REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 3624/2010

In the matter between:

PANSOLUTIONS HOLDINGS LIMITED **APPLICANT**

and

P & G GENERAL DEALERS & REPAIRERS CC **RESPONDENT**

In re:

P & G GENERAL DEALERS & REPAIRERS CC **PLAINTIFF**

and

PANSOLUTIONS HOLDINGS LIMITED **FIRST DEFENDANT**

DRIVE CONTROL CORPORATION (PTY) LTD **SECOND DEFENDANT**

JUDGMENT Delivered on 16 February 2011

SWAIN J

[1] The applicant seeks the rescission of a default judgment, granted in favour of the respondent against the applicant on 06 May 2010, for payment of an amount R969,570.00 together with interest

and costs.

[2] Also before me is an application brought by the applicant to interdict the respondent, together with the Sheriff from executing on the default judgment and from proceeding with a sale in execution on 30 July 2010. The only issue to be decided in this application is payment of the costs of the application. The respondent contends that the launch of this application was unnecessary, whereas the applicant contends that a request addressed to the respondent's attorneys by the applicant's attorneys to stay execution, pending the outcome of the rescission application, was ignored.

[3] In regard to the application for rescission, before dealing with the merits of the application, it is necessary to deal with an application by the applicant for condonation for its failure to apply to this Court, within twenty days of acquiring knowledge of the judgment, as is required in terms of Rule 31 (5) (d).

[4] I am satisfied that the applicant has adequately explained the delay in bringing the present proceedings and this issue need not detain me any further.

[5] As regards the merits of the application for a rescission of the default judgment granted by the Registrar in terms of Rule 31 (5) (b), both parties approached the matter on the basis that the

applicant was obliged to establish "good cause", for the rescission of the judgment, as is required by Rule 31 (2) (b). The latter rule is however applicable where the judgment sought to be rescinded is one granted by "the Court" in terms of Rule 31 (2) (b).

[6] The distinction is one of substance, for whereas an applicant for the rescission of a judgment granted by the Court is required to show "good cause", an applicant is entitled to have a judgment granted by the Registrar, set down for "reconsideration" in terms of Rule 31 (5) (d).

[7] In the case of

Bloemfontein Board Nominees Ltd. v Benbrook
1996 (1) SA 631 (O) at 633 H – I

Hancke J held that a "reconsideration" of a default judgment granted by the Registrar, in terms of Rule 31 (5) does not mean that the Court substitutes its discretion for that of the Registrar, but that the Court will interfere with the judgment or direction given by the Registrar, only if it is of the opinion that the Registrar has erred.

[8] With respect to the learned Judge, it seems to me that the ambit of the Court's discretion in terms of Rule 31 (5) (d) to reconsider a judgment granted by the Registrar, has been defined

too narrowly.

[9] In seeking to determine what is meant by a "reconsideration" of the matter, I believe that useful guidance may be gleaned from those decisions dealing with the ambit of this Court's discretion, to reconsider an order granted as a matter of urgency against a person "in his absence" in terms of Rule 6 (12) (c). In both instances, whether it be a default judgment granted by the Registrar, or an urgent order granted by the Court, the relief is granted in the absence of the aggrieved party.

[9.1] It is clear that the "underlying pivot" for the exercise of the power in terms of Rule 6 (12) (c) is the absence of the aggrieved party, at the time of the grant of the order

I S D N Solutions (Pty) Ltd. v C S D N Solutions cc & others 1996 (4) SA 484 W at 486 H

[9.2] The dominant purpose of Rule 6 (12) (c) is to afford to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence.

I S D N *supra* at 486 I

[9.3] A wide discretion is intended and factors relating to the reasons for the absence, the nature of the order granted and the

period during which it has remained operative, will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. In addition, questions relating to whether an imbalance, oppression or injustice has resulted, and if so, the nature and extent thereof, and whether redress is open to attainment, by virtue of the existence of other or alternative remedies, will have to be considered

I S D N at 487 B – C

[9.4] Rule 6 (12) (c) is very widely framed and the word "reconsideration" must bear its widest meaning

Lourenco & others v Ferela (Pty) Ltd & others (No. 1)
1998 (3) SA 281 (T) at 290 D

In Lourenco Southwood J (at 290 D – E) quoted the definition of "reconsider" in the Shorter Oxford English Dictionary as follows

"1. To consider (a matter or thing) again; (b) to consider (a decision, etc) a second time with a view to changing or amending it; to rescind, alter.
2. To reflect on one's conduct with a view to …. amendment"

[10] When a rescission of a default judgment granted by the Registrar is to be reconsidered in terms of Rule 31 (5) (d), the underlying need for the grant of such a power is equally the absence of the aggrieved party, at the time the judgment was granted. The object is equally to obtain redress against an injustice,

or an imbalance created by the judgment. Of importance will also be factors relating to the reasons for the absence of the aggrieved party, as well as the period the judgment has been in existence, without challenge.

[11] I therefore, with respect, disagree with the views of Hancke J in Benbrook *supra,* that a "reconsideration" of a default judgment granted by the Registrar in terms of Rule 31(5), does not mean that the Court substitutes its discretion for that of the Registrar and will only interfere with the judgment, if it is of the opinion that the Registrar has erred. In my view, the power accorded to the Court is precisely that of substituting its discretion for that of the Registrar. I am fortified in this view by the self-evident fact that at the stage when the Court is asked to reconsider a default judgment granted by the Registrar, it will have before it the contentions of the aggrieved party, which in the nature of things, the Registrar will have been ignorant of. The Registrar may not have erred in granting judgment, on the information available to him at the time, but in the light of the further information available to the Court at the time of reconsideration of the judgment, it may be apparent that the judgment cannot stand.

[12] The anomalous position therefore arises on the clear wording of the relevant Rules, that a different standard applies when a default judgment granted by the Court is sought to be set aside, as opposed to a default judgment granted by the Registrar.

[13] It seems to me however that the conflict is more apparent than real, for the following reasons:

[13.1] It is clear that a court, in evaluating "good cause", has a wide discretion in order to ensure that justice is done

Wahl v Prinsivil Beletgings (Edms) Bpk
1984 (1) SA 457 (T)

[13.2] The courts have declined to frame "an exhaustive definition of what would constitute sufficient cause to justify the grant of an indulgence"

per Innes J in

Cairn's Executors v Gaarn
1912 AD 181 at 186

[13.3] The enquiry in both instances is directed at establishing the reasons for the aggrieved parties' absence. In the case of Rule 31 (2) (b) it is incumbent upon the applicant to show that the default was not wilful.

[13.4] That an applicant is *bona fide* in bringing the application and has a *bona fide* defence to the claim, as required as part of the obligation to show "good cause" in terms of Rule 31 (2) (b) is equally embraced by the concept of determining whether an imbalance, oppression or injustice has resulted from the judgment granted by

the Registrar in terms of Rule 31 (5) (d).

[14] In my view, a court in deciding whether to reconsider, in terms of Rule 31 (5) (d), a default judgment granted by the Registrar, would cause no affront to the provisions of this Rule, if it applied the criteria enunciated by the courts over many years, in determining whether an applicant has established "good cause" for the rescission of a judgment granted by the Court. Such an approach has the merit of removing any unwarranted distinction, between the criteria which are to be satisfied, to achieve success in either instance.

[15] I therefore intend to apply to the facts of the present case, the well established criteria of what constitutes "good cause" in terms of Rule 31 (2) (b) to decide whether the default judgment granted by the Registrar, should be subject to "reconsideration" in terms of Rule 31 (5) (d) and set aside. Such an approach would not be unfair to either of the parties, the Counsel for whom, as pointed out above, approached the matter on the basis that the applicant had to show "good cause". Indeed, when I brought the apparent anomaly in the Rules to the attention of Counsel, as well as the proposed solution, they expressed themselves in agreement with this approach.

[16] It is clear on the papers that the applicant did not deliver a notice of intention to defend, because the applicant did not receive the summons. From the correspondence which was exchanged

between the parties' attorneys before summons was issued, it is quite clear that the applicant intended to defend any action which may be instituted by the respondent. I am therefore satisfied that the applicant has established that it was not in wilful default.

[17] As regards the establishment of a *bona fide* defence, what the applicant has to do is set out a *prima facie* defence, by setting out averments which, if established at the trial, will entitle the applicant to the relief asked for. The applicant is not obliged to deal fully with the merits of the case and produce evidence, that the probabilities are actually in his favour

Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 SCA) at 9 E - F

[18] The respondent sues the applicant for the purchase price of goods sold and delivered, pursuant to a partly oral and partly written contract, which forms part of the papers, and is a copy of the applicant's purchase order. The purchase order states that

"Any order in excess of R20,000.00 is only valid if signed by a Director(s) of this Company. A list of Directors may be obtained from the above addresses".

[19] It is common cause that the purchase order was for the sum of R959,570.00 and that the applicant has alleged on oath that the individual who signed the order, was an employee of the applicant

but not a Director and not authorised by the applicant to place the order.

[20] The reply of the respondent to this allegation is, *inter alia*, to allege on various grounds that the applicant is estopped from denying the authority of the employee, alternatively, the applicant ratified the order by its conduct.

[21] In my view this is not the appropriate stage to finally decide these issues, regard being had to the fact that all the applicant is required to set out, is a *prima facie* defence, which if established at the trial, will entitle the applicant to avoid payment. To attempt to decide the issues of estoppel and ratification, would require the applicant to deal fully with the merits of the case and produce evidence that the probabilities are actually in the applicant's favour, which the applicant is not obliged to do.

[22] I am therefore satisfied that the applicant has *prima facie* established a *bona fide* defence to the respondent's claim.

[23] The remaining issue is the costs of the application in which the applicant sought an interdict, restraining the respondent from executing upon the default judgment and from proceeding with a sale in execution on 30 July 2010. On the papers, I am not satisfied

that the need for such an application was solely caused by a culpable failure on the part of the respondent's attorney to timeously reply by letter dated 26 July 2010, to the applicant's attorney's letter dated 21 July 2010. In my view, the fairest order, as suggested by Mr. de Beer S C, who appeared for the respondent, would be to order that the costs of this application be costs in the cause, in the application for rescission.

[24] In my view, the costs of the rescission application should be reserved for decision by the trial Court, because it will only be at that stage that the validity of the applicant's defence will be determined, which will be of major significance with regard to the costs of the application for rescission.

The order I make is the following:

a) The applicant's failure to comply with the time limits prescribed by Rule 31 (5) (d) is condoned.

b) The judgment granted by default, by the Registrar on 06 May 2010 in favour of the respondent, against the applicant in terms of Rule 31 (5) (b), is rescinded.

c) The applicant is granted leave to file a notice of

intention to defend within seven days of this order.

d) The costs of this application are reserved for decision by the trial Court.

e) The costs of the application brought by the applicant to restrain the respondent from executing upon the aforesaid default judgment are to be costs in the cause, in respect of the costs order to be made by the trial Court, in respect of this application.

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K. SWAIN J

Appearances /…

Appearances:

For the Applicant	**:**	Mr. P. D. Quinlan
Instructed by	**:**	N J Grobbelaar Attorney C/o Cox Yeats Durban
For the Defendant	**:**	Mr. H. A. de Beer S C
Instructed by	**:**	John Dua Attorneys Durban
Date of Hearing	**:**	07 February 2011
Date of Filing of Judgment	**:**	16 February 2011