

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Case number: 1601/2015

In the matter between:-

**DIAMOND BLUE TRADING 505 BK
t/a JUST WATER BLOEMFONTEIN**

Applicant

and

**CROSS POINT TRADING 311 (PTY) LTD
SHERIFF OF THE HIGH COURT,
BLOEMFONTEIN EAST**

1st Respondent

2nd Respondent

CORAM: OPPERMAN, AJ

HEARD ON: 08 OCTOBER 2015

DELIVERED ON: 29 OCTOBER 2015

JUDGMENT

Introduction

[1] This matter concerns an application for rescission of a default judgment. The Registrar granted judgment as requested in terms of rule 31(5)(b)(i) for payment of the sum of R864 019.55 and ancillary relief to the 1st respondent.

[2] The two main issues that came to the fore in the application are; firstly, that the application for rescission is erroneously in terms of rule 31(2)(b) whilst rule 31(5)(d) is applicable. Secondly the prerequisite of good cause is in dispute.

The issue of the rules

- [3] The respective rules are differently worded. Whereas an applicant for the rescission of a judgment granted by the court is required to show 'good cause', an applicant is entitled to have a judgment granted by the Registrar set down for 'reconsideration'.¹
- [4] The criteria pertaining to the rules in practical application is crucial in the adjudication of the appropriateness of the manner in which this case was brought before court. The use of rule 31(2)(d) is formally wrong. The question is whether the application is admissible on the foundation of the error. Similar circumstances were already pondered in case law and as Van der Merwe J put it in **Jansen van Vuuren v Reinecke** (703) [2014] ZAFSHC 109 (24 July 2014) in paragraph 7 with reference to **Pansolutions Holdings Ltd v P & G General Dealers and Repairers CC** 2011 (5) SA 608 (KZD): '...the conflict might be more apparent than real.'
- [5] The crux of the facts and findings in the **Bloemfontein Board Nominees Limited v Benbrook** 1996 (1) SA 633 (0) case is not applicable to this matter and the 1st respondent cannot rely on it.²
- [6] I am in agreement with the finding in both cases (**Jansen van Vuuren** and **Pansolutions**) that the well-established criteria of 'good cause' in terms of rule 31(2)(b) is also applicable to 'reconsideration' in rule 31(5)(d). The erroneous rule on which the

¹ *Pansolutions Holdings Ltd v P & G General Dealers and Repairers* CC2011 (5) SA 608 (KZD)

² *Jansen van Vuuren v Reinecke* (703) [2014] ZAFSHC 109 (24 July 2014) at paragraph 7.

application is based is consequently not fatal and is salvaged by the substantive synonymy of the criteria. Fairness dictates the indulgence of the court.

Good Cause³

- [7] The above said; constitutional principles have come to play a pivotal role in matters of this kind. In **RGS Properties (Pvt) Ltd v Ethekweni Municipality** 2010 (6) SA 572 (KZD) at 575G-576C it was held that default judgements are inherently contrary to the Constitution.
- [8] An absolute rejection of default judgments will not suffice because there is a persistent tension between commercial certainty and prompt remedies in law for non-compliance with contracts, on the one hand; and the right to access to courts on the other hand.
- [9] Commercial certainty is the unfettered right of the 1st respondent to claim compliance with contracts and be aided with access to swift justice in assertion thereof. The sustenance of a democratic economy is crucial. In **Sasson v Chilwan and Others** 1993 (3) SA 742 (A)⁴ at 762H Eksteen JA referred to:

³ *Lazarus v Nedcor Bank Ltd* : *Lazarus v ABSA Bank Ltd* 1999 (2) SA 782 (W) at 785, *Pansolutions Holdings Ltd v P & G General Dealers and Repairers* paragraphs [13] to [15], *Cairns' Executors v Gaarn* 1912 AD 181 at 186 and 189-190, *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H- 353A.

⁴ *Basson v Chilwan and Others* (332/1991) [1993] ZASCA 61; 1993 (3) SA 742 (AD); [1993] 2 All SA 373 (A) (17 May 1993)

'The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible ...'

Justice Ackermann in **Ferreira v Levin NO**; **Vryenhoek v Powell NO** 1996 (1) SA 984 (CC) paragraph 26 described it as 'a central consideration in a constitutional state'. These statements aim for reasonable certainty, so that parties can go about their business knowing the rules of the game; constitutional economic integrity is vital.

[10] The constitutional right of the applicant lies in the use of courts to settle disputes; the right to access to courts in terms section 34 of the **Constitution of the Republic of South Africa, 1996**. Furthermore, to have *any dispute that can be resolved by the application of law* decided in a fair public hearing before a court.

[11] The above sets the atmosphere in which the norm of 'good cause' must be applied on the facts of this case. The criteria includes at least both a reasonable and acceptable explanation for the default and a bona fide defence on the merits which prima facie carries some prospect of success.

A caveat is that if the court is in doubt of the prospects of the defence to be advanced, it cannot for that reason refuse an application. Section 34 of the Constitution specifically directs: '... any dispute that can be resolved by the application of law.' That said, the application for rescission must not to be a delaying tactic. Each case must be adjudicated on its own merits and there is no *numerus clausus* of factors.

[12] It is not in dispute that both parties, officially, complied with the rules during litigation preceding the application. The applicant claims that the 1st respondent obstructed their right to have their issue resolved in a court of law. The defendant did this by serving the summons at an address that was not effective: Suite 5, Victoria Office Park, [.....], Willows, Bloemfontein. The summons did not come to their notice. The service was possibly *ma/a fide*. The argument of the 1st respondent is simply that they had a right to serve in terms of rule 4(1)(a)(v) and no mistake or procedural irregularity in respect of the issuing of the default judgment has been committed.

[13] The reality is that the law is not as elementary as the 1st respondent makes it out to be. Simplistically put; with rights come responsibilities and litigants must conduct themselves with veracity that goes deeper than the words of the rule. The circumstances surrounding the choice of address by the 1st respondent to start litigation is doubtful and for the following reasons:

- i. The sole address of business between the applicant and the 1st respondent was at Bob Morrison Street, Ou Oos-Einde, Bloemfontein.
- ii. Between August 2013 and February 2014 the 1st respondent delivered goods and issued invoices at the Bob Morrison Street address. This was the principle place of business.
- iii. In the meanwhile on 7 October 2014 [.....] endeavoured to cancel the so-called Golden Licence Agreement and informed the applicant of the debt of R864

019.55. It is not in dispute that the respondent knew about the disagreement between the applicant and Water4you@George. It can be comfortably inferred that the 1st respondent must have realised the mentioned dispute is going to prolong and complicate litigation.

- iv. It is not in dispute that the applicant has not appropriated this address for business since November 2013 but was registered there. The neglect to change the address of the company in compliance with statute is peripheral to the issue in hand. Relevant is the return of service dated 8 April 2015 that reads:
 'REMARKS: Given address is Victoria Office Park and Defendant does not exist at address.'
- v. Despite clearly realising that the applicant will not get notice of the summons and having knowledge of the correct address of the applicant, the 1st respondent applied for default judgement.
- vi. Perplexingly they applied for a warrant of execution on the Bob Morrison Street address.

[14] The summons did not come to the notice of the applicant and they immediately reacted and enforced their right in terms of section 34 of the Constitution when the default judgment came to their attention. This confirms *bona fides* and an absence of intent to delay litigation.

[15] The second leg of the test is, as was mentioned, if there are grounds for adjudication of the facts by a court on the basis of a bona fide defence and on merits which prima facie carries some prospect of

success? The applicant satisfied the onus of this test. The 1st respondent relies on an oral agreement for their claim. The agreement is disputed by the applicant. The existence of the agreement depends on evidence and adjudication by a court. The issue of the Golden Licence agreement needs to be unravelled in a court of law. This brings a plethora of questions of fact and law to the table. The undertone of the resistance of the 1st respondent in assessment of the defence, is credibility. Credibility is problematic to deal with at this stage and has to be dealt with by evidence tendered, tested and evaluated.

Conclusion

[16] In conclusion, the applicant has provided a reasonable explanation for the default as well as a bona fide defence on the merits which prima facie carries some prospect of success.

[17] The 2nd respondent did not join the action. The applicant clarified that they were sited due to the interest they might have and relief was not sought against them.

Order

[18] In result the following order is issued:

1. The Default Judgment granted by the Registrar on 28 April 2015 in case 1601/2015 is set aside;
2. The Warrant of Execution issued by the Registrar on 15 May 2015 in case 1601/2015 is set aside;

3. The applicant is granted leave to defend the action and ordered to deliver a plea within 15 (Fifteen) days from date of judgment;
4. The costs already granted in the default judgment to be costs in the cause;
5. Costs of this application to be costs in the cause.

 M. OPPERMAN, AJ

On behalf of applicant: Adv. H.J Benade
Instructed by:
Symington & De Kok Attorneys
BLOEMFONTEIN

On behalf of respondent: Adv. W.A van Aswegen
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