IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

7/9/2016.

Case No: 40664/2013

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

7/09/2016

In the matter between:

THEODORE CLAUDE MUTHEN	Appellant
and	
WACO AFRICA 2005 (PTY) LTD	First Respondent
STEYN'S BUILDING CONSTRUCTION CC	Second Respondent

JUDGMENT

VAN DER WESTHUIZEN, AJ

1. This matter relates to an application for rescission of a judgment granted by the Registrar of this Court on 26 November 2013.

2. It is trite that an applicant for rescission of a judgment granted by default seeks an indulgence and is obliged to provide cogent reasons for the judgment to be rescinded.

3. The aforesaid order was granted against the applicant and the second respondent who was the second defendant in the action wherein the aforesaid order was granted by default.

4. The matter came before Magagabe AJ on 4 February 2016 when it was postponed on that day, the applicant being ordered to file a supplementary affidavit in support of the application for condonation within 10 days of the order for the late filing of the replying affidavit. It is common cause that the applicant did not comply with that order. The replying affidavit is thus not before court. The applicant indicated that it would argue the matter on the founding and answering papers.

5. The founding affidavit in support of the application for rescission is glaringly lacking in particularity, is concise and sparsely deals with the relevant issues. In the founding affidavit it is not stated under which Rule of Court the rescission is sought.

6. Ms Fitzroy, who appeared on behalf of the applicant, submitted that an application for rescission could be entertained under either the provisions of Rule 31 or that of Rule 42 or in terms of the common law, provided that the requirements of each Rule or the common law are met.[1]

7. It was conceded on behalf of the applicant, that the applicant has not made a case for rescission under Rule 31 or under the common law. Ms Fitzroy submitted that the provisions of Rule 41(1)(a) are to be considered in the present matter. Ms Fitzroy submitted that the requirement of the judgment by default to have been erroneously sought or erroneously granted is applicable. It was submitted that where there has been non-compliance with a particular requirement that is to be complied with relating to the application for default judgment, and such is absent, that judgment stands to be set aside on

[1] *Mutebwa v Mutebwa et al* 2001(2) SA 193 (Tk)

the ground that it was erroneously granted.[2] It was further submitted that the applicant for rescission on that ground was not obliged further to show good cause.

8. From the founding affidavit the following is gleaned:

(a) The applicant was a previous member of the second respondent;

(b) The second respondent entered into a written agreement for credit with the first respondent;

(c) The applicant bound himself as surety and co-principal debtor in respect of the obligations of the second respondent in favour of the first respondent;

(d) On 2 July 2013 the first respondent issued summons against the applicant and the second respondent for amounts due to the first respondent by the applicant and the second respondent;

(e) The applicant, on receiving the summons, approached a firm of attorneys to assist him;

(f) On the applicant's instructions, a notice of intention to defend the action was entered and on 7 August 2013 the first respondent applied for summary judgment. The applicant states that summary judgment was refused. However, it appears from the answering affidavit that the application for summary judgment was not refused, but that the first respondent had granted leave to the applicant and the second respondent to defend the action. It is also stated by the first respondent that the applicant had failed to file an affidavit opposing the

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[2] *Naidoo et al v Matlala et al* 2012(1) SA 143 (GNP)

application for summary judgment. Nevertheless leave to defend was granted;

(g) The applicant avers that a notice of bar to file a plea was served by the applicant, but disavows any knowledge thereof;

(h) The applicant claims that he was not advised by his erstwhile attorney that a plea was to be filed and was blissfully under the impression that the applicant had "lost the appetite for the matter and that it had not taken any further steps to proceed". The applicant did nothing to enquire about the action against him. He appears to have been unconcerned and now hides behind the alleged incompetence of his erstwhile attorney. However, the applicant's present attorney belies that fact. In a letter of 3 February 2014, the applicant's present attorney sought an indulgence in filing the required plea;

(i) The first indication that the first respondent had not desisted in its claim against the applicant appeared when a warrant of execution was served upon the applicant;

(j) The applicant was advised on enquiry that the specific attorney who dealt with his matter had left the firm, *inter alia* due to grossly neglecting his responsibilities in respect of a number of litigation matters.

9. The applicant concludes that default judgment had been entered against him due to no fault of his own and that he should be given the opportunity to defend the action.

10. It follows from the foregoing, that no fact is provided, nor any averment is made in the founding affidavit that the judgment was thus either sought erroneously or granted erroneously in the applicant's

absence. The applicant simply never complied with the delivery of a plea, even after further indulgence was sought in that regard.

11. It is submitted on behalf of the applicant that the provisions of Rule 42(1)(a) apply for what follows. It is submitted that in terms of the provisions of Rule 31(5)(a) an applicant for default judgment is obliged to notify the defendant with no less that 5 days notice of the intention to apply to the Registrar for default judgment where the defendant is in default of delivering a plea. Ms Fitzroy submitted that this had not happened and hence the application for rescission is to succeed.

12. The application for default judgment is not before me. The founding affidavit does not contain any reference thereto, nor that the application for default judgment had not been served, whether 5 days prior to the application being made, or otherwise. There is simply no evidence or averment in the founding affidavit to support such contention by Ms Fitzroy. There is no merit in the submission.

13. Ms Fitzroy attempted, with reference to correspondence, to argue a case for the applicant that the first respondent had already obtained default judgment and attempted to mislead the applicant by inviting the applicant to deliver a plea nevertheless. The dates of that correspondence are after the date on which default judgment was granted. Upon the facts before me, both parties were unaware of the granting of the judgment on 26 November 2013 until the first respondent became aware thereof on 4 March 2014, on which day he forwarded a copy thereof to the applicant's attorneys of record. Any inference to the contrary cannot be drawn. There is no merit in that contention.

14. It is clear from the foregoing that the first respondent had afforded the applicant all opportunity to put his case before court. Further in this regard, the applicant's attorney of record addressed a letter on 3

February 2014 to the first respondent's attorney indicating that he had set up a date on which he was to consult with the applicant and prepare a plea. An indulgence was sought in this regard. No plea was forthcoming.

15. It is submitted on behalf of the applicant that a *bona fide* defence is raised in the founding affidavit. The defence raised relates to the amount for which the suretyship was granted. On a reading of the suretyship, it is an unlimited one. It is not limited to an amount of R200 000.00 which the applicant alleges was the amount granted in respect of the credit that was sought by the second respondent. The credit application provides for an adjustment of the credit amount and it is apparent that the amount of R200 000.00 was merely an initial amount set. The suretyship is a separate and distinct document. It does not refer to the application for credit.

16. In view of all of the foregoing there is no merit in the application for rescission. It does not comply with the requirements for rescission of a judgment either in terms of Rules 31 or 42 or the common law.

17. It follows that the application for rescission is to be dismissed with costs.

I grant the following order.

(a) The application is dismissed with costs.

C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant:	K Fitzroy
Instructed by:	Muthray and Associates Inc.
On behalf of Fifth Respondent:	J C van Eeden
Instructed by:	D Paleologu Attorneys