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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	/NO
Of Interest to other Judges:	/NO
Circulate to Magistrates:	/NO

Case number: **3300/2018**

In the matter between:

R W

Applicant

and

W M

Respondent

HEARD ON: 23 MAY 2019

JUDGMENT BY: MOLITSOANE, J

DELIVERED ON: 30 MAY 2019

- [1] This is an application for rescission of a default judgement which was granted against the applicant on the 31st January 2019 on the strength of a loan agreement. For convenience the parties will be referred to as in the main action.
- [2] The parties also brought interlocutory applications seeking condonation regarding their respective affidavits in the main application. Neither condonation applications were opposed. The plaintiff's attorney deposed to his confirmatory affidavit annexed to the founding affidavit of the interlocutory application a day prior to the founding affidavit. Nothing however turns on this as both parties agree that even if the affidavit is disregarded it does not change anything. I granted both condonation applications.
- [3] The main issue for determination is whether the applicant wilfully defaulted and is thus not entitled to rescission of judgment and further whether he has raised a bona fide defence.
- [4] In order for an applicant to succeed in an application for rescission of judgment he must show good cause by:
 - (a) giving a reasonable explanation of his default;
 - (b) showing that his application is bona fide; and
 - (c) showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospects of success – See *Colyn v Tiger Foods* 2003 (6) SA1 (SCA) at 9E-F.

- [5] The background facts surrounding this application are briefly as follows:

On the 3rd February 2016 the parties entered into written loan agreement in terms of which the plaintiff lent an amount of R1 000 000(One Million Rands) to the defendant at 2,5% interest per month for 2 months. An amount of R300 000 was paid back on the 5th October 2017 while a further amount of R100 000 was paid back on the 7th October 2017. The balance of R600 000 was never paid back and it is the subject of this dispute.

- [6] The defendant was at the time of entering into this loan agreement the son in law of the plaintiff. Summons was issued against the defendant on the 27th June 2018. It was served on the defendant personally on the 8th August 2018. It is common cause that the defendant did not enter appearance to defend. Judgment by default was granted against the defendant on the 31st January 2019.

- [7] An applicant who seeks an indulgence in terms of Rule 27 (1) must show good cause. The applicant must furnish an explanation for his default sufficiently to enable the court to understand how it really came about and to assess his conduct and motive -See *Silber v Ozon Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353 A. In this case the defendant in explaining how his delay came about avers that he issued divorce summons on the 27th February 2018 against his wife who is the daughter of the plaintiff. It is his case that on the 18th October 2018 his wife instituted Rule 43 proceedings against him. He avers that in the pre-occupation with his divorce proceedings and regular

consultations with his attorneys about his pending divorce he mistakenly believed that the summons in this matter was handed over to his attorney to defend.

- [8] It is contended in the heads of argument that the nub of the contention of the Applicant is that he was pre-occupied with the separation from his wife, the Rule 43 proceedings, and arrangements regarding his children and regular consultations with attorneys and a belief that he handed the summons to his attorney.
- [9] In my view, the conduct of the defendant does not support the assertions made above. He issued summons against his wife in February 2018. About 4 months later respondent issued summons against him in this case, which was personally served on him about six months later. He avers that he was under the mistaken belief that he handed same to his attorney. On the 19th August 2018, after service of the summons in this case, an email was forwarded to him requesting a meeting with the plaintiff and his attorney in order to try and resolve this matter outside of the court. It appears that such a meeting did take place on the 4th September 2019. Defendant attended such a meeting without his attorney. If indeed the defendant was under the mistaken belief that he had handed his summons to his attorneys, then a formal request for a meeting at the plaintiff's attorneys' offices should prompted him to go to his attorneys for further advise or to seek advice in light of the fact that he believed he handed them the summons to defend. This he did not do but he goes alone to the meeting. At the meeting he does not raise the issue that he has legal representation in this matter but he proceeds with the meeting.

- [10] In the meeting on the 4th September 2018 he makes an undertaking to repay the outstanding amount. According to the evidence before me he ordered a cheque book from his bank and on the 3rd October 2018 he attended at the plaintiff's attorneys' office personally and handed the cheque book to the attorney of the respondent to complete four post-dated cheques dated 31st October 2018, 30 November 2018 and 31 December 2018 and 31st January 2019.
- [11] Attending at the offices of the Applicant and handing the cheques for the balance of the outstanding money, does not evince the conduct of someone who is under the mistaken belief that he handed his summons to his attorney. In my view it is indicative of someone who does not wish to defend the matter but rather to have it settled out of court. It is, however, not the defendant's case that his delay came about as a result of his attempts to settle the matter out of court.
- [12] On the 3rd of October 2018 a letter was written to the defendant confirming that the receipt of the post-dated cheques should not be taken as constituting novation of the agreement. This letter should have reminded him again about the case and one would have expected him to seek assistance from his attorneys. Again on the 2nd November 2018 defendant is informed by email that the first post-dated cheque would be banked on the 6th November 2018. Instead of going to his attorneys as he thought he instructed them to defend his matter, he replied that funds would not be available as he was still awaiting payment on a game sale.

Another letter was addressed to him on the 9th November 2019. None of the interactions made prompted him to visit his attorneys or to even ask for progress on his matter.

[13] Having received summons, participated in the settlement negotiations, attending at the offices of the respondent's attorneys to deliver post-dated cheques and also exchanging correspondence with the plaintiff's attorneys demonstrates clearly to me that it was never the intention of the defendant to defend this matter. His assertion that he mistakenly thought that he handed the summons to his attorneys is negated by his conduct post receipt of the summons. In my view he failed to establish good cause and was in wilful default. The absence of wilful default is a fundamental requirement in applications for rescission of judgement- See *Maujeen v Standard Bank* 1994 (3) SA 801 (CPD) at 805 E. On this point alone this application must be dismissed.

[14] I accordingly find that it is unnecessary to traverse other considerations and I make the following order:

ORDER

1. The application for rescission of judgment is dismissed with costs.

P.E. MOLITSOANE, J

On behalf of applicant:

Adv Ploos Van Amstel

Instructed by:

FJ Senekal

Bloemfontein

On behalf of respondent:

Adv Benade

Instructed by:

Kuhn and Kuhn

Bloemfontein