IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 53881/2011

Date: 1 August 2012

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED ✓

1/8/2012 Pretorius
DATE SIGNATURE

In the matter between:

BROWN MCFARLANE AFRICA (PTY) LIMITED Plaintiff

and

KMG SERVICES CENTRES (PTY) LIMITED Defendant

JUDGMENT

PRETORIUS J,

This is an application for rescission of a default judgment where the court ordered payment of interest in the sum of R15882.19 calculated at the rate of 15.5% per annum from 1 July 2011 to date of final payment, both days

inclusive and costs were ordered as between attorney and client. The order was granted on 9 November 2011.

Both parties agreed that this application is brought in terms of Rule 31 (2) (b) and not in terms of rule 49 as set out in the notice. In these circumstances the applicant must give a reasonable explanation of his default, the application must be *bona fide* and not made with the intention of delaying the plaintiff's claim and the applicant has to show that he has a *bona fide* defence to the plaintiff's claim.

According to the applicant he obtained knowledge of the judgment when the warrant of execution was served on Mrs Jackson on 7 December 2011. The applicant was obliged to launch this application within 20 court days. The application for rescission was only received on 12 March 2012, two months later than the rules provide.

The applicant relies on the fact that the summons was served on Mrs Howard at the applicant's registered address and that the applicant had no knowledge thereof. She did not provide an affidavit setting out how it came about that the summons was not brought to the applicant's attention. On 10 and 12 October 2011 two further letters were sent to the applicant and no explanation is given as to why the applicant did not respond to these letters.

The *bona fide* defence, according to the applicant, is that there was no agreement that interest would be paid; or in the alternative the applicant

contends that according to the written agreement the rate of interest is set out in clause 6.7 of the agreement entered into by the parties:

> *"The Company reserves the right to levy interest on all overdue* ***amounts at 3% (three percent) above the then current commercial bank prime overdraft rate as quoted by ABSA Bank Limited from time to time.***" (Court's emphasis)

Default judgment was granted for interest calculated at the rate of 15.5%, contrary to the provisions of the written agreement. The agreement was signed by Mr Kim McEwen on 15 April 2011. Mr McEwen was a director at the time that he concluded the agreement. This is an instance of *mora ex re* and the interest in terms of the agreement should have been paid when payment of the debt was due according to the demand which was 10 August 2011.

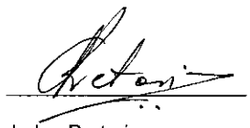
Default judgment was granted for payment of interest from 1 July 2011. Due to the agreement the plaintiff could not have requested interest *a temporae morae*, but should have claimed in terms of clause 6.7 of the agreement. The court finds that the applicant has a *bona fide* defence.

It is clear that although the applicant may have been negligent in not bringing the application for rescission of judgment timeously the applicant was not wilful. However, I am not allowing the replying affidavit which was only handed to court when the application was heard. The application was also set down by the respondent as the applicant had failed to do so. After I have considered whether the applicant had been in wilful default and has shown good cause

and that the applicant has a *bona fide* defence against the plaintiff's claim, I find the applicant has proved a *prima facie* case which should be tried. This is a result of the wrong percentage of interest being claimed and then granted by the court.

The following order is made:

1. The late delivery of the recision application in condoned;
2. The default judgment granted on 9 November 2011 under case number 53881/2011 is rescinded;
3. No order as to costs.



Judge Pretorius

Case number	: 53881/2011
Heard on	: 26 July 2012
For the Applicant / Plaintiff	: Adv JC van Eeden
Instructed by	: Van Greunen & Assosiates
For the Defendant	: Adv CD Roux
Instructed by	: RC Christie
Date of Judgment	: 1 August 2012