

In the KwaZulu-Natal High Court, Durban
Republic of South Africa

NOT REPORTABLE

Case No : 3288/11

In the matter between :

Ithala Development Finance Corporation

Applicant

and

Sinsatheleni Investments CC

Respondent

Judgment

Lopes J

[1] The applicant seeks the rescission of a summary judgment granted against it in its absence on the 14th July 2011. That summary judgment was for the payment of R286 322,40 together with interest thereon and costs.

[2] The history of the matter may be seen as follows :

- a) a summons was served on the applicant at the instance of the respondent on the 17th March 2011;
- b) the applicant's attorneys delivered a notice of intention to defend on the 29th March 2011;

- c) an application for summary judgment was filed on the 12th May 2011, and served on the applicant's attorneys on the 17th May 2011;
- d) as the application for summary judgment was out of time, the respondent sought condonation of the late filing in its notice of application for summary judgment. As no opposition to the summary judgment application was forthcoming, summary judgment was granted on the 14th July 2011;
- e) during August of 2011 the maintenance co-ordinator of the applicant, who was involved in the project pursuant to which the money claim was made, discovered that summary judgment had been granted. He later ascertained that the applicant's then attorney, Ngcobo and Xulu Incorporated had ceased to exist. The allegation is made that when the summary judgment application was served on Ngcobo and Xulu Incorporated, the attorney who was dealing with the matter had already left Durban for Johannesburg;
- f) on the 23rd August 2011 this application for rescission was delivered.

[3] Mr *Khuzwayo* who appeared for the applicant, made it clear that the application for rescission was based of the common law as expanded in *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042 F – 1043.

See also : *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9 C – F.

The requirements as set out in *Colyn* are :

- a) a reasonable explanation of default;
- b) that the application is made bona fide;
- c) that the applicant has a bona fide defence to the plaintiff's claim which prima facie has some prospects of success.

[4] In this matter the facts are almost on all fours with those in *Colyn*. *Colyn* makes it clear that inexcusable inefficiency on the part of a litigant's attorney is difficult to regard as a reasonable explanation. I am, however, mindful of two aspects :

- a) in *De Wet* at page 1042 G - H, Trengove AJA stated :
 'Broadly speaking, the exercise of the Courts' discretionary power appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case.'
- b) in *Colyn*, Jones AJA, when dealing with an explanation of default which was not regarded as reasonable stated at page 9 I :
 'Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success...'

[5] The applicant's defence in this case is that a bill of quantities was prepared in a building contract wherein the parties agreed to the technical specification of the material to be used in refurbishing the building. The respondent, however, purchased material which had not been agreed upon, and

despite notification from the respondent, went ahead and refurbished the building using the incorrect materials. The continuing incorrect work was eventually stopped and another contractor engaged to remedy the respondent's incorrect workmanship. This counter-claim relates directly to the work the respondent claims it did, and for which it is entitled to payment, as set out in its particulars of claim in the action.

[6] Mr *Nqala*, who appeared for the respondent, impressed upon me the allegation in the respondent's answering affidavit that a Mrs S Y Mhlongo, employed by the applicant as a maintenance co-ordinator and responsible for the project concerned, had instructed the respondent's representative to use polycarbonate sheets on the wall of the building. But no substantiation of this allegation in the form of a confirming affidavit by Mrs Mhlongo was put up despite the lapse of a year since the allegation was made.

[7] There was also some dispute between the parties as to the meaning of the phrase '0,58 mm IBR or other approved sheeting ...' as contained in the bill of quantities, with Mr *Khuzwayo* averring that it is a clear reference to chromodek sheeting. This, he submitted, was the evidence of the applicant's maintenance co-ordinator who was the deponent to the applicant's affidavits. I regard this evidence as prima facie persuasive.

[8] Mr *Nqala* submitted that the facts of this matter were similar to those

which were found in *Bristow v Hill* 1975 (2) SA 505 (N). The applicant in that case, however, had failed to keep in touch with his attorney, and had relocated to Harrismith without notifying his Durban attorney of an alternative address in Durban. He also failed to contact his attorney until after he became aware of a warrant of execution which had been issued pursuant to the judgment. The learned judge in that case viewed the conduct of the applicant as having been negligent.

[9] I am not persuaded that the same circumstances apply in this matter. There is no suggestion in this matter that the applicant was indifferent to the litigation or was negligent in not keeping in touch with its attorney. Having entered an appearance to defend, it no doubt relied upon its attorney to let it know of the next step to be taken in the litigation. Failure to notify the applicant of the receipt of the application for summary judgment was clearly something for which the applicant's attorney was to blame.

[10] In all the circumstances, I find that the applicant has satisfied the requirement for rescission by, inter alia, establishing a good prospect of success in the action.

[11] With regard to the question of costs, whilst the applicant may view its conduct in the matter as being free from blame, there is no suggestion whatsoever that the respondent acted in any way improperly, either in seeking

summary judgment or in resisting the grant of this application. The applicant seeks an indulgence from this court and there can be no suggestion that the respondent should bear any of the costs thereof.

[12] I accordingly make the following order :

1. The summary judgment granted against the applicant in favour of the respondent on the 14th July 2011 under case number 3288/2011 in this court is rescinded and replaced with the following :
 - (a) summary judgment is refused;
 - (b) the applicant is given leave to defend the action;
 - (c) the costs of the summary judgment application are reserved for decision by the trial court.
2. The applicant is directed to pay the costs of the application for rescission.

Date of hearing : 20th September 2012

Date of judgment : 27th September 2012

Counsel for the Applicant : T S Khuzwayo (instructed by Shembe Attorneys)

Counsel for the Respondent : C M Nqala (instructed by Mthethwa Attorneys)