IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 2241/2010

In the matter between:

ANDREW EDWARD TENANT WHITEHEAD **Applicant**

and

ABSA BANK LIMITED **Respondent**

JUDGMENT : 13 APRIL 2011

GAMBLE, J:

INTRODUCTION

[1] On 30 March 2010 the Respondent ("the bank") applied for, and was granted, a default judgment against the Applicant by the Registrar of this Court in terms of Rule 31(5)(b)(i) in the sum of R59 793,53 together with interest and costs. The Applicant's liability for this amount was based on a suretyship which he had signed in favour of the bank. A writ of attachment in respect of movables having been simultaneously issued by the Registrar, the Sheriff attempted to serve same on the Applicant on 20 July 2010 but was unable to do so because he was refused access to the Applicant's premises.

[2] After an exchange of correspondence between the parties' attorneys (to which I shall return more fully hereunder) the Applicant paid to the bank the sum of R50 000,00 in full and final settlement of the bank's claim against him.

[3] On 25 August 2010 the Applicant launched the present application for rescission of the judgment granted by the Registrar on 30 March 2010 alleging that his first knowledge of the judgment granted against him was a visit by the Sheriff at his house on 21 July 2010 "*with a Warrant of Execution*". The application is brought in terms of Rule 42 (1)(a), not under the common law nor in terms of Rules 31(2)(b) or 31(5)(d). The bank now opposes that application.

THE BASIS UPON WHICH THE APPLICATION FOR RESCISSION WAS BROUGHT

[4] In a fairly concise founding affidavit the Applicant states that he never received the summons issued by the bank which was served at a *domicilium* address which he had vacated during 2004. He says, further, (as pointed out above), that he only became aware of the default judgment when the Sheriff arrived at his house on 21 July 2010 with a Warrant of Execution.

[5] The Applicant goes on to say that he has a *bona fide* defence against the claim brought against him by the bank, (about which a little more later) and, to the extent that it may be necessary, asks for condonation for his delay in bringing the application.

[6] Perusal of the founding affidavit in this application will show that there is no allegation therein which brings the matter within the purview of Rule 42(1)(a) which reads as follows:

> "***42. Variation and rescission of orders***
>
> *(1) The Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
>
> *'(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby ...'"*

[7] It is trite that in motion proceedings a party's affidavit must contain all allegations of fact and law upon which it wishes to rely and that it is not permitted to beef up its case in reply. But that is just what the Applicant went about doing.

THE BANK'S OPPOSITION

[8] In the opposing affidavit deposed to by the attorney acting for the bank, it is pointed out that the Applicant's allegations regarding an absence of knowledge of the service of the summons are disingenuous and reference is made to certain without prejudice correspondence exchanged between the parties' attorneys during March 2010. From that correspondence it is clear that the Applicant's current attorneys were then acting on behalf of both the Applicant and other parties to the original proceedings and that they had received instructions from, *inter alia*, the Applicant to explore overall settlement of the matter. Nothing came of those negotiations.

[9] The bank's attorney went on to point out in his affidavit that immediately after the attempted service of the writ referred to above he was contacted by the Applicant's attorneys yet again with a request regarding the prospective terms of settlement of the matter. The bank acceded to that request and on 23 July 2010 its attorneys wrote to the Applicant's attorneys in the following terms:

> *"Ek verwys na ons telefoon gesprek vroeër en bevestig dat ons opdragte vanaf ABSA Bank ontvang het dat hulle bereid sal wees om die bedrag van R50 000,00 te aanvaar in volle en finale vereffening. Gemelde bedrag moet egter betaal word teen laastens sluiting van besigheid op Maandag, 26 Julie 2010."*

[10] That amount was duly paid by the Applicant and on 28 July 2010 his attorneys wrote to the bank's attorneys as follows:

> *"We refer to the above matter and thank you for your co-operation herein thus far.*
>
> *We request that you revert to us as soon as possible whether your client would be prepared to consent to a rescission of judgment on a (sic) basis on (sic) the debt had (sic) been paid in full.*
>
> *We await your urgent response to enable us to prepare the necessary documentation for signature by your client."*

THE CASE IN REPLY

[11] In the replying affidavit the Applicant's version is somewhat different to that made out in the founding papers. A futile attempt is made to explain away the obvious knowledge which his attorneys had on 18 March 2010 of the existence of

the summons, but the crux of his case appears from paragraph 2.3 thereof which I shall cite in full:

> *"I wish to bring to the Court's attention that I have a successful electrical business that specialised (sic) in the electrical installations for large developments and that I would not be able to provide these services if I have a default judgment against my name which would then prevent me from obtaining the necessary credit from suppliers. My profits on these (sic) type of installations are considerably more per development than what the Respondent had claimed from me.*
>
> *In these circumstances, I honestly need to bring to this Honourable Court's attention that it is better to protect my credit record than to be blacklisted due to a judgment against me."*

[12] In an attempt to explain away the claim by the bank that the matter had been settled by payment of the sum of R50 000,00 the Applicant says the following in reply:

> *"I fail to understand why the Respondent fails to grasp that the payment of the amount, was the lesser of two very undesirable options for myself and that I had (sic) chosen to pay for reasons as set out earlier and not because I believe that I had no defence. I respectfully submit that I do have a bona fide defence. The fact that I did make payment, is not an acknowledgment that I do not have a defence."*

[13] Counsel for the Applicant argued that, whatever the provisions of Rule 42 may be, his client was nevertheless entitled to approach the Court for relief under the common law. Strictly speaking the replying affidavit should have been struck out but since there was no application in that regard, I shall proceed to consider whether there is any merit in the Applicant's case as amplified.

THE CURRENT APPROACH TO RESCISSION APPLICATIONS IN THIS DIVISION

[14] The matter falls into that category of cases considered by the Full Bench of this Division in Vilvanathan and Another v Louw N.O. [1] where Thring J firstly restated the approach to be adopted at common law in applications for rescission of judgment.

14.1 An applicant must satisfy the Court that there is some reasonably satisfactory explanation as to why the judgment was permitted to be taken by default; and

14.2 An applicant must set up a *bona fide* defence on the merits of the action and must show, *prima facie*, that there is some prospect of success.

[15] The Court then went on to discuss the practice which had developed in this Division following upon the decision in RFS Catering Supplies [2] ,the thrust of which was that where the judgment creditor had consented to the application for rescission this fact could be considered as constituting "*good cause*" by the Court in exercising its decision to rescind.

[16] The Full Bench found that the approach in RFS Catering Supplies was wrong[3] and overruled it. After pointing out that Sections 43 and 70 of the National Credit Act now make provision for the automatic expunging of default judgments after the passage of a fixed period of time, Thring J went on to say the following: [4]

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[1] 2010(5) SA 16 (WCC) at 24C
[2] RFS Catering Supplies v Bernard Bigara Enterprises CC 2002 (1) SA 896 (C)
[3] P27A-31G
[4] P31E-F

So that, whatever equitable need may in the past have been felt to exist for departing from the long-established principles of law to which I have referred, has now been more or less effectively dealt with by the legislature. I hasten to add that the mere expungement of certain information about debtors from the statutory records maintained by debt bureaux is, of course, something entirely different from and far less radical than the expungement from court records of judgments and orders which have been lawfully, competently, regularly and properly handed down by the courts."

[17] In coming to the conclusion that the RFS Catering Supplies case was wrong, the learned judge considered seven different criteria. It is not necessary to traverse all of these in the present case since the decision of the Full Bench is, of course, binding on me. However the following remarks are of relevance *in casu*:

17.1 *"The judgment in ...[the RFS Catering Supplies] case had been regularly, properly and competently granted, as it has in the present matter. The fact that the judgment was taken, was due entirely and exclusively to the fault of the Applicant, who neither paid his debt when it fell due, nor settled with his creditor, nor entered appearance to defend the action when he was sued for the debt."*[5]

In the present case the Applicant was legally represented shortly after issue of the summons and has only himself to blame for the fact that judgment was taken against him.

17.2 *"...(I)t seems to me that what the Applicants seek in this application is this court's participation in what would, I think, be tantamount to the publication of a fiction, that is to say, the creation of an impression, which would be false,*

[5] p28C-D

that the judgment here concerned had not been lawfully, regularly and competently granted in the first place."[6]

17.3 *...(T)here are, or may be, far reaching consequences and ramifications to the rescission of judgments such as these. Such rescissions could presumably operate ex tunc: the position after rescission would be as if the judgment concerned had never been granted. The normal consequence of this would be that the judgment debtor would be entitled to restitution in integrum. Does this mean that he would be entitled to recover what he had paid to the judgment creditor in satisfaction of the judgment?"*[7]

In the present case counsel for the Applicant suggested that in fact it would be required of the bank to repay the amount upon which the parties had settled.

17.4 *...(I)t is highly significant, I think, that there is and has never been any dispute between the parties to this matter: there certainly is and has never been anything between them which remotely resembles a triable issue"*[8]

[18] In relation to the latter mentioned aspect I would point out that in the founding papers the Applicant alleged that the principle debt due to the bank was the liability of a close corporation of which he was formerly a member. He went on to say that he had disposed of his interest in the corporation some years before and had requested the bank to release him from his liability as surety and close the account.

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[6] p29E
[7] p30E
[8] p30B

[19] In my view that stance does not afford the Applicant any defence to the claim on the suretyship. In the first place there is no allegation by the Applicant as to what the terms of the suretyship are regarding discharge of the surety and/or whether these terms have been met. Further, it is trite that the surety will ordinarily only be discharged if the principal debtor's liability has been extinguished. There is similarly no allegation by the Applicant in this regard. In my view then the allegation by the surety that he requested discharge from his liability does not set up a *bona fide* defence to the bank's claim.

[20] But there is a far more compelling reason to dismiss the Applicant's allegations of a *bona fide* defence. The passages that I have referred to above show that the bank's judgment was settled on 23 July 2010 when the sum of R50 000,00 was paid to it by the Applicant in full and final settlement of all amounts due by him to the bank. This payment was made unconditionally by the Applicant, without reservation of any of his rights, and accepted as such by the bank. That settlement accordingly extinguishes any liability by the Applicant to the bank under the suretyship and there is accordingly no longer any triable issue between the parties..

[21] In the Vilvanathan case [9] Thring J referred with approval to the following *dictum* of Flemming DJP in Saphula v Nedcor Bank Ltd [10]:

> *"I can therefore see nothing in the needs of these credit bureaus or their masters (or the debtor who was indebted at the time), for the court process to be abused by granting leave to defend a matter in which the cause of action*

[9] At p30 B-D
[10] 1999 (2) SA 76 (W) at 79 B-D

is dead. The object of rescinding judgment is to restore a chance to air a real dispute. On a more technical level, a requirement for the granting of rescission remains lacking in such cases. It has always been the hallmark of what lawyers call a bona fide defence (which has to be established before rescission is granted), that (sic) defendant honestly intends to pursue before a Court a set of facts which, if true, will constitute a defence. That requirement is lacking in this case despite the problems which applicant has with inert commercial instances."

[22] It follows therefore that the application for the rescission of the judgment granted by the Registrar in this matter must fail.

COSTS

[23] The amount of the claim in this matter is well within the jurisdiction of the magistrates court, so much so that it could almost be regarded as paltry in High Court terms. Rule 31(5)(e) places a limitation on the costs award which the Registrar may make when granting default judgment. That award is even lower in cases which fall within the jurisdiction of the magistrates court.

[24] In my view, a summons such as the one *in casu* (in which there is also a claim for High Court costs on the attorney and client scale) should not have been issued in the High Court in the first place. The costs award which follows will therefore be made on the appropriate scale.

ORDER

[25] The application for rescission of the default judgment granted in this case by the Registrar on 30 March 2010 is dismissed with costs, such costs to be taxed on the magistrates court scale. For purposes of taxation it is recorded that the engagement of junior counsel in this matter was warranted.

P.A.L. GAMBLE