IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – EAST LONDON

In the matter between:

Case no: EL 323/2010
ECD 523/2010
Date Heard: 27/11/12
Date Delivered: 30/11/12

IMITHA YELANGA ENGINEERING CC **APPLICANT**

And

PLM CONSTRUCTION CC t/a PLM PLANT HIRE **RESPONDENT**

JUDGMENT

SMITH J:

[1] The Applicant seeks an order rescinding the default judgment granted on 20 March 2012, in terms whereof it was ordered, *inter alia,* to pay an amount of R1 046 114.93 to the Respondent.

[2] The Applicant was initially represented by Mxuko attorneys, who withdrew as attorneys of record during February 2011. At that stage however pleadings had already closed and the matter was ripe for hearing. Even though the notice of withdrawal did not comply with the rules of court in several material respects, the Respondent had caused a notice of set down to be served by the sheriff at the address stated in the aforesaid notice. The sheriff was however unable to serve the notice of set down at the given address because the premises were found to be vacant and locked.

[3] In addition, the Registrar's notice of set down was also sent to the address which had been provided by the Applicant's erstwhile attorneys.

[4] The Applicant contends that it never received a notice of set down, or any other process from the Respondent. It became aware of the judgment for the first time on 8 May 2012 when the sheriff had attempted to execute a warrant of execution against its property.

[5] The Applicant in addition contends that the default judgment was granted erroneously. It avers that the notice of set down referred to the wrong case, being case number 231/2010, instead of the correct case number, being 232/2010. The latter case was therefore not properly set down and the judgment was therefore granted in error. This averment has however turned out to be unfounded as it was subsequently established that the Registrar's notice of set down did in fact bear the correct case number, and the matter was accordingly properly set down.

[6] Insofar as its defence to the Respondent's claim is concerned, the Applicant's founding affidavit stated only the following:

> "A total amount of R1 692 164.00 was electronically transferred to the first respondent between 4th June 2009 and 16th November 2009. Copy of bank statement is attached marked 'PR 13'."

[7] It is trite law that a court may rescind a default judgment if the applicant has shown that the application is *bona fide*; has provided a reasonable explanation for his or her default; and has established that the default was not willful or due to gross negligence. In addition, an applicant must also show that he or she has a

bona fide defence, and that the application was not merely brought in order to delay the plaintiff's claim. He or she must therefore set out averments which, if proved at a trial in due course, will constitute a comprehensive defence to the plaintiffs' claim. **(Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (OPD) at 476-477; Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 9E-F)**

[8] I am not persuaded that the explanation provided by the Applicant establishes that it was not in willful default. The Applicant had, on its own admission, known that its attorney of record had withdrawn during February 2011. It also knew at the time that the pleadings had closed and all that remained was for the matter to be set down for hearing by the Registrar. It did not make any effort to enquire from the Registrar as to the progress of the case, or to instruct attorneys to represent it. In addition, its representative had known that the notice of withdrawal had provided an address where further process could be served on it. It has not taken any steps to ensure that its representative was available to receive service of processes at the aforesaid address, or to provide another address for service of court documents. I am therefore of the view that, at the very least, the Applicant was grossly negligent in this regard.

[9] In the event the Applicant has failed to set out averments which constitute a *bona fide* defence to the Respondent's claim. Apart from stating that it had paid some R1.6 million to the Respondent, the Applicant has not stated in respect of which accounts these monies were paid, or whether they constituted full and final settlement of the Respondent's claim. In an addendum which was annexed to the

Respondent's declaration, the latter claimed that the Applicant owed it an amount of R2 628 275.93 and that it had paid the sums of R1 482 161 and R100 000, respectively, leaving the balance of R1 046 114. 93. Even on its own version therefore the payment made by the Applicant could not have been in full and final settlement of the Respondents' claim.

[10] The Applicant's plea in the main action was equally evasive in this regard. Paragraph 6 thereof reads as follows:

> "The contents of this Paragraph are denied as if specifically traversed. In amplification thereon the Defendant owes the Plaintiff an amount of R16 000.00 as he had paid him a certain amount of money."

[11] The Applicant has therefore in my view failed to establish any of the legal requisites for rescission of judgment, and the application can therefore not succeed.

[12] In the result the application is dismissed with costs.

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J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Advocate Mayekiso
Attorney for the Applicant	:	Mquqo Attorneys Shop 4, Zanempilo Health Oxford Street East London Ref: Kem/nn/c.1429

Counsel for the Respondents	:	Mr Dekeda
Attorney for the Respondents	:	Abdo and Abdo No 33 Tecoma Berea East London Ref: Mr Dekeda/vs/b02630
Date Heard	:	27 November 2012
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