

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 63765/2012

In the matter between:

15/12/2016

**NORBERTO JOSE DOS
SANTOS COSTA
ANA PAULA RIBEIRO GONCALVES
COSTA**

First Applicant

Second Applicant

and

**THE STANDARD BANK OF
SOUTH AFRICA LIMITED**

Respondent

JUDGMENT

De Kok, AJ

1. This is an application for the rescission of a default judgment granted in favour of the respondent, Standard Bank Ltd ("Standard Bank") against the first and second applicants (Mr and Mrs Costa) in an amount of R1 310 564.44 together with interest and costs.
2. The application was heard together with applications for the final sequestration of the estates of Mr and Mrs Costa under case number 75020/2014 and 74955/2014.

3. The background facts and the cause of action advanced against Mr and Mrs Costa are dealt with in the judgment relating to the sequestration applications and I do not repeat them herein.
4. Mr and Mrs Costa must show "good cause". In **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)**¹ it was held that "*...the Courts generally expect an applicant to show good cause by (a) giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success...*"
5. The summons was served by way of publication in the Citizen newspaper, and after Standard Bank had obtained an order authorising such substituted service. Mr and Mrs Costa contend that they did not read such publication and that they first became aware of the action when their personal banking facilities were frozen as a result of the provisions sequestration orders obtained against them (which orders were also obtained without their knowledge). This is not effectively disputed by Standard Bank and constitutes a reasonably acceptable explanation for their failure to defend the action.
6. It cannot be contended that their defence is not *bona fide* – in the

¹ 2003 (6) SA 1 (SCA) par 11

sense of one which they seriously intend to advance on the merits, as opposed to a mere delaying tactic.

7. It remains to be considered whether they have disclosed a *prima facie* defence. The test that they must meet is described in the oft quoted decision in **Grant v Plumbers (Pty) Ltd**² 1949 (2) 470 (O) as follows:
"It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for."
8. The essence of the defence advanced by Mr and Mrs Costa is that Kensington is not indebted to Standard Bank in the amount claimed (and that their accessory liability in terms of the former section 26(5) of the Close Corporations Act, 69 of 1984 thus does not arise) because Kensington borrowed these monies in terms of an existing loan agreement, which was not terminated by Standard Bank after cancellation of the mortgage bond which served as security for the loan, and that Kensington continued to make monthly repayments in the agreed amounts.
9. In my view these allegations, if proven at trial, would constitute a defence to the cause of action advanced by Standard Bank.
10. It follows that the default judgment must be rescinded.

² 1949 (2) SA 470 (O) at 467-477

11. This is not a case where the applicants for rescission are seeking an indulgence and should therefore bear the costs of the application, even if successful. In my view it is appropriate that the costs of this application should follow the result of the trial in the action.

12. I make the following order:

(1) The default judgment granted against the applicants on 19 August 2013 is rescinded;

(2) The costs of this application are costs in the cause.



A DE KOK
Acting Judge of the High
Court, Gauteng Division,
Pretoria

Date of hearing: 30 November 2016

Date of judgment: ¹⁵
~~14~~ December 2016

Appearances

For applicants: Mr G Kairinos SC instructed by E Da C Luiz Attorneys c/o Jansen and Jansen Inc.

For respondent: Mr R Raubenheimer instructed by Vezi de Beer Inc