

SOUTH AFRICA / JUDGMENT

Fourie v Firstrand Bank Ltd (45437/2011) [2017] ZAGPJHC 448 (11 October 2017)

[2017] ZAGPJHC 448

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten

CASE / FILE NUMBER

45437/2011

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 45437/2011

In the matter between

MARTHINUS THEUNIS STEYN FOURIE APPLICANT

and

FIRSTRAND BANK LTD RESPONDENT

J U D G M E N T

VAN OOSTEN J:

Introduction

- [1] This is an application for rescission of an order of this court (Moshidi J) granted by consent on 20 November 2012 (the order). In terms of the order an agreement of settlement concluded on 19 November 2012 between the respondent (the bank), the applicant and Southcorp Trust (Southcorp), represented by the applicant and his wife (the 2012 settlement agreement), was made an order of court.

Background

- [2] The underlying causa eventually culminating in the 2012 settlement agreement was an indebtedness having arisen from a working capital facility granted by the bank to a company known as Southnet Operations (Pty) Ltd (Southnet), in respect of which the applicant and Southcorp were sureties and co-principal debtors (jointly referred to as the debtors). Southnet was placed under business rescue supervision on 13 September 2011. In regard to the indebtedness two settlement agreements were concluded: the first, in 2009 and, the second, in 2010. The debtors however breached the 2010 settlement agreement which resulted in the bank launching the main application in which the order was made, against the applicant and Southcorp as sureties for Southnet, seeking payment of the amount of R10 811 316.53, interest thereon and costs. The applicant and Southcorp opposed the main application but it eventually became settled as reflected in the order.
- [3] The 2012 settlement agreement, in essence, affords the applicant and Southcorp favourable terms for payment to the bank, including a substantial reduction of the original indebtedness, subject to three interim payments being made on 19 November 2012 and 31 January 2013, and a moratorium for repayment of the outstanding balance of the settlement indebtedness until 31 October 2013. The applicant,

although having made the three interim payments, totalling R1 028 500.00, and having availed himself of the bank's

moratorium, failed to make any of the further 36 monthly payments provided for in the 2012 settlement agreement.

- [4] On 17 September 2014 a writ of execution against the applicant's property was issued but it yielded a nulla bona return. On 22 April 2015 the bank instituted sequestration proceedings against the applicant which are opposed and still pending.
- [5] In September 2015 the present application was launched which was served on the bank's attorneys of record on 18 September 2015. The bank opposes the relief sought.

Condonation

- [6] The present application was brought almost three years after the date of the order. In the founding affidavit the applicant prays for condonation for the late filing of this application which is opposed by the bank. Condonation was accordingly argued upfront at the commencement of the hearing before me. At the conclusion of the hearing I made the order appearing at the end of the judgment. These are my reasons.
- [7] The application for rescission is brought under the common law: the court has inherent jurisdiction to grant rescission of one of its own judgments on good or sufficient cause being shown (*Roopnarain v Kamalapathy and Another* 1971 (3) SA 381 (D) 389A-E). It is trite that rescission must be sought within a reasonable period of time. What is reasonable will depend on the circumstances of each case (*Promedia Drukkers & Uitgewers (Edms) Bpk v*

Kaimowitz and Others 1996 (4) SA 411 (C) 421 F-H). In *Nkata v Firststrand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para [27] Rogers J confirmed the well-entrenched reasons for a time limit, being finality in litigation and prevention of prejudice. The learned judge considered that there are no good reasons for allowing more time in regard to rescission applications under the common law than provided for in rule 31(2)(b) in regard to rescission under rule 42(1). I do not consider it necessary to express any firm views in this regard as the delay we are here concerned with, by far extends beyond the limits of reasonableness.

- [8] The applicant must explain his default which must be reasonable (*Kajee and Others v G&G Investments and Finance Corporation (Pty) Ltd* 1962 (1) SA 575 (D) 577E). In *Van Wyk v Unitas Hospital and Another* (Open Democratic Advice Centre as Amicus Curiae

[2007] ZACC 24; 2008 (2) SA 472 (CC) para [20], the Constitutional Court once again confirmed the interests of justice as the standard for considering an application for condonation and continued:

‘Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.’

Discussion

- [9] In the present matter scant attention was afforded to the reasons for the inordinate delay. The applicant was an astute business man who, right from the outset, was well aware of the ‘defence’ to the bank’s claim now introduced for the first time. As long ago as on 3 August 2009, the bank’s attorneys wrote to the applicant and pertinently denied that the bank has ‘entered into any form of partnership or joint venture with the company (Southnet) or any of its subsidiaries’. The applicant’s personal written response hereto is instructive:

‘We deny your statement that the relationship was a bank-client relationship and not a partnership or joint venture. It is the contention of the company that the relationship was not merely a normal bank-client relationship, specifically in the light of the circumstances leading up to the formation of and the interaction during the relationship, as well as the abnormally high deal fees.

- [10] Against this background it is anomalous that reliance is placed in the lengthy founding affidavit on an alleged recent discovery of new facts which, upon further investigation, led to a new defence that the bank had breached the fiduciary duties it had owed to the Southnet Group of companies, arising from an alleged fiduciary relationship that had evolved between them during the course of their interaction. The defence is short lived: counsel for the applicant, wisely and correctly in my view, disavowed any reliance on the applicant’s alleged recent discovery of new facts.

- [11] The applicant indeed honoured the 2012 settlement agreement in making payments which undoubtedly raises acquiescence and peremption as a bar to success in obtaining rescission (*Schmidlin v Multisound (Pty) Ltd* 1991 (2) SA 151 (C) 156 A-E). I am satisfied that the applicant indeed acquiesced in the judgment, an order, which it must be remembered, was granted by consent.

The applicant's main defence

- [12] Much was made in the papers of the applicant's erstwhile attorney of record Mr Wayne van Niekerk, having been struck from the roll of attorneys by order of court. Not only does the applicant allege that he was ill-advised by Van Niekerk in regard to concluding the 2012 settlement agreement but also that he only discovered this on 11 September 2015, in consequence of having obtained a record of the disciplinary proceedings conducted against Van Niekerk. In the heads of argument on behalf of the applicant (prepared by counsel who did not appear at the hearing) the alleged 'late discovery' was advanced as 'good cause' for condonation. The contention is fallacious. The applicant's reliance on the striking off of Van Niekerk is misplaced and of no relevance to the facts leading up to the conclusion of the settlement agreements. As counsel for the bank correctly pointed out, Van Niekerk was instructed by the applicant after the conclusion of the 2009 settlement agreement, which leaves the applicant's reasons for concluding the settlement agreement other than an unequivocal intention to settle, unexplained.

Conclusion

- [13] I am not satisfied that the applicant has shown good or sufficient cause for rescission. The prejudice rescission would cause, as a matter of logic, is immeasurable. The bank was entitled to accept the settlements and arrange its affairs accordingly. No prospects of a triable issue exist (*Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003 (6) SA 1 (SCA) para [11]). The conclusion and validity of the settlement agreements have not been attacked and they have the effect of *res judicata* (*Dennis Peters Investments (Pty) Ltd v Ollerenshaw and Others* 1977 (1) SA 197 (W) 202 E 203A). Finally, the order recorded the terms of a valid settlement agreement leaving no room for this court to exercise its residual discretion in favour of granting rescission (*Botha v Road Accident Fund* 2017 (2) SA 50 (SCA) para [13]).
- [14] For all these reasons no case has been made out for the granting of condonation which decides the fate of the application (Erasmus

Superior Court Practice D1-565).

Costs

- [15] It is common cause that the applicant in terms of the suretyship agreement is liable for costs on the attorney and client scale.

[16] The bank has asked for a costs order against the applicant's attorney of record, Mr Hansen, de bonis propriis, in regard to the unnecessary prolix, argumentative and irrelevant matter included in the applicant's founding affidavit. The founding affidavit and annexures thereto, extend into some 1220 pages. No justification for the inordinate bulk of unnecessary paperwork exists or has been advanced. It clearly constitutes an abuse of the process of this court (Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another 2016 (1) SA 78 (GJ) para [7]-[15]). The applicant's attorney was in duty bound to abide by and ensure compliance with the rules of this court concerning the length of affidavits (Simoes v Hasewinkel and Another 1966 (1) SA 579 (W)). In this regard he was clearly in remiss and a costs order as sought, is clearly warranted (Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd 2014 (3) SA 265 (GP) para [35]).

Order

[17] In the result I make the following order:

1. The applicant's application for condonation for the late bringing of this application is dismissed.
2. The applicant is ordered to pay the costs of the application on the attorney and client scale.
3. The applicant's attorney, Mr Hansen, shall pay jointly and severally with the applicant, all the costs relating to the following

documents: typed pages 10 to 393 and 408 to 516 of the applicant's founding affidavit, as well as all the annexures thereto.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT ADV BE GRADIDGE

APPLICANT'S ATTORNEYS

JJ VILJOEN ATTORNEYS

COUNSEL FOR RESPONDENT ADV JE SMIT

RESPONDENT'S ATTORNEYS EDWARD NATHAN SONNENBERGS INC

DATE OF HEARING

9 OCTOBER 2017

DATE OF ORDER

9 OCTOBER 2017

DATE OF REASONS

11 OCTOBER 2017

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