

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 32909/13

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
26/04/2018	
DATE	SIGNATURE

26/4/18

In the matter between:

THEO ERIC BEZUIDENHOUT

Applicant

and

**FANTIQUE TRADE 869 CLOSE CORPORATION
T/A PTS BEARINGS**

Respondent

J U D G M E N T

SELLO, AJ:

[1] This is an application for the rescission of judgment granted against the applicant on 22 November 2013.

- [2] The background to this matter is as follows. On 04 December 2012, an entity called Khumbulani Mining CC was placed under supervision of two joint interim practitioners as contemplated in section 131(4)(a) and (5) of the Companies Act 71 of 2008.
- [3] On or about 19 March 2013, the joint interim practitioners concluded an agreement in terms of which Khumbulani sold to the respondent all the rights, title and interest in certain listed assets which included debts owed to Khumbulani by, *inter alia*, the applicant. This agreement reflects the applicant as being indebted to the respondent in the amount of R890 000.00.
- [4] In terms of this agreement the claim against the applicant arose from an amount drawn from or lent and advanced by Khumbulani to the applicant.
- [5] On 27 May 2013 the respondent issued a summons out of this court against the applicant in which it sought payment of R890 000.00 with interest, which the respondent alleged was due and owing to it
- [6] The applicant did not enter appearance to defend and on 22 November 2013 the respondent sought, and the registrar of this court granted, a default judgment for payment of R890 000.00, interest thereon and costs.
- [7] On 23 June 2014 the applicant launched this application for rescission of judgment.
- [8] Rule 31(5)(d) stipulates that a party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after acquiring knowledge

of such judgment or direction, set the matter down for reconsideration by the court.

- [9] Rule 31(2)(b) provides that a defendant may apply to court to set aside a default judgment granted him on good cause shown. In *Pansolutions Holdings Ltd v P&G General Dealers &Repairs CC* 1996 (1) SA 631 (O) it was held that the 'good cause criteria set out in rule 32(2)(b) is of equal application to a default judgment granted in terms of rule 31(2)(b).
- [10] What constitutes 'good cause' is a matter for determination by the court. An applicant must however, as a bare minimum, demonstrate that he provides a reasonable explanation for the default and that such default was not wilful; he must demonstrate that the application is made not with an intention of delaying the plaintiff's claim and must demonstrate that he has a bona fide defence to the plaintiff's claim (See *Colyn V Tiger Food Industries Ltd T/A Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at [11].
- [11] The applicant asserts that he was not dilatory in instituting these proceedings and seeks condonation for the late filing of the application. The respondent, in answering affidavit, whilst accepting that the applicant's excuse for the late filing of the application is understandable, takes issue with the fact that the applicant's attorney has not filed an affidavit in confirmation of the reasons for the delay. In argument however, the respondent had changed its tune somewhat and challenged the probability of the reason being correct.
- [12] According to the founding affidavit, the applicant became aware of the default judgment on 28 March 2014 when the sheriff served a warrant of execution on

him issued pursuant to the judgment, and it was only on 22 May 2014 that he had opportunity to consult with his attorneys. The applicant provided as an annexure, his attorney's affidavit confirming this fact.

[13] While there is no explanation for the delay in filing the application after the consultation with the attorney, I accept the respondent's stance under oath that it does not challenge the reasons advanced for the delay.

[14] In the founding affidavit the applicant sets out the background to receipt of an amount of R150 000.00 from the his former employer, Khumbulani, as a bonus as a reward for profit the Khumbukani stood to make on purchase of equipment concluded by the applicant at a reduced cost. The bonus was to be retained by the Khumbukani and invested at the applicant's instruction on a house the applicant intended to purchase. Khumbulani eventually paid an amount of R750 000.00 to the transferring attorneys when the applicant purchased his property.

[15] The applicant contends that he provided the respondent's attorneys with all documentary evidence of the commission and profit he had earned during his employment with Khumbulani and which were due to him.

[16] The respondent's attorney admits in the answering affidavit that 19 pages of documentation, intended to demonstrate what the applicant claimed he had earned by way of commission and profits from Khumbulani, were handed to him. He denies however that these documents constituted the requisite proof that the applicant was not indebted to Khumbulani.

- [17] The attorney shared these documents with the respondent and was instructed to proceed with the litigation. The attorney could not reach the applicant on the cellphone number he had recorded as belonging to the applicant and advise that his client had instructed him to proceed with litigation notwithstanding. The applicant denies that the stated cellphone number is one he provided.
- [18] These documents do not form part of the pleadings and I am unable to express a view on their evidentiary value.
- [19] In reply, the applicant attached a statement, under oath, by one Irna Breytenbach, who had been a member of the close corporation Khumbulani. There is a dispute between the parties whether she was one of the members or a sole member of the entity. For purposes of this matter it is of no moment whether or not she was the sole member. Both parties admit that she was a shareholder of Khumbulain. It is this common cause fact that is relevant as it goes to the weight of her claims.
- [20] I am satisfied therefore that Ms Breytenbach, as a member of Khumbulani, would have the requisite knowledge as regards the company's affairs.
- [21] Her statement confirms that the applicant was entitled to bonuses from Khumbulani and that he had never obtained a loan from the company. It is evident from the statement that the deponent is the former spouse of Mr Gusty Breytenbach who was the manager of Khumbulani. I am not oblivious to the fact that while there may be reasons she may want to distort facts there are none that are obvious from the papers. I have no basis therefore to gainsay her version of events as set out in this statement.

- [22] The respondent's claim is defined as respondent has provided a document as proof that Khumbulani paid an amount of R750 846. 00 to transferring attorneys. The circumstances under which Khumbulani made this payment have not been set out. This payment is consonant with the applicant's claim that Khumbulani paid his transferring attorneys an amount of R750 000.00 in respect of his house. The respondent does not however claim that this payment is part of the R980 000.00 claim for which it obtained a judgment against the applicant.
- [23] The respondent instead challenges whether the applicant in fact paid PAYE on the alleged bonuses he received from Khumbulani. Whether or not such deduction were made from the bonuses does not address the question whether the amount so paid to the attorneys indeed constituted bonuses as alleged by the applicant.
- [24] The basis for the respondent's claim is an entry in the memorandum of sale concluded between Khumbulani and the respondent which reflects the applicant as owing Khumbulani the amount of R890 000.00. How this amount is made up and calculated has not been set out in the pleadings.
- [25] If Khumbulani had to recover such amounts from the applicant it would be required to fully substantiate the claim with objective evidence. The respondent is in no better position. In disposing of the claim to the respondent Khumbulani ceded all rights it had in this claim. In terms of a cession, a substitution occurs in terms of which the cessionary acquires, by way of cession, all rights and obligations vested in the cedent at the time of the substitution. (See *Fisher V*

Natal Rubber Compounders (Pty) Ltd 2016 (5) SA 477 (SCA) at [15]). As a cessionary, the respondent's position is exactly the same as that of the cedent: neither better or worse. It cannot be in a stronger position against the debtor than the cedent was.

[26] Whether in effect the applicant owed Khumbulani the amount claimed, or at all, is a matter that can only be determined through full ventilation at trial.

[27] The principle enunciated in *Plascon-Evans Paints Ltd V Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) that if the court is satisfied as to inherent credibility of applicant's averments, the court may proceed on the basis of the correctness thereof is in my view applicable. These averments, if proven at trial, would defeat the respondent's claim, or a substantial part thereof.

[28] I am persuaded that the applicant has a bona fide defence to the respondent's claim which *prima facie* has some prospects of success. Having accepted the applicant's explanation for the delay in instituting these proceedings I am inclined to grant the applicant a rescission of the default judgment granted against him.

[29] In so far as the question of costs is concerned, the costs are reserved for final determination by the trial court which will determine the validity of the applicant's defences.

[30] I make the following order:

1. The applicant's failure to comply with the time limits as set out in rule 31(5)(D) is condoned.
2. The default judgment granted by the register on 22 November 2013 in favour of the respondent in terms of rule 35(1)(d) is rescinded.
3. The applicant is granted leave to file a notice of intention to defend the main action within 7 days of the grant of this order.
4. The costs of this application shall be costs in the trial.



M SELLO
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR THE APPLICANT:	Adv APJ ELS
INSTRUCTED BY	GERBER ATTORNEYS
FOR THE RESPONDENT	Adv AP BRUWER
INSTRUCTED BY	MANFRED JACOBS ATTORNEYS

DATE OF JUDGMENT