IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 49226/13

12/6/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

12/06/2015

DATE SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 PRETORIA 0001
2015 -06- 12
JUDGE'S SECRETARY REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

BRET WALLIS MURDOCH APPLICANT

and

THE STANDARD BANK OF SOUTH AFRICA RESPONDENT

Coram: HUGHES J

JUDGMENT

Delivered on: 12 June 2015

Heard on: 10 June 2015

HUGHES J

1. The applicant, Bret Wallis Murdoch, seeks recession of a default judgment granted by this court on 14 October 2013. Standard Bank LTD, the respondent, obtained the judgment in respect of monies owed to it by the applicant in the sum of R 595 767.89 plus interest and costs.

2. Briefly, the respondent served the summons personally upon the applicant on 29 August 2013. The time to enter an appearance to defend having expired on 13 September 2013, the application for default judgment was filed into court on 14 October 2013. On 12 December 2013, the registrar of this court granted default judgment.

3. The applicant states that as soon as he received the summons he contacted the respondent's attorney of record. He informed the respondent that fraudulent transactions had occurred on his account and that he had referred the matter to the Banking Services Ombudsman for consideration. He further states that the respondent's attorney reassured him that he had *"nothing to worry about as default judgment would only be granted against me in about ten to twelve months from receipt of the summons"*. [Paragraph 6 of the founding affidavit].

4. At the time that he made the previously mentioned representations, on 12 July 2013 an email sent from the Ombudsman to his personal email address, advising that, on the informed him that on information he submitted, his case had no prospects of success. In response to this email from the Ombudsman, the applicant sent emails on 15 and 17 July 2013 voicing his disagreement with the Ombudsman's findings.

5. During the month of September 2013 after the service of the summons, negotiations ensured between the applicant and the respondent's attorney. The applicant annexed correspondence from 13 September 2013 to 30 September 2013 to his founding affidavit. The just of the correspondence was:

   (a) On 13 September 2013, the applicant submitted a proposal *"to settle this outstanding debt at the bank";*

   (b) The respondent replied, setting out instalment payment amounts they were amicable to accept;

   (c) On 30 September 2013, the applicant presented a counter proposal to the instalment payments sought by the respondent. He advised the respondent, replied advising that, in six months from 13 September 2013 he would be getting a portion of his inheritance and would be able to settle the debt; and

(d) On 22 January 2014 at 07:59 am, the applicant sent an email to his erstwhile attorney, on "eddie@adlattorneys.co.za, providing them with the correspondence between him and the respondent's attorney set out above.

6. The applicant is adamant that he did not owe the respondent the amount claimed, *"but entered into settlement negotiations pending a response from the Ombudsman for banking services and pending the outcome of the main court action".* [Paragraph 14 of the founding affidavit]. This he did because of the fraudulent transactions conducted on his bank account held with the respondent, which resulted in the amount claimed being due and payable to the respondent.

7. During the middle of January 2014, he established that default judgment had been granted against him. On 14 January 2014, he contacted his attorneys and consulted with them on 21 January 2014. The contents of the court file were obtained on 30 January 2014 and further consultations took place on 14 February 2014.

8. The applicant now seeks condonation for the late filling of his recession application. The respondent does not vigorously oppose and has opted to abide by the court's decision.

9. The period of delay sought in respect of condonation is not lengthy one. In addition, it is evident from the sequence of events that from the day the applicant became aware of the default judgment, he acted immediately.

10. The grant or refusal of condonation lies within the discretion of the presiding officer. In the circumstances of this case the respondent does not resist the application for condonation and the explanation advanced by the applicant is a reasonable one, as such I see no reason not to grant condonation sought by the applicant.

11. I now turn to deal with the recession application. From the founding affidavit this application is brought in terms of Rule 31(2)(b) of the uniform rules of court, which reads as follows:

> "**31(2)(b)** A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as set out seems fit." .

12. However, the applicant sought that I take into account Rule 42(1) (a). The judgment was erroneously sought and granted in spite of an agreement between the parties, where the respondent undertook not to seek judgment until the applicant obtained a response from the Ombudsman to his letter of 31 July 2013 wherein he voiced his disagreement to the Ombudsman's findings.

13. The applicant submits that the fraud committed was with the assistance of bank personnel and that the bank personnel failed to follow proper procedures. In the circumstances, the respondent participated in the fraud and was negligent in its duties. The applicant argued that in the circumstances the default judgment was not supposed to be granted.

14. The applicant further submits that at the least, the negligence of the respondent contributed to the fraud. In that, the respondent allowed unclear funds to be withdrawn by the applicant. The fraud and negligence will have to be canvassed at trial, thus recession should be granted and the applicant be allowed to defend the action.

15. Lastly, the finding of the Ombudsman was clearly incorrect, regarding the Code for Banking Practices, as the respondent was supposed to exercise reasonable care, which it did not in this case, when collecting cheques.

16. The respondent argues that the reasons furnished for being in wilful default by the applicant are unconvincing and far-fetched. In that, the applicant states that he was still busy with negotiations with the respondent; was also awaiting the final decision from the Ombudsman; the respondent's attorney agreed that

default judgment would not be sought until the aforesaid was finalised; and that in ten to twelve months' time judgment would be granted.

17. The respondent submits, in light of the summons having been served after the Ombudsman's assessment, the applicant's argument is flawed. The respondent further submitted that as attorneys of the respondent they bound by certain "turn around" times. Thus, they would never have made the proposition that the judgment would materialise in ten to twelve months.

18. In addition, the respondent points to the emails during the negotiation period, and argues that these do not reflect the version advanced by the applicant. There is no written confirmation of the applicant's allegations, in the contrary, the applicant offered to pay the debt owed, thus accepting liability. In premises, the respondent concludes that the applicant was in wilful default.

19. The respondent submitted that the fraudulent defence raised by the applicant could not stand as he withdrew the amount from his account *in lieu* of a cheque having been deposited in his account. The applicant was also aware that he would be liable, at the banker's discretion, if he withdraw from unclear funds i.e. cheque deposited in his account. As such, he cannot blame the bank for being a part of the alleged fraud.

20. The respondent also highlights the contents of the applicant's email where he makes an offer to pay after been advised of the amount sought by the respondent. He goes so far, as too even promised to settle the entire debt within six months. In these circumstances, the respondent argues that the applicant has not advanced a *bona fide* defence. The respondent thus seeks the application for rescission to be dismissed with costs.

21. The notion by the applicant that Rule 42(1) (a) has application because the judgment was erroneously sought cannot succeed. To succeed the applicant needs to show that there was a fact that the court which granted the default judgment was unaware of and as such would not have granted the judgment had it been appraised of that fact.

22. In this case, this is not so, because from the facts and the documents before me there is no evidence that the agreement as suggested by the applicant mentioned above existed.

23. Adv. Coetsee, for the applicant, argued that the respondent had a duty of care as the collecting bank to the applicant and as crime was rife in our country, this duty was more onerous. Adv. Shepard, for the respondent argued that the relationship between the respondent and the applicant was one based on contract, in that it was that of debtor and creditor. In this instance, the duty of care was not an issue that come into play.

24. I will deal with the duty of care issue first. The relationship between a bank and its client is either mandatory or that of debtor and creditor. It is never fiduciary in nature. To this end I refer to **Louw NO and others v Coetzee and Others 2003 (3) SA 329 at 334H-I [12]**:

"It is trite that when a customer of a bank deposits money in an account the money becomes the property of the bank, which in turn, as debtor of the customer, has an obligation to pay the customer as creditor the amount deposited. The bank does not hold the money for the customer as agent or trustee: it becomes the owner and has only a personal obligation to repay the amount together with interest if agreed."

25. I agree with the respondent's argument that the decision of the Ombudsman was at hand before the respondent issued and served the summons on 29 August 2013. Therefore, the respondent could not have agreed to that as suggested by the applicant, as the Ombudsman as far back as 12 July 2013 had already taken the decision.

26. The approach to be adopted when dealing with rescission matters is stated in **Colyn v Tiger Food Industries LTD t/a Meadow Feed Mills (CAPE) 2003 (6) SA 1 at 9E-F**:

"With that as the underlying approach the Courts generally expect an applicant to show good cause *(a)* by giving a reasonable explanation of his default; *(b)* by showing that his application is made *bona fide*; and *(c)* by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success (*Grant v*

Plumbers (Pty) Ltd, HDS Construction (Pty) Ltd v Wait supra, Chetty v Law Society, Transvaal)."

27. From the pleadings there is nothing on papers indicating why the applicant did not defend this matter after he was personally served with the summons, if from the onset he disputed the debt. In fact, after receipt of summons, the applicant immediately liaised with the respondent, admitted the debt and even offered to settle the debt in full.

28. In light of this evidence, how can the applicant come and state that he now disputed the debt but just offered to settle same. In my mind, the applicant's letters of 13 September 2013 and 23 September 2013 places all in perspective. Bearing in mind that these are documents put up by the applicant as annexures to his founding affidavit.

29. The documents and pleadings of the applicant are at variance with that which the applicant seeks this court to believe.

30. In the circumstances, in my view, no good cause has been shown by the applicant that his conduct was not wilful. Further, his explanation does not indicate that his *bona fide* to the claim of the respondent and that his defence to the respondent's claim is *bona fide* or even *prima facia* to say the least.

31. In conclusion the recession application is dismissed with costs.

W. Hughes Judge of the High Court

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