REPUBLIC OF NAMIBIA

CASE NO.: A83/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

UWE BERTRAM Applicant

and

AGRA CO-OPERATIVE LTD Respondent

CORAM: VAN NIEKERK, J

Heard: 11 May 2010

Delivered: 17 September 2010

JUDGMENT

VAN NIEKERK, J: [1] The applicant seeks leave to file a replying affidavit out of time. In order to adjudicate the merits of this application, it is necessary to refer to the history of the main application and some of the issues raised therein.

[2] During March 2009 the applicant, who resides in Omaruru, filed an application to rescind a default judgment granted in favour of the respondent on 26 September 2008. Further ancillary relief is claimed. From the application it appears that respondent had issued summons on 18 July 2008 on an acknowledgement of debt signed by applicant in favour of respondent on 11 April 2005. Applicant had undertaken to pay the amount indebted, which was N$852 035, in 10 instalments of N$80 000, plus interest, commencing on 10 April 2005 and to continue payments as agreed upon in a schedule attached to the instrument of debt. Should applicant fail to make payment as agreed, the outstanding amount as well as any other amount owing, became payable forthwith. In the alternative respondent relied on an agreement in terms of which the respondent would lend and advance certain sums of money to the applicant subject to certain conditions. These sums of money were repayable within 21 days from the date of advancement. In addition thereto the applicant had to pay certain sums of money termed "commission" at a rate of 4.5% of the sum advanced, as well as interest on any outstanding balance from time to time. In respect of either of the above-mentioned alternatives it is alleged that applicant failed to effect payment of the amounts and on the dates as agreed, giving rise to an indebtedness of N$372,376-02, including interest calculated until 31 May 2008.

[3] In the founding papers applicant gives certain reasons why he is in default of defending the action instituted against him. There is no need to

deal with these reasons now. As far as the merits of the claim against him is concerned, he admits that he signed the acknowledgment of debt, but states that the terms and conditions of repayment of the debt were orally amended and agreed upon between him and the respondent, then represented by its northern regional livestock manager, Mr Chris Botha, on or about 15 June 2006. In terms of this oral agreement the parties allegedly agreed that applicant would repay the debt in monthly instalments of N$8000. Applicant alleged that he signed a stop order with his bank to make the monthly payments. In addition the parties agreed that the indebtedness would further be reduced by respondent subtracting half of applicant's commission earnings for each auction he held for respondent as a livestock handler in Omaruru.

[4] Applicant alleges in the main application that he has honoured the 'acknowledgment of debt as amended' by making the monthly payments and that respondent maliciously instituted action against him. Citing a desire not to over burden the application with voluminous attachments, he attaches only one month's bank statement as confirmation of a payment of N$8000 on 15 December 2008. I pause to note that this document is irrelevant, as it does not deal with the period in issue in the summons. In fact, on 15 December 2008 the default judgment was already about 3 months old. He denies all the alternative allegations on the basis that such an agreement does not exist or is not part of the dispute. Applicant further alleges that he has a counterclaim against respondent for N$760 000 for certain cheques allegedly incorrectly made out in favour of respondent, as

well as for damages suffered on account of him being defamed by the fact of, and the publication of the default judgment taken against him.

[5] The main application became opposed and on 9 September 2009 respondent delivered its answering affidavits. The gist of respondent's answer on the merits is that Mr Botha had no authority to enter into a verbal agreement amending the acknowledgment of debt. However, even on the oral agreement, respondent alleges that respondent did not make all the monthly payments during the period 15 June 2006 to 31 May 2008, e.g. for September 2007, October 2007, December 2007 and March 2008.

[6] In terms of rule 6(5)(e) applicant was required to deliver his replying affidavit within 7 days of service of the answering papers. In this case the deadline was 18 September 2009. Applicant filed no reply.

[7] On 25 September 2009 respondent's legal practitioners requested applicant's counsel to attend at the Registrar's office on 14 October 2009 to obtain a date of hearing. On 3 November 2009 respondent set the matter down for hearing on 23 March 2010. Ten minutes before the matter was to be heard on that day, applicant filed a faxed replying affidavit, a faxed confirmatory affidavit by deponent Mr Chris Botha and a confirmatory affidavit applicant's counsel, Mr Stolze. At the same time applicant also filed an application in terms of rule 27, praying that the time period within which he may file his replying affidavit may be extended to 23 March 2010. The matter was then postponed to 11 May 2010 for argument on the application to extend the time period. Respondent meanwhile formally noted opposition to this application and filed answering affidavits.

[8] In his affidavit in support of the rule 27 application applicant states that his legal practitioner, Mr Stolze, forwarded the respondent's answering affidavit in the main application to him on 24 September 2009. It should be noted that this date was already 4 court days after the due date for the reply. His lawyer requested him to peruse the answering affidavit, provide a written reply and to then arrange a consultation. Some time thereafter his lawyer sent him by courier a written reminder dated 26 October 2009. I note that by then the date of hearing had already been allocated by the Registrar. Shortly thereafter applicant telephoned Mr Stolze and informed him that he believed that his founding affidavit contained sufficient information to support the rescission application. He states that Mr Stolze was "also of the same legal opinion." He states that he is inexperienced in legal matters and that he relies on the advice received from his legal representatives.

[9] He continues to state that on 19 March 2010 Mr Stolze tried to contact him, but due to the nature of his business he is often in areas where he does not have cell phone reception. Mr Stolze therefore did not manage to make contact with applicant until 22 March 2010. This was also allegedly part of the reason why it took from 24 September to 26 October 2009 to contact Mr Stolze. However, the main reason for this delay, he says, is that the answering affidavit is 27 pages long and he had difficulty in understanding the "baseless conclusions" allegedly made by the deponent, Mr Hugo.

[10] On 22 March 2010 Mr Stolze advised applicant that he is now of the

opinion that applicant must file a replying affidavit "so as to estop the respondent from saying that Mr Chris Botha had no authority (This Honourable Court cannot mero motu take notice of estoppel) and so as to proof (*sic*) that my application is bona fide (by only filing a replying affidavit) and also the aspect of quasi-mutual assent." (see para. 6.2).

[11] The applicant further makes averments that the application is *bona fide* and not intended to delay the proceedings. He states that he has a *bona fide* defence as set out in his founding and replying affidavits. The applicant states that he will suffer irrevocable damage should this court not grant him the indulgence sought, as the replying affidavit is vital to the success of his rescission application. If the replying affidavit is not allowed he states that he will in all likelihood never have the opportunity to put his side of the story in the event that the rescission application is unsuccessful. On the other hand, he alleges, respondent will suffer no real prejudice as it is being paid its monthly instalments of N$8 000.

[12] In his extensive and detailed opposing affidavit Mr Hugo sets out the reasons for respondent's opposition, which were repeated and expanded upon during argument by counsel for the respondent, Mr *van Vuuren*.

[13] It is trite that this Court has wide discretion in considering applications for extension of time (rule 27(1)) or for condonation for non-compliance with the rules (rule 27(3)). Rule 27 sets one requirement in all cases: that the applicant shows "good cause". In *Chetty v Law Society,*

Transvaal 1985 (2) SA 756 (A) at 765A-E the Appellate Division said:

> "The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairn's Executors v Gaarn* 1912 AD 181 at 186 *per* INNES JA.) But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:
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> (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
>
> (ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success. (*De Wet's* case *supra* at 1042; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357 - 8.)
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> It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

(See also *Xoagub v Shipena* 1993 NR 215 (HC) 217D-G; and *Dimensions Properties v Municipal Council of Windhoek* 2007(1) NR 288 HC).

[14] In the circumstances of this case I find it apposite to refer to what was stated in *Du Plooy v Anwes Motors (Pty) Ltd* 1983 (4) SA 212 (OPA) at 216H-

217D. As the judgment is in Afrikaans, I quote from the English head note (at 213B-D), which reflects the judgment:

> "Applications for rescission of default judgment, removal of a bar, leave to defend an application and extension of time for the filing of pleadings must be seen as species of the same genus. In all these cases there is a failure by a litigant to act timeously in terms of the Rules and who seeks the indulgence of the Court so as to allow him to proceed with his action or defence. According to Rule 27 (1) of the Uniform Rules of Court "good cause" must be shown and this gives the Court a wide discretion which must, in principle, also be exercised with regard to the merits of the matter seen as a whole. This approach applies to all the applications concerned, but what does differ is the quantum of the assurance required to the effect that there is indeed a defence, which may vary from case to case. The graver the consequences which have already resulted from the omission, the more difficult it will be to obtain the indulgence. There may also be an interdependence of the reasons for and extent of the omission, on the one hand, and the "merits", on the other."

[15] The following *dictum* in *Maloney's Eye Properties BK v Bloemfontein Board Nominees Bpk* 1995 (3) SA 249 (O) at 253E-G (as reflected in the English headnote at 250F) should also be borne in mind:

> "It is clear from the authorities that the circumstances of every case determine which factors are to be taken into account, and which factors are to be ignored, in considering an application for condonation. Logic dictates, however, that the ultimate purpose which is sought to be achieved by the application for condonation is also a factor which should be considered. The ultimate purpose of the application for condonation should play a role in determining the nature and extent of the information and facts required to decide the question of the prospects of success in the principal case. It would, after all, be illogical to expect an applicant in an application for condonation of the late filing of the defendant's opposing affidavits in an

application for summary judgment to go further in setting out the facts upon which his defence is based than is expected of him in his affidavits in opposition of the application for summary judgment itself."

[16] In *Transnamib v Essjay Ventures Limited* 1996 NR 188 HC this Court dealt with an application for condonation for the late filing of an answering affidavit and said:

"In *Smith NO v Brummer NO and Another* 1954 (3) SA 352 (O) at 358 it was said that the Courts normally are inclined to grant applications for removal of bar where:

(a) a reasonable explanation for applicant's delay is forthcoming;

(b) the application for condonation (or removal of bar) is *bona fide*;

(c) it appears that there has not been a reckless or intentional disregard of the Rules of Court;

(d) the applicant's cause is not obviously without foundation; and

(e) the other party is not prejudiced to an extent which cannot be rectified by an appropriate order as to costs.

See also *Silverthorne v Simon* 1907 TS 123. It has also been said that lack of diligence on the part of the applicant or his attorney, even if gross is not necessarily a bar to relief in condonation applications. See *Gordon and Another v Robinson* 1957 (2) SA 549 (SR). The case *Stolly's Motors Ltd v Orient Candle Company Ltd* 1949 (4) SA 805 (C) was a case where in application for the removal of a bar the defendant had been late in filing his plea and the bar had been in operation for one day; he had been so due to the defendant attorney not having been diligent, it was held that since it appeared that there was a *bona fide* and substantial dispute between the

parties, the application should be granted. On the other hand where the delay is longer and the lack of diligence is gross whether by the applicant or by his attorney the Courts are entitled to take a more serious view of the matter. See *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141D."

[17] I shall first consider the applicant's explanation for the delay. I note at the outset that there is no explanation why the respondent's answering affidavit was forwarded to the applicant after the deadline for reply had already passed. It took more than a month and a reminder from his lawyer before applicant responded to his lawyer's request to provide instructions and to arrange a consultation. Applicant blames irregular cell phone contact and difficulty to understand the answering affidavit. This is no excuse, to my mind. He should then have seen to it that he phones his lawyer from a place where he had contact to arrange an urgent consultation so that the lawyer could explain the affidavit to him.

[18] Perhaps the failure to give a full and acceptable explanation on these aspects is not so important in the context of this case, because ultimately applicant, in agreement with his lawyer, decided that it was not necessary to file a reply and that there was sufficient information in his founding affidavit. As I understand the thrust of applicant's affidavit, he would have come to this conclusion even if the answering affidavit reached him before due date for reply. The decision not to reply was intentionally made. Applicant says he relied on his lawyer's advice as he is a layman. It would

appear that the lawyer changed his mind some time before the hearing and formed the opinion that it was necessary after all to file a reply. Mr *Stolze* confirmed this in his confirmatory affidavit and submitted during argument that, should a lawyer come to a different legal opinion than he held before, it is open to his client to apply for extension to file a reply and that the client should not be penalised by the court refusing to allow the late reply. Mr *van Vuuren* pointed out that there is no proper explanation when and why Mr *Stolze* came to change his mind. He suggested that this may have occurred when Mr *Stolze* perused the respondent's heads of argument filed on 8 March 2010 and in which issue is taken with the failure to file a reply. I agree that this aspect has not been fully explained.

[19] Even if it could be said that the failure to explain on this last aspect is due to the fault of applicant's lawyer, I do not think this should work to the benefit of the applicant, because there are other deficiencies in his explanation. Applicant may not have known the law, but he certainly knew the facts. In the answering affidavit it is expressly stated on several occasions that he did not comply even with the amended acknowledgment of guilt and that he had failed to make several monthly payments which are set out in detail. There is also a list of payments complete with dates and receipt numbers. These allegations clearly and specifically contradict his allegation that he had been making all payments in terms of the amended acknowledgment of guilt. One does not need to be a lawyer to realize that these allegations by respondent go to the crux of proving a breach on applicant's own version of the oral agreement. He deliberately did not

explain the failure to make these payments. In the late reply he explains that it was due to the respondent changing banks on one occasion without notice, but in my view this does not explain why some payments during this period were honoured and others not. He also vaguely states that the "last" problem in this regard was only resolved after March 2008. However, the list of payments provided by respondent, the correctness of which is not disputed by the applicant, does not support this explanation.

[20] The above analysis leads me to the conclusion that, not only has the applicant failed to give a reasonable explanation for the delay, his failure to file a replying affidavit was deliberate. I also conclude that his defence of full payment in terms of the amended acknowledgement of guilt does not appear to be *bona fide*. In this regard I bear in mind the above-quoted *dictum* in the *Maloney's Eye Properties* case and, further, that it is not necessary for the applicant in an application for rescission of default judgment to deal fully with the merits of the case and to produce evidence that the probabilities are actually in his favour. "It 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." (*SOS-Kinderdorf International v Effie Lentin Architects* 1990 NR 300 HC 302F) However, in assessing, as I should do, the *bona fides* of his defence I should not ignore the indications that, *prima facie*, the factual allegations underpinning his defence appear to have no basis. (*Cf. Mutjavikua v Mutual & Federal Insurance Company Ltd* 1998 NR 57 HC 61A-B).

[21] Mr *van Vuuren* pointed out that the applicant did not file a reply to the respondent's allegations in its affidavit opposing the condonation application in which it denies applicant's allegation that respondent is being paid its monthly instalments of N$8000. This much is confirmed in an affidavit by respondent's assistant accountant – credit control, who states that applicant has not made any payments during the period November 2009 to March 2010. In the absence of any attempt by applicant to deal with these factual allegations in reply, I must accept the allegations made by respondent. This leads to the conclusion that the application for condonation itself is not *bona fide* and it therefore should fail also on this score.

[22] For all the above mentioned reasons I am of the view that the application for condonation should not succeed.

[23] Mr Stolze submitted that in the event that this Court should dismiss the application, the costs order should be limited to the costs of instructing counsel, as the matter did not require counsel to be instructed. In my view the respondent was entitled to instruct its counsel who drafted the heads of argument in the main application and who appeared at the hearing on 23 March 2010 to also attend to the application for condonation.

[24] The following order is therefore made:

> The application in terms of rule 27 is dismissed with costs, such costs to include the costs of one instructing counsel and one instructed counsel.

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VAN NIEKERK, J

Appearance for the parties:

For applicant: Mr H Stolze

(Chris Brandt Attorneys)

For respondent: Mr A van Vuuren

(Instructed by Engling, Stritter & Partners)