IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 8244/10

In the matter of:

TERRANCE JOHN ROSSITIER	**APPLICANT**
TERRANCE JOHN ROSSITIER N.O	**SECOND APPLICANT**
GAIL WINGROVE ROSSITIER	**THIRD APPLICANT**

AND

NEDBANK LIMITED	**RESPONDENT**

JUDGMENT

Date of hearing: 11 February 2013

Judgement delivered on: 25 February 2013

D. PILLAY J

[1] In this application for rescission of default judgment the respondent, Nedbank Limited, issued summons on 14 October 2010 for R13 975 793.17 and R10 686 943.68 plus interest on these amounts. The applicants defended the action. The parties renegotiate the payment terms of these loans on 05 November 2010 in a variation agreement. The applicants defaulted again. More than a year later Nedbank's attorneys issued a notice of bar on 29 March 2012. The applicants' attorney received the notice of bar. He was over-committed with other work. He did not deliver the plea. After the notice expired he asked Nedbank's attorneys for an extension of time to deliver the plea. They refused. On 17 May 2012 the applicants' attorney received an application for default judgement. Default judgment was granted on 30 May 2012.

[2] Relying on Rule 42(1)(a) of the Uniform Rules of Court the applicants attack the default judgment on the ground that it was erroneously sought and granted in their absence. The alleged error arose as a result of Nedbank's non-compliance with practice directive 2.3 which provides:

> 'Where an application for default judgment is made six months after the date of service of the summons, it is both a practice of the registrar's office and the court to require that a notice of set down be served on the defendant informing him/her that such default judgment will be sought on a given date and time, such date and time being not less than five days from the notice.'

[3] Furthermore, Rule 31(5)(a) prescribes that when a defendant is in default of delivery of a plea, the plaintiff may obtain judgment by default provided it gives the defendant not less than five days' notice of its intention to apply for default judgment. Nedbank followed its notice of bar with a notice dated 10 May 2012 informing the applicants that it would, after five days, apply for default judgment. The application for default judgment should have but did not set out the date and time when default judgment would be sought. Accordingly, it did not comply with the practice directive.

[4] Rules of procedure exist in order for litigants and the court to conduct proceedings in a predictable way. So they should be adhered to. However, when the parties concluded the variation agreement, the applicants accepted that Nedbank was entitled:

> 'without notice to the Trust and without limiting any other remedy which it may have in law to:
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> 6.1.2 in the event that such breach occurs subsequent to the withdrawal of the confession of judgment, prosecute the action to finality.'

[5] Notwithstanding the applicants attack on the validity of the variation agreement, which I reject below, I find that the applicants waived their right to notice to the further prosecution of the action. By serving the application for default judgment Nedbank did more than it was obliged to in terms of the variation agreement.

[6] The applicants' attorney's explanation for not applying to lift the bar or react to the application for default judgment timeously emerges in the following paragraphs extracted from his affidavit in this application:

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> I wrote to the other side after the expiry of the notice of bar requesting to be allowed to deliver the plea, however they refused to grant any extension, advising that a substantial condonation application would have to be made and that in the interim they would be requesting default judgment.
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> The notice requesting default judgment served on my agents did not give a date when the default judgment was to be requested and as such was a defective, however it was pointless to bring an application to uplift the bar which would have to be brought in a normal course and my contention was that to deal with the application for default judgment before the Registrar and advise the Registrar that the defendants had a substantial defence and wanted to deliver a plea.
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> In my view, it was impossible to bring a substantial application to uplift the bar before the plaintiff applied for default judgment which they could do on 10 days notice.
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> Notice was received to set the application for default judgment down but no date was given and I would submit deliberately so to avoid the defendants and me from approaching the registrar to prevent judgment from being given and such application was therefore defective.
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> After it came to the first defendant's attention that judgment was granted sometime at the end of June 2012, he delivered the writ of execution to me where after on the 10th July 2012, I wrote to the plaintiff's attorney advising that a rescission application would be forthcoming.' (*sic*)

[7] The attorney's evidence above clearly indicates that he was aware of Nedbank's intention to proceed with default judgment as soon as the notice of bar expired. He was also aware that Nedbank wanted a substantial application for condonation if they were to grant any extension to the applicants to deliver their plea. The attorney does not explain why it would be 'pointless to bring an application to lift the bar'. It would have been pointless to lift the bar if the applicants had no defence. If the applicants did have 'a substantial defence' the attorney would have disclosed this at every opportunity and especially when he received the notice of bar and the application for default judgment. He says that it was 'impossible' for him to bring the substantive application to lift the bar because of his personal circumstances. He should have requested an extension to deliver the plea as soon as he received the notice of bar, not after it expired. If he could not render an efficient service to the applicants then he should have informed them. If he did then it was up to them to find another attorney or live with the consequences of retaining him.

[8] The applicants' attorney opined that Nedbank 'deliberately' avoided informing the applicants of the date and time of the default judgment application so that he would not approach the registrar to prevent judgment. If that was indeed his genuine suspicion at the time then he had all the more reason to thwart Nedbank's strategy by applying to uplift the notice of bar, intercepting the application for default judgment, and presenting the registrar with the applicants' plea setting out the promised 'substantial defence'.

[9] The first applicant alleges that he became aware of the default judgment on 9 July 2012 when he instructed his attorney to apply for rescission. The applicants' attorney signalled that the rescission application would be delivered by Monday 16

July 2012. He had became aware at the end of June 2012 that default judgment had been granted. On 10 July 2012 he notified Nedbank's attorneys that he would be applying for rescission. As a result of his personal difficulties this application was eventually launched only on 14 August 2012.

[10] From the affidavits for the applicants it appears that after the parties concluded the variation agreement nothing transpired until the notice of bar. However, it emerges from the affidavit for Nedbank that when the applicants defaulted on the variation agreement by not paying the first instalment which fell due on 1 April 2011, their attorney notified Nedbank's attorney that the applicants would pay by 30 June 2011. Following a meeting at Nedbank's offices on 31 May 2011 the applicants undertook to give Nedbank a further payment proposal urgently. On 20 June 2011 the applicant's attorney again promised that his clients would be in a position to pay R1.5m before 30 June 2011.

[11] Nedbank accepted the applicants' proposal on condition that, in addition to that payment, the applicants would pay enough to Nedbank to service the monthly instalments under the loan agreement for twelve months from 1 July 2011. The applicants paid R2m on 1 July R458 000 on 12 July 2011. They allege that their accounts were consequently not in arrears. Assuming that they are correct, on their own version they still did comply with Nedbank's term that they pay in advance for twelve months from July2011.

[12] Nine months later on 8 March 2012 Nedbank's attorneys notified the applicants of their breach of the variation agreement and demanded payment of the full arrears of R625 890.44. They wrote once again to the applicants' attorney demanding payment of the arrears by 15 March 2012 failing which they would take further action.

[13] Also not apparent from the founding affidavits but which emerges from the affidavit for Nedbank is that on 14 August 2012 the High Court dismissed with costs their application to stay the sale in execution of one of their immovable properties. Whatever the basis of that dismissal was, the ensuing order is premised on the underlying validity of the default judgment. It does not appear that that judgment is on appeal; if it is the applicants would have said so in this application. Instead, other properties of the applicants have since also been attached and sold to Nedbank.

[14] A judgment or order once pronounced is final. This principle of finality divests the court of any inherent jurisdiction to interfere with its judgments or orders.[1] This question arose in *Firestone South Africa (Pty) Ltd v Genticuro A.G* 1977 (4) SA 298 (A). Trollip JA assumed without deciding that a court retains a general discretion to correct, alter or supplement its judgment or order in appropriate cases. But it cautioned that the assumed discretionary power

> 'should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded'.[2]

In that case the applicant had ample opportunities over seven years to clarify or rectify an order. Trollip JA remarked:

> 'In a case as the present one a court ought to be loath to exercise its discretion in favour of the party who has not been vigilant, but indeed supine or dormant, about protecting its alleged rights or redressing alleged wrongs.'[3]

[15] Nestadt JA reiterated the principle of finality articulated in *Genticuro* in *Tshivhase Royal Council and another v Tshivhase and another; Tshivhase and another v Tshivhase and another* 1992 (4) SA 852 at 862 G –J to acknowledge the discretion a court has in an application for rescission.[4] He accepted that an application for rescission should be brought within a reasonable time. What is reasonable depends on the facts of each case. In that case a lapse of two and a half months was not inordinate in circumstances where the attorney based in Pretoria instructed a local correspondent in the Cape.

[16] In this case the conduct of the applicants is inconsistent with a genuine intention to apply to lift the notice of bar, oppose the application for default judgment or indeed to defend the action on its merits. An application of rescission of a judgment or order, even one erroneously sought or obtained, must be brought within a reasonable time of the applicant for rescission becoming aware of the judgment

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[1] DE van Loggerenburg and PJB Farlam (eds)*Erasmus Superior Court Practice* (2012, Revision Service 39) Rule – B1 – p306G;
[2] *Firestone South Africa (Pty) Ltd v Genticuro* supra 309 A-B
[3] *Firestone South Africa (Pty) Ltd v Genticuro* supra 309 F
[4] *Tshivhase* page 863 A see also *Promedia Drukkers and Uitgewers (EDMS) BPK v Kaimowitz and Others* 1996 (4) SA 411 at 421 F-H

and error. The headnote of the judgment of James JP in *Roopnarain v Kamalapathy and another* 1971 (3) SA 387 (D) reads:

> 'When innocent parties will suffer substantial loss if an application for a rescission of an order of court is granted and that loss is directly attributable to the applicant's inordinate delay in making the application, that is in itself a good reason for holding that the applicant should be refused relief.'

Roopnarain was also brought in terms of Rule 42(1) of the Uniform Rules of Court. However, the court pointed to Rule 31(2) (b) as an indicator of what would constitute a reasonable time. Rule 31(2)(b) gives a defendant 21 days to apply to set aside a judgment.[5]

[17] The applicants relied on *Mutebwa v Mutebwa and another* 2001 (2) SA193 (TkH) to reinforce their proposition that it was enough to prove the errors; they did not need to show good cause. Proving the error is not enough if the application is not made within a reasonable time. What is a reasonable time can be determined solely on the basis of the period of the delay. It can also take its meaning from determining whether there is good cause and what the explanation is for the delay. Practically, when a court exercises its discretion in a rescission application it takes into account all three factors: the period of delay, the explanation for the delay and good cause. To do otherwise could result in injustice. There are cases such as *Mutebwa* in which one of the factors could be decisive. Thus a return of service of a summons that was completed fraudulently was sufficient to result in the rescission of the ensuing judgment.[6] In this case the delay, the absence of a reasonable explanation and the applicants' supine attitude to rescinding the judgment are sufficient grounds to refuse the application.

[18] In the confession to judgment incorporated in the variation agreement, the applicants confessed in terms of Rule 31 of the Uniform Rules of Court for the amounts Nedbank claimed in the action, less any payments. The confession to judgment was valid for twelve months. The variation related only to the repayment terms of the original loans as claimed in the action. Accordingly, the applicants did not dispute their liability for the principle debt.

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[5] *Roopnarain v Kamalapathy* 391B-C
[6] *Mutebwa v Mutebwa and another* supra para 18

[19] Notwithstanding their confession, the applicants allege that they have substantive defences to the action. They contest the validity of the mortgage bonds on the grounds that the first applicant signed the loan agreements in his personal capacity; all three trustees did not authorise the loans or the bonds. Similarly, they attack the variation agreement on the basis that the institutional trustee did not sign it.

[20] The applicants looked to *Nieuwoudt and another NNO v Vrystaat Melies (Edms) Bpk* 2004 (3) SA 486 (SCA) paras 2- 4 in which the respondent trustees sought to terminate a sale agreement on the basis that the trust deed required both trustees to authorise the transaction. The second trustee had not authorised the transaction or mandated the executing trustee to act on her behalf.[7] On the facts of that case the trust deed enabled the trustees to authorise one or more of their number to sign any documentation

> 'for official purposes for the administration of the trust and for the execution of any transaction in connection with the business of the trust.'

The Appellate Division interpreted that clause to apply only to the signing of documents for official, administrative purposes and not for contracts such as the sale of mealies which founded the dispute.[8]

[21] In this case clause 9 of the Trust Deed expressly provides:

> '9. The TRUSTEES may from time to time delegate to any individual TRUSTEE or TRUSTEES or committee any specific duty or assignment.'

The mandate to the trustees in this case is therefore wider than in *Nieuwoudt*.

[22] As for impugning the mortgage bonds, if the applicants genuinely believed that this was a valid defence they would not have concluded the variation agreement or indeed be in this predicament. This seems to be a defence dredged up in desperation after default judgment was granted. Assuming this defence is valid, it does not address the central issue of how the applicants intend to repay loans they received without authorisation.

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[7] *Nieuwoudt and another NNO v Vrystaat Mielies (Edms) Bpk* supra para 5.
[8] *Nieuwoudt and another NNO v Vrystaat Mielies (Edms) Bpk* supra para 11.

[23] They complain that Nedbank did not cite all the trustees in the summons. They rely on *Nieuwoudt* again and clause 8 of the Trust Deed which provides:

> '8. A quorum of TRUSTEES shall be two (2) and the TRUSTEES shall not conduct any business unless there is a quorum present, provided always that the presence of PETER BRETT FEATONBY-SMITH, or his nominee in his absence, shall be necessary to constitute a quorum.'

Mr Featon-Smithby, his nominee or successor are trustees who are not cited in this application for the obvious reason that they are institutional trustees representing BOE, a bank associated with Nedbank. The applicants do not say what prejudice they suffer as a result of the non-joinder. Nor do they say what practical purpose will be served by joining the institutional trustee. In any case, the institutional trustee could have been joined at any stage of the proceedings, even by the applicants themselves if they genuinely believed that would have served any useful purpose.

[24] Still relying on clause 8 of the Trust Deed, the applicants submit that the variation agreement is invalid for the further reason that the quorum passing the resolution was not properly constituted. The institutional trustee had to participate to form a quorum to pass the trust resolution to conclude the variation agreement and confess to judgment. The resolution records that only the first and third applicants passed the resolution.

[25] For the same reasons above for the non-joinder of the institutional trustee to the application, his participation in passing the resolution was equally pointless. The applicants signed the variation agreement and confessed to judgment because they, not the institutional trustee, needed help to pay it. They needed the indulgence. The *quid pro quo* for the indulgence was delaying default judgment by rearranging payment and waiver by the applicants of notice of further proceedings. Signing the resolutions and the variation agreement signalled their commitment to repaying the debt. That is what mattered.

[26] From the inception when Nedbank granted the loans against security of the loan agreement, covering mortgage bonds which were registered pursuant to signed powers of attorney granted on behalf of the Trust, and two limited suretyships granted by the first applicant, duly assisted by his spouse, the third applicant, they

always represented that they were authorised to represent the Rossitter Family Trust. In addition, the applicants in all these credit agreements warranted that all information provided to Nedbank was true and correct, that no information affecting Nedbank's decision to approve the loans was withheld and that all information concerning the applicants' financial affairs had been disclosed to Nedbank.[11] The applicants also warranted that there were no material facts or circumstances which had not been fully disclosed in writing to Nedbank. These warrants put the onus squarely on the applicants to disclose fully all information relevant to the credit agreements to Nedbank for the entire duration of the agreements.

[27] When the applicants needed an indulgence they represented in writing to Nedbank that the first applicant was authorised to conclude the variation agreement on behalf of the Trust to stop Nedbank from proceeding with its action. The first applicant also represented that he would sign the confession to judgment on behalf of the Trust. To renege on these representations is not only another breach of the credit agreements but also manifest bad faith.

[28] Notwithstanding the contention that the variation agreement is invalid and cannot be relied upon, the applicants persisted with their next astonishing defence. Their counsel submitted that following the variation agreement Nedbank had a new cause of action. Therefore, it was precluded from relying on the original cause of action. The express wording of the variation agreement quoted above is clearly to the contrary. Prevaricating on the validity of the variation agreement is another act of bad faith.

[29] They further contended that Nedbank should have issued a notice in terms of s 129 of the NCA before it applied for default judgment. As Nedbank delivered such a notice before issuing summons based on the credit agreements, another notice was not required. Nedbank was not suing on the variation agreement. Even if it were I doubt that it needed to issue a second s 129 notice as suggested by counsel for the applicants.

[30] Equally frivolous is their submission that the Trust was not in default when judgment was granted. The bank statements attached to the application do not bear

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[11] Clause 6.1.1 of loan agreement.

out this submission. Indeed, if there was any merit in it the applicants would hastily have applied to lift the notice of bar and intercept the application for default judgment.

[31] The applicants' last challenge to the standing of Nedbank's attorney's right of appearance in the High Court is its final attempt to clutch at elusive straws. A copy of the attorney's enrolment unceremoniously puts this issue to bed.

[32] Taking a bird's eye view of the applicants' conduct, after delivering a notice to defend they delivered no further pleadings. They remained in default of the credit agreements. They even failed to pay in terms of the variation agreement which was executed to assist them. They failed to respond to demands for payment preceding the notice for bar. Their inaction continued after the notice of bar and notice of the application for default judgement. Cumulatively, their conduct suggests that they tacitly acknowledged that they had no defence. Additionally, on the strength of the default judgment their properties have been sold in execution. In this application they now attempt to wriggle out of their indebtedness by relying on form, process and technicalities. By putting form over substance the applicants compound their bad faith. Even if I am wrong in holding that the applicants validly waived their rights to notice in the variation agreement, their conduct is so dishonourable that I exercise my discretion not to come to their assistance. Having regard to the size of the loans these applicants are not indigent and do not deserve any accommodation that a vulnerable person may be entitled to. Whatever their defence, however meritorious it may be, the applicants cannot escape their singular obligation to repay Nedbank.

[33] This raises the question of costs. In view of the frivolous allegations, misrepresentations and manifest bad faith the applicants attract a punitive order for costs. Contractually, the credit agreements bind the applicants to paying such costs. In so far as the applicants' attorney admits that he was at fault he should bear the costs of this application personally. However, the applicants stand or fall by their choice of legal representative. Besides, they know best whose fault it actually was that default judgment was granted. They may decide amongst themselves who would ultimately bear the costs.

[34] The application is dismissed with costs on a scale as between attorney and client, such costs to be paid jointly and severally amongst the applicants, the one paying the others to be absolved.

D.Pillay J

Appearances: //

<u>Appearances</u>

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