

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2924/09

In the matter between:-

WHITELEYS CONSTRUCTION

Plaintiff

and

CARLOS NUNES CC

Defendant

HEARD ON: 3 DECEMBER 2009

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 10 DECEMBER 2009

[1] This is an application for the rescission of the provisional sentence granted by default by Jordaan J on 16 July 2009 in this court under the abovementioned case number against the defendant in the amount of R1 020 395,46 plus interest thereon as set out in the order.

[2] On 18 March 2008 the parties hereto entered into a written building contract in terms of which the plaintiff undertook to erect new town houses for the defendant on property owned by the defendant. The building contract thus entered into

was the standard principal building agreement JBCC Series 2000 Edition 5.0 Code 2101 © July 2007 and is referred to herein simply as the building contract.

[3] Mr. Jose Carlos da Cruz Nunes is the sole member of the defendant. Mr. Sergio Nunes, the son of the said sole member of the defendant, was appointed as the principal agent in terms with the building contract. At all times relevant hereto he therefore acted in that capacity as the agent of the defendant.

[4] The building contract in terms of clause 31 thereof provides that the principal agent shall issue monthly interim payment certificates until the issue of the final payment certificate in terms of the building contract. A payment certificate is defined in the building contract as a document issued monthly by the principal agent certifying the amount due and payable by the employer to the contractor or *vice versa* in terms of the JBCC Payment Certificate form. The building contract therefore also provides for payment certificates indicating the amount due by the plaintiff (the contractor) to the defendant (the employer).

- [5] In obtaining the aforesaid provisional sentence, the plaintiff relied on interim payment certificate no. 14 issued by the principal agent in favour of the plaintiff in the prescribed form on 24 May 2009. In terms of interim payment certificate no. 14 the amount certified in respect of value of work executed and materials on site amounted to R6 300 583,74. From this amount was deducted, as the previous gross amount certified, R5 405 500,00. In the result the amount of R1 020 395,46, inclusive of value added tax, was certified as due for payment by the defendant to the plaintiff.
- [6] On 1 June 2009 the principal agent issued an interim payment certificate purporting to be a revised version of interim payment certificate no. 14. In terms hereof the previous gross amount certified was purported to be varied to the amount R6 065 750,00, resulting in an amount certified due for payment to the plaintiff of R267 710,46. It appears from the documentation before me that the gross amount certified in terms of interim payment certificate no. 13 was indeed the amount of R6 065 750,00 and that the aforesaid amount of R5 405 500,00 was the gross amount certified in terms of interim payment certificate no. 11.

- [7] On 11 June 2009 the plaintiff issued the provisional sentence summons in the present case no. 2924/2009 for provisional sentence in the amount of R1 020 395,46 in terms of interim payment certificate no. 14. This summons was served by a deputy sheriff of Bloemfontein. His return of service reads as follows:

“On this 12th day of June 2009 at 15:20 I properly served this PROVISIONAL SENTENCE SUMMONS WITH ANNEXURES “A” & “B” by affixing a copy thereof to the outer door of the REGISTERED ADDRESS OF CARLOS NUNES CC, Defendant, at 81 ZASTRON STREET, BLOEMFONTEIN, which is kept locked and thus prevents alternative service.”

- [8] It is common cause that the registered address of the defendant is situated at Taxco Accountants at 81 Zastron Street, Bloemfontein. It is not disputed on behalf of the defendant that service as indicated by the deputy sheriff, constituted proper service of the summons on the defendant in terms of the Rules of Court.

- [9] By letter dated 15 June 2009, the plaintiff notified the defendant that the plaintiff cancels the building contract. The

defendant in turn gave notice of its cancellation of the building contract to the plaintiff by letter of its attorneys dated 18 June 2009.

- [10] On 30 June 2009 the plaintiff issued a further provisional sentence summons under case no. 3251/2009, claiming payment from the defendant in the amount of R378 035,02, based on an interim payment certificate no. 15 purportedly issued by Greyling Quantity Surveyors in terms of the building contract. On 6 July 2009 the same deputy sheriff served this provisional sentence summons with annexures upon Ms M. Visser, a receptionist employed by Taxco Accountants at the defendant's registered address. On 16 July 2009 provisional sentence was granted against the defendant as mentioned above. On 24 July 2009 the defendant filed opposing papers in case no. 3251/2009. The answering affidavit by Mr. Nunes was dated 22 July 2009. No replying affidavits were filed by the plaintiff and on 26 November 2009 the plaintiff withdrew the proceedings instituted by it under case no. 3251/2009 and tendered payment of the defendant's party and party costs.

[11] The defendant incorporated its answering affidavit and annexures thereto filed in case no. 3251/2009 in its founding affidavit in the application for rescission of the provisional sentence granted on 16 July 2009. This application for rescission was issued on 13 August 2009.

[12] A period of more than two months has passed since 16 July 2009. Therefore the provisional sentence of 16 July 2009 became a final judgment in terms of Rule 8(11). I am satisfied, however, that the provisional sentence remains a judgment granted by default for purposes of rescission thereof in terms of the common law. See **SANTOS EREC v CHEQUE DISCOUNTING CO (PTY) LTD** 1986 (4) SA 752 (W) at 755 H. See also **MAHABRO INVESTMENTS (PTY) LTD v KARA** 1980 (2) SA 772 (D) and **VAN DER MERWE v BONAERO PARK (EDMS) BPK** 2000 (4) SA 329 (SCA) p. 336 para [16].

[13] The requirements for rescission of a default judgment in terms of the common law are set out authoritatively in **CHETTY v LAW SOCIETY, TRANSVAAL** 1985 (2) SA 756 (AD) at 765 B – D as follows:

“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 Piet 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.)

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 a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”

[14] In respect of the explanation for the defendant's default, the aforesaid Ms M. Visser in an affidavit in support of the

present application stated that the provisional sentence summons in question never came to her knowledge or to the knowledge of any member of the staff of Taxco Accountants. In support of this contention she said that she was at the office on the Friday afternoon 16 July 2009 until close of business at 16h30. She said that from her desk she has a view of the entrance door of Taxco Accountants, which has a glass window. She also said that she never leaves her desk without asking someone to take her place. She said that when she left her workplace on 16h30 on 12 June 2009 there was no process affixed to this door.

- [15] In reply hereto the deputy sheriff under oath reiterated that he properly served the summons by affixing it to the main door of Taxco Accountants at 81 Zastron Street, Bloemfontein. As this is motion proceedings, the evidence of the deputy sheriff must be accepted, for purposes of decision of the application. In any event the return of service of the deputy sheriff constitutes *prima facie* proof of the correctness of the contents thereof. A person who wishes to impeach the facts mentioned in a return of service, bears the onus to show that by clear evidence. See section 36(2) of the

Supreme Court Act, No. 59 of 1959 and **SUSSMAN & CO (PTY) LTD v SCHWARZER** 1960 (3) SA 94 (O) at 96 G – H.

[16] Mr. Nunes, the sole member of defendant, said that he became aware of the provisional sentence proceedings in case no. 2924/2009 for the first time on 23 July 2009 when he was informed by the defendant's attorney that provisional sentence had already been granted in favour of the plaintiff against the defendant on 16 July 2009. In my judgment, the real question is whether in the light of the above, the aforesaid evidence of Mr. Nunes should be questioned. I do not think so. The aforesaid evidence of Mr. Nunes is not disputed by the plaintiff. There are also several factors pointing on the probabilities to the truth of this evidence. Already on 1 June 2009 the principal agent acting on behalf of the defendant purported to issue a revised interim payment certificate no. 14 stating a much reduced amount payable to the plaintiff. On 3 June 2009 the principal agent issued interim payment certificate no. 15 in terms of the building contract, certifying an amount payable by the plaintiff to the defendant. On 18 June 2009 the defendant gave notice of its cancellation of the building contract. The

defendant immediately took steps to defend the provisional sentence in the amount of R378 035,02 claimed in case no. 3251/2009 and already on 22 July 2009 Mr. Nunes signed his answering affidavit in that case. These steps taken by and on behalf of the defendant, make it most probable that the defendant failed to defend the provisional sentence proceedings under case no. 2924/2009 because it was unaware thereof. I conclude therefore that a reasonable explanation for the defendant's default was shown.

[17] In respect of the merits the defendant relies on a wide variety of defences. These include the following averments:

- (i) Interim payment certificate no. 14 contains a patent error in that the gross amount previously certified was incorrectly stated as R5 405 500,00 in stead of R6 065 750,00.
- (ii) The building contract was validly cancelled by the defendant and as a result of the principle of reciprocity of contractual obligations, the plaintiff may no longer rely on an interim payment certificate issued before the cancellation of the building contract.

- (iii) A substituting interim payment certificate was issued on 1 June 2009 and interim payment certificate no. 15 reflecting an amount of R278 416,83 due and payable by the plaintiff to the defendant was issued on 3 June 2009.

[18] I believe that the defendant has shown a defence as set out hereunder. In the light thereof and of the order that I propose to make, it is unnecessary and undesirable for me to express any opinion on the aforesaid matters raised as defences.

[19] Interim payment certificate no. 14 is in terms of the provisions of the building contract one of the kind described by Nienaber J in **THOMAS CONSTRUCTION (PTY) LTD (IN LIQUIDATION) v GRAFTON FURNITURE MANUFACTURERS (PTY) LTD** 1986 (4) SA 510 (N) at 514 I – 515 D and in **LAWSA**, 2nd Edition, Volume 2, Part 1, p. 263 - 264 para 498. Whilst the interim certificate therefore creates a self-contained debt due, the interim payment certificate constitutes a progress payment that is not regarded as compensation for a completed segment of work,

nor does it in any way constitute proof of the sufficiency of the work. In the result it would appear that in respect of an interim payment certificate, in principle and subject to the terms of the specific contract

“..... the employer will generally be entitled to set up defective work or any other breach of contract as a defence when sued upon them, whether or not an overriding arbitration clause is available, though no doubt he will be bound by the certificate to the extent that he will not be able to dispute the valuation element in it.”

See Hudson’s **BUILDING AND ENGINEERING CONTRACTS**, Tenth Edition, p. 494. See also the **THOMAS CONSTRUCTION**-case, *supra*, at 516 D – E. It is not necessary to further discuss the defences available to a claim based on an interim payment certificate such as the one in question, as it goes without saying that payment of the interim payment certificate, either specifically or as a result of overpayment, must be a complete defence to an action on the interim payment certificate. See **LAWSA**, *supra*, para 498.

[20] In its answering affidavit and annexures thereto in case no. 3251/2009, incorporated in the founding affidavit in the present application, the defendant set out in detail and with supporting documentation in all instances except for one, that the defendant before 24 May 2009 had paid to the plaintiff in respect of the building contract the total amount of R6 362 233,48 including value added tax where applicable. The one payment for which supporting documentation is not available, is a payment in the amount of R61 140,00, made according to the defendant, to the plaintiff in cash on 24 October 2008 at the urgent request of the plaintiff in order to enable the plaintiff to make payment of wages. The defendant in the same manner also set out that before 24 May 2009 it made payment in respect of the building contract on behalf of the plaintiff in the amount of R1 047 496,16, including value added tax. Supporting documentation for all these payments are supplied, except in respect of a payment in the amount of R665,00 made on 21 October 2008. The defendant says that it is unable to retrieve this invoice. The total amount so paid amounts to R7 409 729,64. This amount exceeds the gross amount certified in terms of

interim payment certificate no. 14 namely R6 300 583,74 plus value added tax thereon.

[21] The only response of the plaintiff hereto is a sentence generally denying everything stated by the defendant that is contrary to the plaintiff's case. This is ambiguous and at best a bare denial on the part of the plaintiff of very detailed evidence. In the circumstances, in my judgment, the defendant has shown in these proceedings that it will probably show that payment was made by the defendant to the plaintiff in an amount exceeding the gross amount plus value added tax certified in interim payment certificate no. 14. This would constitute a complete defence to the provisional sentence summons in this case.

[22] It follows that the provisional sentence as it exists today must be set aside and that leave should be granted to the defendant to file an answering affidavit, if so required.

[23] Costs remain to be decided. In my view, the decisive factor is that an indulgence is sought by the defendant as a result of its failure to respond to a summons that was properly

served on the defendant at its registered address. The question therefore is whether the opposition of the plaintiff was unreasonable. In my judgment that is not the case, especially in the light thereof that even in the replying affidavit the defendant relied on the provisions of Rule 42, which reliance was not proceeded with before me, and rightly so. I am also not convinced that the plaintiff acted *mala fide*. In my judgment, in the exercise of my discretion in respect of costs, the defendant should pay the costs of the application including the costs of the opposition thereto.

[24] In the result the following orders are made:

1. The provisional sentence granted under case no. 2924/2009 is set aside.
2. The defendant is granted leave to file answering affidavits in the said proceedings on or before 15 January 2010.
3. The defendant is ordered to pay the costs of the application for rescission of provisional sentence, including the costs of opposition thereto.

C.H.G. VAN DER MERWE, J

On behalf of the plaintiff:

Adv. L. Le R. Pohl
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of the defendant:

Adv. D.J. van der Walt
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