REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case no: 2020/16973

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

15 February 2022
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In the matter between:

KIM: JASON 1st Applicant

KIM: CLINT 2nd Applicant

KIM: SARAH 3rd

Applicant

LEAD METAL RECYCLER (PTY) LTD 4th Applicant

LEAD CORP CC 5th Applicant

And

PRIMO RECYCLING COMPANY SOUTH AFRICA Respondent

IN RE:

PRIMO RECYCLING COMPANY SOUTH AFRICA Plaintiff

And

LEAD METAL RECYCLER (PTY) LTD 1st Defendant

LEAD CORP CC 2nd Defendant

KIM: CLINT 3rd Defendant

KIM: JASON 4th Defendant

KIM: SARAH 5th

Defendant

Delivered: This judgement was prepared and authored by the Judge whose name is reflected herein and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 15 February 2022.

JUDGMENT

BEZUIDENHOUT AJ:

[1] Default judgment was granted against the defendants, jointly and severally, the one paying the other to be absolved in the amount of R 12 923 852-00 on 2 December 2020. The applicants brought the current application to set

aside the default judgment order that was granted against them. This application is opposed by the respondent.

SUMMARY OF THE APPLICATION

[2] The 1st applicant attested to the founding affidavit and purports to act on behalf of all five applicants. The 1st applicant is the managing director of the 4th applicant, and the 2nd and 3rd applicants are his mother and father. The 2nd applicant is a member of the 5th respondent.

[3] In November 2020, the 2nd and 3rd respondents contracted the Covid virus and was hospitalised. The 1st applicant had to self-isolate as they all live together and had contact with one another. On 7 December 2020 the 2nd and 3rd applicants were released from hospital and the 1st applicant cared for them during their continued quarantine period which endured until January 2021.

[4] The 1st applicant indicated that on 18 December 2020, an employee of the 4th applicant notified him that the sheriff attended the 4th applicant's business premises, handed him some documents, and was in the process of writing up the movable assets. The employee did not advise the 1st applicant as to the nature of the documents that was handed to the employee, however the 1st applicant assumed that the sheriff was writing up the items to give effect to clause 3.1.6 of the Acknowledgement of Debt (AOD).

[5] The respondent disputed that the employee of the 4th applicant could have notified the 1st applicant of the sheriff being present at the property on 18 December 2020 as the attachment documents indicate that sheriff did his inventory on 17 December 2020. In reply, the 1st applicant indicated that he verified the date he received the call from the employee and the employee contacted him on 18 December 2020. The employee also confirmed this in a confirmatory affidavit.

[6] The 1st applicant alleged that the first time he became aware that default judgment was granted against the applicants was when the sheriff attended the 1st to 3rd applicants' residence on 14 January 2021 to serve the court order and warrant of execution on them[1].

[7] The 1st applicant indicated that he made an appointment to see his attorney which was then scheduled for 21 January 2021. They consulted with Counsel on 2 February 2021 who then attended to the necessary. The founding affidavit was signed on 10 February 2021.

[8] The 1st applicant stated that it was only on 22 January 2021, when he attended the 4th applicant's business premises, that he discovered that a summons also accompanied the documents the sheriff left at the business premises.

[1] The 1st applicant, his mother and father were all served at the same address according to the sheriff's return of service.

[9] The applicants raise the following defences:

[9.1] The acknowledgment of debt does not allow for the respondent to proof its indebtedness, in the event of an application for default judgment, with a certificate:

[9.2] The amount claimed is in dispute:

[9.3] They intent challenging the implied term the respondent pleaded in the particulars of claim at paragraph 11:

[9.4] That they were not in default:

[9.5] That the respondent undertook to act in good faith, which it has failed to do: and

[9.6] The conclusion of the AOD will not pass constitutional muster.

[10] I will briefly expound each ground.

[11] Clause 2.3 of the AOD provide that a certificate can be used to prove the applicants' indebtedness in the event of provisional summons and summary judgment proceedings. The AOD does not provide for the respondent to facilitate prove of its indebtedness via a certificate of balance in any other proceedings.

[12] With regard to the balance owed, the applicants indicated that they dispute the amount as indicated in the AOD. The respondent denied that the amount contained in the AOD was capable of variation According to the 1st applicant payments were made by clients directly to the respondent and they were not privy to these payments. There were also exchange rate differences which needed to be addressed..

[13] The applicants dispute the implied term pleaded by the respondent in paragraph 11 of the particulars of claim. In this regard the applicants claimed that if regard is had to the terms of the AOD, no time was set for performance and if proper regard is had to the clauses dealing with payment, it is evident that certain commissions, rental income and funds generated from a sale of certain assets were to take place over a number of years to reduce the applicant's indebtedness to the respondent and not within a reasonable time as pleaded by the respondent.

[14] The applicants further pleaded in the alternative, even if it is accepted that an implied terms is applicable, then a reasonable time had not lapsed. In this regard the 1st applicant pleaded that the AOD was signed on 30 November 2018 and the summons was issued on 15 July 2020, this period is not reasonable having regard to the terms contained in the AOD.

[15] The applicants also disputed that they were in default and in this regard referred to various clauses in the AOD which provided that income from different sources must be utilised to reduce their indebtedness to the respondent. This included the sale of immovable properties, monthly rent, commission, and so forth. Commission and rent were ongoing payments. The respondents had not indicated in its PoC which of the different payments that had to be used to settle the applicants' indebtedness had the applicants defaulted on. The respondent had not addressed this aspect in the answering affidavit.

[16] The applicants further indicated that demand was not made as alleged in the PoC and in terms of paragraph 5.1.4 of the AOD demand had to be made before the debt became due and no such demand was made. The respondents answer that summons constitute demand does not accord with what was pleaded in the PoC.

[17] With regard to clause 3.1.5 specifically, the applicants contended that the parties agreed that the respondent would lease the property for 10 years and

the option to purchase would then arise. The respondent prematurely terminated the lease and bought the property to the detriment of the applicants and at a below market value. Furthermore, the applicants raise the issue that in clause 9.5 of the AOD the parties undertook to deal in good faith with one another at all times when giving effect to the terms of the AOD.

[18] The applicants also indicated that as part of their defence they intended to raise a constitutional issue regarding the conclusion of the AOD and whether the enforcement thereof infringed certain constitutional principles and values.

THE LAW

[19] In Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) it was stated that a Court is empowered under common to rescind a judgment obtained in default of an appearance, provided sufficient cause therefore has been shown. The court noted that the term ‘sufficient cause’ defies precise or comprehensive definition, as many and various factors needs to be considered. However, it is clear that in principle and in long standing practice, two essential elements of ‘sufficient cause’ for rescission of judgment by default are: a reasonable and acceptable explanation for the party’s default and on the merits, there is a bona fide defence, which prima facie has some prospect of success.

EXPLANATION FOR DEFAULT

[20] The applicants aver that they became aware of the judgment and that the respondent had instituted proceedings against them on 14 January 2020, when the sheriff served the court order and warrant of execution on the 1st to 3rd applicants. The application for rescission was issued on 11 February 2020.

[21] The respondent challenged the 1st applicant's assertion that the employee only contacted him on 18 December 2019 as the sheriff indicated that he served the warrant and order on the employee of the 4th applicant on 17 December 2019. In the replying affidavit, the employee confirmed that he contacted the 1st applicant only on 18 December 2019.

[22] The 1st applicant stated that it was only on 22 January 2021, when he attended the 4th applicant's business premises, that he discovered that a summons also accompanied the documents the sheriff left at the business premises. The respondent in its heads of argument and argument took issue with the allegation that the summons accompanied the documents served by the sheriff on 17 December 2019. The respondent did not take issue therewith in his answering affidavit. It is not appropriate for the respondent to raise issues in argument not raised in his answering affidavit. The applicant had no opportunity to address these issues and the Court does not have the benefit of the applicant's reply.

[23] The respondent referred me to the matter of Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) 345 (A) where the court stated that an applicant must at least

furnish an explanation of their default sufficiently full so that the Court can understand how their default came about and assess their motives and conduct.

[24] Once the 1st applicant became aware that default judgment was entered against the applicants, he took the necessary action to arrange a consultation with their attorney, who in turn arranged a consultation with Counsel and thereafter the rescission application was filed. The time intervals between the different actions taken by the different role players does, objectively speaking, not appear to be unreasonable. The explanation tendered is accepted.

BONA FIDE DEFENCE

[25] The applicants raised the issue of the long-term lease, the intended duration of the long-term lease, the terms of the sale in the AOD, the sale of the leased premises and how these terms were not met and how it impacted on the applicants' indebtedness. According to the applicants these issues must be considered in conjunction with the terms contained in the AOD requiring of the parties to act in good faith.

[26] The respondent in its answering affidavit, has not dealt head on with the sale price of the leased property, its value and how same was determined. It has also not dealt with the issue of the rental income being utilised to settle the applicants' indebtedness over a 7 to 10 year period and that an early

termination of the lease would be prejudicial to the applicants' ability to settle its indebtedness and how that aspect was accommodated in the sale price of the leased property.

[27] Although the respondent denies that it was the intention of the parties that the debt would be settled over a period of more or less 7 to 10 years, paragraph 2 of the AOD read with paragraph 3 where amongst others it is foreseen that the proceeds of a long term lease of 10 years and commissions received were to be paid to the respondent "until the debt is settled", does not support the respondents denial. There appears to be some merit in the applicants' defence in this regard that reliance on the implied term might be misplaced alternatively that a reasonable time has not lapsed.

[28] The applicants also raised the issue of the other immovable properties being sold before an averment can be made that the applicants were in default of making payment and that a reasonable time had lapsed for the applicants to make payment. The respondent averred that it had tried to sell the immovable properties but that the sale would not yield any funds. The respondent had not substantiated this averment by including any figures in its answering affidavit nor has it attached any documents to its answering affidavit in support of this contention neither has it pleaded these facts to complete their cause of action.

[29] The 1st applicant indicated that the amount as claimed in the AOD is an element they wish to challenge if they are allowed to proceed to trail. The

respondents deny that the amount in the AOD is open to scrutiny however the email correspondence between the parties indicate, prima facie, that the schedules to the AOD were not set in stone and open to scrutiny and capable of variation post facto.

[30] Overall it appears that the applicants' defences that having regard to the terms of the AOD, they have not defaulted on the payments they were required to make, that the respondents could not reply on a certificate of balance to prove its indebtedness and that the time for performance had lapsed is bona fide and carry some prospect of success. Furthermore, the issue pertaining to the lease and the respondents bona fides in that regard also carries some prospects of success.

[31] I have had regard to the Constitutional Court cases the applicant and respondent referred me to in their heads and the constitutional issue the applicants' intents to raise, however, the applicants did not formulate the Constitutional challenge it intends to raise with sufficient clarity to allow this court to assess its prospects of success.

[32] The applicant has made out a case for the default judgment to be set aside.

WHEREFORE THE COURT ORDERS THAT:

1. The default judgment granted under case number 16973/2020 on 2 December 2020 is rescinded and set aside.

2. The applicants are ordered to file their plea within 15 days.

3. Costs reserved for adjudication at the trail.

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J M BEZUIDENHOUT AJ
Acting Judge of the High Court

DATE OF HEARING	**:**	**18 October 2021**
DATE OF JUDGMENT	**:**	**15 February 2022**

Appearances:

Counsel for the Applicant:	**Adv Pelser**
Attorneys for the Applicant:	**Arthur Channon Attorneys**
Counsel for the Respondent:	**Adv MD Silver**

Attorneys for the Respondent: **Stein Scop Attorneys Inc**