

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION BLOEMFONTEIN

Case no.1750/2013

In the matter between:

SETSOTO BRICKS AND MANUFACTURING
(Registration number: B2001/037176/23)

Applicant

and

DUMANSI TRADING
(Registration number: 2007/109532/23)

Respondent

IN RE:

DUMANSI TRADING
(Registration number: 2007/109532/23)

Plaintiff

and

SETSOTO BRICKS AND MANUFACTURING
(Registration number: B2001/037176/23)

Defendant

JUDGMENT BY: RAMPAL, J

HEARD ON: 17 SEPTEMBER 2015

DELIVERED ON: 1 OCTOBER 2015

- [1] These were motion proceedings. The applicant was the defendant and the respondent the plaintiff in the action proceedings. *Brevitas causa* I shall refer to the parties as in the action proceedings. The defendant applies to have the judgment granted against it by

default rescinded and leave to defend granted. The plaintiff opposes the rescission application.

- [2] The rescission application was filed out of time. The defendant also applied to have its lateness condoned. The plaintiff did not oppose the condonation application. I condoned the late filing and directed the defendant to pay the costs.
- [3] The plaintiff also brought an application just before the proceedings commenced. It applied for the special leave to duplicate. The defendant did not oppose the duplication application. I then granted special leave to the plaintiff to duplicate in response to the new matters the defendant raised in its replying affidavit. I directed that the costs thereof would be costs in cause.
- [4] It appeared necessary to give an outline of the historical background prior to the launch of the current application. The plaintiff issued summons against the defendant on 5 May 2013 – (vide “anx jk4”). On 7 June 2013 the sheriff served the summons on a certain Mr Sim, an accountant of Deane & Threshner, 27 Steyn Street, Kroonstad. There was no notice of intention to defend filed. The plaintiff then applied and obtained default judgment against the defendant on 2nd July 2013. On 27 August 2013 the sheriff served the writ on someone who called himself Mr J Setsoto at 7910 Constantia Park Kroonstad (vide “anx jk8” and “anx ld7”). The sheriff attached certain immovable property (vide “anx jk9”).
- [5] The defendant’s director subsequently consulted his lawyer at Grimbeek, Van Rooyen & Partners, a lawfirm of Kroonstad in

connection with the summons. At the request of the defendant's lawyers, the plaintiff's lawyers Messrs E P du Preez of Welkom furnished the defendant's lawyers with a copy of the summons on 27 July 2013. The defendant's attorney acknowledged receipt thereof on 1 October 2013 (vide "anx jk2"). They then requested for further documents in order to prepare a rescission application. They were furnished with copies of the agreements or to be specific cessions labelled as "anx jk5" and "anx jk6" on 8 October 2014 (vide "anx ld9").

- [6] The parties and their legal representatives then held a meeting in Welkom on 21 October 2013. The defendant was furnished with copies of the required delivery notes and invoices. The purpose was to enable the defendant to check its records, to verify the correctness of the plaintiff's claim and to advise the plaintiff of its attitude toward the claim within 30 days, in other word before 22 November 2013.

- [7] The defendant did not revert to the plaintiff. On 2 December 2013 the plaintiff's legal representative called upon the defendant to advise the plaintiff of its attitude towards the claim within 5 days. Again the defendant failed to respond.

- [8] On 14 January 2014 the case was transferred in terms of section 65M of the Magistrate's Court Act 32 of 1944 from the Free State High Court to the Kroonstad District Court. On 29 March 2014 notice in terms of section 65A(1) Act 32 of 1944 was served on the defendant's deponent and sole member, Mr Kheleli (vide "anx jk7"). He was called upon to appear on 27 March 2014 so that an enquiry into the defendant's financial position could be held. The

enquiry was postponed six times to 8 April 2014, 13 May 2014, 20 May 2014, 17 June 2014, 24 June 2014 and 8 July 2014. On that last day the defendant changed attorneys. Messrs L M Mokhele Attorneys took over from Messrs Grimbeek Van Rooyen & Partners. Once again the financial enquiry was postponed, on that occasion, to 29 July 2014. This was done in order to enable the defendant to prepare its application for rescission of judgment.

- [9] On 28 July 2014 the defendant served and filed its rescission application. I suppose that on 29 July 2014 the financial enquiry was postponed *sine die* or removed from the roll pending the anticipated outcome of the rescission application. I might be wrong because it does not appear on the papers as to what really happened at Kroonstad District Court on the day in question. On 15 October 2014 the defendant withdrew its rescission application.
- [10] On 24 June 2015, almost nine months later, the current rescission application was served on the plaintiff's attorneys and filed on 29 June 2015. On 21 Augustus 2015 the defendant filed notice of setdown whereby the current rescission application was enrolled for argument on Thursday 17 September 2015. By the time I heard this application for rescission of default judgment 28 months had lapsed since default judgment was granted against the defendant in favour of the plaintiff.
- [11] The broad question in the application was whether the defendant had shown good cause as to why the default judgment should be rescinded.

- [12] On behalf of the defendant Mr Mokhele submitted that the answer to the crucial question must be affirmative. Therefore, he urged me to set aside the default judgment and to grant the defendant leave to defend the plaintiff's action.
- [13] On behalf of the plaintiff Mr Groenewald submitted that the answer to the crucial question must be negative. Therefore, counsel urged me to dismiss the application and to let the default judgment stand.
- [14] The requisites for an application for the rescission of judgment granted by default in favour of the one party against the other were set out in **Grant v Plumbers (Pty) Ltd** 1949 (2) SA 470 (O). It is incumbent upon an applicant who seeks recessionary relief to establish through a reasonable explanation firstly, that he was not in wilful default; secondly, that he was not actuated by any ulterior dishonest or dilatory intentions in applying for the relief; thirdly that he has a *bona fide* defence to the action instituted against him. It is incumbent upon him to show that he has given a reasonably sufficient and honest explanation to demonstrate the overall *bona fides* of his default, intention and defence.
- [15] What a *bona fide* defence entails was elucidated by Brink J in **Grant** *supra*, on 476 – 477 as follows:

“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. (Brown v Chapman (1938 TPD 320 at p. 325).)”

- [16] The “good cause concept” and its twin the “sufficient cause concept” have no precise meaning(s). It has been stressed that it is unwise to give them precise meaning(s). In **HDS Construction (Pty) Ltd v Wait** 1979 (2) SA 298 (E) at 300 Smallburger J, as he then was, said the following about the concepts and the discretion of the court implicitly embodied in them:

“When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (Cairn's Executors v Gaarn 1912 AD 181 at 186; Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352 - 3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.”

- [17] In order to succeed a litigant who applies for the relief of rescission of judgment taken against him by default is expected to show good cause as to why such default judgment should not be allowed to stand. In **Conlyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Pty) Ltd (Cape)** 2003 (6) SA 1 (SCA) at 9e – f para [12] Jones AJA, as he then was, said the following:

“With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success (Grant v Plumbers (Pty) Ltd, 20 HDS Construction (Pty) Ltd v Wait supra, 21Chetty v Law Society, Transvaal).”

[18] I now turn to the papers. As regards the element of the relief which requires an applicant to show that he has a *bona fide* defence, the defendant's factual allegations must be closely examined. In his founding affidavit the defendant stated the following:

- “18.1 It was again during the said consultation that I was advised that after the auditor completes the audit's report, we will file an Application for Liquidation so that we do not pay the Respondent any monies as per the quotation attached on their summons;
- 18.2 I did inform my previous attorney of record about these agreements and have maintained with him that I do not owe and I did not enter any agreement with the Respondent for the supply of the building materials other than the agreements referred to in *supra*;
- 18.3 It further bears to be brought to the attention of the Honourable Court that all agreements entered into between the Applicant, The Respondent and the Department served as a security that they will be receiving their payments for the building materials supplied herein directly from the Department and not from the service providers appointed by the Department;
- 18.4 Regard being had to that which has already being stated herein, I submit that it would be in the best interest of justice that the legal relief sought in this application be granted as I do have a *bona fide* defense to the (sic) in the main action instituted by the Respondent herein and as same will become more apparent of that which follows immediately herein below and the fact that I have shown good cause for my default.”

[19] The plaintiff denied the defendant's factual allegations that it has a *bona fide* defence. The plaintiff's factual allegations, which I have randomly selected in this regard, must be singled out. In its answering affidavit the plaintiff answered:

- “19.1 Op 22 September 2011 het Applicant en respondent a resoluție onderteken in terme waarvan Respondent aan Applikant boumateriaal sou verskaf om ‘n bouprojek te Hoopstad te voltooi. Applikant het toegestem dat “Department of Human Settlements Free State” (hierna die “Departement Behuising” genoem) die Respondent mag betaal op fakture ingedien. ‘n Afskif word hierby aangeheg as Aanhangsel “LD1”.
- 19.2 Op dieselfde datum van 22 September 2011 het Applikant a sessie geteken van enige betalings wat deur die Department Behuising aan hulle verskuldig mag wees. Dit het bloot as sekuriteit vir Respondent gedien en was die Departement Behuising nie ‘n party tot die ooreenkoms nie. Dit is opvallend dat beide voormelde dokumente deur dieselfde deponent as in hierdie aansoek onderteken was. ‘n Afskif van die sessie word hierby aangeheg as Aanhangsel “LD2”.”

[20] In its replying affidavit the defendant persisted that it has a *bona fide* defence in that it was not personally liable to the plaintiff as alleged or in any other manner whatsoever. The defendant replied as follows:

- “20.1 It is also submitted with great respect that the building materials allegedly submitted to the Applicant herein, same were delivered after the resolution as well as the Cession Agreement were concluded between the Applicant; Respondent as well as the Department of Human Settlement, Free State who accepted the responsibility of settling the Respondent’s invoices upon same been produced by the Respondent herein;
- 20.2 Furthermore, I further confirm that we have also entered into a material supply cession agreement with the Respondent as well as the Department of Human

Settlement, Free State and same was entered into on the 1st December 2010 and as such for the convenience of the Honourable Court, the said material cession agreement has been attached to the Applicant's Founding Affidavit as Annexure "**J.K6**" and same is attached herein as Annexure "**J.K6**";

20.3 In terms of the said agreement, the Department still bound itself to pay directly to the Respondent for the materials supplied to the Applicant and such agreement served as a security to the Respondent for any and all claims for building material that it has supplied and delivered to the Applicant;

20.4 I have further been advised that in the event that the Department and/or refused to pay the Respondent any invoices, the Respondent must have issued summons against the Department herein and not the Applicant herein;

20.5 Furthermore, the resolution stipulates that payment "may" only be made to the Respondent on submission of invoices and nowhere in their papers is mentioned that the Department has refused and/or denied to pay their invoices;"

[21] The defendant heavily relied on the two cessions for its contention that the Department Human Settlement, and not the defendant itself, was liable towards the plaintiff. The first cession, "anx jk6", concerned an amount of R3,6 million which the defendant ceded to the plaintiff in Bloemfontein on 1 December 2010. The Department of Human Settlement as the defendant's debtor, acknowledged the

cession by the defendant in favour of the plaintiff and undertook to abide by the terms thereof – (vide p 30 of the record).

The second cession, labelled “anx jk5”, concerned an amount of R524 274,92 which the defendant “purported” to cede to the plaintiff in Welkom on 22 September 2011.

- [22] There was a remarkably significant distinction between the first and second cession. The second cession, unlike the first cession, was not suffixed by any written undertaking by a lawfully authorised and designated functionary of the Department of Human Settlement whereby the Department acknowledged itself to be indebted to the defendant and agreed to honour the terms of the cession signed by the defendant in favour of the plaintiff. Consequently it was fallacious, in my view, for the defendant to claim on the strength of “anx jk5” that the Department bound itself to settle all the claims of the plaintiff for the building materials the plaintiff supplied to the defendant.
- [23] The whole history of the second cession was comprehensively address in the plaintiff’s duplicating affidavit. However, I consider it prudent to fleetingly point out that on 20 November 2012 the plaintiff presented the second cession to the Department in an endeavour to claim payment – (vide anx “a”). On 6 December 2012 the Department repudiated the plaintiff’s claim – (vide anx “b”). It follows, therefore, that the defendant’s averments that the department did not refuse to pay the plaintiff’s claim of R524 274,92 was also incorrect. So too were the defendant’s averments that the plaintiff should have sued the department; that

the department was liable towards the plaintiff and that the department was bound to pay.

- [24] The plaintiff's claim was for the payment of the price of the building material sold and supplied to the defendant to complete a public tender project awarded to him by the department. The defence of the defendant is that the department and not the defendant is, on the strength of the debt which the department never acknowledged, indebted to the plaintiff. The tenuous allegations made by the defendant in its founding affidavit as well as in its replying affidavit, disturbingly revealed lack of basic understanding of the import of a cession as a commercial instrument.
- [25] I have earlier outlined some of the allegations the defendant made in the founding affidavit and the replying affidavit. Those passages as quoted were representative of the high watermark of the defendant's defence. But none of them would entitle him to succeed with the defence that the defendant is not personally liable for the amount claimed in the summons or substantial part thereof.
- [26] The defendant's prospects of success are so remote that it cannot, in my view, be seriously said that the defendant has a *bona fide* defence. On the facts, I have come to the conclusion that the defendant has not been able to show that its alleged defence has good prospects of success – Colyn *supra* at para [13].
- [27] Seeing that the defendant has dismally failed to put up a *prima facie* defence by setting out averments which, if established at the trial of the pending action, would entitle him to the relief of

dismissal of the action, the current application falls to be dismissed – **Grant** *supra* at 476.

- [28] At the heart of the rescission application is the requisite of a *bona fide* defence which has good prospects of success. Where, as in this instance, such core requisite is not established, it cannot be said that sufficient cause has been shown to warrant rescission of default judgment. **HDS Construction** *supra* at 300f – c. However reasonable the explanation may be shown to be and however honest the intention may be shown to be – none of these requisite can, singularly or collectively, constitute sufficient cause in this matter. The application is substantially deficient. The substantive deficiency is so material that nothing else can compensate its demerits as regards defence. In my view the application cannot be redeemed by showing that it has two other very favourable virtues.
- [29] In all the circumstances of this matter, I have come to the conclusion that the defendant, as the applicant, has established no sufficient cause to justify the rescission of the default judgment granted in favour of the plaintiff, as the respondent, on 2 July 2013. Given the considerable delay occasioned by the defendant's apparent lack of interest or serious intention to prosecute its application or to challenge the default judgment it would be a travesty of justice to exercise any discretion in favour of the defendant.
- [30] The defendant was entirely responsible for the inordinate delays and the initiation of the present proceedings. The plaintiff was fully justified to oppose the grant of the relief sought and did so

successfully. That being the case, the plaintiff is entitled to the fruit of its success.

[31] Accordingly I make the follow order:

30.1 The applicant's rescission application is dismissed.

30.2 The applicant is directed to pay the respondent's costs on the scale as between party and party.

M. H. RAMPAL, J

On behalf of the applicant: Mr L. M. Mokhele
Instructed by:
L M Mokhele Attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv. W. J. Groenewald
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