REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT DIVSION, PRETORIA

CASE NO: 40506/2011

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

4/04/2014 .....
DATE SIGNATURE

4/4/2014

In the matter between:

In the matter between:

CHRISTAKIS ANTONIOU Applicant

and

FIRSTRAND BANK LIMITED t/a FNB PRIVATE CLIENTS Respondent

In re the Application between:

FIRSTRAND BANK LIMITED t/a FNB PRIVATE CLIENTS Plaintiff

and

CHRISTAKIS ANTONIOU Defendant

J U D G M E N T

MNGQIBISA-THUSI, J:

[1] This is an application in terms of which the applicant is seeking the following order:

1.1 that the default judgment granted against the applicant on 10 October 2011 be rescinded;

1.2 that the applicant be granted 10 days within which to enter an appearance to defend the action.

1.3 Costs.

[2] Under the common law, in order for the court to grant an order rescinding a previous order or judgment the applicant has to show sufficient cause. In other words the applicant must give a reasonable explanation for his default, must show that he has a bona fide defence and must also show that he has a bona fide defence which prima facie has some prospect of success. *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765.

[3] Rule 31(2)(b) provides that a defendant may within 20 days after he has knowledge of a judgment against him by default 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 as to it seems meet. In terms of Rule 31(2) (b) an applicant for rescission of a judgment must show good cause. This means that the applicant has to give a reasonable explanation for the default, must show that his application is bona fide, and be able to show that he has a bona fide defence to the respondent's claim which *prima facie* has some prospect of success. *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O).

[4] It is common cause that:

4.1 the applicant and the respondent entered into a credit facility agreement on 31 January 2008;

4.2 the loan was secured by a mortgage bond over the property situate at Erf 198 Pine Haven Township ("the property").

4.3 the applicant chosen as its *domicilium* address 194 Pine Haven Country Estate, Krugersdorp.

4.4 The credit facility provided as follows:

"15.3.1 Any of the following acts will place you in default of this facility if you do not rectify them (if possible) within 20 days of receiving written notice from the bank to do so:-

15.3.1.1 Failing to pay any amount owing to the bank when it is due."

and

"15.3.4.1 The bank will draw such default to your notice in writing by pre-paid registered mail affording you 20 (twenty) days to rectify such default, alternatively, proposing that you refer this facility to a debt counsellor, alternatively a dispute resolution agent, Consumer Court or Ombud with jurisdiction."

[5] As a result of the applicant defaulting in its payments, the respondent delivered a letter of demand and a section 129(1)(a) notice on 19 May 2011 to the applicant's *domicilium* address. In the letter of demand the applicant was given 10 days to remedy his default and advised of seeking debt review.

[6] On 22 July 2011 summons was served also at the applicant's *domicilium* address.

[7] On 10 October 2011 default judgment against the applicant was granted for the payment of the sum of R1 778 749.00 plus interest at the rate of 7.8% per annum from 21 June

2011. Furthermore, an order declaring the property specially executable was granted.

[8] A writ of attachment was served on 25 January 2012.

[9] On 15 February 2012 the parties reached a settlement agreement in terms of which the applicant undertook to settle his debt by paying the sum of R15 000.00 per month.

[10] The respondent sent a letter to the applicant's attorneys on 25 April 2013 indicating that the applicant owed an amount of R378 345.00 which was due and payable.

[11] The property was sold on 12 June 2013 to a certain Johannes Pelser ("Pelser"). The non-joinder of Pelser was not made an issue.

[12] Even though the property has been sold to a third party, the third party was not joined in these proceedings.

[13] In explaining his default the applicant alleges that at the time the letter of demand and the section 129 notice was delivered; and at the time the summons were served, he was not residing at the *domicilium* address but at a different address. As a result, the letter and the notice and the summons did not come to his knowledge.

[14] Furthermore, the applicant alleges that he only got knowledge of the default judgment during November 2011. He soon thereafter made a proposal in which he undertook to make payments of R15 000.00 per month, which proposal was accepted by the respondent.

[15] The applicant contends that it has been making payments but that the respondent unilaterally increased the monthly payments to R 17 000.00 per month. During April 2013 his attorney received a letter from the respondent reflecting that he owed an amount of R378 345.00.

[16] It was submitted on behalf of the applicant that in terms of the credit facility, in the event of the applicant defaulting on his payments, the respondent was obliged to send him a letter giving him notice of his default within 20 days i.e. in terms of clause 15.3.1), failing which the respondent was expected to send the applicant a letter of demand calling on him to remedy his default within 20 days failing which legal action would be instituted (i.e. in terms of clause 15.3.4.1). It is the applicant's contention that it has a bona fide defence in that the respondent failed to comply with the procedural aspects for the enforcement of the debt in terms of the credit facility. It is contended that default judgment would not have been

granted if the court was made aware of the fact that the respondent had not complied with the *lex commissoria* contained in the credit facility (clause 15.3.4.1).

[17] The respondent is opposing the rescission of the default judgment on the following grounds. Firstly that the time it has taken the applicant to institute these proceedings is unreasonable in view of its knowledge of the judgment in November 2011. It is the respondent's contention that the applicant has not sufficiently explained its default. Secondly, that by proposing a settlement and signing the settlement agreement, the applicant had waived its right to have the judgment rescinded. Furthermore, that the applicant's proposal was accepted by the respondent on condition that the applicant signed a special power of attorney authorising the respondent to execute against the property should the applicant default. The applicant never signed the special power of attorney which was sent to his attorney on 6 February 2012. Thirdly that the applicant has not shown that it has a bona fide defence to the respondent's claim as the respondent has complied with the terms of the credit facility in enforcing the debt.

[18] It was submitted by counsel for the applicant that it was seeking relief in terms of Rule 42(1) (a) of the Uniform Rules

of Court. Rule 42(1)(a) provides that a court may, in addition to any other powers it may have, *mero motu* or upon application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. This means that the applicant has to show that the court in granting the default judgment had committed an error "in the sense of a mistake in a matter of law appearing on the proceedings of a Court of record. *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (ECD). If the applicant can prove the error committed by the court, it is not necessary for him to explain his default. I am satisfied this application does not fall within the provisions of Rule 42(1) (a).

[19] The risk of non-receipt of legal notices where a consumer has chosen a domicilium address lies with the consumer. *Rossouw v Firstrand Bank Limited* 2010 (6) SA 439 (SCA); *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZD). However, as appears from the applicant's explanation for failing to defend that action, I am satisfied that the applicant was not in wilful default.

[20] In *Gentiruco AG v Firestone (Pty) Ltd* 1972 (1) SA 589 A the court held that:

> "The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be perempted if he, by unequivocal conduct inconsistent with an intention to appeal shows that he acquiesces in the judgment or order."

[21] The court in *Dabner v South African Railways and Harbours* 1920 AD 583 emphasised that before such acquiescence can be inferred the court must be satisfied that that the litigant against whom an adverse judgment or order was made has acquiesced unequivocally in the judgment.

[22] I am of the view that the applicant by making a proposal to the respondent and reaching a settlement with it, the applicant had acquiesced to the judgment. There is no evidence that at the stage that the settlement agreement was concluded that the applicant raised any objection to the default judgment.

[23] I am of the view that the applicant has not shown that he has a bona fide defence against the respondent's claim which prima facie has some prospect of success. The applicant's contention that the respondent has not complied with the procedural terms of the credit facility has no substance. Clause 15.3.1 of the credit facility merely defines instances where the applicant would be regarded to be in default. Whereas clause 15.3.4.1 provides for notice of 20 days to be given to the applicant to remedy its default. The only

criticism which could be levelled against the respondent is that in its letter dated 19 May 2011 it gave the applicant 10 days to remedy his default. However, as submitted by counsel for the respondent, summons was only issued 30 days after the letter was delivered. I am therefore satisfied that the applicant has not shown that he has a bona fide defence to the respondent's claim.

[24] Accordingly the following order is made:

'The application is dismissed with costs'

MNGQIBISA-THUSI J
Judge of the High Court

Appearances:

For Applicant: Adv Van der Merwe

Instructed by: Jan Rossouw Attorneys

For Respondent: Adv Deminey

Instructed by: Delport Van Dr Berg Inc