IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

DELETE WHICH IS NOT APPLICABLE

[1] REPORTABLE: YES

[2] OF INTEREST TO OTHER JUDGES: NO

[3] REVISED: YES

DATE SIGNATURE

Case No: 9719/2013

In the matter between:

SIVUYILE SANDILE ZILWA Applicant

and

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA Respondent

Case Summary: Application under the common law for the setting aside of a summary judgment that was granted in the absence of the defendant – an applicant for such relief under the common law must bring the application within a reasonable time and must show 'good cause' – a weak explanation of the default may be cancelled out by the putting up of a *bona fide* defence which has a good prospect of success.

Matrimonial Property Act 88 of 1984, s 15(2)(h) and 15(6) – deed of suretyship - defence raised that suretyship entered into by person married in community of property without consent of spouse – such invalid if suretyship not entered into in ordinary course of business – the question is whether the surety's involvement in business is his or her business and whether the execution of the suretyship was in the ordinary course of the surety's business – onus on surety to show that suretyship not entered into in ordinary course of business – creditor seeking to enforce suretyship need not join the surety's spouse.

JUDGMENT

MEYER, J

[1] The applicant, Mr Sivuyile Sandile Zilwa, seeks the setting aside of a summary judgment that was granted in favour of the respondent, the Industrial Development Corporation of South Africa (the IDC), in his absence.

[2] The applicant seeks the relief under the common law. He must, therefore, 'show good cause *(a)* by giving a 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'. An inadequate explanation 'may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success'. (*Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), paras 11-12.) 'If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.' (*Federated Timbers Ltd v Bosman and others* 1990 (3) SA 149 (W), at 155G-H.) The applicant is also required to bring the application for rescission within a reasonable time. (*First National Bank of Southern Africa Ltd v Van Rensburg NO and others: In re First National Bank of Southern Africa Ltd v Jurgens and others* 1994 (1) SA 677 (T), at 681B-G.)

[3] The applicant is a practising attorney, who invested and acquired shares in a company, Mandla Technologies (Pty) Limited (the company). Its main business is the provision of 'smart meter reading solutions' to municipalities in their provision of electricity to consumers. The company was formed in 2007. The applicant became a director of the company and a Mr Reginald Vuyile Miti assumed the position of chief executive officer, responsible for all operational matters. Mr Miti did not become a director because of his adverse credit listing. The initial shareholders of the company were the applicant, Mr Miti and a Mr Zola Tsotsi.

[4] The company commenced trading when it, and four other tenderers, were awarded a tender by the Tshwane Municipality during 2009 for the installation of 'smart meters' (the Tshwane project). The company required working capital to execute the Tshwane project. At the time Mr Miti held 55% of the issued shareholding of the company, the applicant held 35% and Mr Tsotsi 15%. Mr Miti's entire shareholding was transferred to the applicant in order not to jeopardise the obtaining of credit by the company in the light of Mr Miti's adverse credit bureau listing.

[5] The company applied for a loan from the IDC at a time when the applicant was a registered shareholder of 90% of the company's issued share capital and Mr Tsotsi the registered holder of the remaining 10%. In its business plan, which the company submitted to the IDC in support of its loan application, the applicant is stated to be a director and the chairman and chief executive officer of the company. Mr Tsotsi is reflected as one of its non-executive officers and Mr Miti as a consultant to the company. Mr Miti, however, and not the applicant, was in fact responsible for the day-to-day running of the company.

[6] On 22 February 2011, the company, represented by the applicant and Mr Tsotsi, and the IDC entered into a written loan agreement in terms whereof the IDC advanced an amount of R5,5 million to the company. In terms of the loan agreement the applicant and Mr Tsotsi bound themselves as sureties and co-principal debtors proportionate to their respective shareholdings for any amount owed by the company to the IDC.

[7] When the company failed to pay its indebtedness to the IDC as agreed upon in terms of the loan agreement, the IDC, on 14 February 2013, instituted action against the company as principal debtor and against the applicant and Mr Tsotsi in their capacities as sureties and co-principal debtors for payment of the then outstanding indebtedness in the sum of R5 359 060.73 plus interest thereon. The action was defended and the IDC applied for summary judgment. On 25 June 2013, this court (Phatudi J) ordered that the application for summary judgment be served on the applicant and Mr Tsotsi personally. It was thereafter served by the sheriff on the applicant at his residential address, and also on Mr Tsotsi. The applicant, it is common cause, was aware that the summary judgment application was enrolled for hearing on 30 August 2013. He acted as the attorney for himself and for Mr Tsotsi in the matter.

[8] The applicant, in his capacity as attorney practising under the name and style of Makuala Zilwa Inc., corresponded with the IDC's attorneys, Mothle Jooma Sabdia Inc. In an email dated 19 August 2013, he advised the IDC's attorneys *inter alia* as follows:

'1. We refer to the above matter and confirm that we act on behalf of the Second Defendant, Sivuyile Sandile Zilwa and the Third Defendant, Mr Zola Tsotsi, in this matter.

2. Our client only became aware of this matter when the application for summary judgment was served personally to (sic) our clients.'

Certain proposals are then made in the email and it concludes thus:

'7. Please revert to us by the 21st August 2013.

8. All our clients' rights remain reserved.'

The IDC's attorneys responded with counter proposals in an email dated 26 August 2013, which email concludes as follows:

'Should your clients not agree to same or should we not hear from you, we will proceed to move for an application for summary judgment against your clients on 30 August 2013.'

[9] The applicant replied in emails dated 26 and 28 August 2013, to which the IDC's attorneys in turn responded in an email dated 28 August 2013, thus:

'Dear Mr Zilwa

I refer to your email dated 26 August 2013 and your subsequent email dated 28 August 2013. We have forwarded your request on to our client for its instructions.

As we pointed out in our letter dated 26 August 2013, however, if your clients do not accept our without prejudice proposal, we will proceed with moving for an application for summary judgment against your clients.

We have strict instructions to proceed on this basis and we intend to move the application for summary judgment, unless our client instructs us specifically to the contrary.

We want to make it clear therefore that you should proceed on the assumption that our client will not accept your clients' proposal and that we <u>will</u> (as we already pointed out in our letter dated 26 August 2013) be moving for summary judgment on 30 August 2013.

Regards'

[10] In an email dated 30 August 2013, which was send at 09.24 that Friday morning, the applicant advised the IDC's attorneys as follows:

‘We have been informed by IDC yesterday that this matter will be postponed today for several weeks while we engage with them.

Please confirm that this matter will be postponed today.’

The IDC’s attorneys responded within the hour, at 10.16, thus:

‘We acknowledge receipt of your email of 30th August 2013.

The matter will not be postponed. Our instructions are to proceed with the application for summary judgment.’

[11] On 30 August 2013, this court (Van Oosten J) granted summary judgment against the company, the applicant and Mr Tsotsi. The applicant, in terms of the order, is liable to pay to the IDC an amount equivalent to 90% of the sum of R5 359 060.73, interest thereon at the rate of 18% *per annum* from 24 January 2013 until date of final payment and costs. The company, the applicant and Mr Tsotsi never filed an affidavit resisting the summary judgment application nor was there any appearance for them when summary judgment was granted.

[12] The applicant served his present application for the rescission of the summary judgment on the IDC’s attorneys on 8 June 2015, which is almost two years after summary judgment had been granted on 30 August 2013. The applicant proffers no explanation for the lengthy delay in bringing the application for the setting aside of the summary judgment, other than to state:

‘I was extremely surprised when I was visited by the sheriff in our offices on the 26th May 2015 armed with a writ of execution and a copy of the default judgment that was granted by this Honourable Court on the 30th August 2013.’

and

‘Neither the IDC nor Mr Miti informed me after the 30th August 2013 that the default judgment was in fact granted until I became aware when the sheriff came to our office with a writ of execution on the 26th May 2015, almost two years after the date of the said default judgment.'

[13] This explanation cannot be regarded as a reasonable one. A reasonable time within which the applicant was enjoined to bring the application for rescission is substantially less than the almost two years it took him to launch the present proceedings. The applicant was unambiguously advised by the IDC's attorneys in their email dated 30 August 2013, which was send to him at 10.16 that morning in response to his email earlier that morning, that the matter will not be postponed and of their instructions to proceed with the application for summary judgment. The applicant explains his failure to have responded to that email thus:

'Despite the fact that at the time, the Court had already started, I did not notice the reply in time hence I didn't reply to the email.'

[14] I find this explanation to be untenable. In his earlier email, which was sent at 9.24 that morning, the applicant specifically requested the IDC's attorneys to 'confirm that this matter will be postponed today'. One would, therefore, have expected the applicant to keep a look out for the response to his email. Furthermore, the applicant does not state when that email came to his attention. Moreover, it is not suggested by him that he made any enquiries whatsoever whether summary judgment had in fact been granted once that email had come to his attention. Also, it is not suggested that he ever made any enquiries whether the matter had indeed been settled if there was any ring of truth to the content of the email that he had sent to the IDC's attorneys that morning. He, after all, was the attorney who represented Mr Tsotsi and himself in the summary judgment proceedings.

[15] The ineluctable inference is that the applicant deliberately refrained from defending the summary judgment application. It was served on him by the sheriff on

17 July 2013. He never filed an opposing affidavit. By the 26th August 2013 he knew that if a settlement agreement was not concluded before 30 August 2013, the application for summary judgment would proceed on that day. No settlement agreement was ever concluded. And he was informed on 30 August 2013 that the summary judgment application would indeed proceed on that day. The applicant's explanation of the default – that he was not aware that the summary judgment application would actually proceed and be heard on 30 August 2013 because of the settlement negotiations that were taking place between the IDC, Mr Miti and Mr Tsotsi - is all but satisfactory and is refuted by the exchange of emails between himself and the IDC's attorneys.

[16] The main defence put up by the applicant is that at the time when he signed the deed of suretyship he was married in community of property and that his spouse had not given the written consent required by s 15(2)(h) of the Matrimonial Property Act 88 of 1984 (the Act). It is common cause that the requirements of s 15(2)(h) were not complied with. But the IDC invokes s 15(6) of the Act, in terms of which such consent was not required where the act in question, such as to stand surety, was 'performed by a spouse in the ordinary course of his profession, trade or business'.

[17] The applicant bears the onus, which rests upon him *qua* surety, to show that the deed of suretyship was not entered into in the ordinary course of his profession, trade or business. (See *Strydom v Engen Petroleum Limited* 2013 (2) SA 187 (SCA), paras 13-16.) The question that arises here is whether the exception contained in s 15(6) applies to the IDC merely because the applicant signed the deed of suretyship in his capacity as director and shareholder of the company. (Compare *Strydom* (supra); *Amalgamated Banks of South Africa Bpk v De Goede en*

'n ander 1997 (4) SA 66 (SCA); and *Investec Bank Ltd and Another v Naidoo and Others* (D&CLD case No 9640/98, unreported), which case is referred to in *Strydom*, para 12.)

[18] The following concise summary of the facts in *De Goede* is given by Wallis JA in *Strydom*, para 8:

'There two members, who were employed respectively as a teacher and a clerk, each held a 12% interests in a close corporation. The controlling interest was held by a man who, in the case of the teacher, was his father and, in the case of the clerk, was his father-in-law. The younger men played no day-to-day role in the operation of the close corporation. They had, however, contributed small amounts to the close corporation as their members' interests by way of loans. In order to finance the business activities of the close corporation a loan was sought from the bank and it required all three men to sign suretyships as security for the loan. When the close corporation went into liquidation the bank sued the teacher and the clerk on their suretyships to recover what was owing to it and were met with the defence that these were invalid by reason of s 15(2)*(h)* of the Act.'

[19] In rejecting that defence on the grounds that, in accordance with the provisions of s 15(6), the suretyships had been furnished by them in the ordinary course of their business, the Supreme Court of Appeal in *De Goede* held that-

'a member of a close corporation stood in a special relationship to that close corporation: as co-manager he was legally entitled to participate in the management of the corporation's business. ... When a member performed a juristic act that relates to the ordinary business of the corporation, he acted in his capacity as co-manager of the corporation, and thus also in the course of his business as such. ... [I]n the application of s 15(6) it had to be determined whether a (single) juristic act performed by a spouse, such as to stand surety, was performed in the ordinary course of his profession, trade or business, and not whether he normally stood surety in the course of his profession, trade or business. ... [T]he fact that the respondents were respectively a clerk and a teacher and not involved in the day-to-day management of the CC was not decisive: although the business of providing passenger services was legally that of the CC, the CC itself was still the business of the respondents in the sense that it was their commercial enterprise and in the sense that they, as members, legally managed the business. … [I]t was also irrelevant whether or not the member in question conducted such business on a daily basis: the issue was whether the member performed *the juristic act in question* (such as binding himself as surety) in the ordinary course of *his business* as co-manager. A single, isolated activity (such as the act of standing surety) could in proper circumstances be regarded as the member's 'business'. … [A]s to the further question whether the provision of surety had taken place *in the ordinary course* of the business, that it had to be answered in the light of the fact that the CC had requested the overdraft facility in order to defray business expenses and that the facility had been granted on condition that each member had to bind itself as surety. If the test adopted under s 29 of the Insolvency Act 24 of 1936 (viz whether, having regard to the terms of the agreement and the circumstances in which it was entered into, the agreement was one which would normally be entered into between businessmen) was applied to the circumstances of the instant case, it appeared that the suretyship had been entered into 'in the ordinary course' of the respondents' business: it had been a transaction with commonly-used terms that ordinary businessmen would normally have entered into in the circumstances.'

(The quoted passage is from the headnote in *De Goede* at 69-70.)

[20] In referring to *Naidoo*, Wallis JA said the following in *Strydom*, para 12:

'That case involved a property syndication, where 50 investors, through the medium of a private company, purchased a property for redevelopment and resale on a sectional title basis. The acquisition was funded by way of a loan from the plaintiff bank repayment of which was secured inter alia by individual deeds of suretyship from the investors. When the scheme collapsed and the bank sued the sureties 14 of them raised a defence under s

15(2)(h) of the Act that the deeds of suretyship were invalid because their wives had not consented to their execution. Hurt J held that the question whether they had been granted in the ordinary course of the sureties business „must be judged objectively with reference to what is to be expected of businessmen (or, these days, businesswomen)‟. He stressed the importance attached in *De Goede* to the fact that the sureties' interest in the close corporation was an investment and that the suretyship was given to enable that investment to succeed by providing it with the necessary funding via a loan to pay operating expenses. In those circumstances, even though the shareholders were not directors and were not managing the venture, he held that the only difference in the two cases was that he was dealing with shareholders and not members of a close corporation. Given the nature of the scheme; the obligation of the shareholders to make capital contributions; the fact that they were consulted on the purchase of the property at a higher price than originally contemplated and that the corporate form was adopted for reasons of business convenience in relation to what was in substance a partnership or joint venture, he held that the deeds of suretyship were executed in the ordinary course of the business of the sureties.'

[21] The *Strydom* case involved a company, Soutpansberg Petroleum (Pty) Ltd (Soutpansberg), which distributed petroleum products on behalf of Engen Petroleum Ltd (Engen). At the time when it was finally wound up Soutpansberg owed some R25 million to Engen. Strydom, who was a director of Soutpansberg, had executed an unlimited deed of suretyship in favour of Engen, binding himself as surety for and co-principal debtor with Soutpansberg for the due and punctual payment of all moneys that were then or might thereafter be owing by Soutpansberg to it. Engen sued Strydom and another surety. One of the questions considered by the Supreme Court of Appeal was whether, in accordance with the provisions of s 15(6), the suretyships had been furnished by them in the ordinary course of their business.

[22] Wallis JA *inter alia* said the following:

‘[10] Accordingly s 15(6) provides that spousal consent in relation to most of the transactions in s 15(2) and (3) is not required where those transactions are entered into in the ordinary course of a spouse’s business, trade or profession. Where a business is carried on through an incorporated vehicle such as a company or close corporation, or even an unincorporated vehicle, such as a partnership or trust, the question to be answered is whether the surety’s involvement in that business is his or her business and whether the execution of the suretyship was in the ordinary course of the surety’s business, not the business of the company, close corporation, partnership or trust. It may not be the surety’s business if they are a mere salaried employee, having no commercial interest in the business’ success or failure. However, a person who holds a number of non-executive directorships that are the principal source of their income may well when executing a deed of suretyship for one of those companies be acting in the ordinary course of their business.

[11] This illustrates the fact that whether a deed of suretyship was executed in the ordinary course of business is, as Southwood J held it to be in this case, a question of fact. That is how this court treated it in *De Goede*. It rejected a contention by the sureties that their interest in the close corporation was merely a paper interest. It pointed out that under the Close Corporations Act 69 of 1984 they both owed a fiduciary duty to the close corporation and both were vested with powers of management in respect of its affairs. They had involved themselves in those affairs by investing money to provide it with capital and by being parties to the conclusion of the loan agreement with the bank. Their intention was to profit from their participation in the affairs of the close corporation. They were therefore conducting business through the vehicle of the close corporation and the execution of the deeds of suretyship was done in the ordinary course of that business.’

[Footnotes omitted.)

[23] The Supreme Court of Appeal held that Strydom ‘failed dismally’ to ‘show that he did not bind himself as surety in the ordinary course of his business’. (See paras 16-20.) Strydom was a director of Soutpansberg. He was principally involved with

the marketing of Engen's products, which was the 'heart and soul' of Soutpansberg's operations. Soutpansberg was a small private company and it is unusual for such companies to have directors who have no share in the company. In terms of the agreements that were concluded between Engen and Soutpansberg, Engen required the directors of Soutpansberg to sign deeds of suretyship for the company's indebtedness to Engen. In the absence of evidence to the contrary, the Supreme Court of Appeal, therefore, inferred that the directors were also the persons having a financial stake in the company, in other words, its shareholders. At some stage Strydom had a debit loan account with Soutpansberg in an amount in excess of R3 million. In conclusion it was held that-

'[e]ven had the onus of proving that Mr Strydom had bound himself as surety in the ordinary course of his business rested on Engen there would still have been a need for Mr Strydom to give evidence to rebut that suggestion. There was certainly sufficient evidence in the nature of the business, Mr Strydom's position as the director in charge of the key area of the company's operations, the fact that he signed the deed of suretyship and, as a result of his directorship, was clearly aware of the nature of the company's relationship with Engen and familiar with the contractual arrangements between Soutpansberg and Engen to require him to explain why he had not been acting in the course of his business. That he failed to do.'

[24] Turning to the facts of the present case, the company in question was similarly a small private company. Although the business of providing 'smart meter reading solutions' was legally that of the company, the company itself was still the business of the applicant, Mr Miti and Mr Tsotsi in the sense that it was their commercial enterprise and in the sense that they were vested with powers of management in respect of its affairs - even though the applicant and Mr Tsotsi were not directly involved in its day-to-day management - and their intention was to profit from their participation in the affairs of the company. They carried on their business

through the vehicle of an incorporated company. The applicant, as director and shareholder, had a commercial interest in the business' success or failure. The only difference in this case and *De Goede*, as was held to be the situation in *Naidoo*, is that I am dealing with a director and shareholder and not a member of a close corporation.

[25] The suretyships were given to enable the business to succeed by providing the company with the necessary funding via the loan from the IDC to defray business expenses in the execution of the Tshwane project. The loan had been granted on condition that each shareholder bind himself as surety. The applicant was one of the persons who represented the company in the conclusion of the loan agreement and he was aware of the nature of the company's relationship with the IDC and the contractual arrangements between them. The terms of the loan agreement including the requirement that suretyships be given by the company's shareholders, is one which would normally be entered into by businessmen. The applicant, therefore, was one of the persons who was conducting business through the vehicle of the company and the execution of his deed of suretyship was done in the ordinary course of that business.

[26] My conclusion renders it unnecessary to consider the alternative argument raised by the IDC based on the provisions of s 15(9) of the Act, which is that the deeming provision in subsection (9) finds application *in casu* and that it must accordingly be deemed that the applicant bound himself as surety and co-principal debtor with the required consent of his spouse in terms of subsection (2), because the IDC, so it is contended, did not know and could not reasonably have known that the deed of suretyship was given contrary to the provisions of subsection (2) in the light of the representations that were made to it that the applicant held 90% of the

company’s issued shares and that he was a director and the chairman and chief executive officer of the company.

[27] The applicant further contends that his wife was a necessary party to the IDC’s action proceedings and her non-joinder had the effect that the IDC was non-suited until she had been joined. The summary judgment that was granted should, therefore, so it is argued, be rescinded. There is also no merit in this argument. The question whether or not a spouse should be joined in circumstances such as these has been definitively answered by the Supreme Court of Appeal in *Strydom*, paras 22-25. Joinder is not necessary. Wallis JA, who wrote the majority judgment, concludes as follows on this question:

‘[24] On that basis the question is whether Mrs Strydom has a direct and substantial interest in the subject matter of this litigation, that is, the suretyship and its validity, or whether her interest is merely a financial interest that is only indirect and therefore does not require her joinder. The answer is clear. She has no interest in the suretyship or its validity. She is not a party to it and according to her husband she was opposed to its execution. The fact that he went ahead and executed it notwithstanding her disapproval is a potential source of financial prejudice to her and undoubtedly a source of matrimonial discord. However, that is not a direct and substantial interest in the issues in this case. It is an interest that exists only by virtue of the fact that she and Mr Strydom are married in community of property. . . . ’

The applicant, therefore, has also not been able to put up a defence which has good prospects of success.

[28] Finally, the matter of costs. The IDC seeks a punitive costs order against the applicant. I am in all the circumstances of this case not satisfied that this is one of those ‘rare’ occasions where a deviation from the ordinary rule that the successful

party is awarded costs as between party and party, is justified. (See *LAWSA* Vol 3 Part 2 2nd Ed para 320.)

[29] In the result the following order is made:

The application is dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	6 September 2016
Date of judgment:	14 October 2016
Plaintiff's counsel:	Adv P Managa
Instructed by:	Makaula Zilwa Inc, Sandton, Johannesburg
Defendant's counsel:	Adv RL Kayingo
Instructed by:	Mothle Jooma Sabdia Inc, Brooklyn, Pretoria