

SOUTH AFRICA / JUDGMENT

Xylomed Pharmaceuticals (Pty) Ltd v Omnisol Outsourced Solutions (Pty) Ltd (33995/2020) [2023] ZAGPPHC 54 (27 January 2023)

[2023] ZAGPPHC 54

COURT

North Gauteng High Court, Pretoria

BEFORE

LG Kilmartin

CASE / FILE NUMBER

33995/2020

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IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG DIVISION,

PRETORIA)

Case No: 33995/2020

REPORTABLE: YES/NO

OF INTEREST TO OTHER

JUDGES: YES/NO

REVISED.

27/01/2023

In the matter between:

XYLOMED

PHARMACEUTICALS (PTY) LTD

Applicant/

Defendant in the action

and

OMNISOL

OUTSOURCED SOLUTIONS (PTY) LTD

Respondent/

Plaintiff in the action

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives. The date for the handing down of the judgment shall be deemed to be 27 January 2023.

JUDGMENT

LG KILMARTIN, AJ:

[1] This is an opposed application in terms of Rule 31(2) for the rescission of a default judgment order granted by Bokako, AJ on 18 August 2021 (“the order”). The order reads as follows:

“1. An order for specific performance is granted and the Defendant is ordered as follow (sic):

1.1. The Defendant is ordered to pay the plaintiff the deposit of R3,450,000.00 (three million four hundred and fifty thousand rand) representing 25% of the agreed manufacturing price.

1.2. The Defendant is ordered to provide the Plaintiff with the artwork required in terms of the agreement in order for the Plaintiff to print the labels for the aerosol cans.

1.3. The Defendant is ordered to pay the balance of the agreed contract sum in the amount of R10,350,000.00 (ten million three hundred and fifty thousand rand) against the Plaintiff finalising the manufacturing of the products.

2. Defendant is to pay the costs of suit on a party-and-party scale.”

[2] At the commencement of the hearing, two unopposed interlocutory applications for condonation in terms of Rule 27 were moved before me. The first was an application for condonation brought by the Applicant, Xylomed Pharmaceuticals (Pty) Ltd (the Defendant in the main action), due to its failure to apply for rescission within 20 days of becoming aware of the judgment, as required in terms of Rule 31(2)(b). The application was filed 5 days out of time. I was satisfied with the explanation given for the failure to meet the deadline and that good cause was shown. I accordingly condoned the late filing of the rescission application and made no order as to costs. The second interlocutory application was brought by the Respondent, Ominsol Solutions (Pty) Ltd (the Plaintiff in the main action), for an order condoning the late filing of its answering papers. I was also satisfied with the explanation given by the Respondent and granted condonation for the late filing of the answering affidavit, no order as to costs.

[3] This matter concerns an order placed by the Applicant for 500 000 units of an aerosol sanitizer product branded “OmniProtect” (“the product”) which was developed by the Respondent and which the Respondent claims was the first product of its kind in South Africa (and possibly the world).

[4] Rule 31(2) of the Uniform Rules of Court reads as follows:

“31 Judgment on confession and by default and rescission of judgments

- (2) (a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the Court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.
- (b) A defendant may within 20 days after acquiring knowledge of such judgment apply to Court upon notice to the plaintiff to set aside such judgment and the Court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.”
- [5] As is evident from Rule 31(2), to succeed with an application based on Rule 31(2)(b), it is necessary to show “good cause”.
- [6] The Court has a wide discretion in evaluating “good cause” to ensure that justice is done.[1]
- [7] In order to establish “good cause” for the purposes of rescission under Rule 31(2)(b), it is necessary for the applicant for rescission to:[2]
- [7.1] give a reasonable explanation for its default;
- [7.2] demonstrate that the application for rescission is made bona fide (and not with some ulterior motive, i.e. to delay the plaintiff’s claim); and
- [7.3] show that it has a bona fide defence to the plaintiff’s claim.
- [8] In *Silber v Ozen Wholesalers (Pty) Ltd*[3] it was held that the explanation provided by an applicant for rescission of his or her default must be “sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.”
- [9] Before dealing with the merits of the arguments raised, it is important to canvas the factual background and, in particular, the correspondence which was exchanged between the parties prior to Bokako, AJ granting the order.
- [10] The Respondent confirmed that in early 2020, whilst the COVID-19 virus was spreading, it commenced researching and developing its aerosol sanitizer. In terms of the research conducted, the Respondent ascertained that in order to have a product which would be effective against the virus, it needed to contain at least 70% alcohol. Of importance in this case is that the Respondent also added an ingredient known as Chlorohexidine Gluconate (“CG”) to the product for residual protection.
- [11] During or about mid-March 2020, when the COVID-19 pandemic was in its early stages, Mr M Palane (“Mr Palane”), a director of the Applicant, was introduced to Mr R Pieterse (“Mr Pieterse”) of the Respondent by one Dr P Pieterse (“Dr Pieterse”).
- [12] At a subsequent meeting on 24 March 2020 between Mr Palane, Mr Paulo Santana De Sousa (“Mr De Sousa”), representing the Applicant, and Mr Pieterse and Mr Andrew Fordsham (“Mr Fordsham”), representing the Respondent, the Applicant was advised that the Respondent had developed the product, being a surface sterilizer spray, which contained

70% alcohol and CG. The Respondent further advised that the product effectively killed 99.9% of known pathogens and the COVID-19 virus and was accordingly suitable and desirable for use in public and private hospital environments and medical facilities. At the meeting, Mr De Sousa and Mr Palane were handed a copy of the Respondent's material datasheet and brochure containing specifications about the product. In the brochure, under the heading "ABOUT THE PRODUCT", the ingredients are specified as "Aqua (29.5%), Ethanol (70%), Chlorohexidine Gluconate (0.3%) and Parfum (0.2%)". The Applicant expressed an interest in the product and later that day an email was sent by Mr Pieterse of the Respondent to Mr Palane setting out "information and next steps on Omni-protect aerosols". In this email, under the heading "Availability", it was stated that "[b]ased upon receiving an urgent order we will have the first 100 000 units available by end of week 2 and the balance of 400 000 units last few weeks of April". Furthermore, the "Payment terms" were stated to be "30 days from statement for 120 ml – COD on bulk supply".

- [13] According to the Applicant, the fact that the product contained a combination of the required amount of alcohol and CG was: (i) essential and critical to the product and its function and usage in killing 99.9% of bacteria and the COVID-19 virus; (ii) "a key selling factor of the product to hospitals and health institutions (being envisaged would be substantial major customers requiring and purchasing the Product)"(sic); and (iii) the basis upon which the Applicant was prepared to purchase the product.
- [14] The invoice which was issued by the Respondent to the Applicant dated 14 April 2020 (which is attached to the particulars of claim as annexure "A") describes the product ordered as "120 ML CAN with 70% Alcohol & 0.4% Chlorohexidine Gluconate Sanitizing Hand and Surface Spray – XYLOMED PHARMA Branded 120 ml Can with Blue Lid for Export". There is nothing on the invoice suggesting that CG could be replaced by another ingredient.
- [15] In an internal email of the Respondent dated 10 April 2020 (which is part of annexure "XP12" to the founding affidavit) Mr Pieterse recorded inter alia "Active ingredient that will be used in all supplied products to Xylomed must be Chlorohexidine Gluconate, unless specifically requested

otherwise". On the papers before me there is no document or correspondence in terms of which the Applicant requested that another active ingredient be used.

- [16] Mr Palane confirms that, upon conducting some enquiries, he was informed that any product containing CG had to be registered and approved by the South African Health Products Regulatory Authority ("SAHPRA") and had to comply with the Medicines and Related Substances Control Act, 101 of 1965 ("the Medicines and Related Substances Control Act") and the Regulations promulgated thereunder. According to Mr Palane, at a subsequent meeting, attended by him, Mr De Sousa and Mr Stephanus de Villiers ("Mr S de Villiers"), representing the Applicant, and Mr Pieterse and Mr Fordsham, representing the Respondent, he had informed the Respondent's representatives that the product could not lawfully be sold if the aforesaid registration and approval was not obtained and a copy of the

relevant regulation was handed to them.

- [17] It was not disputed by the Respondent that the product should be registered and approved by SAHPRA. However, there is a dispute about who would be responsible for obtaining the necessary SAHPRA approval and whether or not the failure to have such a registration or approval in place would have any effect on the Applicant's obligations to perform. The Applicant, on the one hand, alleges that the Respondent undertook to obtain the required registration and approvals and that Mr Fordsham instructed the person responsible for the Respondent's regulatory matters to immediately apply to the relevant regulatory authorities for these to be put in place. The Respondent denies that it undertook to obtain the necessary approval from SAHPRA and alleges that it was in fact the Applicant which undertook to do so. The Respondent further alleges that it was agreed that the need to obtain SAHPRA approval would not detract from the Applicant's obligations in terms of the agreement.
- [18] The Applicant alleges that the Respondent's representative, R Pieterse, gave Mr Palane and Mr De Sousa a tour of the manufacturing facility where they pointed out that it did not meet the regulatory requirements of the South African Pharmacy Council, the National Department of Health and SAHPRA. The Applicant alleges that they were assured that the Respondent would upgrade its

factory to enable it to obtain the required regulatory approval for the product. The Respondent's response to these allegations is essentially a bald denial.

- [19] On 15 May 2020, a letter of demand was addressed by the Respondent's attorneys to the Applicant (a copy of which is attached to the summons as annexure "B"). In this letter:

[19.1] It was recorded in paragraph 3 that the Respondent had procured the necessary materials to perform in terms of the purchase order;

[19.2] it was stated in paragraph 7 that "[t]he reason why we have been instructed to direct a letter to you is to record that our client is willing, able and desirous to execute in terms your Purchase Order whilst we need to demand your immediate deposit of 25% as agreed between the parties.";

[19.3] it was recorded in paragraph 8 that "[the Respondent] cannot manufacture (branded) product on contingency or at the risk of a customer not being paid"; and

[19.4] it was recorded in paragraph 9 that "[o]ur client would like to resolve the matter amicably and as a consequence we were instructed to allow your company an opportunity to pay (initially the deposit) the amount due to our client without further delay. We will advise our client that a period of 3 (Three) days from date hereof is more than sufficient to allow payment from your company."

- [20] On 21 May 2020, a reminder letter was sent by the Respondent's attorneys to the Applicant stating, inter alia the following:

“3. It is not our client’s intention to create a hostile environment with its customers and, as such, we have been requested to direct a further letter to you instead of pursuing our client’s rights by way of legal proceedings rendering the matter litigious.

4. We have been instructed to allow Xylomed Pharmaceuticals (Pty) Ltd to:

4.1 provide our client with the necessary artwork in order to finalise

the labour design, layout and manufacturing;

4.2 pay the 25% deposit as agreed upon between the parties;

within 3 (Three) days from date hereof.”

A response was demanded by 26 May 2020.

[21] On 27 May 2020, a further meeting was held at the Applicant’s place of business and that same day an email was sent by Mr Pieterse of the Respondent to Mr Palane and others titled “Minutes of meeting 27-05-2020” wherein the following was stated regarding “Registrations etc”:

“It was agreed that Mkhululi would keep us informed as to progress on various registrations etc. however, Omnisol made it clear that these actions are interesting but are in no way regarded as any reason for non-compliance with the agreed to terms of our order.”

[22] Mr Palane alleges that he was “dumbfounded” at receiving the email of 27 May 2020 as various statements therein were totally incorrect and inaccurate. Mr Palane further alleges that he contacted Mr Fordsham and asked him “what nonsense” the email was and expressly advised him that until the Respondent obtained the required regulatory approval, the Applicant would be doing nothing further with regard to “the proposed transaction”. The Respondent denies these allegations and points out that several emails were sent to Mr Palane requesting compliance with what had been agreed to and contained in the minutes.

[23] On 27 May 2020 correspondence was sent by the Applicant’s attorneys to the Respondent’s attorneys in response to the 21 May 2020 email recording, inter alia:

“We are instructed that the relevant Purchase Order was conditional upon:-

1. The combination of ingredients (i.e. 70% alcohol. & 0.04% Chlorhexidine Gluconate) in the relevant product requires the South African Health Product Regulatory Authority’s (SAHPRA) approval in accordance with the ‘Medicines and Related Substances Control Act 101 of 1965’ and as such, cannot be purchased or sold without the Product’s Regulatory approval as pointed out to your client by our client.
2. Obtaining necessary permission from the Medicine Regulators in the UK to import a product with such a combination of ingredients into the United Kingdom.

3. Obtaining necessary permission from the South African Department of Trade and Industry (the DTi) to export from South Africa the relevant Product as the recently passed Disaster Management Act has prohibited the export of all Essential Products such as the Product in question without obtaining authorisation from the DTi.

Furthermore, our client has also sought the relevant funding for the manufacture of the aforesaid product and awaits finalisation of this funding. As and when the above conditions are fulfilled our client will attend to providing your client with the necessary artwork and deposit.

Our client is doing its best to expedite the above and your client is requested, in the present circumstances to be patient.”

[24] The Applicant confirms that it had agreed to supply the artwork for the product and that it proposed to do so once the Respondent obtained the required regulatory approvals as the artwork was required to contain and reflect the SAHPRA registration number. According to the Applicant, it would be illegal for the Applicant and the Respondent for that matter to trade, deal in or market the product without the required SAHPRA approval having obtained (which, at the date of the hearing, had not been obtained) and, absent such registration and approval, no artwork could be supplied. The Applicant further claims that it was not obliged to pay the 25% deposit until such time as the required approvals had been obtained by the Respondent. These allegations are denied by the Respondent.

[25] On 5 June 2020, an email was addressed by the Respondent’s attorneys to the Applicant’s attorneys, denying that the transaction concluded was conditional on any of the points raised in the email quoted above and demanding payment of the deposit by 5 June 2020.

[26] On 17 June 2020, the Respondent’s attorneys addressed an email to the Applicant’s attorneys advising that, as they had not received a response to the letter of 5 June 2020, the Respondent had little choice but to issue summons against the Applicant in order to ask the court to compel it to perform in terms of the agreement and obtain an appropriate order for costs. Importantly, in paragraph 3 of the email, the following was stated:

“3. The papers will soon be issued and served. Do you have instruction to accept service of the papers on behalf of your client?” (emphasis added)

[27] On 20 July 2020, an email was sent by the Respondent’s attorneys to the Applicant’s attorneys, advising that the Registrar had been requested to award a case number to the summons which had been prepared for issuing and service. The following was stated in paragraphs 3 to 6 of the email:

“3. The process to have summonses issued is, unfortunately, somewhat delayed but we have advised our client to utilise this opportunity to extend a further invitation to Xylomed to resolve the matter amicably.

4. The facts in the matter are common cause (so we believe) and as a consequence we do not appreciate the reasons for having to incur costs in enforcing our client’s rights.

5. This letter must be seen in context of the fact that our client would like to resolve the matter without having to incur substantial legal costs.
6. If the matter takes its normal course and once we receive a case number from the Registrar we will advise our client to disclose the efforts and for it to resolve the matter amicable in order to insist on an punitive cost order against the defendant.”

[28] The summons was issued on 29 July 2020.

[29] On 6 August 2020, a letter dated 5 August 2020 was forwarded by the Respondent’s attorneys to the Applicant’s attorneys. Attached to the letter was “a copy of the duly issued summons for your further action.” It is common cause that at that time the summons had not yet been formally served.

[30] On 13 August 2020, an email was sent by the Applicant’s attorneys to the Respondent’s attorneys which stated the following:

“We are in receipt of your email of the 5th instant, with enclosed Summons.

Kindly note:-

1. We are authorised to accept service of the Summons. Should same in the interim be served at the given registered address, kindly advise us as we are instructed to enter an appearance to defend, and seek an appropriate costs order against your client.
2. Our client’s main defence has been placed on record. We again record that we are instructed that your clients ‘product’, the subject matter of this action, is unregistered and your client cannot lawfully seek to sell same at this point in time – until such time as the product has been officially duly registered by SAHPRA.
3. Our client is obtaining confirmation from the SA Health Products Regulatory Authority [SAHPRA] with regard to the above, and accordingly that all retailers must cease selling the product.
4. Our client suggests that your client in the circumstances is advised to withdraw the summons and tender payment of our client’s costs to date.

All of our client’s rights herein remains strictly reserved.

Kindly acknowledge receipt hereof.” (Emphasis added)

[31] On 4 September 2020, correspondence was addressed by the Respondent’s attorneys to the Applicant’s attorneys inter alia acknowledging receipt of the email of 13 August 2020. There was an objection by the Respondent to the letter being referred to as it was marked “without prejudice”. The Applicant agreed not to refer to it and its only relevance is that in the letter the Respondent acknowledged receipt of the email of 13 August 2020 referred to above.

[32] On 13 September 2021, over a year later, the Respondent's attorneys forwarded a letter dated 10 September 2021 to the Applicant and its attorneys. A chronology of events was provided and in paragraphs 7 to 9 of the letter, the following was stated:

"7. Due to various delays beyond our client's control the summons was eventually served on the registered address of Xylomed.

8. We did not receive a notice of intention to defend despite service on the registered address of the Defendant and despite your confirmation of receipt of the duly issued summons as early as 5 August 2020.

9. In accordance with our client's rights, we enrolled the matter for default judgment and obtained an order on 18 August 2021 of which a copy is appended hereto for your urgent attention."

[33] The return of service reveals that the summons was served on the Applicant's registered address on 8 February 2021 (being over 6 months after it was issued) by affixing a copy of it to the principal door "at principal place of business, as the premises was found locked". The Respondent did not serve the summons on the Applicant's attorneys (despite them confirming as long ago as 13 August 2020 that they were authorised to accept service) and the Respondent's attorneys failed to inform the Applicant's attorneys of their intention to serve the summons at the registered address in February 2021 or that they had effected service in this manner.

[34] On 13 September 2021, the Applicant's attorneys emailed the Respondent's attorneys confirming that they had not received notice or service of the summons and if they had it would have been defended. In this regard, it had been stated by the Applicant's attorneys in the email of 13 August 2020 that they had instructions to defend the matter.

[35] Mr Palane explained that the registered address was his former place of residence which he had left many years previously. According to Mr Palane, the service of the summons was not brought to his attention nor to the attention of any other official of the Applicant or else it would certainly have caused the summons to be vigorously defended, as the Respondent's claim is invalid and not enforceable.

[36] Turning to the merits of this application, the first question that needs to be answered is whether there was a reasonable explanation for Applicant's default and whether it was in "wilful default".

[37] Argument was presented to me by the Respondent's counsel on section 23(3) of the Companies Act, 71 of 2008, which requires a company to register the address of its office, or its principal office if it has more than one, and to file a notice of change to the registered office when this occurs. I was also referred to Rule 4(1)(a)(v) which provides inter alia that service on a company at its registered address by affixing a copy to the main door is acceptable.

- [38] Although service on the registered address is a valid form of service, the question which arises in this instance is whether, having regard to the facts, there is an adequate explanation by the Applicant for its failure to defend the matter and which shows it was not in “wilful default”.
- [39] In view of the fact that: (i) on 17 June 2020 the Respondent’s attorneys specifically asked whether the Applicant’s attorneys were authorised to accept service of the summons on the Applicant’s behalf; (ii) on 13 August 2020 the Applicant’s attorneys expressly confirmed that they were authorised to accept service of the summons and further expressly requested that, should the summons in the interim be served at the registered address, they be advised of this as they had instructions to enter an appearance to defend, I am of the view that the Applicant was reasonable in expecting the summons to be served on its attorneys of record or being advised that the summons had been served on the registered address. Had this happened, the matter would in all likelihood have been defended and this application would have been entirely unnecessary.
- [40] It was, in my view, unreasonable of the Respondent’s attorneys, in the circumstances, to only effect service on the registered address without doing anything further and, thereafter, proceeding with an application for default judgment without mentioning anything to the Applicant’s attorneys.
- [41] In the circumstances, I am satisfied that the Applicant was not in “wilful default” and that it has provided a reasonable explanation for its default.
- [42] As far as the second question is concerned, i.e. whether the application has been made bona fide, there is no factual basis or evidence before the Court which would justify a finding that this application has been brought with an ulterior motive or to delay the proceedings.
- [43] Finally, insofar as the third requirement is concerned, i.e. that the Applicant is required to show that it has a bona fide defence to the claim, I am satisfied that prima facie, it would appear that the Applicant has a bona fide defence based on there being no SAHPRA registration and/or approval to manufacture and sell the product ordered and described in annexure “A” to the summons. If the registration and/or approval is required (which both parties appear to accept is the case), in their absence, the Respondent may well be unable to perform its obligations as it may be acting unlawfully in doing so.
- [44] As stated above, no allegations referring to the need for SAHPRA registration or approval or the terms of the alleged agreement relating to who should obtain such approval and/or that it would not affect the Applicant’s obligation to perform in terms thereof, were included in the particulars of claim or mentioned in the correspondence attached thereto. It is therefore unclear whether Bokako, AJ was even aware of the SAHPRA issue when the default judgment application was moved. No mention is made of it

in the practice note filed by Mr Wessels, who appears to have been the counsel representing the Respondent in the default judgment

application,

[45] Insofar as the Applicant's failure to file a replying affidavit is concerned, it was submitted by the Respondent's counsel that all of the allegations made in the answering affidavit stand unchallenged as a result thereof. I was inter alia referred to the judgment of Tolmay J in the matter of Nedbank Limited v Ramparsad and Another[4] where the following stated in paragraph [4]:

"In the absence of a replying affidavit in the present application it was the applicant's submission that the applicant's version, as it stands in the answering affidavit, stands to be accepted as uncontested on those allegations that have challenged the content of the founding affidavit this much is trite."

[46] I do not agree that the Applicant's failure to file a replying affidavit renders all allegations in the answering affidavit being unchallenged. That is not what the above passage says.

[47] The above passage merely confirms that the allegations in the answering affidavit that have "challenged" what is stated in the founding affidavit stand uncontested where no replying affidavit has been filed.

[48] In this instance, there is no denial in the answering affidavit that: (i) the correspondence referred to above was exchanged between the parties and their legal representatives; (ii) the product presented to the Applicant and which was ordered included CG; (iii) the product was specifically described in the invoice attached as annexure "A" to the particulars of claim as including CG; and (iii) that SAHPRA registration and approval was required to sell the product as described in the invoice. There is accordingly no version in the answering affidavit on these aspects which differs from the Applicant's version in the founding affidavit.

[49] Insofar as the answering affidavit describes the terms of the agreement concluded relating to: (i) the SAHPRA registration and approvals required and who was responsible for obtaining them; and (ii) the alleged acceptance by the Applicant that a substitute "secondary ingredient" could be used, these allegations do not accord with the agreement pleaded in the particulars of claim which Bokako, AJ considered in granting the default order.

[50] In paragraph 4 of the particulars of claim, the agreement alleged to be in place was pleaded as follows:

"4.

On or about 14 April 2020 the Defendant duly represented by an authorised representative, Mr Mkhululi Palane and the Plaintiff duly represented by an authorised representative, Mr Andrew Frodsham concluded a verbal agreement of which the terms were inter alia the following:

4.1 The Defendant placed an order for 500 000 (Five hundred thousand) branded hand and surface sanitizer units at a cost of R24.00 (Twenty four rand) each, the detail of the product contained in the Defendant's written order appended hereto marked Annexure 'A'.

4.2 The Defendant would pay a 25% deposit in order to commence with manufacturing of the order.

4.3 The Defendant would pay the deposit without delay in order to ensure the delivery of the product mid-May 2020.

4.4 The Defendant would provide the Plaintiff with the necessary art work to finalise the layout and print the labels on the product.

4.5 The Plaintiff may continue to manufacture the ordered goods on receipt of a written purchase order.

4.6 The full outstanding amount on the purchase price will be paid before collection to the product by the Defendant." (sic)

[51] In paragraphs 5 and 6 of the particulars of claim, it was alleged that the Applicant had placed the written purchase order (i.e. annexure "A" to the summons described above) on 14 April 2020 but it failed to comply with the agreement concluded between the parties in that it:

[51.1] failed to pay the 25% (twenty-five percent) deposit; and

[51.2] failed to provide the art work required in order to print the labels for the aerosol cans.

[52] The product is defined in the summons with reference to the invoice attached thereto as annexure "A". The product description specifically states that it contains EG. Unless the Respondent obtains the necessary registration and approvals, it would appear that it would not be able to comply with the order granted by Bokako, AJ and, in particular, paragraph 1.3 thereof, which requires the Plaintiff to finalise the manufacturing of the "products" (i.e. those meeting the description in the invoice).

[53] It was contended on behalf of the Respondent in the answering papers that the only purpose of CG was to add residual protection and that there are other products that could have been used which would have had the same uniqueness and effectiveness. In this regard, the following was stated in paragraphs 6.44 to 6.51 of the answering affidavit:

"6.44. Nevertheless, it is important to mention to the Honourable Court what is the purpose of CG. The only purpose of CG was added as a residual protection.

6.45. It was added to the product in order to act as residual protection after the use and effect of the 70% alcohol contained in the product had its effect on the COVID-19 virus.

6.46. This was the sole purpose for the product and was solely added as a supporting ingredient. In fact, the World Health Organisation recommended that in sanitation products that it should contain 70% alcohol and it further recommended the use of Hydrogen Peroxide as a secondary ingredient, whereas the respondent's product contained CG.

6.47. The mere fact that CG was contained in the initial process of the product did not make it more unique than any other product, nor did it make it any more effective than other products, as its sole purpose was for residual protection and as a supporting ingredient.

6.48. In fact, even if any other secondary ingredient was contained therein would not result in the product becoming less unique or less effective as its effectiveness would still remain.

6.49. Furthermore, after further research in this aspect, the following products can be used in the product, instead of CG, and still have the same uniqueness and effectiveness:

6.49.1. Hydrogen Peroxide (As per the recommendation of the WHO as evident from the following attached as annexure 'AA15');

6.49.2. Benzalkonium Chloride;

6.49.3. Benzethonium Chloride;

6.49.4. Parachloromethaxyleneol (PCMX).

6.50. All of the aforementioned products can still be used as a secondary ingredient for residual protection and the product will still retain its effectiveness and uniqueness and an aerosol surface sanitizer. I attach hereto a confirmatory affidavit of Alasha Meghraj confirming that the listed secondary ingredients would allow the product to retain its effectiveness as annexure 'AA16'.

6.51. As was stated above, in terms of what was agreed, the applicant would attend to the registration and approval of the product containing CG from SAHPRA, and in the event that this does not occur, it was understood that the respondent may use any of the other secondary ingredients as set out above which would still allow the product to have its effectiveness against the COVID-19 virus." (sic)

[54] Again, there is no mention in the particulars of claim that it was a term of the agreement that, if SAHPRA approval could not be obtained, the Applicant understood or accepted that any other secondary ingredient which would still allow the product to have its effectiveness could be used. This term flies in the face of the express recordal in the internal email of the Respondent dated 10 April 2020 that "Active ingredient that will be used in all supplied products to Xylomed must be Chlorohexidine Gluconate, unless specifically requested otherwise" and there is no evidence on the papers that, at any stage, the Applicant requested that any other secondary ingredient, i.e. other than CG, could be used.

[55] Having regard to the facts of this case I am of the view that the Applicant has made out a proper case for the judgment to be rescinded and am further of the view that costs should follow the result.

ORDER:

In the circumstances, I grant an order in the following terms:

1. The default judgment and order of Bokako, AJ are rescinded and the Applicant is granted leave to defend the action;
2. The Applicant is directed to file its notice of intention to defend within 10 (ten) days of the date of the granting of this order and, thereafter, the Rules of Court pertaining to the exchange of further pleadings and notices will apply;
3. The Respondent is directed to pay the costs of this application.

LG KILMARTIN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

Hearing date:

24 November 2022

Judgment date:

27 January 2023

Counsel for the Applicant:

Adv M Mathaphuna

Applicant's Attorneys:

Bokwa Law Incorporated

Counsel for the Respondent:

Adv R de Leeuw

Respondent's Attorneys:

Van der Merwe & Associates

[1] Wahl v Prinswil Beleggings (Edms) Bpk 1984 (a) SA 457 (T) at 461H.

[2] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 9F.

[3] 1954 (2) SA 345 (A) at 353A.

[4] (58806/2018)

[2021] ZAGPPHC 746 (4 November 2021).

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ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2023/54.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/xylomed-pharmaceuticals-pty-ltd-v-omnisol-unknown-topic-agpphc-2023>

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