

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 527/2008

In the matter of:

THE STANDARD BANK OF SOUTH AFRICA Respondent

and

AZZIZ KARA 1st Applicant

CERLEST LUCAL KARA 2nd Respondent

JUDGEMENT: EBRAHIM, J

HEARD ON: 8 MAY 2008

DELIVERED ON: 19 JUNE 2008

- [1] On the 2 November 2007 judgment was granted in this court against the applicants in favour of the respondent for payment of the sum of R515 632,90, interest and costs on the attorney and own client scale together with a further order declaring the applicant's immovable property situated in the Heilbron district, Free State Province, executable.

The judgment was granted pursuant to applicant's failure to repay monies loaned and advanced to them by the respondent and secured by a mortgage bond registered in its favour over applicant's said immovable property.

- [2] According to the applicants service of the summons in that matter was effected at their chosen *domicilium citandi et executandi* outside the jurisdiction of this court and outside the Free State Province, on Saturday 6 October 2007. The applicants contend that, according to their calculation the time for entering an appearance to defend would have expired on the 6 November 2007 being 21 court days from the date of service of the summons. This calculation clearly excludes weekends, Sundays and Public Holidays. The applicants' reckon the period of 21 days to include only court days and not calendar days. On this calculation appearance to defend was entered timeously on the 5 November 2007. They contend therefore that judgment by default was erroneously sought and erroneously granted in their absence on the 2 November 2007 and have bought

this application for rescission of that judgment in terms of the provisions of Rule 42(1)(a) of the Uniform Rules of this court.

- [3] Although the applicants do not rely on the provisions of Rule 31 or the common law they have nevertheless deemed it prudent to mention in their application that no time was lost once they became aware of the judgment on the 15 November 2007 in taking the necessary steps to lodge this application for rescission. Accordingly they disclaim any charge of wilful default on their part in delaying in the bringing of this application which was formally lodged on the 4 February 2008. There is in any event ample authority for the view (this has been conceded by the respondents) that since the applicant's do not rely on the provisions of Rule 31(2)(b) or the common law no onus rests upon them to show good cause. Once they have proved that the judgment was granted as a result of an error in the calculation of the *dies induciae* they are entitled to rescission of that judgment.

See:

HARDROAD (PTY) LTD v ORIBI MOTORS (PTY) LTD

1977 (2) SA 576 (W) at 578 G.

TSHABALALA v PEER 1979 (4) SA 27 (T) at 30 D.

TOPOL v L S GROUP MANAGEMENT SERVICES (PTY) LTD

1988 (1) SA 639 (W) at 650 D – J.

[4] The respondents' contend that the *dies induciae* of 21 days refers to calendar days only in line with the provisions of section 4 of the Interpretation Act, No. 33 of 1957, and that the period for entry of appearance to defend thus expired on the 29 October 2007. In bringing this application for rescission three months after judgment was granted, respondents contend further that the applicants have delayed unnecessarily and therefore this court should find that the application was not brought within a reasonable time and on that ground alone dismiss the application.

[5] The issue before me is thus one of law and revolves around the correct interpretation to be accorded to the calculation of the *dies induciae* referred to in Rule 19 of the Uniform Rules of Court. Rule 19(1) reads as follows:

“Subject to the provisions of section 27 of the Act, the defendant in every civil action shall be allowed ten days after service of summons on him within which to deliver a notice of intention to defend, either personally or through his attorney: Provided that the days between 16 December and 15 January, both inclusive, shall not be counted in the time allowed within which to deliver a notice of intention to defend.”

Section 27 reads as follows:

“The time allowed for entering an appearance to a civil summons served outside the area of jurisdiction of the court in which it was issued shall be not less than –

- a) twenty-one days if the summons is to be served at a place more than one hundred miles from the court out of which it was issued; and
- b) fourteen days in any other case.”

A “court day” is defined in the Rules as follows:

“A court day shall mean any day other than a Saturday, Sunday or Public Holiday, and only court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of court;”

It has been settled law since **ROSSLEE v ROSSLEE** 1971 (4) SA 48 (O) at 50 B that the definition of court day in Rule 1 applies only to the computation of periods of time prescribed in the Rules and not to the periods prescribed in section 27 of the Supreme Court Act, No. 59 of 1959. Accordingly it has been held since that the computation of periods prescribed in section 27 was dictated by the provisions of section 4 of the Interpretation Act, No. 33 of 1957. This judgment has found general approval in other jurisdictions. See **MOOI RIVER VALLEY SEED POTATO GROWERS' ASSOCIATION v STEYN** 1975 (3) SA 642 (N) at 647; **VISSER v VORSTER** 1986 (2) SA 598 (NC) at 601; **ROSSOUW v PRINSLOO v POTGIETER** 1984 (2) SA 603 (T).

Section 4 of the Interpretation Act provides as follows:

“When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day

and exclusively also of every such Sunday or public holiday.”

It was common cause that the sheriff was fully within his rights to serve the summons in this matter on Saturday the 6 October 2007 in accordance with the provisions of Rule 4(1)(c) which provides as follows:

“No service of any civil summons, or order or notice and no proceeding or act required in any civil action, except the issue or execution of a warrant of arrest, shall be validly effected on a Sunday unless the Court or a Judge otherwise directs.”

- [6] The respondents accordingly contend that the period of 21 days which had to be calculated from Sunday the 7 October 2007 expired on Monday the 29 October 2007 in accordance with the provisions of section 4 of the Interpretation Act 1933. They contend further that the request for judgment by default was filed with the Registrar on the 21 October 2007 that is two days after the *dies induciae* expired and that judgment was rightly granted by default on the 2 November 2007 there being no entry of appearance to defend in that time. The respondents

therefore argue that the applicants have not shown that the judgment was erroneously sought or granted.

- [7] The applicants contend that, in the context of the equality clause in section 9, the right to just Administrative Action contained in section 33 and the right to have access to the courts, contained in section 34 of the Bill of Rights, this court should find that their interpretation of the *dies induciae* excludes Public Holidays, Sundays and weekends and refers only to court days and not to calendar days. It was argued on behalf of the applicants that such an interpretation is more in line with the legislature's intention to accord to every citizen the right to be treated equally before the law, the right to be entitled to equal protection by and before the law and the right to have equal and unfettered access to the courts.

Mr. Snyman, on behalf of the applicants, invited me to make the finding that, having regard to the equality provisions in the Bill of Rights, to hold that persons residing

within the courts jurisdiction are subject to court days whilst others outside its jurisdiction are subject to ordinary days is discriminatory. He argued that such a distinction triggers a failure to grant equal protection and benefit to a particular class of litigant, namely those residing outside the court's jurisdiction. He submitted that not having a uniform computation of time for the entry of appearance for all litigants has actively disadvantaged the applicants and that if there was to be a computation which provided for the *dies* to be calculated on the basis of only court days, that is excluding weekends, Public Holidays and Sundays, it would embrace the concept of equality of litigants before the law. Such an interpretation he argues would be good in law and would have the effect that the judgment sought by the respondent and granted to the respondent on 2 November 2007 was erroneously and prematurely granted. He has urged me to disregard case authority decided prior to the inception of our constitutional democracy, more particularly prior to the coming into operation of the Constitution of the Republic of South Africa Act, 1996 (Act

108/1996) on the grounds that these cases gave no consideration to the equality of litigants before the court and that accordingly the interpretation of the *dies induciae*, in so far as it was dealt with in those cases can no longer be regarded as good in law.

- [8] The question which arises therefore is whether the distinction in the type of *dies* provided for in the Rules and in the Supreme Court Act of 1959 discriminates unfairly as between litigants depending on whether they are *incolae* or *peregrini* to the court's jurisdiction. I fail to see how a provision in the Supreme Court Act 1959 which affords a *peregrinus* litigant more than twice the number of days it affords to *incolae* of the court to enter appearance to defend can on that account alone be discriminatory. On its own case the applicants have failed to show this. I refer to the examples quoted in the applicant's heads of argument:

"21.1 if Summons was served on 18 April 2008 and ten ordinary court days were allowed, the dies would expire

on 8 May 2008 for an ordinary litigant (weekends and holidays excluded.)

21.2 if Summons was served on 18 April 2008 and twenty one ordinary days were allowed, for a litigant living one hundred kilometres away from the court and outside its jurisdiction, the dies would expire on 8 May 2008.

21.3 if Summons was served on 18 April 2008 and fourteen ordinary days were allowed, in all other cases (possibly for a litigant living one hundred kilometres away from the court but inside its jurisdiction,) the dies would expire on 28 April 2008.”

In my view these examples admirably and unambiguously demonstrate the legislature’s commitment to the concept of equal treatment of all litigants before the law when enacting the provisions of section 27 of the Supreme Court Act 1959. It was at no stage the case of the applicants that they have been unfairly and unequally treated. Indeed it was always and only the case of the applicants that they laboured under the mistaken belief that they had 21 court days in which to enter appearance to defend and that entry of appearance had been done timeously, according to their calculations.

[9] In the circumstances I am unpersuaded that the judgement was erroneously sought and erroneously granted and the

application is dismissed with costs.

S. EBRAHIM, J

On behalf of applicant:

Adv. C. Snyman
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of respondents:

Adv. J. P. Daffue
Instructed by:
Matsepes Incorporated
BLOEMFONTEIN

/em