REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

20/11/2012

CASE NO: 13631/2010

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

2012:11:20
DATE

SIGNATURE

In the matter between:

ROOPLALL JUDGESH First Applicant

ROOPLALL NEETA Second Applicant

and

STANDARD BANK OF SA LTD Respondent

JUDGMENT

MAKGOKA, J:

[1] This is an application by the applicants to rescind a judgment of this court granted in default against them on 23 September 2010. The circumstances under which default judgment was granted are the following: The respondent alleged in a simple summons that the applicants had breached the terms of a loan agreement between it and the applicants. The loan agreement was secured by a mortgage bond registered in favour of the respondent over the applicant's property. The

respondent claimed payment of the full outstanding amount under the mortgage bond, namely R420 906.34. According to the sheriff's return of service, summons was served at the residential, and *domicilium citandi et executandi,* address, of the applicants, by affixing to the principal door of the residence. No notice of intention to defend was delivered. The dies *induciae* expired and default judgment was granted in favour of respondent on 28 September 2010. This application was launched on 29 June 2011.

[2] From the factual sypnosis, it appears that the application is brought in terms of rule 31 (2) of the Uniform Rules of Court, which provides that a defendant may within 20 days after she or he obtains knowledge of a judgment taken in default of delivery of notice intention to defend or of a plea, apply to court upon notice to the plaintiff to set aside such judgment. The court may, on 'good cause' shown, set aside the default judgment on such terms as to it seems meet. For the purpose of the calculation of the 20-day period mentioned in the rule, the applicants' version is that they first came to know of the judgment in February 2011 when they applied for credit and their application was unsuccessful. The application was launched on 29 June 2011, thus outside the 20-day period. There is no application for condonation of the late launching of this application. On this basis alone the application has to fail. If this conclusion is wrong, I would, as I am entitled to, consider the application at common law, in terms of which a judgment or order may be rescinded on 'good cause'.

[3] The jurisdictional requirement of 'good cause' entails two essential elements. First, a reasonable and acceptable explanation for the default, and second, a

demonstration of a '*bona fide*' defence. In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765 B – C, the following was stated:

> "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 judgment 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 a party has a *bona fide* defence which *prima facie* carries some prospect of success."

[4] It is not sufficient if only one of these elements is established – see *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C) at 418B. See also *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476.

[5] The general approach to applications for rescission was restated by Smallberger J (as he then was) in *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300F-301C in the following terms:

> "In *Grant v Plumber (Pty) Ltd* 1949 (2) SA 470 (O) Brink J, in dealing with a similar provision, held (at 476) that in order to show good cause, an application should comply with the following requirements:
>
> 1. He must give reasonable explanation for his default;
> 2. His application must be *bona fide*;
> 3. He must show that he has a *bona fide* defence to the plaintiff's claim."

(See also an erudite exposition by Jones J, in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 711E-I.)

[6] Having established the proper approach, I turn now to consider two elements of 'good cause'. I must do so in light of the explanation proffered by the applicants for their default to enter an appearance to defend. The explanation is simply that the applicants did not receive the summons. As stated earlier summons **is** said to have been served on the applicants by 'affixing to the principal door' at the applicants' place of residence. The applicants state they did not receive the summons.

[7] They point out that they live in a residential complex and it is possible that the sheriff could not gain entry to the complex to affix the summons on their specific unit's main entrance, as their unit does not have walls around it and further that is has no gates. The applicants state further that the first time they came to know of the judgment taken against them was in February 2011 when they applied for credit and their application was turned down as a result of the judgment sought to be rescinded.

[8] In an answering affidavit on behalf of the respondent, the manageress of the respondent alleges that the second applicant called the attorneys of the respondent, Blakes Maphanga Inc on 11 March 2010, two days after the summons was served, to make a payment arrangement. She spoke to an administrative employee of the firm and promised to pay R 4000.00 per month from 1 April 2010. The employee advised the second applicant that since summons had been served, the respondent would proceed with judgment without further notice should they default with payments.

[9] It is further alleged that the second applicant again contacted the respondent's attorneys on three further occasions. On 9 November 2010 she spoke to two employees of the firm about the arrears, in an effort to cancel the sale in execution which was scheduled for 20 January 2011. She was told that 50% of the arrears had to be paid to cancel the sale in execution. She called again on 11 and 18 January 2011, respectively, during which she made arrangements for payment in order to have the sale in execution cancelled. As a result of these arrangements the sale in execution was indeed cancelled. The confirmatory affidavits of the employees and their file notes confirming the telephone calls, as well as the confirmatory affidavit of the attorney, who also spoke to the second applicant, have been attached to the respondent's answering affidavit.

[10] The applicants did not file a replying affidavit. At the hearing of the matter, I enquired from Mr. *Van Wyk*, counsel for the applicants, whether the applicants did not wish for an opportunity to file a replying affidavit. Counsel declined the invitation. I raised this point because of the serious allegations in the respondent's answering affidavit concerning the applicants' approach to the respondent's attorneys as set out above. In the absence of any response from the applicants, I would have to accept the respondent's allegations as correct.

[11] Mr. *Van Wyk*, in anticipation of that, pointed out to me that those allegations were inadmissible hearsay evidence, as they were raised by the manageress of the respondent, and the confirmatory affidavits purporting to confirm them were not properly commissioned as there is no indication of the date on which the affidavits were commissioned. This point was raised for the first time at the hearing and in

fairness to Mr *Vorster*, counsel for the respondent, who had not prepared himself on the point, I reserved judgment and requested both counsel to submit supplementary written submissions, dealing with this issue. Counsel have done so and I am grateful to them.

[12] Regulation 4(1) of the Regulations Governing the Administration of an Oath or Affirmation require that among others, the date of taking of the declaration should be stated. However, non-compliance with the regulation can be condoned. See *Swart v Swart* 1950 (1) SA 263 (O) where it was held that the grounds for the exercise of any discretion to condone the defect should be placed before court.

[13] In the present matter, I consider that the extent of non-compliance is a minor one. All the required information is contained in the attestation clause, except the date. I therefore conclude that this is a matter where common sense should prevail and the non-compliance be condoned. The applicants elected not to file a replying affidavit. The reason is clear. The allegations in the answering affidavit appear to be unassailable. These are not generalized allegations. They are very specific with regard to the dates and times during which the second applicant is said to have contacted the respondent's attorneys. The probability that the second applicant was in constant touch with the respondent's attorneys after service of summons is overwhelming. If those allegations are not true, there is no reason why the second applicant could not, in a short affidavit, deny them.

[14] With that conclusion, I must accept the respondents' allegation that the second applicant, two days after the service of summons, and thereafter on three other

occasions, approached the respondent's attorneys, where she made arrangements for payment and the cancellation of the sale in execution. These allegations are not so far-fetched or clearly untenable that they fall to be rejected, and I accept them. This finding destroys the substratum of the applicants' allegation that they did not receive the summons and that they were not in willful default.

Bona fide defence

[15] As to the *bona fide* defence, the applicants raise a number of points. First, they dispute that they were ever in arrears. In support of this, they attached a letter dated 2 March 2011 from the legal department of the respondent stating that there were no arrears reflecting on their account as at 9 December 2010, and that the account was up to date as at the date of the letter. But judgment was taken in September 2010, when they were still in arrears. The letter referred to above, does not assist the applicants. It is trite that in rescission applications, an applicant cannot rely on a defence which did not exist at the time default judgment was granted.

[16] Second, it is alleged that the applicants never received the letter sent in terms of s 129 of the National Credit Act. The short answer is this. The letter was sent to the chosen domicilium address of the applicants. At the relevant time, the authority was *Rossouw v First Rand Bank Ltd* 2010 (6) SA 439 (SCA) para 31, in terms of which actual receipt was the responsibility of the applicants, not of the respondent. There was therefore compliance with the provisions of s 129.

[17] Third, the applicants claim that the respondent should have sent two s 129 letters, one to each of them. There is no merit in this argument. The home loan with the respondent is one, single account, jointly in the names of both applicants, not separate accounts. The applicants chose a single address to which notices should be sent to them, they did not indicate that notices should be sent to them at separate addresses. The letter was addressed to them jointly.

[18] Fourth, the applicants contend that no demand was made of them. Summons constitutes demand. See *SA Taxi Securitisation v Mbatha* 2011 (1) SA 310 GSJ at 20 and 21. In any event clause 8 of the bond agreement provides that if the applicants default in any way, all amounts owing become "immediately due and payable in full on demand'. The respondent made demand of all the amounts owing and therefore they became immediately due and payable. There is no provision that the respondent had to specifically notify the applicants of that election to accelerate before issuing summons.

[19] In all the circumstances there is no merit in the application. It falls to fail and in the result:

1. The application is dismissed with costs.

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE HEARD	: 22 OCTOBER 2012
JUDGMENT DELIVERD	: 20 NOVEMBER 2012
FOR APPLICANTS	: ADV ASL VAN WYK
INSTRUCTED	: *PRESHNEE GOVENDER ATTORNEYS*, BRYANSTON, AND *TINTINGERS ATTORNEYS*, PRETORIA.
FOR THE RESPONDENT	: ADV SPM VORSTER
INSTRACTED BY	: *BLAKES MAPHANGA INC*, ALBERTON, AND *VAN STADE VAN DER ENDE INC*, PRETORIA