IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA) 7/8/15

Case No: 20155/2006 and
Case No: 17103/2008

In the matter between:

J J P BERG & OTHERS Applicants

and

ABSA BANK LIMITED Respondent

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

7/8/15

REASONS

D S FOURIE, J:

[1] On 17 November 2014 I granted an order in both matters (case number 20155/2006 in which J J P Berg was the applicant and in case number 17103/2008 in which C J H Nel and M D Nel were the applicants) in terms whereof:

- the applicants' failure to bring their application within the time limits prescribed by the Rules was condoned;

- the default judgment granted against the applicant on 14 August 2006 in case number 20155/2006 and the default judgment granted against the applicants on 11 August 2008 in case number 17103/2008 were rescinded and set aside;

- the applicants were granted ten days to enter an appearance to defend; and

- costs have been reserved.

[2] On 9 December 2014 the respondent requested written reasons in both matters for the orders granted on 17 November 2014. For some unknown reason the court files (and both these notices) were never brought to my attention. On 30 April 2015 a similar notice was filed again. At that stage I was already doing criminal trials at Palm Ridge for almost the entire term. However, on the same date the respondent's attorney was informed that I would only be able to attend to this matter after my return to my chambers in Pretoria. I have now been able to do so and these are my reasons for the orders granted.

BACKGROUND:

[3] During 2003 the respondent and N4 Crossing Hardware (Pty) Ltd (the principal debtor) entered into a written loan agreement in terms whereof the respondent advanced the amount of R1,000,000.00 to the principal

debtor. The applicants in both applications bound themselves as sureties and co-principal debtors, jointly and severally, with the principal debtor in favour of the respondent for the repayment on demand of any sum of money which the principal debtor may owe to the respondent.

[4] During 2005 the principal debtor was finally liquidated. According to the applicants the respondent's claim against the principal debtor at that stage amounted to R650,518.95. During June 2006 summons was issued against the applicant Berg. He failed to enter an appearance to defend and on 14 August 2006 judgment by default was granted against him for payment in the amount of R803,880.07 together with interest thereon at the rate of 11,5% per annum from 10 May 2006.

[5] During April 2008 another summons was issued against both the Nel applicants. They also failed to enter an appearance to defend and on 11 August 2008 judgment by default was granted against them for payment in the amount of R1,024,546.36 together with interest thereon at the rate of 15,5% per annum from 2 February 2008.

CASE FOR THE APPLICANTS:

[6] According to the applicant in case number 20155/2006 (Berg) he only became aware of the judgment against him during January 2010 when he conducted a credit bureau search. Immediately thereafter he arranged for a consultation with an attorney who took the matter up with the respondent.

As no progress had been made, he decided to obtain the assistance of another attorney. After further discussions and a settlement proposal, the respondent refused to settle the matter and then proceeded to execute on the default judgment. The reason why he failed to file a notice of intention to defend is because the summons was served at his chosen *domicilium citandi et executandi* during 2005. As he had by then already relocated from this address, he never received the summons.

[7] As far as his defence is concerned, he gave the following explanation: During 2003 the respondent and the principal debtor entered into a written loan agreement in terms whereof the respondent advanced the amount of R1,000,000.00 to the principal debtor. The loan was advanced on two conditions, being an amount equal to 80% of the outstanding balance would be secured by a policy of Kula Insurance and the remaining 20% exposure would be secured by him and the applicants in case number 17103/2008. When the principal debtor was liquidated during 2005, the respondent's claim against it amounted to R650,518.95.

[8] During June 2006 he surrendered two Sanlam insurance policies for the total value of R58,529.50 to the respondent. According to him the respondent also received dividends from the insolvent estate of the principal debtor in the total amount of R231,132.34. In addition thereto the Kula Insurance Company also paid out an amount of R471,344.58 to the respondent, but this amount was only allocated to the account of the principal debtor on 19 June 2012. It was therefore submitted, having regard to all

these payments, that the principal debtor's account should have shown a credit balance or, *alternatively*, a much reduced debit balance as opposed to the amount for which default judgment was granted.

[9] According to the explanation given by the applicants in case number 17103/2008 (Nel & Nel) they did not enter an appearance to defend because they were under the impression that their estate had already been sequestrated. They referred in this regard to a letter by attorneys Stols-Mashiloane Inc dated 23 March 2007 in terms whereof it is confirmed that *"voorlopige sekwestrasiebevele is toegestaan teen mnr en mev Nel en op 29 Maart 2006 is die finale bevel bekragtig"*. It was only later discovered that the application for sequestration was struck from the roll on the return date resulting in the provisional sequestration order having been discharged. Had they been aware of these circumstances, they would have entered an appearance to defend.

[10] As far as their defence is concerned, they rely on the same allegations which have been explained by the applicant (Berg) in case number 20155/2006. They also maintained that if all the payments mentioned by the other applicant had been taken into account, the account of the principal debtor should not have shown a debit balance or, in the *alternative*, it should have shown a much reduced debit balance as opposed to the amount for which default judgment was granted.

CASE FOR THE RESPONDENT:

[11] The respondent contended that the applicants failed to make out a proper case for condonation of the late filing of their application and they also failed to provide a proper explanation for their failure to enter an appearance to defend. It was also submitted that the applicants do not have a *bona fide* defence against the respondent's claim and therefore both applications should be dismissed.

[12] It was pointed out in this regard that the principal debtor had several facilities with the respondent and that the claim against the applicants as sureties related only to a "term loan". The respondent did not lodge a claim in the insolvent estate of the principal debtor relating to the term loan, as there was a risk of a contribution. However, certain payments had been received from the insolvent estate of the principal debtor, but these payments related to other facilities which, according to the respondent, are not relevant to the present claim.

[13] The two Sanlam policies which had been ceded to the respondent in the total amount of R58,529.50 were paid into the principal debtor's cheque account during June 2006 and later, also during June 2006, transferred to the term loan account. The amount of R471,344.58 (debt insurance) was paid out by Kula Insurance on 19 June 2012 when the account of the principal debtor was also credited with that amount. It was therefore contended, having regard to all these payments and the accumulation of interest, that the

applicants have no *bona fide* defence and that their application for rescission should be dismissed.

DISCUSSION:

[14] Rule 31(2)(b) provides that a defendant may within 20 days after he or she has knowledge of a default judgment apply to Court 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 27 makes provision for extension of time and condonation. Subrule (3) provides that the Court may, on good cause shown, condone any non-compliance with these Rules.

[15] The requirement of "good cause shown" referred to in Rule 27(3) gives the Court a wide discretion (Smith N.O. v Brummer N.O. 1954 (3) SA 352 (O) at 358A). Our Courts have refrained from attempting to formulate a definition of what constitutes "good cause", because to do so would hamper unnecessarily the exercise of a discretion (Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A). However, I accept that it should be exercised in a judicial manner.

[16] The requirements of "good cause shown" referred to in Rule 31(2)(b) have been stated to be as follows:

- the applicant must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance;

- the application must be *bona fide* and not made with the intention of merely delaying the plaintiff's claim;

- the applicant must show that he has a *bona fide* defence to the plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are in his favour (Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476-477 and also HDS Construction (Pty) ltd v Wait 1979 (2) SA 298 (E) at 300F - 301C).

[17] Before a person can be said to be in wilful default, it must be established that he had knowledge about the action, he deliberately refrained from entering an appearance and that he displayed a certain mental attitude towards the consequences of his default (Erasmus, *Superior Court Practice*, Revision Service 45, B1-202).

[18] From the explanation given by the applicant in case number 20155/2006 (Berg) it is clear that he failed to file a notice of intention to defend because the summons was served at his chosen *domicilium citandi et executandi*. By that time he had already departed from this address. After he had become aware of the judgment against him during January 2010 he instructed an attorney to take up the matter with the respondent. He thereafter instructed another attorney and after further discussions and a settlement proposal the respondent refused to settle the matter and proceeded to execute on the default judgment.

[19] Notwithstanding a long period of delay, I was unable to find that his default was wilful or that he acted with the intention of merely delaying the plaintiff's claim. He instructed attorneys on two occasions to act on his behalf in an attempt to come to a settlement. Having regard also to his defence (to which I shall refer later), I was and still am of the view that he gave a reasonable explanation for the long delay as well as for his default. In this regard I also took into account the principal that a good defence may compensate for a poor explanation.

[20] The same applies to the applicants in case number 17103/2008 (Nel & Nel). According to them they failed to enter an appearance to defend because they were under the impression that their estate had already been sequestrated. This has been confirmed by a letter of attorneys Stols-Mashiloane Inc. It was only later discovered that no such order had been granted. I have no reason to disbelieve them when they indicated that, had

they been aware of these circumstances, they would have entered an appearance to defend. This is also, in my view, a reasonable explanation for the delay as well as for their default.

[21] As far as the defence is concerned, I took into account the following:

- the applicants pointed out that the allegations with regard to the loan agreement differ materially. For instance, in case number 20155/2006 (par 11.2 of the particulars of claim) it has been alleged that interest was calculated *"daily and compounded monthly at 11.50% per annum from 10th May 2006"*, whereas in case number 17103/2008 it has been alleged (par 3.3 of the particulars of claim) that interest was calculated *"at the rate of 15.50% per annum as from 2 February 2008 to date of payment, the said interest to be calculated and capitalised monthly"*;

- the applicants also pointed out that the respondent had failed to provide a statement indicating the allocation of the dividends. According to the applicants the other facilities granted to the principal debtor were settled by an entity known as Super Group upon taking over the business of the principal debtor. Therefore, according to them, the dividends in the total amount of R231,132,34 should not have been allocated to these other facilities, but to the term loan account;

- according to the applicants there was an unreasonable delay by the respondent in calling up the debt insurance payment from Kula Insurance. The principal debtor was finally liquidated during 2005 and judgment by default was entered against Berg during August 2006. The amount of R471,344.58 was only credited to the principal debtor's account during June 2012.

[22] In the result it was contended by the applicants that the amount owing to the respondent, if any, would still be substantially less than what judgment was obtained for. The fact that the debt insurance of R471,344.58 was only credited at such a late stage (after several years) and no dividends were taken into account, might be the reason why such a vast amount of interest has accumulated in the meantime for which the applicants should not be held responsible. On the other hand, there may also be merit in the answers given by the respondent, but that is for the trial court to decide. I make no final ruling in this regard.

[23] Having regard to the above I was (and still am) of the view that the applicants demonstrated a *bona fide* defence with regard to the quantum of the respondent's claim. I also took into account that an applicant for rescission must show the existence of a substantial defence which does not

mean that he or she must also show a probability of success at this stage. A *prima facie* case is sufficient in the sense that there should be an issue which is fit for trial (PLJ van Rensburg & Vennote v Den Dulk 1971 (1) SA 112 (W)). In my view there is, in both these matters, an issue with regard to the quantum of the respondent's claim which is fit for trial. For these reasons I have exercised my discretion in favour of the applicants.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: ~~6~~ 7 August 2015.