Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

CASE NO: 1439/12

In the matter between:

WILLEM ALEXANDRA VAN WYK — FIRST APPLICANT

CHARLOTTE LEVINA VAN WYK — SECOND APPLICANT

And

ABSA BANK LIMITED — RESPONDENT

Date of hearing: 23 August 2013

Date of judgment: 25 October 2013

JUDGMENT

PHATSHOANE J

1. Mr Willem Alexandra Van Wyk and Ms Charlotte Levina Van Wyk, the first and second applicants, seek condonation for the late filing of their application to rescind and set aside the default judgment entered against them in favour of ABSA Bank Limited, the respondent, by the registrar of this Court and the attendant costs.
2. The applicants are married to each other in community of property. They are sureties and co-principal debtors with Red Coral Investment 61 (Pty) Ltd (in deregistration), the principal debtor. During August 2012 when summons were issued against them Red Coral Investment had ceased to exist through deregistration. They did not enter appearance to defend. On 06 November

2012 judgment by default was obtained against them in favour of the Bank for the payment of an amount of R717 586.70; payment of interest thereon at the rate of 10% per annum with effect from 23 April 2010 capitalized monthly to date of payment; and costs on an attorney and client scale.

3. In the applicants' explanation of the delay in bringing the application they acknowledge that the summons was served on them by affixing same to the outer principal door of their chosen *domicilium* address. However, they never had sight of the summons. Mr Van Wyk states that he became aware of the action on 22 November 2012 when the sheriff served on him a warrant of execution. He immediately contacted his attorneys. On 26 November 2012 an agreement was reached that the sheriff would withhold execution of the warrant.

4. The applicants state that their attorneys obtained copies of the Court file on 13 December 2012 from the Bank's attorneys. On the date in question their attorneys sought an indulgence from the Bank's attorneys to file the application for the rescission of the judgment on 07 January 2013 because Mr Van Wyk says he had to obtain the Bank's statements and his attorneys offices were to close on 14 December 2012. Mr Van Wyk explained that he was only able to obtain copies of the Bank's statements on 10 January 2013. The application for rescission of the judgment was filed on 01 February 2013. Ms Stanton, for the applicants, argued that, regard being had to the explanation offered for the delay, the applicants were not in wanton and wilful default.

5. The Bank opposes the application for condonation on the ground that the applicants have no bona fide defence to its claim and that they have resorted to technical defences which cannot avail them. In their attorneys' correspondence to the Bank's attorneys seeking an indulgence to file papers at the later date the applicants' attorneys informed the Bank's attorneys that if they were not amenable to their proposal their papers would be served and filed by 19 December 2013. There was no response from the Bank's attorneys. Save that they received the Bank's statements around 10 January 2013 the applicants do not explain why the papers were not filed on the suggested date. There is also no explanation of what the applicants did from 10 January 2013 to 01 February 2013 to file their application.

6. A defendant may within 20 days after he or she has knowledge of a judgment by default apply to Court upon notice to the plaintiff to set aside such judgment and the Court may, upon good cause shown, set aside the judgment on such terms as to it seems meet[1]. The application is approximately 26 days late. However, I am of the view that the delay in bringing the application for rescission of the judgment is not inordinate. I would therefore determine if the application is made bona fide or that the applicants have a bona fide defence to the Bank's claim which *prima facie* has some prospects of success.

7. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9 para 11 the following dictum appears:

> "[11]….The authorities emphasise that it is unwise to give a precise meaning to the term 'good cause'. As Smalberger J put it in HDS Construction (Pty) Ltd v Wait [1979 (2) SA 298 (E)]:
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> 'When dealing with words such as ''good cause'' and ''sufficient cause'' in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (Cairns' Executors v Gaarn 1912 AD 181 at 186; Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352 - 3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'
>
> 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 [1949 (2) SA 470 (O)], HDS Construction (Pty) Ltd v Wait supra, Chetty v Law Society, Transvaal [1985 (2) SA 756 (A)])."

8. In demonstrating that they do have a bona fide defence to the Bank's claim, the applicants attacked the procedure followed by the Bank in obtaining judgment against them on a number of grounds. Firstly, they claim not to have received the s 129 Notices in terms of the National Credit Act, 34 of 2005. Section 129

[1] See Rule 31(2)(b) of the Uniform Rules.

deals with the procedures that should be followed before debt enforcement could commence. Ms Stanton argued that the returns of service in respect of the s 129 Notices are defective in multiple respects. *Inter alia*, no case numbers appears to have been allocated to the matter because it does not appear *ex facie* the returns of service; both returns refer to the action instituted in the Magistrates' Court and not in this Court; the returns are silent on the nature of the letter served on the applicants; and that it was strange that the s 129 Notices were served by two different sheriffs on the same date and at almost the same time.

9. The defects on the returns of service do not advance the applicants' case in anyway. There can be no doubt on what the contents was of what was served by the sheriff on 23 July 2012. This is borne out by the Bank's attorneys' reference number on the s 129 Notice Letters which is reflected on both returns. Ordinarily when the s 129 Notice is issued there can be no case number because no Court process has been issued at this stage, neither can it be known, at least to the Sheriff, whether the action would be instituted in the Magistrates' Court or the High Court. The signature part which seems to display the names of two different sheriffs albeit served at almost the same time would not avail the applicants either because what counts is whether they were served or not. A perusal of both returns of service shows that the applicants were personally served with the s 129 Notices but they simply displayed indifference.

10. The summons was subsequently served by affixing copies thereof to the outer principal door of the applicants' chosen *domicilium*. While this method of service is proper in terms of the Rules the applicants should be given the benefit of the doubt that they might not have received the summons as they claim. In these circumstances it cannot be said that they were in wilful default. But this is not the only yardstick in the determination of the application for a rescission of a default judgment because the applicants should still establish good cause.

11. In *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352E-H the Court remarked:

"In Brown v Chapman, 1938 T.P.D. 320, MILLIN, J., expressed the view at p. 328 that the introduction of the words, 'and if good cause is shown' had made no difference to the effect of the Rule; he was of opinion that the showing of good cause amounted to no more than the disclosing of a substantial defence which had, according to earlier decisions, been required under the unamended Rule. But the language of the amendment does not support the suggested limitation. The applicant had always been obliged to set out the reasons why he did not appear, as well as the grounds of his defence, but it was only in 1936 by another amendment that the application was required to be on affidavit. It seems clear that by introducing the words 'and if good cause be shown' the regulating authority was imposing upon the applicant for rescission the burden of actually proving, as opposed to merely alleging, good cause for rescission, such good cause including but not being limited to the existence of a substantial defence (cf. du Plessis v Tager, 1953 (2) SA 275 at p. 278 (O)). The position under the sub-rule is thus that if the defendant fails to show good cause for relief or if the plaintiff shows that the defendant was in wilful default the magistrate is not entitled to rescind the judgment; if good cause has, and wilful default has not, been shown the magistrate apparently has a discretion, but it is unnecessary to examine this aspect of the matter."

12. The following passage appears in Erasmus Superior Court Practice, Farlam *et al* at B1-204, Service 38/2012.

"The requirement that the applicant for rescission must show the existence of a substantial defence does, however, not mean that he or she must show the probability of success: It suffices if he or she shows a *prima facie* case, or the existence of an issue which is fit for trial. The applicant need not deal fully with the merits of the case but the grounds of defence must be set forth with sufficient detail to enable the Court to conclude that there is a *bona fide* defence, and that the application is not made merely for the purpose of harassing the respondent."

13. The second procedural attack advanced by the applicants is the alleged failure by the Bank to comply with Rule 18(6). They contend that in terms of this Rule a party that relies on a written contract should annex a true copy thereof or the portion relied upon to the pleading. They argued also that the Bank did not attach to the summons the credit agreement it concluded with Red Coral Investment. It also failed to set forth the necessary averments pertaining to this

claim in its particulars of claim. The applicants further intimated that should they succeed with their application, they will serve on the Bank a Rule 30(1) Notice to cure the defect.

14. The Bank instituted action against the applicants in their capacity as sureties and co-principal debtors with Red Coral Investment 61 (Pty) Ltd. The following averments are made in the summons:

> "1.1 By virtue of the provisions of the suretyships annexed hereto and marked A1-A2 the first and second defendant bound themselves as sureties and co-principal debtors with Red Coral Investment (Pty) Ltd ("the principal debtor") in the amount of R717 586.70 plus 10.00% interest calculated and capitalized monthly in arrears the entire debt now being owing, due and payable.
>
> 1.2 As will more fully appear from the suretyship, the first and second defendant have agreed that their liability in accordance with the suretyship are individually and jointly with the principal debtor; in respect of all its liabilities inclusive of interest and costs and that a certificate, signed by a manager of the plaintiff, shall be *prima facie* proof of the amount owing to the plaintiff; the interest rate payable and any other fact relating to the claim. A manager of the plaintiff has certified that the defendants are indebted in the amount claimed as evident from the annexed certificates, marked B1-B2."

15. As it can be gleaned from the preceding paragraph the cause of action was based on the written deeds of suretyship. Both the applicants' deeds of suretyship are attached to the summons. I am not persuaded that the Bank did not comply with Rule 18(6). From what appears on the certificate of balance the principal debtor's indebtedness arose from a cheque account evidently arising from an overdraft facility. The deeds of suretyship are, in terms of clause 11 thereof, a continuing covering security which would remain in force notwithstanding any interim settlement of the debt until the Bank receives written notice from the surety or his/her executors, curators or legal representative to terminate the deeds provided that the amount outstanding together with interest and costs would have been settled. The applicants do not dispute the amount owing to the Bank save that on 19 January 2010 the

balance due to the Bank was R685 385.69. A certificate of balance is designed to facilitate proof of the amount of liability in these situations.[2]

16. The third attack is on the non-joinder of the principal debtor. The applicants further contended that as sureties their liability arises from the time the principal debtor is in default and therefore their obligation towards the Bank is of an accessory nature. They further contended that the Bank did not present proof that it has acted against the principal debtor nor did it produce proof of its indebtedness to the Bank and by extension that the certificate of balance cannot assist the Bank.

17. In *Millman and Another NNO v Masterbond Participation Bond Trust Managers (Pty) Ltd (Under Curatorship) and Others* 1997 (1) SA 113 (C) at 122J-123A the Court held:

"In our view, the legal position was correctly stated by Professor J G Lotz in Joubert (ed) The Law of South Africa vol 26 para 161, where the following statement appears:

'Unless the parties have agreed otherwise, a surety's debt normally becomes enforceable as soon as the principal debtor is in default subject, however, to the surety's right to claim that the principal debtor first be excussed. If a surety has bound himself also as co-principal debtor, his debt becomes enforceable at the same time as the principal debt."

18. The creditor may join the principal debtor and sureties in one action but it is not a prerequisite[3]. The creditor is not obliged to proceed first against the principal debtor unless the surety avails himself of the benefit of excussion[4]. In the applicants' own words the principal debtor was deregistered and therefore non-existent. It would be pointless therefore to join the principal debtor nor can the applicants raise this defence at any hearing in due course. The summons issued against a deregistered company is a nullity (see *Village Freezer t/a Ashmel Spar v CA Focus CC* 2012 (6) SA 80 (ECG) at 87 para 26; *Pieterse v Kramer NO 1977 (1) SA* 589 (A) at 601F-G). The applicants were personally

[2] See at Thrupp Investment Holdings (Pty) Ltd v Goldrick 2008 (2) SA 253 (W)256 A and authorities cited therein.
[3] CF Forsyth & JT Pretorious Caney's The Law of Suretyship, sixth edition at 134-135 para 10.
[4] CF Forsyth & JT Pretorious Caney's The law of Suretyship, sixth edition at 126 para 3.

served with the s 129 Notices which showed that the principal debtor was in default of payment and chose not to act as advised in the notices.

19. The fourth attack against the Bank's claim is that the principal debt cannot be enforced against the applicants because the principal debtor had already ceased to exist when summons were issued against the applicants and therefore they should be released. This cannot be. For all we know, they may have been responsible for the downfall of the principal debtor. In *Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) amongst the issues which the Court had to deal with was the question whether the companies' deregistration extinguishes the liability of a surety. In that case the D company had been deregistered in terms of s 73 of the Companies Act, 61 of 1973, on 21 December 1979. The appellants submitted that as a result of the company's deregistration, there was no longer a principal debtor and, therefore, their liability to the respondent had been extinguished. The Court held that there was no foundation in law for the argument that a surety was released from liability to the creditor when the principal debtor ceased to exist.

20. Fifthly, the applicants contended that the debt was extinguished by prescription in that the Bank failed to issue summons against Red Coral Investment within the prescribed period. They intimate that the debt was similarly extinguished by prescription as against them because they signed the deeds of suretyship on 05 April 2006 and no steps were taken against them until August 2012 when the Bank instituted action against them.

21. To succeed with their application for rescission of the judgment on the basis of the defence of prescription the applicants had to show, at least *prima facie*, that the principal debt had prescribed at the time of the institution of the action on 22 August 2012. The suretyship is indeed accessory to the principal debt. Prescription of the principal debt will extinguish that debt and thereby release the surety.[5]

22. It is for a party invoking prescription to allege and prove the date of the inception of the period of prescription (see *Santam Ltd v Ethwar* 1999 (2) SA

[5] CF Forsyth & JT Pretorious Caney's The law of Suretyship, sixth edition at 200.

244 (SCA) at 256G; *Absa Bank Bpk v De Villiers* 2001(1) SA 481 (SCA) at 486G. No mention is made of the date of inception of the period of prescription in the applicants' papers. What the applicants are saying is that the balance due and payable by Red Coral Investment as at 21 September 2009 was R22.39. From the final statement, Mr Van Wyk says he could obtain from the Bank dated 25 January 2010, the amount due and payable to the Bank by Red Coral Investment as at 19 January 2010 was R685 385.69. Section 11(d) of the Prescription Act, 68 of 1969, provides that a debt shall prescribe after three years unless an Act of Parliament provides otherwise. The claim cannot be said to have prescribed regard being had to the dates the applicants aver that the debt became due and payable.

23. On the sixth ground the applicants argue that should the Court find against them in all the five defences/grounds aforegoing, they plead that the second applicant's liability towards the Bank in terms of her deed of suretyship be limited to the maximum amount of R300 000.00. Her limited liability is apparent from the summons and the certificate of balance. On the latter ground the Bank conceded that its claim against Ms Van Wyk should be limited to an amount of R300 000.00 and consented to the variation of the default judgment to reflect the correct position.

24. Save for raising the technical defences there is no explanation given by the applicants why the amount owed to the Bank has not been paid. I am of the view that the applicants failed to establish good cause or a *prima facie* case fit for trial and must therefore fail. There can be no logic in rescinding a judgment which would be revived or yield the same result at a later stage. To the extent that the liability of the second applicant towards the Bank is limited to an amount of R300 000.00 the judgment should be varied accordingly. There can be no prejudice. The costs will follow the success.

Order:

25. In the result:

1. The application for the rescission of judgment entered against Mr Willem Alexandra Van Wyk and Ms Charlotte Levina Van Wyk, the first and second applicants, is dismissed with costs.
2. Para 1 of the Judgment by default dated 06 November 2012 entered against the first and second applicants is varied to the following extent:

"Having read the summons and other documents filed of record, judgment by default is granted in favour of the plaintiff:

1. (a) As against the first defendant, Mr W A Van Wyk, for the payment of the sum of R717 586.70.

(b) As against the second defendant, Ms CL Van Wyk, for the payment of the sum of R300 000.00."

MV PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

Appearance for the applicants : Adv A Stanton *Instructed by Mjila & Partners*
Appearance for the respondent: Adv. A.S Sieberhagen *Instructed by Duncan & Rothman*