IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: A657/2013

6/10/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

2014 -10- 06

DATE SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2014 -10- 06
JUDGE'S SECRETARY
REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

DISCOVERY AUCTIONS APPELLANT

and

CITY COURIERS RESPONDENT

In re:

Case Number: 47177/2010

DISCOVERY AUCTIONS APPLICANT

and

CITY COURIERS RESPONDENT

Coram: MABUSE J *et* HUGHES J

JUDGMENT

HUGHES J

[1] The appellant seeks condonation for the late filling of a rescission application for an order granted on 14 March 2011. The said order directs the appellant to pay the respondent R100 000 000.

[2] Initially the respondent opposed the rescission application. The respondent filed opposing papers and heads of argument. However, on 29 July 2014 the respondent served a notice of withdrawal of its opposition and heads of argument. The respondent opted to abide by the decision of this court.

[3] The appellant brings this rescission application in terms of section 36(1) (a) of the Magistrate's Court Act 32 of 1944 read with Rule 49(1) and (3) of the Magistrate's Court Rules.

[4] For easy reference, the sections mentioned are set

Section 36(1) (a) of the Magistrate's Court Act 32 of 1944:

"*36 What judgments may be rescinded*

(1) The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), suo motu-

(a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;..."

Rule 49(1) and (3) of the Magistrate's Court Rules:

"*49 Rescission and variation of judgments*

(1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or

variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 days' period shall not be applicable to a request for rescission or variation of judgment brought in terms of subrule (5)....

(3) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim."

[5] Initially, the respondent instituted the case out of the Durban Magistrate's Court under case number 13985/2009. In the summons an allegation was made that the "*Whole cause of action arose within the jurisdiction of the above Honourable Court*", that being Durban. The appellant (defendant) raised a special plea regarding jurisdiction and the respondent (plaintiff) withdrew the case from Durban and tendered the costs.

[6] The special plea of jurisdiction, whether the jurisdiction is Durban or Pretoria, falls away once the respondent withdrew the action in the Durban Magistrates court and tendered costs. The respondent issued new summons, with case number 4177/2010, out of the Pretoria Magistrate's Court. The respondent served the summons on the appellant on 31 May 2010. These papers alleged that the whole cause of action took place in the jurisdiction of Pretoria.

[7] On 18 June 2010, the appellant served a notice of intention to defend. This notice emanated from the offices of Jan du Plessis Attorneys. Naturally, these were the attorneys acting on behalf of the appellant. The respondent caused a notice of bar to be served on the appellant on 7 October 2010. The appellant had five days from the date of service of the notice of bar to file its plea, failing to do so the appellant would be barred from filing its plea. The appellant did not file its plea in the requite time and was *ipso facto* barred from filing a plea. On 14 March 2011, the default judgment order was granted.

[8] The appellant alleges that it instructed Cornelius Boshoff Attorneys to file a notice of intention to defend, plea and counter-claim. However, the appellant does not explain when the attorneys received these instructions and whether indeed they served and filed the notice of intention to defend as allegedly instructed by the appellant.

[9] The appellant further alleges that it terminated the mandate of Cornelius Boshoff Attorneys in early 2011 and transferred its file to Kralevich & van Vuuren Attorneys. It is prudent to point out at this stage that Jan du Plessis Attorneys are the only attorneys on record for the appellant. The respondent served all legal processes on their offices, as they had not withdrawn as the attorneys of record for the appellant. I would like to make mention that, the court papers do not reflect both Cornelius Boshoff Attorneys and Kralevich & van Vuuren Attorneys ever formally placing their firms on record on behalf of the appellant. It is evident that Jan du Plessis Attorneys as at to date have not withdrawn as attorneys of record for the appellant.

[10] In the midst of this the appellant states that :

"...the file pertaining to the matter got lost and was ultimately only found during the end of March 2011".

[11] The appellant submits that its intention from the outset was to defend the matter and when the notice of bar was served between August and January 2011 neither, Kralevich & van Vuuren Attorneys nor Cornelius Boshoff Attorneys advised it that the notice had not been served.

[12] The crux of the appellant's case is that it was not in wilful default or grossly negligent in not filing its plea. It contends that it tendered an explanation for the failure. In any event, it argues that wilful default is not a requirement for rescission; instead, the important issue is whether it has a *bona fide* defence, thus indicating that the application is *bona fide*.

[13] To illustrate the above contention the appellant states that it entered into a written sales agreement where the respondent paid a deposit of R100 000.00 for the machinery purchased. The appellant invoiced in the name of the respondent, which invoice represents the contact, with all the terms and conditions of the sales agreement at the back of said invoice.

[14] Rule 49(1) provides that rescission of a default judgment will be granted *upon good cause shown* and if a court is satisfied, there is a *good reason to do so.* According to *Jones and Buckle, The Civil Practise of Magistrates' Courts in South Africa 2013 volume 2* the words *good cause* extend the court's discretion in granting rescission if there is *good reason* to do so. I agree with the views of the authors of *Jones and Buckle* that the addition of good reason in rule 49(1) intends to expand the powers of discretion of the magistrate court by the introduction of a less stringent approach.

[15] Jones J in *De Witts Auto Body Repairs (Pty) v Fedgen Insurance Co Ltd 1994 (4)SA 705 (E) at 771E-F* sets out an approach to be adopted in rescission matter:

"An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the expectation for the default and any accompanying conduct by the defaulter, be wilful, or negligent or otherwise, gives rise to the probable inference that there is no ***bono fide*** *defence, and hence that the application for rescission is not* ***bona fide****. The magistrate's discretion to rescind the judgment of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interest of the parties..."*

I align myself with this approach as being the correct approach adopted in rescission matters.

[16] It is clear from the papers that both Kralevich & van Vuuren and Cornelius Boshoff Attorneys could not have been aware of the notice of bar because they were not on record. The appellants papers, does not advance any explanation regarding

the appointment of Jan du Plessis Attorneys. How did the appointment of these attorneys come about; when were they instructed; did he consult with them regarding the notice of intention to defend that was required to be served; was they not consulted and informed that a plea had to be filed prior to receiving the notice of bar? The appellant papers do not address these aspects.

[17] With the facts previously mentioned and on an examination of the case made out in the respondent's particulars of claim, it is clear that the cause action is not one based on the written contract but rather on an oral undertaking given by the appellant to reimburse the respondent of the monies advance. In the particulars of claim, the respondent *states "... the Plaintiff did not purchase the machines and was told by the defendant that the deposit would be refunded...".*

[18] The appellant has not furnished an explanation for its failure to file its plea. It has not set out what occurred after it filed its notice of intention to defend on 17 June 2010, what step were taken, if any, before the notice of bar was served on 7 October 2010 and even after the appellant was barred what steps did it take, if any, to uplift the bar.

[19] The actions of the appellant and the lack of any explanation demonstrates that there was no good cause or good reason advanced for the court below to consider and come to a conclusion that there was indeed no wilfulness on the part of the appellant.

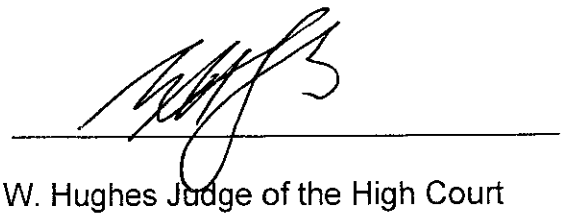
[20] I cannot find fault with the findings of the magistrate in the circumstances of this case as there was no evidence before the magistrate for the magistrate to exercise his/her discretion in striking a balance between the interests of the parties and granting the rescission.

[21] The respondent had withdrawn its opposition and heads of argument on 29 July 2014. In the circumstances, in my view, the respondents are not entitled to any cost order.

[22] In the circumstances the magistrates order stands and the appeal must fail.

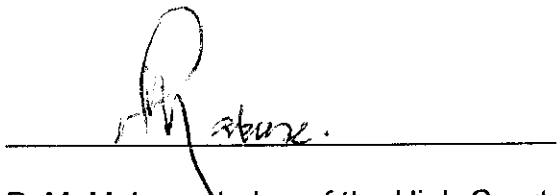
I make the following order:

[22.1] The appeal must fails and is dismissed.



W. Hughes Judge of the High Court

I Agree



P. M. Mabuse Judge of the High Court

Delivered on: 2014 -10- 06 2014

Heard on: 2 September 2014

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