IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION BLOEMFONTEIN

Case No: 2198/2015

STANLEY ROBERTSON N.O.	1st Applicant
THE BEST TRUST COMPANY (WESTERN CAPE)	2nd Applicant
STANLEY ROBERTSON	3rd Applicant
FOLLOW THE STAR TRADING 576 (PTY) LTD	4th Applicant

and

BUSINESS PARTNER LTD	Respondent

In re

BUSINESS PARTNERS LTD	Plaintiff

and

STANLEY ROBERTSON N.O.	1st Defendant
THE BEST TRUST COMPANY (WESTERN CAPE)	2nd Defendant
STANLEY ROBERTSON	3rd Defendant
FOLLOW THE STAR TRADING 576 (PTY) LTD	4th Defendant

Heard: 15 October 2015

Delivered: 29 October 2015

MOCUMIE, J

[1] This is an application for rescission of the default judgment which was granted against the 1st to the 4th applicants (the applicants/the defendants in the default judgment) in favour of the respondent (the plaintiff in the default judgment) under Case no 2198/2015 on 23 July 2015 (the default judgment).

[2] The combined summons issued by the plaintiff against the defendants was purportedly served on the defendants by a sheriff on 27 July 2015 at the defendants' chosen *domicilium citandi* by attaching same to the gate of the defendants' premises. In terms of the summons the plaintiff claimed payment of the amount R 6 293 574.26 from

the defendants. The first defendant representing the defendants and the deponent to the affidavits on behalf of all the defendants alleges that he only became aware of the judgment and order when the plaintiff's attorney called him on 5 August 2015. His attorney thereafter consulted the plaintiff's attorney. The latter only provided the defendants with all the necessary documents on 12 August 2015. Consultation with counsel took place on 13 August 2015. The matter was set down within the prescribed 20 days by notice supported by an affidavit. In the application he asked for the default judgment to be set aside, that leave be granted to the defendants to file a plea within 20 days and that each party pay its costs alternatively costs be costs in the main cause.

[3] Mr Groenewald, on behalf of the defendants, submits that the plaintiff and the defendants concluded two loan agreements (Claim A and B) and a property royalty agreement (Claim C). The loan agreements have since been paid off in full and final settlement. The royalty agreement the parties concluded in addition to the loan agreements in terms of which the defendants must pay the plaintiff royalties totaling R 2 454 894 is now in dispute on the basis that (a) such royalty agreement is a simulated agreement and (b) that the royalties are in actual fact interest in addition to the interest that the defendants would pay on the loan agreements. For his submissions he relies on the unreported judgment of *Business Partners Limited v Silver Stars Trading 245 CC and Another, North Gauteng High Court, Pretoria*[1]. He submits further that in line with the *Silver Stars* decision, the agreement is oppressive and harsh to the extent that it undermines public policy because although the loans have been repaid royalties must still be paid over a period of almost ten years. This means the investment will yield more or less 15,51% interest even when the loans upon which the royalty agreement is based have been paid up. The agreement is clearly made up of the capital loan amount as well as interest,the latter was not expressly mentioned or discussed with the defendants. The calculation thereof is not even provided by the plaintiff. On this basis, the defendants further contend, the royalty agreement is *contra bonis mores*, against public policy and is unenforceable.

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[1] *Business Partners Limited v Silver Stars Trading 245 CC and Another, North Gauteng High Court, Pretoria case number 14408/2008 (delivered 15/05/2012).*

[4] Mr Groenewald submits further that, the full bench decision on which the plaintiff relies for its case, *Business Partners Limited vs Silverstars Trading 245 CC and Another*[2] is distinguishable from this case for a number of reasons. Inter alia (i) the Full Bench found that the royalty agreement was valid and enforceable because the lender explained the royalty agreement and its terms and conditions to the borrower and the latter understood them as such. He signed knowing what he was binding himself too. In this case, this was not done. To the contrary, several pages of documents were handed to the defendants to sign. At that time that they approached the plaintiff they had a serious cash flow problem and thus under financial stress and vulnerable. They just signed the documents when they were told to do so without reading the agreement. Neither did the plaintiff give them any explanation that the royalties will be 15,5% regardless of the fact that the loans were settled. This he contended is not the normal interest charged in loan agreements on any outstanding balance; (ii) There is no evidence that the loans were high risk as the plaintiff claimed. The plaintiff could not say that there was no security. The defendants, combined, had property worth over R6million; (iii) In *Silver Stars* the court had the benefit of detailed evidence led which enabled it to make a finding on a balance of probabilities.

[5] From the onset Mr Zietzman, on behalf of the plaintiff did not take issue with the explanation for the default, but relies only on the fact that the defendants have not made out a case that they have a *bona fide* defence to the plaintiff's claim. Mr Zietzman submitted that a *bona fide* defence, although it only needs to be established prima facie, must still be a defence in law.[3]Thus the main ground of opposition of the plaintiff is that the defendants failed to show good cause for setting aside the default judgment. Mr Zietzman submits further and on the strength of the Gauteng South Full Bench decision of *Business Partners Limited vs Silverstars Trading 245 CC and Another*[4] that a royalty agreement is *per se* not void and invalid. 'Authorities are clear that contracting parties

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[2] *Business Partners Limited v Silver Stars Trading 245 CC and Another, North Gauteng High Court, Pretoria case number 14408/2008 (delivered 15/05/2012).*
[3] Harms B-206(2); B-222(1).
[4] *Silver Stars Trading* above.

are well within their rights to arrange their affairs in such a way that they suit their circumstances; of importance is that the other party is not defrauded, and or does not know what the contract entails.'

[6] He contends that the decision of the court *a quo* in *Silver Star Trading* matter was set aside by the full bench and cannot be relied on. *Inter alia* the court *a quo* found that the royalty agreement in the case was simulated because it was contrary to the Usury Act[5] and the National Credit Act[6]. In this case, the parties are *ad idem* that both Acts are not applicable. Like in the *Silverstars Trading* matter the defendants in this case are not uninformed and vulnerable borrowers. They are business people. There is no evidence that at the time the parties entered into the agreement they were not on equal footing. From the Acknowledgment of Debt Agreement the defendants signed it is clear that they knew all along that the royalty agreement is a separate agreement in addition to the loans advanced to them. The defendants were aware of the terms and conditions thereof as well as their rights to seek legal advice before signing, yet they signed the agreement without exercising the options available to them. The defendants, he submitted will not be able to indicate how the agreement is *contra bonis more* when *inter alia* they bound themselves in the Acknowledgement of Debt. The fact that the loans have been paid up does not absolve the defendants from their obligation in respect of the outstanding amount under the royalty agreement. He argues that contrary to what the defendants now claim in hindsight that the plaintiff did not tell them about the royalty agreement in detail, the defendants knew the terms and conditions at the time of appending their signatures. The plaintiff concluded the royalty agreement with the defendants representing the Trust *in lieu* of becoming a partner or buying shares as it happens with it and other businesses. It is the defendants that approached the plaintiff and not the other way around. The evidence before this court on the affidavits is sufficient for this court to come to a conclusion whether the judgment and order should be rescinded.

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[5] Usury Act 73 of 1986.
[6] National Credit Act 34 of 2005.

[7] The main issue to determine is whether the defendant has shown good cause for the judgment and order to be rescinded.

[8] The test in applications of this nature is set out in Rule 31 (2) (b) of the Rules of Practice which provides:

'A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.'

[9] Rescission of a default judgment generally includes at least both a reasonable and acceptable explanation for the default and a *bona fide* defence on the merits which prima facie carries some prospects of success.[7] But the courts have consistently refrained from attempting to frame an exhaustive definition of what 'good cause' for such attempt would hamper the exercise of the wide discretion of the courts.[8] Many and varied factors need to be considered and each case must be decided on its own facts and circumstances.[9] The fundamental reason behind rule 31[10] is that there is a presumption that a judgment granted is correct. The purpose of the rule is to correct expeditiously an obviously wrong judgment or order.[11]

[10] A indicated earlier, Mr Zietzman, on behalf of the plaintiff did not take issue with the explanation for the default which the defendants provided. The defendants explained that their business premises were open for the day until 17h30. The sheriff who allegedly served the summons by attaching same to the gate of the premises did not attach the summons on their gate. The unrefuted description of the premises of the defendants is such that it is highly improbable that the sheriff could have attached the

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[7] *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-477; Chetty v Law Society Transvaal 1985 (2) SA 756 (AD) at 764J; *Madinda v Minister of Safety & Security* [2008] 3 ALL SA 143 (SCA); Coetzee and Another v Nedbank Ltd 2011 (2) SA 372 (KZD) at 376G-I.

[8] See unreported judgment of the Free State High court Case No 703/2012 delivered on 24 July 2014 *RP Jansen Van Vuuren vs HR Reinecke*.

[9] *Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11.

[10] Uniform Court Rule 31.

[11] *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E.

summons to the gate of the correct premises. In *Greef v First Rand Bank Limited*[12] the court stated:

'[10] The provisions of s36 (2) of the Supreme Court Act[13] are to the effect that a return of service will constitute prima facie proof of the contents thereof. It follows that such evidence may be challenged.'

In other words, the plaintiff ought to have called the sheriff to testify under oath to refute the defendants' allegations of lack of service of the summons because without such evidence, the version of the defendants has to be accepted as correct. Consequently it cannot be found that the summons had indeed been served in accordance with the provisions applicable to service at a domicilium citandi.[14]

It suffices to state the obvious that the judgment and order was granted without proper notice to the defendants. I am satisfied that the defendants were not aware of the judgment against them until the plaintiff's attorney called them some days later when an execution was attempted. It is clear that the defendants were in no willful default in failing to defend the action.

Bona fides

[11] There is no suggestion that this is not a *bona fide* application.

Defence

[12] The defendants stated that the royalty agreement is a simulated agreement which is *contra bonis mores* and against public policy. In order to show good cause as the court in *Grant v Plumbers* above stated decades ago, all the defendants had to do in this regard was to make out a case that they had a defence which they could raise at the trial and which could *prima facie* succeed. This differs from the test to be applied in considering whether the royalty agreement in issue is *contra bonis mores* and against public policy or not. In such a scenario the defendants would be burdened with an *onus* to prove on a balance of probabilities that the royalty agreement is indeed a simulated

[12] *Greef v Firstrand Bank Limited* 2012(3) SA 157 (NC) at 160D.
[13] 59 of 1959.
[14] *Greef* above at 161A.

transaction and additional interest to the loans already paid up. This then means in order for a court to make such determination evidence must be led and based on credibility findings that court will make on the facts presented the court may come to the conclusion whether the transaction was simulated and *contra bonis mores.* Facts to be presented included that although neither the Usury Act[15] nor the National Credit Act[16] applied to the transaction, the transaction fell to be determined in terms of common law as the court held in *African Dawn Finance (Pty) Ltd v Dreams Travel & Tours CC*.[17] A determination based on *bonis mores* is depended upon a full enquiry based on credibility findings by a court. Such enquiry is untenable in motion proceedings particularly when the parties are so at odds on what was conveyed to the defendants and what was not with regard to the royalty agreement.

[13] In my view, the defendants have *prima facie* raised an issue which, if decided in their favour, would mean that in the circumstances of their case, the royalty agreement was a simulated transaction and *contra bonis mores*. Thus not enforceable between the parties, because as is trite each case is judged on its own facts, the trial court may find it distinguishable from *Silver Stars*[18] or even *African Dawn Finance*[19] above.

Costs

[14] On the issue of costs, it is trite that when an applicant seeks indulgence from the court in circumstances such as these, (s) he must bear the costs.[20] But from the unrefuted evidence of the defendants on the non-service of the summons, it is abundantly clear that this is not the ordinary rescission application in which the defendant was well aware of the summons but chose not to oppose the action. It can simply not be expected of the defendants to bear the costs for approaching this court to redress what they believe is a decision that could not have been taken had they been in court. It will be unfair to the defendants and also not in the interest of justice to slavishly

[15] Usury Act 73 of 1968.
[16] National Credit Act 34 of 2005.
[17] *African Dawn Finance Pty Ltd. V Dreams Travel & Tours CC* 2011 (3) SA 511 (SCA).
[18] *Silver Stars Trading* above.
[19] *African Dawn* above.
[20] *Farlam et al Erasmus: Superior Court Practice* at A1-95;*Phillips t/a Southern Cross Optical v SA Vision Care (Pty)Ltd* 2000 (2) SA 1007 (C) at 1015G-H.

apply the general rule applicable in these cases regardless of the prevailing circumstances.

In this instance the plaintiff would be justly expected to bear the costs. But for its concession right from the onset, costs of this application should be costs in the main action.

[15] In the result, the following order is granted.

ORDER

1. The default judgement granted on 23 July 2015 in case No 2198/2015 is set aside;
2. The defendant is granted leave to deliver a plea within 20 days from date of this judgment;
3. Costs to be costs in the main action.'

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B. C. MOCUMIE, J

On behalf of the applicants:	Adv. Groenewald
Instructed by:	Symington & De Kok BLOEMFONTEIN
On behalf of the respondent:	Adv.P Zietzman SC
Instructed by:	McIntyre Van der Post BLOEMFONTEIN