to find any indication that Pam Golding at any time before execution of the judgment became apparent, wanted to defend the action. My views in this regard are fortified as will become apparent later in the judgment, by the nature of the defence relied upon by Pam Golding and more importantly the way in which the defence was initially set out in the founding affidavit and drastically refined after the service of IDC’s answering affidavit. Pam Golding’s concerns relate more to the adverse effects the judgment has on its reputation in the market place and its creditworthiness and therefore financial situation.

[8] The inadequacy of Pam Golding’s explanation for the default in itself may well justify a refusal of rescission on that account. It is well known, and this is often encountered in practice, that strong prospects of success on the merits of the defence, especially where the considerations are evenly balanced, tilts the scale in favour of rescission. Whether this is a permissible approach to adopt is the subject of some controversy (See *Colyn v Tiger Food Industries* supra para [12]). On the view I take of the matter I do not consider it

necessary to attempt to make any meaningful contribution to this debate. Suffice to say that I propose for purposes of this judgment, to determine the *bona fides* of Pam Golding's defence as separate requirement standing on its own.

[9] As a point of departure and before dealing with the defence relied upon, it is necessary to consider the three separate but closely linked agreements that are relevant for a proper understanding of the relationship between the parties. These agreements must be considered and interpreted together (see *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd* 2002 (5) SA 494 (SCA) para [21] – [29]). By way of background the starting point is when Pam Golding decided to make its contribution to Black Economic Empowerment. It had for quite some time made it its mission to include members of previously disadvantaged communities, among the operators of Pam Golding franchises. To this end Pam Golding was quite willing to source, screen, approve and train prospective franchisees to eventually establish and conduct such franchise operations. But finances presented a difficulty. The prospective franchisees coming from previously disadvantaged communities would inevitably not have the finances to become involved in the project. This led to discussions with IDC and eventually the conclusion of a co-operation agreement between Pam Golding and IDC. The co-operation agreement regulated their relationship. Only certain clauses thereof are relevant for present purposes. By way of introduction it is recorded in the co-operation agreement that Pam Golding and IDC have agreed “that IDC will conclude loan agreements with various selected franchisees subject to, amongst other things, the terms and conditions of this co-operation agreement” (clause 2.2) and that IDC will “as and when requested by Pam Golding, advance portions of the wholesale facility (an amount of R10m reserved by IDC for the finance of approximately 16 Pam Golding franchisees) subject to the terms and conditions of the loan agreements” (clause 2.3). A recommended franchisee furthermore, having met IDC's funding criteria, would then be required to enter into a standard loan agreement “subject to such terms and conditions as IDC may decide”

(clause 5.3). A copy of the standard draft loan agreement to be concluded between IDC and the prospective franchisee is annexed to the co-operation agreement. The loan agreement in turn provides for two deeds of suretyship in favour of IDC firstly, by Pam Golding and secondly, by the members of the franchisee entity in respect of which standard draft deeds of suretyship are annexed. Lastly, copies of a standard draft cession of loan accounts and a pledge of shares are annexed and these documents accordingly all form an integral part of the loan agreement.

[10] One of the successful franchisee applicants was the principal debtor. A loan agreement, substantially in accordance with the standard draft loan agreement annexed to the co-operation agreement, was concluded between IDC as lender on the one hand and the principal debtor (as the borrower) and its members on the other (the loan agreement). Subsequent to that Pam Golding signed a deed of suretyship (the suretyship agreement) again substantially in accordance with the draft annexed to the draft loan agreement forming part of the co-operation agreement. In terms of the suretyship agreement Pam Golding bound itself as surety and co-principal debtor with the principal debtor for the “due and punctual” payment by the principal debtor of an amount of R630 000.00 lent and advanced in terms of the loan agreement. The suretyship agreement further limits Pam Golding’s liability to 50% of the total indebtedness of the principal debtor. In addition the third, fourth and fifth respondents signed a similar deed of suretyship. Against this background the liability of Pam Golding now needs to be considered.

[11] Pam Golding does not dispute that IDC has advanced the amount of R630 000.00 to the principal debtor, that it has defaulted and is indebted to IDC in the amount claimed in the summons and that it has undertaken liability as surety as co-principal debtor in respect of 50% of the principal debtor’s indebtedness. The defence relied upon by Pam Golding is stated in the founding affidavit as that the “conditions precedent in clauses 7.1 and 7.2 of the loan agreement were not fulfilled and/or waived” and that IDC’s conduct in advancing the loan “where it was not authorised to do so and where the

applicant was prejudiced thereby” constitutes a breach of clauses 2.3 and 5.3 of the co-operation agreement between the applicant and the first respondent. In response to the somewhat unspecified and blanket statement IDC in the answering affidavit, meticulously attempted to show, annexing documents where necessary, that all the suspensive conditions in the loan agreement in fact had been fulfilled. These documents having been scrutinised by Pam Golding with the proverbial fine comb, revealed three what I prefer to call, imperfections. These were carried forward to the hearing of the application when counsel for Pam Golding, obviously in an attempt to steer away from a self-created *numerus clausus* of suspensive conditions not fulfilled, referred to those imperfections as merely “examples” of suspensive conditions that were not fulfilled. As the argument progressed it became abundantly clear that those in fact were the only suspensive conditions found not to have been fulfilled. Before I deal any further with the defence it is necessary to record that one of the three non-fulfilled conditions (*ie* clause 7.2.9 quoted below, relating to the requirement for VAT registration) counsel for Pam Golding readily and in my view quite correctly, conceded was of no relevance and could therefore be expunged from the defence. It is accordingly necessary to only deal with the non-fulfilment of the two remaining suspensive conditions. Counsel for IDC conceded for purposes of argument, that those conditions had not been fulfilled.

[12] At the outset it is necessary to consider the nature and contents of the suspensive conditions. For this purpose they are quoted in full:

“7.2 It shall be a further condition precedent to any advance whatsoever under this agreement that the following documents shall have been furnished by the borrower to the lender:

7.2.1 a certified copy of the signed franchise agreement;

7.2.2 an auditor’s confirmation to the effect that the members have deposited into the borrower’s operating bank account at least 10% (ten per cent) of the total capital outlay required by the borrower prior to the allocation of the franchise;

7.2.3 curriculum vitae of each shareholder;

7.2.4 a signed balance sheet of each shareholder of the borrower;

7.2.5 projected income statement, operating cash flow and balance sheet of the borrower for a period of 3 (three) years;

7.2.6 a certified copy of the lease agreement in respect of the borrower's business premises;

7.2.6 a bank-certified debit order, duly signed and completed by the borrower, in such form and subject to such terms and conditions as the lender may reasonably require;

7.2.7 written proof to the satisfaction of the lender that Pam Golding has trained the borrower's key personnel to run the franchise outlet;

7.2.8 proof to the satisfaction of the lender that the borrower has been registered for VAT;

7.2.10 copies of the borrower's certificate of incorporation, certificate to commence business, articles and memorandum of association."

The agreement further records that the parties shall use their best endeavours to procure the fulfilment of the conditions precedent.

[13] The question whether a term of an agreement constitutes a suspensive condition has to be answered firstly, by having regard to the intention of the parties. In *Vizirgianakis v Karp* 1965 (2) SA 145 (W), Coleman J held that the words in an agreement for the sale of a motor vehicle, "subject to AA test" decisively showed that a suspensive condition was intended and created. The effect of those words the learned Judge held was that the parties intended the fate of their contract to depend on the outcome of the AA test. Secondly, the words must be interpreted in the context of the agreement in which they appear. In *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1183 (A) at 1187 I-J, Harms JA (as he then was) remarked that the words "subject to" have no *a priori* meaning indicating a suspensive condition. Those words Harms JA further said, may just as well in a particular context establish what is dominant and what is subordinate (in a statutory context) or create a resolute condition, or simply introduce a condition of the contract, *ie* a material term (in contradistinction to a suspensive or resolute condition). *In casu* the introductory words in the clause 7 which I have quoted above, refer to the conditions enumerated in the clause as "condition precedent". Although I am not entirely satisfied that the conditions are true suspensive conditions, I

will assume in favour of Pam Golding that they are. The *dramatis condictiones* are firstly, clause 7.2.2 providing for an auditor's confirmation, and clause 7.2.5 requiring a projected income statement, operating cash flow and balance sheet. The non-fulfilment of these conditions counsel for Pam Golding submitted, had the effect of either rendering the loan agreement void or, as against Pam Golding, rendering the suretyship unenforceable because the obligation for which it stood surety has never come into being. The argument raises nothing but a theoretical possibility which it effectively remains if regard is had to the facts of this matter. It is common cause that Pam Golding prior to IDC advancing the loan amount of R630 000.00, wrote a letter to IDC in which it stated:

This letter serves to inform you that Siroma Properties CC have fulfilled the conditions precedent in respect of the loan agreement for R700 000 (this is a typographical error and should read R630 000). Please transfer the amount of R630 000 to Siroma Properties CC's bank account..."

The amount in consequence was advanced by IDC to the principal debtor. IDC's obligations in terms of the loan agreement were accordingly duly performed. The "voidness" of the loan agreement relied upon by Pam Golding, therefore never occurred. The alternative argument raised by counsel for Pam Golding was that Pam Golding, as surety, resulting from the non-fulfilment of the suspensive conditions, suffered prejudice which flowed from a breach of IDC's obligations to Pam Golding. The argument is fallacious and falls to be rejected. Again, nothing has either been alleged by Pam Golding or shown in argument as to what such prejudice was or benignly advancing it one step further, what possible prejudice Pam Golding could have suffered. It has moreover not been shown that IDC has committed any breach of contract *vis-a-viz* Pam Golding or for that matter any other party. The only possible question that in my view might arise is whether the non-fulfilment of any of the suspensive conditions in any way released Pam Golding from its obligations as surety. Any such suggestion is effectively ruled out by the judgment of the Supreme Court of Appeal in *Bock and Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) para [18]-[21]. If anything, the prejudice suffered by Pam Golding is the very prejudice they

undertook to suffer in the deed of suretyship, which is to make good the principal debtor's failure to comply with the terms of the loan agreement.

[14] For these reasons I conclude that Pam Golding has failed to show the existence of a *bona fide* defence which *prima facie* carries some prospect of success. The application for rescission must accordingly fail.

[15] As to costs there is no good reason for not extending the contractual liability of Pam Golding for payment of costs on the attorney and client scale to this application.

[16] In the result the application is dismissed with costs on the scale as between attorney and client.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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CHEADLE THOMPSON &

***DATE OF HEARING
DATE OF JUDGMENT***

***18 FEBRUARY 2010
5 MARCH 2010***

