IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 7749/10

In the matter between:

CECIL BONGA HLOPHE
t/a THABIZOLO SERVICES Applicant

and

ITHALA DEVELOPMENT FINANCE
CORPORATION LTD. Respondent

JUDGMENT delivered on 09 October 2013

STRETCH AJ:

[1] The applicant has brought an application for the rescission of default judgment granted against him by the registrar in terms of rule 31(5) on 20 December 2010 in favour of the respondent, for payment in the sum of R142 316,76 together with interest and attorney and client costs.

[2] Pursuant to the judgment having been granted, this court on 2 August 2012 also granted an order declaring certain immovable property belonging to the applicant, specially executable.

[3] In terms of rule 31(5)(d), any party dissatisfied with a judgment granted by the registrar, may, within 20 days after he has acquired knowledge of such judgment, set the matter down for reconsideration by this court.

[4] In order to succeed, the applicant must show good cause. This means that he must:

(a) give a reasonable explanation for his default which excludes wilfulness or gross negligence on his part;

(b) be *bona fide* in making the application, and not merely bring it to delay the plaintiff's claim;

(c) show that he has a *bona fide* defence to the plaintiff's claim (a *prima facie* defence is sufficient).

The explanation:

[5] The applicant avers that he became aware of the default judgment when his attorneys told him about it on 8 November 2012. I digress to mention that the judgment was granted in respect of summons which the respondent had issued against the applicant, trading as Thabizolo Service Station, for arrears water charges due to the local municipality, which liability the applicant had apparently incurred during the period 1999 to 2004 when he was leasing the premises from the respondent. To his founding affidavit is annexed an email from attorneys Tomlinson Mnguni James dated 1 October 2012 wherein the applicant is advised that his application for bonds had been rejected by the deeds office as an interdict had been registered against him (interdict I2554/2012AT) by this court in a matter between the respondent and Thabizolo Service Station in the sum of R142 316,76 with interest.

[6] The applicant says that he forwarded this mail to his attorneys to investigate. They did so, and furnished him with copies of the court file illustrating the history of this matter. It appears from the registrar's receipt of payment, that these documents were only uplifted on 7 November 2012.

[7] Having sold the business which he had operated from the service station in 2004, the applicant avers that when the summons in this matter was served at these premises, he was no longer there, and the summons was never brought to his attention.

[8] It was been argued on the respondent's behalf that summons was served on the applicant's *domicilium a*ddress (being the garage premises) as reflected in the lease agreement between it and the applicant. According to the lease agreement (as amended):

(a) the lease was for a two year period (1 December 1999 to 30 November 2001);

(b) the renewal period was for a period of four years and two months (1 December 2001 to 30 November 2006).

[9] I must assume, in the absence of any indications to the contrary, that at the time the applicant sold his business, the lease had been renewed, and in terms of the amendment thereto, the renewal period only expired on 30 November 2006.

[10] Rule 4(1)(a)(iv) which provided for service of any process of this court by delivering or leaving a copy thereof at a chosen *domicilium citandi*, was in my view, complied with, and the applicant's failure to change his address with the

respondent when he was no longer operating from these premises; alternatively, his failure to collect documents delivered to these premises up until the lease had expired in terms of the written lease agreement, was at best, grossly negligent. Accordingly, and his explanation for not having had sight of the summons earlier, is rejected.

The *bona fides* of the application:

[11] Having said this, the wilful or negligent nature of the applicant's default is only one of the considerations which I am constrained to take into account in the exercise of my discretion in determining whether or not good cause has been shown (see ***Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd 1975 (1) SA 612 (D) at 614C).***

[12] It seems to me, after having scrutinised these application papers, that the applicant has nevertheless demonstrated a *bona fide* presently held desire for relief in order to actually raise a defence in the event of the judgement being rescinded. In ***RGS Properties (Pty) Ltd v Ethekwini Municipality 2010 (6) SA 572 (KZD) at 575G-576C*** Ngwenya AJ (as he then was) said the following:

"I may add to this principle that judgment by default is inherently contrary to the provisions of s34 of the Constitution. The section provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. Therefore, in my view, in weighing up facts for decision, the court must on one hand balance the need of an individual who is entitled to have access to court, and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default judgment being granted in the first instance. In its deliberation the court will no doubt be mindful, especially when assessing the requirement of reasonable cause being shown, that while among others this requirement incorporates showing the

existence of a bona fide defence, the court is not seized with the duty to evaluate the merits of such defence. The fact that the court may be in doubt about the prospects of the defence to be advanced, is not a good reason why the application should not be granted. That said, however, the nature of the defence advanced must not be such that it prima facie amounts to nothing more than a delaying tactic on the part of the applicant."

A *bona fide* defence:

[13] The applicant has raised the following defences:

Prescription

[14] The respondent, in its summons issued on 28 September 2010 alleges that the applicant had failed to pay the Msunduzi Municipality for water charges for the period ending 31 July 2004 and that the municipality was ***now*** (my emphasis) looking to the respondent for payment of such outstanding charges. Again, I must assume (for lack of clarity of which both parties are guilty), that the respondent would not have had *locus standi* to apply for judgment against the applicant if it had not settled this debt with the municipality. I cannot, at this stage dismiss the respondent's explanation that it only became aware of the fact that the applicant had sold the business to Khumalo in 2007 when Khumalo offered to buy the service station from the respondent, and thereafter, that it only became aware of the outstanding water bill in 2010 when it tried to secure a rates clearance certificate for the purpose of selling the service station to Khumalo. *Prima facie* then prescription (with respect to the alleged debt owed by the applicant to the respondent) would have commenced running at the earliest in 2007, and at the latest during 2010 when summons was issued.

[15] The applicant has argued that prescription commenced running on 31 July 2004. In support of this contention the applicant relies on the respondent's summons, where it informs the applicant that he was in breach of the terms of his lease agreement with the respondent, in that he had "failed to pay for water charges in the period ending 31st July 2004 due to the Msunduzi Municipality".

[16] However it is clear from the papers that the respondent, after Khumalo had approached it with a view to purchasing the service station during 2007, had acted in terms of clause 20 of its lease agreement with the applicant by absorbing the applicant's alleged debt to the municipality, and now seeks to recover what it had paid over from the applicant. Clause 20 reads as follows:

"…if the Lessee fails to carry out any of its obligations provided for in this agreement, then the Lessor shall be entitled, at its discretion, to enforce or ***to carry out the same on behalf of the Lessee*** (my emphasis), both during the currency of this agreement and after the termination thereof, and to recover the cost and expenses of doing so from the Lessee."

[17] In my view then, the defence of prescription is unlikely to succeed at the trial.

Denial of liability

[18] In terms of the sale agreement between the applicant and Khumalo, Khumalo would, as from 1 February 2004 have been in full and direct control and supervision of the business which was being conducted from the premises of the service station. In terms of clause 11 of the agreement, this would have included taking over "leases" which the applicant had on the premises of the business. It seems to me then (in the absence of any averments to the contrary) that

Khumalo may well have taken physical occupation of the premises as early as 1 February 2004.

[19] The following is apparent *ex facie* the municipality's tax invoice on which the respondent has relied to support its claim for payment of R142 316,76:

(a) It is addressed to a service station and not to a person. Thus the identity of the debtor is not clear at all.

(b) The invoice is dated 26 June 2004. This means that Khumalo may well have been in occupation of the premises for up to five months when the account was rendered.

(c) It purports to reflect, on the face of it, that payment of the bulk of what was being claimed (R139 022,62) was only 60 days in arrears, in other words as from April 2004, which does not encourage this court to come to the assistance of the respondent, particularly in the face of the applicant's claim that he does not owe the municipality anything.

(d) The account does not specify the utility in respect of which the monies are outstanding. This vague and confusing state of affairs is further aggravated by the somewhat nonsensical letter of demand which was allegedly forwarded by the respondent's attorneys to the applicant on 11 August 2010, which purports to suggest to that the respondent's claim against the applicant is in respect of arrears rental.

[20] The respondent, in opposing this application for rescission, and despite having had ample opportunity to clarify these inconsistencies, merely annexes to its affidavit the very same documents on which the applicant has relied in moving the application. The most significant document, being what purports to be a computer generated tax invoice from the municipality dated 16 February 2010 reflecting a total due of R321 821,12, bears a single manuscript entry, the effect

of which seems to be that this balance is apportioned between the applicant and Khumalo, with Khumalo's portion being R179 504,36 and the applicant's being R142 316,76. There is no indication as to how these figures were arrived at.

[21] Finally, it is particularly significant that the respondent, in resisting this application has, on its own papers, fortified the applicant's contention that he is not indebted to the municipality (or the respondent for that matter), in the amount for which judgment was granted or at all. I say this because the respondent's attorney's letter to the respondent dated 8 February 2011, and to which there has been no reply forthcoming from the respondent despite having annexed this letter to its own papers, reads as follows:

"We advise that we consulted with Mr Hlophe regarding this matter.

He stated that he paid a total sum of R420 193,87 in 2009 which included arrears for the water account and outstanding rent. This amount was paid from the sale of his shares to our office directors.

The matter was handled by Mr Diedricks from our office then and Mr Macela from your offices under your reference 1054094.

Kindly confirm if that is indeed the correct position."

[22] The fact that the applicant has averred in reply that this amount was paid with respect to rent only (denying any outstanding debt with respect to utility charges), is in my view one of the many troublesome aspects of this case which ought to be ventilated at a proper hearing.

[23] In the premises, I am of the view that the applicant has succeeded in demonstrating that he has a *prima facie* defence at the very least with respect to the issue of the quantum of the judgment, or whether he is liable at all.

[24] I do not deem it necessary, in the order which I am about to make, to set aside this court's order of 2 August 2012 declaring the applicant's immovable property specially executable. Nor do I deem it necessary to set aside the warrant of execution issued on 12 January 2011.

[25] In my view, the warrant of execution and the order declaring the immovable property specially executable are consequential upon the granting of the default judgment. Once that judgment is set aside, every legal process consequential thereupon falls away. I accordingly make the following order:

ORDER:

1. **The default judgment granted against the applicant in favour of the respondent by the registrar of this court on 20 December 2010 under case number 7749/10 is hereby rescinded.**

2. **The respondent is directed to pay the costs of this application.**

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STRETCH AJ

Appearances /

Appearances:

For the Applicant	**:**	Mr L.M. Nhlabathi
Instructed by	**:**	L.M. Nhlabathi Inc. Tel. 031-5760415 or 0823090933 C/o Mchunu Attorneys 234 Church Street Pietermaritzburg Tel. 033 3425598
For the Respondent	**:**	Mr A.R. Khan
Instructed by	**:**	Ngcobo Poyo Diedricks Inc. 190 Hoosen Street Pietermaritzburg
Date of hearing	**:**	21 May 2013
Judgment handed down on	**:**	09 October 2013