IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 25008/2011

DATE: 2/4/2014

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

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DATE SIGNATURE

In the matter between:

GIJIMA HOLDINGS (PTY) LTD Applicant

and

ISIQINA PROPERTY HOLDINGS (PTY) LTD Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

INTRODUCTION AND SUMMARY OF ISSUES

1. The applicant is the defendant in the main action between the parties. The respondent as plaintiff, instituted action against the defendant for payment of the sum of R3 308 405.12 being in respect of goods sold and delivered by the plaintiff to the defendant at the latter's instance and request. The applicant seeks an order for the upliftment of a notice of bar in terms of rule 26.

2. I will refer herein to Gijima Holdings (Pty) Ltd as the applicant and to Isiqina Property Holdings (Pty) Ltd as the respondent.

3. The respondent opposed the application for the upliftment of the bar and launched an application for default judgment. The respondent has also set down for simultaneous hearing an application in terms of rule 30 to set aside the plea filed by the applicant as an irregular step.

4. The timeline in this matter is alarming in that it would appear that both litigants and/or their attorneys were not too perturbed about the pace of the litigation process as will more fully appear hereunder. A simple summons was initially issued and served on 11 May 2011. The applicant filed an appearance to defend on an unknown date but this notice has gone missing and neither party was able to furnish me with a copy thereof. It is common cause that the appearance was properly served and filed. I must accept that the appearance to defend was filed within the period provided for in the summons. The latest that the

appearance would have had to have been filed is the 25th of May 2011. I will for purposes of this judgment accept this date.

5. In response to the appearance to defend the respondent filed a declaration together with a notice in terms of rule 28. The declaration was served at a post box there being no other serve possible on the day. An affidavit filed by the clerk of the respondent's attorneys shows that the declaration was served by leaving it "*in the Beeld post box*."

6. The applicant did not apply for the setting aside of the service of such declaration as an irregular step and I was advised at the hearing by Mr Strathern, who appeared for the applicant, that he would not be taking any point on this aspect. Had the applicant taken steps against the improper service of the declaration it would probably have saved everyone some time and unnecessary costs. For non-apparent reasons this did not happen and on 13 January 2012 the amended pages were filed in respect of the amendment to the simple summons. The declaration incorporated the amendment.

7. The 20 day period to file a plea to the declaration would have commenced on Monday 16 January 2012 and after the *dies non* period. The 20 day period to file the plea to the declaration was thus 10 February 2012. On 3 May 2012, after no plea had been filed, the respondent's attorneys filed a notice in terms of rule 26. This notice was served upon the applicant's local attorneys of record. Regard

being had to the dies in this notice the plea should have been filed by 10 May 2012.

8. The respondent argued that the applicant had been *ipso facto* barred from filing a plea and would have had to apply to court for the upliftment of the bar from 11 May 2012 onwards. Nothing transpired until 12 June 2012 when the respondent filed an application for default judgment as contemplated in rule 31 (5) (a). This application was also served at the address of the applicant's local attorneys of record. In response thereto the applicant's plea was filed on 19 June 2012. This was followed by a rule 30 notice on 29 June 2012, incorporating a rule 23 notice dealing with allegations that the plea was vague and embarrassing and/or did not set out a defence and calling for the removal of such complaint.

9. What followed is 3 letters, one from the applicant's attorneys calling for a copy of the rule 26 notice, the second in response by the respondent's attorneys providing such notice and the accompanying emails and the third, the gist of which was that the applicant's attorneys advising the respondent's attorneys that they did not receive the notice in terms of rule 26 from their local correspondent. It bears mentioning that there are some four other cases between the same parties that have the same facts and in respect of which the respondent has followed the same route for judgment against the applicant.

10. On 20 July 2012 the respondent filed an application for judgment together with the rule 30 application which included the exception contained therein. The applicant, in response thereto and on 22 October 2012, filed its application for condonation for the late filing of the plea, the upliftment of the bar and for leave to file a plea to the declaration. The applicant tendered the costs of the application on the unopposed basis save that in the event of the respondent opposing the application that such costs be paid by the respondent.

11. The respondent then filed its answering and replying affidavits respectively to the two applications and on 11 January 2013 the applicant filed its reply to the application for condonation.

THE EXPLANATION BY THE APPLICANT'S ATTORNEY

12. The applicant's attorney deposed to an affidavit wherein she explained that she had not received the notice of bar from her Pretoria correspondent despite the notice having been served upon them. A search conducted on her computer server at her office revealed that no such notice had been received on her computer from her correspondent. When she received the application for default judgment in terms of rule 31 (5) (a) she did not pay proper attention thereto and her attention was aimed at the 5 day period contained in paragraph 2 thereof. She incorrectly assumed that this document was in fact the notice in terms of rule 26. She reacted thereto by instructing

junior counsel to draft a plea which plea was then filed after being transmitted to Pretoria and signed by the local attorney.

13. The respondent's argument is based largely, if not solely, on the allegation that there is no good cause shown for condonation if regard is had to the time line and the lack of a proper explanation by the applicant's attorney. Erasmus Superior Court Practice B1-171 gives the following commentary on the expression "*on good cause shown*": " …*subrule requires 'good cause' to be shown, and this gives the court a wide discretion. The courts have consistently refrained from attempting to formulate an exhaustive definition of what constitutes 'good cause', because to do so would hamper unnecessarily the exercise of the discretion*." It must follow that the court's discretion must be exercised after a proper consideration of all the relevant circumstances.

THE LAW AND CONSIDERATION OF FACTS

14. I was referred to several cases wherein what is expected of a person who is required to show good cause. In Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 SCA at para 11 it was held that the requirements are:

14.1 Giving a reasonable and acceptable explanation for the default.

14.2 Showing that the party seeking the indulgence is acting *bona fide*; and

14.3 Showing that the party seeking the indulgence has a *bona fide* defence which *prima facie* has some prospect of success.

15. The respondent submitted that the applicant's attorney failed to give a reasonable and acceptable explanation, neither is she acting *bona fide* and with reference to the plea there is no *bona fide* defence which prima facie has some prospect of success.

16. Although the applicant's attorney can and ought to be severely criticized for her lack diligence and failure to give proper attention to documents in her possession, coupled with the fact that she obviously had failed to pay attention to the particular file, which is linked to other files in her office, I am inclined to accept her explanation, in the absence of any contradictory evidence. She did not appreciate that the document in her possession was an application for default judgment but thought it was a notice of bar. As negligent as her conduct may be shown to be, to rule otherwise would be tantamount to accepting that she is lying under oath. If I accept that she is *bona fide* in seeking the indulgence (despite her conduct falling well short of that expected of the reasonable attorney) then I must accept that her explanation is reasonable and acceptable under the circumstances that she describes.

17. What is left for me to decide is whether the applicant has a *bona fide* defence which *prima facie* has some prospect of success.

18. The basis upon which the applicant contends that it has *bona fide* defence is based upon two contentions, namely that the respondent ceded its claim against the applicant to a company called Sizwe Cabling and that the respondent's claim has prescribed.

19. The respondent contends that the applicant instituted action against Sizwe Cabling ("Sizwe") in this court for payment in respect of services rendered by the applicant to Sizwe. The counterclaim against the applicant by Sizwe was based upon an agreement of cession in terms of which a number of associated companies of the Sizwe Group ceded to Sizwe the claims of such companies against the applicant. The applicant thus argued that in terms of such cession the respondent ceded to Sizwe its claim against the applicant, and consequently has no *locus standi*.

20. It was conceded by the respondent that the cession was not in accordance with the continuing common intention of the respondent and Sizwe and that the cession falls to be rectified. The respondent argued that the applicant is not able to dispute the respondent's evidence relating to the claims ceded and that aside from denying the respondent's *locus standi* on the basis of the cession, the applicant has not denied its liability for the amounts claimed.

21. The second leg of the applicant's defence lies in the contention that the claims have prescribed. Both parties made submissions about the dates upon which the claims would have arisen and when the debts

became due for payment. In my view I am not obliged to make a finding on the question of prescription. Clearly there are some issues that may require oral evidence to be presented to the court to determine the due dates, of amounts that may be found to be due.

22. Moreover, the other cases that are linked to this case would have to be considered on the same basis and to distinguish this case from the others and allow another court to adjudicate perhaps differently between cases that are the same in causes of action and between the same parties, would, in my view interfere with the principles of justice.

COSTS

23. This leaves only the question of costs. The applicant tendered the costs on the unopposed basis for the application for condonation and for the upliftment of the bar. The applicant submitted that I should order the respondent to pay the costs relating to all the applications before me because the opposition was unreasonable. The respondent submitted that if I accept that the opposition was reasonable I should order the applicant to pay the costs of all the applications. Neither party asked for a punitive order as to costs. The respondent did not ask for costs *de boniis propriis* against the applicant's attorney. Both parties submitted that the costs of two counsel should be allowed. The applicant's junior counsel was present at court on the day this case should have been heard and then became unavailable on the actual date of hearing.

24. In Erasmus Superior Court Practice at E12-6A-7 and the cases cited therein, it is stated that general rule is that where a successful application is made for the grant of an indulgence the costs do not follow the event. Furthermore, in such cases it is the applicant who should pay for all the costs as can reasonably be said to be wasted because of the application. The justification for an order that an applicant is to pay the respondent's costs of opposition is that the respondent ought not to be put in a position where he opposes the granting of an indulgence at his peril, in the sense that, if the amendment is granted, he cannot recover his costs of opposition, or may even have to pay such costs as are occasioned by his opposition, despite the fact that such opposition is reasonable in the circumstances. In these circumstances it is my view that the opposition was not unreasonable. Consequently the applicant ought to pay the costs of the opposition of the application.

CONCLUSION

25. In the circumstances I make the following order:

25.1 The application for condonation for the late filing of the plea is granted and the notice of bar is uplifted.

25.2 The respondent's application for default judgment is refused.

25.3 The respondent's applications in terms of rules 30 and 23 are refused.

25.4 The applicant is afforded a period of 10 days to file its plea to the respondent's declaration.

26.5 The applicant is ordered to pay the costs of the respondent on the scale as between party and party, in respect of the application for condonation and upliftment of the bar, the opposition thereof, the costs of the default judgment application and the costs of the rule 30 and rule 23 applications, which costs shall include the costs consequent upon the employment of two counsel.

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AVVAKOUMIDES, AJ

JUDGE OF THE HIGH COURT

Representation for the Applicant:

Counsel	Adv: P Strathern
	Adv: C Cothill
Instructed by	Brain Kahn Inc.

Representation for Respondent:

Counsel	Adv: JJ Brett SC
	Adv: N Segal
Instructed by:	Gary Rachbuch & Associates