04/05/2018

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. ✓

4/5/2018.
DATE

SIGNATURE

Case Number: 14281/2010

In the matter between:

LYDIA COLEMAN N.O.	First Applicant
FRANCA COLOMBA GROENEWALD N.O.	Second Applicant
LYDIA COLEMAN	Third Applicant
FRANCA COLOMBA GROENEWALD	Fourth Applicant

and

ABSA BANK LIMITED	Respondent

In re:

ABSA BANK LIMITED Plaintiff

and

LYDIA COLEMAN N.O. First Defendant

FRANCA COLOMBA GROENEWALD N.O. Second Defendant

LYDIA COLEMAN Third Defendant

FRANCA COLOMBA GROENEWALD Fourth Defendant

JUDGMENT

POTTERILL J

[1] The four applicants on 25 April 2018 applied for the rescission of a judgment granted against them on 20 March 2013 by the Registrar of this Court. The first applicant is cited in her official capacity as trustee of the trust and in her personal capacity as the third applicant due to her signing as surety for the trust. This is exactly the same position pertaining to the second applicant, as trustee, and in her personal capacity as the fourth applicant. The default judgment was granted in lieu of the trust not paying the instalments due and payable in terms of the provisions of two mortgage bonds passed by the respondent upon loan agreements having been concluded. As

set out above the third and fourth applicants signed as sureties for the loan agreements.

The Background

[2] Upon summons being served on the applicants on 29 March 2010 they filed and served a notice of intention to defend on the 2nd of April 2010.

[3] The respondent then applied for summary judgment on 18 March 2010. Omar AJ granted leave to defendant and costs in the cause.

[4] The applicants proceeded to file a plea. On 8 February 2012 Mabuse J set aside the plea of the applicants. The reason for this order was that the Honourable Judge upheld the Rule 30 application brought by the respondent that the plea was to the simple summons and not as required to the declaration filed by the respondent. The respondent had filed a declaration on 3 September 2010. The relevant part of Mabuse J's order read as follows:

> *"That the first to fourth respondents' plea is hereby set aside as an irregular pleading.*
>
> *That the application for postponement is granted in order to enable the first to fourth respondents to file a proper plea.*

That the first to the fourth respondents are hereby ordered to file a proper plea within 10 days of today."

[5] On 22 February 2012 the applicants filed a notice of amendment to the plea in terms of Rule 28. The respondents objected thereto in terms of Rule 28(3).

[6] On 12 April 2012 the applicants again filed a notice of its intention to amend to the plea in terms of Rule 28. The respondent served a further notice of objection in terms of Rule 28(3).

[7] On 21 June 2012 a further notice of amendment to the plea was filed to which the respondent objected to on 29 June 2012.

[8] On 18 July 2012 the applicants delivered a fourth notice of amendment to the plea but did not proceed with any further steps.

[9] The respondent then proceeded to apply for default judgment in terms of Rule 31(5)(a). The application for default judgment reads as follows:

"The summons was duly served on the 1st, 2nd, 3rd and 4th defendants ("the defendants") on 29 MARCH 2010 (see pages 66-69 of the attached bundle);

The plaintiff delivered its declaration on 3 SEPTEMBER 2010 (see pages 85-107 of the attached bundle);

The plaintiff delivered a notice of bar on 4 OCTOBER 2010 (see pages 148-149 of the attached bundle);

The defendants delivered their plea on 8 OCTOBER 2010 (see pages 154-158 of the attached bundle);

The defendants' plea was set aside on 8 February 2012 and they were ordered to deliver an amended plea (see court order on page 159 of the attached bundle);

The defendants delivered four notices of intention to amend their plea on 22 FEBRUARY 2012, 11 APRIL 2012, 20 JUNE 2012 AND 18 JULY 2012 (see pages 160-168, 172-180, 186-194 and 198-207 of the attached bundle), which were all objected to by the plaintiff (see pages 169-171, 181-183, 195-197 and 208-210 of the attached bundle);

The defendants failed to bring applications for leave to amend within 10 days of the last mentioned objection in terms of Rule 28(3);

The plaintiff delivered its notice of intention to apply for default judgment on 1 JUNE 2012 (see pages 184-185 of the attached bundle);

The defendants are barred from delivering an amended plea;

The plaintiff has complied with the provisions of the National Credit Act No 34 of 2005 as set out in the Declaration."

[10] The applicants aver that they were not in default, because they had filed a plea, although it was not finalised. The applicants need not address the defence to the claim, because the order on the summary judgment renders the only inference that the applicants had a *bona fide* good defence. None of these submissions were addressed in court, and rightly so. Three new points were raised all relating to the incompetence of the judgment granted by the Registrar.

Irregularity of judgment – a plea was filed barring the Registrar from entertaining the default judgment

[11] The first string to the bow was that Rule 31(5) was not applicable because the applicants had filed a plea. It mattered not that the plea was set aside; the moment there was a plea filed the Registrar had no jurisdiction to entertain the application for default judgment. The correct approach was in terms of Rule 31(5)(a), *"whenever a defendant is in default of delivery of notice of intention to defend or of a plea ... file with the Registrar a written application for judgment ..."* This was specially so because the matter had already twice previously been before a court. Reliance for this submission was placed on ***Steel South Africa Ltd t/a Vereeniging Steel v Pipechem CC* 2008 (1) SA 640 (C).** Therein it was found that when a notice of intention to defend was signed by a member of the corporation, only a Court could decide whether the intention of notice to defend was regular.

[12] *In casu* the Registrar did not have to decide whether the plea was regular or irregular; the court had set it aside. With no inference to be made, there simply was no plea. No amended plea was filed and served. There was no compliance with the court order to file an amended plea. The Registrar did not have to decide whether the notice of intention to amend constituted pleas, because notices to amend are not a "pleading"; this argument was also not made. The correct position was put before the Registrar as quoted above in the application for default judgment. It was not argued that the position as reflected in the application for default judgment was incorrect. No exercise of discretion was necessary; there was a summons and a plea that was set aside and non-compliance with the court order to put up a plea. The Registrar could grant default judgment. This is exactly one of the default matters which a Registrar could entertain to relieve the burden resting on Judges in this Division.

Non-service of the application for default judgment

[13] The next point raised was that the application for default judgment was not served on the applicant and in terms of Rule 31(5) it had to be served on the applicants. This is so because the applicants had previously participated in the proceedings. Specific reliance was placed on the proviso of Rule 31(5)(a) which reads as follows:

"Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment."

[14] On 30 May 2012 the respondent delivered to the applicant's current attorney and the Registrar a notice of intention to apply for default judgment. The applicants were thus well aware that the default judgment application was to follow after five days, yet the applicants did nothing. I am satisfied that the respondent complied with all procedural aspects of Rule 31(5)(a).

The summons was stale

[15] The third bow to the string was that the default judgment was granted almost a year after it was applied for. Reliance is then placed on this Court's Practice Manual which states:

"13.21 STALE SERVICE

1. *Where any unopposed application is made six months or longer after the date on which the application or summons was served, a notice of set down must be served on the defendant or respondent.*
2. *The notice of set down must set out:*

2.1 the date and time at which the relief will be sought;

2.2 the nature of the relief that will be sought.

3. The notice of set down must be served at least five days before the date on which the relief will be sought."

[16] A notice of intention to apply was served and the request for default judgment was sent to the Registrar. On the application for default judgment there are four date stamps of the Registrar. In terms of ***Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A)** I accept the reason for this was that the Registrar misplaced the application four times. In any event, the application for default judgment was dated 10 August 2012 and the default judgment was granted on 20 March 2013, i.e. seven months after the application and not close to a year as submitted. It is not practice to serve a notice of set down for a default judgment to be granted by the Registrar because the Registrar simply does not grant default judgments on specified dates. All that was required was that a notice of intention to apply for default judgment be given; such notice was given.

[17] But, in any event, this is not a matter where this court should prevent a respondent from legal certainty of a default judgment granted five years earlier. No payments have been made to the respondent for the last 10 years. No Court can for frivolous reasons deprive a respondent of a judgment rendering the respondent severely

prejudiced. The respondent obtained monetary relief and not relief for the execution of the property, albeit that the property is registered in the name of a trust. There is simply no defence/plea to the monetary claim. I cannot find that default judgment was erroneously granted.

[18] Both counsel prayed for costs on an attorney and own client scale. The costs must follow the result.

[19] I accordingly make the following order:

19.1 The application for rescission of judgment is dismissed.

19.2 The applicants are to pay the costs of the respondent on an attorney and own client scale including the costs of senior counsel, jointly and severally the one paying the other to be absolved.

19.3 The applicants are also ordered to pay the costs that was reserved on 26 November 2013.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 14291/2010

HEARD ON: 25 April 2018

FOR THE APPLICANTS: ADV. T.P. KRÜGER SC

INSTRUCTED BY: Steenkamp Van Niekerk Attorneys

FOR THE RESPONDENT: ADV. H.F. OOSTHUIZEN SC

INSTRUCTED BY: VZLR Inc

DATE OF JUDGMENT: 4 May 2018