IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 19084/2012

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

20 JUNE 2014

DATE SIGNATURE

20/6/2014

In the matter between:

S & S FURNITURE AND APPLIANCES **APPLICANT**

And

THE FRIDGE FACTORY (PTY) LTD **RESPONDENT**

JUDGMENT

MAVUNDLA J,

[1] This is an opposed application for leave to appeal against the whole judgment and orders of this court granted on 27 August

2013 dismissing with costs the applicant's application for rescission of the order granted against it on 12 June 2012.

[2] The grounds upon which the application for leave to appeal is premised, are that the court erred

2.1 in applying the principles laid down in *Chetty v Law Society of Transvaal* 1985 (2) SA 756 (A);

2.2 in finding that the test as applied in *Chetty v Law Society of Transvaal* and *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) was a single stage test to be applied in rescission proceedings;

2.3 in not making a finding on the merits of applicant's *bona fide* defence;

2.4 in incorrectly finding that upon the applicant not satisfying the court of his default there was no need to make a finding on the merits.

[3] It was submitted on behalf of the applicant that another court would consider the merits of the defence of the applicant and conclude that there are good prospects that such defence can succeed and balancing such defence with the explanation advanced for the default, will rescind the default judgment.

[4] On behalf of the respondent in opposing the application for leave to appeal, it was submitted that there are no reasonable prospects of success that another court would find otherwise than this court did. It was further submitted that even if leave to appeal were to be granted, there are still no reasonable prospect of success on the appeal. The application for leave to appeal is merely calculated to delay the respondent in executing against the applicant.

[5] It was further submitted on behalf of the respondent that the court considered both the explanation of the applicant for the default judgment and whether the defence was *bona fide*.

[6] In my view, there is no prospect that another court, reading the court's judgment will find otherwise than this court did. Therefore the application for leave to appeal must be dismissed with costs for the reasons set down herein below.

[7] The court was mindful of the fact that in the application for rescission the applicant must satisfy the court that there is a reasonable and acceptable explanation for the default and that there is a *bona fide* defence on the merits thereof. The court was equally aware of the fact that both the aforesaid requirements must be present and in the absence of either it has discretion to or not to grant the rescission; *vide* para [18] of the judgment.

[8] The default judgment was obtained by default against the applicant because he was not aware of the application in that regard. At the time he had an attorney on record who failed neither to withdraw from the matter nor to advise the applicant of the application. The court was not satisfied with this explanation and concluded that "...in the circumstances of this case, the remissness was not only that of his attorney but his as well."

There are limits to tolerate the remissness of an attorney, so too of an applicant for rescission. The court was not satisfied with the reason proffered for the delay. The court was also not satisfied with the applicant's contention that it has a *bona fide* defence and addresses same in paragraphs [13] – [15]. The court, in the exercise of its discretion declined to grant the application for rescission and dismissed the application.

[9] It is trite that the grant or refusal of an application for rescission is a matter of the discretion of the court. The court of appeal will not readily interfere with the exercise of discretion. *In casu*, the court considered whether there was a reasonable and satisfactory explanation proffered by the applicant for his absence when the default judgment was granted against it and found against the applicant. In this regard the court expressed itself as follows:

" I am therefore of the view that, in the circumstances of this case, the remissness was not only that of his attorneys but his as well. There are limits to tolerate the remissness of an attorney. In my view this is not one of those cases. I therefore conclude that the applicant has not discharged this first leg of the requirements as set out herein above. I am of the view that, in the exercise of my discretion, the application for rescission should be refused only on this aground alone."

[10] The applicant complained that the court did not engage in the balancing act of weighing both requirements, i.e. a reasonable and acceptable explanation for the default, and the *bona fide* defence advanced. Again in this regard, there is no merit that another court, considering and reading in context the judgment would find in favour of the applicant. The court was not satisfied with the applicant's denial that the fridge, which formed the subject matter of the agreement of purchase and sale between the parties, was delivered at his place. It stands to reason that the court was not persuaded that there was a *bona fide* defence.

[11] For all the aforesaid reasons, it is this court's view, that, there are no reasonable prospects that another court will arrive at a different conclusion as this court did. In the exercise of my discretion, I therefore conclude that the application for leave to appeal should be dismissed with costs.

[12] In the result the application for leave to appeal is dismissed with costs.

N. M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF HEARING : 29 APRIL 2014

DATE OF JUDGMENT : 20 JUNE 2014

APPLICANT'S ATT : YUSUF BHAMJEE ATTORNEYS.

APPLICANT'S ADV : ADV. Y. BHAMJEE

RESPONDENT'S ATT : ENSLIN & FOURIE ATTORNEYS.

RESPONDENT'S ADV : ADV D.S. WHITE