IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

4234/14

In the matter between:

LINDLEY PRETTIRAJH **APPELLANT**

And

ABSA BANK LIMITED **RESPONDENT**

JUDGMENT

NTSHANGASE J

Introduction

[1] The applicant seeks an order condoning the late application for rescission and for rescission of a default judgment against him in favour of the respondent granted on 29 May 2014. The order for rescission is sought under Rule 31(2)(b) alternatively Rule 42(1)(a) of the Uniform Rules of Court.

[2] The judgment against the applicant was in respect of a shortfall of money not recovered by the respondent in the liquidation of its debtor**,** "The Oak Factory CC" (the principal debtor) with which the applicant, as surety, assumed joint liability for the principal debtor's obligations under agreements with the respondent the terms and conditions whereof the principal debtor breached.

The application for condonation

[3] Initially the applicant took issue with the service of the summons at 15 Temple Close, Woodview from which, he stated, he relocated as far back as 2009. At the hearing counsel for the applicant conceded that the summons was properly served. Indeed, it was served at the applicant's appointed domicilium. It was further conceded that the applicant did not notify the change of address.

[4] The applicant gained knowledge of the default judgment on 28 July 2014. He referred the matter to attorneys who, he states, did not accord priority to it.

[5] On 10 November 2014 the applicant instructed Wadee Attorneys on the matter. He handed them the court file provided to him by Hammond Pole Attorneys to investigate the circumstances which led to the default judgment. On 21 November 2014 he met with his attorneys 'who explained the nature and import of the documents in the court file and the search works report which reflected the default judgment against (him) as the only judgment.' Up to that stage no meaningful steps had been taken by the applicant to bring the matter before court.

[6] In his endeavour to give a reasonable explanation for his default the applicant does not suggest that the judgment was granted erroneously. It accordingly resorts under Rule 31(2)(b) of the Uniform Rules of Court. The applicant remains oblivious of the twenty day time frame set by Rule 31(2)(b) within which the application had to be brought before court, as manifest from the following in the replying affidavit:

'I am advised and reiterate that an application of this nature must be brought within a reasonable time of having become aware of the judgment … taking into account all the factors mentioned in the founding affidavit.'

[7] I perceive no factors in the founding affidavit which show that the application was brought within a reasonable time. It was only on 3 February 2015 that the applicant's attorneys gave notice of intention to launch the application for rescission. The application was subsequently lodged. The applicant's default was clearly due to gross negligence on his part in the face of knowledge that judgment had been taken against him. There was, in this case, an unjustifiable delay in bringing the application before court. The applicant has failed to show good cause for condonation to be granted.

Bona fide defence

[8] Where an applicant has provided a poor explanation of his default, as is the case in the present matter, a good defence may compensate. All the applicant must show is a *prima facie* case or the existence of an issue fit for trial. In endeavour to do so the applicant initially raised a defence based on prescription later abandoned, that the surety agreement was invalid as '… the essential details and information of the debtor were not completed therein when the applicant signed the document. The applicant does not indicate the essential details and information of the debtor which were not completed on the surety agreement document; nor does he suggest as to when such details and information may have been completed as they are now on the document. A reading of the document, annexure "AA2" to the answering affidavit does not bare evidence of errors of omission. In fact the document manifests sufficient care for correctness. Incorrect information on it was deleted and substituted with correct information in manuscript. The document was signed by the applicant and witnesses where corrections had been effected. The applicant ought to have set forth this ground of defence with sufficient detail. See Standard Bank of SA Ltd v El-Naddaf 1999(4) SA 779 (W) at 785 I - 786 B.

[9] On the further ground of defence the applicant makes the following vague averment in the founding affidavit:

> *'In addition I dispute the correctness of the information in account number [7…….] and account number [7…….] and (do) not believe it to be a true reflection of the agreements as entered into at the time between the parties.'*

On this ground the respondent would be just as perplexed as would be the case on the ground relating to the surety agreement, by reason of lack of detail. He does not provide detail of what he disputes on the accounts concerned; nor does he provide detail of what makes him 'not (to) believe it to be a true reflection of the agreements …'. It is in reply that the applicant takes issue with what he believes to be a discrepancy between the amounts on the certificate of balance and the shortfall in the liquidation of the principal debtor. He endeavours to provide detail which should have been set out fully in his supporting affidavit. Raised in reply as it was, the respondent could not respond. In this regard the following passage in the case of Mauerberger v Mauerberger 1948(3) SA 731 (C) at 732 is apposite:

> *'It is quite clear that in notice of motion proceedings an applicant must in his or her supporting affidavit set out fully his or her cause of action. It is not for the applicant to simply make general allegations, and when those allegations are dealt with in reply to come forward with replying affidavit giving details supporting the general allegations originally set out in the affidavit supporting the notice of motion."*

The order

[10] In all the circumstances the application falls to be dismissed and the following order is made:

> The application is dismissed with costs.

DATE OF ARGUMENT	:	3 September 2015
DATE OF JUDGMENT	:	15 September 2015
FOR THE APPLICANT	:	Ms K Pillay, instructed by Wadee Attorneys, locally represented by Mahadevey & Maharaj Attorneys,
FOR THE RESPONDENT	:	A J Boulle locally represented by Shepstone and Wylie Attorneys