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

Case No: 1493/2014

In the application of:

GCP VAN ZYL FAMILIE TRUST	**1st Applicant**
VAN ZYL: CHRISTOFFEL GERT PETRUS N.O.	**2nd Applicant**
SMITH: CARIN N.O.	**3rd Applicant**
PRETORIUS: BRYAN N.O.	**4th Applicant**

and

ABSA BANK LTD	**Respondent**

In re:

ABSA BANK LTD	**Plaintiff**

and

GCP VAN ZYL FAMILIE TRUST	**1st Defendant**
VAN ZYL: CHRISTOFFEL GERT PETRUS N.O.	**2nd Defendant**
SMITH: CARIN N.O	**3rd Defendant**
PRETORIUS BRYAN N.O	**4th Defendant**

CORAM:	NAIDOO, J
HEARD ON:	30 APRIL 2015
JUDGMENT BY:	NAIDOO, J
DELIVERED ON:	2 JULY 2015

NAIDOO J

[1] This is an application for the rescission of a judgment where the applicants seek an order in the following terms:

"1. Granting the first to fourth applicants *("applicants"*) condonation for the late bringing of this rescission of judgment application'

2. The default judgment granted against the applicants and in favour of the respondent is set aside/rescinded.
3. The attachment of all assets under attachment (*"the assets"*)*(sic)* and the Sheriff is ordered to return/release such assets to the applicants.
4. The applicants are ordered to pay to the Sheriff of the High Court all costs related to the removal and storage of the assets under attachment.
5. Costs of the application (only if opposed).
6. Granting the applicants further and/or alternative relief)"

The respondent opposes the application on the basis that the applicants failed to give a satisfactory explanation for their delay in bringing the application for rescission and that they have not shown that they have a *bona fide* defence to the respondent's claim. The applicants were represented in this court by Mr W Wannenburg and the respondent by Mr E Eksteen.

[2] The facts in this matter are, briefly, that the first applicant (the Trust) ordered two trailers from a supplier, and the trailers were financed by the respondent. Initially the Trust and the respondent entered into two lease agreements, but the Trust took delivery of the one trailer (the 1st trailer) but not the other (the 2nd trailer), as it

did not meet the Trust's requirements. After a while the lease agreement in respect of the 2nd trailer was cancelled and the deposit of R200 00.00 paid by the Trust in respect of that trailer was refunded to it by the respondent. It also appears that certain costs associated with the 2nd trailer, amounting to R89 014.86, were also credited to the account of the Trust by the respondent. There was consequently, one valid lease (in respect of the 1st trailer) still in existence between the parties.

[3] It is common cause that approximately two years after the lease agreement was signed in February 2009, the Trust made four payments in respect of the account relating to the 1st trailer, in respect of which there was still a valid lease agreement. These payments totalled R300 00.00. The Trust also paid a deposit of R200 00.00 in respect of the 1st trailer. The initial debt in respect of the 1st trailer was R 615 999.00.The agreement between the parties permitted the respondent to charge interest on arrear payments, which it clearly did. After the Trust made, on 3 August 2012, the fourth of the four payments I referred to, it made no further payments in respect of its account with the respondent. The latter issued summons against the Trust and its trustees (in their representative capacities) in April 2014. The 2nd and 3rd applicants were also sued in their personal capacities as sureties. The summons was served by affixing it to the gate of the address chosen by the Trust as its *domicilium citandi et executandi*. Neither the Trust nor its Trustees defended the matter, and the respondent obtained judgment by default against all four defendants, who are the current applicants, on 29 August 2014. This application for rescission was launched on 27 January 2015.

[4] 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.

[5] The applicants allege that they became aware of the action in this matter only on or about 11 November 2014, when the Sheriff of this court arrived at the premises of the 2nd respondent, Mr Van Zyl (Van Zyl) to attach assets, which he did. The Trust then appointed attorneys in November 2014 to act on its behalf. Van Zyl consulted with the Attorneys in December 2014, after the attorneys obtained copies of the relevant documents from the respondent's attorneys. The Trust's attorney was then ostensibly on leave from 12 December 2014 and returned in January 2015.He, however, injured himself and was away from the office until 19 January 2015. It was only thereafter that the papers for the rescission application were finalised.

[6] The narrative of the Trust, in the Founding Affidavit, notably lacks details of specific dates relating to the receipt of documents from the respondent's attorney, consultations with the Trust's attorneys and counsel and the drafting of the papers, all of which would have been within the knowledge of the Trust's attorneys and easily ascertainable. Such details would have assisted in the assessment of whether good cause has been shown. In an application for condonation, specific dates and times, as well as full details regarding the reasons why the application is necessary, are a necessity. I will return to this later.

[7] Rule 31, Rule 42(1) and the common law make provision for the rescission of a judgment. In the present matter, the respondent acted in terms of Rule 31(5)(a) in obtaining judgment against the applicants. Rule 31(5)(d) provides that "Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court." It seems that the applicants seek rescission of the default judgment in terms of the common law which obliges them to have brought the application for rescission within a reasonable time. Rule 31(2)(b) stipulates a period of 21 days within which an application for rescission may be brought, and this, in my view, is a good guide as to what may be considered a reasonable time for a rescission application in terms of the common law. The requirement of showing "good cause" must similarly be complied with whether the application for rescission is brought under Rule 31, Rule 42 or the common law.

[8] In the matter **Smith No vs Brummer No. 1954 (3) SA 352 (OPD**), where compliance with certain requirements was stipulated in

order for a court to grant removal of Bar. The following requirements were listed at P358A:

(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 not 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.

Similar requirements as in the Smith case were set out in **Du Plooy v Anwes Motors (Edms) Bpk 1983(4) SA 213(O) at 217H**, and **Silber v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345 (A)** which both counsel referred to in their Heads. In the **Silber** case, the court said at page 352 that "good cause" includes, but is not limited to the existence of a substantial defence.

[9] I shall proceed to examine whether the applicants have discharged the duty on them to satisfy all the requirements necessary for the court to condone their non-compliance with the Rules of Court and to grant their request for a rescission of the default judgment in this matter. As indicated earlier in this judgment, the summons in this matter was served on the applicants on 7 April 2014 by affixing it to the gate at their chosen *domicilium* address. Van Zyl, who appears to be the natural person through whom the Trust operates, alleges that the

summons was not received by any of the applicants. On 22 April 2014, Van Zyl (calling himself “Chris”) addressed an e-mail to an employee of the respondent, one Ms Esme Leeuw. The e-mail bears a heading entitled ”Dagvaardiging 1493/2014” (dagvaarding is the Afrikaans word for summons). In the same e-mail, he indicates that he owes the respondent R210 649.00 (presumably as opposed to the R284 222.18 claimed in the summons). The case number under which the summons in this matter was issued, is reflected as 1493/2014. It therefore begs the question how would this case number appear in a communication from Van Zyl about two weeks after the summons was served on the applicants? The logical conclusion is that he must have been aware of it prior to 22 April 2014, and in my view, it is not unreasonable to infer that it would have been on the day the summons was served or very shortly thereafter.

[10] As indicated earlier, Van Zyl alleges that the first time he and the other applicants became aware of the judgment was when the Sheriff arrived to attach assets of the Trust on 11 November 2014. On 14 November 2014, the applicant’s attorney addressed a 3-page letter to the respondent setting out a detailed version in respect of the applicants, which could only have come from Van Zyl or the other applicants. There was no reason at that stage for the application for rescission not to have been launched. These aspects were pertinently raised in the Answering Affidavit, but no reply was forthcoming to explain these apparent contradictions in the version tendered by Van Zyl in the Founding Affidavit. He also is vague about when counsel was consulted in this matter, what “archived” documents were awaited and from whom and when the papers were prepared in this matter. These were details

directly within the knowledge of his legal representatives and the failure to provide such details in the Founding Affidavit is telling.

[11] The applicants allege that a settlement proposal was made in July 2013 on behalf of the respondent by an “alliance” of the respondent, Link Finance, which Van Zyl said was accepted and an amount of R26 984.19 was, as a result, paid into the Trust Account of the Trust’s attorney. Two observations arise out of this allegation, namely that no details are given of which attorney’s Trust Account this amount was paid into and secondly, the Trust or the other applicants have made no further payments to the respondent in respect of the lease agreement between the parties since 2012. It also bears mention that the calculations by the applicants of the amount owed to the respondent does not take into account any interest which the respondent was entitled to, and did, charge the applicants. Mr Eksteen validly made the point that the usual business practice of the respondent is to charge interest and that the only agreement relating to a waiver of interest was in respect of the lease agreement relating to the 2nd trailer. It is therefore opportunistic and unreasonable for the applicants to say that the respondent waived the payment of all interest in this matter. It is, furthermore, noteworthy that the applicants acknowledge being indebted to the respondent, although the amount changes from time to time. In the email of 22 April 2014, Van Zyl acknowledges indebtedness in an amount of R210 649.00, the letter from its attorneys, Keet Attorneys, dated 14 November 2014 acknowledges the indebtedness of the Trust to the respondent, Van Zyl in his founding Affidavit refers to an amount of R26 984.19 as being owed to the respondent. I have already dealt with the lack of logic in the calculation of this amount.

[12] In terms of the common law, the applicants are required to show that good and sufficient cause exists for the default judgment in this matter to be set aside. This generally entails three elements which the applicants must establish: (1) they must give a reasonable and acceptable explanation for their default, (2) that the application is made *bona fide* and (3) that on the merits they have a bona fide defence which prima facie has some prospect of success. In summary, the applicants knew of the summons since April 2014, they knew about the default judgment at least since 11 November 2014 and gave detailed instructions to their attorney by 14 November 2014. No instruction was given to launch an application for rescission and no acceptable explanation is tendered for this failure. They conflate a dispute relating to the 2nd trailer with an alleged defence in respect of the lease agreement relating to the 1st trailer, while admitting indebtedness in respect of the latter mentioned lease agreement. I also do not accept their assertions regarding the settlement proposal made by Link Finance. The only conclusion that can be reached is that the applicants have no suitable explanation for the delay in bringing this application, that they brought this application to delay payment of the amount owed to the respondent, thus robbing the application of the element of *bona fides*. Likewise they have not shown that they have a *bona fide* defence to the respondent's claim and have raised spurious and unfounded defences thereto, which have no prospect of success. The principle laid down in the celebrated case of **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A),** is that an opposed application is approached on the basis that a final order may be made if those facts averred by the applicant .that have been admitted by the respondent, together with the facts alleged by the

respondent, justify such an order, I find that there are material factual disputes between the parties. The applicants have, however not asked for such disputes to be referred to oral evidence. In any event, my view is that no useful purpose will be served in doing so as I am of the view that the applicants have no defence in this matter. I am accordingly obliged to accept the respondent's version.

ORDER

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

The application is dismissed with costs

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S. NAIDOO, J

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On behalf of Respondent:	Mr E Eksteen
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