

SOUTH AFRICA / JUDGMENT

Nagel N.O and Others v Land and Agriculture Development Bank of South Africa (M716/2019) [2021] ZANWHC 53 (22 July 2021) [2021] ZANWHC 53

COURT

North West High Court, Mafikeng

BEFORE

MZ Makoti

CASE / FILE NUMBER

M716/2019

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

Reportable: YES / NO

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CASE NO: M716/2019

In the matter between:

JOHANNES RUDOLPH NAGEL N.O

First Applicant

[In his capacity as Trustee of JR Family Trust]

ANNE-MARIE NAGEL NO

Second Applicant

JOHANNES RUDOLPH NAGEL

Third Applicant

[ID No: 5[....]]

ANNE-MARIE NAGEL

Fourth Applicant

[ID No: 6[....]]

And

THE LAND AND AGRICULTURE DEVELOPMENT

Respondent

BANK OF SOUTH AFRICA

IN RE:

THE LAND AND AGRICULTURE DEVELOPMENT

Applicant

JOHANNES RUDOLPH NAGEL N.O

First Respondent

ANNE-MARIE NAGEL NO

Second Respondent

JOHANNES RUDOLPH NAGEL

Third Respondent

ANNE-MARIE NAGEL

Fourth Respondent

[ID No: 6[....]]

REASONS

MAKOTI AJ

INTRODUCTION

^[1] This matter came before me on 26 March 2021, as an application to rescind and set aside the default judgment and orders that were granted against them, in their absence. The Court order encompassing the default judgment was granted and dated 30 January 2020. I dismissed the application on the same date of its hearing, and awarded costs against the applicant which included the costs

occasioned by the use of senior counsel.

- [2] The applicants have asked that I provide the reasons for my dismissal of the application, which I hereby proffer. Although the request for reasons is dated 31 March 2021, I only became aware of the request during the course of the month of May 2021, after my acting stint had come to a conclusion.

BACKGROUND

- [3] The applicants instituted this application in their capacities as the trustees of JR Familie Trust (IT 189/99), hereafter the Trust, and in their personal capacities. I refer to them collectively as the applicants for purposes of convenience in this application. As indicated, they instituted this application to rescind and set aside the default judgment that was granted on 30 January 2020 by His Lordship Hendricks DJP.
- [4] The respondent is the Land and Agricultural Bank of South Africa (also 'the Bank') and it opposed the application. The record reflects that on 06 December 2019 the Bank instituted the initial Court processes against the applicants for the recovery of an amount of R25,628,590-49 plus compounded interest calculated at the rate of 12% from 01 October 2019 to the date of final payment. In the order that they sought to assail, the Court had also declared certain of the Trust's immovable properties executable.
- [5] It is common cause that the Trust was advanced long term loan(s)[1] by a financing organisation known as the Suidwes Landbou Pty Ltd ('Suidwes'), being a duly licensed credit provider. The initial loan advanced was in the amount of R22,190,000-00, repayable by the Trust in monthly installments of R270,909-57 and was to be settled on or before 01 October 2032.
- [6] The Bank averred that during or about 26 August 2013 it purchased all of Suidwes' debt book. Upon reaching the sale agreement, and this could not be gainsaid on any rational basis by the applicants, Suidwes then ceded to the Bank all the right to collect or recover debts owed to it (Suidwes). It was on the ground of being a cessionary that the Bank established the locus standi and instituted the Court proceedings against the applicants, having ostensibly become their new creditor.
- [7] The primary reasons which were advanced by the Bank for the default judgment was simply that the Trust had failed to comply with or honour the terms of the credit agreement. By that it was meant that the Trust had failed to make the monthly repayments in terms of their loan agreement. This was an important consideration in this rescission application, especially because the applicants have not disputed being indebted to the Bank, or Suidwes for that matter. Their real contention was that the judgment was based on an incorrect calculation of the arrears.
- [8] Despite the above, the deponent of the founding affidavit on behalf of the Trust seemed to disavow any knowledge of the Bank, asserting that he has always held discussions and negotiations with representatives of Suidwes. This cannot be true in light of discussions that took place between them and the Banks officials, to which I reflect briefly below. That said,

it is worth stating at this point that, once Suidwes had ceded its debtors book to the Bank, it was the latter that became legally entitled to collect debts from the Suidwes' affected debtors. By definition, a cession is:

"[9] Cession has been defined as a bilateral juristic act in terms of which a right is transferred by agreement between the transferor (cedent) and transferee (cessionary). Generally, no formalities are required for the antecedent obligatory agreement or the act of cession. The parties may agree on the formalities with which the cession is to comply. A cession may thus be either express or tacit, or may be inferred from the conduct of the parties. While the cession does not have to be reduced to writing, the parties may agree that the cession will only be valid if reduced to writing."[2] (Emphasis added)

- [9] Thus, I do point out that it made no difference whether the applicants were aware of the rights enjoyed by the Bank to recover for itself debts that were previously owed to Suidwes. The Bank was by no means non-suited to litigate in the manner that it did to recover the present debt.

APPLICABLE LEGAL PRINCIPLES

- [10] This is an application for rescission of judgment that was brought in terms of Uniform Rule 31(2). There is abundant authority for the proposition that in matters of this nature, an applicant has to show "good cause", or "sufficient cause", which are concepts often held as identical and used interchangeably. For instance, in the case of *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*[3] the principles for rescission were succinctly set out as follows:

"The applicant must show cause why the remedy should be granted. That entails (a) giving a reasonable explanation of the default; (b) showing that the application is made bona fide; and (c) showing that there is a bona fide defence to the plaintiff's claim which prima facie has some prospectus success. In addition, the application must be brought within 20 days after the defendant has obtained knowledge of the judgement."

- [11] In their explanation for the default the applicants in this rescission applicant stated that they were not aware that summons had been issued against the Trust. This was so because they reside at a farm known as Goedehoop in Christiana, which is their primary residence, whereas service of the summons was made at Cawood's Hope. Their explanation went further that it was only the employees who stayed at Cawood's Hope. The returns of service show that the applicants were served at their chosen domicile address, being farm Goodehoop, Vryburg, by affixation at the main entrance.
- [12] The reasoning advanced by the applicants in this regard does not, in my view, carry sufficient weight to satisfy the requirement of good cause. Despite my misgivings, I am prepared to accept that they were not alerted of the case against them.
- [13] Another important consideration for this kind of application is whether the application was made bona fide. This entails a consideration of the events since the applicants became aware of the court's order which is sought to be set aside. It is common cause that the order

was granted on 30 January 2020. The applicants alleged that they obtained knowledge of the order on 04 August 2020 through an email from a Mr Frik Mulder.[4] This was disputed by the Bank, which asserted that the applicants were notified of the order during a meeting which took place on 27 February 2020 between the applicants and one Mr Leon Anton Shand ('Shand'),[5] an auctioneer who was sent to evaluate the farm Goedehoop.

- [14] The applicants' reply to the allegation that Shand notified them of the court's order on 27 February 2020 was a complete bare denial to the effect that: 'I have dealt with these allegations. In so far as it has not been explicitly admitted, these allegations are denied for the reason aforesaid.' Regarding the visitation of Shand at the farm, the applicants' answer was only that:

"4. ... Although I do not specifically recall Mr Shand coming to the premises, it is quite possible that he has been on the premises. ..."

- [15] What the above means is that the applicants are not in a position to dispute the allegation, duly confirmed, that Shand had shown them the court order. In addition to Shand's confirmatory affidavit, the answering affidavit also attached photographs that were taken by him when he visited the farm on 27 February 2020. The applicants' retort to allegations concerning Shand's visit to the farm is evasive and offers no plausible answer or rebuttal to the allegation. The inability to deny the allegation is clearly because the deponent cannot deny his visible image from one of the photographs that Shand took while at the farm.

- [16] On the grounds mentioned above, I could not accept that the applicants first became aware of the default judgment on 04 August 2020. That explanation was blatantly fabricated. Accordingly, I found that this application was not bona fide. It was incumbent on them to show that the application was made not to delay the finality of the matter, but bona fide,[6] which duty they have failed to discharge. Furthermore, it was my conclusion that the applicants fatally failed to comply with the

dictates of the Rule 31(2) in that they did not institute the application within twenty (20) days of becoming aware of the default

judgment against them.

- [17] Despite my finding that the application was not bona fide, I went on to consider whether on the facts of this matter the applicants had a bona fide defense to the Bank's claim, which prima facie carried prospects of success. I found that none existed. This is mainly because their qualm was that the determination of their arrears or their indebtedness was based on incorrect calculations. They did not dispute that they were in arrears and that, as a result, the Bank or, on their version Suidwes, was entitled to institute the claim. In addition, they also admitted that:

[17.1] They were served with a notice contemplated in s 129 of the National Credit Act ('the NCA').

[7] The notices dated 26 June 2019 reflected the arrear amount as R2, 921,230-26, which is the same amount that the Bank sued them for; and

[17.2] Despite the notices, the applicants were unable to remedy the breach of their contractual obligations.

[18] I should add that the applicants' counsel admitted it when I posed a question to him to the effect that it seemed to me that their last paid instalment was on 27 January 2020 and in the amount of R125,298-56. This is another clear example of default in that the amount paid was far less than the agreed instalment amount of R270,909-24, with no cogent explanation offered.

[19] Before 27 January 2020, the other recorded payments that the applicants were able to show were made on 30 October 2018 in the amount of R283,940-49 and on 25 December 2018 in the amount of R831,317-85. Other than these, the applicants also attached what appeared to be a statement from Suidwes which showed payments that they had made. Between 06 March 2018 and 23 October 2019, according to the applicants, they had made nine (9) payments.[8]

[20] The Bank had an explanation of these payments, which, according to it were made towards compliance with the production credit facility,[9] the existence of which the applicants did not dispute. The explanation by the Bank was that:

"22.11 This payment is part of the payment which was made by the trust on 25 December 2019 in the amount of R831,317.85. The balance after the trust's production credit facility was paid in full, which amounted to R519,020.64 was applied towards the reduction of the respondents' term loan agreement, as is evident from Annexure "H2"."

[21] With all of the evidence that lay at my disposal, it became clear that the applicants were in breach of their agreement(s) with Suidwes and that they were indebted in accordance with the notices in terms of s 129 of the NCA. The applicants never disputed the arrears and their indebtedness, that is, upon receipt of the s 129 notices. In fact, they still did not dispute that they were in arrears even after they had obtained knowledge of the default judgment.

[22] The present denial of the amount of arrears is disingenuous. This is because on or about 04 August 2020, with full knowledge of the default judgement, they instructed legal representatives JAC N Coetzer Attorneys to negotiate some way forward with the Bank in an attempt to get some time towards the settlement of the arrears. The following paragraphs (unnumbered) are critical:

"Mnr. Nagel het my egter meegedeel dat hy besig was met Suidwes om die hele skuld te herskeduleer so da thy 6 maandeliks betaal en nie maandeliks aangesien 'n Boer nie alke maand inkomste het wanneer hy mielies of koring plant nie."

"Hy het aangebied om Desember R1 500 000.00 te betaal en dan weer in Julie volgende jaar R1 500 000.00 om so sy paaieimente op datum te bring."

- [23] The import of these two paragraphs is that the applicants ostensibly acknowledged that they were in arrears, and then they attempted to re-negotiate the terms of the agreement. Also critical is the undertaking made to try and bring the payments up to date by making two payments of R1,500,000-00 in December 2020 and July
2021. Taking these facts into consideration, there can be conceivable contention that the applicants have a bona fide defense to the claim.
- [24] The applicants also raised an argument, a technical defense that was to the effect that the Bank did not have the requisite locus standi to institute the claim against them. This contention falters in that I have already indicated that the Bank's claim is predicated on a cession agreement with Suidwes. But if that was not sufficient, the alleged relationship between the Bank and Suidwes is further evinced in a power of attorney dated 13 December 2013, which authorised the officials concerned to initiate the litigation.[10]
- [25] Once I found that the applicants did not have a bona fide defense to the claim, in addition to the fact that the applicant had failed to prove that the application was made bona fide and in accordance with the provisions of Rule 31(2), I dismissed the application with costs, including the costs occasioned by the employment of Senior Counsel.
- [26] These are the reasons for the order that I granted on 26 March 2021, dismissing the application for rescission of judgment with ancillary order as to costs which included those occasioned by the use of senior counsel.

M.Z MAKOTI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION: MAHIKENG

APPEARANCES

REASONS

REQUESTED :

31/03/2021

DATE OF JUDGMENT :

22/07/2021

COUNSEL FOR APPLICANT : Adv. SJ Reinders

Rossouws Attorneys

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[1] 05 October 2017.

[2] LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd 1974 (1) SA 747 (A) at 762A; 1974 (2) ALL SA 6 (A); also; Carlswald & another v Brews (245/2016) [2017] ZASCA 68 (31 May 2017).

[3] 2003

(6) SA 1 (SCA) at 9C.

[4] FA p 12 par 19.

[5] AA p 138 par 3.14.2.

[6] Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476.

[7] Act No. 34 of 2005.

[8] Annexure H2: FA p 113.

[9] Annexure AA7:

[10] Annexure RMN1: AA p 39.

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