IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: A1107/06
DATE: 12/02/2009

REPORTABLE

In the matter between:

RIAAN FRANKEL RIDDLES Appellant

and

STANDARD BANK OF SOUTH AFRICA Respondent

JUDGMENT

MURPHY J

1. This is an appeal against the judgment of the magistrate, Mr. JM Setlhabi, for the District of Pretoria delivered on 6 July 2006. The magistrate's judgment was given in pursuance of an application for a rescission of a default judgment obtained by the respondent on 20 December 2004.

2. The respondent, the Standard Bank of South Africa Ltd., issued summons against the appellant out of the Pretoria magistrate's court on 17 May 2004 and claimed payment of the sum of R112 443, 45.

3. The appellant filed his application for rescission of the default judgment together with an application for condonation of the late filing of the application on 2 June 2006. The magistrate in a brief judgment dismissed the application with costs. The appellant appeals against that decision.

4. It is alleged in the particulars of claim that the appellant was issued with a credit card, a Standard Bank Mastercard, by the respondent. The card was issued on certain terms and conditions, which the appellant accepted. There is some dispute about the exact terms of the agreement, which need not detain us. The card, amongst other things, entitled the appellant to carry out transactions with merchants, and the bank would pay the merchant on the appellant’s behalf and debit the amount concerned to the credit card account. The appellant then was obliged to repay the amounts to the bank, together with interest on credit balances at the rate advised by the bank which would send monthly statements to the appellant reflecting the total debit or credit balance on the card at the statement date and stipulating the minimum payment due. The arrangement was the well-known standard credit card arrangement conducted in the ordinary course of business. In terms of the standard terms and conditions, the defendant

consented to and submitted to the jurisdiction of the magistrate's court in respect of all actions or other proceedings arising out of the agreement.

5. It is alleged in paragraph 7 of the particulars of claim that from time to time in the period between 16 November 1998 and 5 July 2000 the appellant presented the card to merchants for the purchase of goods or services and obtained advances on the strength of the card from the plaintiff to the value of R112 443, 45. It is further alleged that despite demand and the amount being due and payable, the defendant failed or refused to pay the amount due.

6. The return of service indicates that on 24 May 2004 the summons was served by affixing it to the principal door of the address chosen by the appellant as his *domicilium citandi et executandi*. In terms of rule 9(5) of the Magistrate's Court's Rules of Court it shall be sufficient service to a affix a copy of a summons to the outer or principal or of the residence chosen for service when the sheriff is unable to effect service on the defendant or any other responsible person personally.

7. When the appellant failed to file an appearance to defend, default judgment was taken against him on 20 December 2004. The appellant, as I have mentioned, filed an application for rescission of the default judgment on 2 June 2006.

8. Rule 49 of the Magistrates' Courts' Rules provides that a party to proceedings in which a default judgment has been given may within 20 days after obtaining knowledge of the judgment serve and file an application to court for a rescission of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind the default judgment on such terms as it may deem fit.

9. The requirement of good cause normally will be satisfied if there is evidence of the existence of a substantial defence, which the defendant intends to prosecute conscientiously in the event of the judgment being rescinded. The requirement that the applicant for rescission must show the existence of a substantial defence does not mean that he must show a probability of success in the trial or principal motion: it suffices if he or she is able to show a prima facie case, or the existence of an issue which is fit for trial. In other words, it will be adequate for the purpose of granting rescission if the applicant sets 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, but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that there is a bona fide defence, and that the application is not made merely for the purpose of harassing the respondent. If the merits of the action have been fully dealt with on the pleadings, and if it appears that the probabilities with reference to the existence of an alleged prima facie defence are manifestly in favour

of the respondent, this is a consideration which the court may properly take into account. - *vide Du Plessis v Du Plessis* 1970 (1) SA 683 (O). However, it is important in this latter respect for the court to keep in mind that the primary requirement for rescission does not require the applicant to show the probability of success in the trial, it is enough that he points to an issue which is deserving of being tried.

10. Rule 49(3) requires the applicant for rescission to set out the reasons for his absence or default. In this regard, the applicant must furnish an explanation of his default sufficient to enable the court to understand how the default came about and to assess whether his conduct and motives were reasonable. The wilful or negligent nature of a defendant's default is one of the various considerations which a magistrate is obliged to take into account in the exercise of his discretion to determine whether or not good cause is shown.

11. In his application before the magistrate, the appellant sought condonation for the late filing of the rescission application outside the 20 day period. He averred that on 14 March 2006 he received documentation indicating the respondent's intention to attach and execute against his property. It is common cause that the application was only filed on 2 June 2006. On my calculation, the applicant ought to have filed the application on or before the expiry of the 20 day period on 10 April 2006. He was thus more than

six weeks late. His explanation for being late was that he had some difficulty in understanding the attachment documents because the respondent had in 2002 already withdrawn a case against him in another court and he accordingly believed the matter had been finalized. He spent about two weeks seeking legal assistance, and eventually consulted with his attorney on 6 April 2006. On that day his attorney addressed a letter to the respondent requesting a copy of the summons and inquired of the respondent whether it would be prepared to condone the late filing of the application. On 13 April 2006 the respondent indicated to the applicant's attorney that it would not condone the late filing of a rescission application and referred him to its attorney in Pretoria. The further relevant information was only received by the appellant's attorney on 5 May 2006 and the application was filed about three weeks later.

12. It is not clear from the magistrate’s brief judgment whether or not he actually condoned the late filing of the application outside the 20 day period. The fact that he proceeded directly to the merits leads me to believe that he most likely condoned non-compliance with the time period, or the parties agreed on condonation. It is not clear from the record whether the respondent persisted with the point before the magistrate. That being so, I am inclined to give the appellant the benefit of the doubt. Though one might have preferred to see a fuller explanation of what transpired between 5 May 2006 and the ultimate filing of the application on

2 June 2006, given the incomplete record and my views on the merits of the application, I am prepared to accept that the applicant has provided a reasonable explanation for not bringing the application within the 20 day period; and thus I take the view that the magistrate did not err in condoning the delay in bringing the rescission application.

13. With regard to his default or absence in defending the action, the appellant explained that he did not receive the summons that was affixed to the door of his *domicilium citandi et executandi*. He stated in his affidavit that he had moved from that address some time previously. The respondent did not challenge that averment in its answering affidavit. Counsel has argued before us that the appellant had a duty in terms of the contract to inform the respondent of any change of *domicilium*. Considering that the summons was served about four years after the dispute between the parties arose, the explanation of not having received the summons is both plausible and reasonable. Had the magistrate handing down the default judgment been aware of how long the dispute had endured and the fact that the appellant no longer resided at his original address, it is likely that he would not have handed down the default judgment until another form of service had been attempted. While, in the final analysis, service on the appellant was effective in terms of the rules, the fact remains that the summons only came to the notice of the appellant once the execution process was under way. Accordingly, taking

account of the respondent's unexplained delay in issuing summons, the appellant's explanation for his default and absence would seem to be reasonable in the circumstances.

14. Once again, because the magistrate limited himself in his judgment to dealing with the question of whether or not the appellant had shown the existence of a substantial defence, it is not certain if he made any finding about the justifiability of the appellant's reasons for his default and absence. In argument before us the appellant has contended that his default was never an issue in the application for rescission. The respondent, however, in its heads of argument, takes a different tack, maintaining that the appellant fails to take the court into his confidence by telling the court of the address he appointed as his chosen domicilium. I struggle to understand the point. As I have said, the appellant explained the reason he did not receive summons was that he had changed his address. Accordingly, the submission that he has not provided a cogent explanation for not following up on the state of the litigation is unsustainable. Given the fact that the respondent issued summons some years after the dispute arose, it was incumbent on it to ascertain whether the appellant was at the same address. By not doing so, it ran the risk of a successful application for rescission on the grounds that although the summons was properly served, it was not in fact received in circumstances that can be considered reasonable. In the result, I am

persuaded that the appellant has provided an acceptable explanation for his default and absence.

15. Turning now to whether there is sufficient evidence of the existence of a substantial defence. Again, if I can emphasize the point, an application for rescission of judgment is never simply an inquiry about whether or not to penalize the party for his failure to follow the rules and procedures. The question always is whether or not the explanation for the default gives rise to a probable inference that there is no bona fide defence. The discretion to rescind the judgment must always be exercised judicially and is primarily designed to enable courts to do justice between the parties. The magistrate should balance the interests of the parties and have sensitive regard to the prejudice that might be occasioned by denying the applicant the right to have legitimate issues fully ventilated and properly tried.

16. The appellant raised various defences in his founding affidavit. Some are less meritorious than others. He admits that he received a credit card from the respondent in 1998. He states that he had a total credit limit of R5000 but alleges that he paid certain third-party cheques into his credit card account and, after confirming with the respondent, paid out the money or used it in some way. It seems that the cheques were returned unpaid, and as a consequence his credit card fell into arrears in the amount of the claim. Having regard to his credit limit, one may assume the cheques were

in the amount of approximately R100 000. He contends the respondent's employees were negligent in confirming that the monies were available when they in fact were not. I agree with counsel for the respondent that the particulars of this defence are not set out as clearly as they ought to be and that the attempt to rely on the negligence of the respondent's employees may be somewhat ambitious. Moreover, the defence might be met with clause 18.6 of the terms and conditions of the contract between the parties which provides that the bank will not be liable for any loss or damage suffered by the cardholder as a result of incorrect information being processed by the bank. However, such can only be determined after a proper assessment of the circumstances with reference to all the evidence.

17. The strongest defence raised by the appellant, in my view, is one of prescription. The appellant contends that the debt on the respondent's own version became due and payable, (according to paragraph 7 of the particulars of claim), on 5 July 2000. This fact was also not disputed by the respondent in its opposing affidavit in the rescission application. The summons was served on 24 May 2004, more than 3 years after the debt arose. The appellant relies on the decision in *Standard Bank of SA Limited v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) in support of his contention that each transaction undertaken on a credit card is repayable from the moment the advance is made and that consequently prescription

begins to run against the bank in respect of monies loaned on the account as soon as the advance is made. For practical purposes, therefore, prescription commences running on the date on which the debit is entered into the account. If this point is indeed correct in relation to credit card transactions, it would mean that prescription at the very latest would have commenced on 5 July 2000 in respect of the last transaction concluded and earlier in respect of all others. In paragraph 24 of the founding affidavit, the appellant submits that because summons was served only on 24 May 2004 the respondent's claims against him had consequently prescribed. Strangely, the respondent did not deal with that allegation in its opposing affidavit. In fact, the opposing affidavit is completely silent on the defence of prescription.

18. The question of prescription and negligence are the only issues which the magistrate addressed in his brief judgment. The reasoning of the magistrate is difficult to follow. Frankly, his judgment falls way short of what might be expected. With regard to prescription, he said as follows:

> Perhaps something that he could try and which he is trying but which also fails is the issue of prescription but now it seems what applicant is asking us that we must simply look at the dates, the months, the years, rigid as they are and we should not look at what happened. We should not be looking at the background and still on that leg, this second leg of prescription if you look at what happened then there is no way again that you can claim that the prescription has taken place. This is a typical example of a case where the applicant thinks that through this technicality that now

> he can get away from it. There is no way, he does not have a defence. He does not have a case and the court concludes as follows that the application is dismissed with costs, and that the applicant does not have a defence.

19. There is more than one difficulty with the magistrate's approach. Firstly, prescription is not a mere technicality. A plea of prescription, albeit a special plea, if sustained would have the effect of a substantial defence and would extinguish the debt. Secondly, this misdirection resulted in the magistrate failing to inquire on the facts before him, by taking account inter alia of the relevant time frames, whether a bona fide defence of prescription existed with reasonable prospects of success. As I have said, it is not necessary for the purposes of a successful rescission application for the applicant to show that the defence has a probability of success. It is sufficient if it is shown that there is a triable issue. The magistrate’s erroneous comprehension of the implications of a successful plea of prescription, and ultimately the nature of the discretion bestowed upon him, meant that he neglected his duty to ensure, in the interests of doing justice between the parties, that all legitimate issues were properly ventilated and adjudicated.

20. Neither the answering affidavit nor the magistrate's judgment deal with any counter submissions on the question of prescription made by the respondent. However, in its heads of argument in the appeal, filed unacceptably late, the respondent, apparently for first time, has raised an

argument that the prescription defence is irredeemably bad. Counsel submits that two distinct causes of action arise under the contractual relationships which existed between the parties, namely the underlying revolving credit account in terms of the credit card facility in terms which monies are dispensed on behalf of the appellant to merchants when he used the credit card; and secondly, the distinct relationship that arose by virtue of the appellant (on his version) depositing cheques into his account in anticipation of payment for monies owing on the credit card facility and monies due to become owing as a result of him using the credit card facility in the future. It is contended that credit card indebtedness is one of revolving indebtedness, but the payment by cheque drawn by a third-party and presented to the respondent by the appellant, through depositing it in an account (albeit a credit card account) held with respondent as a deposit taking institution, constitutes a separate and distinct cause of action arising from the cheques. Hence, so it is contended, by suing in respect of the default of the bill of exchange the prescription period is not three years, as would be the case in respect of monies advanced, but in fact six years in terms of section 11[c] of the Prescription Act 68 of 1969. Additionally, the respondent, in support of a further contention that the running of prescription was interrupted in terms of section 14 of the Prescription Act by an express or tacit acknowledgment of liability, seeks, again for the first time, to rely on an affidavit made by the appellant in

November 2000, in which he allegedly tacitly acknowledged his indebtedness.

21. My difficulty with the respondent only now taking these points, which may or may not be meritorious, is that they appear not to have been raised before or adjudicated by the magistrate; and hence it is doubtful whether the appellant has had a proper opportunity to deal with them. The allegation that the respondent has the right to proceed on the dishonoured cheques by ordinary summons or provisional sentence seeks to introduce a new cause of action not covered by the particulars of claim. As a general rule, a question of law may be advanced for the first time on appeal, but only if its consideration involves no unfairness to the party against whom it is directed. However, it is also a general requirement for the raising of a new point on appeal that the point be covered by the pleadings.

22. As I have already said, the answering affidavit did not take issue at all with the prescription point and the particulars of claim do not allege any liability on the part of the appellant predicated upon his clearing cheques through the respondent acting as a deposit taking institution. Undoubtedly prescription was the principal issue before the magistrate. Still, it is far from evident that the magistrate heard or investigated the points raised now for the first time by counsel in heads of argument filed unacceptably late in the appeal. Accordingly, one is instinctively reluctant to allow the

points to be taken and argued at this late stage. Were we to allow otherwise, or for the pleadings to be amended on appeal, we in effect would be introducing a new cause of action and allowing a replication to the special plea not foreshadowed in the opposing affidavit. A court of appeal should do that only where it is satisfied that there is sufficient evidence before it which would enable it to adjudicate the new cause of action, as well as the special plea and replication, appropriately. But perhaps more importantly, the factual substratum required to determine whether the 3 or 6 year prescription period applies has not been adequately canvassed in the particulars of claim or the affidavits, which are skimpy and incomplete to say the least. There is no evidence or allegations of any kind specifying the date of any of the credit card transactions or the cheque deposits. Nor are there any details regarding either the circumstances in which the cheques were dishonoured or the title of the respondent as a holder of the negotiable instruments. As I understand the respondent's version, the cheques were dishonoured during 2000 or even earlier. No summons has been issued, nor any amendment filed, in respect of this cause of action, and hence without any interruption it too may well have prescribed. Moreover, it is not entirely evident from the affidavit of November 2000, attached to the respondent's heads of argument, which statements of the appellant might establish a tacit acknowledgment of liability sufficient to interrupt the 3 or 6 year prescription period. In any event, even if a cogent acknowledgement of

liability was made, it occurred in November 2000 and hence might still be insufficient to meet the claim of prescription irrespective of whether the period was 3 or 6 years. It accordingly would be unfeasible for this court to endeavour to determine the prescription issues without hearing or receiving additional evidence. Or put more accurately, and with reference to the correct test in adjudicating the merits of the magistrate's decision on the application before him, we are not in a position to determine, with the requisite degree of confidence on the available evidence, that the probabilities on the prescription issue are manifestly in favour of the respondent to the extent that it might be definitively held that the defence raised by the appellant is not a substantial bona fide defence.

23. The burden on the appellant for the purpose of obtaining rescission was not to show the existence of a substantial defence with a probability of success. It is enough to establish the existence of an issue which is fit for trial. Even if the probabilities with reference to the existence of an alleged prima facie defence were manifestly in favour of the respondent on the basis of an amended cause of action and replication, that would not inevitably be decisive in the rescission application, but would merely be one consideration, which the court may properly take into account among others. In my judgment, had the applicability of the six year prescription period been pleaded and raised before the magistrate and he had given it proper consideration, more than likely the correct course would have been

for him to have granted rescission and to have allowed the parties to continue to trial in respect of all the issues.

24. Lastly, the respondent in its answering affidavit took the preliminary point that the affidavit of the applicant was not commissioned, and that this rendered the application fatally defective. The copy of the founding affidavit filed in the record of appeal before us was in fact commissioned by an attorney, namely Ms V Louw of Monument Park on 6 July 2006, the day of the hearing before the magistrate. Although his judgment is silent on the point, given that the issue was raised, it must be that he condoned any technical defect. No case has been made before us that he misdirected himself in condoning that defect. I accordingly see no merit in the point. However, the point argued on appeal goes a little further. In the heads of argument, counsel for the respondent correctly points out that the affidavit is defective because it does not appear from the affidavit that the oath was administered by causing the deponent to utter the words “I swear that the contents of this Declaration are true, so help me God”. Once again, the point is raised for the first time on appeal and the appellant has not had a proper opportunity to deal with it. The defect no doubt could have been cured earlier by an appropriate supplementary affidavit. Reading the affidavit as a whole I am satisfied that the oath was administered to the appellant as appears from the fact that he stated that he had no objection to taking it and that he regarded it as binding on his

conscience. Consequently, there has been substantial compliance with the requirements of Act 16 of 1963.

25. Given my view that the magistrate erred by not granting rescission so that the issue of prescription could be tried, as well as the fact that counsel has not placed much reliance on them, I do not consider it necessary to consider whether the other possible defences are bona fide and have reasonable prospects of success. I am satisfied that the appellant made out a proper case on the basis of the prescription plea alone and hence that rescission ought to have been granted. There is no reason why the costs of both the application and appeal ought not to follow the result.

26. In the premises, therefore, the appeal should be upheld. The following orders are issued:

a) The appeal is upheld.

b) The decision of the magistrate is set aside and substituted as follows:

> "1. The application for rescission of the judgment of 20 December 2004 is granted with costs.
>
> 2. The defendant is ordered to file his plea within 15 days."

c) The respondent is to pay the costs of the appeal.

JR MURPHY
JUDGE OF THE HIGH COURT

I agree

CP RABIE
JUDGE OF THE HIGH COURT

Date Heard: 05/02/09
For the Appellant: Adv. JPF de Klerk, Pta
Instructed By: Mitchell & Kruger Inc., Pretoria
For the Respondent: Adv. Z Khan, Sandton
Instructed By: Bham & Daya c/o Bhadrish Daya Att., Pretoria