IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 549/2013

Date: 17 September 2014

REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

LONGCHAMP TURF INVESTMENT (PTY) LTD First Applicant

EMGOLD (PTY) LTD Second Applicant

KYALAMI RANCH RACING CENTRE (PTY) LTD Third Applicant

EMMANUEL CAMBOURIS Fourth Applicant

And

FIRST BANK LIMITED t/a FNB PRIVATE CLIENTS Respondent

JUDGMENT

PRETORIUS J.

[1] In this application for the rescission of a default judgment the applicant applies that the orders which were granted on 6 March 2013, be rescinded and set aside.

[2] The applicants were ordered jointly and severally to pay the amount of R2 702 311.64 together with the interest calculated at the rate of 10.5% per annum from 23 October 2012 to final payment. Furthermore two properties were declared specially executable.

[3] The respondent opposed the application for rescission of the judgment. The application is brought in terms of Rule 42 (1) a of the Rules of the High Court and the Common Law.

[4] It is so that the respondent filed the opposing affidavit late as the notice to oppose was served on 8

October 2013. A signed and commissioned opposing affidavit was only served on 28 November 2013 - 37 court days later. The respondent provided a lengthy explanation as to why it took so long to serve the opposing affidavit. I must agree with counsel for the applicants that there is no reason set out as to why the opposing affidavit was signed on 12 November 2013 and only served 16 days later. However I have allowed the opposing affidavit in the interest of justice.

[5] The applicants contended that they were not wilful in not entering an intention to defend the action, but that they had been unaware of the action up to 11 August 2013. The fourth respondent had relocated to Cape Town, although his *domicilium* address remained as 76 Third Road, Hydepark, Sandton. This is also the address where the summons had been served and there was no obligation on the respondent to serve on any other address.

[6] The Sheriff's return of service showed that the summons had been served at the chosen *domicillium citandi et executandi* by affixing it to the outer principle door on 16 January 2013. There is thus no problem with the service of the summons.

[7] The second, third and fourth applicants chose 1st Floor, South Wing, Hyde Park Shopping Centre, Johannesburg as their chosen *domicillium citandi et executandi.* The Sheriff had served the summons on 16 January 2013 by affixing it to the outer principle door. This service was also good and cannot be faulted.

[8] However, the court cannot find that the applicants were in wilful default, due to the fact that the fourth applicant had relocated to Cape Town and therefor was not aware of the service of the summons, although it was served correctly on all the parties. It was an oversight by the parties in not changing their *domicilium citandi et executandi* or to inform the respondent of the change of address.

[9] According to the applicants they have a *bona fide* defence. The first defence they raise is that the respondent's pleadings do not disclose a cause of action as the necessary averment were not made. According to the applicant there is no averment that money had been advanced in terms of the loan agreement.

[10] The principal defence advanced by the applicants is that the claim has been settled in full. The respondent denies this, as according to the respondent, this relates to a previous agreement. The certificates of indebtedness attached to the summons refer to account number 04-039-026-0, whilst in the opposing affidavit it is set out by the respondent:

> "*The current action relates to the facility under account number 01-038-724-3 and not to the one which was settled. In this regard I refer the Honourable Court to an e-mail by Heather Whiteley, which is attached hereto, marked "FNB1". A confirmatory affidavit by Heather Whiteley is also*

attached hereto and incorporated herein. ”

[11] It is thus clear that there is some confusion as to which account number relates to the present case. Furthermore no e-mail by Heather Whiteley, or any confirmatory affidavit by Heather Whiteley were attached to the opposing affidavit as set out in the opposing affidavit. No particulars are set out as to the suretyships of the second, third and fourth applicants. Counsel on behalf of the respondent submits that the action was launched by the way of a simple summons and therefor all the particulars are not set out in detail and an exception cannot be raised in this regard. This submission by the respondent is correct.

[12] I have considered the facts and the arguments of counsel for both the applicants and the respondent carefully. It is clear that there is some confusion regarding the question whether it is the same debt which is in issue in the present case. The omission of attaching both the email and Ms Whiteley’s affidavit to the opposing affidavit of the respondent must also be considered as the court does not have the privilege to consider the contents of the e-mail which the respondent referred the court to.

[13] Therefor I agree that the applicants should be granted the opportunity to ventilate the issues in the interest of justice as they have set out a *bona fide* defence which, if proven at trial will be a proper defence.

[14] I make the following order:

1. The default judgment granted against first, second, third and fourth applicant on 6 March 2013 is hereby rescinded;

2. Costs of this application will be costs in the action.

Judge C Pretorius

Case number: 549/2013

Heard on: 10 September 2014

For the Applicant: Adv O’Donovan

Instructed by: Zwiegers

For the Respondent: Adv Deminey

Instructed by: Delport van den Berg Inc

Date of Judgment : 17 September 2014