IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

20/5/2016
CASE NUMBER 6058/13

In the matter between:

GARRY GORDON McNAUGHTON	1ST APPLICANT
GORDON CLIVE McNAUGHTON	2ND APPLICANT
GARRY GORDON McNAUGHTON	3RD APPLICANT
ELOIZE McNAUGHTON N.O.	4TH APPLICANT

DELETE WHICHEVER IS NOT APPLICABLE

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

....

DATE SIGNATURE

and

ABSA BANK LIMITED RESPONDENT

JUDGMENT

THULARE AJ

[1] The applicants seeks an order condoning their late filing of the application, and a rescission of the judgment granted against them on 3 May 2013; that they be allowed to file a plea and that the respondent, in the case of opposition like the present, be ordered to pay the costs of the application on a scale as between attorney and client on an opposed scale.

[2] The applicants are joint trustees of Dyno Diesel Trust (the Trust), and the first and second applicant applies in that capacity as well as in their personal capacity. The Trust is the only shareholder of Global Automotive and Engineering Specialists (Pty) Ltd which traded as Gage Specialists (the company).

[3] The Trust was the owner of two immovable properties, remaining extent of erf […] Phalaborwa Extension 6 and erf […] Phalaborwa Extension 5. The third applicant was the owner of portion 4 erf […] Phalaborwa Extension 5. The company conducted its business from the properties. The company held a Momentum Investment Policy which attracted a cancellation value in the region of R5 702 700-00 to R6 737 900-00 at the end of 2012.

[4] The respondent was a trade creditor of the company, which held amongst others credit facilities, to wit

(a) two term loans under account numbers 302… and 303… and

(b) an overdraft facility under account number 405….

[5] The company concluded a sale of business agreement Canton Trading 291 (Pty) Ltd (Canton) in terms of which the company sold its engineering business as a going concern to Canton for R45 million. The sale was made subject to the conclusion of parallel agreements in terms of which the Trust and the second applicant were to sell the properties to Epivert Investments (Pty) Ltd (Epivert). On the same day, the Trust and

Epivert concluded a deed of sale in terms of which Epivert purchased the two immovable properties owned by the Trust for R9 million. And again on the same day, the second applicant and Epivert concluded an agreement in terms of which Epivert purchased the third property earlier referred to, for R6 million.

[6] The properties were encumbered with mortgage bonds registered in favour of the respondent as security for moneys loaned and advanced by the respondent to the company. Conrad Kruger Attorneys were appointed the conveyancers. The respondent appointed Cliffe Dekker Hofmeyer as their bond cancellation attorneys.

[7] In terms of the deeds of sale the R9 million was payable as follows; a deposit of R500 000-00 was to be paid to the conveyancers on or before the date of transfer and an acceptable bank guarantee for the balance of R8,5 million was to be delivered to the conveyancers within 30 days from the date of signature, securing payment thereof on date of transfer. The R6 million was payable to the conveyancers on date of transfer, for which amount Epivert would deliver an acceptable bank guarantee within 30 days from date of signature.

[8] The company held a Momentum Investment Policy which attracted a cancellation value in the region of R5 702 700-00 to R6 737 900-00 at the end of 2012. The company ceded the policy to the respondent as security for moneys loaned and advanced by the respondent to the company. Notarial bonds were registered over the movable assets of the company in favour of the respondent for money loaned and advanced by the respondent to the company.

[9] Various disputes arose between the parties pursuant the sale of business agreement, and the deeds of sale of the properties, which disputes were referred for arbitration and culminated into a written settlement agreement, which award was also made an order of court.

[10] The respondent was not party to the disputes or the settlement agreement which was made an order of court. The nature, scope and content of the involvement of the respondent contemporaneous with and pursuant the settlement is in dispute.

[11] The respondent issued summons against the company and the applicants on 31 January 2013, wherein the respondent sought payment from them for the sums of R10 704 131-12, R5 456 521-41 and R3 278 101-93 plus interest and costs. These were the amounts the respondent claimed were the indebtedness of the company in respect of the overdraft facility as well as the two term loan agreements. The summons were served on 11 February 2013 and default judgment was granted on 3 May 2013.

[12] The respondent issued an application for the winding up of the company. The cause of action was the same as that which informed the summons, and that is, the indebtedness in terms of the overdraft facility and the two term loans. A provisional order was granted and later a final order.

[13] The respondent concedes that they received an amount of R3 200 000-00 in respect of the Momentum policy on or about 24 August 2012. The respondent also concedes that two advance dividends of R3 500-000-00 plus R1 500 000-00 were received from the liquidators of the company on or about 11 October 2013. The respondent also concedes that they received R10 500 000-00 from the proceeds of the sale of the immovable property on or about 24 August 2012. The respondent acknowledges that at the time they applied for default judgment, they had already received an amount of R13 700 000-00. This amount was received some 5 months before they issued summons. Subsequent to the judgment being granted, around 5 months later in October, they received another R5 million from the liquidators as earlier mentioned.

[14] In their opposition to the application, the respondent contends that the amount received is less than the aggregate amount for which summons was issued, which was R19 438 754-46 and that is why the applicants remain indebted to the respondent and that further interest has accrued to the outstanding amount. To that end, the respondent argues that the applicants have no bona fide defence against the claim. The respondent's view is that the applicants remain liable to the respondent, limited to the amount claimed, less payments received, and thereon interest added.

[15] The applicant's case is further that Canton was wound up on 27 November 2012 and that the movable assets of the company which were transferred to Canton were realized in an auction from which the Auctioneers raised proceeds in the amount of R13 407 882-00. Plaintiff's case is that the bulk of the proceeds would and should have been paid to the respondent pursuant to the notarial bonds registered in favour of the respondent over the movables concerned. The plaintiff avers that the respondent should clearly and concisely state what amounts it claimed and received from the winding up of Canton. The respondent chose not to set out any facts hereon, opting for a bare denial in the face of such serious allegations.

[16] The respondent sought and was granted judgment in the sum of R19 438 754-46 together with interest and costs. The respondent issued summons for an amount of R13 700 000-00 more than it was entitled to do, and knowingly thereafter applied for default judgment for an incorrect amount, at the time that to its knowledge its claim only amounted to R5 738 754-46 at best.

[17] The respondent concedes that the applicant's indebtedness was further reduced when it received payments received from the proceeds of the winding up of the company. The applicants dispute that the respondent were correct in paying back an amount of R818 987-88 to the liquidators of the company. The respondent is silent on what amount, if any, they received from the proceeds of the winding up of Canton, which, in my view,

has the reasonable prospect to further reduce the indebtedness of the applicants, if not result in a surplus due to them.

[18] The applicants are also disputing the computation of the outstanding amounts. It is applicant's case that the respondent debited legal fees to the overdraft facility, which the applicants say it was not entitled to do and for which no taxed bill exists. The aggregate sum debited to the overdraft account is given as an example.

[19] It is against this background, of the conduct of the respondent, that the conduct of the applicants should be approached when they got to know about the judgment against them in November 2014 when the sheriff attempted to attach certain of the applicants' assets.

[20] The applicants became aware of the judgment against them around November 2014, and only filed the application for rescission of the judgment against them in July 2015. In my view, in a condonation application, the applicants must furnish an explanation for the delay in sufficient detail to enable the court to understand their mental attitude towards the consequences of their delay, and for the court to be able to assess their conduct. The court must consider whether, with the full knowledge of the consequences, the applicants deliberately chose not to approach the court for rescission. Simply put, once aware, were they indifferent to the judgment against them and its consequences?

[21] The applicants decided to engage with the Bank Ombudsman from January 2015 to 15 April 2015. The Ombudsman advised the applicants in writing that the respondent would contact them with a view to settle the matter. Between April and May 2015 the applicants were engaging with the respondents with a view to settle the matter. It must be mentioned that the respondent had sued the applicants for monies which at the time applicants believed were unaccounted for, in respect of the sale of immovable property,

when in fact the respondent had received such monies. Towards the end of May 2015, the applicant issued summons against the respondent and thereafter also launched this application. I am unable to conclude that the applicants were indifferent to the judgment and its consequences to them.

[22] Their action manifested an intention to have the dispute resolved. In my view, they cannot be faltered for having considered other available dispute resolution mechanisms, which are also effective and efficient, and perhaps cost effective as compared to civil litigation in a High Court, until such remedies are exhausted. In my view, a proper case has been made out for condonation to be granted.

[23] The legal position is set out in Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 9 paragraph 11 by Jones AJA as follows:

> *"[11] I turn now to the relief under common law. In order to succeed an applicant for rescission of a judgment taken against him by default must show good cause (de Wet and others v Western Bank Ltd (supra). The authorities emphasise that it is unwise to give a precise meaning to the term 'good cause'. As Smalberger J put it in HDS Construction (Pty) Ltd v Wait:*
>
> > *'When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (Cairns' Executors v Gaarn 1912 AD 181 at 186; Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352-3). The Court's discretion must be exercised after a proper consideration of all relevant circumstances.'*
>
> *With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by 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 (Grant v Plumbers (Pty) Ltd, HDS Construction (Pty) Ltd v Wait supra, Chetty v Law Society, Transvaal)."*

[24] The summons was served at the erstwhile business premises of the company. The premises were found unoccupied save for the guards from a security firm, who were, on the face of it, preventing vandalism to the deserted property. The other address where service was effected was also unoccupied. These facts support, and do not gainsay, the version of the applicants that they were not made aware of the action against them, before judgment was granted. I am satisfied that the applicants have presented a reasonable and acceptable explanation for their default.

[25] The applicants have an absolute defence to the amount of R13.7 million of the respondent's claim. The amount had been paid by the applicants at the time that the judgment was sought and was granted. The judgment in respect of that amount stands to be rescinded. (*Frenkel, Wise & Co. (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd* 1947 (4) SA 234 (C). This amount, for which judgment was erroneously sought, is the larger part of the capital amount claimed.

[26] When default judgment is sought, the court considers the facts set out in the particulars of claim, and considers only those facts and accepts them as correct and as necessary for the determination of the issues in favour of the applicant. The facts set out in the particulars of claim, for purposes of judgment by default, are accepted for their evidential content as well as their probative value. The court determines the issues and averments in support of a party's case, only from the papers submitted to court. An applicant for judgment by default has a duty to the court to ensure that all necessary and relevant facts are before it. In its particulars, the party defines the issues between the parties, for the benefit of the other party as well as the court.

[27] Where part of the amount claimed has been paid, fairness and consistency require that the whole truth be disclosed to the court. In my view, a party cannot be allowed to secure an advantage to which, but for its non-disclosure, it would not have been entitled to. In this instance, the respondent cannot be allowed to secure the benefit of a

judgment to which it was not in law entitled to at the time that judgment by default was sought. White J in *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk GD) at 510F-G expressed himself as follows:

> *"It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment."*

[28] In this matter, when the respondent applied for judgment by default, it is plain that not all the facts were before the court, which facts ought to have been before the court, to enable the court to determine whether the applicant was entitled to the relief it sought, with specific reference to the amount it claimed. These facts were known to the respondent at the time that the judgment was applied for. It is important that a court not only be placed in a position, but that it must be placed in an informed position in order to return a just decision, in exercising its discretion whether or not to grant a judgment by default.

[29] On the facts available to it, in truth, it was impossible for the court to give a just pronouncement informed by the true facts as, in my view, the applicants have shown that the respondents breached their duty to be frank, candid and truthful with the court when judgment by default was applied for. The material facts and circumstances were available to the respondent, but the respondent failed to disclose them to the court. In my view, I am in no position to exercise my discretion in favour of dismissing the application for default in part, as the respondent prays that I do. I find myself unable to allow a judgment to stand, for an amount which, on the facts before me, may materially be conjecture, if not estimates, and more still, based on factors and recalculations after the fact, and not on the true position as it prevailed as at the date default judgment was granted.

[30] The bare denial of the respondent on the Canton liquidation money as alleged by the applicants is not helpful. In actual fact, I do not know how the respondent expects this court to interpret that bare denial to ascertain what they mean. It is not only possible, but most probable, that the respondent received some satisfaction from the proceeds of the sale of movable property of the company. The multi-faceted and inter-sectoral manner in which the respondent meticulously sought to recover from any of its known possible debtors, under the circumstances, makes it highly improbable that they would have left out recovery from the proceeds of the company's movable assets.

[31] Moreover, there are further facts set out, relating to whether the mortgage bonds should have been cancelled or not. There is also the question whether Momentum paid out more than what the respondent credited the applicants, and whether the payment of R818 987-88 to the liquidators should be explained. Furthermore, the applicants have filed a claim for damages for amounts in excess of the balance that the respondent alleges they owe. These are disputes which can only be ventilated through evidential material.

[32] The applicants are, through this application, approaching the court to exercise its discretion primarily to do justice between the parties with the object of restoring a chance to air the real dispute between the parties. In my view, the applicants have set out facts with sufficient particularity which, if proved at trial, may stand as a valid answer to the claim against them. The applicants have illustrated that they have a *bona fide* defence to the respondent's claim.

For these reasons, I make the following order:

1. The Court condones the applicants' non-compliance with the Uniform Rules of Court with regards to the time periods pertaining to the prosecution of this

application and the Court authorizes the prosecution of this application for rescission of judgment.

2. The default judgment granted against the applicants on 3 May 2013 is hereby rescinded.
3. The Applicants are ordered to file their plea in respect of the action instituted by the respondent in this matter within 15 days of the grant of this order.
4. The respondents to pay the costs of this application, including the costs of two counsel.

DM THULARE
ACTING JUDGE OF THE HIGH COURT