IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 5099/2016

In the matter between:

FLACODOR 109 CC t/a BELL FOODS Applicant

(Registration Number: 2003/078541/23

and

AFGRI POULTRY (PTY) LTD t/a DAY BREAK FARMS Respondent

HEARD ON: 06 SEPTEMBER 2018

JUDGMENT BY: DANISO, AJ

DELIVERED ON: 14 SEPTEMBER 2018

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[1] This is an application for rescission of a default judgment granted against the applicant on the 17 May 2017. The application is opposed.

[2] The brief background is as follows. The applicant, a close corporation duly incorporated in accordance with the laws of South Africa chose Mccabe street, Fiksburg station in Fiksburg as its *domicilium* address. The causa for the default judgment arises from a written agreement concluded by the parties on 27 January 2009[1] in terms of which the applicant would purchase goods from the respondent from time to time. On 25 October 2016 the respondent issued summons against the applicant in the amount of R8 116 567.24 for failing to make payments in respect of goods sold and delivered to the applicant. The summons was served at the applicant's nominated address on 6 December 2016 by affixing the copies to the principal door. The applicant did not enter an appearance to defend the action and after expiry of the *dies inducia*e, the respondent applied and was granted a default judgment in the amount claimed together with interest and costs.

[3] The parties are *ad idem* that for the applicant to succeed with this application it must establish good cause in the sense of explaining fully the reasons for its failure to defend the action and the grounds of its defence. It must show that the application is *bona fide* and not designed as a dilatory tactic to delay the inevitable.

[1] Annexure "1" attached to the respondent's particulars of claim.

[4] The applicant's reasons for not defending the action are set out in the affidavit by Mr. Stefan Engelbrecht the sole member of the applicant's business. He alleges that he was not aware of the legal action involving the parties until 15 November 2017 when the applicant's banker informed him of a judgment on the applicant's credit record. He immediately contacted the applicant's attorneys of record who made arrangements to obtain the court file. The summons initiating the action was indeed served at the applicant's nominated address of service. The summons did not come to the applicant's attention due to the fact that at the time the summons was served the applicant was no longer occupying the said address.[2] It is in this regard that the applicant contends that it was not in wilful default.

[5] With regards to the merits. The applicant avers that it has a bona fide defense to the respondent's claim simply on the basis that the respondent's particulars of claim are vague and embarrassing thus excipiable, for the following reasons,-

5.1. The allegations in the particulars of claim also contradict the essential terms of the agreement. The respondent alleges that the applicant was required to pay for the goods within 7 days of receipt of the invoice whereas the agreement provides that payments shall be made within 14 days from the date of invoice.

[2] Paragraph 1-7 of the applicant's founding affidavit.

5.2. There is a contradiction between the statements of accounts and invoices relied upon by the respondent as proof of the applicant's indebtedness. The statements include entries for 2013, 2014 and 2015 whereas the plaintiff's particulars of claim are limited to 31 March 2016 to 31 July 2016.

5.3. There are also discrepancies with regard to the computation of the amount claimed by the respondent. Annexure "2" refers to unpaid invoices for the period 24 December 2013 to 19 October 2016 in the sum of R8 116 567.24. However, goods to the value of R43 187 167, 87 were purchased by the applicant during that period. The applicant paid R42 536 605, 01 the outstanding amount is only R650 562, 86.

5.4. The applicant continues to state that it also has a valid counterclaim against the respondent. The counterclaim arises from an oral agreement concluded by the parties subsequent to the written agreement. In this agreement the parties agreed that the applicant would render transport services on behalf of the respondent by collecting and delivering goods to the respondent's customers. The applicant would be entitled to a 5% discount on the goods purchased from the respondent provided the applicant pays its accounts in accordance with the agreed terms. In turn the respondent undertook to pay the applicant's accounts within 30 days from date of statements. Any amounts due by the applicant to the respondent would be set-off against any monies due by the respondent to the applicant.

5.5. The applicant has duly complied with all the terms of the said agreement whereas the respondent has failed to credit the applicant's account with the agreed 5% discount reckoned at R2 159 358, 39. The respondent has also failed to pay the full amounts owed for the transport services rendered and is currently indebted to the applicant in the sum of R1 030 880, 31. The applicant's debt in the sum of R650 562, 86 is accordingly extinguished by set-off. In the result the respondent is indebted to the applicant in the amount of R381 317, 45 which the applicant intends to recover through a counterclaim.

[6] The applicant has accordingly raised a bona fide defence and a valid counterclaim against the respondent's claim. The default judgment should therefore be rescinded and the applicant be granted an opportunity to defend the action.

[7] It was argued for the applicant that the costs of this application should be borne by the respondent as the opposition was unnecessary, in the alternative, the costs should be costs in the cause or be reserved for the main action.

[8] On the other side, the respondent's answering affidavit as contemplated in Rule 6(5) (d) (ii) of the Uniform Rules of Court was delivered out of time. It was due on 15 January 2018 but

delivered on 23 January 2018. The answering affidavit was accordingly 6 days late. It was the respondent's submission that it was during December 2017 when the applicant's rescission application was served on the respondent. At that time most of the respondent's staff and also the respondent's legal representative were on holidays. The respondent's legal representative only resumed work on 15 January 2018 and it was only then that consultations were arranged and instructions provided to oppose the application. On 26 January 2018 a request for condonation for the late filing of the answering was forwarded to the applicant's legal representatives by email. The applicant has since not consented nor opposed the late filing of the respondent's answering affidavit. The respondent therefore requests that it's non- compliance with the rules of court be condoned.

[9] It is axiomatic that condonation cannot be had for the mere asking, it is an indulgence which a court has discretion on whether to grant it or not. The respondent must show sufficient cause entitling it to the court's indulgence by giving a full explanation for the non-compliance with the court rules. In my view the fact that the period of delay in delivering the answering affidavit is not excessive, the explanation for the delay has been fully and sufficiently given and that there is no prejudice to the applicant constitutes sufficient cause warranting the court applying its discretion in the respondent's favour. It is in the interests of the administration of justice and the applicant as well

that this matter is finalized. I am therefore inclined to condone the late filing of the respondent's answering affidavit.

[10] The respondent's opposition of the application is simply that the applicant failed to present a reasonable explanation for its default and that the application does not set out a bona fide defence.

[11] According to the deponent of the applicant's founding affidavit he only became aware of the default judgment when he was informed by the applicant's banker Andre Swanepoel but no confirmatory affidavit in that regard was provided in order to confirm these allegations. The applicant's allegations in this regard should therefore be rejected as they constitute hearsay evidence.

[12] It is not in dispute that the summons was served properly and in compliance with rules of court.[3] The reason the summons did not come to the applicant's attention was as a result of the applicant having vacated the address without informing the respondent and this is despite the fact that in terms of the agreement between the parties[4] the applicant was required to inform the respondent of any change of address. The applicant's conduct was reckless as it should have reasonably foreseen the danger of legal process being served at its nominated address that it no longer occupied. The applicant's default was accordingly wilful. The court should not come to its assistance.

[3] Rule 4(1) (a)(iv) of the Rules of Court.
[4] Clause 4, section 3A of Annexure "1".

[13] With regard to the defences to the claim. The respondent concedes that the respondent's particulars of claim in respect of the amount claimed and how it is arrived at is contradictory to the statements of account and invoices. It was argued on behalf of the respondent that the contradictions do not render the claim excipiable as they do not strike at the root of the respondent's cause of action. The claim is simply based on the applicant's failure to pay invoices in breach of the written agreement.

[14] The subsequent oral agreement pertaining to the transport services and its essential terms relating to a set -off and a 5% discount as alleged by the applicant is also not in dispute, except that the respondent was actually represented by one Kabelo Sekete and not Naeema Craig. The respondent also admits being indebted to the applicant for the unpaid transport services however the amount due by the respondent is R781 829,10 and not R1 030 880, 31as claimed by the applicant. The applicant is not entitled to the 5% discount as it never paid its account within the specified period. The application should therefore be dismissed. With regard to the costs, it was submitted that the applicant changed the address of service without informing the respondent otherwise it would have received the summons and defended the action. The applicant is responsible for the costs occasioned by this application. The application should be dismissed and the applicant to pay the costs.

[15] Thus is in short the summary of the facts in this matter. In addition to the submissions presented by counsel I was also referred to various judicial authorities applicable when considering applications of this nature.

[16] Rule 31(2)(b) of the Uniform Rules of Court provides that an applicant against whom default judgment has been granted may, within 20 days after he or she has knowledge of that default judgment, apply to court to set it aside. The court may, on good cause shown, set that judgment aside. The applicant bears the onus of establishing good cause by;-

(a) Providing a reasonable explanation for its default;

(b) Showing that the application is made bona fide and not merely intended to delay the respondent's claim; and

(c) that it has a bona fide defence to the respondent's claim which prima facie has some prospect of success or probability of success.

[17] I now turn to consider the conduct of the applicant to establish whether it was in wilful default or not. It was the applicant's case that it only became aware of the default judgment when it was informed by its banker Andre Swanepoel. As the respondent rightly countered, the applicant relies on hearsay evidence as no confirmatory affidavit was attached to the applicant's affidavit. Hearsay evidence is indeed inadmissible unless condoned by the court, to that end, the applicant in an attempt to rectify this

omission, it attached the confirmatory affidavit on the replying affidavit.

[18] It is trite that the applicant's case must appear in its founding affidavit. It is not permissible to rectify an omission in a founding affidavit in a replying affidavit. See ***Bayat and Others v Hansa and Another 1955 3 SA 547 (A) at 553D E*** and **Titty's Bar and Bottle Store v A B C Garage and Others 1974 4 SA 362 (T)**. Having said that, the issue of how and when the applicant became aware of the default judgment would be pertinent in the circumstances where the applicant is also seeking condonation for the late filing of the rescission application. In this matter it has not be alleged that the applicant's application has not been delivered within the 20 days from the date the applicant acquired knowledge of the judgment.

[19] The applicant's reason for not defending the action is merely that it did not receive the summons and this is despite the fact that the summons was served at the applicant's domiciliary address nominated in the written agreement.[5] A summons served in this manner will be good even though the applicant no longer lived at the address. It was held in ***Sheppard v Emmerich* 2015 (3) SA 309 (GJ) at 310 1-J**, "that where a specific method of effecting service is contractually agreed, that method should be strictly complied with." It was similarly held in ***Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T)** that "It is the obligation of the Defendant to change the *domicilium citandi et*

[5] Clause 10.2, section 3B of the agreement.

executandi address or to change its registered address and accordingly I find that the service at the address referred to in the summons and the return of service was good service on the Defendant."

[20] Taking into consideration the above-mentioned factors and the case law to be applied I find that the applicant's explanation with regard to the reason why it did not defend the action and the circumstances thereof cast doubt on its submission that it was not in wilful default.

[21] An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and the accompanying conduct by the defaulters, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence, and that the application for rescission is not *bona fide*.[6] In other words, wilful default on its own is not a ground for refusing the application. The grounds of the applicant's defence to the claim are also a factor that the court must consider. A good defence may compensate for a poor explanation.

[22] On the facts germane to this matter the applicant's assertion that the respondent's claim has not been properly set out and the amount claimed is not properly computed is not disputed. It is incumbent on a plaintiff to plead a complete cause of action which

[6] De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance CO Ltd 1994 (4) SA 705 (E) 711 E-G.

identifies the issues upon which the plaintiff seeks to rely upon and on which evidence will be led, in an intelligible and lucid form which allows the defendant to plead to it.[7] Except for disputing the total amount allegedly owed to the applicant the fact that the respondent is indebted to the applicant is admitted. A counterclaim is a valid ground for rescinding a judgment.

[23] I'm satisfied that the defences raised by the applicant constitute a *bona fide* defence which prima facie has a prospect of success. There is accordingly a good reason to rescind the judgment.

[24] In the premises, the following order is granted;

(1) The late delivery by the respondent of its answering affidavit is condoned.

(2) The default judgment which was granted by this court on 17 May 2017 under case number 5099/2016 is hereby rescinded.

(3) The costs of this application will be costs in the cause.

DANISO, AJ

[7] Imprefed (Pty) Ltd v National Transport Commission [1993] ZASCA 36; 1993 (3) SA 94 (A) at 107C-H.

APPEARANCES:

Counsel on behalf of Applicant:	Adv. J. Els
Instructed by:	Symington & De Kok
Counsel on behalf of Respondent:	Adv. M. Mgxashe
Instructed by:	Maphoso Mokoena Att.