

SOUTH AFRICA / JUDGMENT

Nelwamondo v Nedbank Ltd (2296/2010) [2013] ZAFSHC 161 (5 September 2013)

[2013] ZAFSHC 161**COURT**

Free State High Court, Bloemfontein

BEFORE

L J Lekale

CASE / FILE NUMBER

2296/2010

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 2296/2010

In the matter between:

KHOROMMBI CUTHWELL NELWAMONDOApplicant

and

NEDBANK LIMITEDRespondent

JUDGMENT BY: LEKALE, J

HEARD ON: 22 AUGUST 2013

DELIVERED ON: 5 SEPTEMBER 2013

INTRODUCTION AND

BACKGROUND

- [1] On the 5th October 2010 the respondent secured judgment by default against the applicant, as surety and co-principal debtor together with two other defendants, for payment of R187 607,25 together with interest after providing the applicant with copies of, inter alia, Deed of Suretyship on the 28th January 2010 and issuing summons against them on the 10th May 2010.

[2] On the 10th February 2011 the respondent's erstwhile attorney had a telephone conversation with the applicant and consulted with him on

the 15th February 2011. On the 21st and 23rd February 2011 the applicant sent electronic mails to the respondent's said attorney furnishing, inter alia, his payslip, bank statements, estimated monthly expenses and, further, requested the name of an attorney who could help him with debt review.

[3] The applicant feels aggrieved by the default judgment and, on the 27th March 2012, requested the respondent to consent to late application for rescission of the same to which the respondent responded negatively on the 28th March 2012. He, thereafter, filed a motion on the 4th July 2012 for an order:

“(a) That any non-compliance with the rules of the Honourable Court be condoned;

(b) That the Judgment granted by Default against the Applicant on 5 October 2010 be rescinded;

(c) That leave be granted to the Applicant to defend the matter;

(d) That the Respondent be ordered to pay the costs of this Application only in the event of it being opposed;

(e) Further or alternative relief.”

ISSUES IN DISPUTE

[4] The parties are, ante omnia, in dispute over whether or not the applicant has shown good cause for condonation of the late application for rescission of

judgment

entered in default of appearance to defend with specific reference to the delay involved and prospects of success in the rescission application.

[5] In the event of the foregoing question being decided in the affirmative, then and only in that eventuality the parties are at variance on whether or not good cause exists for rescission of the default judgment.

CONTENTIONS FOR THE APPLICANT

[6] The applicant avers that he became aware of the default judgment on the 10th February 2011 and attributes the delay in launching the application for rescission to ignorance of the law on his part in that he believed that the respondent's erstwhile attorney would mero motu reverse the judgment after he had advised him that he never signed the alleged suretyship agreement as well as the fact that he

needed to gather some information for the purposes of the relevant application. It is, further, the applicant's case that his signature on the Deed of Suretyship was forged and that the alleged goods were, in fact, never delivered to the company for which he allegedly stood surety.

CONTENTIONS FOR THE RESPONDENT

- [7] It is contended for the respondent that there exists no good cause for condonation of the inordinate delay involved because no satisfactory and acceptable explanation for the same has been advanced and the applicant, further, does not have a bona fide defence to the respondent's claim as he clearly signed as surety and co-principal debtor and the relevant goods were clearly delivered.

APPLICABLE LEGAL PRINCIPLES

- [8] The parties are effectively in agreement that the applicant approaches this court for rescission in terms of rule 31(2)(b) of the Uniform Rules of Court ("the rules"). It is, however, clear that such a vehicle is not available in the instant matter because judgment was entered in terms of rule 31(5)(b)(i) of the rules insofar as the claim was for a debt or liquidated demand as opposed to a claim contemplated by rule 31(2)(a) of the rules. (See *Ramolibe & Another v Nusun Development (Pty) Ltd and Another* [2012] ZAFSHC 102.)
- [9] The applicant does not seek reconsideration as contemplated by rule 31(5)(d) and, in my view, effectively invokes the common law for rescission in so far as he does not seek to persuade the court that the Registrar erred in granting the impugned judgment but contends that good cause exists for rescission. (See *Bloemfontein Board Nominees Ltd v Benbrook* 1996 (1) SA 631 (FS) at 633H.)
- [10] Under the common law the applicant for rescission is not necessarily constrained to launch the same within 20 days of acquiring knowledge of the default judgment. Such an applicant has to approach the court within a reasonable time after becoming aware of the impugned judgment. (See *Ramolibe and Another v Nusun Development (Pty) Ltd and Another supra* at para [31].)
- [11] In an application for condonation the applicant must show good cause for condonation by, *inter alia*, giving a satisfactory or reasonable explanation for the delay involved and by showing that he has good or reasonable prospects of success in the rescission application in so far as good cause depends on the circumstances of each case. (See *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A) and *Shawzin v Laufer* 1968 (4) SA 657 (A) at 663B.)
- [12] In an application for rescission of judgment under the common law the applicant is required to give a reasonable explanation for the default, to show that his application is made bona fide and, further, to show that he has a bona fide defence to the plaintiff's claim which *prima facie* has some prospect of success. (See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003
- (6) SA 1 (SCA) at para [11].)

APPLICATION OF THE LAW AND FINDINGS

- [13] It is not the applicant's case that the respondent's erstwhile attorney undertook to rescind the judgment in question or assured him not to stress himself over it. It is, further, not contended for the applicant that the respondent promised to abandon the judgment in question in the light of the explanation given by the applicant. The applicant was obliged to bring the rescission application without undue delay and his laxity appears to have persisted for more than three months after the respondent had refused to consent to rescission. The only explanation offered for the latter delay is a terse statement to the effect that it took the applicant more than three months to gather the necessary information for the application. As Mr Rautenbach correctly points out for the respondent, details of such information are not apparent *ex facie* the application. I am not persuaded that the inordinate delay of more than 17 months, as calculated from the date on which the applicant became aware of the judgment, has been adequately and satisfactorily explained.
- [14] The foregoing is, however, not the end of the enquiry. It is trite that the importance of the issue involved and strong prospects of success in the rescission application may compensate for a long delay. I am convinced, on the papers before me, that the applicant enjoys some prospects of success in the rescission application regard being had to the fact that he does not have to prove his defence and only has to show that his defence is not patently unfounded and that it is based upon facts, set out in outlines, which, if proved, would constitute a defence. (See *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 213 (O) at 217H.)
- [15] This state of affairs prevails in spite of, *inter alia*, the fact that the applicant furnished his salary advice and bank statements among others to the respondent's erstwhile attorney in circumstances where it was clear that the respondent was holding him liable to it as surety and co-principal debtor. This conduct, on the part of the applicant, *prima facie* casts doubt on his *bona fides* when he contends that he did not sign as surety and, further, that the goods forming the basis of the suretyship were not delivered. A closer look at the interaction between the applicant and the said attorney reveals that he, in fact, disputed delivery of the goods in question to the extent that arrangements were made for an assessor to conduct an inspection on the premises. It is, further, clear from the documents before me that the applicant never made an offer to settle the judgment debt but, in fact, sought assistance from the attorney in question with regard to identification of an attorney to assist him with debt review.
- [16] The dispute between the parties relating to delivery of the goods in question and the applicant's signature on the deed of suretyship falls to be determined by the trial court in so far as they constitute triable issues. It is not for me, sitting as I am, to try such issues in order to determine where the truth lies.
- [17] In the light of reasonable prospects of success in the rescission application condonation is, in my view, indicated. I am, further, persuaded that the default has been satisfactorily explained regard being had to the applicant's deposition to the effect that in June 2010 the

company Rubnick Oil (Pty) Ltd, the first defendant in the action, was no longer trading and he was no longer reporting for work. The explanation is, in my judgment, acceptable and adequate for, if that was not the case, the sheriff would not have affixed copy of the summons to the principal door of that business at 09H15. He would have, most probably, affected service on any responsible person in attendance, if there was any.

[18] In the light of the excessive delay involved in applying for rescission herein, I am of the view that it is proper and fair in the circumstances of the instant matter to express the court's disapproval of dilatory conduct on the part of the applicant by way of costs.

ORDER

[19] Condonation of the late application for rescission of default judgment is granted.

[20] The default judgment entered against the applicant on 5 October 2010, as the second defendant under the above case number, is hereby rescinded and leave is granted to him to generally defend the action by, inter alia, entering appearance to defend within 10 days after receipt hereof.

[21] The applicant shall pay the respondent's costs.

L. J. LEKALE, J

On behalf of applicant: Adv. D. R. Thompson

Instructed by:

Rampai Attorneys

BLOEMFONTEIN

On behalf of respondent: Adv. J. S. Rautenbach

Honey Attorneys

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