IN THE [HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG. PRETORIA

CASE NO: 27673/2012

DATE: 18/9/14

DATE:

In the matter between:

ABDUL GANI MOTANI **APPLICANT**

and

BEDDING COMPONENT MANUFACTURERS (PTY) LTD **RESPONDENT**

REASONS FOR JUDGMENT

RAULINGA J,

[1] The applicant, who is the defendant in the main action, launched an application seeking to rescind and Bet aside the default judgment granted by the Registrar of this Court on the 20 July 2012 under the same case number.

[2] After having heard counsel for both parties, I made the following order:

(a) That condonation is refused;

(b) That application for rescission is dismissed;

(c) That the Defendant pays costs of the application on attorney and client scale; and

(d) That the draft order marked "X" in terms of Rule 46 is made an order of court.

[3] The order marked "X" reads as follows:

(a) Declaring the urjder mentioned immovable property specifically executable in favour of the Applicant/plaintiff;

Erf […], E[...], Registration Division JR, Gauteng Province (which is held in terms of transfer number: T[...]), also known as [...] S[...], E[...], Pretoria (hereinafter referred to as "the Property").

(b) Authorising a warrant of execution, relating to the property, in terms of Rule 46 (1) (a) (ii) of tihe Uniform Rules of Court; and

(c) The Respondent/Defendant is ordered to pay the costs of the application as between attorney and own client.

After hearing thje matter, I indicated that I will provide reasons for judgment. The following arje my reasons for judgment.

[4] The factual matrix to this matter is that, in 2010 the applicant was a director of Sleep Science (PTY) Ltd, a private company that solely specialised in beds and mattress sales. The applicant aind the respondent concluded an agreement whereby the respondent would proyide Sleep Science with bedding stock.

[5] Some of the terms pf contract proffered to the applicant as the company's representative for the Purchase of the stock were that:

(i) Payment would be strictly on the 30 day terms; and

(ii) No interest would be paid on any amount owing due to the fact that payment would not exceed 30 days.

[6] On his own version, the applicant admits that, despite all the offers made by the respondent his company failed to meet its obligations towards the respondent in the first month of the agreement. The agreement continued until November 2010, when the respondent made a demand for immediate payment from the applicant's company. As a consequence the applicant signed a surety for the company fearing that the company would be liquidated as the company did not have much assets. The company was finally liquidated in April 2012, resulting in the respondent launching an application which is the subject of this judgment.

[7] The applicant submits that he never received a letter of demand at any relevant stage as envisaged in closure 13.12 of the suretyship. I must at the outset dismiss this as a non-starter as will be revealed as this judgment unfolds.

[8] The submission by the applicant that the National Credit Act no: 32 of 2005 is applicable in this matter cannot be countenanced. It is also a ploy that the applicant was not served with the summons and other papers timeously. In my view, the applicant does not satisfy the requirements for condonation and rescission of judgment.

[9] It is convenient to deal with the requirements for condonation and rescission of judgment simultaneously, because the two sometimes overlap with a thin line between them.

[10] In terms of the comrjion law, the Court has the power to rescind a judgment obtained on default qf appearance provided sufficient cause therefor has been shown. The term "sufficient cause" defies precise or comprehensive definition, but it is clear that in principle and in the longstanding practice of our Courts two essential elements thereof are: (1) that the party seeking relief must present a reasonable and acceptable explanation for his default and (2) that on the merits such party has a *bona fide* dpfence which, *prima facie*, caries some prospect of success. It is not sufficient if only one of these requirements is met; for obvious reasons a party showing no prospect of (success on the merits will fail in an application for rescission of a default judgment granted against him, no matter how reasonable and convincing the explanation of his default. The two requirements are conjunctive and not disjunctive - Chetty V Law Society, Transvaal 1985(2) 756 (AD) and Colyn V Tiger Food Industries It t/a Meadow Feed Mills (Cape) 2003(6) SA (SCA).

[11] On a proper evaluation of the facts and Law condonation in this matter may not be granted, because the a splicant is seeking an indulgence and not a right. Further to that, in November 2010 the respondent made a demand for immediate payment of the outstanding amourt. The company was liquidated in April 2012- The applicant alleges that on 11 Octjober 2012 he received a call from an unknown gentleman informing him that he (purportedly was the Sherriff of the High Court) and that he was in possession of a writ of execution due to the fact that the respondent obtained judgement against him personally. It is at that time that the applicant ought to have acted.

[12] The applicant admits that on 24 January 2013 he was served with a notice for execution of his property by the respondent; situated at [...] S[...] Street E[...]; Pretoria, Service was attempted at [...] M[...] Street Z[...] by affixing the summons to the door. He claims that he was not working there anymore. Another service was attempted at [...] S[...] Street, E[...]. His claim for non-service is that he was not residing there and had leased the property to his brother who never forwarded or informed him of the summons. He seems to shift the blame to other persons in order to escape responsibility.

[13] It is clear from the Summons that the applicant in his capacity as the director of Sleep Science (PTY) Ltd provided his chosen *domicillium citandi* at *executandi* as [...] M[...] Street, Z[...] and who resides at [...] S[...] Street, E[...], Pretoria. There was no duty upon the respondent to hunt for him. It was the duty of the applicant to inform the respondent of the change of address. When the applicant bbund himself as surety and co-principal of the company, he provided the *domicillium citandi* as [...] M[...] Street Z[...].

[14] It is my considered view that in the premises the applicant did not present a reasonable and acceptable explanation for his default; nor did he offer a bona fide defence which, prima facie, carries some prospect of

success. Both applications for condonation and rescission of judgment must fail with costs.

[15] I now turn to deal with jthe issue as why the hypothecated immovable property was declared specially executable. The respondent is the applicant in this part of the matter.

[16] Rule 46(1) of the High Court Rules was amended with effect from 24 December 2010. The relevant part] reads:

> *"(a) no writ of execution against the immovable property of any judgment debtor shall issue until -*
>
> > *(i) A return snail have been made of any process which may have been issued against the movable property of the judgement debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or*
> >
> > *(ii) Such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of Rule 31(5), by the Registrar; Provided that, where the property sought tp be attached is the primary residence of the judgement debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property".*

[17] As I have already intimated above, the National Credit Act does find application because, the company Sleep Science is a juristic person and the agreement was a large agreement and tJfie customer had an annual turnover in excess of R1 million. Further to that, the applicant/plaintiff and Sleep Science did not expressly or tacitly agree that Sleep Sciencs would be liable for the payment of interest, charges or fees in respect of the unpaic amount.

[18] I am minded to state that before the applicant/plaintiff applied for execution of the property, it obtained a nulla bona issued by the Sheriff of this court, after it was confirmed that there wajs no movable property to satisfy the debt.

[19] The immovable property which was sought to be declared specially executable is not the primary residence ojf the respondent/defendant. The respondent/defendant has leased the property to his brother. It can therefore be concluded that the property is kept for commercial reasons.

[20] If the immovable properjty is not declared specially executable the applicant/plaintiff will suffer enormous prejudice, because the respondent/defendant has no other assets to satisfy the debt. The respondent/defendant is contractually and legally obliged to meet his debts which he incurred in the process of his business dealings.

[21] In the circumstances, the order that I granted on the 29 January 2014 stands.

T J RAULINGA

JUDGE OF THE NORTH GAUTENG HIGH COURT