IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022 - 049732

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the application by

SATIN ROCK (PTY) LTD	First Applicant
R.L. DEVELOPMENT & CONSTRUCTION	Second Applicant
and	
TEICHMAN, MARK HERBERT	Respondent
In re	
TEICHMAN, MARK HERBERT	Applicant
and	
SATIN ROCK (PTY) LTD	First Respondent
LEISHER, LORNA MARY	Second Respondent
LEISHER, ANTHONY RAYMOND	Third Respondent
R.L. DEVELOPMENT & CONSTRUCTION	Fourth Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Rescission of judgment – common law and rule 31(2)(b) - good cause – requirements of a reasonable explanation and a bona fide defence

Rule 42(1)(a) – failure to comply with procedural requirements

Order

[1] In this matter I make the following order:

1. *The application is dismissed;*

2. *The conditional counter- application is removed from the roll, with no order as to costs;*

3. *The applicants are ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for the rescission of a judgement granted by the Court on 10 May 2023 against the two applicants. The applicants rely on uniform rule 31(2)(b), alternatively on rule 42(1)(a), and further alternatively on the common law. I refer to the applicants and the respondent in this rescission application as such and to the other parties in the main application who are not parties to the rescission application by their surname, Leisher.

Good cause

[4] An applicant seeking the rescission of a default judgement at common law or in terms of rule 31 is required to show good cause. This requirement encompasses two discreet enquiries, namely a reasonable explanation for the applicant's default and a *bona fide* defence to the claim on the merits. Granting a rescission when the applicant has no defence to the plaintiff's claim would be an exercise in futility and would merely delay the claim of the plaintiff and the application would not be *bona fide*.

[5] The courts have refrained from giving an exhaustive definition of good cause as any such definition might hamper the discretion of the court.[1] The court will however not come to the assistance of an applicant who was in wilful default or was grossly negligent: The applicant must not merely seek to delay the claim of the plaintiff but must be acting in good faith.

[6] In *Grant v Plumbers (Pty) Ltd*,[2] Brink J said:

> *"(a) He* [the applicant] *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 merely delaying plaintiff's claim.*
>
> *(c) He must show that he has a bona fide defence to 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. (Brown v Chapman (1938 TPD 320 at p. 325).)"*

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1 See *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) 353A and the various cases referred to by Van Loggerenberg *Erasmus: Superior Court Practice* D1-365 *et seq* footnotes 66 to 68 and D1-564 *et seq footnotes 49 to 51.*

2 *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) 476–7.

A reasonable explanation

[7] The main application was served on the applicants and the Leishers in November 2022. The Leishers instructed an attorney to represent them and a notice of intention to oppose the application was given.

There is a family relationship between the parties. The applicants and the Leishers intended to resolve the dispute and they did not file answering affidavits. There were without prejudice settlement negotiations between the parties but by February 2023 there was no resolution to the matter. The applicant then set the matter down on the unopposed role for 22 February 2023 but the matter was removed from the role to enable settlement discussions to continue. The respondent's attorneys advised on 21 February 2023 that *"our client will not tolerate any further delay and has instructed our offices to apply for a new date for the matter to be heard. This matter will not be removed again."*

[8] On 2 March 2023 the attorneys acting for the applicants advised that unless confidential proposals made by them were accepted *"we will proceed in court. Our client will file their opposing papers and will challenge your Clients right to charge interest on all the monies he loans to various people, despite not being registered to do so in terms of the National Credit Act."*

[9] These settlement negotiations did not bear fruit. The applicants however did not file opposing affidavits as they intimated they would do in the letter of on 2 March 2023.

[10] A court file was created on the Caselines system and the documents were uploaded. The attorney acting for the applicants were invited on the Caselines system..

[11] In April 2023 the attorney for the respondent set the matter down for 10 May 2023 and served a notice of set down per email in accordance with rule 4A(1)(c). The set-down was itself uploaded to Caselines. The applicants' attorney received the notification that the application had been set down for 10 May 2023 and this was confirmed in an email message on 27 April 2023. The email message apparently found its way into the attorneys' junk mail folder and did not come to her knowledge. On 28 April 2023 the attorney was admitted to hospital and she only returned to the office some two weeks later. However, during the period of hospitalisation the Caselines system was accessed by the applicants' attorneys. It need hardly be stated that when an attorney is on sick leave, the firm should take steps to have someone else monitor ongoing litigation, and this is obviously what

happened.

[12] In response to this evidence the applicants' attorneys filed only a terse affidavit under circumstances where they ought to have explained what had happened in more detail.

[13] An order was taken on 10 May 2023 against the two applicants (but not against the Leishers) and Mr Leisher was informed of the order on 12 May 2023. Only then did the applicant's attorney find the notification of the set down in her email junk folder. Mr Leisher then instructed the attorneys to proceed with a rescission application.

[14] The applicants failed to file an answering affidavit during the period February to May 2023. The notice of set down was served and was uploaded to Caselines and Caselines was accessed by the applicant's attorneys. A party seeking condonation for a delay or default is required to give a full explanation covering the whole period in issue.[3] They have not satisfactorily explained their default and the explanation that they did give is not a reasonable one. The application is dismissed for this reason alone but I also deal below with the requirement of a *bona fide* defence.

Bona fide defence

[15] I turn to the defence raised by the applicants. The applicants (assuming for these purposes that a reasonable explanation was given for the default) are not required to prove their defence (either in the sense of a full onus or an onus of rebuttal) but must make averments that if established at trial would constitute a defence. The applicant's averments are however not to be read in isolation but with the averments made by the respondent.

[16] The applicants say that the Leishers had in their personal capacity borrowed R3,500,000 from the respondent in December 2019 and repaid this loan in April or May 2020. Then in October 2020 Mr Leisher again approached the respondent for a loan and it was agreed that an amount of R4,000,000 be advanced to the Leishers. On 8 October 2020 the Leishers and the respondent appended their signatures to an acknowledgement of indebtedness.

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[3] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) paras 20 to 22.

[17] The acknowledgement of debt was signed by the Leishers *"collectively of R.L. Development & Construction"* and *"on behalf of R.L. Development & Construction."* It is common cause that the first applicant is not referred to in the acknowledgement of debt and the applicants say that this is so because the first applicant never entered into an agreement with the respondent, and that the respondent merely sought to rely on an agreement with the first applicant as principal debtor in order to avoid the registration requirements[4] in the National Credit Act.

[18] The respondent explains in the answering affidavit that the monies were lent and advanced to the first applicant and that he required additional security in the form of the acknowledgement of debt by the signatories thereto. The payment of the R4,000,000 was made into the bank account of the first applicant and the bank account details of the first applicant was provided to the respondent by an employee of R.L. Development & Construction. When the debtors were unable to repay the loan the funds to settle the loan were to be raised from realising assets of the first applicant. The shareholder of the first applicant is a trust and the Leishers are directors. There would be no commercial reason for the company to repay a loan deal by the Leishers unless of course the company was obliged to repay the loan as the debtor.

[19] The applicants now adopt the view that the second applicant does not exist. This is a surprising allegation and is refuted by the papers emanating from the Leishers. The second applicant is referred to in the acknowledgement of debt as a firm represented by the Leishers and with an address in Glenvista. The second applicant is also referred to in an electronic mail message by Mr Leisher on 5 December 2019 where he describes himself as follows: *"Director, R.L. Development & Construction."* The acknowledgement of debt was sent to the respondent from Mr Leisher's electronic mail address on 8 October 2000 by one Sasha David of R.L. Development & Construction.

[20] The existence of the second applicant is not in doubt despite the denial of its existence by the first applicant. The denial is disingenuous. The second applicant is neither a company nor a close corporation but it falls within the extended definition of a juristic person in section 1 of the National Credit Act. For the purposes of the Act the definition of a juristic person includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees or the trustee itself is a juristic person. The usual definition of what a juristic person is does not apply.

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[4] See sections 45(1) and 51(1)(a) of the National Credit Act 34 of 2005.

[21] The Act does not apply to a credit agreement in terms of which the consumer is a juristic person with an asset value or annual turnover together with the combined asset value or annual turnover of all related juristic persons at the time of the agreement is made, equalling or exceeding the threshold value determined by the Minister. The threshold determined by the Minister[5] is R1,000,000 and was published by the Minister in government notice 713 in government Gazette 28893 of 1 June 2006.[6]

[22] The Act also does not apply to a large agreement as defined in section 9 (4) of the Act when the consumer is a juristic person whether or not its asset value or turnover is above or below the threshold.[7] A large agreement is defined in section 9 (4) as a mortgage agreement or any other credit transaction except a pawn transaction or a credit guarantee and the principal debt falls at or above the higher of the thresholds established in terms of section 7 (1) (b) of the Act. A large agreement is a credit agreement relating to a principal debt of R250,000 or more.[8]

[23] The National Credit Act does not apply to the acknowledgement of debt by the second applicant for the reasons outlined above. The acknowledgement of debt provides for a debt of R4,000,000 clearly in excess of the prescribed minimum and R. L. Development & Construction together with the Leishers declared themselves bound to pay this amount to the respondent together with interest. The firm together with the two individuals declared themselves bound jointly and severally as co-principal debtors.

[24] The Act applies to a credit guarantee only to the extent that it applies to a credit facility or credit transaction in respect of which the credit guarantee is granted.[9] The acknowledgement of debt is binding on R. L. Development & Construction insofar as the acknowledgement of debt is a credit guarantee, and the Leishers are not parties to this application.

[25] The acknowledgement of debt provides for interest at the rate of 24% *per annum* calculated monthly in advance on the outstanding balance due on the first day of each calendar month and calculated and capitalised on the same day each and every month until the total amount due in terms of the acknowledgement have been paid. The document provided that the capital shall be repayable by 8 February 2021.

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5 The reference is to the Minister of the Cabinet responsible for consumer credit matters.
6 Section 4(1)(a) of the National Credit Act read with section 7 (1).
7 Section 4(1)(b).
8 See also Scholtz *Guide to the National Credit Act* 4.2, 4.4.1, 4.5
9 Section 4(2) of the National Credit Act.

[26] The applicants claim that interest was only payable from 8 February 2021, the date on which the loan was to be repaid in full. The loan would then be an interest-free loan provided of course it was paid on due date; if not interest would begin to run.[10] The applicants however made payments of R80,000 from the first month after the conclusion of the acknowledgement of debt. The amount of R80,000 represents the amount of monthly interest that would be payable at the rate of 24% *per annum* on the debt of R4,000,000.[11] The inference must be that these were interest payments but the applicants now deny that these were interest payments and alleged that these payments were made towards the capital debt.

[27] The interpretation placed on the interest provisions in the acknowledgement of debt are not borne out by the document itself. The payment of interest is not deferred and the loan was not an interest-free loan until due date.

Rule 42 (1) (a)

[28] The applicants argue that rule 42 (1) (a) is applicable because not all the information were placed before the court hearing the matter. There is no merit in these contentions and the application falls to be determined in terms of rule 31 (2) (b) and the common law.

A defence on the merits that are unknown to the court hearing the matter cannot sustain relief under rule 42. The rule pertains to a failure to comply with procedural requirements.[12]

Counter-application

[29] The respondent brought a conditional counter-application on the basis that if the judgment were rescinded, it should be granted relief in the counter-application. The counter-application is superfluous. If the rescission application were granted the main application

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10 The effect of this argument on the applicants' argument that the National Credit Act applies need not be decided. See Scholtz *Guide to the National Credit Act* 4.2.

11 24% of R4,000,000 equals R960,000, or twelve payments of R80,000.

12 *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) para 25, *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), ([2003] 2 All SA 113 (SCA) paras 9 - 10

would have proceeded; if only a part of the order granted in the main application were rescinded there would have been a judgment for the remaining part. No case is made out for the relief in the counter-application but the question is an academic one and the counter-application is removed from the roll with no order as to costs.

Conclusion

[30] I find that:

30.1 the applicants have not furnished a reasonable explanation for their default;

30.2 the denial of the very existence of the second applicant is palpably false and is rejected on the documents emanating from the applicants and the Leishers;

30.3 the defence raised is not a *bona fide* defence;

30.4 the applicant have not shown good cause for the rescission of the default judgement.

[31] I therefore make the order in paragraph 1 above.

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J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected 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 of the judgment is deemed to be **5 MARCH 2024**

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INSTRUCTED BY	KAVEER GUINESS INC
DATE OF ARGUMENT:	19 FEBRUARY 2024
DATE OF JUDGMENT:	5 MARCH 2024