

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

Case No: 5277/2014

In the matter between

PIETER WILLEM DU PLOOY

APPLICANT

and

OOS VRYSTAAT KAAP BEDRYF BEPERK

RESPONDENT

CORAM:

NAIDOO, J

JUDGMENT:

NAIDOO, J

HEARD ON:

19 NOVEMBER 2015

DELIVERED ON:

15 FEBRUARY 2016

- [1] This is an application for condonation for the late filing of a Replying Affidavit by the applicant (defendant in the main action) in an application for rescission of default judgment, which was granted against him on 4 February 2015. The application for rescission of the judgment was also before me for adjudication. Mrs L Collins appeared for the applicant and Mr SJ Reinders appeared for the respondent (plaintiff in the main

action). For ease of reference I shall refer to the applicant as the defendant and the respondent as the plaintiff.

BACKGROUND

- [2] The plaintiff issued summons against the defendant for payment of the sum of Eight Hundred and Sixty Five Thousand Nine Hundred and Twenty Two Rand and Forty Five Cents (R865 922.45), together with interest, certain insurance premiums and costs. The summons was properly served on 4 December 2014 at the address chosen by the defendant. The defendant did not defend the action, and, consequently, judgment by default was granted against him on 4 February 2015. On 20 August 2015, he launched an application for rescission of default judgment, which the plaintiff opposed. The defendant filed a Replying Affidavit, out of the time period allowed by the Rules, hence the application for condonation in respect thereof, which is also opposed by the plaintiff.

LEGAL FRAMEWORK

- [3] Rule 27(1) of the Uniform Rules of Court provides:

“In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet”

The requirement of “good cause” to be shown is repeated in sub-rule (3) which provides that “The court may, on good cause shown, condone any non-compliance with these rules”.

These two sub-rules of Rule 27 provide the court with a wide discretion to condone non-compliance with the Rules. It is clear, however, that an important safe guard is that good cause must be shown.

- [4] Rule 31, Rule 42(1) and the common law make provision for the rescission of a judgment. Rule 31(2)(b) provides that “A defendant may within twenty one days after he or she has knowledge of such judgment apply to court on 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”. Rule 42 makes provision for the setting aside of a judgment which is erroneously granted, where it contains an ambiguity, patent error or omission, or where it is obtained as a result of a mistake common to the parties.

THE EVIDENCE

- [5] I will deal first with the application for condonation for the late filing of the defendant’s Replying Affidavit. In essence, he alleges that his previous attorney of record, Mr Jordaan, withdrew as attorney of record without his being aware of it, on the very day that he ought to have filed his Replying Affidavit (5 October 2015). In spite of speaking to Mr Jordaan telephonically after the latter withdrew from the matter, Mr Jordaan did not mention this fact and said that the defendant need not attend court for the hearing of the rescission application. It was only subsequently on 23 October 2015 that he became aware of Mr Jordaan’s withdrawal. After the involvement of his current attorney, the parties agreed to postpone the matter from 29 October 2015 to 19

November 2015, for the purpose of hearing this application and the rescission application. At this stage, it is only necessary for this court to decide whether it will condone the late filing of the Replying Affidavit. The defendant's reasons for the late filing are somewhat thin, as pointed out by the plaintiff in its Opposing Affidavit. However, it is still within this court's discretion to allow such late filing. In my view, in order to be able to fairly assess the application for rescission, the contents of and annexures to the Replying Affidavit are relevant. It is for this reason that I condone the late filing of the Replying Affidavit and allow it into the record. I will deal with the contents thereof when considering the application for rescission.

[6] This court is tasked with determining whether the defendant has satisfied all the requirements necessary for the setting aside of the judgment in this matter. For the sake of completeness, I set out hereunder the relief sought in the rescission application:

- "1. That the order given against the Defendants (sic) under this case number on 4 February 2015 be rescinded;
2. Condonation for failure to adhere to any of the Court Rules;
3. Condonation for the lateness in launching this application should the Honorable Court find that the Applicant ought to have been aware of the judgment prior to 14 August 2015;
4. That any warrants in execution or attachments in terms of this order be set aside;
5. Costs of the application be granted against the Respondent on attorney and client scale should the respondent oppose the application;
6. That the applicant be granted further and/or alternative relief."

The defendant alleges that the application for rescission is based on the judgment being void *ab initio*, in that the plaintiff did not comply with section 130 of the National Credit Act 34 of 2005. Rule 42 does not refer to judgments which are void, but allows a court to “correct expeditiously an obviously wrong judgment or order” (**See Erasmus, Superior Court Practice, page B1-306G**), where such judgment is erroneously sought or erroneously granted, or where the other jurisdictional facts, alluded to above, exist. The expression “void *ab origine*” is used in the section 36(1)(b) and Rule 49(8) of the Magistrates’ Courts Act 32 of 1944. If a generous interpretation were to be given to the defendant’s assertion that the judgment is “void *ab initio*” in this matter, it can perhaps be dealt with, within the meaning of “erroneous”. Rule 31 does not, in my view, apply to the present application, as the defendant ought to have brought the rescission application within twenty one days of becoming aware of the judgement. For reasons I will elaborate on later, I am of the view that the defendant became aware of the judgment considerably earlier than 14 August 2015.

- [7] Even if the defendant were to be allowed the generosity of dealing with his application in terms of Rule 42, he would have to show that good cause exists for rescission of the judgment. The same would be true if the application were to be dealt with in terms of the common law. The application must also be brought within a reasonable time and the facts of each case determine what a reasonable time is. It has been held that even if an applicant proves that section 42(1) is applicable in this matter, the court still has the discretion to hold that a reasonable time has elapsed. (See **Erasmus page B1 – 306G**). Put differently, the defendant will not succeed if he has not brought the application for rescission within a reasonable time, even if he proves that Rule 42(1) applies to his

application. One of the cases referred to by Mrs Collins in her Heads of Argument is the often cited case of **Smith NO vs Brummer No. 1954 (3) SA 352 (OPD)**, which succinctly sets out the requirements that must be complied with in order for a court to grant removal of Bar. On p 358A the court said the following:

- (a) The Applicant has given a reasonable explanation for his delay
- (b) The application is bona fide and not made with the object of delaying the opposite party's claim.
- (c) There has not been a reckless or intentional disregard of the Rules of Court
- (d) The Applicant's action is clearly ill-founded
- (e) Where prejudice has been caused to the opposite party it must be capable of being compensated for by an appropriate order as to costs.

Exactly the same considerations apply when a rescission of judgment is sought. See also **Silber v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345 (A)**, where the court said at page 352 that "good cause" includes, but is not limited to the existence of a substantial defence.

- [8] In the present matter, my view is that the defendant has failed to show that Rule 42(1) applies to this application as there is nothing in his papers that would suggest that there was an error in obtaining the judgment or that it was invalid. My view is that the application should be dealt with in terms of the common law. As such, the applicant should have launched his application within a reasonable time after becoming aware of the judgment, failing which he must tender a reasonable and acceptable explanation for the delay. As a guide to what is a reasonable time in which to bring the application, reference to Rule 31(2)(b) is instructive. That Rule provides for a period of twenty one (21) days in

which to bring the application for rescission, and in my view this is a reasonable time. The defendant brought this application more than six months after the date on which the judgment was obtained. He fails to disclose in his Founding Affidavit that there were ongoing oral and written communications between himself and the plaintiff's representatives, even before the summons was issued. Significantly, the deponent to the plaintiff's opposing affidavit (Helgard Botes) as well as its legal representative discussed this matter with the defendant after the judgment was obtained in an effort to secure payment of the debt from the defendant. Considering that the Sheriff attached the defendant's assets on 5 March 2015, such discussions would have taken place between 4 February and 5 March 2015.

- [9] Mr Botes indicates that this conversation took place on 26 February 2015, which the defendant admits in his Replying Affidavit. I find his version of what was discussed quite contrived. He asserts that Botes said that the Sheriff is on his way (to the defendant) and this could mean anything. No indication was given to him that judgment had been obtained against him. In my view, even a lay person knows what the functions of the Sheriff of the Court are. The defendant is an astute and (apart from the drought) successful businessman. I find it improbable that he would not know that serious legal proceedings are afoot if the Sheriff is on his way with a Warrant. If he was in doubt, then service of the Warrant of Execution upon his employee, Mr Stander, and attachment of his assets would have left him in no doubt that a judgment had been granted against him. The absence of a supporting affidavit from Mr Stander about whether or when he brought the Warrant of Execution to the defendant's attention, fortifies my suspicion that he was well aware of the judgment not later than 5 March 2015 or, at worst, even a day or so after that date.

- [10] His tales of woe ranging from the drought to the fault of his attorney in not properly advising him of what needed to be done in this matter, coupled with his claim about a total failure of technology, which were the cause of his delay in bringing this application, ring hollow and are not credible. The defendant admits the debt but attempts to rely on a technicality to evade fulfilling his obligations in terms of the judgment. There are numerous points which are indicative of his lack of bona fides, but I will deal with only a few. The first is the issue of his address. In the application for credit facilities, which is the basis for the plaintiff's action in this matter, the defendant furnished his physical address as "Blomentuin, Hennenman" and his postal address as "Posbus 41 Ventersburg, 9450". The summons was served at the farm Blomentuin in the Hennenman District upon an employee, Mr T Lebona. In the Founding Affidavit in this rescission application, the defendant avers that he resides at the farm Blometuin, Hennenman District. It is clear that this is also the address he furnished to his attorney Mr Jordaan, as that is the address reflected on the Notice of Withdrawal as Attorney of Record.
- [11] By the time the Replying Affidavit was filed on 2 November 2015, the defendant's address had changed to the Farm IDA, Ventersburg, Free State. It bears mention that the Notice of Set Down for the rescission application, which was to be heard on 29 October 2015, was served personally on the defendant on 12 October 2015 at the Farm Blometuin, Hennenman District. The change in address, which was not communicated to any of the parties involved in this matter is most convenient for the defendant and leads to the irresistible inference that it is contrived to suit his version that he did not receive any of the process or correspondence relevant to this matter.

- [12] The defendant raised no issue with the service of the summons on Mr T Lebona in his Founding Affidavit, although he had sight (on his version) of the documents in the court file on 14 August 2015. This is only raised in the Replying Affidavit, where he (conveniently) alleges that he has a number of people with the surname Lebona in his employ, but not one of them bearing the initial "T". Again the absence of confirmatory or supporting affidavits from the Lebonas creates much doubt about the defendant's *bona fides* in this matter. The Founding Affidavit is the basis of an applicant's case, by which he must stand or fall. The Replying Affidavit serves the purpose of elaborating on matters raised in the Founding Affidavit. The applicant cannot raise new matters or supplement his case in Reply, and expect to have the ear or the sympathy of the court, as the defendant has done in this matter. I therefore reject his version that he did not receive the summons in this matter.
- [13] One of the annexures to the Replying Affidavit is an application by Mr Jordaan, the defendant's former attorney who is also his Debt Counsellor, for a debt review and debt restructuring in respect of the defendant. Mr Jordaan did not include the debt of the plaintiff in this application. He indicated that the plaintiff had instituted legal proceedings (against the defendant) prior to the debt review application. An application for rescission was launched, based on the fact that *ex facie* the summons, the plaintiff did not comply with section 129 of the National Credit Act. The significant part of this affidavit (paragraph 9) is Mr Jordaan's assertion that "In the opposing papers to the application it became evident that a Section 129 notice was sent via e-mail. I am of the opinion that OVK did therefore comply with Section 129 and the agreement is therefore not included." Equally significant is the confirming affidavit of the defendant in which he confirms the correctness of the debt counsellor's (Mr Jordaan's) affidavit.

This, in effect, extinguishes the basis for the application for rescission. The defendant's confirmatory affidavit is dated 2 November 2015. The Replying Affidavit is also dated 2 November 2015, in which the defendant persists in his defence, which in my view is clearly spurious. The only conclusion that one can draw from the defendant's conduct is that he has no *bona fide* defence to the plaintiff's claim and has brought the rescission application solely for the purpose of delaying the payment of the debt due to the plaintiff, much to the prejudice of the plaintiff. In my view, the application for rescission itself lacks *bona fides* and justifies a finding that the defendant has failed to make out a case for the relief he seeks.

[14] In the circumstances, I make the following order:

14.1 The application for rescission of the judgment dated 4 February 2015 is dismissed with costs, such costs to include the costs of the condonation application in respect of the Replying Affidavit.

S. NAIDOO, J

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