IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE No. 69796/2011

31/10/2012

(1) **REPORTABLE:** NO

(2) **INTEREST TO OTHER JUDGES:** NO

31/10/12
DATE

SIGNATURE

In the appeal of:-

EXPORT AND IMPORT MOVEMENT CC	First Applicant
ANVER ALLI OSMAN	Second Applicant

and

ABSA BANK LIMITED	Respondent

JUDGMENT

Van der Byl AJ:-

[1] On 16 February 2012 default judgment was granted against the Applicants in favour of the Respondent for payment of R216 364,96, together with interest and costs,

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as agreed, on the scale as between attorney and client.

[2] The Respondent's claim against the Applicants was based, in the case of the First Applicant, on overdraft facilities granted by the Respondent and, in the case of the Second Applicant, on a written suretyship in terms of which he bound himself as surety and co-principal debtor of the First Applicant in favour of the Respondent for the repayment of any sum which the First Applicant owes or may owe to the Respondent.

[3] A summons, issued during December 2011, was served on the First and Second Applicants at their *domicilium et executandi*, being, in the case of the First Applicant, at 799 Church Street, Arcadia, Pretoria, being the First Respondent's registered address, on 20 January 2012 and, in the case of the Second Applicant, at 358 Mink Street, Laudium on 19 December 2011.

[4] On 15 February 2012, the Applicants having failed to give notice to defend, default judgment was granted against them.

[5] The Applicants now, in an application launched on 6 June 2012, seek an order rescinding this judgment granted against them.

[6] It is, as held in a long line of decisions, trite that in an application of this nature an applicant must comply the following requirements -

(a) that his or her default was not wilful or that it was not due to gross negligence;

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(b) that his or her application is *bona fide* and not made with the intention of merely delaying plaintiff's claim;

(c) that he or she has a *bona fide* defence to the plaintiff's claim.

See: ***Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)*** at ***476; Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) agt 352C***

[7] As far as the Applicants' failure to have given notice of their intention to oppose the matter is concerned, it is contended, as appears from their founding affidavit deposed to by the Second Applicant -

(a) that they only became aware of this judgment when the Sheriff attended at 337 Mink Street, Laudium, to attach movable assets of the Second Applicant on 2 April 2012;

(b) that he, thereupon, took steps to obtain copies of the court file and, although his attorneys acted as expeditiously as possible, it was not possible to launch this application within the prescribed 20 day period calculated as from 2 April 2012, but was eventually launched on 4 June 2012, ie., more than two months later;

(c) that they never received the summons and the section 129 notice;

(d) that the reason for not having received either the summons or the section 129

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notice is -

(i) in relation to the First Applicant, that 799 Church Street was never its principal place of business, but was the address of the Applicants' erstwhile accounting officers who has since resigned (apparently, as is apparent from Annexure CK 2, on 10 May 2012, being a date after service of the summons and the warrant of execution) and that, as is alleged for the first time in the replying affidavit, the First Applicant is in the process of correcting the registration of its correct address;

(ii) in relation to the Second Applicant, that the summons and section 129 notice was served, respectively, on 19 December 2011 and 2 April 2012 at, and addressed to, 358 Mink Street, being an address chosen 12 years ago as their *domicilium et executandi* which was his previous place of residence as he had moved to 337 Mink Street, being an address of which he had not given notice to the Respondent;

(e) that the Respondent had knowledge of their change of address;

[8] As far as the Applicants' failure to have launched this application within the 20 day period prescribed in Rule 31(2)(b), it is contended by the Second Applicant -

(a) that, upon obtaining knowledge of the warrant of execution on 2 April 2012, he "*enquired about the matter and have since learnt that default judgment had been*

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granted against the applicant (sic)";

(b) that he made arrangements to consult with his attorneys "*who had to investigate the matter, obtain copies of the contents of the court file and to make further enquiries in an effort to establish the facts pertaining to the default judgment order*";

(c) that although his "*attorneys have been most expeditions it was not possible to issue this application within twenty days*" since there were some delays in obtaining the court file;

(d) that after copies of the court file have been obtained the merits were considered and this application was drafted, counsel was briefed to settle the application and the application had to be issued.

[9] As far as the merits of their defence is concerned, it is contended -

(a) that, although it is conceded that monies amounting to R180 893,84 were indeed advanced to the First Applicant, the Respondent had written the amount off as bad debts on 24 May 2010;

(b) that when he became aware of monies outstanding he contacted an officer in a managerial position at the offices of the Respondent and arranged to pay the outstanding monies off at R1 000 per month as from the end of July 2010 and

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that they have duly been paying these monthly amounts;

(c) that the Respondent relied in its summons on an oral agreement of which no particulars are pleaded which renders the Particulars of Claim excipiable;

(d) that the certificate of balance in any event relates to outstanding monies in their own accounts;

(e) that the Respondent debited legal fees to the account to which it was not entitled;

(f) that the suretyship the Second Applicant had allegedly signed contains a cession of rights by the First Applicant which is unrelated to the suretyship.

[10] As appears from the opposing affidavit filed on behalf of the Respondent, the following is contended in response to the allegations made in the Applicants' founding affidavit.

[11] In relation to the Applicants' contention that they never received either the summons or the section 129 notice -

(a) that the attachment of the movable assets of the Second Applicant were attached at 358 Mink Street (in reply the Applicants contend that the Sheriff's return in this regard is wrong);

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(b) that the Sheriff was unable to make any attachment at 799 Church Street as the First Applicant was unknown at that address;

(c) that the Applicants never informed the Respondent of their change of address;

(d) that the Applicants failed to submit any proof that the Respondent was aware of their new address.

[12] In relation to the Applicants' failure to have launched this application within the prescribed 20 days, that the Applicants fail to disclose any detail of what precisely occurred between the period 2 April 2012 to 6 June 2012 which had in actual fact had given rise to the delay (which are in any event allegations not supported by an affidavit of the Applicants' attorney).

[13] In relation to the merits of the matter -

(a) that the overdraft facility account had indeed been written off by the Respondent, but that it had only been written off in the Respondent's books, but did not release the Applicants from their obligations to pay the outstanding amount (as indeed seems to be accepted by the Applicants in so far as they thereafter offered to repay the amount at instalments of R1 000 per months);

(b) that, although the R1 000 payment agreement had been concluded, it was a further term of the agreement that in the event of non-payment the Respondent

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will institute legal action and all interest would be recalculated and collected;

(c) that, as is apparent from the bank statements, the First Applicant failed to make the agreed monthly payments as a result of which further negotiations were conducted and the parties agreed to increase the monthly payments to R10 000 per month;

(d) that the First Applicant again breached this further agreement whereupon the Respondent instituted action against the Applicants;

(e) that, as far as the cession is concerned, the First Applicant granted a general cession in favour of the Respondent in terms whereof a 32-day notice deposit account as additional security which no longer exists and was not used as security;

(f) that in so far as it is contended that the suretyship contains a cession of rights by the First Applicant which is unrelated to the suretyship, the First Applicant on or about 24 January 2001 entered into a general cession agreement with the Respondent in terms whereof the First Applicant ceded its 32 day notice deposit account number 6302151127 as extra security to the Respondent, being an account which in any event no longer exist.

[14] In my view the Applicants' application stand to be dismissed on at least three grounds.

[15] **Firstly**, I am unpersuaded that the Applicants have shown good cause as to why they delayed to file an appearance to defend.

As is apparent from the papers the summons was served at(and the section 129 notice forwarded to) two addresses, namely, at 358 Mink Street and 799 Church Street.

As far as the address at 799 Church Street is concerned -

(a) the Second Applicant indicated in the Applicants' founding affidavit that the First Applicant's principal place of business is located at that address, but, when challenged in the answering affidavit, contended in the replying affidavit that the reference to that address in the founding affidavit was a *bona fide* error;

(b) the Applicants contend, still in their replying affidavit, that 799 Church Street was the address of the First Applicant's erstwhile accounting officers who had since resigned.

In support of these contentions reference is made to a so-called "*amended founding statement (Form CK2)*" annexed to the replying affidavit as Annexure RA1. However, this Form shows that the accounting officer resigned on 10 May 2012, being a date after the summons was served and the section 129 notice (**Annexure D, record p. 21**) had been forwarded to the First Applicant.

The Applicants' version that the summons could not have been duly served on the First

Applicant seems to me on the probabilities not to be true.

[16] **Secondly**, the Applicants failed, apart from some vague, unsupported and flimsy allegations, to show that they launched this application within the 20 day period prescribed in Rule 31(2)(b). According to the Applicants they became aware of the judgment granted against them on 2 April 2012. This application was launched, as already indicated, on 6 June 2012. The founding affidavit contains no details as to why more than two months have elapsed before the application was launched. The explanation is that they had "*made arrangements to consult with (their) attorneys*" who "*had to investigate the matter*". No dates are provided on which all this occurred. No supporting affidavit of the Applicants' attorney is annexed. There is no reason why contact could not have been made immediately with the attorneys acting on behalf of the Respondent who would obviously have been in a position to assist without any delay.

[17] **Thirdly**, I am unpersuaded that the Applicants have shown that they have a *bona fide* defence. The Respondent has shown convincingly that, despite an agreement to pay the arrears off at a rate of R1 000 per month, they failed to complied with this and a further agreement concluded between the parties.

I disagree with the submission that the further agreements relating to the repayment of the overdraft facility granted constitute a novation of the original oral agreement relied on ion the Particulars of Claim. In my view the further agreements contains no indication that it was the parties intention to bring the original agreement to an end and in effect constitute no more than agreements to repay the debt incurred in terms of the oral

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agreement concluded originally concluded being the real cause of of the Respondent's action.

In my view the Applicants, having conceded that they are indebted to the Respondent in an amount of R180 893,84, being the amount advanced in terms of the oral agreement referred to in the Particulars of Claim and having offered to repay that amount in terms of the further agreements, failed to show that they have a *bona defence* o the merits of the matter, and were in all respects merely grabbing at straws to delay the Respondent's claim.

[18] In the result the application is dismissed with costs on the scale as between attorney and client.

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P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANTS — **ADV J H MOLLENTZE**

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DATE OF HEARING	29 OCTOBER 2012
JUDGMENT DELIVERED ON	31 OCTOBER 2012