IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 4338/2015

In the matter between:-

ESKOM HOLDINGS LIMITED Applicant

and

CHRISTIAAN FREDERICK MARTHINUS NIGRINI N.O. Respondent

JUDGMENT BY: VAN DER MERWE, J

HEARD ON: 28 JANUARY 2016

DELIVERED ON: 25 FEBRUARY 2016

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[1] This is an application for rescission of a default judgment and for ancillary relief.

[2] On 15 September 2012 a fire was caused by a fault on an electrical power line under the control of the applicant, Eskom Holdings Limited (Eskom). The fire spread to properties owned by the Chrismar Besigheids Trust (the trust), herein represented by its only trustee. In terms of a summons issued in this court on 10 September 2015, the trust alleged that the fire had been caused by the negligence of Eskom. The trust therefore claimed payment of damages in the amount of R4 061 329,00.

[3] Eskom failed to enter appearance to defend the action timeously and on 22 October 2015 Daffue J granted default judgment against Eskom in the amount claimed. A writ of execution was issued on the same date. In terms of the writ of execution the sheriff attached the amount R4 061 329,00 standing to Eskom's credit in the books of First National Bank. The sheriff paid this amount directly to the trust.

[4] Eskom became aware of the default judgment on 23 October 2015 and immediately gave instructions to its attorneys to attend to the matter. Eskom's attorney personally informed the trust's attorney on 27 October 2015 that Eskom would proceed with an application for rescission of the default judgment. The trust nevertheless spent part of these funds, but paid an amount of R3,3 million into its attorney's trust account. The attorney undertook to repay this amount to Eskom in the event of the rescission of the default judgment. The present application was launched within 20 days after 23 October 2015. Apart from rescission of the default judgment, Eskom prayed for orders setting aside the writ of execution and notices of attachment issued pursuant to the default judgment, as well as for repayment of the aforesaid amount by the trust.

[5] In terms of rule 31(2)(b), Eskom must show good cause. Our courts have consistently refrained from attempting to frame an exhaustive definition of what would constitute good or sufficient cause, for such an attempt would hamper the exercise of the wide discretion of the courts. (See **Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)** 2003 (6) SA 1 (SCA) para [11].) However, the

general requirements for good cause are set out as follows in **<u>Grant v Plumbers (Pty) Ltd</u>** 1949 (2) SA 470 (O) at 476 – 477:

> "(a) He must give a reasonable explanation of his default. If it appears that his 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 made with the intention of merely delaying plaintiff's claim.
>
> (c) He must show that he has a *bona fide* defence to plaintiff's claim. 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 and produce evidence that the probabilities are actually in his favour."

(See also **<u>Chetty v Law Society, Transvaal</u>** 1985 (2) SA 756 (A) at 765A – C.) The position in respect of requirements (b) and (c) is analogous to what is required to successfully oppose summary judgment. The defendant must set out averments which, if established at the trial, would constitute a defence and must set out the averments in a manner that satisfies the court that the defendant *bona fide* intends to rely on the averments. A lack of particularity in respect of the averred defence may lead to the conclusion that the application for rescission is not *bona fide*.

[6] In the founding affidavit, deposed to by Eskom's attorney, it was pointed out that an insurance loss adjuster acting for Eskom had per

letter dated 13 June 2003 informed the attorney of the trust that the trust's claim against Eskom "is regrettably declined" on the ground that Eskom had not been negligent. It was further stated that the summons was received by Ms Xolelwa Cynthia Thywabi, a claims handler employed by Eskom in Johannesburg, on 11 September 2015. The attorney stated that the untimely death of a senior claims handler in the office placed additional responsibilities and significant work pressure on Ms Thywabi. At the time Ms Thywabi also suffered from bad health, causing her absence from work on numerous occasions. The combined effect of these factors, so it was averred, caused Ms Thywabi to overlook giving instructions to defend the action before 23 October 2015.

[7] Both Ms Thywabi and a senior manager to whom she reported, Ms Pulane Gloria Sikhudo, deposed to affidavits purporting to confirm the founding affidavit, in so far as it related to them. But both affidavits were deposed to on 4 November 2015, whereas the founding affidavit was deposed to only on 10 November 2015. This was not referred to or relied upon in the answering affidavit on behalf of the trust. In the replying affidavit the attorney nevertheless explained that he had deposed to an affidavit on 4 November 2015 and that that affidavit had been read and confirmed by Ms Thywabi and Ms Sikhudo. He said that the founding affidavit herein was subsequently drafted only to remove unnecessary matter from the initial founding affidavit.

[8] On 8 December 2015 Ms Thywabi and Ms Sikhudo deposed to affidavits confirming both the founding and replying affidavits in so

far as they related to them. If these confirmatory affidavits are admissible, they would show a reasonable explanation for Eskom's default. However, at the hearing counsel for the trust argued that the latter confirmatory affidavits were inadmissible on the ground that *ex facie* the affidavits they had been deposed to before a commissioner of oaths employed by Eskom. In both affidavits the certificate of the commissioner of oath contained the following:

> "Commissioner of Oaths Ex Officio
> Eskom Holdings Ltd
> Loc D3 Z42, Megawatt Park
> Maxwell Drive, Sunninghill"

The argument was that because the commissioner of oaths had an interest in the matter, she was prohibited from administering the oath to Ms Thywabi and Ms Sikhudo by the provisions of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (the Act) and the regulations promulgated in terms of the Act.

[9] Section 5 of the Act provides for the appointment of a person as a commissioner of oaths. Section 6 of the Act deals with *ex officio* commissioners of oaths. It provides that the Minister of Justice may, by notice in the *Gazette,* designate the holder of any office as a commissioner of oaths for an area specified in the notice. In terms of Government Notice R903 published in *Government Gazette* 19033 of 10 July 1998, the holders of a variety of offices in the public in private sectors were designated to be commissioners of oaths for the Republic of South Africa. These include the holders of the following offices in Eskom:

“(a) Security Member with the rank of Senior Inspector or higher.

(b) Legal Adviser (all ranks).

(c) Internal Auditor (all ranks).

(d) Official with the rank of Chief Officer or higher.

(e) Head:

Public Relations.

Health Services.

Township, other residential area or hostel.”

[10] Section 7 of the Act provides:

> “Any commissioner of oaths may, within the area for which he is a commissioner of oaths, administer an oath or affirmation to or take a solemn or attested declaration from any person: Provided that he shall not administer an oath or affirmation or take a solemn or attested declaration in respect of any matter in relation to which he is in terms of any regulation made under section *ten* prohibited from administering an oath or affirmation or taking a solemn or attested declaration, or if he has reason to believe that the person in question is unwilling to make an oath or affirmation or such a declaration.”

The relevant regulations were published in Government Notice R1258 of 21 July 1972, as amended. Regulation 7 provides:

“(1) A commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has interest.

(2) Subregulation (1) shall not apply to an affidavit or declaration mentioned in the Schedule.”

Paragraph 2 of the Schedule provides:

> "A declaration taken by a Commissioner of Oaths who is not an attorney and whose only interest therein arises out of his employment and in the course of his duty."

[11] In the light of these provisions, I find that unless it appears *ex facie* the certificate of the commissioner of oaths that the commissioner was *prima facie* prohibited from administering an oath or some evidentiary material to that effect is placed before the court, the court may accept that the commissioner of oaths was not prohibited from administering the oath. In this matter it does not appear *ex facie* the certificate of the commissioner of oaths that she was prohibited from administering the oath. No evidentiary material to that effect was placed before me. Thus there is no reason to believe that the commissioner of oaths was prohibited from administering the oath to Ms Thywabi and Ms Sikhudo. In fact it appears probable that the commissioner of oaths is not an attorney and being the holder of an office described above, has no interest in the present matter other than that which arises from her employment and in the course of her duty. If follows that the confirmatory affidavits of Ms Thywabi and Ms Sikhudo dated the 8 December 2015 are admissible and that Eskom has shown a reasonable explanation for the failure to timeously enter appearance to defend the action.

[12] Regarding a *bona fide* defence it was stated in the founding affidavit that a crow had built a nest on the power line. It was said that that caused a short circuit and was the direct cause of the fire. It was also stated that Eskom was required to inspect all power lines under its control on an annual basis. These averments were expressly

accepted in the answering affidavit. The attorney said that the power line in question had been inspected on 11 April 2011 and on 20 March 2012 and attached reports of these inspections to the founding affidavit. These inspections did not reveal the crow's nest, neither was Eskom advised thereof before the fire occurred on 15 September 2012. The attorney averred that in the circumstances Eskom had exercised reasonable care and had not been negligent. In a supplementary founding affidavit, the attorney *inter alia* pointed out that in terms of the report that had been used for purposes of quantification of the trust's damages, the trust claimed both the lost grazing (R2 000 072,00) and the cost of alternative grazing and related expenses, such as the cost of transport to the farm leased for alternative grazing (R886 295,05). He submitted that that amounted to a duplication and over-compensation.

[13] The answer of the trust hereto was that as the attorney clearly had no personal knowledge of these matters and no confirmatory affidavits in this regard had been filed, the evidence of the attorney was hearsay. Thus it was argued that Eskom placed no admissible evidence before the court to demonstrate a defence to the trust's claim.

[14] But the argument misconceived the nature of the present enquiry as set out above. Eskom had to prove a reasonable explanation for its default, but it did not have to prove its defence to the trust's claim. Eskom did make averments which, if established at the trial, would substantiate a defence of absence of negligence. Eskom was also entitled to raise the legal argument in respect of the quantum of

damages, which argument appears to carry some prospect of success, to say the least. And I am satisfied that Eskom *bona fide* intends to raise these defences at the trial.

[15] It follows that the default judgment should be rescinded and the writ of execution and notices of attachment be set aside. The question whether repayment of the amount paid to the trust should be ordered, caused me some concern. It seems to me, however, that on application of the principles set out in **Jasmat and Another v Bhana** 1951 (2) SA 496 (T), an order of repayment should be made.

[16] In **Jasmat** the respondent issued a summons in the magistrate's court for ejectment. He alleged that he was the holder of a lease in respect of the premises. Default judgment for ejectment of the occupants of the premises was given in favour of the respondent. As a result of the execution of the default judgment, the respondent took occupation of the premises. The default judgment was, however, rescinded. Nevertheless the respondent remained in occupation of the premises. On appeal the full court considered whether the respondent should be ejected from the premises. Neser J said the following at 499F- H:

> "Respondent is presently in occupation of the premises solely by reason of the judgment which has been rescinded. That judgment is a nullity and respondent can clearly derive no advantage therefrom nor can petitioners labour under any disadvantage as a result of that judgment. In my opinion petitioners are entitled to claim that any benefit or advantage respondent has derived from the judgment or any disadvantage caused thereby to themselves should be set aside and that the *status quo* prior

> to the judgment be restored. … If a judgment by default was given against a defendant for a sum of money on which execution was levied and the sum of money was after execution paid by the messenger to the plaintiff and such judgment was thereafter rescinded, *Mr. Eloff* conceded that the plaintiff would have no defence whatever to a claim by the defendant for repayment of such money."

Lucas J added at 500H – 501A:

> "Whichever is the true position, applicants were by virtue of their lease in possession when the messenger executed the judgment of the magistrate's court. As that judgment admittedly has been set aside the respondent cannot now claim to have any greater rights than he had when he filed his summons in his action in that court. However strong may be his rights in that action, he cannot enforce them except by getting a judgment in his favour on them. The judgment which has been set aside is a nullity and anything obtained by him under it must be restored to the applicants."

As a result of the rescission of the default judgment, the trust still has to prove that Eskom is liable to it. Until such time the trust has no right to payment of its claim against Eskom nor to retain any portion of the payment made in terms of the rescinded default judgment.

[17] Eskom asked for an indulgence to remedy the consequences of its default. The opposition of the application was not unreasonable. In the circumstances I consider it a proper exercise of my discretion in respect of costs to order Eskom to bear the costs of the application,

including the costs of opposition thereof and the costs of two counsel.

[18] The following order is issued:

1. The default judgment granted by Daffue J in the favour of the respondent on 22 October 2015 is rescinded.
2. The writ of execution issued in favour of the respondent on 22 October 2015 is set aside.
3. The notices of attachment dated 22 October 2015 prepared by the sheriff of this court, are set aside.
4. The notices in terms of rule 45(12)(a) prepared by the sheriff on 23 October 2015 and 28 October 2015 respectively, are set aside.
5. The respondent is ordered to repay the amount of R4 061 329,00 to the applicant.
6. The applicant is ordered to pay the costs of the application, including the costs of opposition thereof and the costs of two counsel.

C. H. G. VAN DER MERWE, J

On behalf of the applicant: Adv. P. U. Fischer SC
Instructed by:
Webbers Attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv. L. le R. Pohl SC
with Adv. A. Williams
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