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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 27058 /2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

17 OCTOBER 2022

In the matter between:

REYAKOPELE TRADING 117

1st Applicant / 1st Defendant

MZOXOLO YOKWE

2nd Applicant / 2nd Defendant

and

**WESBANK, A DIVISION OF FIRSTRAND
BANK LIMITED**

Respondent / Plaintiff

JUDGMENT

Mdalana-Mayisela J

Introduction

1. This is an application for rescission of a default judgment granted against the first and second applicants in favour of the respondent on 19 April 2021. The application is brought in terms of rule 31(2)(b) *alternatively* rule 42(1)(a) of the

Uniform Rules of Court *further alternatively* common law. The applicants also apply for condonation for the late filing of the replying affidavit. The respondent is opposing the rescission application. The condonation application is not opposed.

Condonation application

2. I deal briefly with the condonation application. The applicants filed a substantive application for condonation for the late filing of the replying affidavit. They state that they received the answering affidavit on 11 May 2021. The replying affidavit was due to be filed on 8 June 2021. It was commissioned on 18 June 2021. It was filed 6 days late.

3. Rule 27(3) of the Uniform Rules of Court gives a discretion to the court to condone non-compliance with the rules where good cause has been shown and the other party would not suffer prejudice. The second applicant submits that the reason for a delay was that they were not legally represented at the time the replying affidavit was prepared and filed. They relied on the assistance from a paralegal assistant. At that time the paralegal assistant was in the Eastern Cape province to attend to a critically ill family member. The second applicant sought legal assistance from Legal Aid South Africa but was told he did not qualify. The paralegal assistant came back to Gauteng province on 13 June 2021 and they commenced preparing a replying affidavit the next day.

4. I accept the explanation for a delay given by the applicants. In considering the extent and cause for a delay, I find that it is in the interest of justice that the condonation application be granted. I am satisfied that the applicants have shown good cause for the delay in filing the replying affidavit, and the late filing thereof is condoned.

Background facts

5. The respondent issued combined summons commencing the action on 22 September 2020. The cause of action was based on a written loan agreement concluded between the first applicant and the respondent. The second applicant was

sued as a surety and co-principal debtor of the first applicant. The respondent in the action sought an order directing the applicants to forthwith return to the respondent a 2013 M A N TGS 33,440 BBS L 6X4 T/T C/C with CHASSIS NUMBER: [...] and ENGINE NUMBER: [...] and ancillary orders.

6. The summons was served by the Sheriff on the applicants on 8 October 2020 at their chosen domicilium citandi et executandi, by affixing a true copy thereof to the principal door of the residence. The dies induciae (10 days) expired on 22 October 2020. No appearance to defend was entered by the applicants. The respondent brought a default judgment application. It was granted on 19 April 2021.

Rescission application

7. The applicants have raised a point *in limine* in their replying affidavit, contending that the deponent to the answering affidavit had no authority. I first deal with this issue. The deponent to the answering affidavit states that she is a legal and recoveries manageress employed by the respondent in its corporate collections department, duly authorised to depose to the affidavit on respondent's behalf. The content of the affidavit falls within her personal knowledge, unless stated otherwise. She has under her control all documents pertaining to this matter including, *inter alia*, the relevant credit agreement/s together with terms and conditions thereof, historic statement of account, all records of written and verbal communications exchanged between the parties, and all source documentation referred to and annexed to the answering affidavit.

8. The applicants in their replying affidavit contend that they have no knowledge of the allegations made by the deponent to the answering affidavit referred to in paragraph 7 above, and can neither admit nor deny and accordingly call the respondent to proof thereof.

9. The Supreme Court of Appeal in *Gains & Another v Telkom Namibia Ltd* 2004 (3) SA 615 (SCA) ([2004] 2 ALL SA 609), dealt with the same point *in limine* raised in this matter. Streicher JA at 624 said, "*In my view, it is irrelevant whether Hanke has been authorised to depose to the founding affidavit. The deponent to an affidavit in*

motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised". In the present matter the applicants are not challenging the authorisation of the institution of the proceedings and the prosecution thereof.

10. In my view the legal and recoveries manageress is a fit and proper deponent to the answering affidavit, for the respondent. She would prima facie have knowledge of the relevant written agreement and deed of suretyship and their conclusion, of their terms and effects thereof, and the amounts paid and owing by the first applicant. The challenge to the authority of the deponent to the answering affidavit has no merit, and the point *in limine* stands to be dismissed.

11. The applicant seeks to rescind the default judgment in terms of rule 31(2)(b) *alternatively* rule 42(1)(a) *further alternatively* common law. I first deal with a rescission in terms of rule 42(1)(a). This rule provides as follows:

(1) *The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*

(a) *An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."*

12. In order to obtain a rescission under this rule the applicant must show that the judgment was erroneously sought or erroneously granted in his absence. A judgment is erroneously granted if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such an order (*Athmaram v Singh* 1989 (3) SA 953 (D)).

13. The court has a discretion whether or not to grant an application for rescission under this rule. The applicant must also show that he has a legal interest in the subject-matter of the application which could be prejudicially affected by the judgment of the court (*United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C)).

14. It is common cause that the applicants did not file the notice of intention to defend the action. The applicants assert that they were not served with the combined summons hence they did not defend the action.

15. The respondent contends that the combined summons was duly served by the sheriff on the applicants on 8 October 2020 at their chosen *domicilium citandi et executandi* by affixing a true copy thereof to the principal door of the residence. It has attached proof of service by way of the sheriff's return of service. The sheriff noted that the home was locked up and unattended, and he was of the view that the business was no longer conducted at the given address.

16. It is common cause that the address chosen by the applicants as their *domicilium citandi et executandi* is at 2nd floor office no 2, 82 Edward avenue, Westonaria. Clause 18 of the instalment sale agreement provides “*You agree that the address given on the schedule to this agreement shall be the place to which all post, notices or other communications shall be sent to you and you agree that such communications shall be binding on you*”.

17. It is also common cause that at the time service was effected, the applicants had not changed their *domicilium citandi et executandi*. Rule 4(1)(a)(iv) of the Uniform Rules of Court provides “(1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:

(iv) if the person so to be served has chosen a *domicilium citandi*, by delivering or leaving a copy thereof at the *domicilium* so chosen;”

18. The summons was served at the applicant's chosen *domicilium citandi* in accordance with Rule 4(1)(a)(iv). I am satisfied that a proper service of the combined summons was effected on the applicants. The respondent had no legal duty to ensure that the summons came to the applicants' attention after the service was effected in terms of the rules. The respondent was procedurally entitled to the default judgment. The applicants have failed to discharge the onus to show that the default

judgment was erroneously sought or erroneously granted. The rescission application under rule 42(1)(a) fails.

19. I now turn to consider the rescission application under rule 31(2)(b). This rule allows the defendant within 20 days after acquiring knowledge of a default judgment granted against him, to 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 it may deem fit.

20. The requirements for rescission application under this rule have been stated as follows:

(20.1) The applicant must give a reasonable explanation for his default;

(20.2) The application must be bona fide and not made with the intention of merely delaying plaintiff's claim; and

(20.3) He must show that he has a bona fide defence to the plaintiff's claim (see *Vosal Investments (Pty) Ltd v City of Johannesburg 2010 (1) SA 595 (GSJ) at 599 A-B*).

21. I have dealt with the explanation given by the applicants for their default above. Where the applicant has provided a poor explanation for default, a good defence may compensate (see *Carolus v Saambouw Bank Ltd; Smith Saambouw Bank Ltd 2002 (6) SA 346 (SE) at 349 B-C*). The applicants must set forth the grounds of defence with sufficient detail to enable the court to conclude that there is a bona fide defence, and that the application is not made for the purpose of harassing the respondent (see *Duma v Absa Bank Ltd 2018 (4) SA 463 (GP) at paragraph [8]*).

22. The conclusion of the written instalment sale agreement and suretyship is common cause. The terms and conditions of the said agreements are also common cause. The breach of the instalment sale agreement and indebtedness are also

common cause. The inability of the applicants to settle the outstanding arrears is also common cause.

23. The applicants submit that they breached the instalment sale agreement by failing to keep the account up to date due to the impact of Covid 19 pandemic and the adverse effect that it had on the business; that they are working on a new truck hauling business outside the mine environment, which will give them an additional income of R200,000.00 per month, which will enable them to stabilise the account; and that they are intending to sell assets to generate R800,000.00 to enable them to pay creditors.

24. It is common cause that the first applicant was in breach of the instalment sale agreement prior to Covid 19 lockdown. Therefore, the impact and adverse effects of Covid 19 could not be the cause for such breach. Furthermore, the instalment sale agreement had been lawfully cancelled, and a promise and an intention to settle the arrears in the future does not constitute a valid legal defence. For these reasons I conclude that the applicants have failed to show the existence of a bona fide defence which prima facie carries some prospect of success.

25. The applicants have also brought this application in terms of common law. The basic requirement under common law rescission application, is that good cause must be shown (see *Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) paragraph [11]*). I have concluded above that the respondent effected a good service of the combined summons on the applicants and that the applicants have failed to set forth the grounds of defence with sufficient detail to enable the court to conclude that there is a bona fide defence. The applicants have failed to show good cause for the rescission application to be granted. In my view this application was brought in order to delay the execution of a default judgment. The rescission application has no merit and it must fail.

26. The applicants have raised a new ground of rescission in their heads of argument, which was not canvassed in the founding and replying affidavits. They assert that they did not receive a notice in terms of section 129 of the National Credit Act 34 of 2005. It is not open to a party in motion proceedings to raise a new ground

in the heads of argument which ought to have been canvassed in the pleadings. In *Public Servants Association obo Olufunmilayi Itumu Ubogu v Head of Department of Health, Gauteng and Others* (2017) ZACC 45, para [50], the Constitutional Court endorsed the cautionary remarks expressed by Jaftha J (albeit the minority) in *SATAWU v Garvas* (2012) ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (Garvas) at para 114, where he emphasised the need for accuracy in the pleadings and stated as follows:

‘Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.’ Accordingly, I am not considering this ground of rescission.

27. I now turn to the issue of costs. The applicants are unsuccessful and I find no reason why they should not be ordered to pay the costs of this application.

28. In the premises, the following order was made on 31 January 2022:

1. The rescission application is dismissed with costs on a party and party scale.

MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 17 October 2022

Appearances:

On behalf of the Applicants: Mr Mzoxolo Yokwe

Instructed by:

In person

On behalf of the respondent:

Adv JC Viljoen

Instructed by:

Rossouws Leslie Inc.