REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(1) REPORTABLE: YES / NO

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

(3) REVISED

27/05/2016 ..... DSiwendu .....

DATE SIGNATURE

GAUTENG DIVISION, PRETORIA

27/5/2016

CASE NO: 2733/2015

In the matter between:

EH HASSIM HARDWARE (PTY) LTD Applicant

and

FAB TANKS CC Respondent

J U D G M E N T

SIWENDU, AJ:

[1]. The applicant is a supplier of building materials and related products to various builders in the construction industry. Its operations are based in Limpompo Province. On 19 May 2015, the respondent obtained a default judgment against the applicant following a failure by the applicant to pay an outstanding balance due

in respect of a Galvanised Pressed Steel Tank (herein in after referred to as "**the tank**") supplied and delivered to the applicant. In terms of this judgement, the applicant was ordered to pay an amount of R484 585.00 together with the costs of the suit to the respondent. As a consequence, the applicant seeks a rescission thereof in terms of Rule 31(2)(b) of the Uniform Rules of Court.

[2]. Rule 31(2)(*b*) provides that:

> "*A defendant may within twenty (20) days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet*".

In order to succeed in terms of this rule, the applicant must show good cause. The approach is succinctly set out in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11, that an applicant shows good cause: (a) by giving a reasonable explanation for the default; (b) by showing that the application is made bona fide; and (c) by showing a bona fide defence to the plaintiff's claim which prima facie has some prospect of success.

[3]. The facts leading to the application disclosed in the applicant's affidavit are that:

[3.1] The applicant, acting as a subcontractor of Segabokeng Building Construction, the main contractor with the Department of Public Works, ordered the tank from the respondent which was to be installed at Malipsdrift SAPS as part of the Department of Public Works building project. A quotation which embodies the terms and conditions for the supply and installation of the tank as well as the estimated and/or expected delivery time period of 5 to 7 weeks was provided to the applicant on or about 25 September 2013. On acceptance of the terms, the applicant paid to the respondent a deposit in the amount of ± R484 585.50 which constituted 50% of the contract price. The payment terms entailed inter alia that the applicant pay to the respondent 40% of the price on delivery of the material, 5% of the price after the erection of

the tank and a further 5% after testing or three months after the erection of the tank.

[3.2] An examination of the quotation in annexure TN5 attached to the applicant's affidavit reveals that the delivery time period was subject to clause 3 of the terms and conditions of contract. The clause states that the delivery times were to be calculated.

[3.3] "*from the date of the order or on receipt of all technical confirmation necessary to proceed with the manufacturing whichever is received last.*"

[3.4] It was common cause between the parties and at the hearing of the application that delivery was effected in April 2014 outside of the estimated 5 to 7weeks time period. The respondent conceded the late delivery which it had attributed to a larger than expected work order load.

[4]. A review of the correspondence exchanged between the parties annexed to the applicant's affidavit reflects that the applicant had registered its unequivocal dissatisfaction with the delay. Prior to delivery and installation of the tank, the respondent had issued the applicant with an invoice dated 31 March 2014 for the balance of the price. Further invoices were issued on 9 June 2014 respectively. The respondent failed to honour the payment. The balance owing became the subject of the default judgment obtained and the dispute which ensued between the parties.

[5]. It is also common cause that prior to the launch of the action proceedings, the applicant and the respondent were embroiled in a dispute about the outstanding balance. The applicant was at first represented by Bresler Bekker Attorneys. On 24 February 2015, the legal representation was transferred to De Bruin Oberholzer Attorneys the current attorneys of record. The applicant persisted in the denial of liability on account of the late delivery of the tank and certain defects subsequently found on the tank. At the instance of Oberholzer, summons commencing action were served at his offices on 23 April 2015.

[6]. Undisputed unexpected course of events occurred as Oberholzer took ill from 25 March 2015 and was hospitalized in intensive care on 8 April 2015 for a month. He was only able to return to work on 11 May 2015. He has deposed to an affidavit in support of the application for rescission of the judgment further confirming the fact of his hospitalisation. He submits that during his absence the administration of the affairs of his office were entrusted to Mrs Mariaan Bresler, the erstwhile attorneys of the applicant as well as a professional assistant in his office and an article clerk. The erstwhile attorney was to supervise the applicant's files. It was only after a call by the applicant on 20 May 2015 informing of the having been blacklisted that Oberholzer became aware of the court process. He nevertheless filed a notice of intention to defend, on the same day. This was a day after default judgment was granted. The respondent's attorneys refused to consent to the rescission of the judgment.

[7]. The applicant in the first instance relies on the confluence of events in particular Oberholzer's illness and submits that it was not in wilful default or grossly negligent in the handling of the matter. It was submitted that the respondent was aware at all times that any court action instituted against it would be opposed hence why it was invited to serve summons on the applicant's attorneys.

[8]. Secondly, it submits that it has bona fide defences to the applicant's claim. The first defence argued for is based on a counterclaim. The applicant submits that it is being held liable for penalties allegedly raised against the main contractor for the late completion due to the late delivery of the tank. It has attached as proof a progress payment certificate and an unsigned reconciliation statement issued to the main contractor. There are no summons issued against the applicant or direct demands to applicant by the main contractor evident. It submits further that this counter-claim will be instituted simultaneously with the plea in defence of the claim once the recession has been granted.

[9]. The second defence raised in the applicant's founding affidavit is that leaks were found on the tank subsequent to installation. As a consequence, the applicant had incurred costs to cure these defects as the respondent had refused to do so.

[10]. The main issue before me is whether the applicant has shown good cause to warrant the rescission of the default judgment, and, in particular, whether the counter- claim in respect of the penalties constitutes a bona fide defence to the respondent's claim. I pause to mention that the trite principle of whether good cause exists is not only confined to the determination of whether the default was wilful but also whether or not there is evidence of a substantial defence to the claim. In this regard, Mr Gouws for the applicant correctly contended that the two considerations must be counterbalanced in assessment. The decision in Colyn *supra*, that a weak explanation for the default may be offset by the defendant being able to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success is apposite.

[11]. Prior to determining this, it is necessary to first dispose of the question of the existence or otherwise of a wilfulness resulting in the default on the part of the applicant. This relates to the unforeseen illness and absence of his attorney which resulted in the matter not being defended. The respondent has in resisting the application dismissed this assertion as a matter of negligence. The respondent however did not dispute that but for this, the matter would have been opposed. In assessing this, the principle in *Saloojee and Another NNO* v *Minister of Community Development* 1965 (2) SA 135 A which has been restated generally, is that subject to the facts, the courts are slow to penalize a litigant for his attorney inept conduct of a litigant's matter has relevance. This approach is still relevant given the accepted and constitutionally protected right to legal representation. There is however a fetter to this general view, in that subject to the facts of a particular case, the court may have no alternative but to require that a litigant bears the consequences of the negligence of his attorneys (*see Colyn supra*). In my view the facts of this case do not qualify as such a case. I have as a consequence accepted that the confluence of events emanating from the illness of the attorney of record led to the failure to enter an appearance to defend the matter. Notwithstanding the failure, there were no facts to dispute that he had not put measures to look after the applicant's matter. Having regards to the time period over which his illness and the judgment occurred, I am constrained to find

that the applicant was in wilful default. A reasonable explanation for the default has been offered. Nevertheless, this matter does not stand alone.

[12]. I now turn to the question of whether or not the applicant has a bona fide defence to the claim. Mr Jacobs on behalf of the respondent submitted that the essence of the applicant's counter- claim is that of damages which are unliquidated and cannot be set-off against a liquid claim. In my view, at the heart of the assessment of whether the applicant has a bona fide defence is first, a procedural dilemma confronted by the applicant. Unlike in a case of a defence to a summary judgment, the procedure envisaged in Rule 22(4) rule does not apply to cases where a judgment already exists. Thus, an applicant faced with a recession of a default judgment cannot apply for a recession of a default judgment to enable it to deliver a counter claim.

[13]. In argument at the hearing, the question posed was whether based on the facts of this case there is merit in extending the approach applied in respect of summary judgments to the current case. In my view, the answer must be in the negative. The first reason lies in the distinct nature and peculiar features of a summary judgment which is a robust remedy designed to dispose of a matter expeditiously and to force a defendant to reveal it defence early. Materially, an assessment of the bona fides of a defence in an application for summary judgement occurs prior to the granting of judgment thereof. In view of the robust nature of the remedy, the greater latitude to the ambit of allowable defence are to be understood in that context.

[14]. The second reason is to be found in the rationale for the Rules of Court. The framework for the interpretation of the Uniform Rules of Court, has been referred to in a number of cases, in particular that, "*the Rules of the court are delegated legislation, having statutory force, and are binding on the court, subject to the court's power to prevent abuse of its process*". The Rules are provided to secure the inexpensive and expeditious completion of litigation and are devised to further the administration of justice (Lawsa, third edition Volume 4 – para 8 -10). Nevertheless, one of the time honoured principles which applies to the furtherance

of the administration of justice is that there must be finality to litigation. Trollip AJ in *Firestone South Africa (Pty) Ltd vs Gentiruco AG 1977 (4) SA 298 (A)* dealing with the discretionary power a court may have at common law stressed, that the:

> *"... assumed discretionary power is obviously one that should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded ...".*[8]

[15]. What remains is the question whether the counter- claim alleged and as framed in the applicant's papers constitutes a bona defence to the respondent's claim. Mr Jacobs placed reliance on the decision in *Lazarus vs Nedcore Bank limited, Lazarus vs ABSA Bank 1999 (2) SA 782 W* and submitted that the object of rescinding a judgment is "*to restore a chance to air a real dispute*" and it was not necessary to rescind the judgment to enable the applicant to ventilate the issues raised.

[16]. In opposition, Mr Gouws argued that the there was a breach of the agreed terms of the contract by the respondent. The applicant accepted the late delivery against its right to claim damages and this right was never abandoned. He submitted that the late and defective delivery has resulted in a plethora of triable issues evidencing the applicant's defence. The penalties for which the applicant is held liable pertain to the entire contract and the respondent's entire cause of action. While the submissions may in themselves be correct, I part ways with the submission that the penalties allegedly raised against the applicant pertain to the entire cause of action by the respondent. I find favour with Mr Jacobs's contention. In my view the triable issues relied upon while flowing from the alleged breach, are not necessarily germane to claim the applicant may have against the respondent in respect of the counter claim. Stated conversely, the facts giving raise to the counterclaim which is in its nature contractual damages, can and does constitute a separate cause of action. In this sense, it cannot be construed to constitute a defence that goes to the heart of the respondent's claim. In my view, the requirement of a bona fide defence means a defence that provides the kind of answer that addresses the heart and merits of the respondent's claim. This

approach is countenanced in *Dominion Earthworks (Pty) Ltd V MJ Greef Electrical Contractors (Pty) Ltd 1970(1) SA 228 (A)*, namely that a defendant who wishes to claim damages flowing from a breach must raise this in a counter-claim and not as a defence to a plea. This militates against the applicant and the finding that the default was not wilful.

[17]. In view of the above, the prospective defence raised is not in the nature that meets the requirements for the rescission of the judgement. The application for the rescission of judgment cannot succeed.

[18]. In view of this, the costs must follow the result. The gusto with which the respondent has opposed the application complained of by Mr Gouws cannot be the reason to deprive it of its costs. No facts were presented to indicate that the respondent may have abused the court process which would give rise to the exercise of my discretion against the respondent. In the circumstances,

[19]. it is ordered that:

[19.1] The application for the rescission of judgment is dismissed; and

[19.2] The applicant is ordered to pay the costs of the application.

SIWENDU, NT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.:	2733/2015
HEARD ON:	15 FEBRUARY 2016
FOR THE APPLICANT:	ADV SG GOUWS
ATTORNEYS FOR THE APPLICANT:	DE BRUIN OBERHOLZER ATTORNEYS C/ O A L MAREE INCORPORATED
FOR THE RESPONDENT:	ADV JACOBS
ATTORNEYS FOR THE RESPONDENT:	HOGAN LOVELLS (SOUTH AFRICA) C/O VAN STADE VAN DER ENDE INC
DATE OF JUDGMENT:	27 MAY 2016