IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Reportable Judgment **Case No: 13954/2009**

In the matter between:

E R PERRINS BUILDING CONTRACTORS CC Plaintiff/ Respondent (Registration No. 1995/008056/23)

And

DRUK- MY- NIET WINE ESTATE (PTY) LTD Defendant/ Applicant

CORAM: **Meer, J**

JUDGMENT: **Meer, J**

DATE OF HEARING: **19 August 2010**

DATE OF JUDGMENT: **23 August 2010**

ADV. FOR APPLICANTS: **Adv. G Elliot**

INSTRUCTED BY: **Mcloughlin Inc.**

REF: **Smcl/rjs/22004**

ADV. FOR RESPONDENT: **Adv. B Fourie**

INSTRUCTED BY: **Van Der Spuy & Vennote**

REF: **JLU van Der Hoven**

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JUDGMENT: 23 AUGUST 2010

MEER, J

1. Applicant seeks an order rescinding and setting aside a final judgment in provisional sentence proceedings which became effective on 9 November 2009 in terms of Rule 8 (11) and directing Respondent to reinstate the security furnished by it to Applicant. In the alternative Applicant seeks an order condoning its non compliance with the provisions of Rule 8 (11) and declaring the results of such non compliance to be cancelled.

2. The final judgment was granted as a result of Applicant's failure to deliver its plea and counterclaim timeously in terms of Rule 8(11). Respondent as Plaintiff issued

a provisional sentence summons against Applicant as Defendant during July 2009 claiming the sum of R270 467,45 from Applicant on the strength of an interim payment certificate dated 17 December 2008, for building work to Applicant's wine cellar undertaken in terms of a JBCC Series 2000 Principal Building Agreement. The contract in respect of the wine cellar was one of four contracts entered into between the parties in respect of building projects to be undertaken by Respondent on Applicant's wine estate.

3. On 22 July 2009 Applicant entered an appearance to defend the provisional sentence summons. There followed settlement negotiations as a result of which the provisional sentence proceedings were postponed to 14 September 2009 to enable Applicant's architect and the principal agent in terms of the building contracts, a Mr Malherbe, to assess the building projects undertaken by Respondent.

4. Pursuant thereto Applicant's architect prepared a report which was sent under cover of a letter to Respondent's attorney on 11 September 2009. The report, based on findings on a site inspection held on 10 September 2009, lists work which Applicants alleged to be incomplete or defective and the repair costs thereof. The letter stated on the basis of the report, that Applicant had a bona fide and legitimate counterclaim against Plaintiff in the amount of approximately R520 000,00. Respondent was invited to withdraw the provisional sentence summons against Applicant and it was suggested that the entire dispute, being a building matter requiring expert evidence, be referred to arbitration for determination. Respondent did not

agree. Applicant then elected to enter into the principal case after paying the amount in the provisional sentence summons to Respondent.

5. On 23 October 2009 Applicant delivered its notice to enter into the principal case. On 27 October 2009 Respondent gave notice that it had put up security *de restituendo* to the satisfaction of the Registrar in terms of Rule 8 (9). Applicant however failed thereafter to deliver its plea by 6 November 2009, within 10 ten days of its notice to enter into the principal case, as envisaged in rule 8 (11). As a consequence the provisional sentence ipso facto became a final judgment and the security that had been given, lapsed. This application flows from these events.

6. Applicant's reason for the failure to deliver the plea timeously is that its legal representatives overlooked the provisions of Rule 8(11). The founding affidavit of Applicant's attorney, Steven Mc Loughlin, states that at all material times Applicant's legal representatives were unaware that Rule 8(11) required Defendant/ Applicant to delver its plea and counterclaim within the ten day period of delivering its notice of intention to enter into the principal case. They operated under the mistaken belief that Plaintiff/ Respondent would have to place Defendant/Applicant under bar to deliver its plea. They were unaware of Defendant's / Applicant's obligation to have delivered its plea by 6 November 2009.

7. Mc Loughlin's affidavit emphasizes that at all material times his instructions had been to defend Plaintiffs /Respondent's claim in the provisional sentence summons and to prosecute the counterclaim, the amount of which he alleges exceeds Plaintiffs / Respondent's claim. To this effect he had taken steps during November and December 2009 to expedite the expert input of architect, Malherbe which was required to prepare the plea and counterclaim. During January and February 2010 other complex litigation had consumed his practice and it was only on receiving an enquiry from Applicant about the progress of its claim, late in March 2010, that he had requested counsel to prepare a plea and counterclaim. Mc Louchlin goes on to state that on 15 April 2010 upon his return from leave he was handed a telefax dated 23 March 2010 from Respondent's attorneys stating that as Defendant/Applicant had failed to file a plea as envisaged in rule 8(11), provisional sentence *ipso facto* had become a final judgment and the security given had lapsed. The telefax, Mc Loughlin explained, had been misplaced and hence did not come to his attention on 23 March 2010 when it was faxed to his office, but only on 15 April when it was discovered under a pile of documents, and handed to him. Applicant's legal team, he intimated, sprang into action immediately, and delivered this application two days later, on 20 April 2010.

8. Mr Fourie for Respondent took issue with Applicant's explanation for its default, pointing out that no account was given of action taken between the period of delivery of the notice to enter into the principal case and the granting of provisional sentence. This criticism would be relevant had the evidence indicated that Applicant's

legal team was aware that they were obliged to act in terms of rule 8(11) and deliver a plea within ten days of delivering its notice.

9. Disconcerting though the reasons for default may be, it is clear that Applicant intended at all times to enter into the principal case. I am satisfied from the reasons preferred by Applicant above, that a reasonable and acceptable explanation has been presented for Applicant's default. Applicant is clearly not to blame for the error of its legal representatives and should not be penalized on that account. See *Kolberg (Pty) Ltd* v. *Atkinson's Motors Ltd.* 1970 1 SA 660at 663 G-H.

10. The basis for Applicant's defence in the main claim has been set out in the plea and counterclaim, which rely on the contents of the architect's report of September 2009. The defective and/or incomplete nature of the work undertaken by Respondent, as set out in the report, is confirmed in an affidavit by Malherbe Applicant has alleged that it has cancelled the agreements and claimed damages in the amount of R561 550,00. Applicant alleges that Respondent is indebted to it in the net sum of R229 873,70.

11. Mr Fourie's opposition on the merits was based principally on the contention that Applicant had not shown sufficient prospects of success regarding the defence and counterclaim sought to be raised by it. In this
regard he raised the following:

11.1 He questioned whether this Court was the proper forum for the dispute, given that Clause 40.3 of the JBCC contract applicable to the building works provided for all disputes to be referred to arbitration. He was however mindful during argument that the schedule to the contract provided for dispute resolution by litigation.

11.2. He contended that the grounds upon which Applicants based three of their four counterclaims were incorrectly set out in the founding affidavit. Applicant had conceded, he indicated, on receipt of Respondent's answering affidavit that all four contracts were governed by the JBCC agreement.

11.3. He questioned whether in terms of the pool house contract Applicant could hold Respondent responsible for patent defects.

11.4. He took issue with Applicant's failure to deal with Respondent's counterclaim of R519 064.90 other than by way of a bare denial. He took issue further with Applicant's reconciliation of the retention amount of R61 208,25 with his counterclaim, only in its replying affidavit.

11.5. Applicant's failure to annex to its founding papers an affidavit by architect Malherbe confirming the contents of his report on which the counterclaims were based, and the belated handing in of such affidavit only at the hearing of this application, was a further ground for exception.

12. Whilst the above issues raise relevant questions, they however do not enable me at this stage on the basis of the information before me to rule out the prospects of success. Nor is it advisable in proceedings such as these to ventilate these issues in any detail, issues about which a finding can be made on fuller information than is now before me. I am however able to find that Applicant's counterclaim, supported as it is by a report and affidavit from the architect and principal agent in respect of the building projects, meets the

threshold of a bona fide defence , which, prima facie, carries some prospect of success.

13. In view of my finding that a reasonable explanation as well as a bona fide defence are present, Applicant has demonstrated sufficient cause for the relief it seeks both by way of the order for rescission of the judgment[1] of 9 November 2009 and the alternative order for condonation for non compliance with Rule 8(11)[2]. The latter order falls within the purview of Uniform Rule 27 which permits a Court a discretion to extend the time for taking any step in connection with proceedings, including the delivery of a plea within the period prescribed in rule 8 (11). See F. O. *Kollberg (Pty) Ltd* v. *Atkinson's Motors Ltd* 1970 (1) SA 660 (C) at 662 H to 663 A. As the final

1 See Chetty v Law Society, Transvaal 1985 (2) SA756A at 765 where it is stated two essential elements of sufficient cause for rescission of a judgment by default are, a reasonable and acceptable explanation for default and a bona fide defence which prima facie carries some prospect of success

2 In *Kollberg (Pty) Ltd* v. *Atkinson's Motors Ltd* 1970 (1) SA 660 (C)at 663 C-E the requirement of sufficient cause for condonation for non compliance with rule 8 (11) is acknowledged.

judgment flowed from non compliance I am inclined to grant relief in terms of the alternative order for condonation.

Costs

14. It is accepted that where an applicant seeks an indulgence from the Court in circumstances such as the present, on account of its non compliance with the Rules, the applicant for the indulgence pays the costs of opposition where such opposition is in the circumstances reasonable. As is stated by Cilliers Law of Costs Second Edition Butterworths 1984 paragraph 2.34 at 29:

> " Where the opposition is "fair and reasonable respondents ought not to be put in a position where they oppose at their peril, in the sense that.... they cannot recover their costs of opposition, or may even have to pay such costs as are occasioned by their opposition"
>
> See also Stocks &Stocks Properties (Pty)Ltd v City of Cape Town 2003 (5) SA 140 (C) pararaph 27 at 147

15. This application was precipitated by Applicant's non compliance with Rule 8(11). In the setting out of its defence in the founding affidavit Applicant raised issues which called for clarification and response from Respondent who was entitled to raise in opposition the aspects referred to in paragraph 11 above, and place its contentions before Court regarding the prospects of success. Respondent's opposition cannot be said in the circumstances to have been unreasonable frivolous or vexatious and Respondent is accordingly in my view entitled to its costs of opposition. In the result the following order is made:

1. Applicant's/Defendant' non- compliance with the provisions of Rule 8 (11) is condoned;

The results of such failure to comply with the aforesaid Rule are cancelled;

2. Applicant/Defendant is directed to file its plea and counterclaim within 5 days

of the date of this order;

3. Applicant/Defendant is directed to pay Respondent's costs of opposition.

Meer, J