IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 13960/2009

DATE: 26 AUGUST 2010

In the matter between:

NICHOLAS DAVID HAYDON WILLIAMS Plaintiff/Respondent

and

TRIFECTA 165 (PTY) LIMITED 1st Defendant/Applicant

FRANS HENDRIK BADENHORST 2nd Defendant/Applicant

GEDEELTE 118 LINDLEY 528 (PTY) LIMITED 3rd Defendant/Applicant

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J U D G M E N T

DAVIS, J:

This is an application brought on the basis of urgency in terms of Rule 31(5)(e) of the Uniform Rules of the High Court, which provides that any party dissatisfied with a judgment granted by default by the registrar may, within 20 days after his acquired knowledge of such judgment, set the matter down for reconsideration by the court. Such an application is then

heard, as I have already mentioned, as a matter of urgency.

The reason it has taken some time for this case to be finally determined, that is from 22 June 2010 to date, is because a series of issues arose which motivated me to request written argument from both counsel. I am grateful for counsel for having so provided me with written submissions, which then necessitated a delay in the delivery of this judgment.

Briefly, the dispute arose within the following context. Defendants acquired knowledge of the judgment of the Registrar on 14 April 2010. The 20 day period in terms of Rule 31(5)(d) ended on 13 May 2010. There is no question that the issue was referred for reconsideration in terms of the applicable rule on 18 June 2010. Accordingly, the first issue insofar as an application for reconsideration is concerned, is the question of condonation.

Mr Joubert, who appeared together with Ms De Wet, on behalf of the respondents, submitted that condonation should be refused and accordingly the application for reconsideration should be dismissed with costs. Clearly two issues have to be examined in this regard:

1. The basis of the application for condonation, and
2. the extent to which there is a *bona fide* defence

against the plaintiff's claim.

I turn briefly to deal with the question of delay in the prosecution of this application in terms of Rule 31. Applicant concedes that it was late. It provides the following explanation in the founding affidavit:

> "The plaintiff issued summons out of this Honourable court against the defendants on 13 July 2009. According to the returns of service, which were later obtained by us, it was served on "first defendant" and "third defendant" on 14 July 2009 at 56 Suikerbossie Drive, Gordon's Bay, which is stated to be the first (second) defendant's principal place of business, by attaching a copy to the main gate at the premises... The sheriff's return service... shows that the summons was served on 6 August 2009 at the same address referred to above, "by leaving a copy at the premises". Clearly the returns of service indicate that the process was not handed to anybody in person and that the premises at 56 Suikerbossie Drive, Gordon's Bay, must have been unoccupied as they were. The fact of the matter is that myself, as director of the first defendant, and F M Nel as director of the third

defendant, were not residing at the said address for a considerable time, yet the service of the summons took place at that address, and further that the said address was not the principal place of business of either of the two companies. I, in my personal capacity, nor F M Nel, or any representative or official of the first and third defendants, were aware of the fact that that plaintiff had instituted the said action or of service of the said summons, until the middle of April 2010.... The said address, 56 Suikerbossie Drive, Gordon's Bay, is a rented premises where I and F M Nel temporary reside. We had, to the knowledge of the plaintiff, vacated the premises and moved to Gauteng Province long before this action was instituted. What is more is that Mr Barnard, who is the attorney acting for the plaintiff in these proceedings, was the attorney who was handling the transfer of the Suikerbossie Drive property on behalf of its owners ad was acutely aware that we had vacated the property when the said action was instituted. Mr Barnard not only drafted the particulars of claim, but also instructed the sheriff to serve the process on the said address, well knowing that we had long since vacated same. The plaintiff also knew that we had moved to

Gauteng as our new address, e-mail and telephone contacts were available to plaintiff and his wife."

Mr Badenhorst, then continues, on behalf of the defendants, to state the following in his affidavit:

"At 09:05 on 12 April 2010, I received a skype message from a Ms Denice Cronje to enquire whether I was aware of an auction which was going to take place the following Monday (19 April 2010). In the ensuing conversation, it became clear that the third defendant's property, Erf 4200, Somerset West... was advertised as being on auction on the instructions of Attorney Barnard acting on behalf of the plaintiff... On 15 April 2010, my attorney, Mr Pretorius, spoke to Mr Barnard, who promptly furnished me with copies of the summons, particulars of claim, annexures, returns of service, request for default judgment in these proceedings. It was only then and on that date, that I and my co-defendants knew exactly what action would be instituted against us and that judgment had been entered by default and what the nature and extent of the said judgment was. Mr Pretorius asked what our instructions were, upon which I briefly told him

(per telephone) what the circumstances of the matter was and that had we known of the said action, most definitely would have opposed it. The defendants then resolved to instruct Mr Pretorius to request the plaintiff not to proceed with the sale in execution of the third defendant's property, Erf 4200, pending an application for rescission of the judgment... I submit it is clear that defendants were not wilfully in default, that we were not aware of the action that was instituted against us and that we are not contemptuous of the process."

This set of events, as outlined by Mr Badenhorst, has been contested by the respondents, but there is no detailed plausible reason as to why a delay in dealing with the matter took place.

It appears, however, an explanation, after defendants became aware of the judgment in April 2010, is not provided in the founding affidavit, and accordingly what becomes crucial is the extent of the defence and its *bona fide* quality. The stronger the defence, the more likely a court is to grant condonation, particularly in that the actual procuring of a judgment by default, has a number of qualities which appear certainly on the applicant's version, to be disturbing.

It is, therefore, necessary to deal with this latter question. The rule refers to a reconsideration of a default judgment granted by the Registrar. The question which arises, therefore, is what is meant by a reconsideration of the judgment and in the light thereof, the role of a *bona fide* defence is the overall inquiry.

Mr Joubert submitted that the Registrar duly granted judgment by default in terms of Rule 31(5)(a) and Rule 31(5)(b)(i), in that it was corrected granted, summons was served on the chosen *domicilium citandi et executandi* addresses of the defendants (the applicant's version, as I have set it out, is obviously important in this regard), it was granted after the *dies* had expired on request by plaintiff and no defence was entered. Mr Joubert submitted that a default judgment cannot be rescinded or set aside in the absence of a *bona fide* defence which *prima facie* carries some prospect of success.

In order to deal with what is required of a court sitting as a court of reconsideration, it is necessary to examine the competing approaches which counsel took to this question. Mr Van Riet, who appeared on behalf of the applicant, submitted that the respondents had been incorrect to rely on a judgment of Cloete, J (as he then was), in Lazarus & Another v Netcare

1992 (2) SA 782 (T) in support of the proposition that an application for reconsideration is effectively the same as an application for rescission .

When I dealt with a matter which was related to this application, that is an application brought by respondents for security for costs, I had already determined on the strength of Nedbank Limited v Mortenson 2005 (6) SA 462 (W), that a Full Bench of the WLD was correct when it held that good cause does not have to be shown by the defendant and that there is no question of an onus. The reconsideration is conducted by the court on the basis of all the facts before it. In that judgment 26, Joffe, J said:

> "Furthermore, and different to the magistrate's court, Rule 31(5)(d) contains a valuable safeguard to protect, in particular, the debtor. It provides for the reconsideration by the court of a judgment or a direction given by the registrar within 20 days after the party concerned has acquired knowledge of such judgment or direction. This would obviously include an order declaring specifically hypothecated immovable property executable. Other than in the case of S62 of the Magistrate's Court Act, the reconsideration does not cast any onus on the

debtor. The court is required to consider the application for a default judgment *de nova* without any onus on the debtor. Accordingly, any order made by the registrar declaring immovable property executable, is open to reconsideration by the court, if brought to the attention of the court."

It was on this basis of this *dictum* that I found in the application for security for costs that what was required of a court in a case such as the present, was to examine, on all of the facts available, whether default judgment was justified. There is no onus on either of the parties. What is required is for the court to analyse the factual matrix as would have been the case had the dispute come to the court initially and make the necessary determination. This process becomes important in assessing whether there is any merit in the reconsideration of this default judgment. Accordingly it is not only relevant as to whether condonation should be granted, but whether applicant has a case for reconsideration under the factual circumstances so presented.

On this basis, Mr Van Riet referred to the agreement which had been entered into the parties and which formed the basis of the claim by respondent and which claim had resulted in the granting of default judgment on 15 October 2009. In terms of

this agreement, respondent lent an initial amount of R1.5 million to applicant, which was then increased later to R1.7 million. It appears that R453 500,00 was repaid. Mr Williams, who deposed to an affidavit on behalf of respondent, then says the following:

> "In the period of approximately two and a half years since I advanced the loan on 1 November 2007, mora interest on the unpaid balance of the initial sum, brings the outstanding amount to well over R1.5 million, for which the property, Erf 4200, was sold at a public auction."

Mr Van Riet focused his attention on clause 7.1 of the agreement, which, in his view, was determinative of the entire merit of Respondent's claim. The clause provides as follows:

> "Should any one repayment of the principal debt not be made upon due date as set out herein, the creditor may regard the balance of the principal debt and interest owing in terms thereof, as due and payable immediately, and the mortgagor (third defendant) shall sell the immovable property referred to in clause 2 thereof, to the creditor (plaintiff) in an amount equal to the balance of the principal debt still outstanding at that time."

On the strength of this clause, Mr Van Riet submitted that it meant that, in the event of a default, the obligations towards plaintiff by all three defendants, would be extinguished by the transfer of immovable property to plaintiff. In his view, this clause was clearly aimed at obviating any claim for the payment of any balance due and the sale of execution of the property. He thus submitted that what plaintiff sought to do was to obtain the property at less than half the outstanding balance of it and recover the balance without actual notice to the defendants.

Mr Joubert, on behalf of the respondents, submitted that clause 7 embodied a *parate executie*, because plaintiff is thereby entitled to acquire the immovable property pledged on his own authority without an order of court in the event of the defendant failing to pay the debt on due date. This varied the normal rule relating to the satisfaction of the principal obligation by recourse to the mortgaged property. The purported grant of a power of *parate executie* is invalid. See Escor Housing Utility Company v Chief Registrar of Deeds 1971 (1) SA 613 (T).

Accordingly Mr Joubert submitted that this provision must be regarded as void *ab initio* and thus *pro non scripto*. The fact

that the plaintiff did not even attempt to enforce this provision, was of no consequence. However, notwithstanding this clause, Mr Joubert submitted that courts existed to sanction and enforce valid commercial contracts between parties and, in his view, the judgment granted was based on provisions of the contract which were valid and enforceable and this court, accordingly, had a duty to ensure that the contract was so enforced.

I should add one issue with regard to the dispute insofar as the claim is concerned, absent clause 7. In his replying affidavit, Mr Badenhorst says the following:

> "In his answering affidavit, plaintiff studiously avoids any reference to clause 8 of the agreement and deals exclusively with the loan component thereof. The latter clause provides in terms that I should transfer 3% of the shares in first defendant (which was to conduct the cement import venture in question) to plaintiff within 15 days. It further provides that plaintiff shall, as a consequence, be entitled to 2.5% of the underlying investment profit share. In other words plaintiff becomes a shareholder in first defendant. It is appropriate to point out that this latter provision only came into the

picture approximately two weeks after the initial advantage by plaintiff had discussed and agreed upon in principle. During these negotiations the advantage were agreed to be treated as a loan. Plaintiff, however, required first defendant to provide a feasibility study which was done and which demonstrated that profits of some hundred million a month were being envisaged... After receipt of the feasibility study, plaintiff started making demands for a shareholding in the business which would entitle him to share in the anticipated profits. At that time, the whole nature of the agreement changed. As is apparent from both Annexure "P4" in the final agreement, the details of the cement import transaction and the profits to be achieved therefrom, were made an integral part of the agreement as was the profit sharing provision in "P4", which reads:

> "As part of this transaction, as per my request, you've agreed to transfer to me 2.5% of the underlying investment profit share..."

I have been advised that in the absence of any indication to the contrary, shareholding in such a venture would not only entitle the shareholder to profits, but also render him liable for the losses in

the same percentage. In this regard I point out that losses in excess of R7 million were indeed suffered. I respectfully submit that the transaction in the process changed from being that of a loan to one being an investment in Trifecta business, in terms of which plaintiff made available to it the amounts advanced on a loan account. I respectfully submit that it was a tacit term of such agreement that the loans would be repaid out of profits generated by the venture and that plaintiff, as did all other interested parties, assuming the risk of non-repayment in the event that the venture should fail, which it did."

In short, the court was confronted with competing versions as to the interpretation of the contract and its substance and further with an argument on the one side, which claimed that clause 7 of the contract provided for a clear mechanism for the resolution of a dispute, assuming that it was a loan agreement as contrasted with the argument of the respondents conceding that the clause should be declared to be invalid, and that the contract should be interpreted as a whole, absent this particular provision.

Mr Van Riet concentrated his attack mainly on the latter issue.

He noted that the respondent had now conceded that the provisions of clause 7 were invalid In terms of this concession, that particular clause should be regard as *pro non scripto*. In his view, this conclusion held certain significant implications. T, the parties had clearly intended that, in the event of the defendants' inability to pay, a "swop of this kind" would take place. In doing so, the parties clearly specifically contracted in a manner so as to avoid the very proceedings which plaintiff initiated and which would include the sale in execution of the property itself. This term was of a material nature and the concession that it was invalid would, in his view, lead to the invalidity of the whole of the agreement.

In other words, clause 7 was the only provision dealing with a mechanism which would resolve a difficulty in the event of a default, such as non-payment of the loan. Should the clause be declared to be invalid, it would, therefore, mean that the whole of the contract would be unenforceable, in which event the matter would have to be determined, not by reference to the contract, but by reference to the principles of enrichment. This submission, could be linked to the averment of Mr Badenhorst in his replying affidavit that the monies advanced were loss as and hence there was no enrichment to any of the defendants.

To summarise: it does appear that there are two issues which would require serious determination on the basis of evidence, namely whether the contract as a whole could stand legal scrutiny, given the concession about the invalidity of the dispute resolution mechanism in clause 7 and further if the contract was unenforceable, whether any enrichment had taken place. When the case is examined in this way, absent any onus on any of the parties for the reasons that I have advanced, the court, faced with an application for default judgment, would have to conclude that there was a defence against plaintiff's claim, sufficient to refuse an application for default judgment and to ensure that the matter was properly ventilated.

For these reasons, therefore, the application succeeds with costs and the default judgment of 15 October 2009 is hereby set aside.

DAVIS, J