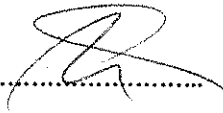


REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO:13904/ 2007

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
	
<u>1/3/2003</u>	

In the matter between:

Mr DA Weelson

Applicant

and

Waterlinx Pool and Spa (Pty) Ltd

Respondent

In re the matter between:

Waterlinx Pool and Spa (Pty) Ltd

Plaintiff

And

**Right Stuff Hardware CC t/a Kings Paint
& Hardware Pool Company**

First Defendant

Zelma Weelson

Second Defendant

Mr D A Weelson

Third Defendant

JUDGMENT

Mia AJ:

[1] The applicant approached this Court for an order rescinding a default judgment granted against him in the respondents favour on 30 October 2007. He further seeks leave to file a notice of intention to defend in the above case number within 10 days of the grant of this order and that the respondent pays the costs in the event that the application is opposed. The respondent opposed the application requesting that the application be dismissed. The applicant relies on Uniform Rule of Court 42(1) (a) alternatively Uniform Rule of Court Rule 31(2) (b).

BACKGROUND FACTS

[2] The default judgment granted against the applicant was based on an acknowledgement of debt signed by the applicant in May 2007 for a debt payable by Right Stuff Hardware CC trading as Kings Paint & Hardware Pool Company. (Kings Paint). The applicant's states that he signed the acknowledgment of debt to assist his ex-wife who was one of the directors of the company. The demand for payment in terms of the acknowledgement of debt was sent per fax to Kings Paint on 1 June 2007. The summons commencing action against the applicant was also served on Kings Paint and the return of service stated that it was the applicant's place of employment. It was handed to a Mr Ebrahim in the temporary absence of the applicant. Mr Ebrahim is now deceased.

[3] The applicant stated that he was not employed by Kings Paint and attached a letter and an affidavit supporting his version that he was employed at Rail Road Containers during the period that the demand was faxed and summons served on the Kings Paint address. He stated that it was not possible for him to be employed in both companies and the demand and service of the summons was effected on the incorrect address. In light hereof he stated that the demand and summons did not come to his attention as he was not employed at Kings Paint. He stated that he had a financial interest in the company but does not explain the nature thereof to enable this Court to ascertain his *bona fides*. According to the applicant he signed the acknowledgment of debt to assist his ex- wife who had custody of his children.

ISSUES

[4] The issues to be determined are whether the applicant has made out a case for rescission of the judgment in terms of Rule 42(1) (a). In this regard the applicant must show that he was affected and has an interest in the subject matter of the judgment. Further the applicant must show that the judgment was erroneously sought or granted. In the alternative the applicant in relying on Rule 31(2) (b) must show that he applied within 20 days of becoming aware of the debt and that there is good cause to rescind the judgment granted against him.

LEGAL POSITION

[5] Rule 42(1) (a) provides that a court may of its own accord or upon application of any party affected by the order grant a rescission of the order or vary the order or judgment which has been erroneously sought or erroneously granted in the absence of any party affected thereby. The rule was introduced to cater for errors in judgment which are obviously wrong and are procedurally based. The rule lays down no time limit within which rescission of the judgment be sought but will not normally be successful where the applicant has delayed seeking a rescission or acquiesced in the execution of the judgment. In Herbstein and Van Winsen, *The Civil Practise of the High Courts of South Africa* it is stated at p 930 that:

"The court will normally exercise its discretion in favour of an applicant who, through no personal fault, was not afforded an opportunity to oppose the order granted against him and who, having ascertained that such an order has been granted, takes expeditious steps to have the position rectified. This is in line with the common law position.

[6] At p 931 *supra* it is further stated that:

"Judgments have, however, been rescinded on the ground of a mistaken belief on the part of the court that the defendant knew of the hearing when in fact this was not the case,.....and where there had not been service of the summons on the applicant.

SUBMISSIONS

[7] Mr de Oliveira submitted on behalf of the applicant that Rule 42 (1) (a) was dispositive of the matter. The demand and summons was sent to Kings Paint on the

assumption that he was employed there. He did not receive either the demand or summons. Further it was also pointed out that the judgment amounted to duplication as judgment was granted for the same amount against the first and third defendant. In the alternative the applicant requested condonation for the late application in terms of Rule 31(2) (b) due his work commitments taking him out of the country and not being in a position to consult fully. If condonation is granted the application is based on the respondent not having complied with section 129 of the National Credit Act 34 of 2005 (the Act). It was submitted that the acknowledgment of debt is a credit guarantee. Further that the respondent did not comply with section 129 of the Act and that this constituted good cause for a rescission of judgment.

[8] Mr Dobie submitted on behalf of the respondent that there was effective service on the applicant. The acknowledgement of debt containing the words “of Kings Paint and Hardware” appearing on the first page can only be interpreted to mean the applicant’s place of employment and his chosen *domicilium citandi et executandi*. The applicant signed the document and did not insert another address thus service on Kings Paint and Hardware constituted proper service. He further submitted that the summons served on Mr Ebrahim indicated that the applicant was temporarily absent. If he was not employed there, Mr Ebrahim an employee of the company would have informed the Sheriff that the applicant was not employed at Kings Paint.

[9] Mr Dobie submitted further that provisions of the Act were not applicable as the acknowledgment was not a credit guarantee and in the event that this Court

found that it was it was a credit guarantee then it was submitted on behalf of the respondent that the first defendant's turnover was in excess of one million. Mr Dobie relied on the credit application of the first defendant where credit in the amount of R150 000.00 per month was granted to the first defendant. He submitted that this was credit from one supplier only, the first defendant would more than likely have other suppliers granting it credit. If the first defendant used the R150 000.00 credit facility each month its purchases would amount to more than one million over a period of twelve months at cost and did not include retail amount of turn over.

[10] From the above the applicant represented in the acknowledgement of debt that he was "of Kings Paint". It follows that the respondent would have believed that the applicant was employed at or was a director of Kings Paint. The applicant had created that impression by completing and signing the acknowledgment of debt in the manner described above. There was no other address furnished by the applicant in the acknowledgment of debt to indicate that he was employed elsewhere. It is thus the only address on which the respondent could serve a demand and summons. The respondent relied on the information furnished in the acknowledgment of debt by the applicant. In light of this there was proper service on the applicant. The applicant has not explained satisfactorily why he was in default in view of the summons being served on Kings Paint. He represented in the acknowledgement of debt that he was of Kings Paint. He indicated that he came to the assistance of his ex wife who was a director. He appears to have had information about the company's finances and stated that he had a financial interest in the first defendant. It is not clear why with such an intimate involvement with the first defendant such that he signed an acknowledgment of debt for the company he is unaware of the summons and did not

respond thereto. His involvement with Kings Paint in light of the interest he states he had, that his ex-wife was a director and that he was willing to sign an acknowledgment of debt to assist them, does not support a version of the applicant that he could not have had knowledge of the summons and is not in wilful default.

[11] On the question of proving *bona fides*, the applicant has not furnished a complete explanation for the full period covered by the request for condonation. Further he has not demonstrated that he has a *bona fide* defence to the claim of the respondent. His only explanation is that he informed the first respondent that their debts were their own. This does not afford an adequate defence to the respondent's claim based on the acknowledgement of debt. In view of the above I am unable to exercise my discretion in favour of the applicant. I am not satisfied that he has made out a case for rescission based on Rule 42(1)(a) or Rule 31(2)(b).

[12] To the extent that Rule 42(1) (a) provides that a court may of its own accord or upon application of any party affected by the order grant a rescission of the order or vary the order or judgment which has been erroneously sought or erroneously granted in the absence of any party affected thereby, the judgment may be varied. In view of the judgement being taken against the first and third defendant separately, it appears that the respondent will claim twice for the same amount from two different persons. In this regard it appears that there was duplication. Mr Dobie submitted that the judgment could be corrected in terms of Rule 42(1) (a) of the Uniform Rules of Court. The rule provides that a court can *mero motu* correct a patent error in a judgment. In view of the above I am of the view that the judgment be corrected to

read that judgment be granted against the first and third defendant jointly and severally.

[13] In light of the above the following order is made;

1. The application that default judgment granted against the applicant in the respondents favour on 30 October 2007 be rescinded is dismissed.
2. The judgment handed down on 30 October 2007 is varied to read, judgment is granted in favour of the respondent for the amount of R274 413.58 against the first and third defendants jointly and severally.
3. The applicant is ordered to pay the costs of the application.

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line and a loop.

S Mia

**Acting Judge of the South
Gauteng High Court, JHB**

Counsel for the applicant:

Adv. M De Oliviera

Instructed by:

Darren Ho Attorneys

Counsel for the respondent:

Adv. JG Dobie

Instructed by:

Rooseboom Attorneys