REPORTABLE JUDGMENT

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 27659/2010

In the matter between:

TOWER CONSTRUCTION	**Applicant**
and	
ANNEKE VAN DER WALT	**First Respondent**
HUGO ERNST LODEWIKUS	**Second Respondent**

Counsel for the Applicant	:	Adv. Loots
Instructing Attorneys	:	
Counsel for Respondent	:	Adv. Barthus
Date of Hearing	:	31 October 20121
Date of Judgement	:	20 November 20112

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 27659/012

In the matter between:

TOWER CONSTRUCTION CC	Plaintiff/Respondent
versus	
ANIKA VAN DER WALT	First Defendant/ Applicant
HUGO ERNEST LODEWIKUS	Second Defendant/Applicant

JUDGMENT DELIVERED ON 20 NOVEMBER 2012

MANSINGH, AJ

[1] This is an application in terms of Rule 31(2)(b) of the Uniform Rules of Court for the rescission of a default judgment granted on 10 July 2012, by Henney J.

THE FACTS:

[2] The respondent sued the applicants jointly and severally for R907 147,20 for building work completed by the respondent to the applicants' eight roomed guest house. The amount claimed is the total sum per the final payment certificate.

[3] Summons was served on the applicants on 23 December 2010 and a Notice to Defend received on 12 January 2011.

[4] The Respondent did not pursue its application for summary judgment and removed it from the Roll on 15 February 2011.

[5] The applicants failed to file their plea. A notice of bar was served on 14 May 2012. Consequently applicants were barred in terms of the Rules on 21 May 2012. Applicants' plea was filed on 24 May 2012.

[6] It is clear that there was no agreement between the parties for an extension of time for the late filing of the plea.

[7] When applicants' attorney requested an extension, they were told that the Respondent would not consent thereto.

[8] Applicants' submitted that they made an assumption that the Respondent consented to an extension based on the fact that there was no reply to their written request for an extension. The written request had though inadvertently been sent to the incorrect email address but had not been returned to sender as the incorrect address was a valid email address.

[9] Respondent submitted that this contention was flawed and implausible considering that Applicants' had specifically requested a response to their letter for an extension of time. If anything, Respondent's non-reply could only have been construed as a refusal to consent to an extension. Further, the Notice of Bar was served on 14 May 2012 and would have dispelled any mistaken belief.

[10] Respondents applied for default judgment in terms of Rule 31(5)(a) as applicants filed their plea after the *dies* had expired without bringing an application to lift the bar.

[11] The reason proffered by Applicants' attorneys of record for failing to attend to the Rule 31(5)(a) application is that the attorney was on leave.

[12] Default judgment in terms of Rule 31(5)(a) was granted on 10 July 2012.

THE LAW:

[13] The requirements for the removal of bar and rescission of judgment are similar, in that applicant must provide:

13.1 a satisfactory explanation for the delay;

13.2. the application must be *bona fide* and not simply to delay;

13.3. a *bona fide* defence must be established which is not patently unfounded and is based on facts, that if proved, constitute a valid defence. **Nathan (Pty) Ltd v All Metals (Pty) Ltd 1961 (1) SA 297 at 300.**

[14] The relevant facts must be set out clearly with particularity to enable the Court to exercise its discretion in terms of the rule on a consideration of the facts of the case. **Smith N.O. v Brummer N.O. 1954 (3) SA 352 (0) 357 - 358C**.

[15] In terms of Rule 31(2)(b) a court will on "good cause shown" grant the rescission of a default judgment.

[16] The onus is upon the applicant for rescission to establish that such good cause exists in the circumstances of each case. The courts have in the past shied away from defining the concept 'good cause', since doing so would hamper the exercise which the rules have purposely made very extensive. 'Good cause' cannot be satisfied, unless there is evidence firstly, that a substantial defence exists, and secondly, that the applicant has a *bona fide* desire to raise the defence if the application is granted. **Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd 2011 (3) SA 477 (KZN)**.

THE ABSENCE OF GOOD CAUSE:

[17] It was conceded by the respondent and correctly so, that the applicants cannot be held liable for the negligence of their attorney for failing to file the plea timeously or attending to the Rule 31(5)(a) application.

[18] Accordingly, that disposed of this leg of the argument.

[19] To succeed in its application, applicants need then only satisfy the second leg of the Rule, namely a good defence.

A GOOD DEFENCE:

[20] Respondent submitted that since the bar had not been removed prior to this application for rescission, the Plea and Counterclaim are in principle not before this Court. Consequently, it is essential that the defence must be set out in the application for rescission as required by the Rule.

[21] Respondent submitted that the defence was not contained in the application for rescission. Further, that in any event, the plea amounts to a bare denial and the counterclaim alleging defective workmanship, is wholly unsubstantiated. In shock, respondent contends that it is a fabrication in bad faith to frustrate the respondent's relief.

[22] **Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (0),** set the test in applications for rescission of default judgments as:

> *"(a) He (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.*

(b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.

(c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."

[23] Respondent submitted that although the applicant is *'not required to deal fully'* with the merits of the case, set out in **Grant** supra, the applicant is obliged to set forth the grounds on the defence with sufficient detail to enable the court to conclude that there is a *bona fide* defence and that the application is not made merely for the purpose of harassing the respondent.

[24] Respondent relied on **Standard Bank of South Africa Ltd v El-Naddaf 1999 (4) SA 779 (W)** at 7851-786B, wherein Marais J declined to follow **Grant v Plumbers** *supra,* in so far as that case may suggest that a mere bald averment is sufficient to demonstrate bona fides.

[25] Respondent then submitted that the case of **Brangus** supra, has now raised the bar for the test in rescission of default judgments, in that, there must now be a "substantial defence".

[26] Whilst it is correct that the head note to **Brangus,** states, *"Good cause cannot be satisfied, unless there is evidence firstly, that a substantial defence exists, and secondly that the applicant has a bona fide desire to raise the defence if the application is granted. (paras [19], [28] and [30] at 482F-H, 485A-D and 485F-486A)".* The cited paragraphs of [19], [28] and [30] are in fact quotations from well established case law. Accordingly, the judgment in **Brangus** applies the existing law without introducing a new or higher standard of test for rescission of judgment applications.

[27] Pertinently, as pointed out in Brangus, at para 28, the requirement of good cause was originally introduced in 1936 and in regard, thereto Schreiner JA remarked, "such good cause including but not limited to the existence of a substantial defence..." **Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352F-G).**

[28] Van Zyl J in **Brangus** held at para [27], *"The court below in regard to this issue found that the appellant did not pertinently raise the validity of the cession as a defence, and that '(n)ot even a bald statement to the effect that the cession is not valid is made in the founding affidavit....As a result, it held that this 'defence did not disclose the existence of an issue which is fit for trial'".*

[29] Hence, the judgment does not raise the bar. There is no issue of the standard of the test but a mere application of the test, in circumstances, that not even a bald statement was made to the defence sought to raise.

[30] I find though, the *ratio decidendi* in **RGS Properties (Pty) Ltd v Ethekwini Municipality 2010 (6) SA 572 (KZD) at 575 para 10-11**, particularly instructive: *"In **Naidoo v Cavendish Transport Co (Pty) Ltd 1956 (3) SA 244 (N)** the court, faced with similar contentious issues as those before me, associated itself with the views expressed in two earlier decisions, in **Joosub v Natal Bank Ltd 1908; and Scott v Trustee, Insolvent Estate Comerma E 1938 WLD 129**, where the court's remarks were to the effect that the court should not scrutinise too closely whether the defence is well founded, as long as, prima facie, there appears to the court sufficient reasons for allowing the defendant to lay before court the facts he thinks necessary to meet the plaintiff's claim, and that, where a defendant has never clearly acquiesced in the plaintiff's claim, but persisted in disputing it, the court should be slow to refuse him entirely an opportunity to have his defence heard. The principles enunciated in Naidoo above have been followed in a number of cases. See, for example, **Galp v Tansley N.O. and Another G 1966 (4) SA 555 (C) at 560; Kritzinger v Northern Natal Implement Co (Pty) Ltd 1973 (4) SA 542 (N) at 546; and Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A)**"*

And at 575-576 para 12, which reads:

"I may add to this principle that judgment by default is inherently contrary to the provisions of s34 of the Constitution. The section provides that everyone has a right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court, or, where appropriate, another

independent and impartial tribunal or forum. Therefore, in my view, in weighing up facts for rescission, the court must on the one hand balance the need of an individual who is entitled to have access to court, and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default being granted in the first instance. In its deliberation the court will no doubt be mindful, especially when assessing the requirement of reasonable cause being shown, that while among others this requirement incorporates showing the existence of a bona fide defence, the court is not seized with the duty to evaluate the merits of such defence. The fact that the court may be in doubt about the prospects of the defence to be advanced, is not a good reason why the application should not be granted. That said however, the nature advanced must not be such that it prima facie amounts to nothing more than a delaying tactic on the part of the applicant."

[31] Moseneke J, (as he then was), in **Harris v ABSA Bank Ltd t/a Volkskas 2006 (4) SA 527 (T),** held at para [9], "*The Court's discretion in deciding whether sufficient cause has been established must not be unduly restricted."* And at para [10], *"A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation."* And para [16], *"Even in the face of wilful default, in my view, the Court is enjoined to examine whether the defence raised by the person who seeks the relief shows the existence of an issue which is fit for trial."*

[32] In my view the test is now more lenient than before. A more lenient test also accords with the values of a constitutional era, specifically access to courts and to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place.

[33] The applicants' founding affidavit in the application for rescission specifically states at para 15, that the applicants' defence is fully set out in their Opposing Affidavit to the Summary Judgment Application and in their Plea and Counterclaim dated 21 May 2012, and filed on 24 May 2012. That the court is referred to the contents of those documents and the contents are incorporated into the affidavit for the application for rescission of default judgment.

[34] Further, at para 16 of the founding affidavit for the rescission application, the applicants refer to the Special Plea which states that the dispute ought in terms of the building agreement, to be referred to arbitration. This aspect is also raised in para 8 of the Opposing Affidavit to the Summary Judgment Application.

[35] The Opposing Affidavit to the Summary Judgment Application and the Plea set out that there was an ongoing dispute since 2008 on the defective workmanship.

[36] The Opposing Affidavit to the Summary Judgment Application reads at para 13, *"Ek is in die proses om die skade deur my gely van Eiser se laat gebrekkige prestasie, te kwantifiseer. In hierdie verband kan ek net meld dat ek*

verplig word om ander kontrakteurs aan to stel om inter alia die bestannde defektiewe bouwerk wat betref die onvoldoende dakhellings/valle vir waterafvoer en/of die vereiste verseeling van deure, vensters, mure en balkonne teen water- en reenpenetrasie, asook die herstel van die trappe tot dieselfde hoogte, te laat doen. Additionele opknapping-en verfwerk moet ook gedoen work om skade deur waterpenetrasie veroorsaak, te herstel. Laasgenoemde herstelwerk allen beloop meer as R275 000, 00. Buiten vir die strafheffing ("penalty clause") van R1 500, 00 per dag soos kontraktueel in klousule 42.2.7. ooreengekom (wat opsigself meer as R360 000, 00 beloop vir die laat en gedeeltelike voltooiing van die gastehuis meer as 8 maande na 30 Junie 2008), het ek ook aansienlik inkomsteverlies weens die onbeskikbaarheid van die gastehuis oor vakansieseisoen in 2008/2009 gely."

[37] The documents also raise the defence that clause 34.5 of the Principal Building Agreement was not complied with in that as no certificate of final completion had been issued, the respondent is not entitled to the issue of a final payment certificate. That as the work is defective a certificate of final completion has not been issued. As such the respondent is not entitled to payment.

[38] With regard to second applicant, a *bona fide* and good cause defence is made out on the documents that as the agent, he can not be held liable for the principal's debt unless it was an undisclosed principal, which is not the case.

[39] Respondent submitted that the arbitration clause is not applicable as the clause regulates disputes arising from building work and not the recovery of debt. In any event, applicants are now prepared to submit themselves to the jurisdiction of this Court.

[40] Respondent also contended that clause 34 is not applicable as it is suing on a contractual debt and this Court has jurisdiction to hear the matter.

[41] It is clear from the papers that applicants displayed a firm intention to defend this matter at all times and took steps to do so.

[42] The Plea and Counter-Claim was filed a mere three days after the Notice of Bar and such delay was not owing to any fault on the part of the applicants.

[43] The failure too to attend to the Rule 31(5)(a) Application was owing to no fault on the part of the applicants.

[44] In my view, second applicant has a *bona fide* defence to this matter. In addition, first applicant has shown good cause for the rescission of the default judgment and the removal of the Notice of Bar.

[45] The following order is made.

IT IS ORDERED THAT:

1. The default judgment granted against the applicants by this Honourable Court under case number 27659/2010 on 10 July 2012 is rescinded;

2. The Notice of Bar for the filing of a Plea, under which the applicants have been placed, the dies of which expired on 21 May 2012, is removed;

3. The applicants' Plea and Counterclaim dated 21 May 2012 and delivered on 24 May 2012 is hereby received by this Honourable Court.

4. Respondent to pay the costs of this application.

MANSINGH, AJ