IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NUMBER: 18528/2012

DATE: 15 OCTOBER 2014

In the matter between :

NOBLE MINING & MACHINERY

COMPANY LIMITED **PLAINTIFF**

and

LESEKA RESOURCE MANAGEMENT CC

REGISTRATION NO: 2010/069140/23 **FIRST DEFENDANT**

MICHAEL FRANCOIS VISSER

IDENTITY NO: 5[...] **SECOND DEFENDANT**

JOHANNES CHRISTIAAN MULLER

IDENTITY NO: 6[...] **THIRD DEFENDANT**

JUDGMENT ON THE FIRST DEFENDANT'S APPLICATION TO

SET ASIDE THE DEFAULT JUDGMENT GRANTED AGAINST

IT ON 6 JULY 2012

Default judgment was granted in favour of the Plaintiff against the First Defendant by this Honourable Court on the 6th July 2012. The Registrar granted the judgment.

2.

At the hearing of the matter on the 7th October 2014 Mr Els appeared for the First Defendant (Applicant in the application for rescission of judgment) and Mr Van Rensburg appeared for the Plaintiff (Respondent in the application for rescission of judgment). I will refer to the parties as "Plaintiff" and "Defendant".

3.

The Defendant's Heads of Argument and practice note were filed late, the explanation for the lateness is not particularly good but I read the papers and in order to finalise the matter was prepared to condone the late filing of the Heads of Argument and the practice note. There was also no objection from the Plaintiff in this regard. I accordingly grant the following order on the condonation application dated 2 October 2014:

3.1 The late filing of the Defendant's Heads of Argument and practice not are condoned.

3.2 The Defendant is ordered to pay the costs of the condonation application on unopposed scale.

4.

The Defendant applies for the rescission of the judgment of the 6th July 2012 (hereinfurther referred to as "the default judgment") as well as an order setting the writ of execution aside, granting the Defendant leave to defend and for an order that the costs be costs in the cause alternatively such costs order as the Court may deem fit.

5.

The application is brought in terms of Rule 31(2)(b). In terms thereof a judgment may be set aside upon good cause shown.

6.

The requirements for an application for rescission of judgment under this subrule are stated in the matter of *Grant v Plumbers (Pty) Ltd* **1949 (2) SA 470 (O) at 476 - 477** and can be summarised as follows:

6.1 The applicant for rescission must give a reasonable explanation for his default.

6.2 The application must be *bona fide* and not made with the intention of merely delaying the plaintiff's claim.

6.3 The applicant for rescission must show a *bona fide* defence. It will be sufficient if a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle the defendant to the relief asked for. It is not necessary to actually show that the probabilities are in the defendant's favour. A poor explanation for the default may be compensated for by a good defence. It is accordingly a question of exercising a wide discretion by the court.

Creative Car Sound v Automobile Radio Dealers Association 1989 (Pty) Ltd **2007 (4) SA 546 (D) at 555C - D;**

Wahl v Prinswil Beleggings (Edms) Bok **1984 (1) SA 457 (T).**

7.

The summons was properly served on the registered address of the Defendant. It was served by affixing it to the principal door.

See: **paginated papers p1.**

8.

The deponent on behalf of the Defendant does not dispute that service took place at the registered address but explains that the Defendant had already vacated the premises in July 2011 whereas the summons was served on the 9th May 2012.

9.

The address where service took place is also the *domicHium citandi et executandi* of the Defendant for purposes of claims arising from the supply agreement attached to the particulars of claim.

10.

It is the obligation of the Defendant to change the *domicilium citandi et executandi* address or to change its registered address and accordingly I find that the service at the address referred to in the summons and in the return of service was good service on the Defendant.

See: ***Van der Merwe v Bonaero Park (Edms) Bpk*** 1998 (1) SA 697 (T).

11.

There however, is no reason to doubt that the Defendant did not receive the summons. The Second and Third Defendants did receive their summonses and immediately filed notices of intention to defend. I accordingly accept that the Defendant only became aware of the judgment on the 11th March 2013.

12.

Mr Els raised the point that service of the summons on the *domicilium* address is only good service insofar as the claims set forth the in summons and particulars of claim are covered by the written supply agreement that the parties entered into. This submission is correct but does not take the Defendant's case any further because that very same address was at all relevant times also the registered address of the Defendant. Accordingly the service on the Defendant was good service for all purposes and all claims mentioned in the particulars of claim.

13.

The essence of the Plaintiff's claim against the Defendant can be summarised as follows:

13.1 The Plaintiff claims US $30 000.00 being a prepayment in anticipation of delivery of manganese to the Plaintiff by the Defendant.

13.2 The First Defendant failed to deliver manganese as agreed in the supply agreement.

13.3 Secondly the Plaintiff paid US $3 035.00 to the First Defendant as a deposit in anticipation of a joint mining venture. This is not a claim arising out of the supply agreement.

13.4 In terms of an oral agreement the Plaintiff made an advanced payment of US $30 000.00 to the First Defendant for manganese to be produced and supplied by the First Defendant as per the supply agreement on condition that the Second and Third Defendants cede 5% of their members' interest in the First Defendant to the Plaintiff as security for the performance of the obligations of the First Defendant in terms of the supply agreement. A written cession was entered into (see paginated papers p28).

13.5 The Plaintiff paid to the Defendant a further US $3 035.00 in anticipation of the joint mining venture.

13.6 Travelling costs incurred by the Plaintiff.

14.

The Defendant admits payment by the Plaintiff of the first US $30 000.00 but denies breach of the supply agreement. However, it is admitted in paragraph 15 of the founding affidavit in the rescission application that it could not comply with its obligations. On basis of an allegation that the Plaintiff was aware of the Defendant's inability it is then alleged that an oral agreement was entered into entailing *inter alia* that the Plaintiff would provide to the Defendant two jig machines.

15.

The alleged oral agreement as set forth in paragraph 15 and 16 of the founding affidavit in the rescission application constitutes an amendment or replacement of the supply agreement. The terms of the supply agreement and more particularly clause 11 thereof prohibit such an agreement.

16.

Payment to the Defendant of all the amounts alleged by the Plaintiff is not in dispute. The reason for such payments is in dispute. In addition the Defendant denies liability to the Plaintiff for repayment of these amounts on grounds of the additional oral agreement referred to in paragraph 16 of the founding affidavit in the rescission application.

17.

The Plaintiff also claimed travelling costs against the Defendant. There simply is no basis for this claim although judgment in favour of the Plaintiff was granted against the Defendant in this regard. Mr Van Rensburg did not dispute that the travelling costs claim is unfounded.

18.

The Plaintiff argues that some of the oral agreements referred to by the Defendant in setting forth its defence to the Plaintiff's claim are contrary to the e-mails exchanged between the parties. I agree with this submission. My perception is that the oral agreement relied upon is also contrary to the provisions of clause 11 of the supply agreement. The Plaintiff did not make much of this point and I refrain from deciding this issue against the Defendant.

19.

The submission in the Plaintiff's Heads of Argument that the ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A)** will apply and that the rescission application must be dealt with on the Plaintiff's version, is not correct and Mr Van Rensburg did not persist with that argument.

20.

When one has regard to the judgment granted, it is clear that the Registrar erred. The claim for travelling costs simply has no basis in my respectful view. In addition the alternative, being an alternative claim to claims A and B of the Plaintiff's particulars of claim could never have been granted.

21.

In these circumstances it is clear that the judgment itself was not correctly granted.

22.

A number of Mr Van Rensburg's arguments go to the probabilities of the Defendant's defences. My general impression of the defences raised are that they are contradictory to the terms of the supply agreement and accordingly do not constitute defences. However, at the very least with regard to the travelling costs claim, the Defendant is entitled to defend the Plaintiff's claims.

23.

The travelling costs judgment amounts to US $32 653.00. Mr Van Rensburg's argument is that the Court is entitled to set aside part of the judgment and rectify the judgment *mero motu* in terms of Rule 42 and secondly that if rescission of judgment is granted in favour of the Defendant, such rescission can be for a part of the judgment and need not be for the whole of the judgment. Mr Van Rensburg referred me to the judgment of Fleming DJP in ***Silky Touch International (Pty) Ltd and Another v SmalI Business Development Corporation Ltd*** **[1997] 3 All SA 439 (W)** where Fleming, DJP in a matter that arose in the Magistrates' Court agreed with the Namibian High Court that partial rescission of judgment is possible.

See: ***SOS-Kinderdoff International v Fieffie Lentin Architects*** **1993 (2) SA 481 (NnHC) at491E-l.**

24.

I considered the ***Silky Touch*** judgment. This matter concerned a rescission of judgment arising from Section 36 of the Magistrates' Court Act 1944 and the wording there does not stand on all fours with the wording of Rule 31(2)(b). The general consensus arising from cases such as ***Kavasis v South African Bank of Athens Ltd*** **1980 (3) SA 394 (D)** is that if there is a *bona fide* defence against a portion of the plaintiff's claim, the

defendant is entitled to rescission of the whole judgment. See also the discussion in ***Erasmus, Superior Court Practice*** **page B1 - 204A.** I support the ***Kavasis***-supra approach.

25.

The Defendant is at least entitled to leave to defend regarding the travelling costs claim.

26.

A factor that has to be taken into consideration here is that both the Second and Third Defendants defend the Plaintiff's claim and if the judgment against the First Defendant stands there exists a potential that different judgments on the same set of facts might be granted. That is a result that must be avoided. Accordingly the fact that the Second and Third Defendants are busy opposing the Plaintiff's claim and that there at least exists the possibility that they might be successful with their defences, persuades me, in addition to the exposition above, that leave to defend ought to be granted to the Defendant.

27.

The Defendant attacked the commissioning of the answering affidavit of the Plaintiff in these proceedings. That attack was abandoned and I need not deal with it.

28.

I am of the view that I must decline Mr Van Rensburg's invitation to *mero motu* correct the judgment in terms of Rule 42.

29.

Mr Els referred to the judgment of ***Bank v Grusd*** **1939 TPD 286** as a basis upon which I could come to the assistance of the Defendant despite my *prima facie* views on the general acceptability of the Defendant's defence. In that case a building owner was not permitted to rely on a non-variation clause in an agreement after orally agreeing with the builder for certain extras. I make no finding in that regard at this moment in view of the fact that I already concluded that leave to defend must be granted on the basis that the Defendant is at least entitled to rescission of judgment for part of the judgment granted.

30.

I already alluded to the fact that, in addition, the judgment is defective in that the alternative claim was also granted.

31.

Lastly the question of costs must be dealt with. Mr Els argued that the Defendant ought not to be ordered to pay the costs of the rescission of judgment application. Judgment was granted against the Defendant because of the First Defendant's own negligence in not amending its *domicilium citandi et executandi* and registered address. It applies for an indulgence from the Court. The Plaintiff's opposition certainly was in this respect not unreasonable. The First Defendant must pay the costs of these proceedings. See: *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* **2000 (2) SA 1007 (C) at 1015G - H.**

32.

In the circumstances I make the following order:

32.1 The default judgment granted against the First Defendant on the 6th July 2012 by the Registrar of the above Honourable Court is hereby set aside;

32.2 The writ of execution issued against the First Defendant arising from the judgment of 6th July 2012 is set aside;

32.3 Leave is granted to the First Defendant to defend the Plaintiff's claim; and

32.4 The Defendant pays the opposed costs of the rescission of judgment proceedings.

SIGNED AT PRETORIA ON THIS THE 15th DAY OF OCTOBER 2014.

AJ LOUW: ACTING JUDGE