

SOUTH AFRICA / JUDGMENT

Theron v TWK Agri (Pty) Ltd (1431/2022) [2023] ZAFSHC 272 (18 July 2023)

[2023] ZAFSHC 272**COURT**

Free State High Court, Bloemfontein

BEFORE

Reinders

CASE / FILE NUMBER

1431/2022

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Policy**IN THE HIGH COURT****OF SOUTH AFRICA,****FREE STATE****DIVISION, BLOEMFONTEIN****Case number: 1431/2022****REPORTABLE: YES/NO****OF****INTEREST TO OTHER JUDGES: YES/NO****CIRCULATE TO****MAGISTRATES: YES/NO****In**

the matter between:

ESME
THERON
Applicant
and
TWK
AGRI (PTY) LTD
Respondent
In

re:

In

the matter between: TWK
AGRI (PTY) LTD
Plaintiff
and
JOSME
(PTY) LTD
1st
Defendant
(Registration
number: 201[...])
ESME
THERON
2nd
Defendant
Identity
number: 780[...]

JUDGMENT

BY:

REINDERS J

HEARD ON:

25 MAY 2023

DELIVERED ON:

18 JULY 2023

This judgment was handed down in open court and on even date circulated to the parties' representatives by electronic mail communication.

- [1] The respondent herein issued summons against the present applicant and a company known as Josme (Pty) Ltd for payment of the amount of R 804 126, 23 together with interest and costs. The provisions of the National Credit Act [1] did not apply as the legal entity is a juristic person and had an annual turnover of more than R1 million at the time the agreement was entered into. Judgment was ultimately granted on 30 August 2022 against both defendants.
- [2] It is convenient to refer to the parties as in the main action. The present applicant is the second defendant therein.

- [3] The second defendant in her affidavit in support of rescission of the default judgment confirms having received the summons. Having received same, she at the time, handed the summons to her attorney to defend the matter. The attorney filed a notice to defend but no plea was ever filed on second defendant's behalf. As a result, a notice of bar was filed and as no plea was filed, judgment by default was ultimately granted against both defendants.
- [4] The attorney who appeared on behalf of second defendant has in the meantime passed on and the second defendant had not been able to consult and ventilate the failure to file any plea.
- [5] Second defendant explains that she gave pertinent instructions to her erstwhile attorney to defend the matter. She trusted him in doing the necessary and can only speculate on why he failed to file a plea on her behalf. She only became aware of the judgment against her when the Sheriff wanted to attach her personal assets. She then contacted her present attorney of record who, within the prescribed time limit of twenty days after obtaining knowledge of the judgment, brought this application.
- [6] In respect of the merits, second defendant explains that she never signed any surety agreement in respect of first defendant. Assuming that annexure "A" to the summons is the application for a credit facility, she was unaware of clause 1 in Section B thereof and her attention was not drawn to the fact that the signatory of the document would bind him/herself as a surety. Put differently, she relies on the defence of iustus error based on a hidden clause in an agreement where an application for credit was done on behalf of another party (first defendant) and the surety clause was hidden in the terms of the agreement.

See: *Brink v Humphreys & Jewell (Pty) Ltd* [2]

- [7] The second defendant also raises some other defences which I do not deem necessary to repeat herein.
- [8] It is trite that a court may set aside a judgment by default in the event that just cause is shown. The court at the same time retains a discretion to do so. In my view, the second defendant has given a reasonable explanation for her default and I cannot conclude that she was in wilful default. As stated in paragraph [6] herein above, one of the defences relied upon by the second defendant relates to the suretyship clause contained in the document signed by her. In *Brink v Humphreys & Jewell (Pty) Ltd* supra the court was satisfied that such a document could be a trap for the unwary and that the signatory could think he/she was signing a credit application form on behalf of a third party where he/she was in addition thereto undertaking personal suretyship for the debts of that entity rendering the suretyship obligation void ab initio.[3] In the present application the second defendant raises therefore in my view a bona fide defence which can only be adjudicated after evidence had been adduced.

[9] I am satisfied that the default judgment against second defendant should be rescinded. There is no application for rescission of the judgment granted against first defendant. It is the attorney of second defendant who did not file any pleading on behalf of second defendant resulting in the judgment being granted. She moves for an indulgence in these circumstances and should pay the costs of the application. I shall afford her ten days from date of this order to file her subsequent pleading.

[10] I therefore make the following orders:

10.1 The default judgment granted against second defendant on 30 August 2022 is hereby rescinded and set aside.

10.2 The second defendant is afforded 10 (ten) days from date of this order to file her subsequent pleading.

10.3 The second defendant is to pay the costs of the application.

C REINDERS, J

On behalf of the applicant: Adv C.L. Harms Instructed by: Christo Faber Attorneys Inc. c/o Stander & Associates BLOEMFONTEIN On behalf of the respondent: Adv N. Plaatjies Instructed by: Mlozana Attorneys BLOEMFONTEIN

[1] Act 34 of 2005.

[2] 2005

(2) SA 419 (SCA).

[3] At paragraphs [11] and [12] thereof.

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Prepared on 9 October 2026 · Esheria