IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 84986/16

In the matter between:

MOISES SARDINHA FERNANDES Applicant / 1st Defendant

and

DALE PARRISH 1st Respondent / Plaintiff

STEVEN ABRAHAMSE 2nd Respondent /2nd Defenda

JUDGMENT

Brand AJ

Introduction

[1] The applicant applies for rescission of a default judgment against him. He also seeks condonation of his failure to bring this application within the time period required by Uniform Rule 31(2)(b) and the setting aside of the attachment of his current income to satisfy the judgment debt. An application for the striking out of portions of the first respondent's answering affidavit was also filed.

Background

[2] The applicant and the second respondent started a company (Lurco Trading 289 (Pty) Ltd – 'Lurco') together in 2009. Both were appointed directors of

Lurco. At that stage the applicant's role was to put up a large sum of the capital with which to start the company, but he was not involved in its day to day running, playing a background, supervisory role. Lurco was run by the second respondent, through a manager, one Botha.

[3] Profitable originally, Lurco started to lose money at the beginning of 2013. This prompted the applicant to become more closely involved in its affairs, leading to conflict with the manager, Botha, who resigned in September of that year.

[4] On 27 August 2014 the first respondent issued summons against Lurco. On 22 August 2016 Lurco was voluntarily liquidated. On 5 September 2016 default judgment was granted against Lurco.

[5] On 10 November 2016, the first respondent served a new summons, directed against the applicant in his personal capacity. On 14 September 2017 default judgment was on this summons granted against the applicant. It is this default judgment that the applicant seeks to have rescinded.

[6] On 29 January 2018 a warrant of execution was served on the applicant at his place of employment, attaching his commission earnings. It is this warrant that the applicant seeks to have set aside.

[7] On 8 February 2018 the applicant's attorneys delivered a letter to the first respondent's attorneys notifying them that he intended to apply for rescission and inviting the first respondent to consent to rescission. On 23 February the first responded made her refusal to consent to rescission known by letter to the applicant's attorneys.

[8] On 7 March 2018 the applicant served and filed his rescission application.

Condonation of late filing of the rescission application

[9] The applicant admits that his filing of the rescission application was six days out of time in terms of the rules. This failure to file in time may be condoned on good cause shown.

[10] In the event it becomes unnecessary for me to decide whether or not good cause was shown: the applicant submits that the first respondent's attorneys, upon being notified that the applicant would file the application late, on 7 March 2018, in an email consented to late filing. The email in question, sent on 2 March 2018 reads in relevant part: 'I note the contents and agree as mentioned below and await your application on ... Wednesday 7th of March 2018'. It clearly evinces consent to late filing so that the application was indeed not out of time.

[11] Even had such consent not been granted I would still have condoned the late filing. The application is only six days out of time in terms of the rules; the applicant provides a reasonable explanation of the delay (counsel was unavailable to settle the papers); and the applicant warned the first respondent of the delay at the time, so that no prejudice can be said to have arisen from it. On these grounds any late filing is condoned.

The rescission application

[12] The applicant submits that the default judgment must be rescinded in the first place because it was erroneously granted in a number of respects relating to service of the summons and the terms of the order itself. Given the approach that I take below to the question whether the judgment stands to be rescinded on more substantive grounds it becomes unnecessary to decide this issue.

[13] It is trite that an application for rescission of default judgment must succeed if an applicant can show a reasonable explanation for his default and that he

has a *bona fide* defence that if proven at trial, would dispose of the claim against him.[1]

Reasonable explanation of default

[14] The explanation the applicant offers for his default is that he was not aware of the action against him in his personal capacity until the warrant of execution was served on him at his place of employment, as the summons was not properly served and never reached him.

[15] He points out that the summons, as appears from the sheriff's return of service, was served at the applicant's chosen *domicilium* address, but that, given that there was no agreement between the first respondent and the applicant in which a *domicilium* could have been chosen, no chosen *domicilium* existed, so that the service was *ex facie* improper.

[16] More importantly, he alleges that the address at which summons was served (elected by the first respondent on strength of a trace report indicating it as the applicant's residential address) is indeed not his residential address so that the summons having been served there never reached him.

[17] This allegation is given credence by two facts: that the applicant, upon becoming aware of the default judgment when the warrant was served at his (correct) place of employment, promptly acted on it by bringing this rescission application; and that the first respondent, having obtained the default judgment did not use the address at which summons was served again, but instead used the applicant's place of employment address for further service.

[18] In this light I hold that the applicant has provided a reasonable explanation for his default.

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[1] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (AD) 765A-G.

Bona fide defence

[19] The applicant raises a number of defences against the first respondent's claim that on his version, if proven at trial would defeat it. The first of these is that the first respondent's claim had prescribed.

[20] The prescription defence is that the first respondent's claim is based upon alleged loans she advanced to Lurco from December 2009 to September 2013; that in the first respondent's particulars of claim it is pleaded that these debts fell due the moment the loans were requested or agreed; and that the first respondent pleads no other date at which she requested payment or at which she had agreed with Lurco that payment would be effected, so that all the debts would have prescribed during the course of September 2016, before summons was issued against the applicant.

[21] To this the first respondent retorts that prescription was in fact interrupted when the applicant on her version admitted liability in the course of settlement negotiations.

[22] To succeed for rescission purposes the applicant at this stage of course does not have to prove his defence of prescription – he simply has to show that, *if proven at trial*, this defence would defeat the claim; that is, that it is *prima facie* a defence against the claim.

[23] This the applicant does with room to spare. Although on the papers it is not clear when prescription indeed began to run and although the email evidencing the settlement negotiations could indeed be interpreted as showing an admission of liability none of this can be determined without the leading of evidence at trial – the prescription defence, if proven at trial, would be good.

[24] In this light it is unnecessary for me to deal with the applicant's other defences (the absence of any loan agreement between Lurco and the first respondent; no personal liability).

[25] I also do not have to address the striking out application and the interesting question of law that it raises as to whether concessions made without prejudice during the course of settlement negotiations may be relied upon in litigation that both Mr Alli for the applicant and Mr Blignaut for the first respondent argued spiritedly at the hearing (although I thank both counsel for the additional authority on this point that they provided me with).

[26] I hold that the applicant indeed raises a *bona fide* defence against the first respondent's claim and that the application for rescission of the default judgment against him must therefore succeed.

[27] This inevitably means that the further application for setting aside of the warrant of attachment must also be granted.

[28] Although Mr Alli motivated in his heads of argument for a punitive costs order as between attorney and client against the first respondent, I see no reason that costs should not simply follow the result. Given that the application to strike out essentially became moot during the course of the hearing of this matter, no order with respect to costs is made for that application.

[29] Accordingly, I order as follows:

1. The applicant's failure to bring the application within the time prescribed by Rule 31(2)(b) is condoned.

2. The default judgment granted by this court against the applicant on 14 September 2017 under case number 84986/16 is rescinded.

3. The attachment of the applicant's sales commission in terms of the Notice of Attachment under Rule 45(12) under case number 84986/16 is uplifted and set aside, with effect from date of this order.

4. The applicant must file a plea to the respondent's particulars of claim within 20 (twenty) days of date of this order.

5. The first respondent is ordered to pay the costs of the application for rescission of judgment.

6. No order is made with respect to the costs of the application to strike out.

JFD Brand
Acting Judge of the High Court

Appearances:

For the applicant - **N Alli**
Instructed by **Cascoigne Randon and Associate**

For the defendant - **JG Blignaut**
Instructed by **Cilliers & Reynders Inc.**

Date of Hearing : 31 October 2018

Date of Judgment : 09 November 2018