



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

CASE NO: 81098/14

31/3/2017

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
31/03/2017	
DATE	SIGNATURE

In the matter between:

NIMENG BELEGGINGS (PTY) LTD

APPLICANT

and

EVERDURE SERVICES AND TECHNOLOGIES CC

RESPONDENT

J U D G M E N T

COLLIS AJ:

INTRODUCTION

[1] In the present application, the Applicant seeks an order for the rescission of

a default judgment taken against it on 31 March 2015. It is apposite to mention that the said judgment was granted by the Registrar. The application is brought in terms of Uniform 31(2)(b), **alternatively**, Rule 42. The Respondent has opposed the relief sought.

BACKGROUND

[2] The facts are briefly that, during or about November 2011 and at or near Midrand, the Applicant and the Respondent concluded an oral agreement in terms whereof the Respondent would render bookkeeping, accounting, auditing and related services to the Applicant¹.

[3] During the time period from November 2011 to June 2012 the Respondent did complete several bookkeeping, accounting, auditing and related services for the Applicant and other legal entities including:

“3.1.1 The Philadelphia Trust, of which the Applicant is a trustee;

3.1.2 The Olympia Trust, of which the Applicant is a trustee;

3.1.3 The Etienne Ernst Trust, of which the Applicant is a trustee;

3.1.4 N.A.S.M.E of which the Applicant is the sole director;

3.1.5 M. T. I Manpower Consulting Services (Pty) Ltd of which the Applicant is the sole director; and

3.1.6 In respect of the Applicant's director in his personal capacity.”²

¹ Founding Affidavit par 7.1 page 10

² Founding Affidavit par 7.3 page 10

- [4] Pursuant to the rendering of the services mentioned above, the Respondent had furnished the Applicant with various invoices against which the Applicant made several payments to the Respondent.³

UNIFORM 31(2)(b)

- [5] Rule 31(2)(b) provides as follows:

"A defendant may within twenty (20) days after he or she has knowledge of such judgment apply to court upon notice to the Plaintiff set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

- [6] An Applicant in order to, meet the requirements for the rescission of judgment under Rule 31(2) (b) must show the following:

(a) He (the Applicant) must give a reasonable explanation of its default. If it appears that the Applicant's default was wilful or that it was due to gross negligence the Court should not come to his assistance;

(b) His application must be bona fide and not merely with the intention to delay the Plaintiff's claim;

(c) He must show that he has a bona fide defence to the Plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out

³ Founding Affidavit par 7.4 page 11

averments which, if established at trial, would entitle him to the relief sought⁴. He need to deal fully with the merits of the case and produce evidence that the possibilities are actually in his favour.

[7] A court must therefore in this application for recession decide whether sufficient cause has been shown to rescind the judgment. In *Chetty vs Law Society of Transvaal* 1985 (2) SA 756 (A) the requirements of this concept were considered by Muller JA as follows at 756A – C:

*“The term **sufficient cause** (or good cause) defies peace for many and various factors required to be considered. But it is clear that in principle in the long standing practice of our Courts two essential elements of sufficient cause for rescission of judgment by default are:*

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a bona fide defence which prima facie, carries some prospect of success.”

[8] I will proceed to deal succinctly with the above requirements.

CONDONATION

[9] As mentioned in paragraph 5 above, an application to Rule 31(2)(b) should be brought within the 20 days of the Applicant’s knowledge of the judgment.

⁴ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O)

- [10] Insofar as the Applicant's knowledge is concerned, the Applicant sets out that it first obtained the knowledge of the judgment being taken against it during May 2015. Subsequent thereto the parties entered into discussions with each other. After the discussions had failed to bear any fruit, a decision was then taken to institute the present application for the rescission of judgment. According to the Applicant the rescission application was instituted as soon as was practically possible.⁵
- [11] The Applicant contends that part of the delay was brought about by the erroneous case number reflected on the warrant of execution. In support of the explanation for the delay the Applicant annexed a confirmatory affidavit deposed by its instructing attorney.⁶
- [12] In response the Respondent contends that the Applicant first approached its instructing attorney with regards to possible settlement of the matter during October 2015, which was six (6) months after first obtaining knowledge of the judgment. When settlement negotiations proved fruitless, the Applicant waited for a further period of five (5) months before instituting the rescission application.⁷
- [13] Counsel appearing for the Respondent argued that the explanation proffered by the deponent to the Founding Affidavit as regards the reasons for the delay

⁵ Founding Affidavit par 9.4 page 13

⁶ Founding Affidavit par 9.3 page 13

⁷ Answering Affidavit par 9.2 page 51

was sketchy bold and vague and as such not sufficient to enable a court to come to the assistance of the Applicant.

[14] The Applicant having been represented by attorneys when judgment was granted has failed to explain why its attorneys were unable to launch the rescission application timeously. It would have been a simple exercise for its attorneys to ascertain the correct case number as between that reflected in the court order and that on the warrant of execution. In such an event the Applicant would have been able to launch the rescission application within the time limit permitted by the Rules.

[15] The deponent to the Founding Affidavit makes no reference to the dates when the settlement negotiations, after first obtaining knowledge of the judgment, ensued, nor is any reference made to the dates when such negotiations failed. In fact it is the Respondent who made reference to such dates in its Answering Affidavit whereas it was incumbent upon the Applicant to refer this Court to such dates.

[16] An Applicant seeking an extension of a time limit has to satisfy the court on good cause shown that an indulgence ought to be given.

[17] Given the totality of what has been expanded in the Founding Affidavit the Court is not convinced that the delay has been satisfactorily explained. See *Silber vs Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345A at 353A*.

[18] The explanation on the delay is however not the only requirement to satisfy the court on "good cause shown". In addition thereto, an Applicant must also satisfy the court that he has a bona fide defence⁸. I will return to this requirement later in the judgment.

ABSENCE OF WILFULNESS

[19] The wilful or negligent nature of the defendant's default is another consideration which the court takes into account in the exercise of its discretion to determine whether or not good cause is shown.⁹ It then follows that the reason for the Applicant's absence or default must therefore be set out as this is relevant to the question whether or not his or her default was wilful. In *Silber v Ozen Wholesalers (Pty) Ltd*¹⁰ it was held that the explanation for the default must be sufficiently full to enable the court to understand how it came about and to assess the Applicant's conduct and motives.

[20] Before a person can therefore be said to be in wilful default the following elements must be shown:

(a) knowledge that the action is being brought against him or her;

(b) a deliberate refraining from entering an appearance, though free to do so; and

⁸ *Dalhousie v Bruwer* 1970 (4) SA 566 (C) at 57 F

⁹ *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 530B – 531B

¹⁰ 1954 (2) SA 345 at 353A

(c) a certain mental attitude towards the consequence of the default.

[21] In this regard the Applicant sets out, in par 8.2 to the Founding Affidavit that:

21.1 "The summons was served upon the erstwhile auditors of the Applicant whose address was still listed within CIPRO. They however never sent the relevant documentation through to myself.

21.2 Furthermore I was later informed that the summons was also e-mailed to me. I however never received such email."

[22] The Respondent as per paragraph 8 – 8.2.2 denies that the Applicant at the time was not aware that summons was served on its erstwhile auditors, and in this regard referred the court to various emails wherein the Applicant's erstwhile auditors informed the Applicant of the service of the summons and even furnished the Applicant electronically by registered post with a copy of the summons.

[23] The Respondent therefore contends that it is disingenuous for the Applicant to aver that it only became aware of the proceedings, when the warrant of execution was executed on it.

[24] The Replying Affidavit is silent as to whether at the time of service of the summons the Applicant received a copy thereof either electronically or as per the registered post from its erstwhile auditors.

[25] As a consequence I cannot, but conclude that indeed the Applicant had knowledge of the impending action and deliberately refrained from entering an appearance to defend, thereby displaying a certain mental attitude towards the consequence of default.

[26] I therefore find the Applicant's default was wilful.

BONA FIDE DEFENCE

[27] In essence the defence raised by the Applicant appears in paragraph 7.4 to its Founding Affidavit. Therein the Applicant essentially alleges that it cannot be held liable for services rendered to wholly unconnected legal entities, despite the fact that those legal entities might have been represented by the same businessman.

[28] Furthermore, the Applicant alleges that of the invoices upon which the Respondent's main action was based, only four invoices related to services rendered to the Applicant amounting to a total of R270 981.00. As such, the Applicant further contends that the full amount could and should never have been granted against the Applicant.

[29] The Respondent in opposition to the defence sets out¹¹ that upon receipt of specific instructions Mr Etienne Adalbert Ernst, all invoices on which the Respondent's action is based were made out to Nimeng Beleggings (Pty) Ltd.

¹¹ Answering Affidavit para 7.3 – 7.3.6 page 46

The reason for the aforesaid was stated as being that this was done in order for the Applicant to claim VAT on all the issued invoices because it was the only VAT vendor of all the entities.

[30] This specific instruction was denied by the Applicant in its Replying Affidavit.¹²

[31] Ex Facie the affidavits before the Court a factual dispute exists between the parties as to whether there was some agreement reached between the parties as to the fact that the Applicant will be liable for the debt of other legal entities.

[32] This to my mind constitutes a *bona fide* defence which can only be ventilated at trial.

[33] As a bona fide defence has been disclosed, this court is inclined to grant the Applicant its condonation request as the second requirement for condonation i.e. that of a bona fide defence has been met.

[34] Where an Applicant, such as in the present matter, fails to convince a court of a lack of wilful conduct on his part, but indeed disclose a bona fide defence, a court must come to his assistance.

ORDER

[35] In the result the following order is made:

¹² Replying Affidavit para 3 pages 74 - 76

35.1 The Applicant is granted condonation for the late launching of the rescission application.

35.2 The default judgment order and warrant issued pursuant thereto, are to be rectified to reflect case number 81098/14 instead of 87098/14.

35.3 The judgment granted against the Applicant under case number 81098/14 is hereby rescinded.

35.4 Each party to pay its own costs.



C. J. COLLIS

ACTING JUDGE GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR APPLICANT:	ADV. C. L MAKRAM
INSTRUCTED BY:	GENIV WULZ ATTORNEYS
FOR RESPONDENT:	ADV. J. A VAN TONDER
INSTRUCTED BY:	HECKROODT ATTORNEYS
DATE OF HEARING:	14 MARCH 2017
DATE OF JUDGMENT:	31 MARCH 2017