REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

22/5/15

CASE NO: 70894/14

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

22/5/15

DATE SIGNATURE

In the matter between:

LYTTLETON AUTO BODY CC	First Applicant
ABDUL'S AUTO ELECTRICAL CC	Second Applicant
ABDULE KADER MOOSA	Third Applicant

and

ABSA BANK LIMITED	Respondent

JUDGMENT

DODSON AJ

Introduction

[1] This is an application for rescission of judgment in terms of rule 31(2)(b),

alternatively, the common law.

[2] The judgment sought to be rescinded was based on an overdraft facility granted in favour of the first applicant. The second and third applicants had bound themselves as sureties for the overdraft.

[3] The application was brought 8 days after the applicants attorney became aware of the default judgment and thus within the 20 day period provided for in rule 31(2)(b). By the time the matter was argued, it was also not in dispute that the applicants had given a reasonable explanation for their default.

[4] The application therefor turns on whether or not the applicants have shown that they have a bona fide defence to Absa's claim. This requires that the applicants show that they have by way of the defence put up, raised an issue which is fit for trial.[1]

Factual background

[5] At the time when the first applicant's members were a Mr and Mrs Lopes, an overdraft facility in an amount of R700 000 was granted to it by Absa. As part of the security that Absa held for the overdraft facility there was a deposit in a money market account in the name of the first applicant, Lyttleton Auto Body CC, in the amount of R200 000.

[6] In November 2007, the third applicant, whom I will refer to as "Moosa",

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[1] *PLJ Van Rensburg en Vennote v Den Dulk* 1971 (1) SA 112 (W); *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (W).

together with another family member, purchased the member's interest in both the first and second respondents from Mr and Mrs Lopes.

[7] Moosa avers that at the time that he did so, he was willing to assume the liability in respect of the overdraft because of the fact that the bank held what he considered to be the first applicant's deposit in the money market account in the amount of R200 000.

[8] On 8 July 2009, Moosa made enquiries about the money deposited in the money market account and was provided with a statement. The statement revealed that on 3 June 2008, all of the funds in the account in an amount of R211 615,97 had been paid out, leaving a nil balance. Upon enquiry, Moosa was informed by Absa that the money had been paid out to Mr Lopes.

[9] Moosa insists that the funds in the money market account were the property of the first applicant. As evidence of this he refers to the fact that the two statements in respect of the account both reflect Lyttleton Auto Body CC as the account holder.

[10] Moosa avers further that he had brought the amount of the overdraft down to an amount of R260 000 by June 2012. He avers that he then -

> *"again made enquiries to [Absa] about the money that was paid to Mr Lopes and they informed me that they can do nothing. The first applicant then stopped to use the [overdraft] account any further and informed [Absa] that they should claim the money from Mr Lopes and that it should be enough to cover the overdraft if the interest is added."*

[11] There is a dispute between the applicants and the respondent about the entitlement of Mr Lopes to have received the funds from the money market

account. The applicants rely on the account holder identified on the bank statements in alleging that the money belonged to the first applicant.

[12] Absa puts up a copy of a balance sheet purporting to be that of Mr Lopes in which he lists as one of his investments *"money market Absa"* in an amount of R200 000. They also put up the annual financial statements of the first applicant for the year ending 28 February 2009. By contrast, these financial statements do not anywhere reflect as one of its assets the funds in the money market account. The financial statements are for both the years ending 28 February 2009 and 28 February 2008, the latter preceding the date upon which the funds were paid out to Mr Lopes. The financial statements are signed by Moosa, but not the accounting officer or the other member.

[13] The amount now claimed in respect of the outstanding balance on the overdraft is R310 169,48.

The parties' contentions

[14] Counsel for the applicants averred that the above facts gave rise to a *bona fide* defence. To the extent that there was a dispute as to the ownership of the funds in the money market account, she contended that the applicant had produced evidence which favoured their case over that of the respondent. In any event, this dispute was an indication of the appropriateness of the matter being dealt with at a trial following the grant of rescission.

[15] She argued that the conduct of Absa in paying out the money in the money market account to a person that was not entitled to it, gave rise to a breach of the banker-customer contract in respect of the money market account. This, in turn, gave rise to a claim on the part of the applicants for damages against Absa. That claim stood to be set-off against the claim on the overdraft. Even if set-off did not apply, then it at least provided the basis for a dilatory plea so that Absa's claim on the overdraft would be deferred until determination of the applicants' claim against Absa for damages for breach of contract.

[16] On behalf of Absa it was argued that any claim which the applicants might have had against Absa (the existence of which it disputes) has long since prescribed. In any event, the defendant contends that even if it has not prescribed, it is not fully due and is therefore not capable of being set off against Absa's claim on the overdraft.

Analysis

[17] As is pointed out in Amlers *Precedents of Pleadings*[2] -

> *"A party wishing to rely on set off must allege and prove the following:*
> *(a) the indebtedness of the plaintiff to the defendant;*
> *(b) that the plaintiff's debt is also due and legally payable ..;*
> *(c) that both debts are liquidated debts ...;*
> *(d) that the reciprocal debt was owed by the plaintiff to the defendant."*

[18] The point at which both debts are compliant with the above requirements is

[2] 7th Ed p352

described as the moment of mutuality of the debts.[3]

[19] Viewed in isolation, the applicants' claim against Absa (assuming that it exists), arose when Moosa became aware of the payment by Absa of the proceeds of the money market account to Lopes on 8 July 2009. Viewed in isolation, this claim has clearly prescribed.

[20] Christie[4] explains the position in relation to set-off and prescription as follows:

> *"A debt which has become prescribed since the set off occurred has already been set off by operation of law, so the running out of the time for prescription is immaterial, but in contrast to other natural obligations a debt that is already prescribed before the necessary mutuality of debts arises could not, under the common law, be set off, and there is no reason to think that the Prescription Act 68 of 1969 s10(3) was intended to alter this rule."*

[21] I agree with this analysis of the common law and the Prescription Act.

[22] Counsel for the applicant argued that the moment of mutuality in the present matter arrived at the point in June 2012 when the first applicant stopped using the overdraft and Moosa allegedly instructed Absa to claim the money from Mr Lopes.

[23] In my view, this can by no stretch of the imagination be described as the moment of mutuality. Significantly, Christie points out that-

> *"For set off to operate the defendant must be in a position to say 'the plaintiff owes me a debt' rather than 'I have a claim against him'."*

[24] The moment of mutuality would only be reached at the point when the first

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[3] See, for example, *Thorne & Ano, NNO v The Government* 1973 (4) SA 42 (T) at 45G.

[4] *The Law of Contract in South Africa* 5th Ed Lexis Nexis at p 497.

applicant secures judgment against Absa on its alleged claim for damages for breach of contract. That is when there will be a debt that is *"due and legally payable"*. That moment is yet to arrive, with the first applicant having yet to institute proceedings against Absa, let alone obtain any judgment.

[25] That being the case, no mutuality of debts existed at the time when the first applicant's alleged claim against Absa prescribed.

[26] In the circumstances, I am not satisfied that the applicants have available to them any defence based either on set off or on any entitlement to delay Absa's claim, pending proof of their claim.

[27] Moreover, the fact that the first applicant has done nothing about pursuing its alleged claim against Absa over a period of some seven years is indicative that the application is not made *bona fide* and is rather made with the intention of merely delaying Absa's claim.

[28] I accordingly make the following order:

(1) The application for rescission of judgment is dismissed.

(2) The applicants are ordered to pay the respondent's costs.

A DODSON
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Counsel for the applicants: **ADV A VAN NIEKERK**

Instructed by:	**DEYSEL ATTORNEYS,** 80 Lyttleton Road, Centurion, Pretoria
Counsel for the respondent:	**ADV R RAUBENHEIMER**
Instructed by:	**TIM DU TOIT & CO INC,** 433 Rodericks Road, Lynwood, Pretoria
Date of hearing :	6 May 2015
Date of judgment:	22 May 2015