

SOUTH AFRICA / JUDGMENT

Li v Oriental Global Logistics South Africa (Pty) Ltd In re: Oriental Global Logistics South Africa (Pty) Ltd v Li (24319/2014) [2017] ZAGPPHC 707 (26 October 2017) [2017] ZAGPPHC 707

COURT

North Gauteng High Court, Pretoria

BEFORE

Strydom AJ

CASE / FILE NUMBER

24319/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 24319/2014

In

the matter between -

LI

KE Applicant

and

ORIENTAL

GLOBAL LOGISTICS SOUTH AFRICA (PTY)

LTD Respondent

In

JUDGMENT

- [1] This is an application for rescission of judgment brought by the applicant against the default judgment granted on 4 August 2014 in terms of which the applicant was ordered to pay to the respondent an amount of R1,762,520.97 plus interest and costs.
- [2] The applicant avers that the judgment was erroneously sought and granted and is void ab initio. It is averred first, that no proper service of the summons occurred in accordance with the rules and that the respondent failed to comply with the provisions of the National Credit Act 34 of 2005 ("the NCA"). The applicant's case is further that it has paid the debt.
- [3] In the applicant's replying affidavit it raises the further defence that the principal debtor that incurred the debt which rendered the applicant liable, does not exist. Accordingly, so it was argued, a surety cannot be held liable for payment of the debt of a non-existing principal debtor. Due to the findings I make herein, it is not necessary to deal with this belated defence.
- [4] A rescission application can be brought in terms of the rules of court or in terms of the common law. The applicant brought the application in terms of the rules of court, and relied rule 31(2)(b) and rule 42.
- [5] Rule 42 deals with specific situations and the sub-rule which the applicant placed reliance on is rule 42(1)(a) which reads as follows:

[6] The applicant avers that it brought its rescission application within the 20 days prescribed in rule 31(2)(b) but this is disputed.

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brought in terms of a specific rule does not mean it cannot be entertained in terms of another rule or under the common law, provided that the requirements therefore are met. The court should note however that the applicant's version that he only became aware of the judgment on 15 September 2016 is rejected. This version is in direct conflict with what is contained in the return of service to execute a writ, which was served personally on applicant on 10 June

2015. In this writ the sheriff noted that he had spoken to the applicant and that the applicant had informed him of his dire financial position. It is highly improbable that the sheriff would fabricate this information considering that he has no interest in the matter. The applicant's bare denial in this regard is unconvincing. In his founding affidavit he stated that he only learnt of the judgment on 15 September 2016 when he was contacted by one Corrie van der Westhuizen who advised him that the sheriff was attempting to execute against him by attaching property belonging to another company. In his replying affidavit he said that he became aware of the judgment recently when the sheriff served the warrant of execution on a worker at his premises who gave him a copy.
- [7] The court finds that applicant became aware of the judgment at the latest on the 10th of June 2015. This will mean that the applicant is hopelessly out of time to have brought the application in terms of rule 31(2)(b). The avenues still open for the applicant to obtain rescission of the judgment would then be to rely on either rule 42 or the common law. In both instances such an application would then have to be brought within a reasonable time after a party becomes aware of a default judgment being granted against it.
- [8] The application was launched on 11 October 2016. This would mean that it was brought 1 year and 4 months after the applicant became aware of the judgment. This borders on an unreasonable time delay but the court will deal with the application to determine whether applicant acted wilfully and has shown the he has a bona fide defence to the respondent's claim.
- [9] The court will accept the argument on behalf of the applicant that where a judgment was erroneously sought and granted and the court holds that it was so erroneously sought and granted, it should without further enquiry rescind or vary the order. In these circumstances there is no need to show good cause. See *Tshabalala v Peer* 1979 (4) SA 27 (T) at 300 and *Topal v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650 D-J.
- [10] In casu, the first question for decision is whether the judgment was erroneously sought and granted. This will be the case if there is a fact which would have prevented the court from granting judgment if the court was aware of the fact. See *Nyingwa v Moo/man* NO 1993 (2) SA 508 (Tk) at 510 D-G.
- [11] On behalf of the applicant, it was argued that the court must find that the applicant in his capacity as the defendant in the action, was not given due notice of the action that lead to the default judgment being granted.

- [12] The respondent (the plaintiff in the action) based its claim on a document referred to as an "Acknowledgement of Debt" in terms of which the applicant undertook to make payment to the respondent of certain amounts owed by Channel Furniture (Pty) Ltd (the principal debtor) to the respondent. In terms of this acknowledgement of debt, the applicant chose a domicilium citandi et executandi at [...] Street, Centurion, Pretoria. It is common cause that summons in this action was served on the domicilium citandi et executandiby affixing a copy thereof on the post box situated at this address. The return of service indicated that the summons was served at the address, by attachment to the post box after the occupier (Mastoroudes) indicated that the applicant no longer lived there. This information was recorded in the return of service upon which judgment was granted. It is common cause that Mastoroudes is a member of the principal debtor whom the applicant described as his ex-girlfriend.
- [13] The court is satisfied that the service on the domicilium address established proper service in terms of the rules. No special instructions are discernible in the applicant's selection of a domicilium address. Accordingly, it cannot be found that the judgment was erroneously sought or granted pursuant to defective service.
- [14] However, the court cannot find that the applicant received the summons and was in wilful default.
- [15] On behalf of the applicant, it was also argued that the judgment was erroneously sought and granted as the respondent did not comply with the peremptory terms of the NCA, more particularly sections 129 and 130 thereof.
- [16] I will deal with this legal question. To decide whether the NCA was applicable in relation to the "Acknowledgement of Debt" signed on 22 November 2012, the nature of this document should be considered. The reason being, if it was a suretyship in terms of which the applicant stood surety for the debt of a principal debtor, (with a turnover exceeding the threshold value determined by the minister in terms of the NCA), then the NCA would, on the strength of this, not be applicable pertaining to the principle debt nor the surety. A suretyship constitutes a "credit guarantee" as defined in section 1 of the NCA and the NCA is then not applicable to the suretyship in terms of section 4(2)(c) of the NCA. This section determines that if the credit facility or transaction giving rise to the principle debt falls outside the ambit of the NCA so will the credit guarantee.
- [17] The acknowledgement of debt described the applicant as the "debtor". It stated further that the debtor "do hereby acknowledge that I am truly and lawfully indebted to" the creditor in the sum of R2,880,780.97 "being monies owed in respect of transport services undertaken by the creditor for Channel Furniture (Pty) Ltd of which the debtor is the sole director and for which monies the debtor has agreed to stand surety, which monies are now due, owing and payable". No provision was made for interest to be payable and the applicant undertook to pay the outstanding amount in instalments over a period. If the monthly instalment stipulated is divided by the total debt then applicant undertook to pay the debt over a period

of 8 months exactly.

- [18] Although this document makes reference that the debtor has "agreed to stand surety", I am of the view that this is not a suretyship but that the applicant became a co-principal debtor to pay the debt of Channel Furniture (Pty) Ltd. The applicant acknowledged that he in his personal capacity was "truly and lawfully indebted to" the respondent. He was the sole director of the principle debtor and the document is silent on the question whether his promise to pay was subject to non-payment by the principle debtor. When the applicant signed this acknowledgement of debt, the moneys were already due, owing and payable and he did not undertake to only pay for debts of a principal debtor when and if such debt arose.
- [19] Accordingly, the applicability of the NCA should be considered from the premise that the acknowledgement of debt was an undertaking to pay a debt in instalments by the applicant. It was not a credit guarantee as defined in the NCA. The question that then arises is if the acknowledgement of debt is a credit agreement to which the NCA applies.
- [20] The repayment which the applicant agreed to was of the debt without further charge, fee or interest although a discount was applicable if payment was made according to the tenor of the acknowledgement of debt. In fact, the clause in the document dealing with interest was specifically deleted. The reference to interest in the pre-amble and clause 6.1 of the acknowledgement of debt is a reference to mora interest and does not change the situation. Further no goods or services were provided to the applicant. Accordingly, the acknowledgement of debt is not a credit facility as envisaged in section 8(1)(a) read with section 8(3) of the NCA.
- [21] The further question is if the acknowledgement of debt was a "credit transaction" as envisaged in section 8(1)(b) read with section 8(4) of the NCA? For the same reason rendering the acknowledgement of debt not a credit facility it is not a credit transaction. No further charges, fees or interest was payable.
- [22] The only outstanding question remaining is then if the acknowledgement of debt falls within the definition of a "credit guarantee" as envisaged in section 8(1)(c), read with section 8(5) of the NCA? I am of the view that it is not a credit guarantee for reasons stated above. There is not undertaking or promise to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction. The applicant's undertaking was not subject to the undertaking of a principle debtor.
- [23] Consequently, I find the NCA was not applicable pertaining to this acknowledgement of debt and the default judgment was not erroneously sought or granted, as envisaged in rule 42, as a result of non-compliance with section 129 and 130 of the NCA.
- [24] All that remains now is to consider whether the applicant has shown good cause in terms of which a court can grant the rescission of the

judgment.

- [25] The defence put up is one of payment of the debt. According to the summons the applicant made total payments to the respondent in the amount of R1 118 260.00. The last two payments by way of cheques in the amount of R250 000 each. On the deposit slip of one of these payments appears the name of "Crystal". Crystal was the representative of respondent in South Africa and she dealt with the applicant. After these payments were made the outstanding balance stood in the amount of R 1 762 520.97 which is the amount of to the default judgment which was granted.
- [26] The applicants defence is that he paid a further R1 700 000.00 in reduction of his debt into accounts nominated by Crystal acting on behalf of respondent. These amounts were paid from the accounts of other entities.
- [27] It was argued that although the acknowledgement of debt stipulated the account of the respondent into which payments were to be made, the agreement was not subject to a non-variation clause and as such, the subsequent oral variation in relation to payment was valid. The respondent did not dispute that Crystal at the relevant times represented the respondent.
- [28] It was argued that if the applicant can prove at the trial that payment occurred to accounts nominated by Crystal representing
respondent, then payment was made to respondent, albeit into different accounts.
- [29] The payments were made into the account of Gold Style Trading CC wherein Crystal (Jie Huang) is the only member. Crystal in her confirmatory affidavit to the answering affidavit confirmed the allegations contained in the answering affidavit and in relation to the alleged instruction from her to pay the outstanding amounts into different accounts she merely denied that she gave such instructions. She never stated that the R1 700 000 was paid into the account of an entity which she controlled. One would at least have expected of her to explain what these payments were for. This aspect raises a suspicion which opens the door to a possibility that these payment, which in value comes close to the outstanding debt, was in fact paid in reduction of applicant's debt. Applicant when he went to Hong Kong to see the representatives of the respondent during October 2015 already then informed respondent that he made these payments as instructed by Crystal in reduction of his debt. The defence of payment put forward by applicant cannot be rejected outright it carries some prospect of success and is not a delaying tactic.
- [30] The true veracity of the defence will only be establish at the trial. Therefore costs should be in the cause.
- [31] The following order is made:
- 1) The judgment granted on 15 August 2014 in favour of respondent against the applicant is hereby rescinded;

- 2) The applicant must file its plea to the respondent's particulars of claim within 15 days of this order;
- 3) Costs of this application will be costs in the cause.

Date of hearing 23 October 2017

Date of judgment 26 October 2017

For the applicant: Adv J G Dobie Instructed by: VZLR INC.

For the respondent: Adv J G Botha Instructed by: Yammin Hammond Inc.

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