

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No. 7309/2011

In the matter between:

ASCON TRADING CC

(REGISTRATION NUMBER: 2006/067185/23)

Applicant

And

ANIX TRADING 401 CC T/A SHE SAND

(REGISTRATION NUMBER: 2002/015876/23)

First Respondent

THE SHERIFF OF THE HIGH COURT,
SCOTTSBURGH

Second Respondent

UMDONI MUNICIPALITY

Third Respondent

JUDGMENT

MNGUNI J

[1] This is an application for rescission of a default judgment in the sum of R298 253.65 granted by the Registrar of this Court against the applicant on 4 August 2011. The application is brought in terms of Rule 31(2) (b) of the Uniform Rules of Court.

[2] The first respondent (the plaintiff in the action), is a close corporation apparently carrying on business as a supplier of sand having its principal place of business at Southern Home, Old Main Road, Mtwalume KwaZulu-

Natal. As at July 2010 and at the request of the applicant, (the defendant in the action) the first respondent would from time to time supply sand to the applicant on account and would then render the account to the applicant.

[3] The applicant's account was not properly serviced and fell into arrears, resulting in the first respondent issuing summons against the applicant claiming an amount of R298 253.65. It would appear and it is not disputed by the first respondent that the summons was served upon the applicant at its registered address on 5 July 2011 by affixing a copy thereof to the front door. In its founding affidavit, filed in support of the present application, the applicant denies having received the summons. It avers that it became aware of the action for the first time on 12 August 2011 when the third respondent contacted it to enquire about the payment to be made to the second respondent. It would appear that the second respondent had attached the applicant's property on 5 August 2011.

[4] When the applicant failed to enter an appearance to defend within the prescribed period, the matter was placed before the Registrar who, on 4 August 2011, granted a default judgment for the amount of R298 253.65 plus interest and costs.

[5] Rule 31(2)(b) provides:

'[a] defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it

seems meet.'

[6] It therefore follows that this court will be entitled to exercise its discretion to rescind a judgment against the applicant provided that sufficient cause has been shown. Miller JA defined the term 'sufficient cause' in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 at 765A-C as follows:

'The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (see *Cairn's Executors v Gaarn* 1912 AD 181 at 186 *per* INNES JA). But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success. (*De Wet's case supra* at 1042; *PE Bosman Transport Works Committee and others v Pieter Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357 – 8.)

[7] It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have judgment against him rescinded on the ground that he had reasonable prospects of success on the merits. (see *Chetty supra*)

[8] I have already stated that it is not disputed that the summons was never received by the applicant, and that it only learnt of its existence after the default judgment had been granted. The first respondent's contention is that the applicant failed in its founding affidavit to give explanation why it did not receive the summons despite the fact that it was served at its registered address. The applicant's counsel conceded that the service of the summons in *casu*, complies with Rule 4 of the Uniform Rules of this Court. He, however, submitted that the proper service of a summons is not a bar to an application for rescission of a default judgment.

[9] In *Kajee and Others v G and G Investments and Finance Corporation (Pty) Ltd* 1962 (1) SA 575 (N) at 577E-G Fannin J pronounced:

'It seems to me that what is required in a case such as this is that the applicant must explain his default. He cannot simply claim the Court's indulgence without giving an explanation. The explanation must be reasonable in the sense that phrase was used in *Naidoo's* case and *Grant's* case, *supra*, namely that it must not show that his default was wilful or was due to gross negligence on his part. If explanation passes that test, then the Court will consider all the circumstances of the case, including the explanation, and will then decide whether it is a proper case for the grant of indulgence.'

[8] Having carefully considered the matter, I accept that the applicant has presented an acceptable explanation for its default in the circumstances of this particular case.

[9] I now turn to deal with the requirement of a *bona fide* defence. In its founding affidavit, the applicant sets out its defence as follows:

25.

Applicant denies its indebtedness to the First Respondent in the amount claimed. Applicant denies that the amount owed was the agreed price or First Respondent's usual price for the goods sold and delivered.

26.

Applicant and First Respondent reached agreement for the sale of goods in the amount of R 66 766, 00. Applicant however denies this amount to be due, owing and payable. Neither was applicant placed on terms for payment of that amount.'

[10] The first respondent, declared as follows in its answering affidavit in relation to the applicant's defence:

7.

Annexure "A" hereto is the first respondent's statement rendered to the applicant (incorrectly dated 29 February 2012 and which should read 28 February 2011.)

8.

Annexure "A" records:-

- (a) the particulars of invoices rendered by the first respondent to the applicant on 30 October 2010, 9 November 2010 and 25 November 2010 all of which were paid by the applicant;
- (b) particulars of a tax invoice rendered by the first respondent to the applicant on 30 November 2010 (INA 11279) in the amount of R268, 435.80.

9.

Annexure "B" hereto is a letter dated 3 December 2010 addressed by the applicant to the first respondent explaining why payment had not been made of the first respondent's account and claiming that payment is awaited from the Umdoni Municipality.

10.

On 24 December 2010 the applicant paid R74, 457.95 (evident from annexure "A").

11.

It deserves mention that the applicant's invoice for R268, 435.80 was not disputed (that much is apparent from annexure "B") nor was it disputed when payment was made on the 24th December 2010.

12.

On 7 December 2010 the first respondent rendered to the applicant an invoice for sand delivered in the amount of R 100, 901.40. Further invoices were rendered on the 1st January 2011. These invoices too were not disputed. No payment was however made by the applicant in regard those invoices.

13.

When payment of the first respondent's account was raised with the applicant the letter dated 22 February 2011 (annexure "C" hereto) was received from the applicant. It confirms that the applicant awaits payment from the Umdoni Municipality and that the applicant will advise the first respondent when payment can be made. No dispute is raised in regard the amount which was then payable by the applicant to the first respondent.

14.

The first respondent had by then (22 February 2011) rendered a further invoice (on 10 February 2011) for an amount of R3, 390.02 which amount was paid on the same day. Further invoices were also raised on 17 February 2011 (R2, 052.00) and 28 February 2011 (R3, 390.02). The latter amount was paid on 23 February 2011.

15.

- 15.1 Subsequent to the purchases in February 2011, the first Respondent informed the Applicant that the credit facility afforded to the Applicant had terminated due to non-payment of the balance of R298 253.65. The Applicant, however, required more sand and made cash purchases from the First Respondent during the period March 2011 until 26th May 2011 (Annexures D, E & F are First Respondent's monthly statements account dated 31st March 2011, 30th April 2011 and 31st May 2011).
- 15.2 After the last payment the balance outstanding, due and payable by the applicant to the first respondent was the amount of R298, 253.65.

16.

When a further demand was made of the applicant to pay the account (annexure "G") the applicant responded in writing on the 31st May 2011 (annexure "H" hereto).

17.

Although the applicant's letter raises certain issues relating to deliveries, it ends with the author stating: "At this stage we unfortunately still await payment, and will advise shortly on a date for payment". Again there is no dispute of the amount owing to the first respondent, recorded in the statement which the applicant received with annexure "G".

18.

The first respondent's response (through its attorney) is annexure "I" hereto). Its contents are self-explanatory and it deals in detail with the allegations made by the applicant in relation to delivery.

19.

When further negotiations between the applicant's attorney and the respondent's attorney as to settlement of the first respondent's account broke down, action was instituted by the first respondent against the applicant on 30 June 2011 in which the amount of R298, 253.65 is claimed.'

The first respondent attached the correspondence exchanged between it and the applicant together with the statements of account sent to the applicant.

[11] Pausing here for the moment, it is to be observed that the applicant had merely made a bald averment lacking in detail concerning its defence. Confronted with the first respondent's evidence aforesaid, and in an attempt to overcome the problem it faced, the applicant filed a replying affidavit in which it proffered the following defence:

- (a) The applicant does not have order numbers for the deliveries made relating to the tax invoice of 30 November 2010 in the amount of R 268

435.80,

- (b) The applicant did not order the sand for the invoice dated 7 December 2010 in the amount of R 100 901.40; and
- (c) The applicant did not order additional material set out in paragraph 14 of the first respondent's answering affidavit.

[12] These defences referred to in paragraph 11 above were not disclosed in the founding affidavit. Because of the change of tack, the first respondent filed and served an application on 10 May 2012, in which it notified the applicant of its intention to seek an order on 15 May 2012 granting it leave to deliver a further affidavit and that the applicant pay the costs of the application. When the matter came before me for argument, counsel for the applicant informed me that he did not oppose the granting of the order authorizing the first respondent to deliver a further affidavit, but only opposed to the aspect of the costs of application. I granted the order and directed that costs be costs in the cause.

[13] It is clear that the defences raised in the founding affidavit relate only to the issue of the first respondent's price in respect of the goods sold and delivered and that the sale and delivery of the goods are not in issue. Whereas the defences raised in the replying affidavit place in dispute the subject matter of the sale between the parties, the applicant contending that it ordered much less sand than what the first respondent delivered.

[14] I am mindful of the fact that it is trite that an applicant must make out a

case in its founding affidavit and not in reply (see *Kleynhans v Van der Westhuizen* NO 1970 (1) SA 565 (0) at 568E). As was stated by Nestadt J in *Shephard v Tuckers Land and Development Corporation (Pty) Ltd* 1978 (1) SA 173 (W) at 177H – 178:

“This is not however an absolute rule. It is not a law of the Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. This indulgence, however, will only be allowed in special or exceptional circumstances.”

[15] The exercise of such discretion calls for the taking into account of the variety of factors, bearing in mind the underlying principle that the applicant should not be permitted to make a case in the replying affidavit when no case at all was made out in the original application (see *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd And Another* 1980 (1) SA 313 (D) at 315H – 316A).

[16] The explanation advanced by the applicant for its failure to disclose in its founding affidavit the defences which now appear in its replying affidavit is that the first respondent instituted its action on simple summons which, it alleged, lacked in particularity. One of the factors which are usually found to be compelling in exercising the discretion in applicant's favour in these matters is lack of prejudice. I have already granted the first respondent leave to deliver a further affidavit to deal with new matters raised in the applicant's replying affidavit, thus eliminating the existence of prejudice.

[15] I have alluded to the fact that the applicant should demonstrate the

existence of a *bona fide* defence. Brink J in *Grant v Plumbers (Pty) Ltd* 1949

(2) SA 470 (0) at 476 – 7 formulated the requirement 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.’

In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9 Jones AJA added the following:

‘With that as the underlying approach the courts generally expect an applicant to show good cause ...(c) by showing that he has a *bona fide* defence to the plaintiff’s claim which *prima facie* has some prospect of success.’

[15] In *Standard Bank of SA Ltd v E L–Naddaf and Another* 1999 (4) SA 779 WLD at 785J – 786A Marais J concluded that:

‘The authority of the judgment of Colman J (and common sense) indicate that *bona fides* cannot be demonstrated by merely making a bald averment lacking in any detail. To hold that such bald averment is sufficient to demonstrate *bona fides* is a classic oxymoron. It effectively negates the requirement that the Court be *satisfied* that the applicant has a *bona fide* defence.’

[16] It accordingly follows that the prospects of success of the applicant’s defence must be measured against the above exposition of the law. The first respondent has, set out in detail how it arrived at the amount which is owed by the applicant. The applicant dispatched a letter dated 3 December 2010 to the first respondent and because of the importance of the letter, I quote its contents in full:

‘Re: **PAYMENT DELAY**

We would like to inform you that our payment certificate is being processed by Umdoni Municipality and will possibly be paid out to us on the 10th of December. We

will then make payment to She Sands. We are sorry for any inconvenience caused.

We trust and hope you will find the above in order, if you have any queries please don't hesitate to contact us.'

Again, the applicant dispatched another letter to the first respondent dated 22 February 2011 which reads thus:

'Re: **OUTSTANDING ACCOUNT**

As per our previous telecom, we currently await payment from the Umdoni Municipality for work carried out on our Malangeni site.

We will advise shortly on the tentative day for payment to us and thereafter your payment.

Hope you find the above in order, if you have any queries please don't hesitate in contacting me on the above number.'

The first respondent dispatched a letter to the applicant dated 27 May 2011 which reads:

'Re: Payment of outstanding account

We have been advised by Umdoni Municipality that your payment is set for today. We hereby request full payment of all outstanding balances due to us, as agreed on your previous letter. Attached is a copy of our statement and your previous correspondence.'

It is to be observed that in both the letters of 3 December 2010 and 22 February 2011, the applicant did not deny that it was indebted to the first respondent but only gave the reasons for the delay in payment of the account.

[16] The applicant does not deny that the invoices which form annexures to the first respondent's answering affidavit were furnished to it. Importantly, it does not explain what happened to the sand that the first respondent delivered to it, and which the applicant had not ordered. Also, it does not tender the return thereof to the first respondent.

[17] Counsel for the applicant sought to argue that the first respondent did not account for the payment of R233 611.00 made on 24 December 2010. Therefore, he submitted, the default judgment ought to have been granted in the sum of R64 642.65. I have considered this submission, and it seems to me that it overlooks the evidence contained in annexure "A" to the first respondent's answering affidavit. This submission is therefore unsustainable.

I am accordingly not able to find that the applicant has shown any defence to the first respondent's claim, let alone the one carrying a prospect of success.

In the result, the following order shall issue,

The application for the rescission of the judgment granted against the applicant on 4 August 2011 is dismissed with costs.

Date of Hearing : 15 May 2012

Date of Judgment : 08 June 2012

Counsel for the Applicant : Adv. W. J. Pietersen

Instructed by : Venn Nemeth & Hart

Counsel for the First Defendant : Adv. P.J. Combrink

Instructed by : G.H. Ismail & Associates