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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 40203/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: NO

(3) REVISED: YES

DATE

SIGNATURE

In the matter between:

LEN H GOBEY

First Applicant

(Identity Number: 8[...])

CHANTAL L GOBEY

Second Applicant

(Identity Number: 8[...])

and

NEDBANK LIMITED

Respondent

(Registration Number: 1951/000009/06)

In re:

NEDBANK LIMITED

Plaintiff

(Registration Number: 1951/000009/06)

and

CHANLOU TRADING CC

First Defendant

(Registration Number: 2002/052033/23)

LEN H GOBEY

Second Defendant

(Identity Number: 8[...])

CHANTAL L GOBEY

Third Defendant

(Identity Number: 8[...])

NKOSINATHI ABSALOM NGEMA

Fourth Defendant

(Identity Number: 7[...])

JUDGMENT

H G A SNYMAN AJ

INTRODUCTION

- [1] The applicants seek rescission of a default judgment the Honourable Mr Justice Millar J granted against them in favour of the respondent / plaintiff (“*Nedbank*”) on 10 June 2022 (“*the order*”). The application is brought in terms of rule 31(2)(b) of the Uniform Rules of Court (“*the rules*”).
- [2] In terms of the order, the applicants were ordered to make payment jointly and severally to Nedbank in the amount of R613,807.79, with interest at the rate of 17.50% per annum from 30 April 2021 to date of final payment, and costs on the scale as between attorney and client.
- [3] The applicants’ indebtedness relates to them signing surety to Nedbank for

an outstanding overdraft facility of the first defendant (“*Chanlou*”). It is common cause between the parties, that due to certain payments that were made, the order was incorrectly granted in the said amount. Nedbank therefore asks that the order be amended to only reflect the amount of R308,487.97. A draft order to this effect was presented to this court. The applicants on the other hand ask that the order be rescinded by their names being deleted from it in toto.

BACKGROUND

- [4] Chanlou was registered in 2001 and started trading in July 2007. The first applicant (“*Mr Gobey*”) was one of its employees.

- [5] His wife, the second applicant (“*Mrs Gobey*”), was a member of Chanlou.

- [6] The main business of Chanlou was to do electrical work for rolling stock and components (i.e. locomotives and train sets) for the Passenger Rail Agency of South Africa (“*PRASA*”), Transnet and Metro Rail. Chanlou worked directly with and for PRASA and PRASA’s various contractors for the maintenance, repair and general functioning of the South African passenger rail network, from 2007 until 2020. Chanlou’s business was generally stable. It was able to generate a steady flow of income (this is until approximately March 2020).

- [7] During or about July 2013, Chanlou, represented by Mrs Gobey, and Nedbank, concluded a written agreement in terms of which Nedbank would operate a current account for Chanlou. At the time, Nedbank granted Chanlou an overdraft facility in the amount of R750,000. Mrs Gobey signed surety in respect of Chanlou’s indebtedness to Nedbank on 24 July 2013.

- [8] At that stage the applicants were residing at 8[...] D[...] K[...] Street, Rayton Estate, which was a leased property (“*the Rayton property*”). This is the address Mrs Gobey’s recorded in her suretyship agreement as her *domicilium* address. The applicants moved out of the Rayton property in

November 2014. The applicants content that Nedbank was at all relevant stages aware of this.

- [9] Chanlou had an *ad hoc* contract with PRASA for the on-site minor repairs of defective locomotives and train sets. During or about 2016, PRASA cancelled all its *ad hoc* contracts and proceeded to use only general overall (“GO”) contractors. At that stage Chanlou concluded an agreement with Naledi Rail. In terms of this agreement, Chanlou would perform *ad hoc* work on behalf of Naledi Rail in KwaZulu Natal, the Western Cape and Gauteng.
- [10] Chanlou flourished during the period 2017 to 2018. In February 2018, it recorded its highest turnover, namely R50 million for the year. Chanlou’s agreement with Naledi Rail accounted for approximately R20 million of this record turnover.
- [11] During or about 2017, Chanlou needed additional funding and approached Nedbank for the first time to increase its overdraft facility. Nedbank agreed and the overdraft facility was increased “*temporarily*” from R750,000 to R2,050,000 (“*the first overdraft facility increase*”). Chanlou would pay the increased amount back within 12 months. It is common cause that this was done. (There was also a second increase of the overdraft facility on or about 1 March 2018, which was similarly paid back. It is therefore only the amount that remains outstanding on the original amount of the overdraft facility, which forms the basis of the order).
- [12] As a condition of the first overdraft facility increase, Nedbank also required Mr Gobey to sign surety. He did so on 6 April 2017. Mr Gobey was allegedly under the “*impression*” at the time that he was only agreeing to stand as surety for the increased amount of Chanlou’s overdraft facility. Accordingly, that he had been released from the suretyship once the additional amount on the overdraft facility was settled. He raised this issue with Nedbank during March 2020. Nedbank’s reaction was that they found

no evidence on their side that the suretyship was meant to be limited. Save for insisting that his recollection was that the surety was meant to be limited to the temporary increase of the overdraft facility, it does not appear that Mr Gobey ever formally challenge this.

[13] During or about March 2018, PRASA started failing to renew its contracts with its GO and *ad hoc* contractors. In September 2018, Chanlou's relationship with Naledi Rail ended as Naledi Rail was unable to pay its account with Chanlou. Although Chanlou's existing agreements were at the time sufficient to keep the business going, Chanlou gradually became unable to generate new work after PRASA stopped paying its contractors. Sales continued to decline. The applicants explain in detail in the founding affidavit what led to the demise of Chanlou, including that their clients were falling in arrears with payments. This in turn caused them to fall in arrears with their payments to Nedbank, which ultimately resulted in Nedbank cancelling its credit facilities. A further development was that PRASA's offices were effectively closed for most of the Covid-19 lockdown period between March and August 2020.

[14] By or about 2019 to 2020, Chanlou's annual turnover had fallen to R13 million. The applicants assisted in trying to bring Chanlou's overhead expenses down by taking out personal loans while Mr Gobey was retrenched as an employee of the business. Chanlou allegedly survived by buying and selling engineering equipment and products. Since no supplier was prepared to give Chanlou credit facilities, it had to work on a "*cash on demand*" basis. It was, however, not possible to work on this basis with state owned companies, such as PRASA, which was only paying its contractors sporadically, if at all, and only after a period of 120 days. Prior to March 2020, Chanlou allegedly maintained good standing with Nedbank and only began falling into arrears by the latter part of 2020 once it was pressurised by Nedbank to make repayments and decrease the overdraft facilities. Chanlou did further restructuring by January 2021. It sold its stock for scrap just to stay afloat. In February 2021, Chanlou's members agreed

that it would enter into voluntary liquidation. However, the applicants at the time heard rumours that PRASA would soon be awarding *ad hoc* contracts again, for which Chanlou had previously been shortlisted. The members therefore held off on the voluntary liquidation in the hope that the new PRASA contracts would materialise, which eventually happened in 2020. Unfortunately, Chanlou had by then already entered into voluntary liquidation, namely on 24 May 2021.

- [15] Nedbank instituted the action under this case number based on the sureties resulting in the order being granted on or about 13 August 2021. The action was instituted against the applicants, Chanlou and the fourth defendant (“*Mr Ngema*”). Mr Ngema was a member of Chanlou from 2009 until February 2021 when he resigned. He was responsible for sales and marketing at Chanlou.
- [16] The summons was served at the Rayton address. The applicants complain about this. According to them Nedbank at the early stages already knew that they vacated that address. In support of this, they for instance refer to the fact that subpoenas for them to attend a 417 and 418 inquiry held in the winding up of Chanlou were served on their current residential address, namely 1[...] P[...] Road, Golden Springs, Selcourt, Springs (“*the Springs address*”). The applicants allege that it was only on 17 May 2022 that the action came to their attention, when the notices of enrolment of the application for default judgment, to be heard on 10 June 2022, were delivered at the Springs address. Nothing really turns on this, as this court accepts for present purposes that the applicants only became aware of the summons on 17 May 2022.
- [17] When the matter came to the applicants’ attention, they immediately handed the notice of enrolment to their attorney, Mr Clive Kern of Kern & Partners (“*Mr Kern*” and “*Kern & Partners*” respectively). They instructed Mr Kern to oppose the application for default judgment. Mr Kern, however, neglected to timeously deliver a notice to defend the action and/or the

application for default judgment. The order was granted in the applicants' absence on 10 June 2022.

THE LEGAL POSITION

[18] Rule 31(2) provides that:

“(2)(a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.

(b) A defendant may within 20 days after acquiring 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 it deems fit.”

[19] It is trite that if an applicant institutes an application in terms of rule 31(2)(b) for the rescission of a judgment granted by default, it must establish that the judgment is one granted by default; that the judgment was granted due to the failure by the applicant to enter an appearance to defend; the application must be brought within 20 days after the defendant obtained knowledge of the judgment; and sufficient or good cause for the rescission must be shown.

ISSUES TO BE DECIDED

[20] According to the parties' joint practice note, the issue to be decided is whether the applicants show sufficient or good cause for the rescission of the order.

- [21] That is, whether they give a reasonable explanation for their default, show that the application is made in good faith, and that they have a *bona fide* defence to Nedbank's claim.
- [22] A further issue is whether the applicants applied for the rescission within 20 days from the date on which they learned of the default judgment. An ancillary issue is whether the applicants' indebtedness to Nedbank had been reduced by two payments, and what the judgment debt should be. Further, whether Nedbank should be granted condonation for the late filing of its answering affidavit.

NEDBANK'S CONDONATION APPLICATION

- [23] As part of their condonation application Nedbank contends in its answering affidavit that after receipt of the application for rescission, the facts advanced in the founding affidavit had to be investigated. Consultations had to be scheduled between the relevant employees of Nedbank, its attorney and counsel. Nedbank contends that due to circumstances beyond its control, more specifically due to their counsel falling ill, a consultation to discuss the issues raised could not be timeously scheduled.
- [24] It is also stated that following a request the applicants made that all execution steps be held over pending the institution and finalisation of the rescission application, although the request was summarily refused at the time, Nedbank has in fact since ceased with any further execution steps. According to Nedbank, there was therefore no prejudice to the applicants, due to its failure to deliver the answering affidavit timeously.
- [25] As I see it, it would be in the interest of justice for the answering affidavit to be allowed. What weighs heavily in this regard is the fact that it is only in the replying affidavit that the applicants provide a real explanation why the default occurred in their attorney's office, which resulted in the order being granted in their absence. There is therefore no prejudice for the applicants

if the answering affidavit is allowed since they had a full opportunity to reply to it.

THE APPLICANTS' EXPLANATION FOR THE DEFAULT

- [26] The only explanation the applicants advance in the founding affidavit for their default, is that that they handed the notice of set-down informing them that the matter would be heard on 10 June 2022 to their attorney, who failed to act. Nothing is for instance said about what they did during the period of more than three weeks until the default judgment was granted. Nothing is also said in the founding papers of why Mr Kern failed to timeously act on the applicants' instructions.
- [27] The only explanation provided is that on 13 June 2022, Ms Nicola Klue ("*Ms Klue*"), an attorney at Kern & Partners, addressed an email to Nedbank's attorneys ("*Snyman De Jager*") requesting access to the matter on CaseLines.
- [28] On 14 June 2022 Ms Klue phoned Nedbank following up on a response to her email of 13 June 2022. Snyman De Jager advised Ms Klue that they were not prepared to provide her with access to the matter unless she entered an appearance to defend on behalf of the applicants. Ms Klue "*promptly*" attended to this. When the notice to defend the action was delivered on 14 June 2022, Snyman De Jager advised Ms Klue that default judgment had already been granted on 10 June 2022.
- [29] On 6 July 2022, which was 15 court days later, Ms Klue addressed a letter to Snyman De Jager asking that execution steps be suspended while an application for rescission of judgment is drafted and issued. Although Snyman De Jager refused, as things turned out Nedbank actually suspended execution steps. The application for rescission was launched on 13 July 2022. This was within the 20 days provided for in rule 31(2).
- [30] In the answering affidavit Nedbank, correctly in my view, contends that the

applicants' explanation for their 17-day default after becoming aware of the summons is "*vague in the extreme*". Nedbank's attitude is that one would have expected of the applicants to at least in the period between 17 May and 10 June 2022, follow up with Mr Kern whether a notice of intention to defend was in fact delivered, or for Mr Kern to at least contact Snyman De Jager.

[31] Nedbank contends that this constitutes gross negligence and that the applicants cannot hide behind the negligence of their attorney in so far as legal proceedings are concerned. Moreover, that it is not explained why the applicants and their attorney were under the impression that it would serve any purpose to deliver a notice of intention to defend on 14 June 2022, knowing that the hearing date of the application for default judgment was set down for 10 June 2022.

[32] As part of their reply, the applicants contend that they as "*lay persons*" had no knowledge of how they could and should have defended the action or application for default judgment, by appearing at court in person on 10 June 2022, or otherwise. They seemingly trusted their attorney to do so. It is therefore clear that they in fact did nothing during this period to follow up with their attorney.

[33] It is also only for the first time in the replying affidavit that an explanation is provided why Mr Kern did not timeously act on the applicants' instructions. It is stated that Mr Kern was away during the latter part of May 2022. He says it was his intention to deal with the matter upon his return to office at the beginning of June. However, no specific dates or times are provided.

[34] Mr Kern's further explanation is that it was purely due to pressure of work that the matter was not attended to timeously. No further details are provided. It is stated that Mr Kern, upon the oversight coming to his attention, reacted immediately by communicating with Snyman De Jager with a purpose of serving a notice of intention to oppose, but it was simply

too late as the default judgment had already been granted one business day before. This, of course, is also not correct as it was not Mr Kern, but Ms Klue who contacted Snyman De Jager. As this court sees it, the applicants' explanation for their default therefore remains vague in the extreme.

[35] In **De Wet and Others v Western Bank Ltd 1979 (2) 1031 (A) at 1044 C to F** the court held that defendants have a responsibility to communicate with their legal representatives and that they *"cannot divest themselves of their responsibilities in relation to the action and then complain vis-à-vis the other party to the action that their agents, in whom they have apparently vested sole responsibility, have failed them."* In that case the court rejected the defendants' explanation that they took it for granted that their attorney would protect their interests. The court held that the defendants had demonstrated a complete lack of interest in the proceedings and were the authors of their own conduct. As this court sees it, similar conclusions can be drawn about the applicants' conduct in the present matter.

[36] As the court held in **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at paragraph 12:**

"I have reservations about accepting that the defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a reasonable explanation. While the Courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys (Saloojee and Another NNO v Minister of Community

Development). Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success (Melane v Santam Insurance Co Ltd).” (this court’s emphasis)

THE APPLICANTS’ LACK OF A BONA FIDE DEFENCE

- [37] Save for contending that a portion of the judgment debt amount had already been settled, the sole ground for the applicants’ alleged *bona fide* defence is that Mr Gobey was under the impression that he would only be liable as surety in so far as the additional amount of the first overdraft facility increase is concerned, and not for the original portion of the overdraft. This of course does not assist Mrs Gobey.
- [38] Counsel for the applicants submitted that what happened in this case, is similar to what happened in the matter of **Volkskas Beperk v Geyser 1960 (4) SA 412 (T)**. I do not agree. In that matter the court accepted at the exception stage that a plea that the written agreement entered into was contrary to the terms of a prior oral agreement, was sufficient to serve as a defence and that it was not necessary for the defendant to for instance plead rectification of the written agreement. In the present instance, the high-water mark of Mr Gobey’s defence is his “*impression*”. In any event, on the face of it, it does not appear from the suretyship that Mr Gobey signed that it would only be a limited surety and that he would be released from it once the top-up in terms of the first overdraft facility increase was paid. It is stated on the first page thereof that Mr Gobey:

“Bind [himself], jointly and severally, as surety and co-principal debtor in solidum (which means, where there are several sureties, each is liable in full) for repayment on demand of all amounts which [Chanlou] may now or at any time thereafter owe [Nedbank], its successors in title or assignees (hereinafter referred to as

‘Nedbank’), provided that the total amount to be recovered from [him] hereunder shall not exceed in aggregate the sum of 2050000 ZAR (Amount).”

[39] It was therefore submitted on behalf of Nedbank that the principal of *caveat subscriptor* must apply to Mr Gobey and that he is contractually bound to the terms of his surety agreement and cannot escape liability. I agree.

[40] Based on the authority of the Supreme Court of Appeal referred to above, since the applicants’ explanation for their default is attributed solely to the actions of their attorney, what was required of them was to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success. As I see it, they have failed to do so.

APPLICATION NOT MADE IN GOOD FAITH

[41] Based *inter alia* on the lack of a reasonable explanation for the delay, Nedbank argues that the applicants’ application for rescission of the order is sought merely to delay. Moreover, that it is evident from the fact that since inception of the action proceedings in 2021, to date, there have been no payments made by the applicants in settlement of their admitted debt. In addition, that the applicants have not been open and forthcoming as to how they intend settling the admitted debt.

[42] As this court sees it, to the extent that the judgment debt is reduced, the application is made *bona fide*. For the remainder, however, the applicants’ application lacks merit and I agree with the submissions on behalf of Nedbank that the application is not made *bona fide*.

CONCLUSION

[43] The applicants have failed to show that they have a reasonable explanation for their default; that the application is made in good faith; and that they have a *bona fide* defence against Nedbank’s claim.

[44] They have therefore failed to show sufficient or good cause for the rescission of the order.

[45] In the result, this court finds that the applicants have failed to make out a case for the rescission of the default judgment that they seek.

COSTS

[46] Although the applicants had some success with their application in that the amount of the order is reduced with more than 50%, i.e. from R613,807.79 to R308,487.97, it cannot be said that they were substantially successful.

[47] They have not succeeded in the rescission that they seek. Moreover, their opposition to Nedbank's condonation application must fail.

[48] I therefore see no reason why costs should not follow the event.

[49] In the result, the following order is made:

ORDER

1. Condonation is granted for the late delivery of the respondent's answering affidavit;
2. The judgment debt is reduced with an amount of R305,319.82. Paragraph 1 of the judgment and order granted by default on the 10th of June 2022 under the above case number is therefore varied to read as follows:

“1. Payment in the amount of R308,487.97 (THREE HUNDRED AND EIGHT THOUSAND FOUR HUNDRED AND EIGHTY SEVEN RAND AND NINETY SEVEN CENTS).”

3. The application for rescission of the judgment is dismissed; and

4. The first and second applicants are ordered to pay the costs of the rescission application jointly and severally, the one paying the other to be absolved.

H G A SNYMAN

Acting Judge of the High Court of
South Africa, Gauteng Division,
Pretoria

Heard in open court: 5 June 2023

Delivered and uploaded to CaseLines: 21 August 2023

Appearances:

For the applicants: Adv CJ Bekker
Instructed by Kern & Partners

For the respondent: Adv L Kotze
Instructed by Snyman De Jager Inc