

SOUTH AFRICA / JUDGMENT

Fluxmans Incorporated v Dynamic Shell South Africa (Pty) Ltd (94050/2015) [2017] ZAGPPHC 643 (30 June 2017) [2017] ZAGPPHC 643

COURT

North Gauteng High Court, Pretoria

BEFORE

TM Makgoka

CASE / FILE NUMBER

94050/2015

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Not

reportable

Not

of interest to other Judges

CASE

NO: 94050/2015

DATE:

30/6/2017

In

the matter between:

FLUXMANS

INCORPORATED

Applicant

and

DYNAMIC

SHELL SOUTH AFRICA (PTY)

LTD

Respondent

Summary: Practice and procedure - rescission of judgment- Attorneys' fees - untaxed bills of costs - client paying part thereof and later insisting on taxation of whole statement before paying balance - whether such competent- judgment granted in default against attorney for statement and debatement of account - applicant for rescission of that judgment - general principles restated - applicant to show good cause.

JUDGMENT

MAKGOKA, J:

- [1] This is an opposed application for rescission of judgment. The applicant, a firm of attorneys, seeks to rescind an order of this court granted against it in favour of the respondent, its former client, by default on 2 March
2016. In terms of the impugned order, which was granted with costs, the applicant was required to:
- (a) render to the respondent a 'true and proper statement of account' in respect of fees and disbursements debited to the respondent's account together with original supporting documents and VAT invoices, within one month from the date of the order;
 - (b) debate the account with the respondent within one month from the date of receipt of the respondent's notice that it had received the statement of account and that it is ready to debate the account with the applicant.
- [2] The following is the factual background. In March 2015, the applicant represented the respondent together with other persons in an opposed urgent application in this court in which the respondent was an applicant. At all material times to the litigation, applicant was represented by one of its directors, Mr Trevor Simon (Simon) while the respondent was represented by Mr. Amit Doron (Daron) and Mr. Joe Venter Tal (Tal).
- [3] The litigation was preceded by a written mandate in favour of the applicant given by Tal, Doron and an entity called Dynamic Shells Holding Ltd and the respondent. There was also a 'litigation funding agreement' concluded between a Mr Mark Sonik (Sonik) on the one hand, and Tal, Doron, Dynamic Shells Holdings Holding Ltd, and the respondent, on the other. In terms of the litigation funding agreement, Sonik undertook to fund the respondent and the others in the litigation. These two agreements are not particularly relevant to the present application and are merely mentioned for background purposes.
- [4] That application was eventually settled on 25 March 2015, in terms of a settlement agreement concluded by the parties in that application. Following the settlement agreement, an amount of R1 350 000.00 was paid into the applicant's trust account. The applicant set off that amount against the fees and disbursements which had already been incurred. Upon the implementation of the settlement agreement the applicant finalized its

invoices which were submitted to the applicant for payment. The balance outstanding as at 25 May 2015 was R206 0794.96.

- [5] Pursuant to a request for a discount by Doron and Tal, the applicant advised them that provided they settled the final amount by close of business on 26 May 2015 the applicant will provide them with a 10% early discount. On 25 May 2015 Doron addressed a letter to the applicant seeking clarity on certain queries he had regarding the applicant's account. Those queries were dealt with in a letter by the applicant on 26 May 2015. On 26 May 2015, Doron sent an email to the applicant advising that payment has been affected in settlement of the applicant's account. It should be noted that this was half of the discounted account. A balance of R96 133.83 remained outstanding.
- [6] There was further correspondence between the parties arising from queries raised by the respondent against the applicant's statements of account. I refer to some of the correspondence. On 1 June 2015 Tai addressed a letter to the applicant in which he confirmed his liability for payment of the balance. On 9 June 2015 Tai requested copies of further documentation. In response, on 11 June 2015 the applicant provided Tal and Doron with a ledger account in respect of the matter, as well as copies of relevant invoices.
- [7] On 2 July 2015 Tal wrote a letter to the applicant in which he reaffirmed his indebtedness to the applicant and the commitment to pay once he receives 'the invoices'. On 3 July 2015 the applicant furnished Tal with invoices raised for the accounts of the respondent and Sonik (the litigation funder) as well as the disbursements raised by various service providers whom the applicant was obliged to engage in the application. In the letter, it was noted that all the necessary documentation had been furnished to Tal and Doron and on that basis, the applicant requested the settlement of the applicant's account by close of business on 8 July 2015.
- [8] On 5 August 2015 the respondent's attorneys wrote a letter to applicant advising that they had been briefed by the respondent and Dynamic Shells Holdings with regard to the applicant's demand for payment. On 28 August 2015 the applicant wrote a letter to the respondent's attorneys, responding to the queries raised earlier. On 4 September 2015 the respondent's attorneys wrote to the applicant, raising various queries pertaining to the manner in which the applicant had accounted to the respondent. They demanded that the applicant furnish them with 'proper specified accounts indicating details of each item... '
- [9] The respondent's attorneys further pointed out what they deemed to be discrepancies in the applicant's invoices. In the end, they suggested that the applicant's statements of accounts be submitted to the taxing master for taxation. In response, on 16 September 2015 the applicant drew the respondent's attorneys to the fact that: the applicant had provided the respondent with all relevant documentation and invoices in the matter; it had properly invoiced the respondent in accordance with the terms of the fee mandate; and at no stage did the respondent dispute the charges set out in the mandate. The applicant also acceded to the respondent's request to submit the accounts for taxation on condition the respondent

undertook liability for the costs of preparation of the taxing of the bills by a costs consultant. The respondent did not give the undertaking for liability regarding the costs of taxation. As a result, the submission of the accounts for taxation did not materialise. The matter reached a stalemate.

- [10] As the balance of its fees remained unpaid, on 23 November 2015 the applicant caused summons to be issued against Doron and Tal in the magistrate court, Johannesburg, for payment of R97 278.44. That case is pending.
- [11] On 22 March 2016 the respondent's attorneys informed the applicant that it had taken judgment by default against the applicant. It attached the impugned order. The applicant immediately, on 23 March 2016, informed the respondent's attorneys that the summons had not come to its attention, and that first occasion it became aware of it was through the respondent's attorneys' letter of 22 March 2016. It was further stated that had summons been brought to its attention, the applicant would have defended the action on the basis that the respondent had been furnished with copies of invoices and relevant documentation on various occasions evidencing the respondent's liability to the applicant.
- [12] I turn now to the applicant's default in defending the respondent's action. According to the sheriff's return of service, the summons was served upon the respondent's offices on 1 December 2015 by delivering it to a Mr Monnakgomo in the mail room. The applicant did not deliver a notice of intention to defend. As a result, on 2 March 2016 the respondent took judgment against the applicant by default in the terms referred to earlier. It is that judgment which the applicant seeks to rescind.
- [13] Before I consider the merits of the application, I set out briefly the jurisprudential framework within which the application ought to be considered. The application is made in terms of rule 31(2) of the Uniform Rules of Court, in terms of which a default judgment may be set aside upon 'good cause' shown. The rule prescribes a period of twenty days within which the application must be made, after a defendant has knowledge of such

judgment.

- [14] The court may also consider the application at common law, in terms of which a judgment can be set aside where it had been granted by default, provided the applicant shows 'good cause' (*De Wet v Western Bank Ltd* 1979
- (2) SA 1031 (A) and *Colyn Tiger Foods Industries Ltd t/a Meadow Feed Mills* (Cape) 2003
- (6) SA 1 (SCA)) and the application is made within a reasonable time (*Genticuro AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A); *First National Bank of SA Ltd v Van Rensburg NO & Others* 1994
- (1) SA 677 (T) at 681H).

[15] The jurisdictional requirement of 'good cause' entails two essential elements. First, a reasonable and acceptable explanation for the default, and second, a demonstration of a bona fide defence. In *Chetty v Law Society, Transvaal* 1985

(2) SA 756 (A) at 765 B-C, the following was stated:

'But 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:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such a party has a bona fide defence which prima facie carries some prospect of success.'

[16] Having established the proper approach, I turn now to consider the two elements of 'good cause'. I must do so in the light of the explanation for the applicant's default and the defence it discloses in the papers. The default judgment was granted on 2 March 2016. As stated above, the default judgment only came to the attention of the applicant on 22 March 2016 when a director of the applicant received a letter from the respondent's attorneys drawing the applicant's attention to the default judgment. The application was launched on 21 April 2016, being the last day on which the twenty day period prescribed by rule 31(2)(b) expired.

[17] The applicant's explanation for the default in not defending the matter is that although the summons was served on Mr Monnakgorong, its messenger, the latter did not bring it to the attention of any of the directors of the applicant. As a result, no appearance to defend was delivered. A confirmatory affidavit by Mr Monnakgorong was attached, in which he states that he did not recall that he ever accepted summons on behalf of the applicant. Furthermore, he could not recall having handed a copy of the summons to any of the directors of the applicant. After a diligent search in the mailroom to ascertain whether a copy of the summons was located there, he was unable to locate it.

[18] With regard to the merits, the applicant asserts that it has a bona fide defence to the respondent's claim. It bases its defence on two assertions. First, that it has provided the respondent with a comprehensive account of its fees and disbursements, supported by copies of all the relevant invoices. Second, that the respondent has conceded liability for payment of the account, and that the quantum thereof was not disputed.

[19] Regarding the explanation for the applicant's default, counsel for the respondent fairly conceded in her adopted written

submissions

that the applicant had furnished an acceptable explanation for its failure to deliver a notice of intention to defend. However, it was submitted on behalf of the respondent that the applicant has failed to provide sufficient or good cause for the rescission of the judgment. It was argued that the mere providing of invoices does not amount to the debatement of account. Accordingly, so was the argument, the applicant fails to show the existence of a bona fide defence to the claim for statement and debatement of the account.

[20] I disagree. It must be borne in mind that in this application, the court does not need to decide on the merits of the defence raised by the applicant to the main action. It is sufficient that the applicant shows that it has a bona fide defence to the respondent's claim 'which prima facie has some prospect of success as explained in *Colyn v Tiger Food* para 11. The applicant is therefore not obliged at this stage to prove its defence or to show that on the probabilities its defence would ultimately be successful. The test at this stage is simply whether the applicant has a bona fide defence which prima facie carries some prospect of success. Differently expressed, the applicant need only establish a prima facie case in the sense that there should be an issue which is fit for trial. See *PLJ van Rensburg & Vennote v Den Duik* 1971

(1) SA 112 (W).

[21] In the present case, the applicant alleges that it has provided all relevant documents, and has in fact, rendered a full account to the respondent. Also, it has tendered, albeit conditionally, the taxation of its accounts. It must also be borne in mind that neither Tai nor Doron ever disputed their liability towards to the applicant, and that in fact, the account has been partly paid. I take a view that the defence shown by the applicant is, if proven at trial, a good defence and this should serve as a material consideration.

[22] There is a more persuasive consideration why the applicant's defence bears prospect of success. As correctly pointed out in the supplementary written submissions on behalf of the applicant, the respondent had a choice between accepting the applicant's account and paying it, or disputing it and insisting on the taxation of the account. There is authority for the proposition that a client is not entitled, without allegation of fraud or overreaching, to insist that the attorney initiates and procures a taxation of the invoices it had submitted, and which the client had voluntarily paid, just so that the client can decide whether it has a cause of action in enrichment against the attorney. See *Praxley Corporate Solutions (Pty) Ltd v Werksmans Incorporated* (A5074/2015) [2017] ZAGPJHC 21 (28 February 2017) para 43.

[23] The respondent in the present case elected to accept the applicant's account and paid it without demur. It therefore likely to be held that it had lost any right to object to the applicant's account and insist on taxation before payment of the balance.

[24] For all the above reasons I conclude that the applicant has disclosed a bona fide defence which has some prospect of success. As stated earlier, the other leg of 'good cause', namely an acceptable explanation for default in entering a notice of intention to defend has been conceded. The applicant has thus demonstrated good cause for the default judgment granted against it to be rescinded. The order for rescission must be coupled with a time-frame for the applicant to file its plea.

[25] What remains is the issue of costs. The applicant has succeeded in the relief it had sought. Costs should follow the event.

[26] In the result the following order is made:

1. The default judgment granted against the applicant on 2 March 2016 is rescinded;
2. The applicant is ordered to file its plea to the respondent's summons within 20 (twenty) days of the granting of this order;
3. The respondent is ordered to pay the costs of this application.

TM Makgoka

Judge of the High Court

APPEARANCES:

For the Applicant:

CP Wesley

Instructed by:

Fluxmans Inc., Johannesburg

Friedland Hart Solomon Nicolson, Pretoria

For Respondent:

JH Mollentze

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