IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED

DATE 12/7/16 SIGNATURE

12/7/2016.

Case Number 51934/2015

In the matter between:

THE SPAR GROUP LIMITED	Applicant
and	
MOREMART SUPERSTORE (PTY) LIMITED	Respondent
In Re:	
MOREMART SUPERSTORE (PTY) LIMITED	Plaintiff
and	
THE SPAR GROUP LIMITED	Defendant

JUDGMENT

CANCA AJ

INTRODUCTION

[1] This is an application for the rescission of a default judgment granted by the Registrar of this Court in favour of the respondent on 18 May 2015 under Case Number 79897/2014 against the applicant. The judgment compels the applicant to pay the respondent the sum of R74 000.00 plus interest thereon calculated at 2% above the prime rate charged by First National Bank of South Africa on overdraft facilities granted to its commercial customers from 21 January 2015 plus costs. The application is opposed by the respondent.

BACKGROUND FACTS

[2] The applicant ("Spar") is a public company duly incorporated and registered in terms of South Africa's company laws. It is the defendant in the main action.

[3] The respondent ("the seller"), a limited liability company incorporated and registered in terms of South Africa's company laws, is the plaintiff in the main action.

[4] The parties entered into a written agreement of sale ("the agreement") on 29 January 2013 in terms of which the respondent sold its supermarket business, conducted under the name and style of Moremart Superspar ("the business"), to Spar as a going concern.

[5] The following provisions of the agreement are relevant to these proceedings:

5.1 In respect of the purchase price and the payment thereof, the parties agreed as follows:

"5.1 The purchase price payable by Spar to the seller in respect of the sale of the business shall be the aggregate of-

5.1.1 the sum of R14 500 000.00 (FOURTEEN MILLION FIVE HUNDRED RAND) (sic) being in respect of the goodwill R13 500 000.00 (THIRTEEN MILLION FIVE) (sic) and equipment R1 000 000.00 (ONE MILLION RAND); and

5.1.2 a sum equivalent to the value of the stock-in-trade calculated as more fully set out in clause 6 below; and

5.1.3 the sum equivalent to all claims for stock returned, credits, claims, rebates and any money owning to the seller; and

5.2.1 Subject to the provisions of 5.5.2, the purchase price in 5.1 shall be paid at close of business on the date prior to the effective date into the account designated by the seller ... in such manner and form as to render the funds immediately available to the seller without the delay of prior bank clearance on or before the effective date.

5.2.2 The purchase price shall be applied as follows:

5.2.2.1 firstly in payment of all monies to be determined owing by the seller to Spar as at close of business on the date prior to the effective date ....

5.2.2.4 a further amount of R700 000.00 (SEVEN HUNDRED THOUSAND RAND) shall be retained in the interest bearing trust account referred to above from the purchase price and kept for payment of drop shipment purchasers where deliveries have been made to the seller by the suppliers but not yet invoiced. Within six weeks calculated from the effective date Spar will account to the seller for all drop shipments purchases and after deducting the monies due to Spar for such purchases the residue of the purchase price shall be paid to the seller. Likewise any deficiency shall forthwith be paid by the seller to Spar."

5.1.2 Drop shipment suppliers are approved suppliers of Spar supermarkets. Retailers such as the seller place orders directly with the drop shipment suppliers. Thereafter Spar pays the suppliers. Spar then recovers the monies paid to those suppliers from the retailers in question. In practice, it often happens that the drop shipment suppliers render their invoices to the retailers after the lapse of a substantial period of time after the deliveries have taken place.

5.1.3 The R700 000.00 referred to clause 5.2.2.4 of the agreement was the agreed amount to be retained by Spar in order to settle invoices presented by the drop shipment suppliers after the effective date.

5.1.4 The seller contends in its summons that all the drop shipment suppliers had been paid and that Spar had refused or failed to pay the balance of R74 000.00 which remained of the R700 000.00 referred to paragraph 5.1.3 above.

5.2 The seller also warranted, *inter alia*, that during the period between the date of signature of the agreement and its effective date,

> *"12.2.2 the assets which form part of the business will continue to be in good order and condition and fully operational (where appropriate) apart from breakdowns arising in the ordinary course or any loss or damage arising due to causes beyond the reasonable control of the seller; provided that any such loss, damage or destruction will be fully replaced or repaired as the case may be by the seller."*

5.3 Under the heading "*DOMILICIA AND NOTICES*" in the agreement, the parties elected for the purposes of the service of legal proceedings and for the giving or sending any notice provided for in terms of the agreement, the addresses of their respective attorneys. Either party could vary its *domicilium citandi et excutandi* address ("*domicilium* address") by written notice to any other address within South Africa. The *domicilium* address of Spar was the erstwhile address of its attorney of record who, after the conclusion of the agreement, moved offices to a different suburb of Johannesburg on 1 November 2013.

[6] On 8 May 2014, the applicant's attorney addressed a letter to the seller which was copied to its attorney on 12 and 19 May 2014. The applicant's attorney's new South African office address is visible on the top right hand corner of the letterhead.

[7] In this letter Spar's attorney states that, on taking possession of the business, Spar ascertained that, contrary to the warranty referred to in paragraph 5.2 above, seven air conditioning units were not functional. Spar had to repair and or replace these air conditioning units at a cost of

R150 537.00. Spar demanded payment of the aforesaid amount within ten days from the date of the letter and threatened to appropriate an amount of R36 140.50 should the seller fail to comply with the demand.

[8] The sum of R36 140.50 was apparently the balance of the R700 000.00 retained by Spar to settle the seller's drop shipment suppliers. The letter also threatened the institution of proceedings to recover from the seller any monies that remained owing after setting off the sum of R36 140.50 for the said repairs or replacements.

[9] The seller's attorney, Mr Kriel, who appears to be the senior partner of that firm of attorneys, responded to the aforesaid letter on 1 July 2014. Kriel did not comment on or query the contents of the 8 May 2014 letter but merely requested a copy of the agreement. A curious aspect of Kriel's letter is that although the reference cited therein is that of the applicant's attorney, Mr Moss, the email address to which the letter was sent was that of jdoods@mossmarsh.co.za who, on the letterhead appears to be the Manager: Construction Contracts Division based, at the applicant's attorney's offices in France.

[10] In his reply to Kriel's letter, Moss attached a copy of the agreement as requested and pointed out in the reply, which was dated 4 July 2014, that he was corresponding with Kriel from his Kensington offices in Johannesburg and not from France. Bruma (which is where Moss' erstwhile office was situated) and Kensington are different suburbs of Johannesburg.

[11] On 30 October 2014 the seller caused a summons to be issued out of this Court. The summons was served on Spar's chosen *domicilium* address,

by attaching a copy of same on the front door of the building in Bruma which housed its attorney's erstwhile offices, on 21 January 2015.

[12] On 9 February 2015 the seller filed a request for default judgment which was granted on 18 May 2015.

[13] Spar's Divisional Financial Director for its Northern Region, Mr Du Preez avers that: (a) he had no knowledge of any legal proceedings against the applicant by the respondent,(b) the judgment in favour of the respondent only came to his knowledge on 5 June 2015 when he received an updated ITC credit bureau report on the applicant and (c) in choosing their respective attorneys' office addresses as their *domicilium* addresses, it was the parties intention that any notice or legal process would receive their respective attorney's immediate attention.

LEGAL MATRIX

[14] In terms of Rule 31 (2) (b) of the Uniform Rules of Court, an applicant for rescission must show good cause why the application should be granted. What constitutes good cause is trite and has been formulated in *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 – 477 to be as follows:

1. The applicant must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance;

2. The applicant's application must be bona fide and not made with the intention of merely delaying the respondent's claim; and

3. The applicant must show that it has a *bona fide* defence to the respondent's claim.

See also *Vosal Investments (Pty) Ltd v City of Johannesburg* 2010 (1) SA 595 at 599A-B.

THE MERITS

[15] The respondent applied for condonation for having filed its answering affidavit late by 15 days. As no prejudice was indicated by the applicant and in order to avoid an unnecessary delay in the administration of justice, I granted condonation.

[16] It is not disputed that Spar and its attorney were not aware that action had been instituted against it by reason of the fact that the summons had been served at its attorney's erstwhile offices. Therefore Spar was not in wilful default in failing to defend the action. There is also no indication that this application is made purely to delay the seller's claim.

[17] The crisp issue in this matter is whether or not the Spar has a *bona fide* defence to the seller's claim.

[18] Spar's defence to the seller's action is two pronged. Firstly, Spar contends that after paying the drop shipment suppliers only an amount of R36 140.50 remained to the seller's credit. This is the only amount the seller could possibly have taken judgment for, so the contention continued. This amount was mentioned to both the seller and its attorney in the letter of demand dated 8 May 2014 referred to in paragraphs 6 and 7 above. Rather than

respond to the contents of that letter or query the amounts mentioned therein, the seller elected to issue summons for an amount of R74 000.00 without setting out how that amount was calculated.

[19] In his answering affidavit on behalf of the respondent, Mr Castro denied that the sum of R36 140.50 was the only amount standing to the credit of the respondent in respect of drop shipment payments. In support of that averment, Castro cited the contents of correspondence between Du Preez and Mr Clark, a retail management consulted appointed by the respondent, dated 31 October 2013 and 8 November 2013, which revealed that an additional sum of approximately R 40 000.00 was due to the respondent. However, in his replying affidavit, Du Preez annexed a document showing how the amount of R 36 140.50 was calculated and that the R 40 000.00 had been accounted for. The amount claimed and for which judgment was granted is therefore in dispute and falls to be determined by the trial Court.

[20] Spar's second defence is that it has a counter claim against the seller in respect of the balance of the amount it spent on the faulty air conditioning units referred to in paragraph 7 above. Spar contended that had it been aware of the existence of the summons it would have instituted a claim in reconvention against the seller. Therefore, so the contention continued, the counterclaim was, in and of itself, a *bona fide* defence to a claim sounding in money.

[21] The seller challenges the contention that Spar's alleged counter claim against it is *bona fide*. The seller contends that Spar lacks jurisdiction to bring such a claim. The seller states that the air conditioning units, on which Spar bases its counter claim, never belonged to it but rather to the landlord who owned the premises from which it had conducted the business. The air

conditioning units were never defined as forming part of the equipment which was sold and consequently were not incorporated in the agreement, the seller contended. The failure of a previous tenant to maintain the air conditioning units was a dispute between that tenant and the landlord and did not concern Spar, so the contention continued.

[22] Spar countered this contention by stating that, until deposing to its answering affidavit, the seller had not denied liability for ensuring that the air conditioners were in good working order on Spar taking over the business. The seller had been aware that there was a dispute relating to the air conditioners for quite a while prior to issuing the summons against it. Reliance for this proposition was placed not only on the letter of 8 May 2014 but also on email correspondence between Du Preez and Clark dated 8 November 2013. From this email it is evident that a number of the air conditioning units were faulty and that according to the applicant, a representative of the seller had to ensure that same were in working condition on the effective date.

[23] The applicant has made some valid propositions particularly in regard to the respondent's failure to either attach any documentation or provide any other evidence to demonstrate how the debt was calculated when judgment was obtained. The amount claimed by the respondent and for which it obtained judgment is clearly in dispute.

[24] In my view the applicant has set out sufficient averments which, if established at trial, would entitle it, at the very least, to a finding that the respondent took judgment for an amount more than it was entitled to.

[25] In the light of the above, it is not necessary for me to determine whether or not the applicant's counter claim defence has prima facie prospects of success. It is sufficient, to my mind, for purposes of this judgment, that I have found that the applicant's first defence is *bona fide* and has, *prima facie*, prospects of success.

[26] In the result, I order as follows:

1. The late filing of the respondent's answering affidavit is condoned.

2. The default judgment granted on 18 May 2015 under case number 79897/2014 is set aside.

3. The applicant is granted leave to defend the action under case number 79897/2014, and the dies for the taking of the next steps in the proceedings are to be calculated from the date of this judgment.

4. The respondent is ordered to pay the costs.

MP CANCA

Acting Judge of the High Court of South Africa,

Gauteng Division, Pretoria.

APPEARANCES:

For the Applicant: Mr Z Schoeman

Instructed by: Moss Marsh & Georgiev

Kensington,Johannesburg.

For the Respondent: Mr C A Kriel

Instructed by: Machobane Kriel Inc.

Brooklyn, Pretoria.

Heard on: 28 April 2016

Judgment on: 12 July 2016