

SOUTH AFRICA / JUDGMENT

Fourie NO and Others v Firststrand Bank Limited t/a First National Bank (1886/2019) [2020] ZAFSHC 232 (22 October 2020)

[2020] ZAFSHC 232

COURT

Free State High Court, Bloemfontein

BEFORE

Raikane

CASE / FILE NUMBER

1886/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(FREE

STATE DIVISION, BLOEMFONTEIN)

Case

No.: 1886/2019

In

the matter between:

STEFAN

FOURIE

N.O

1st Applicant

NICOLAAS

PETRUS MAREE

N.O

2nd Applicant

ELISMA

FOURIE

N.O

3rd

Applicant

(In

her capacity as trustees of Stefan Fourie IT837/07)

and

FIRSTRAND

BANK LIMITED

t/a

Respondent

FIRST

NATIONAL BANK

JUDGMENT

CORAM: RAIKANE, AJ

DATE HEARD: 15 OCTOBER 2020

DATE DELIVERED: 22 OCTOBER 2020

INTRODUCTION:

1] This is an opposed application to rescind a settlement by agreement between the parties that was made an order of court On 29 August

2019. The agreement was pursuant to a debt owned by the trust following two written loan agreements granted to the applicants by the respondent with a current balance of R18 345 161. 70, excluding interest.

2] The Fourth Applicant who is surety and First Applicant had tendered to pay the debt by way of promissory notes pursuant to the agreement.

3] An application for condonation for the late delivery of the supplementary replying affidavit which occurred at 10: 00 on the day of the set down was declared highly prejudicial and was not granted.

THE

LEGAL FRAMEWORK

4] The procedure with regards to the validity or enforceability of promissory note is governed by the Bills of Exchange Act, 34 of 1964 (“The Act”). Compliance with the Act, is peremptory.

5] Rule 31(2) (b), 42 of the Uniform Rules of Court, common law or appeal.

lay down the basis under which an application for rescission can be instituted.

6] This renders this judgment to be more academic especially as it hinges heavily on the provisions of the Act. No relevant case law pertinent to the issues under discussion was provided by the applicant to support the application.

APPLICATION OF THE LAW TO THE FACTS:

7] Various sections of the Act provides features that must be apparent on the promissory note for it to be binding and enforceable between the drawer and the drawee. The promissory note attached to the papers lack some of these features required in terms of the following sections:

section 7 of the Act states that the sum payable should reflect the following

7.1] section 7(1) (a) the interest,

7.2] section 7(1) (b) if the sum is payable in instalments a further addition to the effect that upon default or any instalment the whole becomes due is necessary.

7.3] section 7(1) (d) the rate of exchange must be indicated or be abstained by the bill.

7.4] section 15 (2) the acceptance is invalid unless it is written on the bill and be signed by the drawee, this simply translate into the fact that the drawee shall not be liable on the bill; he is merely involved but not a contracting party.

7.5] Section 19(1) states that no contract on a bill shall be complete and irrevocable until delivery of the bill and notification of the acceptance has been complied with.

7.6] The applicant delivered the bill with a covering letter to which the respondent stating in bold letters that it is: “WITHOUT PREJUDICE”

“... if you wish to respond you can do so by fax to fax number 0865679872”. The respondent opted not respond. Had it responded, this would be accepting the fact that if the payment was done in the envisaged instalment of R29 300.00. It would have taken the debtor 52 years to pay both the loan and the interest.

8] It cannot be it said as averred by the applicant that for the mere fact that the respondent did not respond an inference can be drawn that this amounted to tacit acceptance as held in COLLIN V RIETFontein Engineering Works 1948 (1) SA 413 (A), and failure by the respond to attend the second auction and collect payment the obligation of the applicant has been discharged.

9] Thus there was no basis upon which the respondent could call for payment as the promissory note as it stands was not enforceable due to non –compliance as stated above

CANCELLATION OF THE SETTLEMENT AGREEMENT:

10] The terms of the agreement between the parties that led to the issuance of the promissory note has an in-built clause that dictates

the manner in which can be cancelled as evident from clause 2.5 and 2.6 of the agreement that: “The entire agreement between the parties constitute the entire agreement between the parties and no cancellation, amendment or addition hereto will be valid unless reduced in writing and signed by or on behalf of all the parties hereto” So the purport cancellation is a none factor.

RESCISSION OF JUDGMENT/ ORDER OF COURT:

11] A rescission in terms of Rule 31(2) (b) is aimed at rescinding a judgment that was given in absence of the applicant. The applicant

must be done within 20 (twenty) days after which the applicant became aware of the default judgment. The requirements for the application

to succeed are clearly laid down in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003 (6) SA 1 (SCA) (2003) 2 ALL SA 113.

12] Rule 42 (1):

12.1] the court, may in addition to any powers it has mero motu or upon the application of any party affected, rescind or vary an order or judgment if it was erroneously sought and granted in the absence of any party affected or any party effected thereby,

12.2] or an order or judgment in which there is an ambiguity or patent error or omission

12.3] or an order or judgment as granted as a result of a mistake common to the parties, and

13] under the common law the applicant must sufficient cause must be shown that there is:

13.1] a reasonable explanation of the default, 13.2] the application is bona fide, and

13.3] the applicant must show he has bona fide defence which prima facie has some prospect of success.

14] None of the above grounds of rescission is evident from the application. The applicant has not make out a case that justifies the prayers embodied in the notice of motion.

15] I, therefore make the following order:

15.1 The application is dismissed,

15.2 Costs to follow the results

RAIKANE, AJ

On behalf of the Applicant: Mr Bekker

Instructed by: Bekker Attorneys

BLOEMFONTEIN

On behalf of the Respondent: Adv. Tsangarakis

Instructed by: Symington & de Kok

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