Republic of South Africa

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

Case No: 2377/2011

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

RECRUITMENT WORLDWIDE (PTY) LTD
t/a GLOBAL PERSONNEL SELECTION Applicant/ Defendant

and

PRIDE INTERNATIONAL MANAGEMENT COMPANY LP Respondent/Plaintiff

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JUDGMENT DELIVERED: 20 SEPTEMBER 2012

BINNS-WARD J:

[1] This is an application in terms of uniform rule 31(2)(b) for the rescission of a judgment granted against the applicant in default of any entry by it of intention to defend the action brought against it by the respondent. Rule 31(2)(b) provides:

> A defendant may within 20 days after he 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.

[2] The requirements that an applicant making an application in terms of rule 31(2)(b) must satisfy are well established. They were recently rehearsed by the Supreme Court of Appeal in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1

(SCA); [2003] 2 All SA 113, at para. 11, as follows (footnote references included within square brackets):

> The authorities emphasise that it is unwise to give a precise meaning to the term 'good cause'. As Smalberger J put it in *HDS Construction (Pty) Ltd v Wait* [1979 (2) SA 298 (E) at 300 in fine - 301B]:
>
> > 'When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (*Cairns' Executors v Gaarn* 1912 AD 181 at 186; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352 - 3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'
>
> With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success (*Grant v Plumbers (Pty) Ltd* [1949 (2) SA 470 (O) at 476], *HDS Construction (Pty) Ltd v Wait* supra, [At 300F - 301C], *Chetty v Law Society, Transvaal* [1985 (2) SA 756 (A) at 764I - 765F]).

(It is of no moment that the court in *Colyn* was concerned with an application for rescission in terms of 42(1)(a). The applicable approach is the same.)

[3] In determining how to exercise its discretion the court can overlook an inadequate explanation of default if the defence shown appears to be good and strong. The court does not however take a mechanical approach in this respect. Thus in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A), at 767J-768D, Miller JA commented as follows:

> As I have pointed out, however, the circumstance that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. (Cf *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532.) But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits. In the light of the finding that appellant's explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to

> consider the arguments relating to the appellant's prospects of success. Nevertheless, in the interests of fairness to the appellant, it is desirable to refer to certain aspects thereof.

Cf. also *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) at para.s 54-57; *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at para.s 9-11

[4] Having summarised the manner in which the application falls to be judged and determined, it is time to turn to its content. It is convenient to begin by sketching its historical context.

[5] The respondent instituted action against the applicant company for payment of the sum of US$450 000. The claim was based on an alleged agreement in terms of which the applicant had undertaken to indemnify Pride Foramer (an Angolan company) and its parent, subsidiary or affiliate companies in respect of any claim made against them by the heirs of an employee of the applicant, one Desmond Louw, who had died while working on a vessel owned or controlled by Pride Foramer. The respondent was alleged to have been an affiliate company of Pride Foramer and a subsidiary of Pride International Inc, a company registered in the United States of America. It alleged that it had settled the claim by Louw's heirs in the sum of US$450 000 upon the written request of the applicant.

[6] A copy of the indemnity undertaking relied upon by the respondent was annexed as annexure A to the particulars of claim. It was contained in a letter from the applicant to Ms Lucy Starbranch at Pride International Inc in Houston, Texas, dated 30 April 2009. It read:

> Dear Lucy
>
> RE:DEMAND FOR DEFENSE AND INDEMNITY - DESMOND LOUW D/L MARCH 4 2009
>
> Recruitment Worldwide T/A Global Personnel Selection hereby grants indemnification and defense to Pride Foramer, its parent, subsidiary, and affiliate companies ("Pride") in any claim against Pride by the heirs of our employee, Desmond Louw.
>
> Yours sincerely

[signed]
FIONA RHODA
DIRECTOR

(Ms. Rhoda is the sole director of the applicant.)

[7] The claim referred to as that of the heirs of Desmond Louw was subsequently settled in the amount of US$450 000. The deed of settlement was annexed to the supporting affidavit in the rescission application. The deed records the receipt by the claimants of payment of the settlement sum from and on behalf of Pride International Inc., Pride Foramer, GPS (i.e. the applicant) and the vessel Pride Venezuela. The settlement records the release and discharge from any further liability to the claimants by Pride International Inc., Pride Foramer and the applicant.

[8] It is evident that the Pride Group presented the deed of settlement to the applicant for the purpose of obtaining performance of the indemnity given in terms of the applicant's letter of 30 April 2009. The applicant responded in an email from Ms Rhoda to Daniel Pipitone (who would appear from his email address to have been a legal representative) and Ms Starbranch, dated 24 September 2009. A copy thereof is annexed to the particulars of claim. It read as follows:

> Subject: Louw Matter
>
> Dear Daniel/Lucy
>
> I have had a response from Mike Tucker, who has perused the settlement document. Based on his advice I would like to state the following:
>
> GPS remains committed to underwriting/paying our contribution to the settlement, we are however hesitant to actually make payment at this time for fear of compromising our position under the Contractors Liability policy until such time as our underwriters have reverted formally one way or the other, and will not be doing so at this time. taking into consideration that Pride and GPS have been advised that the settlement is the most efficient means of disposing of the litigation, Pride has a duty to contain or minimise any claim against GPS for contribution/indemnification, we suggest that Pride should proceed to conclude settlement and pay the settlement sum to the claimants, with reservation of its position vis a vis GPS, and vice versa.
>
> We trust that you will give the abovementioned due consideration.
>
> Kind regards

Fiona Rhode (sic)
GLOBAL PERSONNEL SELECTION

[9] The payment to the Louw claimants was made on 1 October 2009.

[10] The summons was issued on 8 February 2011. It was served at the applicant's registered office on 10 February. The registered office was at the offices of Vassen Bros., 60 Sir Lowry Road, Cape Town. According to the tenor of the sheriff's return, the correctness of which has not been called into question (cf. s 36(2) of the Supreme Court Act 59 of 1959[1]), service was effected on a clerk, Ms T. Dien. No appearance to defend the action having been entered, the respondent applied for and was granted default judgment, as contemplated in terms of uniform rule 31, on 28 March 2011. A writ of execution was issued against the applicant to enforce the judgment. Ms. Rhoda, became aware of the writ on 5 May 2011, when she found a letter from the sheriff concerning the intended execution of the writ in her letterbox at 22 Cambridge Close, Milnerton, Cape Town. Ms Rhoda avers that this was the first inkling she received of the litigation. She states that upon enquiry she ascertained from 'a certain Ms Suray Dien' at Vassen Bros., who were the applicant's accountants, that 'they, in general, receive summonses on a daily basis for clients and that they could very well have omitted to forward the summons to the Applicant'.

[11] The applicant applied on 3 June 2011 for the rescission of the judgment. Ms Rhoda expressly acknowledges in her supporting affidavit in the application for rescission that she was aware that the application was required to be made by 2 June 2011 (i.e. within 20 days of 5 May). The tenor of the relevant averments in the affidavit suggests that the document must have been drafted well before that date, for Ms Rhoda avers (in para. 11 of her affidavit), 'Inasmuch as this application will be served and filed on/before the 2nd June 2011, I confirm

[1] Section 36(2) of Act 59 of 1959 provides: '*The return of the sheriff or a deputy-sheriff of what has been done upon any process of the court, shall be prima facie evidence of the matters therein stated.*'

that I am well in compliance with the requirements for this application'. Notwithstanding the aforementioned averment, the affidavit was deposed to only on 3 June 2011. The application was filed at the registrar's office on the same date. It is not apparent on the papers when the application was served on the respondent. There is no application, in terms of rule 27, for an extension of the period prescribed in terms of rule 31(2)(b). There is also no explanation why the rescission application has been brought out of time.

[12] Despite the fact that the sub-rule provides for the application to be brought on notice, proceedings in the current matter were brought on notice of motion, which allowed the respondent until 17 June to deliver notice of opposition, and until 8 July to deliver answering affidavits, if any. The notice of motion stated that if the application were unopposed it would proceed on (Friday) 15 July 2011. Friday, 15 July 2011 was a date in the court's winter recess. Unopposed matters, other than those brought in terms of rule 6(12), are heard in the Western Cape High Court only on Tuesdays during recess periods. The matter thus could not have been enrolled for hearing as an unopposed matter on 15 July. The result, even had the application been unopposed, is that further delay would have been entailed. In this regard it may be observed that had the application been brought on notice, as prescribed, it could feasibly have been accommodated on the motion court roll, after reasonable notice to the respondent, before the commencement of the winter recess on 17 June. If it had become opposed, it would in the ordinary course have been referred for hearing on this court's semi-urgent roll. That course would have brought the matter to hearing as an opposed application during either the third or fourth term of 2011.

[13] The respondent delivered notice of its intention to oppose the application on 17 June (the notice was served on the applicant's attorneys on 15 June and filed at court on 17 June). Its answering papers followed on 5 July.

[14] The applicant did not reply to the respondent's answering papers. It also took no steps to enrol the matter for hearing as an opposed application. The respondent thereupon, on 25 August 2011, itself took steps to enrol the matter. It did not apply, as it might have been advised to, for a date on the semi-urgent roll. In the event the matter was set down for hearing on 5 September 2012. The registrar issued a notice of set down for that date on 10 April 2012.

[15] In terms of the uniform rules of court, and also the practice directions of this court,[2] the applicant was obliged to prepare the documents for the hearing, by paginating and indexing them. The applicant neglected to comply with this obligation, which rendered the application susceptible to being struck off the roll on that account alone. The respondent's attorneys attended to preparing the court file for the hearing.

[16] In terms of PN 50 the applicant was required to deliver full heads of argument 10 days before the hearing; and the respondent likewise five days before the hearing. The applicant did not comply with this obligation. Heads of argument were delivered timeously by the respondent. The practice directives of this court require that in the event of a party finding itself in breach of compliance with the requirements concerning the delivery of heads of argument it shall apply without delay for condonation.[3] The applicant's heads of argument were handed up only when the case was called on 5 September 2012. They were accompanied by an application for condonation for their late delivery. The heads of argument were dated 4 September, and the accompanying application for condonation 5 September.

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[2] The practice directives of the Western Cape High Court are published in Van Loggerenberg & Farlam, *Erasmus, Superior Court Practice* (Supplementary Volume) at D31-24.

[3] PN 50(3) provides '*Failure on the part of a plaintiff, applicant, excipient or appellant (as the case may be) to comply with the provisions of these directions may result in the matter being struck from the roll or dismissed. Failure on the part of defendant or respondent (as the case may be) to comply with the said provisions will result in the court making such order as it deems fit, unless in each case condonation of such failure is sought on good cause shown by way of written application and is granted, and the court may make such order or orders as to costs as may to it appear appropriate.*'

[17] The application for condonation sought costs against the respondent in the event of the application being opposed. The respondent was anxious for the matter to be determined, and was fearful that order striking the matter from the roll would result only in further delay. It therefore left the matter of condonation in the hands of the court. It was nevertheless quite extraordinary in the context of the lateness of the application and the thinness of the explanation for non-compliance with the practice requirements that the applicant could have given notice that it would seek costs against the respondent in the event of opposition.

[18] The application for condonation was supported by an affidavit by the applicant's attorney, Mr Mark Meyer, a professional assistant in the employ of the applicant's attorney of record. He referred in the affidavit to his employer, Mr Titus, somewhat incongruously, as his 'principal'.

[19] Mr Meyer testified that the reason for the failure to comply with the rules and practice note requirements was the applicant's failure to provide his firm with the requested financial cover to enable counsel to be instructed. He averred in this regard –

> 3. The applicant was informed of the date of the hearing of the matter and also informed of the need to put counsel in fees by depositing the requisite amount of money in the trust account of the abovementioned firm.
>
> 4. I initially informed my principal, Mr Titus, of the impending date, who then undertook to converse with the Applicant in this regard. I also sent a letter to the Applicant remind her of this fact.
>
> 5. As I was not prepared to brief counsel in the matter until such fees had been received the matter was delayed as a result of the Applicant not depositing the fees as aforesaid. As late as yesterday [i.e. 4 September, the day before the hearing] I took the matter up with Mr. Titus who expressed surprise at this fact and further informed me that he was of the view that I had been liaising with the Applicant client in this regard. I then reminded him that he had undertaken to do so.
>
> 6. Due contact was made with the Applicant yesterday [i.e. the day before the hearing] again to remind it of the need to place counsel in fees and client gave a formal undertaking that this would be done no later than 08h00 this morning [i.e. two hours before the scheduled commencement of proceedings].

7. While I had been of the view that the aforementioned letter sent as well as communication from Mr. Titus with the Applicant would have been sufficient to alert Applicant to the need to make the requisite payment it has transpired that Mr. Titus had been under the impression that I had been communicating with the Applicant in this regard.

8. As stated already hereinabove I was able to formally instruct counsel to draft the Heads of Argument in this matter as late as yesterday.

[20] A copy of the attorney's letter informing the applicant of the date of the hearing and the need to make provision for counsel's fee was not annexed to the affidavit. The court thus has no information as to when the letter was sent. The affidavit also indicates that counsel was in fact instructed, albeit at the eleventh hour, even before the Applicant had provided its attorneys with financial cover. There is no reference to, or explanation of the applicant's failure to have set the principal application down, or to have put the papers in order for the hearing, in the affidavit in support of the condonation application. Moreover, there were no confirmatory affidavits by Mr. Titus or Ms. Rhoda.

[21] The application for condonation is woefully deficient. It does not make out an adequate explanation for the non-compliance. It raises more questions than it answers. That, viewed together with the manner in which the principal application was initially prosecuted, and thereafter, by all outward appearances, entirely neglected, has resulted in the applicant falling short on its obligation to show that the principal application was brought, or persisted with, *bona fide*.

[22] The explanation for the applicant's default is also thin. It was not supported by an affidavit from the person upon whom the summons was served. There is no explanation of what became of the summons after it had been served by the sheriff at the applicant's registered address. A company's address is the place at which the outside world is invited to deal with the company. Under the 2008 Companies Act (Act 71 of 2008) the registered

office is required to be at the same place as the company's principal office.[4] An adequate explanation for the default would have set out the basis on which the Applicant interacted with its registered office, and described the measures in place to ensure that documents delivered there came to the attention of its sole director. The applicant sought to cast aspersions again at the respondent for having served the summons at its registered address. Ms Rhoda expressed 'surprise' that the summons had not been served at a *domicilium* address chosen in terms of a contract to which the respondent was stranger, and which did not bear on the cause of action. The respondent obviously had no right to serve at that *domicilium*, and Ms. Rhoda's complaint was thus wholly misplaced.

[23] Turning now to consider the defences that the applicant alleges it has to the claim. The applicant raises three points.

[24] Firstly, it points to the fact that it was not joined as a party in the litigation in which the Louw claim was prosecuted. It is not apparent from the affidavit why the applicant considers this to be significant. It merely states that it was to be expected 'upon litigation so being commenced that Applicant would be joined to such litigation as the indemnifying party'. There does not appear to be any merit in this point. It is not apparent in which jurisdiction the Louw litigation took place, but there is a general presumption in the absence of proof to the contrary that foreign law is the same as ours.[5] It might have been appropriate for the defendants in the Louw litigation to have joined the applicant as a third party in the litigation if they wished to obtain judgment against it on the indemnity simultaneously with any judgment given against them in favour of the Louw claimants. But they were not obliged to join the applicant. On the contrary, in view of the indemnity agreement, and the absence

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[4] See s 23(3)(b).
[5] Cf. e.g. *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 692D-E; *MV Heavy Metal; Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) at para. [65].

of any indication that the applicant would not honour it, it is not surprising that the defendants in the Louw litigation did not join the applicant as a third party.

[25] Secondly, referring to the email of 24 September 2009, quoted above, the applicant contends that upon a proper construction thereof it makes out a request that payment not be made until the applicant had received a response from its insurance underwriters. That is not what the email says. It says '*we suggest that Pride should proceed to conclude settlement and pay the settlement sum to the claimants*'. The qualification attached to that statement in the following words '*with reservation of its position vis a vis GPS, and vice versa*' is meaningless. What position was to be reserved? The deponent to the supporting affidavit does not explain. The terms of the indemnity required the applicant to indemnify any Pride company in respect a liability on the Louw claim. No conditions were attached to the indemnity. Difficulties which the applicant may have been experiencing with its insurance brokers and underwriters were therefore no concern of the companies to which the applicant had given an unqualified and unconditional indemnity. The suggestion by the applicant in an email to Pride's management that the settlement amount should be paid triggered the indemnity. There were no 'positions' available for reservation in the circumstances; a reservation of rights is meaningless if there are no rights available to be reserved. What the email does convey is that the applicant intended to withhold discharging its obligation under the indemnity until it had settled matters with its insurance underwriters. It was not entitled to adopt this position, and the fact that the Pride Group appears to have accommodated it by holding off the institution of recovery proceedings for more than 16 months is entirely incidental.

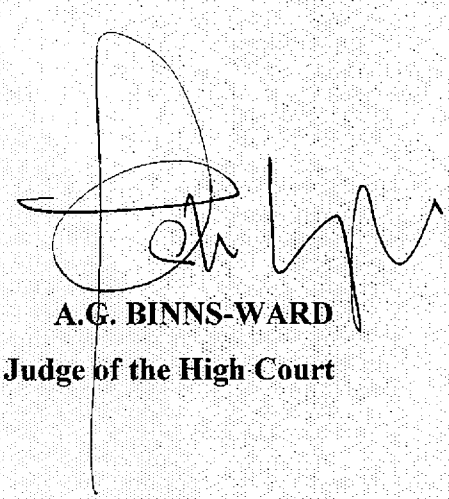
[26] Thirdly, the applicant points to the fact that it was not a party to the settlement agreement. The simple answer is that nothing about the indemnity agreement required it to

be. As mentioned , it is clear from the terms of the settlement agreement that the settlement discharged the applicant from any liability in respect of the Louw claim.

[27] In the circumstances the applicant has failed to show good cause (i) why it should be granted condonation for the late filing of its heads of argument, (ii) why its application for rescission of judgment brought out of time should be entertained and (iii) in any event, why its application for rescission should be granted. I intend to reflect these conclusions in an order simply dismissing the rescission application with costs, including the costs of the condonation application.

[28] The following order is made:

> The application for rescission of judgment is refused with costs, including the costs of the application for condonation.



A.G. BINNS-WARD
Judge of the High Court