

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5541/2011

In the matter between:-

UMSO CONSTRUCTION (PTY) LTD
(Registration number: 1996/015450/07)

Respondent/Plaintiff

and

BK INVESTMENTS HOLDINGS (PTY) LTD
(Registration number: 2007/013557/07)

Applicant/Defendant

HEARD ON: 2 AUGUST 2012

JUDGMENT BY: KRUGER, J

DELIVERED ON: 10 AUGUST 2012

[1] This is an application for rescission of a default judgment granted by the registrar on 9 February 2012 for R7 436 507,79. In the founding affidavit the deponent states that the application is brought in terms of Rule 31(2)(b) alternatively the common law on good cause shown. In the answering affidavit the deponent points out that the application was not timeously launched within the time limits prescribed by Rule 31(2)(b), and there is no application for condonation of the late filing of the application. The deponent to the answering

affidavit says that even if it is accepted that the applicant only got knowledge of the default judgment on 28 March 2012, the 20 day period allowed by Rule 31(2)(b) expired on 30 April 2012. The application was only served on the respondent on 11 May 2012. In the replying affidavit the applicant admits that the application was issued more than 20 days after the default judgment came to applicant's attention and the deponent continues:

“...but deny that, for that reason alone, the applicant is disentitled to relief or that a condonation application is required.”

He goes on to say that the default judgment also falls to be set aside in terms of Rule 42(1)(a) as having been erroneously granted, because it was granted on particulars of claim which are excipiable.

- [2] As to the legal provision on which applicant relies, it is common cause that applicant delayed more than 20 days after gaining knowledge of the default judgment before approaching court for relief. Thus Rule 31(2)(a) could not be used. Mr De Wet contends that the remedy which the

applicant should have applied is Rule 31(5)(d), which gives a disgruntled defendant the right to set the matter down for reconsideration by the court after a default judgment granted by the registrar has come to his attention. In my view the reconsideration procedure is to be distinguished from rescission applications. An application for reconsideration is not the same as a rescission application. Be that as it may, the common law has not been excluded and applicant retains the right to apply for rescission of the default judgment under the common law, as it has done here.

- [3] At the hearing Mr Pienaar, who appeared for the applicant, relied mainly on Rule 42(1)(a) but also on the common law in his request for rescission.
- [4] Mr De wet, for the respondent, contends that in seeking rescission, the common law can only be reverted to where it is necessary to do so in order to make a court order effective and to grant relief where the Rules of Court are silent and the proper administration of justice demands such intervention, with reference to **ATHMARAM v SINGH** 1989 (3) SA 953 (D+CLD) at 956 B. However, this reference is to

the order granted by that court dismissing the defence and granting judgment by default, not to the situations where the common law can be invoked. The applicant is entitled to rely on the common law in this application and must explain its default and show that it has a *bona fide* defence – **CHETTY v LAW SOCIETY, TRANSVAAL** 1985 (2) SA 756 (A) at 765A - F.

- [5] The summons was served at applicant's registered address on 29 December 2011 by affixing a copy to the main door of the premises. The premises were locked at the time, for the end of year vacation. Applicant's employees only became aware of the existence of the default judgment on 28 March 2012 after a writ of execution had been served. Applicant is not in wilful default, and has explained its default sufficiently.
- [6] Applicant raises defences against the judgment. The first defence is that the court does not have jurisdiction, firstly, because applicant's registered address is in the Western Cape and the contract was concluded either in Gauteng or the Eastern Cape. The fact that the subcontract dealt with bridges in the Free State is not, in the view of the deponent

to the founding affidavit, sufficient to confer jurisdiction in this court. Mr Pienaar, for applicant, submits that in order for this court to have jurisdiction, the applicant should have been bound to perform that portion of the contract in respect of which applicant is being sued, within the area of jurisdiction of this court, with reference to **VENETA MINERARIA SPA v CAROLINE COLLIERIES (PTY) LTD** 1985 (3) SA 633 (D) at 643 B – D (upheld on appeal), 1987 (4) SA 883 (A)); **FRANK WRIGHT (PTY) LTD v CORTICAS 'BCM' LTD** 1948 (4) SA 456 (C) at 463 – 464. The **VENETA**-case concerned anticipatory breach which occurred outside the country. The **FRANK WRIGHT**-case dealt with CIF contracts.

I disagree with Mr Pienaar. The right infringed is here anchored in a contract that has a direct connection with the area of jurisdiction of this statement (**VENETA** at p 643D).

- [7] A more fundamental point which the applicant raises is that the contract contains a comprehensive dispute resolution mechanism. That dispute resolution mechanism requires the decision by the appointed engineer and if that fails, mediation. Applicant intends to invoke section 6 of the

Arbitration Act 1965 to obtain a stay of respondent's action pending the institution of arbitration proceedings. Mr Pienaar says courts generally respect arbitration agreements.

The onus is on the respondent to satisfy the court that it should not in its discretion refer the matter to arbitration –

UNIVERSITEIT VAN STELLENBOSCH v J A LOUW

(EDMS) BPK 1983 (4) SA 321 (A) at 333 H. A court will only

refuse to refer the matter to arbitration where a very strong

case has been made out – **G K BREED (BETHLEHEM)**

(EDMS) BPK v MARTIN HARRIS & SEUNS (OVS) (EDMS)

BPK 1984 (2) SA 66 (O) at 70 A and 70 D.

- [8] Mr De Wet, for respondent, contends that in spite of the dispute resolution mechanism in the contract, the respondent had the option to decide to approach this court for relief. That may be so, but courts try to honour the intention of parties. If the parties have inserted a dispute resolution mechanism in a contract, courts will generally allow the parties to follow that procedure. Especially in building contracts, which are technical in nature, it is sensible to have an engineer consider the facts. That is what the parties intended to do here. Arbitration should take its course, all

things being equal. According to the Answering Affidavit p. 60 § 24 this dispute is not about contract, but the merits of the claim for payment. The engineer would be well-placed to adjudicate such dispute.

- [9] Mr De Wet refers to annexure “F” to the particulars of claim which, in his view, contains an acknowledgement of liability to which the applicant in the founding affidavit does not refer. Annexure “F” is addressed to Messrs Price Waterhouse Coopers dated 13 September 2010. It reads as follows:

“13 September 2010

PRICEWATERHOUSE COOPERS INC

PO BOX 13069

VINCENT

5217

OUR ACCOUNT WITH UMSO CONSTRUCTION REFERS

On behalf of BK Investments (Pty) Ltd, I hereby confirm that at the end of June 2010 an amount of R 2 100 754.46 was due for work done on various bridge projects with them.

Due to financial constraints we were not able to pay our accounts with Umso Construction as well as for all work done after June 2010.

In due course we will be in a financial position to pay Umso

Construction and it is therefore not necessary for them to provide for bad debts for the amounts owed to them by us.”

[10] In the answering affidavit respondent refers to annexure “F” in para 26. In the replying affidavit applicant’s deponent deals with this aspect at p 92 § 11.3 and makes it clear that annexure “F” is not an acknowledgement of debt; it was written for a different purpose, namely for bookkeeping.

[11] In the answering affidavit the respondent states that the contract price was defined and reduced to writing. In the replying affidavit (p 93 § 12) the applicant’s deponent quotes a letter which states that the final contract value is subject to remeasurement:

“12.2 I quote the relevant extract from that letter which was dated 3 September 2009:

‘The contract sum is the amount of R2,670,301.80 (Two Million, Six Hundred And Seventy Thousand, Three Hundred And One Rands And Eighty Cents) and is inclusive of V.A.T.. The final contract value is subject to remeasurement of quantities against the tendered rates contained in the sub-contract agreement. (emphasis added)

12.3 The contents of my letter (annexure 'D' to Mr Moodley's affidavit) do no more than affirm the terms of the sub-contract agreement on which the respondent relies – there would have to be a valuation of the work performed by the respondent!

12.4 The paragraph I have quoted above does not constitute either an agreement or an admission that the respondent, upon completion of the works, was entitled to be paid R2 670 301.80."

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[12] The papers indicate the there is a dispute between the parties on several aspects. It is desirable that those disputes be fully ventilated, either in further court proceedings or at an arbitration or both. I am satisfied that the applicant has a *bona fide* defence.

[13] In the replying affidavit applicant's deponent points out that the respondent's claim was incorrectly computed and to that extent the judgment was erroneously granted as contemplated in Rule 42. In my view applicant made out a proper case for rescission under the common law.

[14] As to costs, applicant's attention was drawn to the fact that

the application was out of time in the answering affidavit and that applicant had to apply for condonation. Yet applicant failed to do that. The applicant is seeking an indulgence from the court and should be ordered to pay the costs of this application.

ORDER:

1. The default judgment granted by the registrar of this court on 9 February 2012 is rescinded.
2. The costs of this application are to be paid by applicant.

A. KRUGER, J

On behalf of respondent/plaintiff:

Adv C D Pienaar
Instructed by:
Wessels & Smith
BLOEMFONTEIN

On behalf of applicant/defendant:

Adv P J T de Wet
Instructed by:
Symington & De Kok
BLOEMFONTEIN

/sp