

SOUTH AFRICA / JUDGMENT

Kruger v ABSA BANK Limited (16/25398) [2018] ZAGPPHC 81 (15 March 2018)

[2018] ZAGPPHC 81

COURT

North Gauteng High Court, Pretoria

BEFORE

Shangisa

CASE / FILE NUMBER

16/25398

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Source record

REPUBLIC
OF SOUTH AFRICA
THE
HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: 16/25398
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
DATE
15 MARCH 2018
In

the matter between: KRUGER,
 PETRUS
 UYS
 Applicant
 and
 ABSA
 BANK LIMITED
 Respondent

JUDGMENT

SHANGISA AJ:

Introduction

1 In this application, the applicant seeks rescission of judgment of this court granted against him on 12 May 2016.

2 It is common cause that the applicant brought the present application more than two months after he had acquired knowledge of the default judgment. Later I will return to deal with the significance of the latter aspect. In the main, the applicant disavows any reliance on rule 31(2)(b) because he contends that the aforementioned rule only pertains to rescissions of default judgments where the claim was not one of a liquidated debt. Consequently, the applicant asserts that his application rests solely on common law grounds.

3 The respondent opposes the application on two grounds. Firstly, it contends that the applicant has failed to establish that he has a bona fide defence to the claim. Secondly, the respondent contends that the applicant delayed in bringing the rescission application, and that accordingly, he was in willful default of the time constraints imposed by rule 31(2)(b) of the uniform rules of court. In any event, so the respondent's argument goes, even at common law grounds, the applicant has woefully failed to give a reasonable explanation for his default. That being the case, the respondent argues that the applicant has failed to show good cause why his non-compliance with rule 31(2)(b) and common law grounds for rescission should be condoned.

Factual

Background

4 At the outset, I consider it important to sketch a brief factual background of the matter. On 12 May 2016 the respondent obtained a default judgement against the applicant for the sum of R347, 000.00 plus interest and costs. The latter judgment has its genesis in the written loan agreement entered into between the respondent, ABSA, and an entity called Port Ferry Properties 92 (Pty) Ltd (the principal debtor) in October 2000.

5 On the same day the aforementioned written loan agreement was entered into, the applicant executed a written suretyship agreement in terms of which he bound himself as surety and co-principal debtor to ABSA for the principal debtor's liability. It is common cause that the applicant's liability in terms of the principal debt was limited to R374, 000.00.

6 Subsequent to the loan agreement, the principal debtor further obtained a second loan in 2007 of R1 296 167.94 from ABSA. The respondent extended the second loan to the principal debtor on the basis that it was covered by the suretyship agreement.

7 It is common cause that two mortgage bonds were registered over the property of the principal debtor as security for both the original and second loans obtained in 2000 and 2007, respectively.

8 Pursuant to the principal debtor's default, on 24 July 2012 ABSA sued and obtained default judgment against the principal debtor for the sum of R1 329 377.05, including an order declaring its property specially executable.

9 The property was duly attached and sold in execution, resulting in an amount of R959, 946.35 being credited against the principal debtor's indebtedness to ASSA. However, there still remained a shortfall of R568, 288.04.

10 On 31 March 2016, some four years after the sale in execution, the respondent issued summons. Soon thereafter, on 12 May 2016, the respondent obtained default judgement against the applicant as a co-principal debtor for payment of the sum of R374 400.00. The latter was the amount for which the applicant had bound himself as surety and co-principal debtor in terms of the suretyship agreement.

11 It is common cause that prescription does not arise since the debt was secured by mortgage bond and the current debt is now a judgement debt which prescribes after 30 years.

12 The applicant contends that he did not defend the action because he did not receive the summons. In that connection, he contends that the summons was served on his previous address on which he had last lived in 2008.

The Applicant's case

13 The applicant argues that had he received the summons he would have defended the action because he believes that he has a bona fide defence to the respondent's claim. Although the application for default judgement was granted on 12 May 2016, the applicant avers that it only came to his knowledge on 2 August 2016 when he was notified by an email from the attorneys of the respondent.

14 The applicant claims he was taken aback as he had previously advised the respondent telephonically when the second bond was registered that he would not be held accountable for any further debts incurred by the principal debtor or its members.

15 On 15 August 2016 the applicant's attorneys directed a letter to the respondent in which they denied liability and demanded consent for a rescission of the judgement. On 22 September 2016 the applicant says he approached his current attorneys of record and instructed them to apply for a rescission of judgement. In his papers, the applicant avers that his attorneys of record deemed it prudent to instruct counsel to render an opinion on the merits of the application. On 5 October 2016 counsel rendered his opinion the consequence of which resulted in the current application for rescission.

16 On 12 October 2016 the applicant asserts that his attorneys settled the founding affidavit in the current application which was served on the respondent on 20 October 2016. The applicant was clearly out of time in bringing the application for rescission. In my view, he falls foul of the timeframes set out in rule 31(2)(b). Accordingly, later I consider whether he has made out a case for rescission based on common law grounds he purports to be relying upon.

17 The foregoing being the case, the applicant contends that it was not in willful default and that he has accordingly satisfied the requirements of rule 31(2)(b). In the alternative, the applicant contends that even if he falls short of the requirements of the rule, he has satisfied the common law grounds for rescission.

Respondent's defence

18 For its part, the respondent contends that the applicant has failed to make out a case for rescission as contemplated both at common law and in the rules. I turn to consider the respondent's response to the application.

19 The respondent contends that the explanation proffered by the applicant for the delay in bringing the rescission application lacks particularity.

20 The respondent points out that the applicant admits service of the summons on 21 March 2016, and that he had expressly bound himself as a co-principal debtor and surety in terms of the suretyship agreement he signed in 2000.

21 The respondent refutes the applicant's contention that he did not receive the summons because he has not lived at the address since

2008. In that regard, the respondent points out that the suretyship

agreement expressly required all parties to the agreement to notify the other parties in writing of any change of their chosen address. However, the applicant failed to notify the respondent in writing of his change of address. Worse still, the applicant does not allege in his founding papers that he had complied with clause 12 of the agreement which required that such change of address be communicated in writing.

Legal position on service on the party's domicilium

22 In the matter of *Shepard v Emmerich* 2015 (3) SA 309 (GJ) at para 4, the court enunciated the trite principle that service of process contractually agreed upon must be strictly followed.

Consequently, the respondent in this matter was obliged in terms of the suretyship agreement to serve the summons at the applicant's

chosen domicilium.

23 It is not sufficient for the applicant to rely on his failure to notify the respondent of his change of address. (See *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1044 A-8)).

24 It follows therefore that the fact that the applicant claims not to have received summons in circumstances where he had failed to notify the respondent of the change of his domicilium in writing cannot avail the applicant.

25 It is worth noting that the applicant was reminded of the outstanding debt during 2012 and 2013. On his own version, the applicant was aware that the respondent sought to recover the debt. He sought to ensure that the principal debt was reduced. What is more, in his founding and replying affidavits the applicant does not dispute the claim that he sought to effect renovations to the property with a view to achieving a reduction of his principal debt as a surety. The fact that the applicant does not dispute that he participated in the process leading to the sale in execution amply demonstrates that he was aware of the summons.

26 The foregoing constitutes common cause facts that are either admitted or not denied by the applicant in his papers. That being so, it follows then that the applicant's assertion that she was unaware of his obligations to the respondent in terms of the suretyship agreement cannot be correct. In my view, the latter further casts doubt that the applicant has brought this application on the basis of a bona fide case.

Merits of the Applicant's defence

27 The applicant's defence on the merits rests on the fact that, contrary to ABSA's claim in its particulars of claim, the applicant denies liability for the second loan. In that regard, the applicant contends that the agreement itself stands disputed because it was neither a written agreement nor was it signed by either ABSA or the principal debtor.

28 The applicant alleges that the second mortgage loan agreement is invalid for lack of signature by the principal debtor. It is significant that the applicant admits the second mortgage loan agreement in paragraph 18 of his founding affidavit. Furthermore, in paragraph 19 of his founding affidavit the applicant admits the registration of both mortgage bonds which he describe as:

as security for the original loan in 2000 and the second loan in 2007".

29 The other ground on which the applicant contends that he has a bona fide defence is the fact that he alleges that the suretyship agreement falls to be rectified. The applicant accordingly asserts that he bound himself as surety only for the original loan of October

2000. He avers, without referring to any specific clause in the

agreement, that it was never contemplated in the suretyship agreement that the principal debtor would be entitled to borrow further sums of money and thus expose the applicant to ongoing liability.

30 The obvious hurdle to the applicant's aforementioned contention is that the suretyship agreement contained the clause which categorically stated that the applicant had bound himself not only for the original loan of October 2000, but also for all other future debts incurred by the principal debtor. To overcome this hurdle the applicant contends that the suretyship document

does not accurately reflect his contentions concerning the agreement because it is clearly a pro forma suretyship document which incorporates liability for any sum which the principal debtor may subsequently owe for any reason whatsoever.

31 Simply put, the applicant seeks to escape the consequences of the suretyship agreement by claiming that the suretyship agreement does not say what he thought it said when he signed it. In any event, the applicant does not dispute that he read, signed and agreed to be bound by the terms of the suretyship agreement.

32 That the applicant read the agreement is all the more apparent from the fact that he initialed all its pages and this provides further proof that he understood the terms of the agreement. By way of example, the applicant deleted certain clauses which he thought were either not applicable, or he did not agreed to. The signed suretyship agreement in which the applicant bound himself as surety and co- principal debtor is replete with the applicant's deletions, initialed and signed pages.

33 There is an obligation on the parties to the suretyship agreement to honour and be bound by the terms of such an agreement. The principles underlying the doctrine of pacta servanda sund are trite, and consequently, I do not deem it necessary to rehash them here. It suffices merely to mention that for our present purposes the applicant does not suggest that he was in anyway misled by the respondent to sign the suretyship agreement.

34 Contrary to his latter position towards the suretyship agreement, the applicant had initially expressed himself bound by the agreement and even assisted with the sale in execution of the principal debtor's property. He only raised concerns with the agreement when there was a shortfall and the respondent sought to recover it from him.

35 In my view, the defence raised by the applicant has no merit. It is clear from the applicant's own version that he clearly misconceived his legal obligations as a surety and co-principal debtor. At any rate, the applicant seems to have misconstrued the terms of the suretyship agreement.

36 Properly construed, the applicant's obligation as surety extended beyond the initial amount of the original loan in the suretyship agreement "to all amounts owing in future arising for whatever reason". The suretyship agreement uses the latter phrase and terminology several times and throughout the document.

37 It is untenable for the applicant to assert that he did not notice the fact that the suretyship agreement he signed bound him for future debts incurred by the principal debtor. In my view, it cannot assist the applicant to contend that he was not aware of the true import and effect of the suretyship agreement that he signed. That is not a valid and competent defence in law.

38 The foregoing being the case, it therefore seems to me that the applicant has not raised any bona fide defence or issue that may possibly avail him in escaping from the terms of the suretyship agreement.

39 In any event, the validity of the second loan agreement is in law irrelevant. That is the case because the suretyship agreement expressly provided that the applicant was bound as a surety and a co-principal debtor for all future debts of the principal debtor, however arising, including a court order.

40 The applicant belatedly purported to raise a constitutional objection to the clause in the suretyship agreement which saddled him with liability for the principal debtor's future debts. The obvious difficulty with the applicant's constitutional point is that it was never pleaded in its founding or replying affidavits. It was only raised for the first time by counsel during argument. In my view, it therefore goes without saying that the unpleaded constitutional point stands to be dismissed without more.

41 The applicant's liabilities are further evidenced by a certificate as envisaged in clause 14 of the suretyship agreement in terms of which the applicant agreed to be bound by such certificate. The applicant contended that the proceeds of the property ought to have been used by the respondent to satisfy the original debt of the loan of October

2000. However, contrary to the latter contention, the suretyship gives the respondent a discretion as to how it chooses to realize the proceeds from the sale of the property. Again, I can conceive of no basis in law warranting interference with the respondent's discretion as to how it chooses to realize the proceeds of the property.

42 The applicant fails in my view to make out a case for rectification of the suretyship agreement. In any event, it seems to me that the applicant also fails to disclose a possible basis for the rectification of the suretyship agreement. I have already pointed out that the suretyship agreement provided for future debts and that these were binding on the applicant as the surety. It seems to me that the defence of rectification is premised on the applicant's failure to appreciate the true import and the legal nature of the suretyship agreement.

43 When one has regard to the admitted facts, including those facts which are common cause between the parties and are not disputed by the applicant, it becomes crystal clear that the applicant has failed to establish that his application was made bona fide and that he has a bona fide defence which prima facie carries some prospects of success.

Conclusion

44 To sum up, I have already mentioned the basis on which the applicant's contention regarding the issue of service on his domicilium have no merit. It suffices merely to emphasise that the undisputed and common cause facts of this matter indicate that the applicant was well aware of the proceedings instituted by the respondent against the principal debtor. In that regard, the applicant had gone to the extent of effecting renovations to the property with a view to appreciating its value and to ensure that its sale in execution satisfied the entire debt of the principal debt owed the principal debtor. It remains common cause that there was a shortfall. In my view, the applicant as surety was bound in law by the debts of the principal debtor arising from the suretyship agreement.

45 Indeed, it was only when there was a shortfall in the sale in execution that the applicant belatedly raised the defence that he had not received summons since they were served on his previous domicile. Needless to say, the latter defence does not avail the applicant for reasons that I have already fully set out above. I have also dealt with the significance of the renovations and improvements that the applicant effected on the property before the sale in execution. The latter remains common cause since it was never disputed by the applicant in its founding and replying affidavits.

46 Consequently the applicant has failed to furnish a reasonable explanation that accounts for his default, and has not disclosed a bona fide defence that prima facie carries some prospect of success or merit.

47 In the result I therefore find that the applicant has failed to show sufficient cause for the rescission of judgement.

Costs

48 The applicant bound himself to a suretyship agreement that provided for any future debts incurred by the principal debtor. The agreement also made provision for costs on an attorney and client scale. It seems to me that the applicant belatedly raised the defences mentioned in this judgment as a result of the shortfall in the sale in execution of the property. Until that stage, the common cause facts amply demonstrated that the applicant was aware of the extent of the principal debtor's debt as set out in the summons, and had even attempted to effect the improvements on the property so that the entire debt could be satisfied when it was sold in execution.

49 When the applicant realized that there was a shortfall, he belatedly claimed to have never received the summons. He also raised unmeritorious defences that could not possibly avail him in law and were at odds with the express terms of the suretyship agreement and the common cause facts.

50 In my view, the conduct of the applicant warrants that he be saddled with the punitive costs order.

Order

51 In the result the following order is made:

1. The application for rescission is dismissed.
2. The applicant is ordered to pay the respondent's costs on an attorney and client scale.

SHANGISA AJ

Acting Judge of the High Court,

Gauteng Division, Pretoria

DATE OF JUDGMENT: 15 March 2018

APPEARANCES:

COUNSEL FOR THE APPLICANT: Adv. A. WILLIAMSON

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