Republic of South Africa

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

Case No: 9399/2008

In the matter between:

PIETER HENDRIK ERASMUS N.O. 1st Applicant

NAULINE ERASMUS N.O. 2nd Applicant

and

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA t/a LANDBANK Respondent

Court: Acting Justice J I Cloete

Heard: 29 January 2013

Delivered: 13 February 2013

JUDGMENT

CLOETE AJ

Introduction

[1] This is an application for the rescission of a default judgment granted by the registrar on 5 March 2008 against the applicants in their capacities as trustees of the Blydskap Trust, a trust duly registered under trust number IT 2238/96 (*'the Trust*). The applicants also seek condonation for the late filing of the application. The parties have agreed that the merits of the condonation application need not be determined and that condonation should follow the result in the rescission application.

[2] Default judgment was granted in favour of the respondent for: (a) payment of the sum of R552 600 (the amount claimed by the respondent having being abated in terms of the *in duplum* rule); and (b) costs.

[3] The application is brought in terms of rule 31(5)(d) of the uniform rules of court which provides that:-

> *'Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after he has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.'*

[4] The applicants' case is that the lengthy delay between service of the summons and the respondent obtaining default judgment, coupled with the circumstances in which default judgment was obtained, might well lead a trial court to find that it should exercise its inherent discretion to dismiss the respondent's action on the basis of superannuation; and that if the action is dismissed the respondent

may be prevented from proceeding against the applicants again since its claim may have prescribed. The applicants also allege that judgment was obtained for the incorrect amount.

[5] The respondent contends that the delay between the institution of action and the granting of default judgment was not unreasonable; that this defence was not available when default judgment was granted; and that judgment was indeed obtained for the correct amount. The respondent also denies that in the event of a trial court dismissing its action it would be prevented from again proceeding against the applicants due to prescription of its claim.

Relevant legal principles

[6] The uniform rules of court distinguish between an application for rescission of a default judgment granted by a court and one granted by the registrar. Rule 31(2)(b) deals with an application for the rescission of a judgment granted by a court and provides as follows:

> *'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.'*
>
> [emphasis supplied]

[7] Accordingly, whereas rule 31(2)(b) stipulates that an applicant is required to show *'good cause'* for rescission, rule 31(5)(d) does not.

[8] There are two conflicting decisions on whether the requirement of *'good cause'* nonetheless applies to the reconsideration of a default judgment granted by the registrar.

[9] In *Bloemfontein Board Nominees Ltd v Benbrook* 1996 (1) SA 631 (O) at 633H-I Hancke J found that the word *'reconsideration'* in rule 31(5)(d) means that a court will only interfere with a default judgment granted by the registrar if it is of the opinion that the registrar has erred in granting the judgment; and that this does not involve a court substituting its discretion for that of the registrar. Accordingly *'good cause'* is not a requirement in an application for rescission in terms of rule 31(5)(d).

[10] In the more recent decision of *Pansolutions Holdings Ltd v P&G General Dealers & Repairers CC* 2011 (5) SA 608 (KZD) the court disagreed with the findings of Hancke J in *Bloemfontein Board Nominees* (*supra*). At paras [5] to [11] Swain J found as follows:

> *'[5] As regards the merits of the application for a rescission of the default judgment granted by the registrar in terms of rule 31(5)(d), both parties approached the matter on the basis that the applicant was obliged to establish "good cause" for the rescission of the judgment, as is required by rule 31(2)(b). The latter rule is however applicable where the judgment sought to be rescinded is one granted by "the court" in terms of rule 31(2)(a).*
>
> *[6] The distinction is one of substance, for whereas an applicant for the rescission of a judgment granted by the court is required to show "good cause", an applicant is entitled to have a judgment granted by the registrar set down for "reconsideration" in terms of rule 31(5)(d).*

[7] In the case of Bloemfontein Board Nominees Ltd v Benbrook *1996 (1) SA 631 (O) at 633H–I Hancke J held that a "reconsideration" of a default judgment granted by the registrar, in terms of rule 31(5) does not mean that the court substitutes its discretion for that of the registrar, but that the court will interfere with the judgment or direction given by the registrar only if it is of the opinion that the registrar has erred.*

[8] With respect to the learned judge, it seems to me that the ambit of the court's discretion in terms of rule 31(5)(d), to reconsider a judgment granted by the registrar, has been defined too narrowly.

[9] In seeking to determine what is meant by a "reconsideration" of the matter, I believe that useful guidance may be gleaned from those decisions dealing with the ambit of this court's discretion, to reconsider an order granted as a matter of urgency against a person "in his absence" in terms of rule 6(12)(c). In both instances, whether it be a default judgment granted by the registrar, or an urgent order granted by the court, the relief is granted in the absence of the aggrieved party.

*[9.1] It is clear that the "underlying pivot" for the exercise of the power in terms of rule 6(12)(c) is the absence of the aggrieved party, at the time of the grant of the order (*ISDN Solutions (Pty) Ltd v CSDN Solutions CC & Others *1996 (4) SA 484 (W) at 486H).*

[9.2] The dominant purpose of rule 6(12)(c) is to afford to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence (ISDN, supra, at 486I).

[9.3] A wide discretion is intended and factors relating to the reasons for the absence, the nature of the order granted and the period during which it has remained operative, will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. In addition, questions relating to whether an imbalance, oppression or injustice has resulted, and if so, the nature and extent thereof, and whether redress is open to attainment, by virtue of the existence of other or alternative remedies, will have to be considered (ISDN at 487B–C).

[9.4] *Rule 6(12)(c) is very widely framed and the word "reconsideration" must bear its widest meaning (*Lourenco & Others v Ferela (Pty) Ltd & Others *(1) 1998 (3) SA 281 (T) at 290D). In* Lourenco *Southwood J (at 290D–E) quoted the definition of "reconsider" in the* Shorter Oxford English Dictionary *as follows:*

> *"1. To consider (a matter or thing) again; (b) to consider (a decision, etc) a second time with a view to changing or amending it; to rescind, alter.*
>
> *2. To reflect on one's conduct with a view to . . . amendment."*

[10] *When a rescission of a default judgment granted by the registrar is to be reconsidered in terms of rule 31(5)(d), the underlying need for the grant of such a power is equally the absence of the aggrieved party at the time the judgment was granted. The object is equally to obtain redress against an injustice, or an imbalance created by the judgment. Of importance will also be factors relating to the reasons for the absence of the aggrieved party, as well as the period the judgment has been in existence, without challenge.*

[11] *I therefore, with respect, disagree with the views of Hancke J in* Benbrook, *supra, that a "reconsideration" of a default judgment granted by the registrar in terms of rule 31(5), does not mean that the court substitutes its discretion for that of the registrar and will only interfere with the judgment, if it is of the opinion that the registrar has erred. In my view, the power accorded to the court is precisely that of substituting its discretion for that of the registrar. I am fortified in this view by the self-evident fact that at the stage when the court is asked to reconsider a default judgment granted by the registrar, it will have before it the contentions of the aggrieved party, which in the nature of things, the registrar will have been ignorant of. The registrar may not have erred in granting judgment, on the information available to him at the time, but in the light of the further information available to the court at the time of reconsideration of the judgment, it may be apparent that the judgment cannot stand.'*

[emphasis supplied]

[11] I am in respectful agreement with the conclusions reached by the court in *Pansolutions* (*supra*) as well as the view expressed that the approach adopted therein *'has the merit of removing any unwarranted distinction, between the criteria which are to be satisfied, to achieve success in either instance'* (at para [14]).

[12] In addition both counsel approached the present matter, correctly in my view, on the basis that the requirement of *'good cause'* stipulated in rule 31(2)(b) applies equally to an application for the reconsideration of a default judgment granted by the registrar. It is thus necessary to refer briefly to the onus that rests upon the applicants in this regard.

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

[13.1] 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;

[13.2] show that his application is *bona fide* and not made with the intention of merely delaying the respondent's claim; and

[13.3] 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.
[referred to in *Muller v Cancun Investments 25 (Pty) Ltd* (case numbers 18828/2012 and 5868/2009) [WCHC] delivered on 14 December 2012 at para [8].]

[14] There is no statutory provision, common law principle, rule of court or rule of practice to which regard may be had in order to determine the length of time that is required before a summons may be regarded as "stale" or having lapsed due to "superannuation". It is in the discretion of the court to allow proceedings on a stale summons to continue: see Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa 5th ed at page 505. The authors state that if a plaintiff issues summons and the defendant ignores it the plaintiff must nonetheless proceed with the action within a reasonable time. What is a reasonable time will depend upon the particular facts of each case. In *Molala v Minister of Law and Order and Another* 1993 (1) SA 673 (WLD) Flemming DJP summarised the approach to be adopted by the court at 677C-E as follows:-

'The approach which I am bound to apply is therefore not simply whether more than a reasonable time has elapsed. It should be assessed whether a facility which is undoubtedly available to a party was used, not as an aid to the airing of disputes and in that sense moving towards the administration of justice, but

knowingly in such a fashion that the manner of exercise of that right would cause injustice. The issue is whether there is behaviour which oversteps the threshold of legitimacy. Nor, in the premises, can plaintiff be barred simply because defendants were prejudiced. The increasingly difficult position of the defendants is a factor which may or may not assist in justifying an inference that plaintiff's intentions were directed to causing or to increasing such difficulties. But the enquiry must remain directed towards what plaintiff intended, albeit in part by way of dolus eventualis. *The increase in defendants' problems is, secondly, a factor insofar as the Court, on an overall view of the case, is to exercise a discretion about how to deal with a proven abuse of process.'*

[emphasis supplied]

[15] In *Sanford v Haley NO* 2004 (3) SA 296 (CPD) at paras [8] to [9] Moosa J, referring to s 173 of the Constitution, said the following:-

'[8] In terms of s 173 of the Constitution the High Court has the inherent power to protect and regulate its own process and to develop the common law, taking into account the interest of justice. It has an inherent jurisdiction to control its own proceedings and as such has power to dismiss a summons or an action on account of the delay or want of prosecution. (Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa *4th ed at 547;* Hunt v Engers *1921 CPD 754;* Western Assurance Co v Caldwell's Trustee (supra *at 272).) The Court will exercise such power sparingly and only in exceptional circumstances because the dismissal of an action seriously impacts on the constitutional and common-law right of a plaintiff to have the dispute adjudicated in a court of law by means of a fair trial. The Court will exercise such power in circumstances where there has been a clear abuse of the process of Court. (*Kuiper and Others v Benson *1984 (1) SA 474 (W) at 477A;* Molala v Minister of Law and Order and Another *1993 (1) SA 673 (W);* Western Assurance Co v Caldwell's Trustee (supra *at 271).)*

> *The test*
>
> *[9] The prerequisites for the exercise of such discretion are, first, that there should be a delay in the prosecution of the action; secondly, that the delay is inexcusable and, thirdly, that the deceased is seriously prejudiced by such delay. (*Gopaul v Subbamah *2002 (6) SA 551 (D).)'*

[16] In *Golden International Navigation SA v Zeba Maritime Co Ltd* 2008 (3) SA 10 (CPD) Griesel J highlighted the requirement that the plaintiff furnish an acceptable explanation for the delay. In that case the defendant had applied to strike out the action as being vexatious and/or an abuse of the process of court since the plaintiff had failed to take any steps for five years from the date upon which the pleadings had closed to prosecute its claim. In the present matter the enquiry relates rather to the period between the institution of action and default judgment finally being obtained by the respondent. However in my view there is no reason in principle why the same should not apply in considering the merits of an application for rescission of judgment where the respondent has delayed for an inordinate length of time prior to obtaining that judgment, since this is one of the factors to be considered in determining whether the applicants have shown that they have a *bona fide* defence in the sense set out in *Grant v Plumbers* (*supra*).

[17] Of course, this does not relieve the applicants of the onus that rests upon them to establish the absence of the element of wilful default. The wilful nature of an applicant's default is one of the factors which the court will take into consideration in the exercise of its discretion to determine whether good cause has been shown. Insofar as an applicant's explanation for his default is

concerned, it was held in *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A that:-

> *'It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.'*

[18] In *Maujean t/a Audio Video Agencies v Standard Bank of South Africa Ltd* 1994 (3) SA 801 (CPD) at 803H-I it was held that wilfulness in the context of a default judgment:-

> *'connotes deliberateness in the sense of knowledge of the action and of its consequences, i.e. its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be.'*

[19] It is also necessary to touch briefly on the issue of prescription in the context of considering whether the applicants have established a *bona fide* defence. In support of his submission that, were the judgment granted by the registrar to be set aside, nothing would preclude the respondent from again proceeding against the applicants, the respondent's counsel relied on the decision of Motata J in *The Land and Agricultural Development Bank of South Africa v Holeni* (case no 13080/2004 High Court, Pretoria, delivered on 5 December 2006) where the court found that the plaintiff (who is the respondent *in casu*) fell within the meaning of *'the State'* in s 11(b) of the Prescription Act 68 of 1969 (*'the Prescription* Act'); and that accordingly a 15 year period of prescription applies to claims advanced by the respondent. However, this decision was

overturned by the Supreme Court of Appeal in *Holeni v The Land and Agricultural Development Bank of South Africa* (266/08) [2009] ZASCA 9 (17 March 2009) where it was held that the respondent does not fall within the definition of *'the State'* in s 11(b) aforesaid and that accordingly the 3 year period of prescription contained in s 11(d) of the Prescription Act applies. Navsa JA, who delivered the unanimous judgment of the court, had the following to say at para [39]:-

> *'I am unable to understand how the spirit, purport and objects of the Bill of Rights are served by interpreting s 11(b) of the Act to provide the benefit of the 15-year prescription period. In my view, the objects of the bank are best met by an alert management that recovers monies due to it diligently and promptly so as to optimise the use of its funds to meet the urgent demands of land reform and modernisation of South African agriculture. The facts of this case speak volumes of the bank's laxity in recovering funds due to it.'*

The factual matrix

[20] As already indicated the applicants are the co-trustees of the Trust which previously conducted a farming operation. On 4 April 1998 the applicants entered into a written agreement with the respondent in terms of which the latter lent and advanced an amount of R276 000 to the Trust on the terms and conditions contained therein.

[21] In particular the loan was repayable with interest in eight annual instalments, the first on 15 March 1999 and the last on 15 March 2006; and there is no acceleration clause in the agreement.

[22] The Trust fell into arrears with its payments and the last payment that it made prior to the issue of summons by the respondent was the amount of R30 000 on 6 December 2003. During the months that followed correspondence was exchanged between the parties and/or their respective legal representatives regarding the default, culminating in a letter dated 2 July 2004 when the applicants made a further proposal to settle the amount due. This letter was referred to the respondent by its attorney for instructions on 7 July 2004. The respondent's reaction was to instruct its attorney to proceed with summons.

[23] The respondent issued summons on 20 August 2004 in which it claimed payment of the sum of R552 000 (the claim being abated in terms of the *in duplum* rule) together with interest and costs; alternatively, and in the event of *'this Honourable Court'* finding that there was no acceleration clause in the agreement, payment of the sum of R207 225 *'being the sum of the six annual capital repayments due on 15 March 1999 to 15 March 2004'* plus interest and costs.

[24] The summons was served on the applicants on 31 August 2004. They did not enter an appearance to defend but instead addressed a revised settlement proposal to the respondent on 10 September 2004. This proposal was rejected by the respondent on 3 January 2005 and (for reasons unknown) again in identical wording on 24 January 2005. The applicants then made a further payment of R100 000 on 15 February 2005, which interrupted prescription in terms of s 14(2) of the Prescription Act; and prescription would thus have

commenced to run afresh for a period of three years, terminating on 14 February 2008.

[25] Thereafter the applicants heard nothing further from the respondent until a warrant of execution was served on them by the sheriff on 19 March 2008 pursuant to a default judgment granted by the registrar on 5 March 2008 for the main claim of R552 000 which was based on a non-existent acceleration clause in the agreement.

[26] It subsequently emerged that the respondent had applied for default judgment on two earlier occasions but that the registrar had declined both applications. The respondent did not take this court into its confidence about when the first application was made, but alleged that:-

> '20. *In view of the absence of an acceleration clause in the agreement, the Registrar of this Honourable Court was not prepared to grant judgment for the full amount of the claim but indicated to* [the respondent's erstwhile attorney, Mr Twala] *that upon receipt of an appropriate certificate, judgment would be granted for the alternative amount.*
>
> 21. *The respondent instructed Twala, with specific reference to the provisions of the Land Bank Acts No. 13 of 1944 and No. 15 of 2002, to advise whether the Registrar was correct in refusing to grant judgment for the full amount of the claim.*
>
> 22. *Twala informed the respondents that the relevant provisions in the Acts do not assist the respondent in circumstances where the agreement does not specifically provide for the acceleration of the debt in the event of default. Twala requested the relevant certificate of balance in confirmation of the amount then and during* [sic] *payable in order to satisfy the Registrar's requirement.*

23. *For some unknown reason, this certificate was never presented. I can only assume that the matter was overlooked as a result of personnel changes on the side of the respondent and the misfiling of the file by Twala during the merger with the respondent's attorneys of record.*

24. *It needs to be mentioned that the respondent's attorneys of record were handling matters on behalf of the respondent at the time when Jeftha Twala Attorneys were also acting on behalf of the respondent.*

25. *During an auditing exercise, I discovered that no further progress was made with this matter and requested Mr Dawie Malan ("Malan") of the respondent's attorneys of record to look into the matter and to continue handling the matter on behalf of the respondent.*

26. *Malan made enquiries at the office of the Registrar and discovered that the Court file had gone missing. He proceeded with a new application for judgment and addressed a letter to the Registrar, explaining the situation, on 25 October 2007…'*

[27] The aforementioned letter of 25 October 2007 merely contains the following:

'We refer to the above matter.

We advise that the court file has gone missing. An application for default judgment had previously been made in this matter. We have been advised that a query has been raised on the application. In light of the fact that we are bereft of the court file, and accordingly the queries raised on the application, we seek your indulgence in considering our application afresh.

We thank you for your indulgence in this regard.'

[28] On 1 November 2007 the registrar informed Mr Malan (another of the respondent's erstwhile attorneys) that default judgment could not be granted since the summons had called upon the applicants to file a notice of intention to

defend, if any, at *'New High Court Building, Corner Hector Pietersen & University Drive, Mmabatho'* and that the incorrect rule had been cited for *'service'* upon the applicants. (It seems that the registrar had meant to refer to the respondent's failure to draw the applicants' attention to the provisions of rule 19(1).)

[29] The respondent alleges that Mr Malan attended to the *'necessary amendment'* to the summons and on 14 December 2007 addressed a letter to the sheriff requesting him to re-serve the amended summons on the applicants.

[30] On 15 January 2008 the sheriff rendered a return of non-service with the remark that *'Farm is sold – Trust does not exist anymore at given address. Informed by Mr Voëg'.*

[31] The respondent's former attorneys then appointed tracing agents to ascertain the whereabouts of the applicants. On 28 January 2008 the tracing agents, Orion Tracers, provided the respondent's former attorneys with both the home and work addresses of the applicants. However the attorneys did not attempt to serve the amended summons on the applicants at the address provided by the tracing agents concerned. The respondent simply went ahead and again applied for default judgment on 4 March 2008. An affidavit by a Mr Meyer (a candidate attorney in the employ of the attorneys at the time) which was filed in support of the application for default judgment contained the following allegations:-

'3. This matter was first handled by Mr Zithulele Twala of the firm Jeftha Twala Inc, then taken over by Mr Dawie Malan when the practice of Jeftha Twala Inc was absorbed into the practice of Cliffe Dekker Inc.

4. Despite a diligent search the original summons was nowhere to be found.

5. I attach a copy of the summons stamped by the Registrar of this Honourable Court dated 20 August 2004.

6. I respectfully submit this to be a true copy of the original summons.

7. We further submit that the Application for Default Judgment should be granted, as prayed for.'

[32] The application for default judgment only made reference to the respondent's main claim of R552 600 and costs. No reference was made to the alternative relief sought by it; nor was any reference made to the concerns previously raised by the registrar on two separate occasions. They were simply ignored by the respondent.

[33] The respondent seeks to explain its conduct away by alleging that:-

'Despite the fact that the summons in its amended form had not been served on the [applicants] *the Registrar was satisfied that there was no prejudice suffered by the* [applicants] *and granted judgment on 5 March 2008. A warrant of execution was issued on 6 March 2008. I am advised that, in view of the correspondence between the trust's attorneys of record and the respondent's erstwhile attorneys of record, prior and subsequent to the issuing of the summons, that there can be no doubt that the trust was not prejudiced at all by the incorrect address reflected on the summons and the incorrect rule in respect of which a service address had to be provided.'*

[34] Of course, what the respondent has pertinently failed to address is that: (a) the last communication between the parties' respective attorneys had been more than three years earlier on 24 January 2005; (b) the respondent, with knowledge of the applicants' whereabouts on 28 January 2008, nonetheless chose not to have the amended summons served on the applicants but instead to rely on a return of service dated 31 August 2004 (three and a half years earlier) despite the concerns raised by the registrar; (c) did not disclose to the registrar that a query had previously been raised concerning the main claim in circumstances in which there was no acceleration clause in the agreement that could be relied upon; and (d) made no mention whatsoever of the substantial payment of R100 000 made by the applicants on 15 February 2005, i.e. five and a half months after service of the summons and more than three years before default judgment was sought for the third time and finally granted for the full amount initially claimed in the main claim.

[35] The respondent thereafter instructed the sheriff to serve the warrant of execution at the applicants' home address, which he attempted to do on 19 March 2008. It was only at that stage that the applicants became aware that the respondent had in fact proceeded against them.

Evaluation

[36] It is against this background that the applicants contend that:

[36.1] if they had been made aware that the respondent intended to pursue its action after more than three years of silence, they would have delivered a notice of intention to defend as well as a special plea that the respondent had unreasonably delayed the prosecution of its case;

[36.2] since the respondent had accepted their payment of R100 000 on 15 February 2005 without demur and without having given any subsequent indication of its intention to proceed against them, they had formed the reasonable belief that the respondent no longer wished to pursue its claim. Accordingly their default was not wilful;

[36.3] in the event of them being afforded the opportunity to advance their special plea and that plea being upheld, this may effectively put an end to the matter on the ground of prescription. They have thus shown *bona fide* defences, namely superannuation and prescription, which *prima facie*, carry some prospect of success; and

[36.4] in any event, on the respondent's own version, the judgment on the main claim was wrongly granted by the registrar for the simple reason that the respondent had relied on a non-existent acceleration clause in the agreement.

[37] For the reasons that follow I am satisfied that rescission should be granted. First, the explanation put up by the respondent for the delay in prosecuting its claim prior to obtaining default judgment falls far short of being acceptable. On

the contrary, and in the words of Navsa JA in *Holeni* (*supra*), it *'speaks volumes of the bank's laxity in recovering funds due to it'*. To the extent that it was contended that the defence of superannuation was not available to the applicants when default judgment was obtained, this is incorrect, since more than three years had passed since service of the summons upon them.

[38] Second, not only did the respondent display a disregard for acting diligently and promptly in pursuing its claim, it appears (through its erstwhile attorneys) to have actively avoided bringing its intention to proceed (after that intention was eventually formed) to the notice of the applicants. The respondent knew that it had not complied with the registrar's requirements; knew the applicants' current whereabouts as a result of having appointed tracing agents; nonetheless elected not to inform the applicants of its intention to apply for default judgment after more than three years; and misled the registrar into granting default judgment in its favour on the main claim.

[39] Third, the applicants were clearly not in wilful default. They had heard nothing whatsoever from the respondent since making the payment of R100 000 on 15 February 2005 until the sheriff served the warrant of execution on 19 March 2008. To my mind their contention that they had thus formed the belief that the respondent did not intend to proceed was entirely reasonable in the circumstances.

[40] Fourth, judgment was granted for the incorrect amount. During argument the respondent's counsel sought to persuade me that in light of the decision in

Scott v Holmes 1916 NPD 33, where the court found that an acceleration clause is implied by law in the event of a default, the respondent had been entitled to obtain judgment for the full amount of its claim. However, and to the extent that *Scott* (*supra*) is correct (and in my respectful opinion it is not) what the respondent overlooks is that it did not rely on any such implied term in its summons. The respondent instead alleged that the written agreement provided, as one of its material (and thus express) terms, that should the applicants fail to make any payment on due date the respondent would immediately be entitled to claim the full capital balance and interest owing. This is presumably why the registrar in considering the first application for default judgment raised the concerns that he did. These concerns were never addressed by the respondent and it furthermore failed to take any steps to amend its summons to incorporate such an "implied term" prior to obtaining judgment.

[41] I am accordingly of the view that the applicants have: (a) given a reasonable explanation for their default; (b) shown that their application is *bona fide* and not made with the intention of merely delaying the respondent's claim; and (c) shown that they have a *bona fide* defence which, *prima facie*, carries some prospect of success.

[42] The applicants' counsel submitted that in the event of the application being successful, it would be appropriate to order that costs stand over for determination at trial, and in the exercise of my discretion I intend making such an order.

[43] I accordingly make the following order:-

[1] The applicants' non-compliance with rule 31(5)(d) is condoned.

[2] The default judgment granted on 5 March 2008 by the registrar is hereby set aside.

[3] The applicants shall deliver their plea by not later than Friday, 15 March 2013 failing which they shall be barred from so doing.

[4] The costs of this application shall stand over for determination at trial.

J I CLOETE