

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Application No: 1037/2012

In the matter between:-

IHC BUILDING SUPPLIES (PTY) LTD
MORNE ERNST

1st Applicant
2nd Applicant

And

MOYAKE TRADING CC
SHERILL LOSER N.O.
MMAHLAJWANE MARIA CHAKA N.O.

1st Respondent
2nd Respondent
3rd Respondent

(cited herein in their capacity as trustees of the
Devinfra Trust, IT2309/2001)

THE MEC: DEPARTMENT OF CO-OPERATIVE
GOVERNANCE, TRADITIONAL AFFAIRS AND
HUMAN SETTLEMENTS, FREE STATE PROVINCIAL
GOVERNMENT

4th Respondent

IN RE: Application no 1037/2012

MOYAKE TRADING CC

Applicant

and

IHC BUILDING SUPPLIES (PTY) LTD
MORNE ERNST
SHERILL LOSER N.O.
MMAHLAJWANE MARIA CHAKA N.O.

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent

(cited herein in their capacity as trustees of the
Devinfra Trust, IT2309/2001)

THE MEC: DEPARTMENT OF CO-OPERATIVE
GOVERNANCE, TRADITIONAL AFFAIRS AND
HUMAN SETTLEMENTS, FREE STATE PROVINCIAL
GOVERNMENT

5th Respondent

JUDGMENT BY: THAMAGE, AJ

HEARD ON: 18 OCTOBER 2012

DELIVERED ON: 1 NOVEMBER 2012

[1] This is an application for rescission brought under common law.

First and second applicants here seek to rescinded and set aside judgement and order granted by Snellenburg, AJ in their absence on the 26 April 2012 under case number 1037/2012.

[2] Applicants thus approach this court for a relief in the following terms as per their Notice of Motion.

2.1 That the default judgment granted against the first applicant on the 26 April 2012 be rescinded.

2.2 Leave be given to the first applicant to file an opposing affidavit to the application launched by the first respondent, within 15 days of granting of the order.

2.3 That the first respondent be afforded an opportunity to reply on the aforementioned opposing affidavit within 10 days thereafter.

2.4 Alternatively to the abovementioned prayers, the order granted by Snellenburg AJ on the 26 April 2012 be varied and read as follows:

“The first respondent forthwith to comply with the agreement between the first respondent and the applicant and the agreement between the applicant, the first respondent and the fifth respondent, for the supply of material in respect of the 187 uncompleted housing units, attached to the founding affidavit as annexure G in the Motheo Local Municipality, Bloemfontein, Free State Province district.”

2.5 That the first respondent be ordered to pay the costs of this application, only in the event of the respondent opposing it.

[3] Applicants filed a founding affidavit, confirmatory affidavit by Sheril Loser as well as a replying affidavit in support of their application.

[4] Respondents on the other side also filed notice to oppose as well as, answering affidavit, supporting affidavit and confirmatory affidavits in support of their opposition.

[5] The fourth respondent filed notice to abide by the decision of this court.

- [6] Applicants withdrew the alternative prayer mentioned under paragraph 2.3 above, hence both appellants' and respondents' counsel made submissions in regard the other prayers except for the alternative prayer. I am thus not going to make a ruling in that regard.
- [7] At common law, the court is entitled to rescind a judgment obtained by default provided that sufficient or good cause has been shown. Sufficient cause includes a reasonable and accepted explanation for the default and that on the merits the party has a *bona fide* defence which carries *prima facie* prospects of success. See **CHETTY v LAW SOCIETY, TRANSVAAL** [1985] 2 ALL SA 76 (A) at page 79 (parallel citation 1985 (2) SA 756 (A)).
- [8] Applicants in this regard did receive the process and upon receiving same, they made use of services of Finhuis who provided advice on the said documents meaning the main application. Later on the services of Graham Attorneys were utilised so as to communicate with the current respondents'

attorneys. A letter was then written to the respondents' attorneys to the effect that the main application is not going to be opposed.

[9] Applicants on receiving the documents only read the first page of the notice of motion and did not read the whole documents.

[10] Furthermore, it is the applicant's case that his contract with the respondents was the supply of material only and not the supply of material and construction of houses. Having received the court processes, he understood the prayers to be the one of supply of materials.

[11] The following argument was also raised namely:

The order may be interpreted so as to suggest that IHC is to construct the 187 uncompleted housing units and order to supply the relevant material in respect thereof alternatively the physical construction of the building material and building material only.

[12] Coming now to the question as to whether the applicant was in wilful default. Before a person can be said to be in wilful default, the following elements must be shown:

- 12.1 Knowledge that the action is being brought against him;
- 12.2 A deliberate decision to refrain from entering an appearance to defend though free to do so; and
- 12.3 Certain mental attitude towards the consequences of the default - See **Erasmus, SUPERIOR COURT PRACTICE, B1-302.**

[13] As regards 12.1 and 12.2 the respondent knew of the application and also decided not to oppose the application, to an extent that their attorney even wrote a letter confirming same.

[14] Can it now be said that the respondent had a certain mental attitude towards the consequences of the default. It has been argued that the respondent knew his obligation towards the applicants to be that of the supply of building material, and that he took steps by consulting with Finhuis and later with Graham Attorneys. According to my view, applicant did not just ignore the application but did something by consulting with Finhuis and later with Graham Attorneys.

[15] The mental element of the applicant should be one of the several elements which the court must have in determining good cause. See **HARRIS v ABSA BANK LTD t/a VOLKSKAS** 2006 (4) SA 527 (T).

[16] I am thus of the view that applicant was not a wilful default, since he did not sit back with the full knowledge of the consequences of his default.

[17] I now turn to the other requirement namely whether the defendant had a *bona fide* defence.

I suppose not to make the ruling or decision on the main application but have to peruse the main application, also the contention the applicant is making, and to decide as to whether *prima facie* the applicants have a *bona fide* defence.

[18] Applicants' version is to the effect that the written agreement, marked annexure C on his founding affidavit constitute his obligation towards the respondent. He further states that the agreement has a non-variation clause. Salient feature of the

agreement is that he has to supply materials only and not material and construction of 300 houses. He thus, contest that he is obligated to construct/erect the houses.

[19] On the other hand, the respondent states that applicants' obligation is not only to supply the material, but to erect the houses as well. Also that he has been actively involved in the erection of the other completed houses to an extent that he also attended the wage dispute of the workers who were constructing the houses.

[20] Respondent do acknowledge that the contract referred to as annexure C do have a non-variation clause but there is another contract running parallel to annexure C, whereby the applicant had to construct the houses, i.e. *pactum de non petendo*. That this contract was between the second applicant and Devifra (Trust).

[21] Applicants defence relies heavily on the so-called Shifren Clause, see **SENTRAL KO-OP GRAAN MPY BEPERK v SHIFREN** 1964 (4) SA 760 A. This non-variation or Shifren

clause was confirm by the Appellant Division in **BRISLEY v DROSKE** 2002 (4) SA 1 (SCA).

[22] I am now faced with two contentions; the Shifren Clause whether is it applicable in this regard or the *pactum de non petendo*, whereby the second contract between the applicant and Devinfra Trust. I am of the view that my duty is not to decide whether the Shifren Clause should prevail or the *pactum de non petendo* should prevail. My duty is whether based on the non-variation clause and the parole evidence rule, the applicant has a *bona fide* defence which may succeed.

[22] I have to consider all relevant circumstances and make my discretion herein – see **COLYN v TIGER FOOD INDUSTRIES LTD t/a MEADOW FEED MILLS (CAPE)** 2003 (6) SA 1 (SCA) at 9B-D. I therefore come to the conclusion that applicants application succeeds.

[23] I have been requested to order costs against the respondents as they ought not have opposed the application for rescission. I am

mindful that costs may follow the result, at the same time this is not a final judgment, matter still have to be decided on merits.

[24] The following order is thus made:

24.1 That the judgment granted against the applicant on the 26 April 2012 is hereby rescinded.

24.2 That leave is granted to the first applicant to file an opposing affidavit to the application launched by the first respondent, within 15 days from date this judgment was delivered.

24.3 That the 1st respondent is afforded an opportunity to reply to the aforementioned opposing affidavit within 10 days thereafter.

24.4 That costs of these proceedings are costs in the cause.

S. J. THAMAGE, AJ

On behalf of applicants: Adv. S. Grobler
Instructed by:
Graham Attorneys
BLOEMFONTEIN

On behalf of respondent: Adv. P. Zietsman
Instructed by:
Bokwa Attorneys
BLOEMFONTEIN

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