



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case Number: 13869/2015

In the matter between:

BRUCE EARL GRIFFITHS

Applicant

and

MMI GROUP LIMITED

Respondent

JUDGMENT

Delivered on: 04 December 2017

MAHBEER AJ

[1] The applicant applies for the rescission of a default judgment granted against him on 20 December 2015, condonation under rule 27 and ancillary relief.

[2] The applicant's heads of argument were served a day late and his application for condonation was unopposed. I need not address this aspect.

The law

[3] The following is necessary under Uniform Rule 31(2)(b), which it seems is common cause founds the present application:-

- 3.1 the applicant is to make an application within twenty (20) days of knowledge of the default judgment; and
- 3.2 the court may upon good cause shown set aside the default judgment on terms it deems meet.

[4] It is trite that in order to establish good cause an applicant must set forth a reasonable explanation for the default and a *bona fide* defence/s. Our courts routinely shy away from defining 'good cause' as "doing so would hamper the exercise of a discretion which the rules have purposely made very extensive" (see *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd* 2011 (3) SA 477 (KZP))

[5] *Silber v Ozen Wholesalers* 1954 (2) SA 345 (A) at 353A remains authority for the proposition that an applicant's explanation must be sufficiently full to enable the court to understand how the default came about and assess the applicant's conduct.

[6] An element of the explanation for the default is that the applicant must show that he was not in wilful default. If the case the applicant makes out on wilful default is not persuasive, that is not the end of the enquiry - the applicant's case may be rescued if a *bona fide* defence is demonstrated.

Harris v ABSA Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at [8] – [10]
Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532C-F

The facts

[7] The material facts which are common cause or undisputed are:-

- 7.1 in 2010, the applicant and respondent concluded a Financial Planner Agreement. The applicant was employed as an independent contractor (a broker) who would sell the respondent's products;
- 7.2 the applicant would earn commission, in advance, on the products so sold;
- 7.3 in the event of policies lapsing or being cancelled, the commission would be derived from the respondent's recalculations and adjustments (the so-called "clawback" clause);
- 7.4 between July 2010 and July 2013, the respondent advanced commissions to the applicant;
- 7.5 between July 2010 and September 2015, certain products or policies lapsed or were cancelled;
- 7.6 the respondent recalculated commission and claimed adjustments from the applicant;
- 7.7 the respondent provided the applicant with monthly ledgers setting out the commission calculations and adjustments;
- 7.8 in about November 2012, the applicant began to suffer from severe depression and related ailments. By December 2013, his condition had progressed such that he was prevented from

continuing his work for the respondent this according to a neuropsychological assessment report dated 10 December 2013;

- 7.9 in the meantime, in April 2013, one Ryan Roberts (“Roberts”) was appointed as the ‘caretaker’ of the applicant’s portfolio;
- 7.10 on 20 June 2013, the respondent terminated its contract with the applicant;
- 7.11 on 28 July 2013, the applicant sold his business (also referred to as his “book”) to Roberts;
- 7.12 the respondent invoked the “clawback” and in October 2015, it instituted the action for R340,453.47 plus interest;
- 7.13 summons was served by affixing at the applicant’s *domicilium* address when the respondent knew that the applicant had moved to an alternate address;
- 7.14 on 10 December 2015, default judgment was granted against the applicant;
- 7.15 the applicant learned of the judgment on 23 July 2016;
- 7.16 the applicant entered into correspondence with the respondent’s representatives and, when that failed to resolve the dispute, he instructed his attorneys of record. This was in October 2016;
- 7.17 the applicant’s attorneys then attempted to settle the matter with the respondent’s representatives but they too failed; and

7.18 the present application for rescission was brought on the 20th December 2016.

[8] I note that there is no suggestion that the applicant is non *compos mentos*. No medical evidence was submitted to indicate that at the time of the application he was emotionally incapable of appreciating or acting in appreciation of the implications of the legal proceedings. Indeed, the applicant was capable of making enquiries and communicating with the respondent's representatives, instructing his attorneys and counsel and he deposing to the founding and replying affidavits. I record this because it is relevant to the emotional content of his affidavit, by which I am unmoved.

Condonation

[9] Regarding service of the summons, it is undisputed that this occurred at the applicant's *domicilium* address, notwithstanding the respondent's knowledge that he had vacated that property. I am prepared to give the applicant the benefit of the doubt and accept that this effectively means that between December 2013 and 23 July 2016, the applicant was not in wilful default of the judgment. (See *Wishart NO v First Rand Bank Ltd* (3459/2013) [2014] ZAKZDHC 58 (28 November 2014) What is of concern, however, is that as soon as the applicant instructed his attorneys, steps should immediately have been taken to avoid wilful default from that point on. Why an application was not so made, even if to run parallel with the attorneys' attempts to negotiate with the respondent in order to protect the applicant's interests and comply with Uniform Rule 31(2)(b), is unexplained. Instead, the application was launched two months after the applicant instructed his attorneys'. The applicant's and his attorneys' silence on this material point feature in my assessment of wilful default.

[10] The respondent's opposition to the application for condonation for the late institution of the rescission application thus has merit in the context of the

five month delay between July 2015 (when the applicant first learned of the default judgment) and December 2015 (when the application was finally brought). And whilst the two month delay following the applicant's first consultation with attorneys may seem minor, it is not the period that perturbs me but the active disregard of the Uniform rules of this court. The delay is unacceptable and it constitutes wilful default.

The Defences

[11] As I pointed out at the outset, wilful default is not the only factor in the exercise of my discretion. I must still analyse if the applicant has demonstrated a *bona fide* defence. I take guidance in doing so from the reasoning in *Harris v ABSA Bank Ltd supra* at paragraph [16] and examine if the applicant's defence "shows the existence of an issue which is fit for trial". If so demonstrated then this may overcome my finding about the wilfulness of the applicant's default.

[12] The applicant raised a number of issues. Not all of these were tendered as defences but it is necessary, for reasons I advance later, to highlight some of the matter contained in his affidavits:-

- 12.1 the applicant's emotional state rendered him incapable of acting proactively;
- 12.2 the applicant's personal claim against the respondent under an income protector policy had resulted in a dispute which preoccupied him;
- 12.3 the respondent had coerced the applicant to settle on a purchase price for his "book" which was far less than its true value. This, so the applicant averred, constituted grounds for a claim-in-reconvention;

12.4 part of the respondent's claim in the action has prescribed;

12.5 the purchaser of the respondent's books, Roberts, ought to have been joined as a party to the action because it was he against whom the "clawback" ought properly to have applied.

[13] Counsel for the applicant prudently confined his argument to two defences: prescription and misjoinder of Roberts.

[14] On the defence of prescription, it is trite that the party who raises prescription must allege and prove the date of inception of the period of prescription. (See *Gerrick v Sack* 1978 (1) SA 821 (A)). In my view, it does not suffice that the applicant adopted prescription somewhat speculatively as a defence and blamed the lack of particularity on the respondent's particulars of claim.

[15] Nevertheless and notwithstanding the flawed manner in which the defence was invoked, the respondent countered it by pointing out that in fact the applicant was provided with commission ledgers on a regular basis and this would have adequately enabled him to formulate the prescription defence properly.

[16] Thus for the applicant to claim that he was so emotionally overwrought as to not understand the ledgers is simply not good enough. Even if he did lack the necessary grasp of the law and process, nothing prevented the applicant's legal representatives from formulating a *bona fide* prescription defence by applying their collective minds to the commission ledgers. The Financial Planner Agreement contemplates that the lapsing or cancellation of policies may occur at any time, so the date upon which prescription arises would have been determinable through or by the date of lapsing or cancellation of the policies. All that the applicant and or his legal representatives were required to do to set out prescription properly was to analyse the ledgers and identify what

amounts and dates were subject to prescription. This exercise was not undertaken.

[17] In the circumstances, the defence on prescription is unsustainable and not *bona fide*.

[18] The defence based on misjoinder similarly does not resonate. A connection between the respondents' claim and a third party claim against Roberts for possible future lapses and current debit balances was not demonstrated. What is more, the issue of "current debt balances" is a red herring upon a plain reading of the affidavits, as is the insinuation that the respondent and Roberts conspired to undervalue the applicant's "book".

[19] Mr Shapiro for the applicant pointed out, in the interest of full disclosure, that the respondent acquired certain rights under clause 2.4.1 of a Conditional Consent to Cession and Delegation of Broker Entity Rights and Obligations. Clause 2.4.1 states:-

"All rights and obligations in respect of the policies will be transferred from the transferring broker [in this case, the applicant] to the accepting broker [Roberts], however, any debit will revert to the broker that was credited with the initial credit movement."

[20] This confirms that there is no *nexus* between Roberts and the respondent. Clause 2.4.1 comprises a cession to secure the respondents' rights relating *inter alia* to the calculation, advancement and recovery of commission and is unequivocal in its effect. The clause does not indemnify the applicant from the claim - quite the contrary.

[21] The defence of misjoinder accordingly would have little prospects of success in an action.

[22] Mr Shapiro referred me to regulations pertaining to the formulation of what commission would be payable upon *inter alia* a health event of a life insured. This is of no assistance to the applicant.

[23] Generally, I am left with the impression that this application was calculated to unnecessarily frustrate the respondents' judgment. If I am wrong on this, the point of relying on irrelevant and obfuscatory matter nevertheless escapes me. For instance, the applicant misrepresented the negotiations for the sale of his "book". The respondent's intervention in the negotiations between Roberts and the applicant for the sale of the applicant's "book" was supportive and facilitative, not coercive as alleged, and this is borne out by the correspondence comprising annexures "AA2" – "AA17" to the answering affidavit. The applicant introduced matter regarding his disputed claim under the income protection policy seemingly to paint the respondent in a poor light when actually the complaint is irrelevant to the present dispute. I need not say more on all this other than it is contrary to the spirit in which an applicant should approach the court for relief under rule 31(2)(b).

[24] Ultimately, the applicant has failed to show a *bona fide* or arguable defence against the respondent's claim. Add to this the wilfulness of his default and I arrive at the conclusion that the application cannot succeed.

[25] The order I make in the circumstances is that the application is dismissed with costs.

MAHABEER AJ

Date of hearing : 28 November 2017
Date delivered : 04 December 2017

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