IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case Number: 4772/14

Coram: Molefe J

Heard: 24 July 2014

Delivered: 11 September 2014

In the matter between:

JEREMY ANDREW COPSON **APPLICANT**

and

NEDBANK LIMITED **RESPONDENT**

JUDGMENT

MOLEFE, J:

[1] This is an application for rescission of the judgment granted by default against the applicant (the first defendant in the main action) on 25 October 2013. The application is brought in terms of Rule 31 (2) (b) which provides as follows:

> *"A defendant may within 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".

[2] The requirements that an application for rescission in terms of rule 31(2) (b) must satisfy are well established in ***Colyn v Tiger Food Industries Ltd t\a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) (2003) 2 ALL SA 113*** at para 11 and other authorities cited:

"The applicant must show cause why the remedy should be granted. That entails:

a) giving reasonable explanation of the default;

b) showing that the application is made bona fide;

c) showing that there is a bona fide defence to the plaintiff's claim which prima facie has some prospect of success. In addition, the application must be brought within 20 days after the defendant has obtained knowledge of the judgment".

[3] The subrule does not require that the conduct of the applicant be not wilful, but is an ingredient of the good cause to be shown that the element of wilfulness is absent.

[4] The applicant is one of six defendants in the main action; the applicant and the second to sixth defendants as directors\shareholders and surety and co-principal debtors to the principal debtor. All of the sureties were involved in one way or another in the management of the principal debtor. The principal debtor was finally liquidated on 7 October 2010 and the third and fourth defendants timeously filed their notice of intention to defend the action. The main action is still pending.

[5] Summons was duly served on applicant's chosen *domicilium citandi et executandi* which is admitted by the applicant. The applicant failed to enter appearance to defend the action as a result of which the respondent made application and obtained default judgment against the applicant.

[6] The default order reads as follows:

> *"After having read the summons and other documents filed, judgment by default is granted in favour of the plaintiff against 1st, 5th, and 6th defendants, jointly and severally, the one to pay the other to be absolved for:*
>
> ***Claim 1***
>
> *1. Payment of the sum of R348 933,83;*

2. Interest on the said sum at the rate of 9,75% calculated from 3 July 2013 to date of final payment, both days inclusive, calculated daily until date of final payment;

Claim 2

1. Payment of the sum of R27050.66;

2. Interest on the said sum at the rate of 7,5% calculated from 3 July 2013 to date of final payment, both days inclusive, calculated daily until date of final payment;

Claim 3

1. Payment of the sum of R756 197,15;

2. Interest on the said sum at the rate of 10% calculated from 3 July 2013 to date of final payment, both days inclusive, calculated daily until date of final payment;

3. Cost of suit on attorney and client to be taxed inclusive of prayers 3 of claim 1 and 3 of claim 2".

[7] The applicant submits that he became aware of the existence of the judgment for the first time when the sheriff arrived at his house in terms of a warrant of execution on 13 January 2014. The applicant then launched the rescission application on 24 January 2014.

[8] The application was made within 20 days after the defendant acquired knowledge of the judgment. Accordingly, the defendant must merely show good cause for rescission by giving a reasonable explanation of default and showing that he has a *bona fide* defence to the plaintiff's claim. In the latter regard, it will be sufficient for the defendant to set out facts which, if established at the trial, would constitute a good defence.

[9] The applicant's explanation for his default is that he first received notice of the judgment against him on 13 January 2014, when the Sheriff attended his home and presented three writs of execution against his movable property. The applicant states as follows:

"14. I nominated the address which I previously resided, 33 Edison Cresent, Sunninghill as my chosen domicilium et executandi as appears from annexure "PC4" to the respondent's summons.

15. Both my wife and I vacated the Sunninghill address in June 2010 (having resided there for 22 years) and in consequence, the service of summons upon me did not come to my attention. Had it done so I would have defended same for the reasons set out hereunder.

16. I was not contacted by the current occupier of my former home nor advised that summons had been served on me and I respectfully submit that I am not in wilful default".

[10] The applicant submits that summons did not come to his attention and that notwithstanding the applicant's change of address, respondent was aware of his current whereabouts having served three writs at the applicant's present address.

[11] While default judgment on the part of the applicant is not a substantive or compulsory ground for refusal of an application for rescission, the reason for the applicant's default remains an essential ingredient of the good cause to be shown. The wilful or negligent nature of the applicant'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 is shown.

[12] Before it can be said that the applicant is in wilful default, the following elements must be shown:

12.1 knowledge that the action is being brought against him;

12.2 deliberate refraining from entering an appearance, though free to do so; and

12.3 a certain mental attitude towards the consequences of the default.

[13] The explanation of the applicant for his default is challenged by the respondent in the answering affidavit. The explanation is not denied but the respondent contends that the founding affidavit does not contain allegations to the extent that notice was given to the respondent that the applicant has changed his chosen *domicilium* and that the respondent had effected service of the summons at the incorrect address. The applicant furthermore fails to provide a confirmatory affidavit from the present occupier who allegedly failed to inform him of the summons.

[14] The absence of any knowledge of service of the process is indeed a reasonable explanation for default. In my view, the applicant presented a reasonable and acceptable explanation for his failure to defend the action. Although the applicant was grossly negligent in not having notified the respondent of his change of address, in my view he did not deliberately refrain from entering appearance and is therefore not in wilful default.

[15] The applicant has raised the point that there are two deponents to the Answering Affidavit. Lauren Webber-Froneman deposes to an affidavit on 5 March 2014 and the second deponent, Deidre Lindeque signs her confirmatory affidavit on 4 March 2014. Applicant's counsel argues that the second deponent cannot confirm the contents of the affidavit which was not in existence on 4 March 2014. Counsel for the applicant contends that the application should proceed on the basis that no opposing affidavits have been filed, alternatively that such affidavits are of no evidential value and constitute hearsay. I am satisfied that both deponents to the Answering Affidavit have access to the records of the respondent pertaining to this matter and as such both are equally able to testify to this matter.

[16] Regarding the merits of this application, the applicant's defences are as follows:

Claim 1

[17] A written overdraft facility agreement which governed the terms and condition upon which the principal debtor secured such facility had been lost by the respondent. Applicant contends that respondent must prove the terms thereof by way of oral evidence and that this in itself is a triable issue.

[18] The certificates of balance are incorrect as on the respondent's own version, no banking operations are conductible after the date of liquidation. There is therefore a dispute as to what amount is due in terms of the overdraft and how same is calculated.

[19] Applicant's Counsel submits that a defence to a portion of a claim entitled applicant to have the whole judgment set aside and in this respect relies on ***Kavasis v SA Bank of Athens 1980 (3) SA 394 D*** *and* ***Terrace Auto Service v FNB 1996 (3) SA 209 W.***

[20] Respondent's counsel concedes that the applicant is correct in this regard and to this extent, the respondent has attended to a recalculation of the amount owing until date of liquidation. However, counsel for respondent contends that the applicant has no defence against the amounts claimed prior to the date of liquidation.

Claim 2

[21] Applicant submits that the debt has been paid in full and the certificates of balance are incorrect as the liquidators received R75240,00 from the vendors of the Ford Focus vehicle. The respondent admits in the particulars of claim of having received R64 026,96 after deductions of commission and auction costs.

Claim 3

[22] The respondent does not make mention of the capital amount due to it in respect of the balance of outstanding payments on the Roland printing machine. The amount claimed is unascertainable since the respondent admits payment of a further R83 413,83 in respect of the claim. The certificates of balance are incorrect as the respondent relies on a valuation of the printing machine and not on the sale price.

[23] Respondent's counsel argues that there is no merit to the allegations made by the applicant regarding claim 2 and 3 and that the applicant places an incorrect interpretation on the accounts received from the liquidators.

[24] In the final instance the applicant seeks to rely on the principle of excussion with specific reference to the alleged free residue in the estate of the principal debtor. Respondents counsel argues that the applicant is not entitled to insist on excussion in respect of the principal debtor first as the applicant places an incorrect interpretation on the liquidator's accounts and that the applicant waived its entitlement to rely on this defence.

[25] Respondent's counsel submits that the application should be dismissed *alternatively* to rescind the judgment in respect of claim 1 only to the extent of the disputed amount.

[26] It is clear in *casu* that there is a triable dispute as to precisely what is due to respondent in terms of the overdraft and how same is calculated. I am satisfied that the respondent has demonstrated that it has *bona fide* defences that are triable to all three claims. On merits the applicant's defences *prima facie* carry some prospect of success.

[27] In the premises, the following order is granted:

> *i) the default judgment granted against the applicant on 25 October 2013 is hereby rescinded and set aside;*

ii) the applicant is ordered to enter an appearance to defend within 10 days of this order;

iii) costs of this application will be costs in the cause.

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D S MOLEFE
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of applicant	**:**	**Advocate C E Boden**
Instructed by	**:**	**J J S Manton Attorneys**
Counsel on behalf of respondent	**:**	**Advocate S Aucamp**
Instructed by	**:**	**O'Connell Attorneys**