IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 20173/2009

In the matter between:

VENEER CONCEPTS (PROPRIETARY) LTD Applicant/Defendant

And

GEERLINGS (PROPRIETARY LTD Respondent/Plaintiff

JUDGMENT DELIVERED ON 18 NOVEMBER 2010

CLOETE, AJ

[1] This is an application for rescission of a default judgment granted by the registrar in terms of r 31(5)(b)(i) against the applicant/defendant on 1 December 2009. In this judgment I will refer to the applicant as defendant and the respondent as plaintiff.

[2] The application is brought both in terms of r 31(2)(b) and in terms of the common law. The defendant further contends that r 42(1)(a) provides a clear basis for the rescission.

[3] For sake of convenience I will deal firstly with the defendant's claim for rescission in terms of r 42(1)(a) since, if I conclude that rescission on this basis should be granted, it will not be necessary for me to deal with defendant's claims for rescission on the other grounds referred to above, nor will it be necessary for me to determine whether the defendant is in wilful default or whether 'partial rescission' of the judgment will be competent in the present circumstances.

[4] During the course of the proceedings, the following emerged from the papers, heads of argument and certain concessions made by plaintiff's counsel on its behalf:

[4.1.] The plaintiff's claim is for damages pursuant to the defendant's alleged unlawful repudiation of an agreement of sale, in terms of which the plaintiff sold to the defendant a certain machine with an extraction system ("the machine"). These damages fall into two distinct categories, and are dealt with as such in the plaintiff's particulars of claim;

[4.1.1.] A cancellation fee of R109 272; and

[4.1.2.] A claim for loss of profit of R337 575.02.

[4.2.] It is conceded by plaintiff that judgment in respect of the claim for loss of profit was erroneously granted, and thus falls within the ambit of r 42(1)(a). Simply put, it was not competent for the registrar to grant default judgment for a claim other than for a debt or liquidated demand in terms of r 31(5)(a).

[4.3.] The plaintiff's opposition is thus confined to the claim in respect of the cancellation fee of R109 272.

[4.4.] In respect of this claim, the plaintiff concedes that it is indeed one for special damages, but contends that the claim nonetheless falls within the category of a 'debt or liquidated demand' as envisaged in terms of r 31(2)(a).

[4.5.] The plaintiff further concedes that the relevant portions of its particulars of claim pertaining to the special damages claim are irregular in that they do not comply with the provisions of r 18(6). Plaintiff however argues that this irregularity does not constitute a ground for rescission of the judgment.

[4.6.] Defendant on the other hand submits that the cancellation fee claimed is *'pure and simple damages in respect of which evidence needs to be led'*.

[4.7.] Defendant argues that the requirement gleaned from r 31, namely, that in the case of damages evidence needs to be led before an order may be granted, extends not only to the quantum but also to the merits of the claim.

[5] The primary issue is thus whether the special damages claim in respect of the cancellation fee of R109 272 is a '*debt or liquidated* demand'. The issues relating to non-compliance with the provisions of r 18(6) and the necessity (or otherwise) for the leading of evidence are pertinent to the determination of this primary issue.

[6] The relevant portions of plaintiff's particulars of claim read as follows:

"6. At the time of the conclusion of the sale agreement the defendant was aware and the sale agreement was concluded on the basis that:-

6.1 … In the event of the plaintiff cancelling the purchase of the machine from the overseas supplier consequent upon the defendant not proceeding with the sale agreement, the plaintiff would, in terms of the agreement between the plaintiff and the overseas supplier, be obliged to pay a cancellation fee to the overseas supplier …

11. As a consequence of the defendant's conduct (i.e. the alleged repudiation) *… the plaintiff cancelled the purchase of the machine from SCM and in terms of the agreement between the plaintiff and SCM the plaintiff became obliged to make payment to and did make payment to SCM in rands of the amount of €9 420.00 being R 109 272.00 …*

13 The damages suffered by the plaintiff … :

13.2 were within the contemplation of the plaintiff and the defendant at the time of the conclusion of the sale agreement."

[7] In The *Law of South Africa* (Joubert) 2nd Edition Vol 7 p16, the author summarises what is required when a party claims 'special damages' as follows:

"In contract the two terms (i.e. general and special damages) *are convenient labels to differentiate broadly ... between damage that flows naturally and generally from the kind of breach of contract in question and which the law presumes that the parties contemplated would result from such a breach, and damage that, although caused by the breach of contract, is ordinarily regarded in law as being too remote for damages to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or constructively contemplated that they would probably result from its breach ... A plaintiff who has suffered damage of a kind which the law does not presume to be the necessary consequence of the act complained of but which depends upon the circumstances of the case, must warn the defendant that the claim extends to such damage. Special damages must therefore be specially alleged and claimed and fully established by the evidence."*

[8] In terms of r 18(6) a party who in its pleading relies upon a contract shall state '*whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading*'.

[9] The plaintiff in its particulars of claim contented itself with the bare allegations to which I have referred above and it cannot be said that the claim for special damages was '*specially alleged and claimed*'.

[10] Counsel for plaintiff relied on what is stated at *Wright v Westelike Provinsie Kelders BPK* (supra) at 1180B-F in support of his submission that the irregular pleading contained in the particulars of claim is not a ground for rescission of the judgment. The following is stated at 1180B-D:

> "*... The particulars of claim in the action by the respondent against the appellant did not make out a cause of action, or at best for the plaintiff, were liable to be met by a dilatory plea ... That being so, judgment should not have been granted thereon, by default or otherwise ... The fact that the judgment was wrong and probably practically of no use, does not, however, necessarily mean that it should be set aside at the instance of the appellant. It is apparent from the passage in the African Farms & Townships Ltd case quoted above, that a final judgment based on an incorrect apprehension <u>by the court</u> of the facts or of the law is nonetheless an effective judgment between the parties to the action.*" (my emphasis)

[11] In *African Farms & Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564C-F, it was stated as follows:

> "*According to DiG 50.17.207, res judicata is accepted as the truth. Because of the authority with which, in the public interest, <u>judicial decisions</u> are invested, effect must be given to a final judgment, even if it is erroneous ... referring to the rule in DiG 50.17.207, De Villiers CJ in Bertram v Wood* (10 SC 180), *held the following:*

'The meaning of the rule is that the authority of res judicata induces a presumption that the judgment upon any claim submitted to a competent court is correct ...' (my emphasis)

[12] All three authorities referred to specifically make reference to a judgment being granted by 'a court' and, to my mind, it is implicit from these authorities that what is intended is that a judicial officer has exercised a judicial discretion in granting the judgment.

[13] These authorities are thus distinguishable from the present case, in which it is common cause that the default judgment was granted by the registrar and not by a competent court. In my view, the registrar can never be vested with a judicial discretion for the simple reason that he or she is not a judicial officer. Accordingly, the submission of plaintiff's counsel on this ground must fail.

[14] The plaintiff further submits that the *'cancellation fee claim'* is in a fixed sum, which falls within the definition of a *'debt or liquidated demand'* in r 31(2). It argues that no evidence is required to determine its quantum – it is a fixed sum payable in terms of a contract between the plaintiff and its overseas supplier. The fact that the plaintiff in turn claims the same amount from the defendant does not make it any less fixed and determinable.

[15] In support of this submission, plaintiff relies on two authorities, i.e. *Kleynhans v Van der Westhuizen N.O.* 1970 (2) SA 742 (A) at 750-751 and *Probert v Baker* 1983 (3) SA 229 (D) at 236H-237B. Plaintiff's counsel conceded that the facts in both of these cases were completely different from the present matter but argued that the principles contained in these authorities should nonetheless persuade me that the claim for special damages falls squarely within the category of a '*liquidated amount in money*'.

[16] With regard to the defence to the claim, the circumstances in which the sale agreement was allegedly concluded are fully set out in the founding affidavit of Mr Theron. The defendant maintains that the agreement was subject to its ability to obtain approval for the required finance, that the machine would arrive in South Africa by not later than the end of June 2009 so as to enable the machine to be delivered and commissioned immediately upon its arrival, and that the machine would be shipped to South Africa by the plaintiff regardless of the defendant's order. The defendant's finance was not initially forthcoming, but it was eventually approved by the third week of June 2009. However, on contacting the plaintiff at this stage, it appeared that the machine had not in fact been shipped and that it would take another six to eight weeks to arrive and then be fully commissioned. The defendant considered this to be a material breach of the agreement and notified the plaintiff of cancellation of the order.

[17] The plaintiff takes issue with this, referring to the signed written order and the *minutiae* of the small printed conditions of sale on the back of the order form. As pointed out by defendant's counsel, the plaintiff's own purchase order sent to the defendant expressly contains the wording '*Subject to suitable finance to be arranged*'.

[18] Importantly, Theron in his founding affidavit stated that he was advised by the plaintiff that it intended to ship the machine to South Africa *'because the* (plaintiff) *believed that it would be beneficial to have this particular model in stock, instead of having to wait at least six weeks for it to be shipped to South Africa and cleared through customs'*. Theron further alleges that according to the plaintiff, this would have enabled the latter to be placed ahead of some of its local competitors. This is simply not challenged in the plaintiff's answering affidavit.

[19] Specifically with regard to the *'cancellation fee'* allegedly payable (and, according to the plaintiff, paid) by it to its supplier of the machine, the plaintiff alleges that the defendant would have been aware of this in the event that its own sale agreement with the defendant was cancelled. The defendant expressly denies this and, in my view, provides a reasonable explanation, in view of the allegation that, on its version, the plaintiff was intent on shipping the machine to South Africa in any event so as to give it the market edge over its competitors.

[20] To my mind, the defendant has succeeded in establishing a *prima facie* defence insofar as the *'cancellation fee'* claim is concerned. In *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA (WLD) 573 at 575H-576A the court, dealing with the meaning of a *prima facie* defence, stated the following:

'It is sufficient if he makes out a prima 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 or produce evidence that the probabilities are actually in his favour.' (my emphasis)

[21] In determining whether a claim is one for a liquidated amount in money, the court is entitled to have regard to the defence raised by a defendant in opposition to a claim for summary judgment. In *Tredoux v Kellerman* 2010 (1) SA (CPD) 160 at 166G-167A, the court referred with approval to *Neves Builders & Decorators v De la Cour* 1985 (1) SA 540 (C) at544G, where the following was stated:

'If from the defence as disclosed, it appears to the judge that proof of the claim may be protracted and difficult rather than prompt, then it seems to me that that is a matter which he may take into account in deciding whether or not the claim is liquidated."

[22] In my view, the same principle applies to the determination of whether the judgment for the cancellation fee claim was erroneously granted by the registrar. In addition, the plaintiff did not even annex a copy of its agreement with the third party overseas supplier in support of its claim that a cancellation fee was payable. It also did not annex proof of any such payment, nor did it allege when such payment was made. This court is entitled to take judicial notice of the varying rate of exchange of South African rands to Euro. At the very least, the plaintiff would have to lead evidence as to

the date upon which payment of the amount of €9 420 was made in order to sustain its claim that such payment equates to the amount of R109 272.

[23] I am thus satisfied that the cancellation fee claim is not a liquidated amount in money as is envisaged by the provisions of r 31(5)(a). Accordingly, this leg of the judgment was clearly erroneously granted by the registrar and falls to be set aside in terms of the provisions of r 42(1)(a).

[24] Once a court finds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order and it is not necessary for a party to show good cause. In *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471F-H the court summarised the position as follows:

> *"Rule 42(1)(a), it seems to me, is a procedural step designed to correct expeditiously an obviously wrong judgment or order ... In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the defence of an explanation for his default and a bona fide defence ... Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission. It is only when he cannot rely on an 'error' that he has to fall back on Rule 31(2)(b) ... or on the common law ... in both latter instances he must show 'good cause'."*

[25] It should also be mentioned that, unlike the provisions of r 31(5)(b), in which a specific time period is stipulated for a party to approach a court for the setting aside of a default judgment granted against it, there is no corresponding provision in terms of r 42 and accordingly it is not necessary for me to consider the defendant's application to condone non-compliance with the rules of court with regard to time periods.

[26] In the result, I make the following order:

[26.1.] The default judgment granted on 1 December 2009 is rescinded;

[26.2.] The defendant is granted leave to defend the action;

[26.3.] The costs of the application for rescission of judgment shall stand over for determination at trial.

J I Cloete, AJ