IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG, PRETORIA

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

15/3/2016
DATE

SIGNATURE

CASE NO: 25147/2014

17/3/2016

In the matter between:

KORTEKAAS J J M Applicant

And

NEDBANK LIMITED Respondent

JUDGMENT

NEUKIRCHER AJ

1] This is a matter that has rather a sad and somewhat disturbing history. I do not intend to set out the entire history as, in my view, that is not necessary, but I will set out some of the salient facts in order to demonstrate why it is that I intend to make the costs order that will follow the result of this matter.

2] To start with, this application for recission of judgment was launched 11 days late. In the bigger scheme of things that is, quite frankly, *de minimus* and I grant condonation for the late filing of the application.

3] It appears from the papers that on 28 August 2014 judgment was granted by the Registrar against the applicant and two other parties who had all bound themselves as sureties and co-principle debtors for the debts of a company known as Memoire Trading 118 (Pty)Ltd ("the principal debtor").

4] The judgment should, unfortunately, never have been granted in the first place as it appears quite clearly from the papers that service had actually never taken place upon the chosen *domicilium citandi et executandi*. It took place at a completely foreign address and where the sheriff obtained this particular address to serve the papers is nowhere explained by the respondent or the respondent's ttorneys of record. Furthermore, why the respondent's attorneys actually sought judgment under these circumstances and why the registrar actually granted judgment leaves one with a very bad taste in the mouth and this too is not explained anywhere. But this is not the end of the matter.

5] It would appear that :

5.1 during April 2008 the applicant received a letter in terms of s129 of the National Credit Act 34 of 2005;

5.2 he then contacted the respondent's attorneys and explained to them that he had sold his shares in the principal debtor in 2006 to the 2 remaining shareholders and provided the attorney with their details – he heard nothing further and assumed that all was resolved;

5.3 during January 2010 he again received a letter in terms of s129 of the National Credit Act 34 of 2005 and he again contacted respondent's attorneys and explained to them that he had sold his shares in Memoire Trading 118 (Pty)Ltd (the principal debtor) in 2006 to the 2 remaining shareholders and provided the attorney with their details – he heard nothing further and again assumed that all was resolved;

5.4 on 29 January 2014 he then received an email from one Des du Toit of DRSM attorneys claiming an amount of R117 296-78 and the applicant again explained the situation to the attorney for the third time in 6 years. He then received an acknowledgement of receipt of this email and assumed that this was the end of the matter when suddenly a year later ie in January 2015 he was contacted again by the same firm of attorneys and the entire matter started all over again.

5.5 It was only after some correspondence had flowed between them, that the applicant was informed that judgment had already been taken against him.

5.6 What is very clear upon a clear reading of all the documents provided by the applicant is that, in the claim as against him personally, his debt had prescribed prior to summons being issued against him and judgment being obtained.

6] And, of course, the defence of prescription is exactly the defence upon which the applicant relies to found his *bona fide* defence.

7] Unfortunately, this matter has the proverbial twist in the tail as it appears from the answering affidavit the respondent in fact took judgment against the principal debtor on 29 August 2013.

8] What this in effect means is that the period of prescription of the principal debt is no longer 3 years but 30 years because of the judgment and that the defence of prescription is not available to the applicant in these circumstances.[1]

9] Thus although I am of the view that the application itself is brought *bona fide*, it unfortunately does not disclose a defence that would constitute a sustainable defence[2] for purposes of trial. In the circumstance the applicant can therefore not succeed.

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1 Eley v Lynn and Main Inc 2008 (2) SA 151 (SCA)
2 Silber v Ozen Wholesalers 1954 (2) SA 345

10] What is left then is the question of costs. I do not intend to mulct the applicant with a costs order given all the circumstances set out *supra* and especially in circumstances where the respondent's conduct has been less than savoury. The respondent in this matter obtained judgment on a return of service which was certainly not in order. In fact, judgment should never have been sought or granted in the first place.

11] Given those circumstances the following order is made:

The application is dismissed. No order as to costs is made.