IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2012/10327

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

23/05/2014
DATE

SIGNATURE

23/5/2014

In the matter between:

MORGESHVARIN AROONSLAM — **APPLICANT**
MORGESHVARIN AROONSLAM N.O — **SECOND DEFENDANT**

and

FIRSTRAND BANK LIMITED
t/a FNB PRIVATE CLIENTS — **RESPONDENT**

J U D G M E N T

COLLIS AJ:

Introduction

[1] The Applicant is applying for the rescission of a summary judgment granted against him on 12 June 2012. The present application for rescission of judgment was opposed before the Court.

[2] The application is premised on the provisions of Rule 31(2)(b) of the Uniform Rules of Court. The specific rule reads as follows:

"A defendant may within 20 days after he has knowledge of the 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."

[3] For an applicant to meet the requirements for relief of a rescission of judgment under Rule 31(2)(b), he (the applicant) must show the following:

(a) He must give an 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.

[4] In Silber v Ozen Wholesalers (Pty) Ltd[2] the Appellate Division held that *"good cause"* includes, but is not limited to, the existence of a substantial defence. The Court went on to state that *"the defendant must at least furnish an*

[1] Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)
[2] 1954 (2) SA 345 (A) at 352H

explanation of his default sufficiently full to enable the court to understand how it really came about, and assess his conduct and motives."

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

(a) he had knowledge that the action was 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 consequences of default.

The Issue

[6] The respondent's claim against the applicant is based on an agreement concluded between the parties during 2009. In terms of the agreement the respondent advanced a loan amount (R2 700 000, 00) to the applicant called a FNB Structured Facility. In terms of this agreement, the applicant was obliged to repay the loan amount over a period of 240 months in minimum monthly amounts of R27 376,96. As the applicant had failed to comply with his obligations in terms of payment of the minimum amount due in terms of the facility, the respondent instituted action against the applicant.

Absence of Wilful Default

[7] In his founding affidavit[3], the applicant sets out, albeit that he had filed through the auspices of his attorneys a notice of intention to defend the action brought against him by the plaintiff, he failed to respond to the application for summary

[3] Founding affidavit para 3 & 4

judgment due to lack of funds to instruct his attorneys to oppose the summary judgment application.

[8] The lack of financial means on the applicant's part, is the only explanation proffered by him as a reason as to why he was unable to oppose the summary judgment application. The applicant in his affidavit does not state that he was unaware of the date that the application for summary judgment was set down for hearing, nor does he state that he was unable to attend court on the day of the hearing or even that on the day of the hearing he made an appearance at court and requested an indulgence from the Court to seek legal assistance through the Legal Aid Board.

[9] What is apparent from the explanation given by the applicant is that he had knowledge that the summary judgment was set down for hearing, but had failed to attend court proceedings on the said day. He was also aware that in the absence of any opposition filed against the granting of a summary judgment, judgment could be obtained against him.

[10] For the reasons as set out *supra* I cannot find that his explanation for his default was lacking of wilfulness on his part. The applicant as a result had failed to meet the first requirement of absence of wilful default.

Bona Fide Defence on the Merits

[11] In his founding affidavit[4] the applicant sets out that he never entered into a structured facility agreement in terms of which he was obliged to repay the loan in monthly instalments over a period of 240 months. He further sets out that during 2006 he had applied for an ordinary overdraft facility, which account was conducted as such until 2012 when the respondent awarded him a facility of R1200 000,00 to enable him to buy a house for cash unencumbered, by monthly payments.

[12] He went on to state that this facility was not structured and that he was under no obligation to repay the said amount in instalments or at any time.

[13] The respondent has denied that the applicant was not obliged to repay the loan facility extended to him in monthly instalments. In this regard, the respondent contends that depending on the amount of the facility utilised by the applicant, the monthly amount to be repaid in part would service the interest on the account.[5] The respondent further stated that it would be absurd to assume that it would have advanced funds to the applicant, without there having been an obligation to repay the said funds.

[14] In this regard, counsel appearing on behalf of the applicant had argued that the only money payable by the applicant in terms of the agreement was interest that accrued on the outstanding amount, but that the interest charged had not become due and payable as the account of the applicant was still active.

[4] Founding affidavit para 8 to 11
[5] Opposing affidavit para 19.3

[15] Although the applicant disputes having concluded the facility agreement with the respondent, he does not dispute the existence of annexure "RMB1"[6] which indicates that such an agreement was concluded with him. Insofar as the applicant contends that the facility agreement was preceded by various other agreements, it is not indicated how such prior agreements would impact on its validity. Further, the applicant has not denied that the amount advanced to him by the respondent was a loan. I am unable to agree with the applicant that such loan was not to be repaid to the respondent. If regard is had to the facility agreement, annexure "RMB1", the repayment terms of the facility are clearly set out. If on the applicant's contention this loan was not to be repaid or the interest had not become due, such term would have been expressed in the agreement. In the circumstances I cannot find that the applicant has established a *bona fide* defence against the plaintiff's claim.

Rescission application to be made within twenty days

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

[17] It is significant to note that the founding affidavit is silent as to when the applicant first obtained knowledge of the judgment taken against him. At best with reference to his founding affidavit, he states that the summary judgment application was served on his attorney on 17 May 2012, which application

[6] See Index Volume 1 pg 38

depicts a date of hearing of the summary judgment application for 12 June 2012.

[18] In the absence of express evidence that the applicant obtained knowledge of the judgment on a different date than the date of the entering of judgement in a summary manner against him, the applicant ought to have been brought his application within twenty days calculated from 12 June 2012.

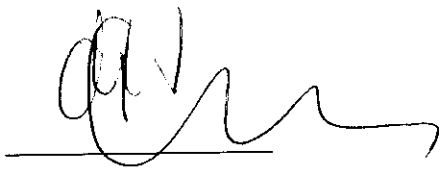
[19] Counsel appearing on behalf of the applicant had argued strongly that the Court should condone the fact that the application was brought outside the time period permitted for in Uniform Rule 31(2)(b). This request in the absence of condonation having been addressed in the founding affidavit cannot be acceded to by this Court.

[20] As a consequence I cannot find that the application was brought within the time period permitted for by the rule.

Order

[21] In the result the following order is made:

The application is dismissed with costs.



C. J. COLLIS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR APPLICANT:	ADV D CLOETE
INSTRUCTED BY:	OLIVIER & MALAN ATTORNEYS
FOR RESPONDENT:	ADV R DEMINEY
INSTRUCTED BY:	DELPORT VAN DEN BERG INCORPORATED
DATE OF HEARING:	24 APRIL 2014
DATE OF JUDGMENT:	23 MAY 2014