

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

DELETE WHICHEVER IS NOT APPLICABLE
IS REPORTABLE YES/NO.
IS OF INTEREST TO OTHER JUDGES YES/NO.
REVISOR: ☒
DATE: 9/7/10 In the matter between:  SIGNATURE

CASE No. 15285/2008

9/7/2010

HASHATSI ELECTRICAL CC
PITJO JOSEPH HASHATSI

First Applicant
Second Applicant

and

JAMANZI ELECTRICAL CC
SHERIFF, JOHANNESBURG CENTRAL
ESKOM HOLDING LTD

First Respondent
Second Respondent
Third Respondent

In re:

JAMANZI ELECTRICAL CC

Plaintiff

and

HASHATSI ELECTRICAL CC
PITJO JOSEPH HASHATSI

First Defendant
Second Defendant

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] In this matter the First Respondent was granted default judgment against the Applicants on 14 January 2009 for payment of a sum of R1 078 721,31, together with interest thereon at 15,5 per cent per year *a tempore morae* until date of payment and costs in the sum of R650 plus Sheriff's fees, and pursuant thereto obtained a warrant of execution on 24 July 2009.

(I will for the sake of convenience refer to the parties as they were cited in the default judgment proceedings, namely, to the Applicants as the First Defendant and the Second Defendant, respectively, or, as the circumstances may require, collectively as the Defendants and to the First Respondent as the Plaintiff)

[2] As is apparent from the summons issued on or about 25 March 2008, the Plaintiff claimed payment of a sum of R1 078 721,31, together with interest and costs, for services rendered and goods supplied in the performance of such services by the Plaintiff to the Second Defendant in his capacity as "owner" of the First Defendant at the First Defendant's special instance and request.

[3] According to the returns of service, the summons was served -

- (a) on 19 June 2008, by affixing a copy to the principal door of the residence of the Second Defendant at 907 King Bruce, corner of Claim and Bruce Streets, Hillbrow, Johannesburg;

- (b) on 10 November 2008, by affixing it to principal the door of First Defendant's "*place of business*" at the same address.

[4] The Defendants now seek an order rescinding the aforesaid judgment granted against them on 14 January 2009 and setting aside the warrant of execution obtained pursuant to that judgment.

Grounds on which rescission of the judgment in question is sought

[5] In terms of a long standing practice followed in our courts a party seeking rescission of a judgment or order obtained on default of appearance in terms of either Rule 31(2)(b) or the common law is required to establish on a balance of probabilities two essential elements, namely -

- (a) a reasonable and acceptable explanation for his or her default of appearance;
and
- (b) a *bona fide* defence on the merits which carries some prospect of success.

(See: ***Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, fifth edition, Volume 1, p. 938***)

[6] In relation to the Defendants' default of appearance the Second Defendant contends -

- (a) that the First Defendant stopped conducting business at the address where the summons was served sometime in March 2008 and that it now conducts business at Office B6, Third Road, Linrow Park, Sandton (which, incidentally, is, as is apparent from **Annexure JE 12, record p. 271**, the First Defendant's registered address);
- (b) that similarly he no longer resides at the address where the summons was served as he had moved to his current residential address specified in the founding affidavit; and
- (c) that he only became aware of the summons on 30 July 2009 when the Third Respondent, Eskom Holding Ltd ("*Eskom*"), "*was about to stop effecting payment of monies due to the First (Defendant) pursuant to a court order*" and was given a copy of the warrant of execution issued pursuant to the default judgment granted in this matter, requiring Eskom to stop payments due to the Plaintiff.

[7] As far as the Second Defendant is concerned, it is contended, and conceded by the Plaintiff, that the summons, in so far as the claim is based on the contention that the Second Defendant is liable as "*owner*" of the First Defendant, a close corporation, does not disclose a lawful cause of action against the Second Defendant.

[8] As far as the First Defendant is concerned, it is, in essence, its defence that the Plaintiff did not render any services to it.

[9] In this regard there are, as I will be pointed out below, numerous factual disputes between the parties on the papers.

[10] On the one hand, it is the First Defendant's case -

- (a) that the First Defendant at some stage rendered electrical works for Eskom in an area classified by Eskom at its "*northern region*" and that it engaged the services of the Plaintiff in the performance of those works as a sub-contractor;
- (b) that in terms of an agreement concluded between them in this regard the Plaintiff would, after having rendered the services as such, invoice the First Defendant who would then pay the Plaintiff the agreed amount;
- (c) that it, however, moved from the northern region to the area classified by Eskom as its "*central region*" sometime in 2006 where it continued rendering services to Eskom, particularly, in the Lichtenburg and surrounding areas;
- (d) that since it moved to the central region it had no dealings with the Plaintiff and has never sub-contracted any work to the Plaintiff;
- (e) that the Plaintiff decided to seek business opportunities in the central region as well and then commenced forwarding fraudulent invoices, allegedly on the basis of information obtained through "*some person at Eskom's offices*" on invoices submitted by the First Defendant to Eskom, to the First Defendant for payment

as if the services were rendered by the Plaintiff to the First Defendant as its sub-contractor;

- (f) that it, thereupon, caused a letter dated 20 August 2007 by its attorneys to be addressed to Eskom and a meeting between itself and Eskom to be convened;
- (g) that at that meeting, attended by the Plaintiff, the Plaintiff failed to prove that it had done electrical work in the central region or that a sub-contract or understanding existed between it and the First Defendant;
- (h) that the Plaintiff nevertheless caused a letter dated 20 February 2008 to be addressed by its attorneys to the First Defendant in which payment of an amount of R1 078 721, 31, together with interest, is claimed from the First Defendant for goods sold and services rendered, in response to which the First Defendant in a letter dated 17 April 2008 through its attorneys denied any liability to the Plaintiff.

Plaintiff's opposition of the application for rescission

[11] In its opposing affidavit the Plaintiff contends that it indeed rendered electrical services for Eskom in the areas of Verdwaal 1 and 2, Blauwbank and Lichtenburg situate in the so-called central region during 2006 and 2007 at the special instance and request of the First Defendant, as, according to the Plaintiff, is evident from -

- (a) four itemized tax invoices annexed to the papers as **Annexures JE3.1 to JE 3.4, record pp. 79 to 87**, submitted to the First Defendant during the period 15 June 2007 to 25 June 2007;
- (b) e-mails exchanged between the Plaintiff and the First Defendant during the period 16 April 2007 to 31 May 2007 annexed to the papers as **Annexures JE 5.1 to JE 5.4, record pp. 92 to 93**;
- (c) the fact that it employed 27 employees referred to in paragraph 13.4.1 of Plaintiff's opposing affidavit, **record pp. 54 to 55**, some of whom filed confirmatory affidavits annexed as **Annexure JE 7, record pp. 122 to 162**, confirming that they were so employed in the areas concerned;
- (d) the fact that, as is evident from Plaintiff's bank statement for the period 16 March 2007 to 29 March 2007, **Annexure JE 4, record p. 88**, the First Defendant made partial payments in respect of those services;
- (e) the fact that, as is evident from documentary proof, **Annexures JE 7.1 to JE 7.7, record pp. 163 to 265**, it incurred expenses whilst performing those services in the central region;
- (f) the fact that, as far as the meeting referred to by the First Defendant is concerned, the meeting which was chaired by the deponent to the opposing affidavit was convened to discuss the First Defendant's indebtedness to the

Plaintiff, but that the Second Defendant left the meeting immediately after he noticed that the deponent was present at the meeting;

- (g) the fact that the deponent of the Plaintiff's opposing affidavit personally and telephonically demanded payment from the Second Defendant who on every occasion promised that the First Respondent would pay its indebtedness "*within the near future*".

[12] In its replying affidavit the First Defendant disputes all these factual averments.

Evaluation of evidence

[13] The First Defendant concedes in its replying affidavit that its application should fail if the Court accepts, as established facts, the version of the Plaintiff.

[14] This calls for a consideration of the First Defendant's challenge of the Plaintiff's contentions that it indeed rendered services to the First Defendant in the Verdwaal 1 and 2, Blauwbank and Lichtenburg areas.

[15] As already indicated, the Plaintiff relies on seven factual averments in support of its allegation that it indeed rendered services to the First Defendant in the areas concerned.

[16] I deal *seriatim* with the First Defendant's challenges on these factual averments.

Firstly, the four invoices, Annexures JE 3.1 tot 3.4

[17] These four invoices issued during the period 15 June 2007 to 25 June 2007 reflect detailed lists of services rendered in the areas concerned in which the First Defendant is invoiced in amounts of R317 164,86, R37 736,26, R875 647,71 and R150 828,04.

[18] The First Defendant denies that any work detailed in these invoices was performed at all or, if such work was performed, that such performance was performed at the instance of the First Defendant.

[19] In this regard the First Defendant refers to statement, **Annexure PJH 1, record p. 322**, which seems to be a statement submitted to it by the Plaintiff on 30 July 2007 setting out invoices submitted to it and payments made by it during the period 30 November 2006 to 17 August 2007.

[20] It shows a balance of R1 078 721,31 (which, incidentally, is the amount claimed by the Plaintiff in its summons) and reflects, *inter alia*, the invoices, namely, invoice numbers 2204, 2205, 2208 and 2225, which are the invoices annexed to the papers as **Annexures JE 3.1 to 3.4** and two payments totalling R315 000 effected on 28 May 2007.

[21] As far as the payments reflected in this statement, the First Defendant denies any of those payments were made in respect of any of the invoices on which the Plaintiff

relies and contends that the payments "*pertain to dealings*" between them in Mpumalanga.

[22] As far as the invoices reflected therein are concerned, the First Defendant refers to a payment of R77 161 which is also reflected in that statement which has obviously been made on an invoice numbered 2221 annexed to the replying affidavit as **Annexure PJH 2.2, record p. 323**, which, according to the First Defendant, deals with work done for "*earthing*" at Kwaggafontein, Mpumalanga.

[23] The First Defendant, furthermore, refers to two invoices annexed to the papers as **Annexes PJH 3.1 and 3.2, record pp. 325 and 326** which were submitted by it to Eskom on 9 February 2008 in respect of work done in the Verdwaal and Blauwbank areas and which was, according to an endorsement thereon, paid been directly to the First Defendant on 21 February 2007.

[24] A scrutiny of these allegations and the documentation referred to does not in my view detract in any way from the Plaintiff's reliance on the invoices annexed to its papers as **Annexures JE 3.1 to 3.4**.

[25] In this regard I can refer to the following:-

[26] The statement, **Annexure PJH 1**, purports to be a full record of the Plaintiff's dealings with the First Defendant for the period 30 November 2006 to 17 Augustus 2007, hence the fact that the outstanding balance is the exact amount claimed by the

Plaintiff in respect of its services rendered in the Verdwaal 1 and 2, Blauwbank and Lichtenburg areas.

[27] It would appear that the First Defendant does not deny that the payments of, particularly, the amounts of R77 161 and R20 000, and, I add, various other payments reflected in the statement reflected therein were duly effected on invoices of which the correctness is not disputed.

[28] In so far as the amount claimed in the summons is determined with due regard to all the invoices and payments specified in the statement in which the various, including the invoices which are not disputed by the First Defendant, I fail to understand the First Defendant's contention that the whole amount claimed is based on fraudulent invoices compiled on information relating to invoices submitted by it to Eskom irregularly obtained from some unidentified person in the employ of Eskom.

[29] The First Defendant could fairly easily have annexed the invoices from which this information was obtained so as to show how the services claimed in the Plaintiff's invoices are duplicated.

[30] It is, furthermore, significant to note that no allegations of fraud were made in the letter addressed to the Plaintiff's attorneys in response to their letter of demand dated 17 April 2008.

[31] The allegation based on **Annexure PJH 2.1** is, furthermore, not supported by



the invoice which contains no indication as to where the work has been done.

[32] The fact that Eskom paid the First Defendant the amounts referred to in **Annexures PJH 3,1 to 3.4** does likewise not detract from the Plaintiff's case as it appears to be common cause between the parties, at least at the time the Plaintiff performed work at the First Defendant's instance and request in the northern region, that the First Defendant would pay the Plaintiff directly the agreed amount as contained in an invoice submitted to it.

[33] In these circumstances the contention that the Plaintiff submitted false invoices to the First Defendant seems to me to be so farfetched that the allegation can be rejected on the papers.

Secondly, the e-mails exchanged between the parties

[34] In its replying affidavit the First Defendant merely denies that the e-mails "*are in respect of any agreement*" between the parties in respect of the electrification works in the central region which is a denial which is clearly contradicted by the contents of the e-mails themselves

Thirdly, the employees who have been employed by the Plaintiff in the central region

[35] In its response the First Defendant refers to members of the local community it

employed in the Verdwaal 1 and 2 and Blauwbank areas and a “*daily risk assessment form*” filled in on 31 January 2007 apparently in respect of electrification work performed in the Blauwbank area.

[36] I fail to see how this allegation detracts from the Plaintiff’s allegation that it also employed employees in those areas as well as in the Lichtenburg area.

Fourthly, the partial payments made to the Plaintiff

[37] As already indicated, the Plaintiff’s allegation relates to two payments totalling R315 000 made to it in respect of Invoice No. 2204 on 25 May 2007 which according to the First Defendant have been made in respect of services rendered on its behalf by the Plaintiff in Mpumalanga.

[38] I need to point out, as is also contended by the First Defendant, that, bearing in mind that Invoice No. 2204 is dated 15 June 2007 and the payment of R315 000 was made on 25 June 2007, it appears *prima facie* unlikely that that payment could have been made in respect of Invoice 2204.

[39] It, however, does not detract from the fact that Invoice No. 2204 purports to relate to work done by the Plaintiff in the Verdwaal 1 and 2 area

Fifthly, the expenses incurred by the Plaintiff in the areas concerned

[40] The First Defendant's response to this allegation by the Plaintiff is a denial that those expenses could have been incurred by the Plaintiff in respect of services rendered at the instance of the First Defendant and points out, particularly, that Eskom provided all material for the use of electrifications projects.

[41] It is, however, apparent from the documentary proof rendered by the Plaintiff that the expenses were incurred not in respect of material, but in respect of petrol expenses, toll gate fees, motor vehicle maintenance expenses, expenses in respect of equipment, lodging expenses, food and beverage expenses and certain diverse expenses.

Sixthly, the meeting convened to discuss the First Defendant's indebtedness to the Plaintiff

[42] In this regard the deponent of the Plaintiff's answering affidavit is accused by the First Respondent of lying under oath.

[43] Although the meeting took, according to the First Defendant, place under completely different circumstances as those alleged by the Plaintiff, the First Defendant concedes that the chairperson did raise the issue of the invoices which were allegedly due to the Plaintiff and that the deponent of the Plaintiff's answering affidavit was present at the meeting.

Seventhly, the Plaintiff's allegation that Second Defendant promised to pay the First Defendant's indebtedness

[44] In its replying affidavit the Second Defendant denies that he "*did not dispute the claims advanced by the (Plaintiff)*" and, furthermore, indicates that the First Defendant "*is minded to place the invoices prepared by the deponent on behalf of the (Plaintiff) before the commercial fraud unit of the prosecution authorities*".

Conclusion

[45] On the question whether the First Defendant has given a reasonable and acceptable explanation for its default of appearance, I am satisfied that service had been duly effected on the First Defendant's registered address, but I have no reason to reject its explanation that it did not receive the summons because it had at the time of service no longer doing business at that address. It is in any event clear from correspondence exchanged between the parties before summons was issued that the First Defendant was opposed to the Plaintiff's claim. It is accordingly in my view unlikely that, had it received the summons, it would not have filed a notice of intention to defend the action.

[46] On the question whether the First Defendant has shown that it has a *bona fide* defence, I am satisfied that the First Defendant did not show a *bona fide* defence which has some prospects of success.

[47] In conclusion I need to point out that the Plaintiff filed an application for the striking out of various paragraphs contained in the Defendants' founding and replying affidavits together with certain Annexures to those affidavits on the grounds thereof,

inter alia, that those paragraphs and Annexures contain inadmissible evidence and, in the case of the replying affidavits, that they also contain new evidence.

In view of the conclusion I have reached I do not regard it necessary to deal with the allegations raised in this regard.

Costs

[48] This is clearly a matter where in the case of the First Defendant costs should follow the result. In the case of the Second Defendant it does not appear, the two Defendants having been represented by the same attorneys and the same counsel, to be a matter where the costs incurred by the two Defendants can be separated from each other. It, furthermore, does not appear that the papers would have been different had default judgment been granted against the First Defendant only.

[49] For the reasons set out in this judgment the following order is made:-

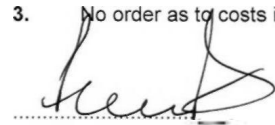
1. The application for rescission of the default judgment granted in this matter on 14 January 2009 is -

(a) in the case of the First Applicant, dismissed; and

(b) in the case of the Second Applicant, granted.

2. The First Applicant is ordered to pay the costs incurred by the First Respondent in opposing this application.

3. No order as to costs is made in respect of the Second Applicant.



P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANTS

ADV O MOOKI

On the instructions of:

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ON BEHALF OF FIRST THE RESPONDENT

ADV J A DU PLESSIS

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DATE OF HEARING

31 May 2010

JUDGMENT DELIVERED ON

9 July 2010