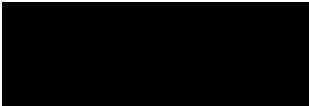


REPUBLIC OF SOUTH AFRICA



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

|  |                                 |
|--|---------------------------------|
| (1)  | REPORTABLE: NO                  |
| (2)  | OF INTEREST TO OTHER JUDGES: NO |
| (3)  | REVISED NO                      |
|  | 1 Sept 2023                     |
| SIGNATURE  | DATE                            |

CASE NO: 701/2021

In the matter between:

NMPOFU TRADING AND PROJECTS CC T/A NM LOGISTICS

Applicant

and

COCHRANE STEEL PRODUCTS(PTY)LTD

Respondent

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JUDGMENT

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**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 1st of September 2023.

**BADENHORST AJ**

[1] On 21 February 2023 this Court granted condonation for the applicant to file an application for rescission of default judgment out of time. The present judgment concerns the merits of that application.

[2] The test for rescission of a default judgment (as it has been developed by the Courts) is summarised as follows in Erasmus' Superior Court Practice:<sup>1</sup>

*"In order to succeed, an applicant for rescission of a judgment taken against him by default must show good/sufficient cause. This generally entails that the applicant must:*

*(i) give a reasonable (and obviously acceptable) explanation for his default;*

*(ii) show that his application is made bona fide; and*

*(iii) show that on the merits he has a bona fide defence which prima facie carries some prospect of success.*

*The courts, however, retain a discretion which must be exercised after a proper consideration of all the relevant circumstances."*

[3] The defendant's excuse for not defending the matter at the appropriate time is that the summons was not discovered after it was affixed to the principal door at the applicant's registered office. The deponent explains that neither he nor any other employee received the summons. The respondent speculates that *"the only possible reason why (the deponent) would not have had sight of the summons is because another employee took same and did not bring it to his attention."* On the strength of this theory respondent argues that the explanation is *"wholly inadequate"* and points to the fact that there are no affidavits filed by the other employees.

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<sup>1</sup> RS 20,2022,D1-564/5

- [4] I find the explanation put forward by the applicant to be reasonable. There was, in my view, no need for other employees to file supporting affidavits to prove a negative (speculative) proposition advanced by the respondent.
- [5] The real issue is whether applicant has satisfied the requirement to show a *bona fide* defence on the merits which *prima facie* carries some prospect of success.
- [6] The claim is for damages in the sum of R749 129.98 allegedly suffered to goods of the plaintiff, carried by the defendant from Kempton Park to the Eastern Cape, in terms of a written agreement concluded on 28 August 2019 [“the agreement”].
- [7] In terms of the agreement defendant, as “Service Provider,” assumed the following obligations:

*“4. OBLIGATIONS OF THE SERVICE PROVIDER*

*4.1. The Service Provider:*

*4.1.1. Will be responsible for collecting all specified Goods from the Collection Location/Locations as designated by CSP (plaintiff) on the agreed and at the agreed time;*

*4.1.2 Will ensure that all specified Goods that have been collected in accordance with clause 4.1.1 above are safely and timeously transported from the relevant Collection Locations/Locations to the specified Delivery Location/Location;*

*4. 1.3. Shall exercise all reasonable and professional skill, care and diligence in the performance and completion of the Services;*

*4 .1.4.....; and*

*4 .1.5. Is strictly required to ensure that it maintains the appropriate insurance cover at all times during the duration of this Agreement and which insurance cover shall cover any Goods placed in the care of the Service Provider for purposes of rendering the Services. The Service Provider will provide CSP with the necessary certificates immediately on request evidencing that the Service Provider has the necessary insurance cover in place. In this regard, the relevant Insurance covers are as follows:*

*4.1.5.1 Goods in Transit (GIT) Cover - R1 500 000 .00 (Ono Million Five Hundred Thousand Rand)*

*4.1.5.2. All Risk Cover – R1 000 000.00 (One Million Rand).”*

- [8] In terms of clause 6.1 of the agreement, all risk in the goods shall pass to the applicant upon same being loaded onto its vehicles and “*the Service Provider shall remain solely responsible for the Goods until such time as all the Goods have been offloaded and accepted at the Delivery Location/Locations.*”

[9] It is clear from clause 5.1.2 that plaintiff was responsible for loading of the goods onto defendant's vehicle. This appears from the following provision thereof:

*"5.1 CSP [the plaintiff] shall ensure that it:....*

*5.1.2 Ensure [sic] that all specified Goods to be delivered are made available and are loaded onto the Service Provider's vehicles timeously at the relevant Collection Locations/Locations. The Service Provider acknowledges that given the nature of CSP's products, loading may take longer than usual and in this regard will allow a loading time of up to 8 (Eight) hours per vehicle depending on the quantity of Goods to be delivered;..."*

[10] On 27 September 2019 a portion of the load was damaged in transit when it slipped off the defendant's vehicle near Maclear Mountain, Eastern Cape *en route* to the point of delivery. While the load was temporarily left unattended by the driver (who left to summon the assistance of the South African Police Service), some of the goods were apparently stolen, adding to the loss.

[11] An insurance claim submitted by defendant was rejected on two grounds namely: (a) the load was not suitably or adequately secured; and (b) the vehicle was left unattended.

The insurance broker's report to defendant (emailed on 5 December 2019) offers the following explanation of what apparently happened:

*"We regret to advise that as per the attached rejection letter the Insurer has declined to accept liability in respect of the loss that occurred on 27 September 2019. The reason being that Nmpofu Trading cannot be held liable in respect of the load being insufficiently packaged under full custody and control of Cochrane as Nmpofu under no circumstances acted negligent in term of which they could attract any accountability. According to the information at our disposal the driver from the onset indicated that he was concerned about the mannerism in which the load was packed and secured, and he also informed Cochrane's management team - Samuel - accordingly.*

*In light of the outcome of the Assessors report as well as the Policy Terms and Conditions the claim cannot be considered due to the load being inadequately secured and same being the proximate cause of the loss.*

*It is further noted that a subsequent rejection relates to Prevention of Loss which bears reference to the fact that the driver left the scene of the incident to go to the SAPS and only returned later upon which it was found that certain of the items were indeed stolen. In*

*respect of the drivers' actions there was no prevention imposed at the scene to avoid any further loss and it might be that Cochrane may have recourse against yourself in this regard.*


*From the above it is evident that the Insurer will unfortunately not cover the loss in lieu of the above reasons and attached rejection letter."*

- [12] Unsurprisingly, defendant's principal defence is that the load collapsed and fell off the vehicle because, at the time of loading by plaintiff, its representative negligently overloaded or negligently loaded the truck and failed to properly secure the load ignoring the driver's warnings.
- [13] The plaintiff argues that because in terms of clause 6.1 of the agreement "all risk" in the goods rested upon the defendant and it remained solely responsible for the Goods until such time as all the Goods had been offloaded and accepted, no *bona fide* defence is demonstrated.
- [14] I am however satisfied that defendant has disclosed a *bona fide* defence which *prima facie* carries some prospect of success for the following reasons:
- a. Plaintiff is the party which assumed responsibility for loading the goods onto the vehicle (indeed it is afforded up to 8 hours per vehicle to perform this task).
  - b. If it is established at trial that plaintiff's (loading) work was deficient (as alleged by defendant), a reasonable possibility exists that it might not escape liability for all or some of the loss.
  - c. The risk assumed by defendant for carriage of the goods arguably excludes defects in loading and securing of the load for which plaintiff carried the responsibility.
  - d. There may be a debate, in due course, about responsibility for the stolen goods (as indicated in the broker's report), but it cannot be said at this stage that the defendant has not raised a *bone fide* defence to at least a substantial portion of the amount it was ordered to pay.

- [15] There is a further defence raised by defendant which has a reasonable prospect of success: it contends that the amount claimed (and for which default judgment was taken) is far in excess of the percentage of goods actually lost in the accident and, in addition, that costs were granted on a punitive scale without any foundation in the agreement.
- [16] Counsel for the plaintiff was unable to locate any provision in the agreement which warrants a special order for costs.
- [17] As far as the costs of this application are concerned, I take the view that costs should be directed to be in the cause.

I accordingly grant the following order:

1. The default judgment dated 12 September 2022 is set aside; and
2. The costs of this application are directed to be costs in the cause..



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C H J BADENHORST  
ACTING JUDGE OF THE HIGH COURT  
JOHANNESBURG

APPEARANCES

|                        |                             |
|------------------------|-----------------------------|
| DATE OF HEARING:       | 28 August 2023              |
| DATE OF JUDGMENT:      | 1 September 2023            |
| APPLICANTS' COUNSEL:   | Adv.R.F de Villiers         |
| INSTRUCTED BY:         | Deneys Zeederberg Attorneys |
| RESPONDENT'S COUNSEL : | Adv R Bhima                 |
| INSTRUCTED BY:         | Rademeyer Attorneys         |