IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

9/5/2014.

CASE NO: 1994/6145

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

09/05/2014
DATE

SIGNATURE

In the matter between:

JOHAN ANTON SWANEPOEL **APPLICANT**

and

HENDRIK FREDERIK VAN ZYL **RESPONDENT**

J U D G M E N T

COLLIS AJ:

INTRODUCTION

[1] In the present application Applicant seeks an order for the rescission of a default judgment taken against him on 5 July 1994. The application is brought in terms of Uniform Rule 31(2) (b) and was opposed by the Respondent.

BACKGROUND

[2] On or about 30 November 1992 the parties entered into a purchase and sale agreement in terms whereof the Respondent purchased 20% (percent) membership in a Close Corporation, Club Equusite ("the CC"), for an amount of R 50 000 (Fifty thousand rand) from the Applicant.

[3] It is common cause that the Respondent duly paid the amount of R50 000 to the Applicant, upon which transfer of the 20% (percent) membership in the CC should have occurred. This, the Respondent contends never transpired resulting in the Respondent issuing summons and later obtaining default judgment for the repayment of the purchase price.

UNIFORM RULE 31(2)(b)

[4] Rule 31(2)(b) provides as follows:

"A defendant may within twenty (20) days after he or she has knowledge of such judgment 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."

[5] For an Applicant to meet the requirements for an application for rescission of judgment under Rule 31(2)(b) he (the Applicant) must show the following:

(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

(b) His application must be *bona fide* and not made merely with the intention to delay the Plaintiff's claim;

(c) He must show that he has a *bona fide* defence to the Plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at trial, would entitle him to the relief he seeks.[1]He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

[6] I will proceed to deal succinctly with the requirements as mentioned above.

ABSENCE OF WILFUL DEFAULT

[7] The wilful or negligent nature of the defendant's default is one of the considerations which the Court takes into account in the exercise of its discretion to determine whether or not good cause has been shown.[2] It then follows that the reasons for the Applicants' absence or default must therefore be set out. This is because it is relevant to the question whether or not, his or her default was wilful. In Silber v Ozen Wholesalers (Pty) Ltd[3] it was held that the explanation for the default

[1] Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)
[2] Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at 530B-531B
[3] 1954 (2) SA 345 (A) at 353A

must be sufficiently full to enable the Court to understand how it came about and to assess the applicant's conduct and motives.

[8] Before a person can therefore be said to be in wilful default, the following elements must be shown, namely that:

(a) he had the knowledge that the action is being brought against him or her;

(b) there was a deliberate refraining from entering an appearance, though free to do so; and

(c) there was a certain mental attitude towards the consequence of default.

[9] In his Founding affidavit[4] the Applicant sets out that he had no knowledge of the judgment until the 6th September 2013 when a warrant of execution was served on him. In answer hereto, the Respondent replied[5] that the summons was duly served at the *domicilium* address provided by the Applicant in the purchase agreement.[6] In support of such assertion, the Respondent annexed a copy of the return of service depicting service of the summons on the said chosen *domicilium*. In his affidavit, the Applicant proffers no additional information as an explanation why when the summons was served at an address elected by him, he did not receive the summons. He further does not set out that had he indeed received the summons, he would have defended the action of the plaintiff. Significant to note further is that the Applicant does not deny that the address of service of the summons, was indeed his chosen *domicilium*.

[4] Founding Affidavit par 3 p 6
[5] Answering Affidavit par 27 p 37
[6] Annexure "NFZ 1", Answering Affidavit p 40

[10] In the absence of an explanation of his default, this Court is not placed in a position to assess the absence of wilfulness on his part and as a consequence I cannot find that the first requirement of absence of wilfulness has been met by him.

BONA FIDE DEFENCE

[11] As previously mentioned, in terms of the purchase agreement entered into between the parties, the Respondent purchased 20% (percent) membership interest in the CC for the payment of the sum of R 50 000.[7]The purchase agreement further contained certain contractual guarantees undertaken by the Applicant to the Respondent upon signature of the agreement. These guarantees included *inter alia* that:

11.1 the CC had no creditors and was in a healthy financial state;

and

11.2 the CC was in possession of all the required licences necessary to conduct its business e.g. a liquor licence.

[12] The Applicant in his founding affidavit contends that the Respondent paid him the R 50 000 and he was duly registered as a member of the CC.[8] He further sets out that the Respondent received his own keys to the premises and was also involved in the decision making and management of the CC. He denied that the Respondent was unaware the CC or that he did not possess a liquor licence at the time that the purchase agreement was concluded.

[7] Founding Affidavit par 9 & 10 p 7 & 8
[8] Founding Affidavit par 15 & 18 p 9 & 10

[13] The Respondent has denied ever having been registered as a member of the Close Corporation,[9] and similarly he denied having been involved in any management decisions of the Close Corporation. In support of this assertion he annexed to his Answering Affidavit, "HFZ 2" a record retrieved from the Companies and Intellectual Property Commission (CPIS) reflecting that throughout the existence of the now deregistered Close Corporation, the Applicant was the sole member of the Close Corporation.

[14] In the present application, the Applicant has failed to file and Replying affidavit and as a result denied himself the opportunity to refute his sole and exclusive membership in the Close Corporation. As a result hereof, I cannot reject the denial by the Respondent that indeed he never held membership in the Close Corporation.

[15] The Respondent's denial that he held membership in the Close Corporation forms the crux of the action brought against the Applicant. In view of the Respondent's denial that he ever held membership, which the Applicant has failed to refute, I am not satisfied that he has a *bona fide* defence to the Respondent's claim.

APPLICATION WITHIN TWENTY DAYS

[16] Lastly, I turn to the requirement that an application for rescission in terms of Uniform Rule 31(2)(b) should be brought within twenty days of the Applicant obtaining knowledge of the judgment.

[9] Answering Affidavit para 3.6 & 3.8 p 23

[17] As mentioned in paragraph 9 supra, the Applicant contends that he first obtained knowledge of the judgment on 6 September 2013, when the Sheriff executed a warrant on him. This is some 19 years after the granting of the judgment. He went on to state that he launched this application before the expiry of the twenty day period and indeed the Notice of Motion depicts same was issued on 20 September 2013. Thus within the twenty day requirement as set out in the Rule.

[18] In rebuttal on point, the Respondent sets out that subsequent to the judgment being obtained in his favour, a warrant for execution was issued and several attempts were made by his erstwhile attorneys to execute the warrant.[10] As he was unsuccessful and the whereabouts of the Applicant were unknown at the time, he decided not to spend any further money on the matter. Years later, upon learning that the Applicant could be traced again, he instructed his current attorneys to re-issue the warrant and to have same executed. After attempting to execute the warrant, the Sheriff of Pretoria East left three business cards on 23 July 2013, 25 July 2013 and 29 July 2013 respectively at the Applicant's address being 711 Great Dane Street Garsfontein, Pretoria.[11]No response was received from the Applicant by contacting the Sheriff. This failure on the part of the Applicant, the Respondent contends, is indicative of the actions of a person who became aware of the judgment much earlier than 6 September 2013, but trying by all means to avoid execution of the judgment on him.

[10] Answering Affidavit par 4 p 24
[11] Answering Affidavit annexure " HFZ 9" p 73

[19] A further attempt to execute the warrant on the same address was later made on 9 September 2013, this after the Respondent utilised the services of a locksmith. On this date the Sheriff managed to serve the warrant personally on the Applicant.[12]

[20] As the Applicant had failed to file a Replying affidavit to rebut these allegations as mentioned *supra*, I cannot discount the possibility that indeed the Applicant could have obtained knowledge of the judgment prior to 6 September 2013, being the date on which the execution of the warrant took place. As a consequence, it remains doubtful whether the present application was launched within the twenty day period as prescribed in the Rule.

[21] For the reasons as set out above, I cannot find all that the requirements set out in Rule 31(2) (b) have been met to rescind the judgment taken against the Applicant.

[22] In the result I make the following order:

22.1 The application is dismissed with costs.

C. J. COLLIS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION

[12] Answering Affidavit par 4 p 26

APPEARANCES

FOR APPLICANT:	ATTORNEY F HARTZENBERG
INSTRUCTED BY:	HARTZENBERG INCORPORATED
FOR RESPONDENT:	ADV S MENTZ
INSTRUCTED BY:	COENRAAD KUKKUK ATTORNEYS.
DATE OF HEARING:	23 APRIL 2014
DATE OF JUDGMENT:	9 MAY 2014