Republic of South Africa

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

Case no's: 18828/2012
and 5868/2009

In the matter between:

GREGORY STEWART MULLER Applicant

v

CANCUN INVESTMENTS 25 (PTY) LTD Respondent

Court: Acting Judge J I Cloete

Heard: 21 November 2012

Delivered: 14 December 2012

JUDGMENT

CLOETE AJ:

Introduction

[1] This is an application for the rescission of a default judgment granted by this Court on 4 November 2011 against the applicant, one of seven defendants, who stood surety for the obligations of the principal debtor, Erf 8354 Constantia CC (*'the close corporation'*) to the respondent.

[2] Default judgment was granted in favour of the respondent for: (a) payment of the sum of R3 million; (b) interest thereon at the prime interest rate charged by Nedbank Limited from time to time, calculated from 1 February 2009 to date of final payment; and (c) costs.

[3] This application was launched after the respondent had instituted proceedings during April 2012 for the sequestration of the applicant's estate. The sequestration application is still pending and is dependent upon the outcome of this application since the ground of insolvency relied upon is the judgment debt followed by the sheriff rendering a *nulla bona* return of service in respect of the applicant's property.

[4] The application is brought in terms of rule 31(2)(b) of the uniform rules of court. However the applicant also contends that since the Court granting default judgment was not informed by the respondent of a payment made to it and that the respondent had perfected shares pledged in terms of a pledge agreement, both events having taken place after service of the summons, the application also falls to be determined in terms

of rule 42(1)(a) and (2).

[5] The respondent contends that while rule 31(2)(b) is applicable, rule 42 is not, since applications in terms of the latter rule are limited to procedural irregularities only. I will accordingly consider the application in accordance with rule 31(2)(b) and will only deal with the parties' respective contentions concerning the applicability of rule 42 if I am satisfied that the applicant is not entitled to the relief sought in terms of rule 31(2)(b).

Relevant legal principles

[6] In order for a judgment to be rescinded in terms of rule 31(2)(b), the applicant must:

6.1 Launch the application within 20 days of obtaining knowledge of the judgment; and

6.2 Show *'good cause'* as to why the judgment should be set aside.

[7] Where an application for rescission of a judgment is brought outside of the 20 day period the applicant must persuade the Court to grant condonation for the late filing of the application in terms of rule 27 and is similarly required to show good cause why the period within which he was obliged to bring the application should be extended.

[8] For an applicant to show that *'good cause'* exists for the judgment itself to be set aside he must:

8.1 Give a reasonable explanation for his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance;

8.2 Show that his application is *bona fide* and not made with the intention of merely delaying the respondent's claim; and

8.3 Show that he has a *bona fide* defence to the respondent'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 disentitle the respondent to the relief claimed. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. Put differently, the applicant must show that he has a *bona fide* defence which, *prima facie*, carries some prospect of success.

Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476 – 477.

Chetty v Law Society, Transvaal [1985] 2 All SA 76 (A) at p79.

[9] It is common cause that the applicant became aware of the default judgment on 13 January 2012 but that he only made application for rescission on 28 September 2012, some eight and a half months later. Accordingly the applicant is required not only to show good cause for condonation for the late filing of his application, but also good cause as to why the judgment should be set aside (i.e. the applicant must give a reasonable explanation for his default and show that he has a *bona fide* defence to the

respondent's claim).

Background

[10] The respondent's claim is based upon a loan agreement entered into between itself and the close corporation of which the applicant and his wife were members and in respect of which loan they bound themselves as sureties and co-principal debtors. In terms of the loan agreement the respondent loaned and advanced to the close corporation an amount of R3 million upon the registration of a covering bond over an immovable property owned by the close corporation in Constantia (*'the Constantia property'*).

[11] A covering bond was duly registered over the Constantia property in favour of the respondent. Various other forms of security for the loan were also furnished to the respondent which included a suretyship by Plasti-World Trading (Pty) Ltd (*'Plasti-World'*), a company in which the applicant and his wife owned 65% of the shares.

[12] On 20 March 2009 the respondent issued a simple summons out of this Court against the close corporation, the applicant, his wife and the other sureties for payment jointly and severally of an amount of R3 156 293.15 together with interest thereon at the rate of 15.5% per annum from 1 February 2009 to date of payment and costs.

[13] The period of the loan specified in the loan agreement was two years from date of signature thereof being 8 February 2008, i.e. until 7 February 2010. There is no

acceleration clause in the loan agreement.

[14] The plaintiff however issued its simple summons in March 2009, i.e. at a date when the full amount was not yet due and payable. The respondent did not rely on any breach or other event that served to trigger early payment of the loan. The respondent simply relied on an allegation that it had demanded payment of the full amount. There is no provision for such a demand in the loan agreement.

[15] Furthermore in terms of the loan agreement the close corporation was required to pay interest on the amount at the prime bank rate chargeable by Nedbank Limited. The respondent in its summons claimed interest at the rate of 15.5%. This thus fell foul of the specific provision relating to interest in the loan agreement.

[16] The action was defended and the respondent brought an application for summary judgment. On 5 June 2009 an order was taken by agreement in terms of which the applicant was granted leave to defend the action. The affidavit opposing the summary judgment application clearly sets out a defence as envisaged in rule 32(3)(b). The respondent alleges that the order was taken since the parties were engaged in settlement negotiations. The applicant denies this, pointing out that if that were the case one would have expected the summary judgment proceedings to have been postponed and not withdrawn.

[17] On 2 July 2009 the applicant and his wife entered into an agreement of pledge

with the respondent in terms of which:

17.1 The covering bond over the Constantia property was cancelled to enable the property to be sold and the net proceeds to be paid to the respondent;

17.2 The applicant and his wife agreed to pledge to the respondent, as additional security for the loan, their 65% shares in Plasti-World;

17.3 It was agreed that the loan would be repaid in annual instalments of R1 050 000, the first instalment being due on 26 June 2010. In the event that payment was not made the respondent would be entitled to sell the shares as full or part settlement of the loan indebtedness.

[18] Signed security transfer forms were delivered to the respondent in accordance with the pledge agreement.

[19] On 20 October 2009 the Constantia property was sold and the net proceeds of R1 818 329 were paid to the respondent in part settlement of the loan.

[20] On 26 June 2010 the applicant failed to pay the first instalment due of R1 050 000. On the same date the respondent took transfer of the shares but did not give the applicant any value for the shares. It is common cause that the shares were not valued at the time that they were transferred to the respondent nor at any time

thereafter. The only indication of their value is to be found in a letter of intent dated 11 August 2009 annexed to the applicant's founding papers in which a prospective investor expressed an interest to purchase 60% of the shares in Plasti-World for an amount of R2.5 million. The applicant states that Trevor Watson, who at all material times had been the auditor and financial advisor of the applicant, his wife and the close corporation, had not only introduced the prospective investor but had also completed a due diligence for that prospective investor that verified the suggested purchase price for the shares. The applicant thus submits that although the sale did not in fact take place the shares indeed had value.

[21] The respondent's answer is that the allegations in relation to Watson constitute inadmissible hearsay evidence. It is *"significant"* that the sale did not take place and it is *"reasonable"* to infer that this may have been as a consequence of the value which *"the applicant"* sought to place on the shares. The respondent also states that no weight can be attached to the value attributed to the shares in a letter of intent concluded in 2009 and which did not result in a sale; and that this valuation was performed long before it learnt that a particular licence (the *Resintile* licence) in which it is alleged the value of the shares in fact lay, did not belong to Plasti-World. As such the valuation is outdated and worthless.

[22] The applicant in turn denies these allegations particularly those relating to the *Resintile* licence.

[23] However the respondent's counsel correctly conceded during argument that there indeed appears to be a defence to the claim based on the value of the shares; and that this constitutes a defence which *prima facie* carries some prospect of success.

[24] I return to the chronology of events. It is common cause that from the date of the order taken in the summary judgment proceedings, i.e. 5 June 2009 and until 27 March 2011 the respondent took no steps whatsoever to further its litigation with the applicant, thus including a period of some nine months subsequent to 26 June 2010 when the applicant failed to pay the first instalment in terms of the pledge agreement.

[25] On 27 March 2011 the respondent's attorney addressed an email to the applicant's erstwhile attorney advising that he was required to file the applicant's plea within five days, failing which a formal demand would follow. On the following day the applicant's erstwhile attorney addressed an email to the applicant's wife which read as follows:

> *'Dear Maria,*
> *Herewith an e-mail received. Please let me know what is going on as I thought that this matter had become settled.'*

[26] The applicant did not file a plea. He explains that he did not believe that it was necessary since the applicant was not entitled to persist with its claim against him inasmuch as a payment and a transfer of shares had been effected. As I understand it the applicant's contention is that irrespective of his default on the first instalment due on

26 June 2010, the respondent had taken transfer of the pledged shares and that, together with the net proceeds paid in respect of the sale of the Constantia property, had resolved the matter.

[27] Again and despite the threat contained in the respondent's attorney's email of 27 March 2011 the respondent took no further steps against the applicant until on 16 September 2011 (about 5½ months later) it caused its attorney to prepare a notice in terms of rule 26 (i.e. a demand for plea) which was served on the applicant by registered mail and by email on his wife (although the applicant maintains that this notice did not come to his attention).

[28] On 17 October 2011 an application for default judgment was served by the sheriff on the applicant's home upon *'ROBBIE HOUSEHOLD MEMBER apparently a responsible person and apparently not less than 16 years of age, of and in control of and at the place of residence of* [the applicant]*... the* [applicant] *being temporarily absent'*. The applicant maintains that this notice also did not come to his attention and that he was in fact out of the country at the time.

[29] On 4 November 2011 the respondent was granted default judgment as set out above. The Court was not informed by the respondent of the fact that subsequent to the issue of summons it had:

29.1 Received payment of the amount of R1 818 329; and

29.2 Taken transfer of the shares pledged as security for its claim.

[30] In fact an affidavit deposed to by the respondent's attorney on 3 October 2011 and filed in support of the application for default judgment contained the following:

30.1 That the circumstances surrounding the application were within his own knowledge and that he could swear positively to the facts in relation to the default judgment;

30.2 That the papers were in order and that he requested judgment to be granted in favour of the respondent.

[31] On 13 January 2012 a warrant of execution was served on the applicant. No goods were attached and the sheriff issued a *nulla bona* return on 18 January 2012. It is not in dispute that the applicant only became aware of the default judgment for the first time on 13 January 2012. The warrant of execution sought to attach property for the full amount of the judgment debt in terms of the order of 4 November 2011.

[32] The applicant claims that he did not appreciate that he could take steps to set aside the judgment and that he did not have the funds to consult an attorney.

[33] The respondent is unable to advance any facts to dispute the applicant's contentions that: (a) he was not aware of service of the application for default judgment

by the sheriff; and (b) after learning of the judgment he did not appreciate that he could take steps to have it set aside and that he did not have the funds to consult an attorney. All that the respondent states is that it has no knowledge of these allegations and accordingly denies them.

[34] The respondent launched sequestration proceedings against the applicant in April 2012. The deponent to the founding affidavit in those proceedings, Joseph Farthing, stated that:

> *'The* [applicant] *is truly and lawfully indebted to the* [respondent] *in the amount of R3 000 000.00 (Three Million Rand) in respect of a judgment granted by the High Court of South Africa (Western Cape High Court) on 4 November 2011...'*

[35] The applicant instructed an attorney to oppose the sequestration application on his behalf. He states that during the preparation of his answering affidavit (which was filed in late May 2012) he was advised by his attorney that he could bring an application for the rescission of the respondent's judgment. In that answering affidavit the applicant stated that *'I will also have to incur the costs of setting aside the default judgment of the* [respondent] *as the debt is not a valid one... The application of the* [respondent] *is an attempt to extort funds which the* [respondent] *knows are not due and owing'.*

[36] The applicant also states that after having been advised that he could bring an application for rescission *'*[f]*unds were however very limited and I was not in a position to instruct them to bring this application.'* He also states that after filing his answering

affidavit in the sequestration application he managed to secure employment as a consultant in China and was again out of the country for a month; and that this '*was necessary to earn money in order to place our attorneys in funds to bring this application*'.

[37] Again, save for contending that a lack of funds is not an excuse for '*wilful default*' the respondent states only that it has no knowledge of these allegations and accordingly denies them.

[38] As previously mentioned this application was launched by the applicant on 28 September 2012.

Evaluation

[39] I turn to consider the applicant's case in light of the principles set out in *Grant v Plumbers (Pty) Ltd* and *Chetty* as well as the provisions of rule 27.

[40] As to whether the applicant has shown that he has a *bona fide* defence to the respondent's claim and that this application has not been brought with the intention of merely delaying that claim, there can be little doubt that the applicant has discharged the onus that rests upon him. That he has such a defence was conceded by the respondent's counsel during argument. It has also not escaped my notice that it was only when the respondent filed its answering affidavit in these proceedings that it conceded for the first time that a payment had been made and that it had taken transfer

of the shares pledged as security for the balance of the loan prior to seeking default judgment. Whether the shares have value or not is a dispute which falls to be determined by another court in due course. Although the respondent in its answering affidavit abandoned that portion of its default judgment that it had eventually disclosed had been paid prior to the judgment having been granted, the fact of the matter is that it did not come to Court when applying for default judgment with clean hands. This is not a situation where the respondent had no knowledge of what, if any, the applicant's defence was likely to be. On the respondent's own version it knew what that defence was (whether or not it believed that there was merit in respect of the share transfer defence) and it nonetheless instructed its attorney to request on oath that default judgment be granted in its favour for the full amount of the loan.

[41] As regards the explanation furnished by the applicant for failing to file his plea, I am satisfied that it is reasonable. In the particular circumstances of this matter it would be inappropriate to focus only on the applicant's inaction as opposed to his intention; and it would similarly be inappropriate to view that inaction in isolation. As previously stated the respondent itself: (a) took no steps against the applicant subsequent to his default on 26 June 2010 until nine months later on 27 March 2011 when it instructed its attorney to despatch an email requesting that the applicant file his plea within five days; and (b) after requesting the applicant to file his plea the respondent then waited a further 5½ months before instructing its attorney to prepare and serve a formal demand for plea during September 2011. In addition the respondent is not able to dispute the applicant's averment that the notice of application for default judgment did not come to

his attention. Furthermore both parties were aware that a substantial payment of R1.8 million had been made and that the pledged shares had been transferred to the respondent. The latter is also unable to dispute the applicant's averment that he was under the *bona fide* impression that the dispute had been resolved. In these circumstances the applicant cannot be said to have been in wilful default.

[42] As far as the delay in bringing this application is concerned, the applicant is indeed on thin ice. I believe that there may be merit in the submissions made during argument by the respondent's counsel that the applicant adopted a 'devil may care' attitude to service of the warrant upon him; and that it was only when he was served with the papers in the sequestration application that he took steps to obtain legal advice, resulting in him launching this application but on his own version only four months after he was informed of his rights. I was also referred to *Bowes v Pinnick* 1905 TS 156 at 157 in support of the submission that a lack of funds does not excuse wilful default since nothing prevents a party from defending a matter in person.

[43] However *Bowes* was decided about 90 years before the advent of our Constitution. In *S v McKenna* 1998 (1) SACR 106 (CPD) at 112j-113a the Court found that the right to legal representation as provided in s 35(3)(f) of the Constitution

> *'...is essential to a fair trial. In my judgment, if the right to legal representation is to have any meaning, it must include the right to be afforded a reasonable opportunity to secure it. A denial of a reasonable opportunity to secure legal representation where one is demanded is, in my view, a denial of the right to legal representation and it is a denial of a right to a fair trial guaranteed by the Constitution.'*

[44] Of course the court in *McKenna* was dealing with the right of a person accused of a crime to legal representation and s 35 of the Constitution itself specifically relates to arrested, detained and accused persons. However s 34 of the Constitution provides that:

> *'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum.*
>
> [emphasis supplied]

[45] There is nothing in the Constitution which militates against the view that a litigant in a civil matter should not also be afforded a reasonable opportunity to obtain legal representation (and inherent in that is a reasonable opportunity to fund his or her own representation) if that litigant so desires. I do not suggest that this means that a litigant can take his or her time or proceed at his or her leisure; representation should be secured within a reasonable time. But on this approach I do not believe that, despite what I have already said in relation to the applicant's conduct between service of the warrant of execution and the papers in the sequestration application, the applicant deliberately dragged his heels after having been advised during May 2012 of his right to apply for rescission of the default judgment. He has stated that he thereafter travelled overseas for a month on a consultancy contract which resulted in him being able to place his attorney in funds. While it is so that the application was only launched at the end of September 2012 it is my view that a delay of 4½ months in the particular circumstances of this matter is not necessarily indicative of a gross disregard for the

consequences of the default judgment. Nor is it such that to allow the application for condonation to succeed would be *'inimical to the public interest'* that there be finality in litigation: *Absa Bank Ltd v Gary Edgar Petersen* (Western Cape High Court, case no 934/2011) at para 5. In the circumstances the applicant has scraped past this hurdle albeit by the skin of his teeth.

Conclusion

[46] In the circumstances the applicant is entitled to the rescission of the default judgment. It is accordingly not necessary to consider the parties' respective contentions relating to rule 42. Insofar as costs are concerned, in the exercise of my discretion, I believe that it would be appropriate that the costs of this application should be costs in the cause.

[47] I accordingly make the following order:

1. **The applicant's non-compliance with rule 31(2)(b) is condoned.**
2. **The default judgment granted on 4 November 2011 by this Court is hereby set aside.**
3. **The applicant shall deliver his plea by not later than Friday, 31 January 2013 failing which he shall be barred from so doing.**
4. **The costs of this application shall be costs in the cause.**

J I CLOETE