

IN THE HIGH COURT SOUTH AFRICA,
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 14064/2009

In the matter between: ~~YES~~ NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

ABSA BANK LIMITED

And

2010/06/01

DATE

SIGNATURE

Plaintiff/ Respondent

Dircon Industrial Properties (Pty) Ltd

1ST Defendant

Izak David Frederick Schneieder N.O

2ND Defendant

Cornelius Frederick Schneieder N.O

3RD Defendant

Izak David Frederick Schneieder N.O

4TH Defendant

Cornelius Frederick Schneieder

5TH Defendant/ 1st applicant

Adriana Martha Schneieder

6TH Defendant/ 2nd Applicant

JUDGMENT

MAVUNDLA J,

- [1] On the 26 August 2010 I dismissed with costs the application for rescission of the judgment granted against the first and second applicants on 24 June 2009 and ordered that the reasons for the order may be requested within 10 days. I therefore set out the reasons for this order.

- [2] The applicants sought an order rescinding the aforesaid order granted against them. Although the judgment was granted against all four defendants, only the fifth and sixth defendants, as applicants seek rescission of the aforesaid order.
- [3] The applicants further sought an order in terms of which this Court exercise its discretion and refer their alleged over-indebtedness to a debt counselor in accordance with the provisions of ss85 and 86 of the National Credit Act 34 of 2005 (NCA), alternatively they be declared in terms of s87 over their over-indebtedness.
- [4] The respondent had issued summons against all the defendants jointly and severally, the one paying the other to be absolved, for payment in the amount of R754,778.80 with interest and an order against the first defendant declaring certain immovable property executable.

[5] The plaintiff and the first defendant on 11 September 2006 entered into a loan agreement in terms of which the plaintiff lent and advanced an amount of R800 000.00 to the first defendant. The aforesaid loan was secured by a mortgage bond passed by the first defendant over certain immovable property in favour of the plaintiff hypothecating the immovable property mentioned herein above.

[6] The second, third, fourth and fifth defendants bound themselves as sureties and co-principal debtors, together with the first defendant in favour of the plaintiff, for the payment of the amount of any sum of money which first defendant may from time to time be owing to the plaintiff from whatever cause arising. Copies of the deed of surety were annexed to the summons as annexure D1-D3. It needs mention that the fourth defendant had both consented to the conclusion of the surety by the fifth defendant. I shall henceforth refer to the last two defendants as the applicants.

[7] It needs mention that in the particulars of claim it was averred that the National Credit Act, No 34 of 2005 does not apply to the agreement/ between the parties to the stipulation of Section 4(1)(a), alternatively Section 4(1)(b), read with section 4(c) and Section 8(5).

[8] The summons was served personally on the fifth defendant and properly served on the sixth defendant by way of service on the sixth defendant's husband both on the 2 April 2009. There was no appearance to defend entered by or on behalf of the defendants. The plaintiff applied in terms of rule 31(5) for default judgment which was granted on 24 June 2009.

[9] On the 15 September 2009 the sheriff served the applicants with a notice of attachment. The application for rescission was only filed with the registrar on 26 October 2009.

[10] It is common cause that the application for rescission is brought in terms of rule Rule 31(2)(b).¹ The application for rescission

¹ Rule 31(2)(b) provides that:

should be brought within 20 days from the date on which the applicants came to know of such judgment. The application was only brought on 26 October 2009, clearly out of time.

[11] The applicants did not apply for condonation for the late filing of their application. The Rules are to be complied with. Where a party is out of time, such party must seek the Court's indulgence, which may on the court's discretion be given or refused.

[12] The applicants admit that the summons was served on them on 2 April 2009. At that stage the fourth defendant was the second defendant and also their attorney. They immediately handed the summons to the fourth defendant with instruction to defend the matter.

“ A defendant may within twenty days after he or she has knowledge of such a judgment apply to court upon notice to the plaintive to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.”

[13] The applicants further acknowledge that the notice of attachment in execution was served on them on 15 September 2009. They further aver that at that stage they had already been informed by Mr. Muller of Eal Muller Attorneys of the existence of another action instituted by the respondent against them. The first applicant says that he assumed that the aforesaid notice of attachment had something to do with the other matter. Because Mr. Muller was already representing them in the second matter he merely handed the notice to him. The latter instructed his correspondents in Pretoria to obtain copies of the pleadings of the matter, which were eventually received on 30 September 2009. It was during the consultation with Mr. Muller that it was brought to their attention that summons was issued and judgment had already been obtained against them. The applicants then realized that it was the same matter as the one he had instructed the fourth defendant to defend. It was further brought to his attention that the fourth defendant had vacated his premises in the middle of 2009 and had already been struck off the roll of attorneys.

[14] In the matter of Mutebwa v Mutebwa² Jafta J (as he then was) referring to Rule 31(2)(b) stated that the Rule requires that the applicant, upon whom the *onus* rest:

- “(a) ... must give a reasonable and acceptable explanation for his/ her default;
- (b) ... must prove that the application for rescission is *bona fide* and not made with the intention of merely delaying plaintiff's claim; and
- (c) ... must show that he/ she has a *bona fide* defence to the plaintiff's claim.”

[15] Jafta J (as he then was) in the same matter (*supra*) also cited with approval the matter of *Sanderson Technitool v Intermenua*³ where Coetzee J said:

“In *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (0) at 470 (0) at 476 Brink J summarised the effect of South African decisions. An applicant, who claims relief under this Rule, should comply with, *inter alia*, the following requirements. His application must be *bona fide* and not made with the

² 2001 (2) SA 193 (Tk HC) at 197D-198A.

³ 1980 (4) SA 573 (W) at 575H-576A.

intention of merely delaying plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments, which if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case or produce evidence that the probabilities are actually in his favour. See also *Brown v Chapman* 1938 TPD 320 at 325."

[16] The question of condonation is a matter of the discretion of Court. The court must have regard to all the circumstances and the explanation proffered for the default and the delay in taking appropriate steps to comply with the Rules of the Court. The applicant must put at least something which will sufficiently justify the court in holding in the exercise of its discretion that sufficient cause has been shown justifying the relief sought to be granted.

[17] In the matter of *Cavalinias v Claude Neon Lights S.A. Ltd*⁴ the Appeal Court said:

⁴ 1965 (2) SA 649 at G-652 A.

“ In Silber’s case it was also decided that even if good cause is shown it is still in the discretion of the magistrate to grant or refuse relief (p. 352).

As this is a case involving fault of the litigant’s attorney it is necessary to consider the cases bearing on that. In *Rose and Another v Alpha Secretaries Ltd.*, 1947 (4) SA 511 (AD), Tindal., said at p.519:

‘ It seems to me undesirable to attempt to frame a comprehensive test as to the effect of an attorney’s negligence on his client’s prospects of obtaining relief under sub-rule (2), or to lay down that a certain degree of negligence will debar the client and another degree will not. It is preferable to say that the court will consider all the circumstances of the particular case in deciding whether the applicant has shown something which justifies the court in holding in the exercise of its discretion that sufficient cause for granting relief has been shown.”

[18] Remissness on the part of the attorney, in certain circumstances will not be condoned, *vide Sallojee and Another NNO v Minister of Community Development*⁵. However, a weak

⁵ 1965 (2) SA 135 (A) at 141C.

explanation seen against a strong defence may be accepted and condoned by the Court, *vide Smith v Saambou Bank Ltd*⁶.

[19] In exercising its discretion, the Court must not only look at the explanation regarding the remissness, but also the degree of non-compliance, the strength of the applicant's case and its prospects of success on trial, *vide National Union of Metalworkers of SA v Jumbo Products CC*⁷; *Rennie v Kamby Farm (Pty) Ltd*.⁸

[20] The reason for the applicants in not having entered an appearance to defend is attributable to the remissness of the fourth respondent. The applicants, without saying so, want to attribute the remissness of not bringing the application for rescission within the prescribed period to their attorney Mr. Muller.

6 2002 (6) SA 346 (SECLD) at 349B-E.

7 1996 (4) SA 735 (AD) at 741F-G

8 1989 (2) SA 124 (A) at 131H the Appeal Court said: "In matter of this sort the prospects of success are in general an important, although not decisive, consideration. It has been pointed out (*finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others* 1985 (4) SA 773 (A) at 789C) that the Court is bound to make an assessment of the petitioner's prospects of success as one of the factors relevant to the exercise of the Court's discretion unless the cumulative effect of the other factors in the case is such as to render the application for condonation obviously unworthy of consideration.."

[21] In so far as the failure to enter an appearance to defend, it would seem that the applicants cannot be blamed as they instructed the fourth respondent. But I need not look at this issue in isolation. The applicants do not give any explanation as to why there was a further delay in bringing the application for rescission between the period of 30 September and 26 October 2009. Their affidavit was only deposed to on 22 October 2009. Further, the applicants do not explain to the Court what steps they took to find out from the fourth defendant about the progress of their instruction to defend the matter.

[22] A party cannot dump instructions on an attorney and then sit idle without caring what is happening about the matter. I can only assume that the applicants dumped their instructions on the fourth defendant without caring thereafter what happens; otherwise they would have mentioned what steps they took. Such conduct on their part can hardly be condoned. I further hold the view that the applicants cunningly attempt to bring their application within the 20 days period in that they want this court

to believe that they only became aware on 30 September 2009 of the fact that default judgment was granted against them. As early as on 15 September 2009 they, so too Mr. Muller, must have realized that judgment has already been granted otherwise there would have been no warrant of execution. Further, it would not have taken much effort for Mr. Muller to have established from his own office that the relevant notice of execution did not relate to the other matter he was handling, the details of which this Court has not been taken into their confidence and provided therewith. I shall bear in mind all these factors after I have considered whether the applicants have a *bona fide* defence, *vide Mutebwa v Mutebwa (supra) et National Union of Metalworkers of SA v Jumbo Products CC(supra)*. I shall also bear in mind that the mere fact that a party has a strong case is not of itself sufficient cause to grant condonation, *vide Torwood Properties (Pty) Ltd v South African Reserve Bank*.⁹ Each case must be decided on its peculiar facts.

⁹ 1996 (1) SA 215 (WLD) at 230I-J

[23] The applicants contend that annexure D3 and E of the particulars of claim which they signed constitute a so called credit guarantee as envisage in section 8(5) of the National Credit Act of 2005.

[24] The applicants further contend that, they did not only bind themselves as sureties but also as co-principal debtors. They further contend that they are over-indebted and had they been aware of the simple and inexpensive and possibly effective debt restructuring procedure envisaged in provisions of s86 of the NCA they would have proceeded along that avenue rather than having to apply through this Court for rescission and be directly referred to a debt counselor for evaluation and for recommendation in terms of s86(7) of the NCR. In the alternative they pray that they be declared as over-indebted in accordance with s85(b) of the NCA.

[25] The applicants further contend that the respondent did not comply with the provisions of s129 of NCA. They further

contend that their statutory right to voluntarily apply for debt review was never brought to their attention.

[26] The respondent in his opposing affidavit has, *inter alia*, raised a crisp point that the NCA does not apply to the applicants since they were not sued in their capacity as co-debtors but as sureties.

[27] The defence raised by the applicants has been succinctly dealt with in the matter of *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another*¹⁰ and find it apposite to cite in detail what Satchwell J said:

"[20] Following the reasoning of Trollip JA in *Neon and old Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 471, credit was in fact not granted to the second respondent. The loan finance granted and the mortgage bond agreement are and were between the applicant and the first respondent. The second respondent was not advanced credit and did not become party to the contract between the applicant and the first respondent. He did not contract with the applicant to acquire credit

¹⁰ 2009 (3) SA 384 (TPD) at 390F-391E.

himself or to be a party to the agreement between applicant and first respondent.

[21] The second respondent signed as surety and co-principal debtor. The right enforceable by the applicant against the second respondent arises from the contract of suretyship. The contract between applicant and second respondent is separate and distinct from the bond agreement between the applicant and the first respondent, although it is accessory to it. The second respondent is not a consumer and did not receive credit. He is a guarantor of a consumer and did not receive credit. He is a guarantor of a consumer's obligations to a credit giver. Second respondent's contractual relationship with the applicant remains ancillary to the main agreement between the applicant and the first respondent.

[22] The authorities on this point are clear. A surety who has bound himself as surety and co-principal debtor remains a surety whose liability arises wholly from the contract of suretyship. Signing as surety and co-principal debtor does not render a surety liable in any capacity other than a surety who has renounced the benefits of exclusion and division¹¹. As De Villiers CJ stated, 'the use of the words "co-principal debtor" does not transform the contract into any other than suretyship'.¹²

[23] Second respondent could not be and was not sued in his capacity as co-principal debtor, since his liability to the bank remains that of surety

¹¹ Ft note 17 *Maassdorp v Graaf-Reinet Board of Executors* (1906-1909) 3 Buch AC 482 at 490, *Du Plessis v Estate Teich Brothers* 1914 CPD 48 at 50; *Neon supra* at 471.

¹² Ft Note 18 *Maassdorp supra* at page 490.

who has renounced certain rights. This position is correctly referred to by the applicant in the summons.

[24] In the result the, the second respondent is sued as a guarantor to the obligations of the first respondent in terms of a credit transaction to which the NCA does not apply. He cannot claim that he is entitled to have received a notice in terms of s129."

[28] *In casu* the summons clearly state that the applicants bound themselves as sureties and co-principal debtors in favour of the first respondent and have renounced their benefits of cession of actions and no cause of debt and the NCA does not apply. In my view the liability of the applicants arises from the agreement of suretyship.

[29] I am in respectful agreement with the views expressed by Satchwell J, which I find to be dispositive of the defence of the applicants. The rest of the contention raised in the applicant's affidavit is nothing more but a still born effort to motivate their assertion that they are over-indebted and should be referred to a debt counselor and does not, in my view, warrant any further attention. I therefore conclude that the defence raised by the

applicants has no prospect of success were the matter to be referred to trial.

[30] In the premises, I therefore hold the view and conclude as such that the applicants have not satisfied¹³ this Court that:

- (a) their remissness in regard to both the default and bringing the condonation is reasonable and acceptable and should be condoned.
- (b) the application for rescission is *bona fide* and not made with the intention of merely delaying plaintiff's claim; and
- (c) have a *bona fide* defence to the plaintiff's claim.

[31] It is for the above reasons that I dismissed with costs the application for rescission and accordingly hand down same.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF THE REASONS: 01 OCTOBER 2010

¹³ My emphasis.

APPLICANT'S ATT	: EAL MULLER ATTORNEYS
APPLICANT'S ADV	: MR JE KRUGER
RESPONDENTS' ATT	: VAN ZYL LE ROUX & HURTER
	INCORPORATED
RESPONDETS' ADV	: MR. JP VAN DEN BERG