IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: **NO**

(4) Date: 31 October 2022 Signature:

CASE NO: 23779/2019

In the matter between:

ARTHUR BLIGNAUT First Applicant

SKYE-LAB TECHNOLOGIES Second Applicant

And

FIRSTRAND BANK LIMITED Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] The Applicant before court seeks a rescission of judgment in terms of Rule 42 (1) alternatively the common law, and further alternatively in terms of the provisions of Rule 31(2)(b) of the Uniform Rules of Court. The judgment in question was granted on the 20 August 2019. The application is opposed.

[2] The Applicant bases his application on allegations that the application is that:

2.171A Kerk Street, Johannesburg was never the chosen address of the First Applicant and as such, service of the summons at this address on 15 April 2019, never came to the attention of the First Applicant. He chose 3rd Floor, Darras Centre as his chosen *domicilium* (as per page 12 of Annexure "B" to the summons). For this reason, the order should never have been granted as same was erroneously sought.

2.2There are two stands at the property with two addresses. The default judgment was only granted in respect of the one stand.

2.3No statement of account was attached, and it is alleged that the Respondent was not entitled to rely on the certificate of balance. As such the claim is not liquid and remains a claim for

damages that has not even reached the threshold of prima facie proof. The First Applicant states he intends to launch a counterclaim for statement and debatement of account. No such counterclaim had been delivered.

2.4 The Applicants only became aware of the judgment on 28 January 2021 when the application to amend (Rule 46A (8) was served on the First Applicant.

2.5 The First Respondent had failed to comply with section 129(1), read with section 130(1) of the National Credit Act 34 of 2005 (NCA) prior to launching the main Application to enforce the relevant credit agreement, and consequently, that the court was precluded from granting the said judgment as the notices were sent to the wrong address as 71A Kerk Street, Belgravia was not the First Applicant's chosen address and neither was 15 Michigan Avenue, Eldorado Park, the chosen address of the Second Applicant. Premised on the alleged non-compliance, the action was premature.

B. RESPONDENT'S CASE

[3] The Respondent points out that the Applicants did not to disclose to this Court that on 25 June 2018, the Rule 46A application was served **personally** on the First Applicant.[1]

[4] Regarding the merits, the Respondent submits that the default judgment (incorporating the Rule 46A) granted on 20 August 2019, was obtained after due process was followed. This is so because:

4.1 The address situated at 3rd Floor Darras Centre, Kensington, was not the First Applicant's chosen address. This was inserted on page 12 of the agreement to refer to the address at which the Second Applicant (as surety) took a resolution to be bound by the terms and conditions to the agreement. The Darras address was never chosen as the *domicilium* by either the First or the Second Applicant.

4.2 In terms of clause 4.30 of the agreement, the First Applicant chose, and nominated the physical address reflected on the first page of the agreement, being 71A Kerk Street, Belgravia. On Applicants' own version summons was served at this address on 15 April 2019.

[1] Sheriff's return of service, Annexure "AA4" read with Answering Affidavit Para 36.

4.3 In terms of clause 11 of the suretyship, Second Respondent nominated 15 Michigan Avenue, Eldorado Park as its chosen address. On Applicants' own version summons was served at this address on 11 April 2019.

4.4 It follows then that there was proper service of the summons and that the Applicants were in wilful default of defending the action.

4.5 The section 129 notices were equally sent to the addresses mentioned herein above.

4.6 Clause 4.29 of the agreement, and clause 8 of the suretyship provided that a certificate of balance may be used, although nothing turns on this point.

4.7 The allegation that only one of the two neighbouring stands was included in the granted order does not take the Applicant's application anywhere.

[5] The Applicants, as it was submitted, have not made out a case for rescission on the reasons they have proffered.

C. THE PROVISIONS OF RULE 31(2)(b)

[6] In terms of the provisions of Rule 31(2)(b) a defendant may within 20 days after he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.

[7] In giving a reasonable explanation for his default, the appellant must show that his default was not wilful.[2] Where the element of wilfulness is absent, good cause will be more readily evident. However, this is but one of the elements in showing good cause.

[8] The requirements for an application for rescission under the sub-rule have been stated as follows:

> 81 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;
>
> 82 The application must be bona fide and not made with the intention of merely delaying the plaintiffs claim;

[2] Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd 1994 (3) SA 801 (C); See also Civil Procedure – a practical guide (2nd Ed) by Pete, Hulme *et al* P274.

83 The applicant must show that he has a bona fide defence to plaintiffs claim. lt 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.

[9] While wilful default on the part of the applicant is not a substantive or compulsory ground for refusal of an application for rescission, the reasons for the applicant's default remain an essential ingredient of the good cause to be shown.

[10] A defendant is said to be in wilful default where he or she:

10.1 Has knowledge that the action is being brought against him or her; and;

10.2 Deliberately refrains from entering an appearance to defend, though free to do so; and

10.3 Has a certain mental attitude to the consequences of default.[3]

[3] Erasmus Superior Court Practice, B1 - 202.

D. ANALYSIS

[11] First Applicant was served personally with the Rule 46A application. That much is clear from the Sheriff's return of service at the very property that is subject of the Rule 46A application. The First Applicant is disingenuous by not divulging this crucial fact to the Court. He was clearly aware of the Court date and was thus in wilful default.

[12] First Applicant, and by extension Second Applicant, his alter ego sought to sow confusion regarding their chosen addresses, there is no plausible reason given for their failure to defend the matter.

[13] First Applicant seems to have adopted an attitude of indifference to the consequences of his failure to act. The only reasonable inference here, is that the Applicants issued this application for rescission to cause delay and frustration, and in doing so they are merely buying time to somehow find a solution for the situation they are in.

[14] Having regard to the fact that the First Applicant is conducting the matter in person, the Court has *mero motu* taken into account the other provisions governing rescission applications; namely Rule 42(1) and the common law. Respondent's Counsel has also helpfully made submissions in that respect.

E. THE PROVISIONS OF RULE 42 (1)

[15] Rule 42 (1) provides for three distinct rescission or variation procedures, the first refers to instances in which a judgment was erroneously sought or erroneously granted in the absence of any party affected thereby (my own emphasis). For example, a judgment will have been erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which fact would have dissuaded the court from granting the judgment. The second aspect is where the judgment was sought or granted in the absence of the party who is affected thereby.

[16] Again, in this instance, having regards to the facts traversed above, Applicants did not make any compelling case to show that the judgment or order was erroneously sough or granted.

F. RESCISSION UNDER COMMON LAW

[17] First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that it has a bona fide defence which prima facie carries some prospect of success on the merits.[4]

[4] Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others [2021] ZACC 28.

[18] The Applicants' efforts fall far short of the threshold required to prove that there is "sufficient" or "good cause" to warrant rescission.[5]

G. COSTS

[19] Respondent's Counsel made compelling submissions for costs to be awarded against the Applicant on a punitive basis. I have taken a considered view to defer to the *Biowatch* principle and award at an ordinary scale.

H. ORDER

[20] In the circumstances the following order is made.

The Applicants' application for rescission is dismissed with costs.

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J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

[5] Infinitum Holdings & Another v Lerm & Others (Unreported) [2022] ZAGPJHC 342 at Par 18 – Per Molahlehi J.

Date of hearing: 24 October 2022

Date of Judgment: 31 October 2022

Appearances

On behalf of the Appellant: Mr. A. Blignaut (in person)

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 31 October 2022.