IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 7660/2014

In the matter between:

CARMEL NURSERIES CC Applicant

And

THE DUBE TRADEPORT CORPORATION Respondent

In re:

CARMEL NURSERIES CC Plaintiff

And

THE DUBE TRADEPORT CORPORATION Defendant

Coram: Koen J

Heard: 8 June 2016

Delivered: 21 June 2016

O R D E R

The application is dismissed with costs.

J U D G M E N T

KOEN J

[1] On 19 September 2014 the Registrar of this court granted default judgment against the Applicant for:

> ‘(a) Payment in the sum of R 2 299 736.82;
>
> (b) Payment in the sum of R182 005.40;
>
> (c) Interest on the aforesaid amounts *a tempore morae* at the rate of 9% per annum from the date of judgment to date of payment;
>
> (d) Costs in the amount of R650.00 plus Sheriff’s fees.’

The judgment in the sum of R2 299 736.82 was in respect of arrear and unpaid rental, electricity and water charges, and interest thereon. These arose from the terms of a written lease agreement concluded between the Applicant and the Respondent dated 20 February 2012. The judgment in the sum of R182 005.40 relates to the costs to repair and restore the leased premises to the condition they were in at the commencement of the lease, after the Applicant vacated the leased premises. The judgment was granted by default after the Applicant had failed to deliver its plea timeously and had been properly barred from delivering such plea.

[2] Before the default judgment was granted a letter dated 29 August 2014 was addressed by the Applicant’s then attorneys to the Respondent’s attorneys the relevant part whereof read as follows:

> ‘1 …
>
> 2. We confirm that our client is not of the intention to further litigate in this matter. It is for this reason that our client did not file any Plea or Counterclaim.
> 3. We trust you find the above in order and would be pleased to hear from you once your client has provided you with further instructions subsequent to Judgment granted.’

[3] On 30 June 2015 the Applicant launched the current application in which it claims that:

> ‘1. The judgment of the Respondent in this matter granted by default on or about 9 September 2014[1] is rescinded
> 2. The Applicant is granted leave to defend the action.
> 3. The Respondent shall pay the costs of this application.’

[4] In amplification of the legal basis on which the application is pursued, Mr Wilson for the Applicant explained that the relief claimed was more appropriately:

(a) for a reconsideration of the judgment granted by the Registrar pursuant to the provisions of rule 31(5)(d); alternatively

(b) for the rescission of the judgment at common law.

[5] Rule 31(5)(d) provides that:

> ‘Any party dissatisfied with a judgment granted or direction given by the Registrar may, within 20 days after such party had acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.’

[6] A Registrar may grant judgment only in respect of claims for a ‘debt or liquidated demand…’ The judgment for R2 299 736.82 was clearly such a judgment whereas the one for R182 005.40, being *prima facie* for damages, was not. It was contended that ‘the reconsideration’ contemplated by rule 31(5)(d) is not confined to a reconsideration of the judgment for R182 005.40 but would include a reconsideration of the entire judgment. The argument would relate inter alia to the legal nature of such a ‘reconsideration’ and whether it is confined to a judgment which might not be legally competent, or whether it is a ‘reconsideration’ akin to that contemplated by Rule 6(12)(c) where ‘a person against whom an order was granted in his absence in an urgent application may by notice set down a matter for reconsideration of the order’. *Erasmus Superior Court Practice* 2nd Edition by van Loggerenberg in the commentary on Rule 31(5)(d) states as follows:

> ‘Sub-rule [31(5)(d)] has, however, elicited conflicting judgments. In *Bloemfontein Board Nominees Ltd v Benbrook* [1996 (1) SA 631 (O) at 633 H] it was held that the “reconsideration” of a default judgment granted by the Registrar in terms of the sub-rule did not mean that the court substituted its discretion for that of the Registrar, but that the court would interfere with the judgment for direction given by the Registrar only if it was of the opinion that the Registrar had erred. In *Pansolutions Holdings Limited v P & G General Dealers and Repairers CC* [2011 (5) SA 608 (KZD) at 610 H – I] it was held

[1] The date is incorrect and should read ‘19 September 2014’.

> that the power accorded to the court under this sub-rule was that of substituting it's discretion for that of the Registrar. In addition, it was held that the "good cause" criteria applicable under Rule 31(2)(b) be applicable when a court, in terms of this sub-rule, reconsidered a default judgment granted by the Registrar. It is submitted that the latter view is to be preferred. Alternatively, a default judgment granted by the Registrar could be set aside by the court in the exercise of its common law powers or its inherent jurisdiction referred to above.'

[7] In view of the conclusion to which I have come, it is unnecessary to resolve the aforesaid issues. I shall assume in favour of the Applicant that the test is no different to that which founds a rescission. 'Good cause' must however be shown to exist whether a 'reconsideration' in terms of rule 31(5)(d), or a rescission at common law, is sought.

[8] The requirement of 'sufficient' or 'good cause', lying at the heart of either a reconsideration in terms of rule 31(5)(d) or a rescission at common law, requires:

(a) a reasonable and acceptable explanation for an Applicant's default; and

(b) the disclosure of a *bona fide* defence with *prima facie* prospects of success.[2]

[9] The only additional requirement of significance in the context of the present application between rule 31(5)(d) finding application or a rescission being claimed at common law, is that in the case of the former, the application for reconsideration must be brought within 20 days, whereas an application for rescission only needs to be pursued within a reasonable time. The application was clearly launched way beyond the 20 day period. The applicant has applied, based on allegations advanced in the founding affidavit, although not claimed as a separate prayer[3] in the Notice of Motion, for any delay, whether beyond the 20 day period or beyond a reasonable time, to be condoned. In either instance though, a reasonable explanation for delay must

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[2] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764J to 765F.

[3] The absence of a separate prayer in the Notice of Motion is not fatal to the Applicant's case. Such formalism and technicality are not required nor encouraged – see *Pangbourne Porperties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 (SGJ).

be advanced and it is trite law that it must cover the entire period or periods of delay.[4]

[10] The explanation tendered by the Applicant for condonation, whether for the failure to pursue an application in terms of Rule 31(5)(d) within 20 days or in only pursuing the application on the 30th June 2015, is inadequate and unacceptable. The reasons advanced by the Applicant in the founding affidavit are as follows:

> '28 …the Applicant could no longer afford to incur any further legal costs in defending the Respondent's action…
> 29 … William Minne who was the general manager of the Applicant at the time, and the only person dealing on behalf of the Applicant with engagement with the Respondent, was immobilised in August 2014 owing to a knee operation he had to undergo. During the period September 2014 up until December 2014, Mr Minne was rendering consultancy services to a greenhouse operation in New York, USA, while out of the RSA, and as such, was unaware that the default judgment had actually been taken against the Applicant.
> 30 Notwithstanding the above, in and during the period February 2015 to March 2015. Mr Minne came to learn through perusing various articles and various different newspaper publications that the Respondent's CEO at the time, namely Saxen van Coller had acted fraudulently in that *inter alia* she lied about her identity and her qualifications.
> 31 I immediately thereafter sought further legal advice because it was the conduct of the Respondents CEO Saxen van Coller, that had been the cause of the Applicant losing the crucial Holland contract.
> 32 Upon seeking alternative legal advice on this issue, I was informed that the Applicant indeed has a counter claim against the Respondent in the amount of R38 559 776.00 as a result of the Respondents breaches of contract.'

[11] The aforesaid explanation does not begin to explain why, where the Applicant inevitably must have been aware that judgment would follow as recognized in its attorney's letter dated 29 August 2014, an application for rescission was not brought earlier. The explanation relating to the absence of Mr Minne and his physical incapacity, does not detract from him being able to give telephonic instructions to an attorney to rescind the judgment if that was in fact the intention. Furthermore, the fact that Mr Minne and the deponent to the finding affidavit had come to hear of the alleged fraud of Saxen van Coller, also does not provide an explanation for the delay in pursing the application. Mr Wilson in argument fairly conceded that the reports regarding Ms Van

[4] *Ethekwini Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC) at para 28.

Coller was at best simply a reminder to the Applicant of its dealings with the Respondent and not specifically alerted it to any alleged defence it previously would not have known of, or the existence of a counterclaim.

[12] The explanation that until seeking legal advice, the Applicant was not aware of a counterclaim that it alleges it had, is also contradicted by the contents of the letter from the Applicant's attorneys dated 29 August 2014. That letter was clear in its terms that the Applicant had no intention to further litigate in the matter and it was for that reason that it 'did not file any plea or counterclaim' (my underlining). That statement in the letter is consistent with the possibility of a counterclaim having been considered and instructions thereafter being given not to file any counter claim. The Applicant has not in any of the affidavits filed on its behalf dealt with this conflict between the instruction given to its attorney and expressed in that letter, and what is contended in the affidavits regarding knowledge of the alleged counterclaim which its only member alleges it only gained subsequently and which it now wishes to pursue. There is not even a suggestion in the papers that what the attorney recorded in the letter to the Respondent's attorneys was contrary to the instructions of the Applicant and therefore written in error. Indeed, the affidavits do not deal with the letter at all. The Applicant simply has not advanced any evidence on the basis of which condonation can be granted. Nor is there any basis on which it can be concluded, even accepting the correctness of the Applicant's version that it only became aware during February to March 2015 of the counter claim it wishes to pursue, that the delay until the application was launched at the end of June 2015 was reasonable and excusable.[5]

[12] Not only has there been no reasonable and acceptable explanation for the aforesaid delays, but there is also no reasonable and acceptable explanation for the Applicant's default in the first place. On 29 August 2014

[5] The effect of this finding is that the judgment for damages granted by the Registrar, which would otherwise be beyond the powers of the Registrar, stands. That is an inevitable consequence of an inexcusable delay and the ideal that legal certainty should be achieved, just as unlawful administrative action stands as valid unless and until successfully challenged – see *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2010 (1) SA 333 (SCA) para 33 ffg.

the unequivocal communication was that the Applicant would not be filing any plea or counterclaim. If the Applicant had a *bona fide* defence with a *prima facie* prospect of success it should have pursued it at the time.

[13] In support of its contention that the Applicant has a defence, the deponent to the founding affidavit states:

> '27 In regards to the Respondents claim against the Applicant the Applicant initially disputed the amount claimed by the Respondent in that:
> 27.1 Cleaning costs were charged to the Applicant's account, however the Applicant had cleaned the premises prior to vacating the premises;
> 27.2 An amount was charged to the Applicant for lighting, however, part of this amount had already been settled by the Applicant;
> 27.3 The electricity meter readings were incorrect. Therefore, the amounts charged in respect of the Applicant's alleged electricity consumption were incorrect.
> 28 Notwithstanding the above at the time of the above, owing to the fact that the Applicant had not been able to secure the contract mentioned above, the Applicant could no longer afford to incur any further legal costs in defending the Respondent's action…"

[14] Elsewhere in the affidavit the deponent apart from referring to the cleaning costs, the amount wrongly charged for lighting and the electricity metres allegedly reading incorrectly, also contends that 'an amount of approximately R208 000.00 was paid to the Respondent by means of a bank guarantee which was called up by the Respondent, which amount has not been credited to the Applicant's account.' During argument Mr Wilson fairly conceded that the statement that the payment was not reflected was incorrect and that the payment of R208 000.00 had in fact been credited to the Applicant's account.

[15] Not only were the alleged defences regarding the alleged cleaning costs and electricity charges known at the time, but no particularity is provided in the affidavits in the application as to what cleaning costs were allegedly unnecessarily incurred and for which judgment had been granted, or to what extent the electricity meter readings were incorrect, resulting in excessive charges, and hence to what extent, if any the Applicant might have been

overcharged and the judgments should be reduced. The lack of such particularity strikes at the *bona fides* of any defence that could be advanced.

[16] Mr Wilson conceded that there was a lack of particularity but nevertheless urged me to exercise my discretion to recognise that there might be some defence which could be advanced which would entitle the Applicant to rescission of the judgment. I am not prepared to do so. It is incumbent on the Applicant to set out details of a defence, including the extent of such defence, which if proved at the trial would constitute a *bona fide* defence with *prima facie* prospects of success. It has not done so. I am not persuaded that the Applicant has made out a *bona fide* defence with *prima facie* prospects of success which would entitle it to rescission.

[17] All that remains to be considered then is the contention that the Applicant has a substantial counterclaim which would extinguish the amount of the judgment granted in favour of the Respondent.

[18] I do not intend repeating the extensive allegations advanced in the affidavits which it was argued would give rise to such a counter claim. Suffice it to say that any such claim which the Applicant might have would be one for contractual damages and that if regard is had to the allegations as to when the alleged breaches of the composite agreement the Applicant contends for occurred, that such claims would have arisen during or about October 2012 to January 2013 (in respect of claim A) and somewhere during 2011 (in respect of claim B) and similarly in regard to claim C, where at best for the Applicant such claims could also only have arisen it seems, by the latest by January 2013. There is a very real likelihood that these claims have all prescribed, a fact confirmed by the Applicant having also instituted a separate action under case number 8337/15 based on the same causes of action and for similar amounts as would be pursued in respect of the counterclaim, to interrupt prescription.

[19] The claim being one for damages, and the Respondent being an organ of state established in terms of s 2 of the KwaZulu-Natal Dube Tradeport

Corporation Act 2010, the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act 2002 ('the Act') were required to be complied with. No notice as required in terms of that Act has been sent to the Respondent in respect of the alleged counter claim.

[20] No such notice was sent to the Respondent in respect of the action under case no. 8337/15 either. Consequently an application was brought in that action in which the Applicant sought an order in terms of the provisions of sub-section 3(4)(a) of that Act for condonation for the late delivery of its notice in terms of sub-section 3(1)(a). That application came before Lopes J who on 3rd June 2016 found that there was no reasonable explanation for the delay in pursuing this claim, and consequently that condonation should not be granted. The application was dismissed with costs.

[21] Mr Wilson submitted that the refusal of condonation in respect of that action would not be fatal to the intended counterclaim. He argued, with reference to the decision in *Dauth and others v Minister of Safety and Security and others*[6] that the Legislature did not intend a 'premature' summons devoid of such notice to be ineffective or void. That case however held that once condonation was granted, the legal proceedings instituted remain effective as from the date of inception (date of issue) and no further order for the resurrection of those proceedings was required. I accept the correctness of that judgment. It however did not deal with the situation where condonation is refused and whether the institution of that action would then still interrupt prescription. I not believe that it will. Unless and until a legal process is instituted following the requisite notice being given, or until condonation for the failure to give such notice is granted, prescription will not be interrupted.

[22] Argument was also addressed before me as to whether where a counterclaim is pursued, such notice would be required to be given. The provisions of s 3 referred to 'institute'. With reference to the provisions in the Small Claims Court Act No 61 of 1984, also dealing with the meaning of the

[6] 2009 (1) SA 189 (NC).

word ‘institute’, Hurt J in *Raman v Barlow Motor Investments (Pty) Ltd t/a Natal Motor Industries, Prospecton, and others*[7] held, in the context of that Act that a counterclaim in the Small Claims Court could be instituted without being preceded by the requisite notice required in terms of the provisions of the Small Claims Act. That position is in my view to be distinguished from the facts in this matter. The provisions of the Institution of Legal Proceedings Against Certain Organs of State Act are there to provide timeous notification, within 6 months of any event giving rise to a claim for damages, to the relevant organ of state in order to secure evidence, preserve documents and to ensure that the necessary investigations are done when the facts are still fresh in the minds of potential witnesses. If this notice is not given, then in the absence of condonation being granted, a complete defence in abatement is afforded to the Defendant. Were an action to be instituted and a counterclaim is filed within the 6 month period, the failure to provide such notice will readily be condoned. The position is however entirely different where a party having a claim available to it against an organ of State, does nothing for the period of 6 months stipulated in the Act and beyond, but when fortuitously sued by the particular organ of State thereafter, then wishes to pursue a counterclaim for damages. It would be absurd that in such an instance it can validly pursue a claim by way of a counter claim, where if it wished to institute a separate action (as the Applicant in *casu* did) a notice would be required and if not given, or the failure not to give such notice is not condoned, it has no valid action. It seems to me that the denial of condonation by Lopes J is not only fatal to the separate claim for damages sought to be pursued by the Applicant under case number 7660/14, but would also, if condonation was sought in respect of any proposed counterclaim to be lodged beyond the six month period, be highly unlikely to be granted. That casts serious doubts on whether the Applicant would have a counter claim with *prima facie* prospects of success.

[23] In any event it appears, as alluded to briefly earlier, that on the Applicant’s own version and its reasons for pursuing the separate action

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[7] 1999 (4) SA 606 (D) at 608B.

under case number 8337/15, that any counterclaim it might wish to pursue in the future could be met successfully by a special plea of prescription, and hence that such counterclaim would not have *prima facie* prospects of success.

[24] I am accordingly of the view that the Applicant has not shown that it has a *bona fide* counterclaim with *prima facie* prospects of success which could extinguish the Applicant's claims for which judgment had already been obtained.

[25] The Respondent has also raised other defences including that on the provisions on the lease, notably clause 30.1 which is to the effect that the written lease 'embodies the entire agreement between the parties relating to the matters dealt with herein and no representations, warranty, undertakings or promises were made except as incorporated herein', precludes reliance on an alleged 'composite agreement' contended for by the Applicant which is partly written and partly oral. The terms on which the Applicant would rely for any counterclaim are oral terms not embodied in the written lease document. This might also detract from a valid counterclaim. In view of the conclusion to which I have come earlier I do not express any definite view on this argument.

[26] In the circumstances, the application is dismissed with costs.

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KOEN J

Appearances

For the Plaintiff:	Adv. A J Dickson SC
Instructed by:	PKX Attorneys Tel.: 033 347 5354 Ref.: M Potgieter
:	

For the Defendant:	Adv. A D Wilson
Instructed by:	Spellas Lengert Kubler Braun Inc c/o Jon White Attorneys Tel.: 033 342 0280 Ref.: Jon White