

SOUTH AFRICA / JUDGMENT

Venter v Firstrand Bank Limited t/a First National Bank (3835/2019) [2020] ZAFSHC 224 (27 November 2020) [2020] ZAFSHC 224

COURT

Free State High Court, Bloemfontein

BEFORE

Chesiwe

CASE / FILE NUMBER

3835/2019

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 3835/2019

In the matter between:

LEON VENTER

Applicant

and

FIRSTRAND BANK LIMITED t/a FIRST

NATIONAL BANK

Respondent

JUDGMENT BY: CHESIWE, J

HEARD ON: 10 SEPTEMBER 2020

DELIVERED ON: 27 NOVEMBER 2020

[1] This is an application for rescission of a default judgment granted on 19 December 2019 against the applicant (defendant in the main action) on the grounds that, when the order was granted, the applicant could not pursue the action due to financial constraints. The respondent (plaintiff in the main action) opposes the application.

[2] The applicant seeks the following relief as prayed for in the notice of motion:

“1. That condonation be granted for the late filing of this application.

2. Rescission of the judgment granted on 19 December 2019.
3. Costs of suit (if opposed).”
- [3] The applicant in the affidavit in support for the application in the rescission of judgment indicated several grounds for the rescission, however, mention will be made of the following salient aspects: That it only came to his knowledge on or about March 2020 that judgment was granted against him and as a result of that he was unable to raise the defence of prescription. The applicant further explained that after signing of the Acknowledgment of Debt on 17 February 2016, he was unaware that the claim of the respondent had already prescribed.
- [4] The respondent in the answering affidavit contends that the applicant’s defence on prescription was selectively presented, as the applicant has over a period of time expressly acknowledged his liability towards the respondent, and that the acknowledgment of liability interrupted the running of prescription.
- [5] Mr. Bekker, Counsel on behalf of the applicant submitted in oral argument that the applicant has sufficient evidence and a bona fide defence for the court to grant the relief sought. Counsel further submitted that the acknowledgment of debt must not be tacit, but must be an admission. He referred to paragraph 13 of the written Heads of Argument that further referred to the matter of *Sci Essel Offshore Services Ltd v Fantasy Construction Central (Pty) Ltd & 3 others*.^[1]
- [6] Adv. Tsangarakis on behalf of the respondent submitted in oral argument that the defence of prescription is no defence, as the mortgage bond have not yet lapsed. He submitted that the applicant concluded the acknowledgment of debt directly with the respondent. He further submitted that the applicant’s indebtedness was secured by a registered mortgage bond, which actually prescribe after a period of 30 years in terms of section 11 of the Prescription Act.
- [7] The requirements for an application for rescission of judgment are well established in *Colyn v Tiger Foods Industries Ltd t/a Meadow Feeds Mills (Cape)*^[2] where the court said the following: “Court generally expect an applicant to show good cause (a) by giving reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff’s claim which prima facie has some prospect of success.”
- [8] In addition, in accordance to the Uniform Rules of Court, Rule 31(2)(b), the defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.

- [9] Furthermore, commentary in Erasmus Superior Court Practice at D1- 563 sets out these principles succinctly as follows: “At common law a judgment can be set aside on the following grounds, (a) fraud; (b) justus error (on rare occasions); (c) in certain exceptional circumstances when new documents have been discovered; (d) where judgment had been granted by default; and (e) in the absence between the parties of a valid agreement to supports the judgment, on the grounds of *justa causa*.”
- [10] In terms of Rule 42(1) the court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected; (b) an order in which there is an ambiguity or a patent error, or omission, but only to the extent of such ambiguity, error or omission; (c) an order granted as a result of a mistake common to the parties.
- [11] In the current application, the applicant contends that the claim against him has prescribed. The respondent issued summons against the applicant on 20 August 2019 which summons with the particulars of claim were served on the applicant on 27 August 2019, subsequently the applicant was served with a notice of bar.
- [12] I pause to mention that the relief sought by the applicant for condonation for the late filing of the application, was not raised by the applicant, in spite of the applicant being way out of the 20 days as required by the Uniform Rules of Court.
- [13] The respondent applied for a default judgment on 6 December 2019. The order was granted on 19 December 2019. Seemingly, the applicant obtained knowledge when the writ of execution was served upon the applicant on 4 June 2020 (according to the return of service). The applicant for a period of six months did not file any papers, nor a condonation for the late filing of the application. The applicant was aware of the default judgment application, in that he had an attorney on record. After the attorney withdrew from record, the applicant seemed to have made no further attempts to find legal assistance to continue to defend the matter, other than to explain that he had no funds to appoint new legal representative.
- [14] However, without the assistance of an attorney, the applicant proceeded to entered into an acknowledgment of debt with the respondent to the extent that the parties agreed as follows: “Verweerder bevestig dat, indien, na ondertekening hiervan, betalings deur hom gedoen word ter vermenderig van die verskulde bedrae, Eiser sal geregtig wees on enige uitstaande balans dan te bewys deur middle van n sertifikaat van enige bestuurder van eiser, wie se aanstelling nie bewys hoof te word nie en sal sodanige sertifikaat dien as prima facie bewys van verweerder verskuldigheid aan eiser op daardie stadium.” The AOD between the parties states further that: “verweerder erken hiermee onvoorwaardelik aanspreeklikheid vir gevorderde bedrae soos uiteengesit in eiser se dagvaarding onder bogemelde saak nommer.”

- [15] In clause 3.2 of the AOD page 31 of the respondent's answering affidavit, the applicant agreed as follows that: Verweerder gee hiermee onherroeplik volmag aan Eiser, verteenwoordig, Elrich Mark Cameroon on die gemelde onroerende eindom te verkoop op openbare veiling of per tender of uit die hand."
- [16] The applicant thereafter proceeded to interact with the respondent attempting to arrange to pay the debt. An offer to purchase the farm Pensplaas was made for R7 471 183, which offer the applicant declined to accept. The applicant communicated with the respondent through its agent Mr Elrich Mark Cameron. The applicant wrote a letter to Mr Cameroon. In the letter (attached as "AA4", page 77 of the answering affidavit) in which he explained his financial demise as well as his indebtedness to the respondent, which letter reads as follows: "Kan hierdie veiling nie dalk on n latere statum plaasvind nie, soos na die afhaal van die moontlike konring oes en dalk beter prys in die mark. Huidege swak pryse in die mark beïnvloed ook ander boere. Ons is baie afhanklik van n redelike prys om te oorleef en ook ander heencome te vind."
- [17] The applicant's then attorney of record followed up with a letter to the respondent's attorneys in terms of which letter, "AA9" on page 101 stated that: "It is my understanding that you proceeded to obtain judgment in respect of this matter. We have received instructions from our client to request a full and final settlement amount. We are aware that the capital amount to R6 118 346, 28 exclude interests and legal fees. To enable our client to make a settlement proposal, we are requesting your offices to provide our offices with a full and final settlement amount, including interests and legal fees up until 31 January 2020."
- [18] Indeed, from the time the default judgment was granted the applicant was involved in negotiating to pay off the debt. The applicant actually cooperated in the selling of the farm, but disputed that the amount offered of R7 471 183, 80 that it was far below the market value of the Farm Pensplaas. The applicant went as far as to offer some of his assets as security for his indebtedness to the respondent. Throughout all the correspondences between the applicant and the respondent, the defence of prescription was not raised and as correctly stated by the respondent that the mortgage bond still exists as well as the loan agreement which is still secured by this bond as contemplated in section 11(a)(1) of the Act.
- [19] The explanation given by the applicant that, due to his financial demise, he could not obtain new legal representation when his attorneys of record withdrew, that explanation is unacceptable. The applicant may be a layman, but he proceeded to engage with the respondent in spite of alleging that he did not have legal representation. The applicant is now on the third attorney and does not explain to this court whether his finances have improved to have appointed a third legal representative. Respondent's

counsel argued that a negative inference should be drawn from the applicant's conduct in respect of the issue of legal representation. In my view, the defence of not having a legal representative is therefore not acceptable.

[20] Section 11 of the Prescription Act 68 of 1969: “The period of prescription of debts shall be the following:

- (a) 30 years in respect of:
 - (i) any debt secured by mortgage
 - (ii) any judgment debt
 - (iii)

[21] However, the applicant contends that prescription was interrupted by the acknowledgment of liability, whether expressed or tacit. When the applicant signed the acknowledgment of debt, it was within three years after signing the original loan agreement. As correctly stated by the respondent, the applicant did not plea prescription as a defence. Taking into consideration that debt relating to a registered mortgage bonds, prescription applicable is indeed 30 years. The applicant’s defence on prescription ought to fail.

[22] It is the respondent’s contention that the applicant failed to put up a defence that has good prospect of success. Further that the applicant does not dispute that there is an amount owed to the respondent. He accepted the amount, however, sought to stop or prevent the sale of the farm.

[23] To rescind a judgment, the applicant must show sufficient cause. In *Chetty v Law Society, Transvaal*, [3] , Miller JA said:

“(i) that the party seeking relief must present a reasonable and acceptable explanation for his default;

(ii) That on the merits such party has a bona fide defence which prima facie carries some prospect of success.”

[24] Based on the above, the applicant has not shown that there is sufficient good cause to rescind the judgment, nor has the applicant established a bona fide defence that prima facie there is some prospect of success. I am not satisfied that the applicant has made out a good case for the relief sought.

[25] Accordingly, the judgment granted on 9 December 2019 will not be rescinded, nor be set aside.

[26] I accordingly make the following order.

1. The application is dismissed with costs.

S, CHESIWE, J

On behalf of the Applicant: Mr. JJ Bekker

Instructed by: Bekker

Attorneys

BLOEMFONTEIN

On behalf of Respondents: Adv. S Tsangarakis

Instructed by:

Symington & De Kok

BLOEMFONTEIN

[1] 17195/2010 [2014] ZAGPPHC 279 at para 16

[2] 2003 (6) SA (SCA) (2003) 2 ALL SA 113, at para 11

[3] 1985 (2) SA 756.

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Prepared on 14 October 2026 · Esheria