IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Case No: 2370/2022

In the matter between:

RICKSHAW TRADE INVESTMENTS 49 (PTY) LTD t/a FMMC **APPLICANT / DEFENDANT**

and

MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR EDUCATION IN THE EASTERN CAPE

RESPONDENT / PLAINTIFF

JUDGMENT

Bloem J

[1] The issue is whether the order granted by default on 22 November 2022 against the applicant, a company, in favour of the respondent, the Member of the Executive Council responsible for education in the Eastern Cape, for payment of R1 531 660, interest thereon and costs (the order) should be rescinded. Although this is an application, I shall refer to the parties as they have been cited in the summons commencing action, namely as plaintiff and defendant respectively. The application for the rescission of the order (the rescission application) was heard on 5 October 2023. After the hearing of submissions, the parties were informed that judgment would be delivered on 17 October 2023.

[2] On 12 October 2023 the defendant instituted an interlocutory application for an order that it be granted leave to file a further affidavit. That application, which was opposed by the plaintiff, caused the judgment not to be delivered on 17 October 2023. Instead, submissions were made on 15 November 2023 on whether leave should be granted to the defendant to file a further affidavit. In the first part of this judgment I shall deal with the facts contained in the affidavits before the interlocutory application was instituted whereafter I shall deal with the additional facts that the defendant sought to introduce through the filing of a further affidavit.

[3] On 27 July 2022 the plaintiff issued summons against the defendant for payment of the above amount, interest thereon and costs, being in respect of a payment allegedly wrongly made by the Eastern Cape Department of Education (the department) to the defendant. On 11 August 2022 the sheriff served the summons upon Ms Thiyena Nkola at the defendant's principal place of business. It is common cause that Ms Nkola is the daughter of Bongile Nkola, who deposed to the founding and replying affidavits in the rescission application in his capacity as the defendant’s managing director. The defendant did not give notice of its intention to defend the action. The application for default judgment was set down for hearing on 22 November 2022, on which date the order was granted.

[4] On 14 April 2023 the defendant instituted the rescission application. Mr Nkola said in the founding affidavit that the rescission application was made in terms of rule 31(2)(b) of the Uniform Rules of Court. That rule provides that:

“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] A defendant who seeks the rescission of an order under rule 31(2)(b) must satisfy at least two requirements. The first is that the application must be made within 20 days after the defendant has acquired knowledge of the order or judgment against it. Secondly, the defendant must show good cause for the setting aside of the order. I now deal with the first requirement. In the founding affidavit in support of the rescission

application, Mr Nkola said that the sheriff served a copy of the order on him on 25 February 2023. He claimed that was the first time that he became aware of the order against the defendant. The answering affidavit in the rescission application was deposed to by the then head of the department, Mahlubandile Qwase. In his answering affidavit Mr Qwase said that the sheriff served a copy of the order on Mr Nkola on 18 February 2023. In support of that statement, he annexed a copy of the return of service, which reflected that the sheriff served the order on Mr Nkola on 18 February 2023. In his affidavit in support of the application for condonation for the late institution of the rescission application, which was instituted after Mr Qwase's affidavit had been delivered, Mr Nkola said that his "*memory says that I became aware of this matter on 25 February 2023 but the return of the sheriff said that the summons was actually served on me on 18 February 2023. I know that, when I became aware of this matter, I immediately contacted my attorney on behalf of the applicant and informed him about the matter*." In the circumstances, I accept that the sheriff served the order on Mr Nkola, and therefore on the defendant, on 18 February 2023. The twenty-day period referred to in rule 31(2)(b) would have expired on 20 March 2023. The defendant should accordingly have instituted the rescission application on or before 20 March 2023. As pointed out above, the rescission application was instituted only on 14 April 2023, some 17 days after the expiry date. The next question is why the application was, on the defendant's own version, not instituted within 20 days after the defendant had acquired knowledge of the order, but 17 days after the expiry of the 20-day period.

[6] In the above quotation, Mr Nkola said that he, on behalf of the defendant, contacted his attorney immediately after the order had been served on him. He said that, although he had made great progress in his battle with severe depression, he had memory loss, hence his belief that he became aware of the order only on 25 February 2023. His attorney had to consult with him "*more than four times in order to help [him] recollect events properly*" in this matter.

[7] In his answering affidavit, Mr Qwase said that the defendant was aware of the action against it before the order was granted. In support of that statement, he referred to a telephone call that Amanda Madlanga, the plaintiff's attorney, said that she received from the defendant's attorney, Sipho Klaas, on 26 October 2022. During that

telephone discussion, Mr Klaas requested certain documents relating to the plaintiff's claim against the defendant. Ms Madlanga requested Mr Klaas to place the request in writing, because he had by then not placed himself on record in the plaintiff's action against the defendant. That same evening, she received an email from Mr Klaas wherein he requested her to furnish him with all the documents relevant to the plaintiff's claim against the defendant, inclusive of the summons. Ms Madlanga deposed to an affidavit wherein she confirmed that on 26 October 2022 she had the telephone conversation with Mr Klaas and that, later that evening, she received the email from him.

[8] Mr Nkola said that the email was not sent to Ms Madlanga on 26 October 2022, but on 27 February 2023. The explanation for the date of 26 October 2022 on the email was that the laptop, from which Mr Klaas had sent the email, was malfunctioning. In his confirmatory affidavit Mr Klaas confirmed that he sent the email to Ms Madlanga on 27 February 2023 and that the laptop that was used "*for office work was malfunctioning causing a lot of confusion with dates*".

[9] Whether the email was sent and received on 26 October 2022 or 27 February 2023 is immaterial for purposes of establishing what occurred after the sheriff had served the order on Mr Nkola on 18 February 2023. All that Mr Nkola said in that regard was that he contacted his attorney immediately after the service of the order on him. Mr Klaas did not say when he consulted with Mr Nkola and what the aspects were in respect whereof there allegedly was a need to have more than four consultations with Mr Nkola. The defence raised by the defendant to the plaintiff's claim requires proof that the department had requested the defendant to manufacture and deliver furniture to it or to schools and that the defendant had delivered the manufactured furniture. Those documents would in all probability have established the date when the request was made and when the furniture was delivered. As it turned out, nothing was said in Mr Nkola's affidavit about a request by the department to the defendant to manufacture furniture. The only document that was annexed to his affidavit in that regard was a quotation from the defendant to the department for the manufacture of school furniture amounting to R1 531 660.

[10] In my view, it would not have taken long to prepare the founding application papers in the rescission application had Mr Nkola been requested to provide Mr Klaas with the request by the plaintiff for the defendant to manufacture the furniture.

[11] Furthermore, on the assumption, without deciding, that the conversation between Ms Madlanga and Mr Klaas occurred and the email was sent and delivered on 27 February 2023, neither Mr Nkola nor Mr Klaas explained why Ms Madlanga was not informed of the alleged difficulties that they experienced with the preparation of the rescission application or why an agreement was not sought from the plaintiff for the application to be instituted after the expiry of the 20-day period.

[12] It was unclear from the affidavits whether Ms Madlanga sent the requested documents to Mr Klaas after he had sent the above email. That email established that, at least as at 27 February 2023, Mr Klaas knew that Ms Madlanga acted for the plaintiff in the action against the defendant. He could have alerted her of the alleged difficulties that he experienced with Mr Nkola's alleged loss of memory and sought agreement from the plaintiff for an extension of the time within which to institute the rescission application. The defendant failed to do so. Regard being had to all the evidence, I am of the view that the defendant has not given a satisfactory explanation for the late institution of the rescission application. The application for condonation for the late institution of the rescission application should be refused. That refusal would mean that the first requirement of rule 31(2)(b) has not been satisfied. For that reason alone, the rescission application under that subrule should be dismissed.[1]

[13] However, if the finding, that the defendant failed to satisfactorily explain its failure to institute the rescission application within 20 days of acquiring knowledge thereof, is incorrect, the rescission application should nevertheless be dismissed for want of good cause. The courts have deliberately refrained from giving a precise or comprehensive meaning to the phrase 'good cause'. That is so because any definition of that phrase is likely to interfere with the court's wide discretion to determine whether a defendant has

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[1] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*; [2003] ZASCA 36; 2003 (6) SA 1 (SCA; (2003) 2 ALL SA 113 (SCA) para 12.

established good cause. Each case must be determined on its own peculiar facts. The essential elements of good cause for the rescission of an order granted in default are that the applicant must give a reasonable and acceptable explanation as to the reasons for its failure to defend the action; and it must show that it has a bona fide defence to the plaintiff's claim, which defence prima facie carries some prospect of success.[2]

[14] Mr Nkola did not deny that the summons was served by the sheriff on his daughter on 11 August 2022. What he denied was that he was aware of the summons before the order was granted. He stated that even if his daughter had drawn his attention to the summons, it would not have made any difference because his health was fast deteriorating. His daughter said that after the sheriff had served the summons on her, she kept it "*amongst [her father's] personal documents hoping that he would be able to see it and attend to it after he recovered from his sickness.*" She said that she did so because she was aware that her father's depression emanated from his work problems and that members of the family had been given strict instructions by his medical practitioner not to bother him about anything until he recovered. Ms Nkola described herself as an adult. According to the return of service, the sheriff explained the nature of the summons to her. She must have understood that the plaintiff claimed an amount of more than one million rand from the defendant. That should have raised an alarm bell because the defendant was faced with a big claim and something had to be done to protect the defendant's interest. I have difficulty understanding Ms Nkola's conduct under those circumstances. She did not say that she hid the summons from her father or that, during that period, he did not have access to his personal documents. Nothing prevented him from discovering the summons amongst his personal documents while he was still depressed. It boggles the mind that an adult would adopt such a nonchalant attitude towards the summons wherein such a big amount of money was claimed from the defendant. Her conduct in that regard boarded on being reckless. In my view, what Ms Nkola did with the summons does not provide a reasonable and acceptable explanation for the defendant's failure to defend the action.

[15] The plaintiff's claim against the defendant was that on 15 December 2022 and in

[2] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765A-C; [1985] 2 All SA 76 (A) at 79. See also *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-E.

the bona fide and reasonable belief that the department owed R1 531 660 to the defendant, paid that amount to the defendant when it was not owing to it and that the defendant nevertheless appropriated that amount. That amount was based on an invoice dated 7 December 2020, which the defendant sent to the department. It is common cause that during May 2018 the department and the defendant concluded a service level agreement in terms whereof the defendant was required, on request, to manufacture and deliver furniture to the department or schools for payment. The plaintiff's claim was that the defendant had neither manufactured nor delivered any school furniture to the department or to a public school in terms of the service level agreement and that the R1 531 660 that was paid to the defendant was neither due nor owing by the department to the defendant. It is common cause that the defendant has, to date, not delivered furniture to the department or any school, despite the fact that the above invoice, upon which the erroneous payment was based, reflected that the furniture had been delivered at various inland and coastal schools in the Eastern Cape.

[16] Mr Nkola admitted that the defendant received the R1 531 660 from the plaintiff. I set out hereunder what Mr Nkola claimed to have been the defendant's bona fide defence, under the heading of bona fide defence:

"28. I was not afforded an opportunity to defend the action, the alleged Summons was never served to me by the Respondent and that I have not met them until such time they sent to my attorney after the request was made to the Respondent's Attorneys.

29. I further submit that at the time of the issuing of Summons I was in a sick bed and that there was application to compel the Respondent which is still running before the Bhisho High Court under case number 229/2022 as per attached Notice of Motion in this application.

30. It is the above reasons which I believe that I do not owe the Respondent any monies, I am not denying the payment paid to me in December 2020 nor am I denying the fact that I had contractual obligations with the Respondent but the Respondent have to comply with my constant request from him to furnish the Applicant with the delivery instructions. Remember it was and it is not easy for me to just deliver to any school as I was dealing with furniture of various school in the Eastern Cape, it is for this reason why I consistently nagged the Respondent to issue the delivery instruction on which he failed dismally to issue same to the Applicant until this date. I am still looking forward to receive same from the Respondent.

31. I have complied with my contractual obligations but the Respondent failed to submit to the Applicant the delivery instructions until to date.

32. I submit that I have a bona fide defence to defend any action against my company including the main action.

33. It is against this background and reasoning that the default judgment entered against should be rescinded." (sic)

[17] In my view, the defendant has failed to show that it has a bona fide defence which prima facie carries some prospect of success to the plaintiff's claim. One would have expected the defendant to have shown that the plaintiff requested it to manufacture

furniture, that the furniture was delivered to the department or to a particular school or schools and that the defendant invoiced the department for the delivered furniture. Clause 10.3 of the service level agreement provides that payment to the defendant shall take place after the furniture had been delivered. What happened in this case was, on the defendant's own version, that payment was made before the furniture could be delivered. In his founding affidavit in the rescission application, Mr Nkola said that he "*consistently nagged*" the department to issue delivery instructions, but that it failed to issue such instructions. The defendant's explanation was that it retained the amount that the plaintiff paid to it because the plaintiff did not issue a delivery instruction to it. That version is irreconcilable with the invoice on which the payment was based which reflected that the furniture had been delivered; and with what Mr Nkola said in his replying affidavit, namely that the defendant issued that invoice "*for the manufacturing, storage and delivery, even though same had not taken place*". The defendant's explanation is unsatisfactory and so improbable that it must be rejected.

[18] What was annexed to Mr Nkola's founding affidavit was a quotation dated 27 October 2020 by the defendant for 200 teachers' tables, 200 teachers' chairs, 1 000 single tables and 1 000 learner chairs totalling R1 531 660. Mr Qwase explained that, when there was a need for school furniture, the department would request the defendant to provide it with a quotation in respect of a certain number of identified pieces of furniture. On receipt of the defendant's quotation, the department would establish whether it had sufficient funds to instruct the defendant to manufacture the furniture according to the quotation. If the budget allowed it, the department would place an order. Mr Qwase's explanation found support from paragraph 3 of the letter of award dated 15 June 2017 that the previous head of the department sent to the defendant. In that paragraph the defendant was informed that the service level agreement depended on "*budget availability and the need*". The original set of affidavits showed that there was a quotation but no order from the defendant.

[19] What was also annexed to Mr Nkola's affidavit was a letter dated 29 May 2021 from the defendant to the head of the department wherein a complaint was made about a certain Mr Harmse who allegedly did not place orders for school furniture with the defendant. In paragraph 3 of that letter Mr Nkola placed it on record that "*to date the*

department has not furnished [the defendant] nor given delivery instructions, yet Mr Harmse has the guts to withhold [the defendant's] school furniture orders which is totally unfair to say the least". In that letter Mr Nkola complained that the department withheld school furniture orders from the defendant. Despite the overwhelming evidence against the defendant and the absence of proof of an order for furniture, Mr Madukuda, counsel for the defendant, nevertheless submitted at the hearing on 5 October 2023 that the defendant placed an order for the manufacture of furniture. On the evidence contained in the original set of affidavits, that submission was unsustainable for lack of a factual basis.

[20] In my view, on the original application papers, the defendant failed to demonstrate a bona fide defence, which prima facie has some prospect of success to the plaintiff's claim. There was no evidence to indicate that the department placed an order for school furniture to the value of R1 531 660 to be manufactured and delivered. The application for the rescission of the order should, in the circumstances, be dismissed. I will now consider whether the defendant has made out a case for the filing of a further affidavit and, if such affidavit is admitted, whether it changed the position.

[21] In motion proceedings three sets of affidavits are ordinarily filed, namely founding, answering and replying affidavits. Rule 6(5)(e) provides that the court may in its discretion permit the filing of further affidavits. A court is unlikely to grant leave to a party to file a further affidavit to set out facts that should have been in the earlier affidavit, in the absence of a satisfactory explanation as to why those facts were not in the earlier affidavit in the first place.[3]

[22] It is very difficult to appreciate whether the defendant has an explanation why the facts that it sought to introduce by way of the filing of a further affidavit were not set out in its founding or replying affidavits. Mr Klaas said that, after the hearing on 5 October 2023, he "*took time to reason with [Mr Nkola] at his house in order to help him remember the whereabouts of this important information whereafter I took it upon myself to travel to the applicant's offices at Mthatha in order to look for these documents*

[3] *Rhoode v De Kock* [2012] ZASCA 179; 2013 (3) SA 123 (SCA); [2013] 2 All SA 389 (SCA) par 19.

and I was able to find them from the applicant's offices … ".

[23] As pointed out above, the defendant's defence required proof that the plaintiff requested it to manufacture furniture and that the furniture had been delivered. Mr Klaas, as an attorney, must have realised when he prepared the rescission application what the defendant was required to do to demonstrate that it had a bona fide defence to the plaintiff's claim. Before the institution of the rescission application, Mr Klaas could have searched for the documentation to demonstrate that the plaintiff had ordered furniture from the defendant and that the defendant had delivered the manufactured furniture, if that was the case. He failed to do so. In the absence of a reasonable explanation why those facts were not placed before the court in the affidavits prior to the hearing on 5 October 2023, the application for the filing of a further affidavit should be refused.

[24] However, even if regard is had to the contents of the defendant's further affidavit, which, coincidentally was deposed to by Mr Klaas, who obviously had no knowledge of the facts relating to the plaintiff's claim and the defendant's defence, the application for the filing of the further affidavit must be dismissed because, despite the fact that new documents came to light regarding the payment of the R1 531 660, the defendant did not produced any proof that the department placed an order with the defendant to manufacture the furniture. Without such an order, the defendant had no mandate from the department to manufacture furniture to the value of R1 531 660.

[25] The defendant reiterated in the further affidavit that it received the amount of R1 531 660. The plaintiff's case was that the defendant "*was paid without any purchase order having been issued, without any delivery instruction and without any of the items that the department invoice for having been delivered*". The reason for that payment, said the head of department, was because departmental officials misled the department into believing that the school furniture had been delivered, when that was not the case.

[26] The defendant has admitted in the further affidavit that it had not delivered the furniture, claiming that the "*only reason the furniture has not been delivered to this day is that the applicant insists on the delivery instructions, the importance of which the*

respondent had not denied". The plaintiff contended that an instruction to deliver furniture is given before the department issues a purchase order and before payment is made. That makes sense. It means that after the department had ascertained that it had sufficient funds to pay the defendant for the furniture, as quoted, it will place an order for the manufacturing of the furniture. Once payment has been requested and processed, an instruction to deliver the furniture will be issued. After the delivery of the furniture, the defendant would be paid. The defendant's version was that the delivery instruction "*was to follow immediately after the payment but the respondent failed to issue the instruction*". That version is inconsistent with the clear provisions of clause 10.3 of the service level agreement and is so improbable that it must be rejected.

[27] In all the circumstances, the further affidavit was of no assistance to the defendant, as it did not remedy the shortcomings in the defendant's earlier affidavits.

[28] The plaintiff has successfully opposed the rescission application. There is no reason why the defendant should not be ordered to pay the costs of the rescission application as well as the application for the filing of a further affidavit.

[29] In the result, it is ordered that:

1. The application for the rescission of the order that was granted on 22 November 2022 against the applicant in favour of the respondent be and is hereby dismissed.
2. The applicant shall pay the respondent's costs of the application, such costs to include the costs of the application for the filing of a further affidavit and the hearing on 5 October 2023 and 15 November 2023.

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GH BLOEM
JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant / defendant:	Mr Z Madukuda, instructed by Sipho Klaas Attorneys Inc, East London and Mgangatho Attorneys, Makhanda.
For the respondent / plaintiff:	Mr TL Luzipho of TL Luzipho Attorneys, Mthatha and Yokwana Attorneys, Makhanda.
Date of hearings:	5 October 2023 and 15 November 2023.
Date of delivery of the judgment:	21 November 2023.