

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

05/05/2011

CASE NUMBER: 6012/2007

In the matter between:

ANNA MARYNA VAN DER WALT N.O	1 ST APPLICANT
GERTT JACOBUS DU PLESSIS VAN DER WALT N.O.	2 ND APPLICANT
ANNA MARYNA VAN DER WALT	3 RD APPLICANT

And

ABSA ANK LIMITED	RESPONDENT
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In re:

ABSA BANK LIMITED	PLAINTIFF
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AND

RESPONDENT

DELETE WHICHEVER IS NOT APPLICABLE	
(1) FILE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
2011/05/05 DATE	 SIGNATURE

ANNA MARYNA VAN DER WALT N.O	1 ST DEFENDANT
GERT JACOBUS DU PLESSIS VAN DER WALT N.O.	2 ND DEFENDANT
ANNA MARYNA VAN DER WALT	3 RD DEFENDANT

JUDGMENT

MAVUNDLA. J.

- [1] Default judgment was granted against the trustees of Gert Van Der Walt Familietrust No IT68/1998 and also against the Third Defendant in her personal capacity on 27 October 2008. The applicants are now bringing an application to have the default judgment rescinded. I shall henceforth refer to the parties as they are referred to in the main action
- [2] It is common cause that: The plaintiff's claim is in respect of the balance of moneys lent and advanced to the Gert Van Der Walt Familietrust No IT68/1998 on 28 September 2004, secured by a registered bond over certain immovable property, in favour of the plaintiff. The first and second defendants are sued in their representative capacity as trustees. The third defendant's liability arises from the very fact that she signed in her personal capacity a surety. The relevant bond was limited to an amount of R175 000. 00. The third defendant renounced her rights to the advantages of cession and cause of action. The third

defendant and the second defendant are married in community of property. The second defendant gave his consent to the third defendant entering into the surety agreement with the plaintiff.

- [3] The summons were served on 21 February 2007 at the address 1200 Ruimsigsingel, Pretoriuspark, Woodhill. In respect of the third defendant the summons was served at the said address on the second defendant. In respect of the second defendant the summons was served personally on the second defendant on the aforesaid date and place and time. In respect of the first defendant the summons was served on the second defendant. The aforesaid address is the chosen *domicilium citandi et executandi* address of the respective parties¹.

- [4] *In casu* the defendants duly filed their plea. The pleadings were closed and the matter was set down for trial on 27 and 28 October 2008. It needs mention that there had been an attempt to dispose the claim through summary judgment application,

¹ Vide paginated page 24 of the pleading documents (annexure A Bond agreement.

but it came to naught. I need not dwell therewith for purposes of this application. The defendants did not attend court on the scheduled trial date and judgment was granted against the defendants as prayed for.

- [5] It is common cause that the application for rescission was filed on the 14 November 2008. The plaintiff filed its notice of intention to oppose on 18 November 2008, well within the 25 November 2008 which was the date stipulated by the defendants, in terms of rule 6(5)(b). The plaintiff had to file its opposing affidavit within 15 days from the 25 November 2008. I take note of the fact that it is a norm that attorneys' offices are generally closed during the period 15 December to the first week of the following year. Rule 19 (1) provides that the period between 16 December and 15 January shall not be counted for computing the period of filing a notice of intention to defend. Invariably, practitioners who litigate in the High Court are influenced by the period mentioned in rule 19(1) in computing the period of filing of a pleading. This rule relates to the filing of a notice of intention to oppose. It is doubtful whether this rule

can be interpreted to include any other pleading either than the notice of intention to defend or oppose. On a strict interpretation of the rules, it means that the plaintiff filed its answering affidavit out of time. It was submitted on behalf of the plaintiff that the plaintiff was not out of time, as it filed on the last day, if one excludes the period mentioned in rule 19(1). Because of the practical reality I have referred to herein above, I am prepared in the exercise of my discretion to condone the filing of the plaintiff out of time notwithstanding the fact that there is no formal application for condonation. The reason for this is because it cannot be said that the delay was inordinately long. The delay was not unreasonable to warrant a formal application for condonation.

- [6] It cannot, however be said that the replying affidavit of the defendants was filed within reasonable time. It was only filed on 2 September 2009, seven months later. I am of the view, that the delay is unreasonable and consequentially I am disinclined to exercise my discretion in favour of the defendants. Consequentially, I will disregard the defendant's replying

affidavit and dispose of the applications for rescission on the strength of the founding affidavit of the applicants and the plaintiff's answering affidavit.

- [7] An application for rescission of a judgment can be brought either in terms of (a) Rule 31(2)(b); (b) Rule 42(1); or common law. Under rule 31(2)(b) the applicant must²:
- (a) give reasonable explanation of 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.
 - (b) show that his application is *bona fide* and not made with the intention of merely delaying plaintiff's claim.
 - (c) show that he has a *bona fide* defence to the plaintiff's claim. It suffices if he can make a *prima facie* defence by setting out facts, if established during the trial, would entitle him to his relief he seeks.³

² Superior Court Practice at B1-202

³ *Sanderson Techntool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (W) at 575H-576A where Coertze said in respect of the requirements of rule 31(2)(b) "An applicant who claims relief under this Rule, should comply with, *inter alia*, the following requirements. His application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim and he must show that he has a *bona fide* defence to the plaintiff'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 entitle him to the relief

[8] Rule 42 (1)(a) deals with judgments that were erroneously sought or erroneously granted in the absence of the other party. I do not understand the defendants' case to be premised on this rule. I shall therefore not say much in that regard.

[9] Whether the application is brought in terms of rule 31(2)(b) or under common law, the applicant must satisfy the court that he has a "good cause" or sufficient cause" why he was in default. At common law the Court has a discretion to grant rescission of judgment where sufficient or good cause has been shown. It is not enough if one of the prerequisites is not present⁴.

[10] The plaintiff sought the following order:

10.1 Payment of an amount of R2 213 794. 36 (two million, two hundred and thirteen thousand seven hundred and ninety four rand and thirty six cent);

asked for. He need not deal fully with the merits of the case or produce evidence that the probabilities are actually in his favour.

⁴ Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others 1996 (4) SA 411 (CPD) at 417J-418B; Collyn v Tiger Foods Industries Limited t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) PARA [11]; Harris v ABSA Bank Ltd t/a Volkskas 2002[3] ALL SA 215 at 217.

- 10.2 Interest at the rate of 12.50% per annum (calculated monthly and capitalized) from 10 January 2007 to date of payment;
- 10.3 An order in terms of which the immovable property Erf 412, Pretoriuspark Extension 6 Township, Registration Division J.R., Gauteng Province in Extent of 1044 (One thousand and forty-four) Square Metres held in terms of Title Deed Nr T91774/98 specially executable;
- 10.4 Costs of suite;
- 10.5 Other or alternative relief;
- 10.6 The plaintiff further seeks that the third defendant's liability be limited to an amount of R350 000. 00 (three hundred and fifty thousand rand).

[11] The founding affidavit on behalf of the defendants was deposed to by the second defendant. The second defendant avers that since 1996 he suffers from heart ailment which worsened since August 2008. He was under the medical care of Dr Corrie van Wyk and had to undergo a bypass heart operation on 4 November 1997.

[12] It needs mention that the defendants had filed their plea. The matter was set down for trial. According to the second defendant, the matter was set down for trial on 27 October 2008. As the trial date approached, his health worsened and he instructed his attorneys of record to seek a postponement of the matter on 27 October 2008. The approaching trial date resulted in serious stress on his part which exacerbated negatively his ailment. His health condition was such that he could not attend trial. His attorneys appraised the plaintiff's attorneys of his condition during September 2008 at least six weeks before trial date. The plaintiff's attorneys were however sceptic of his condition and as a result he had to bring a substantive application for a postponement. shortly before the trial his attorneys of record withdrew from the matter and as a result there was no counsel instructed to bring the application for a postponement.

[13] The second defendant further avers that he was subsequently informed by his attorney that default judgment was granted

against him on 27 October 2008 and there was no application for a postponement application at all. He further avers that the court did not have an opportunity to consider the merits of his application for a postponement. He has been informed that the plaintiff filed his opposing affidavit for the postponement in which the latter took issue with the fact that the second defendant did not deal with the merits of the case. The second defendant further submits that on advice it was not necessary to deal with the merits of the case at that stage. The second defendant further avers that he would not abuse his health condition to seek a postponement unnecessarily.

[14] It would seem that the plaintiff's scepticism over the second defendant's health condition, led to the plaintiff arranging for by Dr. Landeur to present himself at court in anticipation of the application for a postponement. However Dr. Landeur filed an affidavit which was part of the opposing affidavit of the plaintiff, in anticipation to oppose the envisaged application for a postponement. The second defendant further avers that it would seem tat there was a misunderstanding between himself

and his Dr. Landeur. He further stated that the misunderstanding between himself and Dr. Landeur could not be resolved through affidavits and in all probabilities this would have required that the matter be referred to oral evidence. He further stated that it would seem that the plaintiff exerted pressure on Dr. Landeur who as a result did not want to be involved in the private affairs of his patient. He further contends that the court was deprived of an opportunity to decide whether he had good reason for seeking a postponement. He contends that he had a lawful reason for seeking a postponement.

- [15] The second defendant further refers to the fact that the plaintiff had sought a summary judgment. In that regard the second defendant had filed an affidavit opposing the grant of the summary judgment. He stated further that in his then opposing affidavit he had disclosed a defence. He further direct the court's attention to, as he contends, the fact that the authority of the deponent of the affidavit in support of the application for the summary judgment does not appear from the affidavit. He further contended that neither the resolution of the Board of

directors of the decision of the 28 November 1993 nor the list of balances are identified. Neither does authority appear from the affidavit. He further contended that there was a further irregularity in the sense that whereas the plaintiff relies on a contract, it is not alleged who represented the parties during the conclusion of the contract, neither did the annexure to the particulars of claim identify the representatives of the plaintiff. He further contended that the application for summary judgment was incomplete. The plaintiff's standard bond terms which were filed at the Deeds Office in terms of reference number BC1/1993 form part of the application were not attached.

[16] The second defendant further contends that their defence is fully set out in the plea already filed on their behalf and beseech this court to have regard thereto. The second defendant further contended that there are no averments made out why the third respondent is being held liable in her personal capacity. The second defendant further contended that there is a bona fide defence disclosed by the defendants. He further averred in his

affidavit that he has been advised by his present attorney of record that their plea would have to be amended. He further avers that he did not receive proper advise notice of the withdrawal of his attorneys' of record so as to enable him to make alternative arrangements.

[17] The second defendant has also attached a copy of his affidavit that was filed in opposing the summary judgment application, however, I do not intend to chronicle the contents thereof for purposes of this present application. I have read that affidavit as well.

[18] The third defendant filed an affidavit verifying what was deposed to by the second defendant, in so far as where reference is made to her. She avers in her affidavit that she has been cited as the first defendant in her capacity as the trustee of the Gert van der Walt Family Trust number IT 000068/1991 and also in her personal capacity. She averred that there are no basis set out in the declaration for being cited as such. She further confirms that the second defendant was already since

1996 plagued by heart ailment. She further stated that in so far as the application for rescission of the judgment in her personal capacity is concerned, she left every thing in the hands of the second defendant. She had no knowledge at all that the application for postponement was not heard at court and she learnt with great shock of the judgment against her having been granted.

[19] The plaintiff has filed its answering affidavit deposed to by one Mr. Johaanes Hendrik De Bruy. The latter is the manager of the legal division of the plaintiff in Johannesburg Gauteng. He has also stated that he is duly authorised to depose to the affidavit and that also because of his position as the manager in the legal department is also authorised through his functionary duties to represent the plaintiff.

[20] Where a party seeks to challenge the authority of the person deposing to an affidavit, in the face of an allegation that he is duly so authorised, that attack is misplaced because, it is the institution of the proceedings and the prosecution thereof which

must be authorized. *Vide* the matter of *Ganes and Another v Telecom Namibia Ltd*⁵ where the Supreme Court of Appeal stated that it is irrelevant whether the deponent to an affidavit has been authorised to depose thereto. It is the institution of the proceedings and the prosecution thereof which must be authorized. A party who wants to challenge the authority of a person allegedly acting on behalf of another in instituting the legal proceedings, must direct his salvo through Rule 7⁶.

[21] It needs mention that the defendants have not filed their replying affidavits. The defendants are the applicants in this case, as such they bear the onus to satisfy the court that they seek should be granted. In opposed motion proceedings, the court will grant the relief sought "if those facts averred in the applicants' affidavit which have been admitted by the respondent, together with the facts alleged by the respondent,

⁵ 2004 (3) SA 615 (SCA) at 624G-625A.

⁶ *Vide Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 206D-J.

justify such an order; *vide Plascon-Evans Paints v Van Riebeeck Piant*s⁷.

[22] The reason for the second defendant's failure to attend court on the scheduled trial date of 27 and 28 October 2008 was that he was on account of ill health indisposed and had to consult with Dr. Landauer on the aforesaid date⁸. The plaintiff has countered this allegation by attaching an affidavit of denying Dr. Landauer, who was the second defendant's medical doctor. Dr. Landauer has since confirmed that the second defendant did not consult with him on the 27 October 2008⁹. An interesting revelation comes from the second defendant in paragraph 17 of the postponement bundle at page 6 where he says that: "Although he is criticized of having made an appointment for the 27 and 28 October 2008, he is still of the opinion that he was still at risk of stress associated with attending trial. The plaintiff denies that the second defendant was ill disposed so as not to be in a position to attend court on the 27 and 28 October.

⁷ 1984 (3) S 623 (AD) at 634E-635C.

⁸ Vide paginated page 7 paragraph 19 of postponement bundle. The second defendant has referred this court to this postponement bundle.

⁹ Vide annexure "OB2" paginated page 83 of the application for rescission bundle.

[23] The second defendant is not a medical expert so as to formulate a persuasive opinion that he was at risk in attending court on that day in question. The very fact that his own Dr. Landauer contradicted him on the aspect of an appointment for that day, leaves an impression that the second defendant simply did not want to attend trial on that day. He had no good reason for failing to attend court. Besides, there is no explanation why the third defendant, his spouse, did not attend court on the day in question and inform the court that he was indisposed.

[24] I deem it not necessary to traverse all the issues raised by the second defendant in support of his application and by the plaintiff against the rescission. The issue I referred to herein above, reveals, in my view, a serious credibility flaw on the part of the second applicant. It seems to me, that he was prepared to pervert the truth to his favour, as Dr Landauer has contradicted him. That being the case, I am disinclined to exercise my discretion in favour of the defendants. I am of the

view that I should not in the circumstances of this case grant rescission because I am not persuaded that good cause for the failure to attend court on 27 and 28 August 2008 has been shown.

- [25] I also bear in mind that the defendants have said nothing about their indebtedness to the plaintiff's claim, save raising technical defences. In this regard, I find it appropriate to refer to the matter of *Trans-African Insurance C O. Ltd v Maluleka* 1956 (2) SA 273 (A.D.) at 278 F-G where the Appeal Court said:

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other had technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

- [26] The third defendant bound herself as surety. Annexure D was attached to the summons. She can be in no doubt in what capacity is she being held liable. Besides, technical defences

are not to be countenanced. She has failed to disclose any substantive defence to this claim.

[27] I am of the view that the defendants have failed to satisfy me that, in the circumstances of this case, firstly they have a *bona fide* defence to the plaintiff's claim; secondly that they had good cause for their default; and thirdly that I should exercise my discretion in their favour.

[28] In the premises, I make the following order:

1. That the application for condonation for the filing of the replying affidavit is dismissed;
2. That the application for rescission is dismissed;
3. That the defendants are jointly and severally the one paying the others be absolved, to pay the costs of this application on a party and party scale.



N.M. MAYUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 05/05/2011

PLAINTIFF'S ATT : VAN ZYL LE ROUX

PLAINTIFF'S ADV : MR VAN COLLOR

DEFENDANT'S ATT JACQUES VAN DER MERWE ATT

DEFENDANT'S ADV : E P VAN RENSBURG