In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case no.: 3995/2011

In the matter between:

Aaliqah Logistics (Pty) Ltd Applicant

and

Thekwini Marine Steel CC Respondent

JUDGMENT

Lopes J

[1] The applicant seeks to set aside a default judgment granted against it at the instance of the respondent on the 13th of April, 2012. The applicant also seeks confirmation of a rule *nisi* granted on the 20th of February, 2013 staying the transfer of certain movable property which was sold to certain parties pursuant to the default judgment referred to above.

[2] The two applications are being heard simultaneously, and Ms *Smart*, who appeared for the applicant, agreed that the interdict application would be determined by the outcome of the rescission application. I accordingly deal firstly with the rescission

application. The parties are *ad idem* that the applicant, in order to succeed, is required to demonstrate the following,-

a) that the applicant has shown good cause;

b) that the applicant has shown a defence to the main claim;

c) that the defence is *bona fide* and the application is made *bona fide* and not with the intention to delay the respondents claim. (See *Grant v Plumbers (Pty) Ltd*1949 (2) SA 470 (O) at 476 – 477).

Ms *Smart* submitted that this was an application in terms of the common law. Given the time period which has elapsed, the provisions of Rule 31 cannot apply, and given the circumstances alleged by the applicant, Rule 42 is not applicable.

[3] With regard to relief under the common law, Trengove AJAset out the following in *De Wet and others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042 F – 1043 A :

'Thus, under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient case shown. This power was entrusted to the discretion of the Courts. Although no rigid limits were set as to the circumstances which constituted sufficient cause (cf examples quoted by *Kersteman* (op cit*sv*defaillant) the Courts nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the Court's discretionary power appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The *onus* of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy

the Court, *inter alia*, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default. It follows from what I have said that the Court's discretion under the common law extended beyond, and was not limited to, the grounds provided for in Rules 31 and 42 (1), and those specifically mentioned in the *Childerley* case. Those grounds do not, for example, cover the case of a litigant, or his legal representative whose default is due to unforeseen circumstances beyond his control, such as sudden illness, or some other misadventure; one can envisage many situations in which both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness, be afforded relief.'

[4] I should mention that *Childerley*'s case dealt with a situation where the applicant sought to set aside a final judgment on the grounds that the applicant had subsequently discovered that the judgment had been obtained as a result of fraud and false statements made by a witness during the course of the trial.

[5] In the present case the default judgment came to the knowledge of Mr Pillay, the sole shareholder of the applicant on the 4th of June 2012, and on the 6th of June 2012 an application was brought to stay the execution of the judgment pending the outcome of an application for rescission. This application was subsequently launched some three months later on the 5th of September 2012.

[6] Ms *Smart* submitted that I should grant the rescission application because the amount for which judgment was granted does not coincide with the total of the invoices

submitted by the respondent to the applicant. She submitted that in those circumstances the judgment was simply wrong, and that this was not disputed. The amount to which the respondent is entitled, is, according to Ms *Smart*, something which would have to be decided at the trial.

[7] With regard to the *bona fides* of the applicant's defence and the bringing of this application, I draw attention to the following:-

a) the defence that the applicant was entitled to rescission merely because the amount for which judgment was taken differed from the total of the invoices sent to the applicant by the respondent is not raised in the application papers;
b) Mr Pillay avers that judgment was granted against the applicant pursuant to three dishonoured cheques. He alleges that those cheques were signed under the threat of harm to his family by the respondent's representative. At the time that he made out the three post-dated cheques in favour of the respondent, he also signed an affidavit agreeing to the amount that the respondent was claiming;
c) the cheques, which were dated the 9th of November 2010, the 16th of November 2010 and the 5th of December 2010 were all dishonoured on presentation and were returned marked 'refer to drawer'.

[8] In the affidavit deposed to by the applicant he refers to the amounts of the three post-dated cheques. Those amounts equate to the judgment which was granted against the applicant. It is also common cause that in December of 2010 the respondent laid

criminal charges of fraud against Mr Pillay relating to the dishonour of the cheques. Those charges are no longer relevant.

[9] Nothing however, was done regarding the threats of violence allegedly made by the applicant'srepresentative. No charges appear to have been laid in that regard, and no application was brought by the applicant's representative's to ensure that judgment could not be taken on cheques which were obtained in such a manner. The allegations of duress have, in the circumstances, all the hallmarks of recent fabrication and reflect poorly on the *bona fides* of the applicant in raising this as a defence and relying on it as ground for rescission of the judgment.

[10] It is not necessary for me to set out the various versions of why the debts were not paid. Suffice it to say, in my view the application for rescission was not brought in a *bona fide* manner, and I do not believe the defence to the respondent's claim to be *bona fide*. In all the circumstances the rescission application and the interdict application cannot succeed.

[11] With regard to costs, Ms *Smart* drew to my attention that on the previous occasion the matter had been set down at the instance of the respondent but there had been no appearance on its behalf. The matter accordingly had to be adjourned. Ms

Smart submits that the respondent should therefore be responsible for paying the costs of the last hearing, whatever the result of this application.

[12] Mr *Nicholson*, who appeared for the respondent, submitted that the costs of the last hearing should follow the result. In the exercise of my discretion, the respondent having set the matter down for hearing, was responsible for the adjournment of the matter and accordingly should bear the costs.

[13] I make the following order:-

a) The application for rescission is dismissed with costs;
b) The interdict application is dismissed with costs;
c) The costs of the applications referred to above insofar as they relate to the previous wasted costs of the hearing set down for the 24th day of April, 2013, are to be paid by the respondent.

Date of hearing : 13th May 2013

Date of judgment : 16th May 2013

Counsel for the Applicant : Ms C Smart (instructed by Sanjay Lorick& Partners)

Counsel for the Respondent : Mr W Nicholson (instructed by Larry Singh & Associates)