IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

Case no: 3452/2010
Date heard: 26.4.2012
Order given: 26.4.2012

In the matter between:

KOLEKA NOMSA MBANE **Applicant**

vs

EASTERN CAPE DEVELOPMENT CORPORATION **Respondent**

REASONS FOR JUDGMENT

<u>TSHIKI J:</u>

A) INTRODUCTION

[1] On 4th August 2006 in Port Elizabeth, applicant (third defendant in the main action) herein bound herself as surety in favour of the respondent for a sum of R350 000.00 which the first defendant (Anix Trading 481 CC) in the main action, owed to the respondent. As surety applicant renounced all benefits from legal exceptions, *inter alia*, the following '*non-numeratae pecuniae, non causa debiti*, revision of accounts, no value received, errore calculi and *de duobus vel pluribus reis debendi*'.

[2] Applicant and one Dumalisile Vukile Mbane, the second defendant in the main action, were members of the first defendant close corporation being the main juristic person to which the respondent (plaintiff in the main action) lent and advanced the sum of R350 000.00 of which applicant stood surety for the debt. Applicant bound herself as surety and co-principal debtor in solidum with the principal debtor Anix

Trading 481 CC for the due performance by the principal debtor of its obligations in favour of the respondent. When the first defendant failed to pay the respondent's debt, respondent sued the close corporation and its members for payment of the amount due and payable and subsequently obtained judgment against them on 14th January 2011.

[3] When applicant became aware of the judgment she applied for its rescission which application I dismissed with costs on the 26th April 2012 with reasons for my decision to follow at a later stage. When I was preparing my judgment thieves opened my vehicle and stole my briefcase which contained, *inter alia*, the file in these proceedings. There was, therefore, a further delay in my preparation for my reasons. Fortunately, the file in this case was found and was brought to the office of the registrar who brought it to me. I was, therefore, able to finally prepare my reasons for judgment which now follow hereunder.

[4] When the application for judgment was argued before me Mr. Dyer appeared for the applicant and Mr Moorhouse represented the defendant.

B) ISSUES

[5] Applicant's contention herein is based on a number of points which are:

[5.1] That she only became aware of the judgment sought to be rescinded on 18th March 2011.

[5.2] that the action against her had been prematurely instituted and that respondent (plaintiff) should have first invoked the provisions of section 129

(1) of the National Credit Act 34 of 2005 (the Act) before instituting the action proceedings against her.

[5.3] Secondly, as applicant was a surety who had not excluded the legal exception known as *beneficium excussionis* therefore respondent had not yet *excussed* the first defendant in the main action.

[5.4] Thirdly, applicant contends that respondent had sought and obtained judgment for the incorrect amount in the main action. This is so, as she contends, because only the sum of R200 000.00 had been received by the first defendant.

[6] In its opposition of the application for rescission of judgment, respondent contends as follows:

[6.1] That applicant has failed to show good cause for the rescission of the judgment as she has not presented a reasonable and acceptable explanation for her default and that she has also failed to show that she has a *bona fide* defence to the main action a defence which should carry some prospect of success on the merits.

[6.2] That the applicant's reliance on section 129 (1) the provisions of the National Credit Act 34 of 2005 is of no application in the present proceedings because the principal debt herein was higher than the threshold prescribed by section 7 (1)(b) and section 4 (1)(b) read with sections 9 (4) of the Act.

C) REASONS FOR JUDGMENT

[7] I would have had no reason to refuse respondent condonation for having filed its answering papers out of time that is outside the 15 days period provided in Rule 6

(5)(d)(ii). This is so also in view of the fact that applicants do not appear to be seriously opposing the application for condonation sought by respondents. The rule gives the Court a wide discretion to either grant or refuse the application. Having heard the proffered reason for the late filing of the relevant papers I have no reason to refuse the application (see ***Nedcor Investment Bank Ltd v Visser NO and Others*** 2002 (4) SA 588 (T). The explanation given by the respondent for the late filing of the papers appears to be *bona fide* and not patently unfounded and has not caused any prejudice to applicant.

[8] In terms of common law a Court can only rescind a judgment obtained on default of appearance if the applicant shows sufficient cause for his or her default. This entails two requirements which are:

[8.1] that the party seeking relief must present a reasonable and acceptable explanation for his or her default; and

[8.2] that on the merits such a party has a *bona fide* defence which, *prima facie*, carries some prospect of success (see ***Chetty v Law Society Transvaal*** 1985 (2) SA 756 at 765 A-C).

[9] It follows that the applicant has to prove both requirements and not only one of them. In the present case applicant's explanation in her founding affidavit has to be evaluated to establish whether she has in fact complied with the common law requirement aforesaid.

[10] Applicant's contention that the respondent should have to first proceed in terms of section 129 (1) of the Act has to be evaluated. Firstly in view of the

provisions of section 7 (1)(b) read with sections 4 (1)(b) and 9 (4) of the Act the debt in issue is excluded. The amount in issue is higher than the limit provided for by the Act which is more than the R250 000.00 provided for in the Act. In this case the principal debtor is a juristic person and that the provisions of the Act do not apply to a credit agreement in terms of which the consumer is a juristic person whose asset value or annual turnover at the time of the agreement was made equals or exceeds the threshold value (currently R1 000 000.00) determined by the Minister responsible for consumer credit matters in terms of section 7 (1) of the Act. Secondly, section 4 (1)(b) of the National Credit Act does not apply to a credit agreement:

[10.1] which is a large agreement as envisaged in section 9 (4)(b) read with section 7 (1)(b) of the National Credit Act, if the "principal debt" under the transaction equals or exceeds the amount of R250 000.00 as determined in the Government Notice 713 of 1 June 2000; and

[10.2] in terms of which the consumer is a juristic person, whose asset value or annual turnover, is at the time the agreement was made was below the threshold value of (currently R1million) determined by the Minister.

[11] The above facts which are relied upon by respondent have not been refuted by the applicant and the debt in issue is R350 000.00. It, therefore, follows that the principal debt exceeds the threshold of R250 000.00 thus rendering the aforementioned provisions of section 129 (1) of the Act not applicable.

[12] In the suretyship agreement applicant herein bound herself as surety and co-principal debtor in solidum, jointly and severally, with the first defendant (principal debtor) in the main action for the amount owed by it to respondent. The effect of this

is that "generally the only consequence ... that flows from the surety who is also undertaking liability as a co-principal debtor is that *vis-a-vis* the creditor he thereby tacitly renounces the ordinary benefits available to a surety, such as those of excussion and division, and he becomes liable jointly and severally with the co-principal debtor". (See ***Neon and Cold Cathode Illumination (Pty) Ltd v Ephron*** 1978 (1) SA 463 (A) at 472 B-C, *Canex's the Law of Suretyship* 6th ed p 57.)

[13] Applicant herein has specifically renounced the benefits of excussion and division and bound herself as surety and co-principal debtor. It, follows, therefore that the debt becomes enforceable against her at the same time as the principal debtor. Applicant therefore cannot rely on the mentioned benefits in order to escape liability.

[14] It has also been contended by applicant that respondent had sought judgment for an incorrect amount of money as only the sum of R200 000.00 had been received by the first defendant. This contention, in my view, has been adequately addressed by the respondent in its answering affidavit and I have no reasons to prefer the version of the applicant especially in view of the decision in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A). The applicant's contention in this regard is hereby rejected as having no substance at all.

[15] On the above analysis of the facts and law I am of the view that the applicant herein has no *bona fide* defence to the respondent's main action and therefore her application for rescission of judgment has no merit. She, therefore, has not proffered a *bona fide* defence on the merits of the respondent's claim.

[16] It is, therefore, for the above reasons that I dismissed with costs the applicant's application for rescission of judgment.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

Counsel for the applicant	:	Adv Dyer
Instructed by	:	Laubscher Attorneys PORT ELIZABETH
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