REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 49337/2017

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

23.03.2020
DATE

SIGNATURE

In the matter between:

CITY OF JOHANNESBURG	Applicant
and	
EAGLE TWO PROPERTY INVESTMENTS (PTY) LTD	First Respondent
EAGLE THREE PROPERTY INVESTMENTS (PTY) LTD	Second Respondent

In re:

EAGLE TWO PROPERTY INVESTMENTS (PTY) LTD	First Plaintiff
EAGLE THREE PROPERTY INVESTMENTS (PTY) LTD	Second Plaintiff
and	
CITY OF JOHANNESBURG	Defendant

JUDGMENT

EICHNER-VISSER AJ

[1] In this application, the Applicant applies for a rescission of a default judgment that was granted on the 25th of April 2019. In addition, the Applicant seeks an order that this Honourable Court condones the non-compliance with the Rules of this Honourable Court relating to the time period within which it was to file its plea and that the Notice of Bar served on the Applicant by the First and Second Respondents on the 13th of February 2018, be uplifted and/or removed.

[2] It is trite that in rescission applications, the Applicant must prove that he was not in wilful default and that his defence is a bona fide defence.

[3] In ***Chetty v Law Society, Transvaal*** 1985 (2) SA 756 (A) at 765 D-F, Miller JA formulated the test in these terms:

> "*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. An 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of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospect of success on the merits. The reason for my saying that the appellant's application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, or elsewhere in the papers, any reasonable or satisfactory*

explanation of his default and total failure to offer any opposition whatever to the confirmation on 16 September 1980 of the rule nisi issued on 22 April 1980."

WILFUL DEFAULT

[4] Summons was issued by the First and Second Respondents (hereinafter collectively referred to as "the Respondents") on the 9th of January 2018. On the 11th of January 2018, the Applicant served a Notice of Intention to Defend and was thus enjoined to serve its plea on or before the 8th of February 2018. The Respondents served a Notice of Bar on the Applicant on the 13th of February 2018. On the 20th of February 2018, and with the consent of the Respondents, the Notice of Bar was extended to the 28th of February 2018, whereafter the Applicant was *ipso facto* barred from filing its Plea. Despite being under Bar, the Respondents, on the 18th of April 2018, once again extended the deadline for the Applicant to file its plea to noon on the 23rd of April 2018.

[5] Thus, the Applicant had to file its plea by the 23rd of April 2018, even though *ipso facto* already under Bar, failing which the Respondents clearly indicated to the Applicant on numerous occasions thereafter that default judgment would be applied for.

[6] The matter was set down for default judgment, first on the 4th of February 2019. The matter was postponed on that day as the Return of Service was not properly in the Court file. The matter was again set down for the 11th of March 2019. However, on this day, the Applicant stated that its legal representative, Advocate Sithole had been requested to seek a postponement of the matter to enable the Applicant to file an application to uplift the Notice of Bar.

[7] I was advised that the postponement was agreed to by the Respondents, which gave the Applicant a further ten days to bring the application for the upliftment of the Notice of Bar – namely, the 26th of March 2019.

[8] The Applicant's legal advisor who signed the founding affidavit in support of the rescission application (hereinafter referred to as "Ngwana") stated that the Applicant's attorneys of record "assumed" that Advocate Sithole was in the process of drafting the application to uplift the Notice of Bar.

[9] This was clearly not done and, on the 16th of April 2019, the Respondents served a further application for default judgment on the Applicant, which application was to be heard on the 25th of April 2019. The Applicant states that on the 17th of April 2019, the Applicant's attorneys sent Advocate Sithole an e-mail informing them of the new set down date and requesting progress with the application to uplift the Notice of Bar. This was followed by a conversation on the 17th of April 2019 and by a further e-mail on the 23rd of April 2019

[10] On the 25th of April 2019, Advocate Sithole once again appeared and again requested a postponement.

[11] The Applicant's reason for seeking a further postponement was that, on the 24th of April 2019, in the afternoon, and after its attorneys of record's office had closed, a draft application was sent to his attorney by Advocate Sithole "for service" on the 25th of April 2019. However, on the 25th of April 2019, Ngwana avers it was not possible to "serve" the application to uplift the Bar, since the Registrar advised that it was not possible to "issue" an application without the Court file, which was, at that stage, already with the presiding Judge. Default judgment was granted on the same day, with the result that the application to uplift the Bar on the Applicant's plea was never filed.

[12] It is noteworthy for me to mention at this stage that the non-availability of the Court file is not an impediment to the service of the application on the Respondents. The fact that the Court file was already with the presiding Judge on that day would merely have hampered the filing of the application with the Registrar of this Court.

[13] Ngwana is a Senior Legal Advisor at the Applicant and it was argued on his behalf that he was under the impression that his legal representatives had properly taken the necessary steps to prevent default judgment from taking place. He therefore puts the blame on his legal representatives for their inept conduct and that same should not be attributed to him.

[14] The Applicant attempts to set out a defence as to why it did not bring an application for the upliftment of the Bar within the ten days from the 11th of March 2019. As such, the Applicant is of the view, and this was expressed in argument, that the Applicant was only under Bar from the 26th of March 2019.

[15] This Court does not agree, as it is clear that the Applicant was already under Bar on the 23rd of February 2018. The Court is further of the view that the extensions afforded to the Applicant by the Respondents were not extensions of the period referred to in the Notice of Bar but rather extensions affording the Applicant the opportunity to launch their application to uplift the bar.

[16] No explanation was given by the Applicant as to:

16.1 why the requisite application for the upliftment of Bar and a plea was not served from that day; and

16.2 why it did not bring the application within the time period agreed on the 11th of March 2019, being a further ten days; and

16.3 why the Applicant or its legal representatives waited until the very last moment to attempt to serve and file the Notice to Uplift the Bar.

[17] In *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at para 22, the following is stated:

> *"An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable."*

[18] The Applicant has failed to give an explanation for the entire period of the delay and the explanation given for why it was in default since the 26th of March 2019, falls short of reasonable. As such, it is found that the Applicant is in wilful default.

ASPECTS OF APPLICANT'S DEFENCE AND SUCCESS ON THE MERITS

[19] It is admitted by the Applicant that the municipal accounts of the Respondents contained errors and that there were indeed undue debits on the account but that the accounts had been corrected before default judgment had been applied for. It was argued that the Respondents were credited in an amount of R365 985.30 and R52 978.09 respectively in respect of certain investigations that were done and that the Respondents' accounts had been sorted out and debits appeared on their accounts.

[20] No explanation is given as to how the aforesaid amounts are arrived at, except that it was as a result of certain investigations. The Applicant does not inform the Court as to how the investigations took place and how the debatement process occurred.

[21] It was confirmed by the Respondents that it has been difficult to ascertain the quantum of the claim in the particulars of claim. However, it was able to do so by employing the services of an independent Utilities Management Company known as Eco-

On to investigate the problem with special reference to numerous invoices received from the Applicant and paid by the Respondents, despite the queries raised and the threats of a termination of supplied service should these invoices not be paid.

[22] The Applicant simply makes averments that an investigation took place and that, as a result of this investigation, the Respondents were credited with the amounts as stated hereinabove. The Applicant has not placed information before this Court that enables it to determine whether there is a prospect of success on the merits. The Applicant's averments in this case mostly appear to be bald, vague and sketchy.

[23] It is settled law that an Applicant in an application for rescission of judgment need not deal fully with the merits of the case but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that there is a bona fide defence, and that the application is not made merely for the purpose of harassing the Respondent.

[24] In *Ferris and another v Firstrand Bank Limited and Another* 2014 (3) SA 39 (CC) the test for rescission was set out. At para 24 it states the following:

> *"Similarly, the requirements under Rule 31 and the common law have not been met. Under both grounds, Mr and Mrs Ferris must show good cause for rescission, which means that they must (a) give a reasonable explanation for their default; (b) show that the rescission application is brought bona fide; and (c) show that they have a bona fide defence, including a prima facie case on the merits."*

[25] At para 25, the Court held:

> *"Mr and Mrs Ferris have not given a reasonable explanation for their default. In attempting to explain their default, they blame the negligence of their erstwhile attorneys. An attorney's negligence does not always constitute a "reasonable explanation". Further, it is not seriously disputed that Mrs Ferris knew about the default judgment about 20 days after it was granted, when FirstRand's attorney emailed her a copy of the default judgment, to which she replied. This was long before the application for rescission was made."*

[26] It was also held in *Van Wyk v Unitas Hospital* (*supra*) at common law the requirements for rescission of default judgment are twofold. First, the Applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that, on the merits, it has a *bona fide* defence, which *prima facie* carries some prospects of success. Proof of these requirements is taken as showing that there is sufficient cause for the order to be rescinded. A failure to meet one of them may result in the refusal of the request to rescind. (para 85)

[27] In *Brangus Ranching v Plaaskem (Pty) Ltd* 2011 (3) SA 477 (KZP) at para 31, Van Zyl J held:

> *"The reason for this reluctance to circumscribe the meaning of "good cause" appears from the well-known passage from the judgment of Smalberger J (as he then was) in HDS Construction (Pty) Ltd v Wait 1979 (2) SA 298 (E) at 300 H – 301 A, where it was stated that "In determining whether or not good cause has been shown, and more particularly in the present matter, whether the defendant has given a reasonable explanation for his default, the Court is given a wide discretion in terms of Rule 31 (2) (b). When dealing with words such as 'good cause' and 'sufficient cause' in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (Cairn's Executors v Gaarn 1912 AD 181 at 186; Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352 - 3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances."*

[28] By reason of the aforementioned, I grant the following order:

1. The Applicant's application as set out in its Notice of Motion is dismissed with costs.

T EICHNER-VISSER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING: 3 MARCH 2020

DATE OF JUDGMENT: