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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 7063/02

2002-08-29

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED ✓

DATE 17/9/2002 SIGNATURE

In the matter between

CVS TRAVEL INTERNATIONAL (PTY) LTD Applicant

and

FILM FUN HOLDINGS (PTY) LTD Respondent

J U D G M E N T

WILLIS, J: This is an application in which the applicant seeks:

1. An order that judgment granted by default in favour of the respondent under Case No. 2002/7063 on 14 May 2002 for payment of the sum of R3 823 749,90, together with interests on that sum, on the rate of 15,5% per annum from 31 January 2002 be and is hereby rescinded.

2. Ordering that the warrant of execution issued by the respondent under Case No. 2002/7063 pursuant to the judgment granted on 14 May 2002 be stayed, alternatively set aside pending the determination of this application.

3. Ordering that the respondents pay the costs of the application but only in the event of the respondent opposing the application.

The default judgment which it is sought to have set aside was a judgment in which the present respondent had obtained by seeking an order of court that an arbitration award be made such an order. It is common cause that the parties had an acrimonious and lengthy dispute before an arbitrator. It is common cause that the reference to arbitration arose at the suggestion of the present applicant for rescission.

The subject matter of the arbitration was a dispute over the purchase and sale of certain equipment. The respondent sold to the applicant certain "interactive equipment" and ITV boxes for the sum of R3 718 875. The respondent's asset register listed the value of the equipment as being the sum of R6 714 415,55 (being the value of the equipment) and R4 956 404,80 (as being the net book value).

The purchase price of R3 718 875 was provided for in a clause of the written agreement and was to be paid by the applicant to respondent by way of an initial payment of R218 875 to be set off against amounts collected by the respondents from hotels. The balance of the purchase price of R3 500 000 was to be paid by way of 48 equal monthly instalments of R72 916,67 excluding VAT, the

first instalment to be paid on 15 May 2001 and thereafter the subsequent instalments on the 15th day of each month.

It is common cause that the applicant in this application fell into arrears and did indeed owe the money. There is in fact no dispute concerning the indebtedness. The defence is, however, a rather vaguely stated counterclaim that would arise from certain VAT irregularities which had come to its attention as a result of enquiries from the South African Revenue Services. This aspect is extremely sketchily presented before me. It seems to me to be clear that really the applicant has no real defence on the merits of the issue which came before the arbitrator.

It is common cause that the notice of the application to have the award made an order of court was served on Mr Antonio, the director of applicant, personally. He has been the leading personality on behalf of the applicant in the entire dispute between the parties. It is also common cause that having received this notice of application to have the award made an order of court, Mr Antonio contacted his attorney. It is common cause that there was no notice of opposition filed. I have searched in vain throughout these voluminous papers for some sort of satisfactory explanation for why there was no notice of opposition. The best explanation, and indeed the only one that need concern me, is that the notice of application to have the award made an order of court failed to state, as required in terms of Rule 6(5)(b), that if no such notification is given to the application, it will be set down on a stated day.

It is clear that the notice of motion was defective in this regard.

Nevertheless, it is not without significance that a judge of this court was nevertheless satisfied that a proper case had been made out for the award to be made an order of court and it would seem entirely inappropriate for me to gainsay that exercise of judgment by one of my brethren or sisters on this bench. But be that as it may, it is astonishing that despite personal service of the application on Mr Antonio, and despite Mr Antonio having referred the matter to his attorney, there was no notice of opposition.

Furthermore, it is common cause that when the matter was set down for hearing the notice of set down was served on the offices of the applicant. The explanation given for why nothing was done was that Mr Antonio was away in Australia and that his secretary did not know what to make of it. In the light of the fact that Mr Antonio before his departure for Australia was aware that there was such an application, it is extraordinary that he took no steps within his office to alert them as to what to do in the event of there being any further legal process.

Various technical objections have been raised concerning the granting of the award and the fact that the award was not properly published. It is significant that despite the lapse of several months, no application has been made to have the arbitration reviewed or set aside. It is also significant that on 24 October 2001 the applicant addressed a letter to the respondent wherein it indicated that after having deducted certain amounts, the applicant undertook to commence to pay the instalments from November 2001.

I refer to the case of *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 764I-765D where the court said:

> "It is clear that in principle and in the long standing practice of our courts two essential elements of sufficient "cause" for rescission of a judgment by default are:
>
> (a) the party seeking relief must present a reasonable and acceptable explanation for his default; and
>
> (b) that on the merits such party has a *bona fide* defence which, *prima facie* carries some prospects of success.
>
> It is not sufficient if only one of these two requirements is met. For obvious reasons a party showing no prospects of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing of his default."

In my view the applicant has wholly failed to present a reasonable and acceptable explanation for its default after service of the application to have the award made an order of court. In so far as it is necessary for me to indicate my views on the merits, I think it is plain from what I have said already that there is no real defence on the merits and it is plain that the application has been brought for purposes of delay.

The respondent has sought a costs order on an attorney and client scale but I am not disposed to grant it especially in the light of it that it is common cause that a *nulla bona* return has been filed by the Sheriff pursuant to the warrant of execution issued in this matter and that liquidation proceedings are likely.

The following order is made: The application for rescission of default judgment is dismissed with costs.