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

Case No: 4254/2014

In the matter between

**JAN HERMANUS HENDRIK ANNANDALE** Applicant

and

**STANDARD BANK OF SOUTH AFRICA LIMITED** Respondent

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| **CORAM:** | NAIDOO, J |
| **JUDGMENT:** | NAIDOO, J |
| **HEARD ON:** | 25 JUNE 2015 |
| **DELIVERED ON:** | 18 SEPTEMBER 2015 |

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[1] This is an application for the rescission of a default judgment granted by the Registrar of this court on 6 November 2014, as well as an application for condonation for the late filing of the rescission application. Mr JJ Buys appeared for the applicant and Mr P Zietsman SC for the respondent.

[2] The respondent (as plaintiff) issued summons against the applicant (as defendant) for payment of the amounts of R 1 034 297.66 (claim 1) and R551 200.00 (claim 2), together with interest thereon and costs. For convenience, I shall refer to the respondent as the plaintiff and the applicant as the defendant. The plaintiff lent and advanced monies in respect of home loans to the defendant. As security for the loans, the defendant registered mortgage bonds over his immovable property. The plaintiff alleges that the defendant failed to pay the instalments as he had agreed to do. It consequently issued summons against the defendant for the recovery of the amounts owing as well as for an order declaring the defendant's immovable property specially executable. The plaintiff also alleged in its Particulars of Claim that it complied with section 129(1)(a) of the National Credit Act 34 of 2005 (NCA) by sending the requisite notices in terms thereof, in respect of claim 1 and claim 2. The notices, which were attached to the Particulars of Claim, are dated 21 August 2014.

[3] The summons was served on the defendant on 25 September 2014, by affixing it to the main entrance of the applicant's chosen *domicilium citandi et executandi*, being I Wilge Avenue, Bloemfontein. As there was no response from the defendant, the plaintiff obtained judgment by default on 6 November 2014, with leave to refer, to open court, its

application to declare the defendant's property executable. To this end, the plaintiff subsequently served on the applicant, on 24 November 2014, a notice of set down and an affidavit in support of its application to declare such property executable, together with the application for default judgment and the default judgment granted by the Registrar. This application was opposed by the defendant, who alleges that he received the application some time in November 2014. He immediately consulted a debt counsellor who made an appointment with his current attorney, with whom he consulted on 3 December 2014. The application to declare his property executable was postponed and he was given an opportunity to file his opposing affidavit, which was done on 16 January 2015. The application to declare his property executable was enrolled for hearing on 19 February 2015. The plaintiff's Heads of Argument in that matter was filed a few days before that and it seems that this application for rescission was launched on 12 February 2015, after the filing of the plaintiff's Heads. The application to declare property executable has been postponed *sine die*, pending the hearing of this application. The plaintiff opposes the present application on the basis that the defendant failed to give a satisfactory explanation for his delay in bringing the application for rescission and that he has not shown that he has a *bona fide* defence to the plaintiff's claim.

[4] The defendant alleges that he did not receive the summons, was unaware of it and therefore did not react to it. His first notification of any legal action is the notice of set down, which he saw in November 2014, and which I have referred to above. The events as I have outlined them above, then unfolded. The defendant further alleges that he only became aware of the default judgment during a consultation with counsel on 13 January 2015, which was held for the purpose of preparing his opposing affidavit in the application to declare property executable. I pause to note that the defendant denies that there was personal service of the latter mentioned application on him, as reflected in the Sheriff's return of service. He alleges that it was affixed to a pole at the front entrance of his property. He only caught sight of the summons on 19 January 2015, at which time he instructed his legal representatives to launch the current application for rescission. The defendant also indicates that he applied for debt review in July 2014, due to his over-indebtedness. The debt due to the plaintiff was included in such application, which application was opposed by the plaintiff. The plaintiff revealed that its two claims were ultimately excluded from debt review. The defendant therefore alleges that the plaintiff was aware that he was subject to debt counselling and debt review as early as July 2014, but persisted with the summons in this matter. The defendant's contention is that the plaintiff ought to have terminated the debt review in respect of the credit

agreements between it and the defendant, by way of a notice in terms of section 86(10) of the NCA, before it could issue summons against the defendant. The plaintiff's failure to do so renders the summons premature and, consequently, the default judgment was wrongly granted on 6 November 2014. I will return to this later.

[5] 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.

[6] Rule 31(2)(b) of the Uniform Rules of Court provides that:

"A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon 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"

The requirement of showing "good cause" must similarly be complied with when an application for rescission is brought. Although, in an application for rescission, wilful default, for the purposes of this subrule is not a requirement, the consideration of what constitutes "good cause" usually includes the element of wilfulness. More than six decades ago, the court in **Grant v Plumbers (Pty) Ltd 1949(2) SA 470 (O) at 476-7,** stated the following to be the requirements which an applicant must comply with in an application for rescission:

"(a) He 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.

(b) His application must be *bona fide* and not made with the intention of delaying the plaintiff's claim.

(c) He 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 actually in his favour"

**(See Erasmus** in **"Superior Court Practice", page B1-20).** Grant's case has since been cited with approval in a long line of decisions. **Harms in Civil Procedure in the Superior Court B-204,** expresses the view wilful default is normally fatal but gross negligence may be condoned.

[7] In this matter, the defendant consulted with his attorney on 3 December 2014, in connection with the executability application. It must have been immediately apparent to his attorney that a judgment in favour of the plaintiff would have been the forerunner to such an application. Similarly, when the defendant consulted with counsel on 13 January 2015, the same consideration must have been within the contemplation of counsel. It is difficult to imagine that the defendant would not have been made aware by his legal representatives that a judgment against him would have to have been granted for an executability application to be launched, and if it is in fact the case that this was not brought to the defendant's attention (as he seems to suggest), then one can only conclude that his legal representatives were negligent. An attorney does not need to physically see a summons to know that an application to declare property executable follows upon the granting of judgment (usually by default). In any event, as I indicated earlier, the annexures attached to the notice of set down were firstly, the supporting affidavit by an employee of the plaintiff setting out the facts leading up to the executability application, the dates when the summons was issued and served on the defendant and the amounts owed by the defendant, secondly, the application for default judgment and thirdly, the default judgment granted by the Registrar of this court. The Sheriff's return confirms this, and although the defendant denies that the documents

were served on him personally, he does not deny receipt of the annexures to the notice of set down.

[8] These were the documents presented to his legal representatives. The explanation, therefore, that he became aware of the judgment only on 13 January 2015 or, at the latest,19 January 2015, after a copy of the summons was obtained by his attorney on 14 January 2015, rings hollow. I am more inclined to believe that he was so focused on preventing an order declaring his property executable, that he did not immediately pursue the application for rescission. It was only after this was pointedly raised by the plaintiff in its opposing affidavit and Heads of Argument that he seems to have been spurred into action regarding the rescission application. But once again, he was dogged by some "mishap" in the offices of his attorney resulting in the application for rescission not being issued and served until 12 February 2015. To my mind, the defendant's opposing affidavit in the executability application seems to have all the elements for a founding affidavit in an application for rescission, which may well have been within his contemplation at the time. It seems to me that he was extremely negligent in not pursuing the rescission application at that time. While it seems that his legal representatives may not be blameless, I will refrain from making any pronouncement in that regard. I am constrained to find however, that the

defendant was wilful in his default. I am of the view that his negligence in this regard, even if it is gross negligence, can be condoned.

[9] I turn to the defence raised by the defendant. In essence, he alleges that the summons was premature as he did not receive the notices in terms of section 129 of the NCA sent to him prior to his application for debt review in July 2014. Mr Buys addressed the court extensively regarding the post office at which the defendant receives his post. It seems that although the defendant lives in the Roodewal area, the Renosterspruit post office services that area. A perusal of the relevant section 129 notices, dated 4 June 2013 and 3 July 2014, which were posted prior to the defendant's application for debt review, indicate that they were sent to the Bloemfontein post office and ultimately returned to Standard Bank. The defendant contends that as he had not received the latter mentioned section 129 notices, he was unaware that the plaintiff intended to proceed with legal action and was, consequently, not prohibited from applying for debt review. The defendant seeks the setting aside of the default judgment and the application to declare his property executable, with the ultimate aim of entering into the main action for the purpose of having the debt owed to the plaintiff included in the debt restructuring and revive matter before the Magistrates Court. It seems that he was advised (erroneously, according to him) to exclude the plaintiff's claim

from the debt review (which he did), although his initial assertion was that the plaintiff's claim was included in the debt restructuring application. While the defendant acknowledges receipt of the section 129 notices dated 21 August 2014, his assertion is that they were received whilst he was in debt counselling. The plaintiff was aware of this but proceeded in spite of such knowledge. There is, therefore, still the issue of the section 129 notices which the defendant says he did not receive, which may go to the heart of whether the summons should have been issued when it was. Furthermore, it is not in dispute that the defendant is over-indebted, and is clearly not in a position to service the debt owed to the plaintiff, without losing his home.

[10] The court, in exercising its discretion in this matter must do so judicially and judiciously in ensuring that the prejudice to the plaintiff is minimised, while also bringing a measure of fairness to the defendant. That the defendant was negligent in not bringing the rescission application timeously is without doubt, as is the fact that the plaintiff is suffering prejudice as a result of the delay in payment by the defendant of the monies he owes to the plaintiff. Such prejudice, in my view, can be mitigated to some extent by an appropriate order for costs. Regarding the defence of the defendant, it may well be that a court hearing the trial of this matter will consider such defence sufficient for it to exercise its

discretion in granting the defendant the relief he seeks. To refuse his application for rescission would have the effect of unsuiting him and closing the doors of the court to him. I am of the view that this court should exercise its discretion in favour of the defendant, with an appropriate order for costs to mitigate the prejudice to the plaintiff.

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

11.1 Condonation is granted to the defendant for the late filing and service of the application for rescission;

11.2 The Default Judgment granted by the Registrar of this Court on 6 November 2014, under case number 4254/2014, is hereby set aside;

11.3 The defendant is ordered to pay the costs of this application

**S. NAIDOO, J**

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| On behalf of the Applicant: | Adv. JJ Buys |
| Instructed by: | Willie J Botha Inc<br>95B Kellner Street<br>Bloemfontein<br>(Ref: WJ Botha/jg/Ann1/0001) |

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| On behalf of Respondent: | Adv Zietsman SC |
| Instructed by: | Matsepes Inc<br>26/28 Aliwal Street<br>Bloemfontein<br>(DH/NS444P) |