

IN THE HIGH COURT OF SOUTH AFRICA**SOUTH GAUTENG LOCAL DIVISION, JOHANNESBURG****CASE NR:** 16474/15**DATE:** 2017-06-02**DELETE WHICHEVER IS NOT APPLICABLE****(1) REPORTABLE: YES / NO.****(2) OF INTEREST TO OTHER JUDGES: YES / NO.****(3) REVISED.****DATE****SIGNATURE**

In the matter between

NTUMBA MANSELA**Applicant**

and

NQABA GURANTEE SPV (PTY) Ltd**Respondents**

JUDGMENT

VICTOR J:

[1] In this matter the applicant seeks to rescind the default judgment granted on 18 June 2015 wherein she seeks to be set aside a writ of attachment of portion 186, a portion of portion 24 of the farm Farresfontein 372, registration division IQ Gauteng. She also seeks the setting aside of the sale in execution and that the transfer of the property under the transfer deed 104748/2015 be set aside and that the fourth respondent be ordered to retransfer the property and of course costs.

[2] The founding affidavit in this application refers to the circumstances under which the default judgment was granted. She claims that it was granted erroneously in that the allegations in the main application did not sustain a cause of action, that it was without legal affect and that it was fraudulent. Alternatively the first respondent in these proceedings made false representations.

[3] The default judgment was granted in the sum of R1 285 309.82 together with interest. The applicant in these proceedings claims that the first respondent is not registered in terms of the National Credit Act, 34 of 2005 and that it is the second respondent that was in fact registered and the credit provider certificate is attached.

[4] Ultimately the case was crystalized as to whether an indemnity bondholder could sue because it did not have a credit registration certificate.

[5] The allegations regarding fraud are in fact scurrilous in these circumstances. If one has regard to what was pleaded; it was clear that the applicant in these proceedings was formerly and employee of Eskom and when she left Eskom's employment this amount became due and payable in terms of the agreement.

[6] In my view the pleadings are clear. The cause of action arises out of monies lent and advanced. The documents attached evidenced the

loan. In my view there is nothing fraudulent. The particulars of claim are quite clear in their terms. The indemnity bond is attached and the provisions of the indemnity bond are fully incorporated into the pleadings. In particular if regard has to paragraph 16 and I quote: "The loan was granted against security of a mortgage bond which bond was registered in favour of the applicant over the property." The copy of that mortgage bond was attached and the indemnity mortgage bond is B24974/2012 and is annexed as ANNEXURE 6. The pleader then specifically request that the content of that indemnity bond be incorporated to the extent necessary and attaches the bond and says that it is a true copy.

[7] The loan agreements between Eskom and the applicant in these proceedings were also attached and quite clearly Eskom Finance Company is the company referred to in the mortgage loan agreement and it was when that mortgage bond agreement was concluded that Eskom then brought in the first respondent who is the indemnity bond holder.

[8] It is necessary to assess the terms and conditions of the mortgage loan agreement between the applicant and Eskom, the second respondent. The guarantee is defined, the guarantee means the guarantee given by, at that stage the special purposes vehicle in favour of the company, guaranteeing the borrowers obligations to the company under this agreement. The wording of this definition is very clear in its terms; all that the first respondent is doing is guaranteeing the applicant's obligations to the company and the company is Eskom.

[9] The SPV is defined a Nqaba Guarantee SPV Pty Limited and that is the party which was the holder of the default judgments. The words “indemnity” are defined; indemnity means the indemnity given to the guarantee SPV by the borrower on the entering into this agreement indemnifying the guarantee SPV against any loss, liability, damage, etcetera that may be incurred. “The loan” is the amount set out in the schedule to be lent and advanced by the company. I emphasise those words, the company is Eskom who lends money to the borrower in terms of the agreement. “The security” means the indemnity bond and any other security that has been provided.

[10] There are suspensive conditions and more particularly 3.1.1 refer to the execution and issue of the guarantee SPV in favour of the company, that is Eskom, and it is those obligations by the borrower that are underpinned by this indemnity bond. In other words the connection between the first respondent and the applicant is that of indemnity and akin to that of really a surety. An indemnity bond is defined as a promise to indemnify the obligee against losses and stemming from the principle’s failure to perform. In this case it is the applicant’s failure to perform that is indemnified.

[11] There are further definitions of an indemnity bond and I quote:

“An indemnity bond is a bond that is intended to reimburse the holder for any action or claimed, loss caused by the issuer’s conduct or another person’s conduct. An indemnity bond acts as coverage for the

loss of and obligee where a principle fails to perform according to the terms agreed upon the obligee and the principle.”

[12] In this case the applicant is the obligee and the principal would be Eskom. So all that is happening is that the obligations of the applicant have been undertaken.

[13] in other words for example if a property is sold in execution by the creditor and there is a deficit an indemnity bond would act in that case to ensure the risk and of course pay the creditor such loss as may have been incurred as a result of the sale in execution. That in my view makes it clear that the indebtedness, although the risk taken over by the indemnity bondholder does not interfere with the creditor and debtor relationship and therefore does not fall within the provision of the National Accredited Act.

[14] Reference was made to various case law. The applicant relies on various points in limine in relation to the failure by the court a quo to see that the judgment should not have been granted. In my view the judgment was correctly granted, having regard to the fact that someone who is the holder of an indemnity bond does not fall within the provisions of the National Credit Act. It is Eskom in this case who is registered as a credit provider that is where the true nexus lies.

[15] There are various other points taken in limine by the first respondent and that is the delay of 13 months and no application for

condonation. It is quite clear that that of itself would have been a problem for the applicant. However in my view the real issue is to be traversed in this instance and that is the question of whether an indemnity bond holder has to be registered in terms of the Credit Agreement Act.

[16] In the result the question is whether the applicant, in bringing this application so late and having regard to the scurrilous allegations made in this matter should then be penalised with costs on the party and party scale. It is correct that the applicant should have been, and those representing her should have been far more circumspect in terms of the allegations made and in particular when an allegation of fraud is made against an entity such as the first respondent then those allegations cannot be made frivolously and on no basis in law. I have read out the provisions of paragraph 16 in the application and in no way did the first respondent intent to mislead the court and such an allegation is scurrilous.

[17] While it may be so that the application for rescission is not *male fide* of itself but one has to have regard to the contents of the rescission application and to the allegations made. The case law relied upon by the applicant is also of no application. The applicant has not been deprived of her property and the order obtained by the first respondent was not arbitrary.

[18] I will not refer in great detail to the case of *National Credit Regulated v Opperman and Others* 2013 (2) SA 1 (CC) but in any event the applicant should have been aware that even if the first respondent was not,

was required to be a registered credit provider, the first respondent still has residual common law rights as set out in the Constitutional Court case referred to.

[19] In the result the application is dismissed with costs on the attorney and client scale.

M Victor

Judge of the High Court