




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

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
DATE <u>21-10-2019</u>	SIGNATURE 

Case no.: 89327/2016

In the matter between:-

PIETER SCHALK NEL

Applicant

And

GROFIN AFRICA FUND (SA) (PTY) LTD

Respondent

JUDGMENT

NKOSI (N) AJ

[1] This is an application for rescission of judgement brought in terms of common law. The applicant seeks an order rescinding and setting aside the default judgment granted against him on the 21 February 2017 for payment of R5 283 502,00, interest

thereon at the rate of 11% per annum calculated from the 29 February 2016 and VAT. The application is opposed.

[2] In terms of the common law, in order to succeed in an application to rescind a judgement, the applicant must show sufficient cause¹ which means that:

- a) there must be a reasonable explanation for the default; and
- b) the applicant must show he has a *bona fide* defence which prima facie has some prospect of success².

[3] The combined summons was served by the Sheriff on the 21st of November 2016 by affixing same to the principal gate at the applicant's chosen *domicillium citandi et executandi*. I accept that it is most probable that the applicant was not aware of the action because there was no personal service. I also accept that he may not have been aware of the default judgment entered against him on the 21st of February 2017 because of being unaware of the court action.

[4] The writ of execution was served by the Sheriff on the 12th of June 2017 personally on the applicant. However, the Sheriff's service was a *Nulla Bona*. This fact is common cause. Therefore, I can safely conclude that the applicant became aware of the judgement against him on the 12th of June 2017.

[5] On the 29th of October 2018, the respondent issued an application for provisional sequestration of the applicant's estate. The applicant opposed the application and delivered his opposing affidavit on the 26th of February 2019. As of that date, the applicant had not filed for rescission of judgement. His application for rescission of judgement was only served on the 9th of May 2019 and filed on the 26th of August 2019. It has taken the applicant approximately two years to bring his application for rescission of judgement.

¹ De Wet and others v Western Bank Ltd 1979(2) SA 1031(A) at 1042F-1043C. Also see Colyn v Tiger industries Ltd t/a Meadow Feed Mills Cape 2003(6) SA 1(SCA) at para 11.

² Grant v Plumbers (Pty) Ltd 1949(2) SA 470 (O) 476 also HDS Construction (Pty) Ltd v Wait 1979(2) SA 298(E).

[6] The applicant bears the onus to give a reasonable explanation for his delay in bringing this application. He explains his delay in the following manner:

- a) On 5 February 2014, he underwent a prostate biopsy which caused profuse bleeding which over a period of time disrupted his work schedule;
- b) On 21 February 2014, he was diagnosed with prostate cancer and was advised to undergo a radical, robotic prostatectomy on an urgent basis;
- c) Pursuant to the aforementioned diagnosis, he experienced anxiety and general distress to such an extent, that his work was negatively affected. Antidepressants were prescribed to him by a medical practitioner;
- d) He was admitted at the Pretoria Urology Hospital on the 15th of March 2014 and a prostatectomy procedure was performed, and a lengthy postoperative period of treatment followed;
- e) In or about April 2014 he began to experience persistent chest tightness and underwent an electrocardiogram and angiogram on the 28th of April 2014;
- f) A blocked coronary artery was discovered and was immediately admitted to undergo an angioplasty which was performed on the 29th of April 2014 when a stent was inserted in the blocked artery. This was followed by intensive monitoring;
- g) Sometime in August or September 2016 he suffered several attacks of heart fibrillation and in February 2016 an ablation of the heart was performed;
- h) In February 2019 he underwent a knee replacement procedure; and
- i) Since 2014 he has been on chronic blood pressure medication as well as medication for depression and anxiety.

[7] He concludes by stating that:

"The medical problems, as summarised above was the reason why I did not enter an appearance to defend the summons that was issued against me. At the time, I was literally fighting for my life³".

[8] The applicant's explanation of his health condition remains without a vital and necessary corroboration by the medical practitioners who treated him for his various illnesses. The exact prognosis and the sequelae of his condition remains unexplained. It is therefore very difficult to conclude with certainty that his medical conditions as explained by him caused him not to enter an appearance to defend the action and not to file his application for rescission of judgement earlier than he did.

[9] The writ of execution was served on him personally by the Sheriff on the 12th of June 2017. The service was effected at his place of residence and not in hospital. There is no explanation why he failed to take the necessary steps at that time to challenge the default judgement. He only filed his application after receiving the sequestration application. I can only conclude that his rescission application is not bona fide but only meant to frustrate the sequestration application.

[10] The defences pursued by the applicant relate to the repudiation of the credit agreement and the calculation of the judgement amount.

[11] He contended that the respondent was obliged, in terms of the facility agreement, to make available a skilled and qualified individual to assist in the applicant's business by providing business support. As a consideration for such support, the applicant was bound by the facility agreement to pay a monthly fee of R7500.00 which he did over a period of approximately 42 months. He alleges that the respondent failed, at some point in time, to provide such skilled and qualified person notwithstanding the fact that he continued with the monthly fee payments. This allegation is strongly denied by the respondent who contends that there was always business support in a form of a qualified and skilled persons seconded to the applicants' business. If indeed it is true that the applicant's health was disruptive to his work schedule, a responsible person at his work place and during his absence should have deposed to a confirmatory affidavit giving an explanation specifically on this issue. As matters stand, it's the applicant's word against that of the respondent.

³ Paragraph 14, Applicant's Founding Affidavit pp11 of the bundle.

[12] If the respondent was, according to the applicant, in breach of the facility agreement, surely, this fact should have been communicated to the respondent but this is not the case because there is no proof of such communication. The onus is on the applicant to prove his allegation. I am not persuaded that he has succeeded to do so.

[13] The error in calculation of the judgement amount stems from the applicant's submission that, as a result of the respondent's failure to provide business support, a monthly fee of R7500.00 was not supposed to have been charged. This defence depends on whether the applicant succeeds to prove that the respondent failed to provide business support. I have already made a finding on this issue. This defence ought to fail because the applicant failed to discharge the onus.

[14] The applicant failed to take the Court into his confidence in this application, by withholding a crucial and determining averment mentioned in his answering affidavit in the sequestration application namely:

"4.7. I have not filed a Notice to Defend the matter as at time I have been financially depleted having lost all my life's efforts to building a business. I am 68 years old and at the time despite my financial challenges I have at the time also had to overcome some severe health issues like prostate cancer and getting a stent for my heart condition, which all caused a major depressed state of mind⁴".

[15] The above averment indicates that the applicant did receive the summons and was aware of the action against him. There is no mention of his efforts to obtain legal representation. I must add that all the medical conditions referred to by the applicant, with the exception of a knee replacement occurred, if indeed so, long before judgement was entered against him.

⁴ Page 42 Bundle A, sequestration application dated 26 August 2019.

[16] In *Pro-media Drukkers & Uitgewers (Edens) BPK v Kaimowitz and others*⁵ the Court stated:

"..... In terms of the common law, a court has a discretion to grant rescission of judgment where sufficient or good cause has been shown. But it is clear that in principle and in the long-standing practice of our Courts two essential elements of 'sufficient cause' for rescission of a judgement by default are:

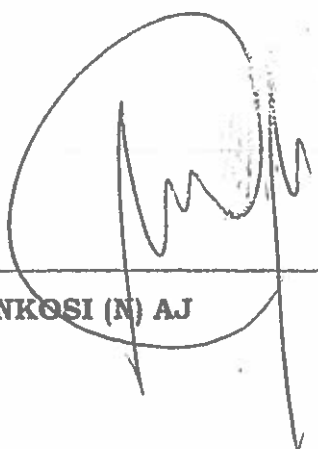
- i. That the party seeking relief must present a reasonable and acceptable explanation for his default; and*
- ii. That on the merits such party has a bona fide defence which prima facie carries some prospects of success".*

Both these elements must be present.⁶

[17] I find that none of the above two elements exist in this application. The applicant has failed to show sufficient or good cause for his default and consequently failed to make out a case for the relief sought. I therefore make the following order:

Order

1. The application for rescission of judgment is dismissed with costs



NKOSI (N) AJ

⁵ 1996(4)SA 411 at 417 O to 418 B also see *Vilvanathan and Another v Louw* No 2010(5)SA 17 Musasike v Standard bank of SA Limited 2018 JDR 1015 (GJ) para 5.

⁶ See *Grant v Plumbers(Pty)LTD* footnote 2(supra).

Date of Hearing : 15 October 2019

Date of Judgement : 21 October 2019

For the Applicant : Adv HN De Wet

Briefed by : Cilliers and Reynders Inc

For the Respondent : Adv MF Ackermann

Briefed by : DBM Attorneys, Centurion