



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 26704/2011

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
8/4/13	
DATE	SIGNATURE

11/6/2013

In the matter between:

JOHANNESBURG ROADS AGENCY (PTY) LTD

APPLICANT/DEFENDANT

and

MIDNIGHT MOON TRADING 105 (PTY)LTD

1ST RESPONDENT/PLAINTIFF

SHERRIF JOHANNESBURG CENTRAL

2ND RESPONDENT

JUDGMENT

MABENA AJ:

- [1] This is an application for rescission of default judgment granted by the Registrar of this Court on the 14 June 2011.

[2] The Applicant in this application, also seeks the following ancillary reliefs:

2.1 Setting aside the Warrant of Execution issued subsequent to the aforesaid judgment;

2.2 Ordering the Second Respondent to realise from attachment the Defendant's movable property attached on 4 July 2011 in execution of the judgment;

2.3 The costs of suit.

[3]

BACKGROUND

3.1 The Applicant alleged that on the 14th of June 2011, a default judgment in the amount of R 3, 870 167.09 plus interest *a tempora morae* at the rate of 15.5 percent was granted against it by the Registrar of this Court.

3.2 The default judgment was based on an alleged written agreement entered into between the Applicant and the First Respondent.

3.3 The summons was served on the Applicant on the 11th May 2011. The Applicant failed to deliver a Notice of Intention to Defend. The Respondent proceeded to apply for default judgment, which default judgment was granted 14th June 2011.

[4] Clearly the Applicant failed to enter appearance to defend within the time frame provided by the Rules of this Court.

[5] The Applicant raises the following grounds as a basis of this application:

5.1 The Applicant alleged that the Respondent snatched the judgment amidst an agreement; *alternatively*

5.2 Amids an agreement between the parties that the matter will be held in abeyance pending investigations of the matter leading to be institution of the action by the Applicant.

5.3 Furthermore, the Applicant contends that the First Respondent failed to comply with the Uniform Rules of Court in regard to the combined summons.

5.4 Finally, the Applicant contends that it has good prospects of success on the merits of the claim.

[6] For an Applicant to succeed in an application of this nature, it must show "good cause" for the setting aside of the judgment.

6.1 It must set out reasons for it's failure to deliver a Notice of Intention to Defend or the reasons for it's failure to deliver a Plea, whichever is applicable.

6.2 Secondly, it must demonstrate that its application for rescission is *bona fide* by setting out the grounds for its defends.

[7] In order to determine whether or not the failure on the part of the Applicant was not of its own making, it is necessary to consider the chronology of events starting from when the summons was served upon the Applicant.

7.1 According to the return of service, the summons were served upon the Respondent on the 11 May 2011;

7.2 The application for default judgment was allegedly applied for on 8 June 2011;

7.3 The default judgment was granted against the Applicant for the payment of R 3, 870 167.09;

7.4 The Warrant of Execution was issued by this Court on 4 July 2011.

[8] The Applicant contends that:

8.1 It received summons on the 26 May 2011. However, the First Respondent makes an averment that the summons was served on the Applicant on 11 May 2011. In support of this averment, the First Respondent referred this Court to Annexure "JR7", a return of service attached to the Applicant's founding affidavit.

- 8.2 The Applicant alleged that upon delivery of the summons, it's Legal Advisor Mr. Benedict Moshoeshoe dispatched a letter to the First Respondent's attorneys of record confirming a telephonic discourse with one Mr Louw an attorney in the aforesaid law firm;
- 8.3 The substance of the conversation was that the matter be held in abeyance pending an internal process by the Applicants to verify the invoices submitted;
- 8.4 It was a further term of their agreement, it is alleged, that no appearance to defend would then be noted.

[9] In confirmation of this arrangement this Court was referred to Annexure "JRA 9". Annexure "JR9A" is dated 26 May 2011. This letter states the following:

"kindly note as per your telephonically conversation with our Mr B Moshoeshoe that we here by acknowledge receipt of your summon.

We are conducting an internal process to verify the submitted invoices and will advise you of our findings which will guide our further action in this regard

We will revert to you as soon as the exercise is finalised...."

[10] It was argued on behalf of the Applicant that the reasonable construction of Annexure "JRA 9" is that the Applicant was going to investigate the matter and thereafter decide whether to admit, settle or defend the action and accordingly advise the Respondent of its election. It is not disputed that the First Respondent's attorney of record did not respond to Annexure "JRA 9".

[11] It was contended by the First Respondent that:

11.1 The agreement that pending an internal process to verify the invoices is in essence an agreement to hold the matter in abeyance and is not borne out by Annexure "JRA 9".

11.2 That after the First Respondent's attorney of record advised the Applicant in a letter dated 15 June 2011 of the default judgment, affording the Applicant seven days to effect payment failing which, a Warrant of Execution would be obtained. The Applicant responded with a letter dated 17 June 2011. This letter is marked Annexure "BR2" (its not the Applicants letter).

11.3 The First Respondent contends that Annexure "BR2" does not collaborate the Applicant's version that there was an express understanding between the parties that the action be stayed pending internal investigations aforesaid.

11.4 Therefore it was submitted on behalf of First Respondent that the probabilities militate against the express

agreement. Should such agreement have existed, Annexure "JRA 9" would record:

- 11.4.1 The existence of such agreement;
- 11.4.2 The breach thereof by the First Respondent;
- 11.4.3 The Applicant's indignation about the First Respondents conduct.

[12] From the contents of Annexure "JRA 9", it is clear that the Applicant sought time to investigate the claim against it. On the other hand the First Respondent, for what ever reason omitted to state it's intention in regard to the Applicant's request. Save for the Applicant to aver and submit in this Court that Annexure JRA 9" does not record the request advanced by the Applicant. The First Respondent does not take this Court into it's confidence with regard to the position it adopted in Annexure "JRA 9".

[13] The First Respondent after merely approximately 13 Court days from the date of Annexure "JRA 9", proceeded to take default judgment against Applicant without further notice.

[14] It is without doubt that it would take an entity like the Applicant quite a significant number of days to investigate a claim of this magnitude. Therefore, the First Respondent by taking default judgment notwithstanding an undertaking from the Applicant that it sought to investigate and would revert to the First Respondent, leaves a bad taste.

[15] Therefore, I accept the Applicant's version that it did not wilfully and deliberately omit to enter Notice of Intention to Defend. I am therefore satisfied that the Applicant advance sufficient reasons for his failure to enter Notice of Intention Defend.

[16] On the question of *bona fide* defence the Applicant raises various defences in regard to the claim upon which judgment was taken. They are the following:

16.1 The Applicant alleged that the Respondent based it's claim on the General Condition of Contract for it's cause of action. The Applicant contends that the agreement ought to have been based on the principles of FIDIC.

16.2 The Respondent in it's opposing affidavit points out that the FIDIC principles referred to by the Applicant in Annexure "JRA 4" is wrong. I am of the view that these disparities can only be resolved in the trial court. Therefore there is substance in the defence raised by the Applicant.

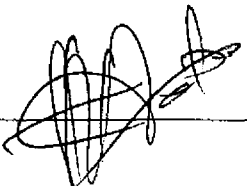
[17] The Applicant raises various other defences that it intends to raise in the trial should this application succeed. However, I do not deem it necessary to deal with the rest of the defences in the light of the issue of wrong cause of action as I have dealt with in the preceding paragraph.

[18] I am of the view that the Applicant has met the requirements of the *bona fide* defence.

[19] Therefore, the Applicant has shown good cause for the setting aside of the default judgment.

[20] I make the following order:

1. The application for rescission of judgment is upheld;
2. The default judgment granted under case number: 26704/2011 is set aside;
3. The First Respondent is ordered to pay the costs of suit.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

**MH MABENA
ACTING JUDGE
NORTH GAUTENG HIGH COURT
PRETORIA**