



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

CASE NO.:CA211/2022

Matter heard on: 11 April 2023

Judgement delivered on: 9 May 2023

In the matter between: -

EAGLE UKHOZI CIVILS (PTY) LTD

First Appellant

MPENDULO NDLAZI

Second Appellant

and

EASTERN CAPE DEVELOPMENT CORPORATION

Respondent

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

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Signature

.....

Date

JUDGMENT

SMITH J:

Introduction

[1] On 30 October 2018, Jaji J granted default judgment against the appellants, inter alia, terminating a 'Construction Loan Agreement' (the loan agreement) concluded by the first appellant and the respondent, and ordering them to pay to the latter the sum of R579 302.32. The appellants subsequently unsuccessfully applied for an order rescinding the judgment. The rescission application was argued before Nhlangulela DJP and on 3 December 2020, the learned judge handed down judgment dismissing the application with costs.

[2] The appellants' application for leave to appeal was only partially successful since Nhlangulela DJP granted leave on a limited ground only. The appellants thereafter petitioned the Supreme Court of Appeal and were granted leave to appeal on the grounds set out in their notice of appeal.

[3] The first appellant is a duly registered company. The second appellant is a businessman and the sole director of the first appellant. The respondent is an organ of state duly established in terms of the Eastern Cape Development Corporation Act, 2 of 1997. The respondent did not oppose the appeal.

The facts

[4] The relevant facts are briefly as follows. During 2015, the Mnquma Local Municipality (the municipality) awarded a contract to the first appellant for the construction and resurfacing of municipal roads. The latter thereafter successfully applied to the respondent for loan finance in the sum of R960 000. The parties then entered into the loan agreement in terms of which, inter alia, the respondent would advance to the first appellant the abovementioned sum as funding for the construction project. The loan was repayable within a period of nine months. In terms of the loan agreement all payments due to the first appellant by the Municipality would be paid to the respondent by virtue of a cession agreement. The respondent would manage and administer all monies received from the municipality and would pay suppliers directly for amounts invoiced to the first appellant. The latter would only be entitled to profits once the loan had been repaid in full and the agreement

terminated. It was common cause that the respondent paid the initial loan amount of R960 000 to suppliers stipulated by the first respondent.

[5] The agreement furthermore provided that should the first appellant fail to pay instalments on the due dates, the respondent would, inter alia, be entitled to terminate the agreement and institute legal proceedings.

[6] At the same time the parties also concluded the cession agreement in terms of which the first appellant ceded to the respondent all payments due to it by the municipality and the latter would make payment directly to the respondent.

[7] The second appellant and the respondent had also previously, on 18 December 2015, entered into a deed of suretyship, in terms of which the former bound himself as surety and co-principal debtor with the first appellant 'for the due payment of any sums of money now owing or which may become owing and claimable' from the first appellant by the respondent.

[8] For reasons which are unimportant for the purposes of the appeal, the payments from the municipality dried up and the respondent demanded payment in the sum of R579 302.32 from the appellants. When they failed to pay, the respondent instituted civil action for an order terminating the loan agreement, payment of the aforesaid amount and ancillary relief. The appellants failed to file notices to defend and the respondent successfully applied for default judgment.

[9] The rescission application was launched during June 2020. In that application the appellant sought to show good cause by asserting that they have a reasonable and acceptable explanation for their default and a valid and bona fide defence to the respondent's claim.

The appellants' explanation for their default

[10] In explaining the reasons for their default the appellants alleged that they did not receive the summonses and only became aware of the default judgment against them on 17 January 2020 after the sheriff had served the warrant of execution on

one Mr Ntsholo, attaching and removing a truck that he had bought from the first appellant. The summons had been served on the first appellant's *domicilium citandi et executandi* during May 2018, but there was nobody at the premises at the time and service was effected by affixing copies of the summons to the door. The second appellant had travelled extensively during that time and the premises were consequently unoccupied for long periods. Because of his dire financial situation brought about by the municipality's failure to pay invoices rendered by the first appellant, he could not afford to employ staff. They were therefore unaware of the fact that the respondent had instituted civil action against them.

[11] Regarding their failure to bring the rescission application within the prescribed time period, the appellants explained that the delay was caused by their attorneys' struggle to obtain copies of missing documents, waiting for counsel to settle the application papers and the difficulties caused by the strictly enforced lockdown in place at the time.

Bona fide defence

[12] The appellants also asserted that they have a bona fide defence to the respondent's claim. They denied that they were in breach of the loan agreement and asserted that the first appellant's contractual duty to pay the instalments had been transferred to the respondent by way of the cession agreement. They had informed the respondent about the municipality's failure to pay the invoices and the latter was thus aware that the first appellant did not receive any payments from the municipality. The agreement provided that the respondent would settle the outstanding balance on the facility from payments received from the municipality. They contended that because the municipality had failed to pay invoices rendered by the first appellant, the latter was not under any obligation to pay the loan instalments. The first appellant could consequently not have been in breach of the loan agreement.

[13] They also contended that the clause which provided that the first appellant would be in breach if the municipality fails to pay is against public policy and thus invalid and unenforceable. They submitted that it is 'absurd that where one organ of

state does not pay, another private person or entity who is a candidate for development should effectively stand as surety for an organ of state.’ They contended furthermore that one of the main objects of the respondent is to nurture and encourage the development of small businesses. It was accordingly against public policy for the latter, using its disproportionately powerful bargaining position, to foist the impugned clause upon it.

[14] In addition, they contended that they have a counter-claim against the respondent that would entirely extinguish its claim. The cession agreement envisages that the respondent, as cessionary, would collect outstanding debts from the municipality. It has failed to do so and the first appellant consequently has a counter-claim against it in the sum of R1 216 714, 64.

Findings of the court *a quo*

[15] For some reason Nhlangulela DJP approached the matter as if it were an application for rescission in terms of rule 42 (1), namely that the default judgment was granted in error. This was an unfortunate misdirection on the part of the learned judge since the application was unambiguously brought in terms of the common law. It also appears that the learned judge was of the view that he was called upon to determine the merits of the defences proffered by the appellants instead of determining whether they have raised triable issues in the sense that the facts put up by them, if established at the trial in due course, would constitute a valid defence to the plaintiff’s claim. This much is also evident from the manner in which he had couched the order granting leave to appeal, namely: ‘for determination of the issue whether the respondent’s right to claim payment, and the applicants’ corresponding obligation to pay, under the Construction Loan Agreement was suspended and/or waived by the terms of the Deed of Settlement.’

[16] Regarding the adequacy of the appellants’ explanation for their default, the learned judge found that their concession that the possibility that the summonses were served on the first appellant’s *domicilium citandi et executandi* could not be ruled out, ‘puts paid to the issue that judgment was granted without prior notification.’ And regarding their failure to bring the rescission application within a reasonable

time, the learned judge found that the long delay was not explained adequately and was 'typically the approach of a litigant with a lackadaisical attitude.'

[17] For the reasons set out below, I respectfully disagree with the learned judge's reasoning and findings.

Discussion

[18] An applicant for rescission must establish good cause by: (a) providing a reasonable explanation for his or her default; and (b) showing that he or she has a bona fide defence to the plaintiff's claim, which has *prima facie* prospects of success. It is not sufficient for only one of those requirements to be established, and a failure to establish both may result in the court refusing to grant the requested rescission. (*Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC), at para 85)

[19] An applicant is not required to deal fully with the merits and must only show a *prima facie* defence by averring facts which, if proved at the trial in due course, would constitute a bona fide and valid defence to the plaintiff's claim. (*Sanderson Technicol v Intermenua* 1980 (4) 574 (WLD), at 575-H) It is also established law that a counter-claim which will extinguish the plaintiff's claim also constitutes a bona fide and complete defence to the plaintiff's claim. (*Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29)

[20] I am of the view that the appellants have proffered reasonable explanations for their default and failure to bring the rescission application within the prescribed time period. It was common cause that the summonses were served on the first appellant's *domicilium citandi et executandi* and the respondent was unable to dispute their assertion that they were unaware of the civil action against them. They have accordingly shown that they were not in wilful default. The court must also take judicial notice of the difficulties encountered by litigants during the early stages of the Covid lockdown. The delay in launching the rescission application was accordingly, in my view, not unreasonable.

[21] To my mind the appellants have also shown that they have several bona fide defences to the respondent's claim. The averment that the respondent had assumed the responsibility to claim payment from the municipality will, if established at the trial, constitute a complete defence to the respondent's claim, since it would mean that the first appellant was consequently not in breach of the loan agreement. The appellants have also set out sufficient facts to establish that they have a counter-claim against the respondent, which if successful, will extinguish its claim.

[22] The assertion that the clause on which the respondent relies for its contention that the first appellant is in breach of the loan agreement is against public policy and therefore unenforceable, will also if proved at the trial, constitute a valid defence to the respondent's claim.

[23] In our law a court may refuse to enforce a term of a contract on the basis that it is mala fide, unfair or unreasonable and therefore contrary to public policy. The Constitutional Court has authoritatively pronounced on this issue in *Beadicia 231 CC and Others v Trustees of the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC), holding that abstract values such as good faith, fairness or reasonableness have relevance in the application of contract law when the question arises as to whether a contractual provision or the enforcement thereof would be against public policy. The Court also emphasized that 'in our new constitutional era, the principle of *pacta sunt servanda* is not the only, nor the most important principle, informing the judicial control of contracts' and that there is no basis for elevating the principle above other constitutional rights. If the enforcement of a contractual term will implicate a number of constitutional rights, 'a careful balancing act' is required to determine whether it will offend public policy. (At para 87)

[24] As mentioned, it is not the duty of the court hearing the rescission application to determine the merits of the defences averred by the applicant, but that of the trial court. I am accordingly of the view that the appellants have also established that they have bona fide defences to the plaintiff's claim, which have *prima facie* prospects of success. The court a quo therefore wrongly dismissed the application for rescission and the appeal must consequently succeed,

Order

[25] In the result the following order issues:

1. The appeal succeeds with costs.
2. The order of the court *a quo* is set aside and there is substituted the following order:
 - (a) The default judgment granted against the applicants on 30 October 2018 under case number 1299/18 is hereby rescinded and set aside.
 - (b) The respondent is ordered to pay the costs of the application on the party and party scale.

JE SMITH
JUDGE OF THE HIGH COURT

I agree

RWN BROOKS
JUDGE OF THE HIGH COURT

I agree

N MULLINS
ACTING JUDGE OF THE HIGH COURT

Appearances:

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