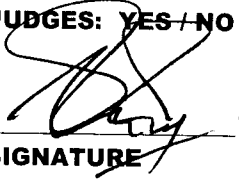




IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
7/11/2014	
DATE	SIGNATURE

CASE NUMBER: 10509/13

DATE: 7 November 2014

SUGENDRAN MERVIN GOVENDER

First Applicant

LOGAMBAL GOVENDER

Second Applicant

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SANDTON GLEN BODY CORPORATE

Respondent

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JUDGMENT

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STRYDOM AJ:

INTRODUCTORY REMARKS

- [1] The applicants are applying for rescission of a default judgment obtained by the respondent against them subsequent to summary judgment proceedings on 2 May 2013, as well as condonation for the late filing of their said rescission application.

[2] The omission of the applicants which stands to be explained is their failure to deliver an opposing affidavit to the respondent's application for summary judgment. The application for rescission is accordingly brought in terms of the common law and not in terms of Rule 31(2)(b) or Rule 42. For a rescission in terms of the common law, sufficient cause must be shown, which means that:

- 2.1 The applicants must present a reasonable explanation for the default;
- 2.2 The applicants must demonstrate that the application was made *bona fide*;
- 2.3 The applicants must show that they have a *bona fide* defence, which *prima facie* has some prospects of success<sup>1</sup>.

A reasonable explanation of the default must co-exist with evidence of reasonable prospects of success on the merits of the applicants' defence<sup>2</sup>.

#### APPEARANCE AND CONDONATION

[3] This application came before me on 3 November 2010 at which time there was only appearance for the respondent by Adv. Molentze.

[4] The respondent delivered an answering affidavit, in which he dealt comprehensively with the averments made by the applicant in their founding affidavit, illustrating the absence of a defence to the order granted against them. The respondent indexed and paginated the matter and enrolled it for hearing, since the applicants did nothing further to finalise it.

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<sup>1</sup> See: *De Wet vs Western Bank Ltd* 1979(2) SA 1031(A) at 1042

<sup>2</sup> See: *Harris v Absa Bank Ltd t/a Volkskas* 2006(4) SA 527 T at para's 4-6

4.1 The respondent did not take the applicants to task on their condonation application and accordingly I grant condonation for the late filing of their rescission application.

#### EXPLANATION FOR DEFAULT

- [5] The explanation which the applicants advanced for their default to deliver an opposing affidavit to the respondent's application for summary judgment is succinctly, that they instructed their attorney to oppose the application for summary judgment, however they failed to provide the said attorney with final instructions and, their attorney in turn failed to instruct counsel to oppose the application for summary judgment.
- [6] The explanation advanced by the applicants cannot on any basis be found to be a reasonable and acceptable explanation for failure to insure that an affidavit resisting the application for summary judgment was timeously delivered. The explanation creates the impression that the applicants are attempting to shift the blame for failure to instruct counsel to appear on their behalf at the summary judgment proceedings, to their attorney. There is no supporting affidavit by the said attorney, and in any event this explanation is insufficient.
- [7] The only reasonable inference that I can draw from reasons advanced for the default by the applicants, is that they were in wilful default.

DEFENCE ON THE MERITS

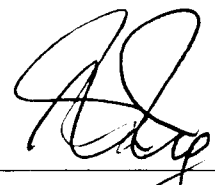
[8] The applicants contend that they have a *bona fide* defence therein that they have a counter claim of which the monitory value exceeds the amount claimed by the respondent. The applicants do not dispute that they are indebted to the respondent, but make the sweeping statement that they dispute the calculation of the amount claimed by the respondent against them.

[9] The respondent dealt comprehensively with the alleged *bona fide* defence in their answering affidavit. On the papers before me there is no evidence of reasonable prospects of success on the merits of the applicant's alleged defence. It follows by necessary implication that the applicants failed to submit evidence that illustrates on probabilities that they have a *bona fide* defence against the respondent's claim.

ORDER

In view of the above considerations and findings I make the following order:

1. The application for rescission is dismissed.
2. The applicants are ordered to pay the respondent's costs, including the costs of a senior/junior counsel appearing on behalf of the respondent.



J.S. STRYDOM

ACTING JUDGE OF THE HIGH COURT

Appearances:

*Counsel for the Applicant:*

*No Appearance*

*Attorneys for the Applicant:  
respondents:*

*Biccari Bollo Mariano Inc. Counsel for the  
Adv. Molentze*

*Instructed by:*

*Michael Dansky*

*Date Heard:*

*3 November 2014*

*Date of Judgment:*

*7 November 2014*