REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 6540/2015

14/12/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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SIGNATURE

14:12:2016
DATE

Dodo Traders CC Applicant

and

Standard Bank of South Africa:

Vehicle and Asset Finance Division Respondent

JUDGMENT

AC BASSON, J

[1] This is an opposed rescission application. The applicant (Dodo Traders CC) is represented by its sole member Mr Van Zyl ("Van Zyl") and is seeking to rescind a default judgment obtained by the respondent (Standard Bank of South Africa: Vehicle and Asset Finance Division – "the bank") on 15 April 2015.

[2] The applicant pursues the rescission application in terms of rule 31(2)(b) of the Rules, alternatively rule 42(1) of the Rules, alternatively in terms of the common law.

[3] It is common cause that Van Zyl approached the bank with a view of procuring asset acquisition finance in that the applicant wished to buy a tractor and a baler to use in pursuit of its baling enterprise.

[4] To this effect on 24 July 2013 Van Zyl negotiated with the bank (represented by a certain Ms Buys) for finance for the purchase of the baler. According to Van Zyl he specifically presented to Buys that he had to procure a tractor in the near future which is required to pull the baler which would then be used as one single indivisible unit in pursuance of operating the applicant's baling enterprise.

[5] The bank considered the applicant's financial statements and approved the applicant's application for the purchase of the baler. The instalment agreement was concluded shortly thereafter and it was agreed that the bank would finance the applicant's purchase of a 2013 Bigpack 12770 Baler ("the baler").

[6] The baler was delivered to the applicant during September 2013. On 18 September 2013 the applicant applied for finance for the purchase of the tractor. After having considered the application, the bank rejected the application for reasons not relevant to this application.

[7] The applicant claims that on 23 September 2013 he telephonically cancelled the instalment agreement due to the bank's refusal to finance to the tractor required to be used with the baler. According to him he also requested the bank to collect the baler from the applicant's premises. As a result of this conversation no payments were made in terms of the instalment sale agreement as, according to the applicant, the instalment agreement was cancelled and restitution was offered. According to the applicant, the respondent failed and/or refused to collect the baler from the applicant's premises where it has remained ever since.

[8] The bank maintains that because the applicant took delivery of the baler he was thereafter required to pay the requisite 12 months' instalments as provided in the instalment agreement. According to the bank the applicant breached the agreement by failing to pay the monthly instalments.

[9] A certificate of balance as required was thereafter issued by the bank and on 22 December 2014 the applicant was notified of its breach of the instalment agreement and was required to remedy the breach within 7 days of receipt of the breach notice. The applicant was also notified that the breach would entitle the respondent to cancel the agreement. The breach notice was delivered to the relevant Post Office and the relevant SAPO Track and Trace report are attached to the papers. Because the applicant failed to remedy its breach of the instalment agreement, the bank addressed a notice, by way of registered post to the applicant in terms of which the instalment agreement was cancelled. The agreement was cancelled on 26 January 2015.

[10] Pursuant to the cancellation of the instalment agreement the bank instituted action for an order cancelling the agreement and for the return of the baler. On 9 March 2015 the summons was served on the applicant's chosen *domicilium citandi et executandi* by affixing a copy to the principal door. Judgment was granted against the applicant on 15 April 2015 by the Registrar.

[11] On 20 April 2015 the applicant's attorneys served a Notice of Intention to Defend on the respondent's attorneys. However, on 22 April 2015 the applicant's attorneys were advised that default judgment had already been granted by the Registrar on 15 April 2015.

Explanation for the default

[12] It is not the applicant's case that the summons was served at an incorrect address. The deponent admits having received the summons. He states that he was absent from his place of residence and only received the summons on or about 22 March 2015 upon his return to his place of residence. In support of his absence Van Zyl attached a copy of the boat cruise's inventory ticket (13 – 20 March 2015). The applicant does not, however, explain why he did not receive the summons on 9 March 2015.

[13] Van Zyl explained that when he received the summons he then instructed his attorneys to defend the action. A Notice of Intention to Defend was thereafter served on the bank on 20 April 2015. Van Zyl admits that the summons states that he had 30 days to respond to the affidavit. He explains, however, that he was under the impression that the 30 days referred to only commenced from the day that he had found the summons on his doorstep.

[14] Despite some reservations regarding the explanation tendered for the default I am nonetheless persuaded that the applicant is not in wilful default. Although Van Zyl had mistakenly assumed the *dies* for the Notice of Intention to Defend, the fact that such a notice had in fact been served on 20 April 2015 (which is the date on which the assumed *dies* for the Notice of Intention to Defend would have expired) is consistent with his explanation for his default.

Defence disclosed in the founding affidavit

[15] In the founding affidavit the main point raised by the applicant is the fact that he (representing the applicant as the sole member) and a certain Mrs Buys

had concluded an oral agreement, an instalment sale agreement and an anticipated second financing agreement for the tractor. According to Van Zyl all three contracts formed one indivisible transaction and submitted that the entire transaction was dependent and conditional upon the entering into of the two credit agreements (one for the baler and one for the tractor).

[16] According to Van Zyl it was therefore an expressed, alternatively tacit term of the oral agreement that the bank would finance the applicant's acquisition of the baler and yet to be procured suitable tractor respectively. In pursuance of the first financing agreement and the oral agreement the bank then purchased the baler on the applicant's behalf and delivered same to the applicant during September 2013.

[17] Shortly thereafter and on 11 September 2013 the applicant located a suitable tractor and approached the bank in order to procure the requisite finance and to enter into a second written financing agreement in pursuance of the alleged oral agreement.

[18] Van Zyl then negotiated with a one Ms Shibaan as Buys was unavailable. It is common cause that the financing application was rejected. According to Van Zyl this was done contrary to the oral agreement that he had reached with Buys.

[19] The bank disputes that an oral agreement as alleged by Van Zyl had been concluded and maintains that at all times there had to be two separate agreements – one for the baler and one for the tractor and that each application would have been considered on its own merits. According to the bank it was therefore always the understanding that the applicant's application(s) for finance for the purchase of the baler and for the tractor were two separate applications and that each application would be considered on its own merits. In this regard the bank referred to clause 2.2.6 of the facility letter which states that each credit facility schedule shall be a separate and distinct agreement between the bank and the customer (the applicant).

[20] In respect of the alleged oral agreement, the bank relied on an affidavit filed on behalf of Buys in which she disputes that such an oral agreement had been concluded.

Further defence disclosed in the replying affidavit

[21] In the replying affidavit the applicant raised an entirely new and further defence which Van Zyl explains was only discovered after the answering affidavit was perused and after the documentation was discovered pursuant to the applicant's notice in terms of Rule 25(12). It was only then that he realised that he had a further and absolute defence to the action.

[22] In this regard the applicant referred to clause 1 of the Instalment Sale Agreement which contains a condition precedent for the granting of credit by the bank to the applicant. In terms of this condition precedent the granting of credit by the bank to an applicant is subject to the fulfilment of the following condition: The applicant must provide the bank with written consent of all the members which shall be in the form and substance acceptable to the bank, of each of the members of the closed corporation providing collateral in respect of the facility and confirming that - (i) immediately, subsequent to the transaction the assets of the applicant, fairly valued are equal to or will exceed its liabilities (solvency test); immediately, subsequently to the transaction the closed corporation will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months following the date on which the solvency test is considered (liquidity test); the terms under which the financial assistance is given are fairly and reasonable to the closed corporation; and all conditions or restrictions, if any, in respect of the granting of financial assistance set out in the founding statement and/or association agreement of the closed corporation have been satisfied.

[23] The applicant called upon the bank to provide it with a copy of the written consent of all the members of the applicant as envisaged by the Instalment Sale Agreement. In response the bank stated that such consent was not

applicable in the case of the applicant's application and therefore no such documents were in the possession of the respondent.

[24] The applicant, however, submitted that, because there was no compliance with the suspension condition, the bank was therefore not entitled to enforce the agreement by way of legal action or by any means whatsoever.

[25] More in particular, in the particulars of claim the cause of action is premised on the existence of a valid contract in terms of which valid obligations arose and with which the applicant had to comply. The applicant submits that it was incumbent on the respondents to have pleaded this condition precedent. In consequent, the particulars of claim do not, according to the applicant, sustain a cause of action and therefore renders the judgment itself to be set aside pursuant to Rule 42 as it was erroneously sought and granted.

[26] The applicant also alleges that it did not breach the terms of the instalment sale agreement by failing to pay the monthly instalments thereof because the suspension condition precedent contained in the agreement had not been fulfilled. Therefore the applicant could not have breached the agreement. Moreover, the applicant further alleges that it had cancelled the credit facility on 23 September 2013 (which is disputed by the bank).

[27] In its reply to the new defence raised in the replying affidavit, the bank points out that the condition precedent relied upon by the applicant only applies when applicable and further that the relevant clause specifically states that the condition precedent is for the benefit of the bank and that the bank may in writing on or before the date for fulfilment of the conditions extend the period for fulfilment or waive any of the said conditions precedent in its sole discretion.

[28] According to the bank the applicant is clearly attempting to create a *bona fide* defence in circumstances where this condition precedent is not applicable to the transaction between the applicant and the bank. In this

regard Buys explains in her affidavit that Van Zyl was at all times the only duly registered member of the applicant. She further confirms that the condition precedent is only applicable in circumstance where a close corporation is an applicant for finance and where there are more than one member.

[29] I do not for purposes of this judgment intend to deal with all the submissions advanced on behalf of the parties in detail. Suffice to point out that it is not necessary for an applicant in a rescission application to fully deal with the merits of his defence. The question to be considered at this stage is whether the facts deposed to by the applicant in his affidavit, if they were to be properly pleaded, can be said to disclose a defence to the respondent's (plaintiff's) action. See in this regard: *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd*:[1]

> "In *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 BRINK J summarised the effect of South African decisions. An applicant who claims relief under this Rule, should comply with, *inter alia*, the following requirements. His application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim and he must show that he has a *bona fide* defence to plaintiff's claim. 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. He need not deal fully with the merits of the case or produce evidence that the probabilities are actually in his favour. See also *Brown v Chapman* 1938 TPD 320 at 325."

[30] On the papers I am persuaded that the applicant has shown that he has a *bona fide* defence which *prima facie* carries some prospects of success not only in respect of the alleged oral agreement but also in respect of the

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[1] 1980 (4) SA 573 (W) at 575H – 576A.

defence raised in the replying affidavit. See in this regard: *Chetty v Law Society, Transvaal*[2]

> "In terms of the common law, the Court has power to rescind a judgment obtained on default of 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 long-standing 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* defence which, *prima facie*, carries 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. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had a reasonable prospect of success on the merits. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of his default."

[31] Accordingly the following order is made:

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[2] 1985 (2) SA 756 (A). Quoted from the headnote.

1. The default judgment granted against the applicant on 15 April 2015 under case number 6540/2015 is rescinded and set aside.

2. The applicant must file its plea within 15 days from the date of the rescission of the judgment.

3. The costs of this application are to stand over for later determination by the Trail Court.

AC BASSON
JUDGE OF THE HIGH COURT

Appearances:

For the applicant:	Adv P Lourens
Instructed by:	Tiaan Smuts Attorneys
For the respondents:	Adv G Steyn
Instructed by:	Lownes Dlamini Attorneys