

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

CASE NO: 304/2018

In the matter between:

TANYA VAN WYK Applicant
(Identity Number: 69...)

and

ABSA BANK LIMITED Respondent
(Registration Number: 1986/ 04794/ 06)

In re:

ABSA BANK LIMITED Plaintiff
(Registration Number: 1986/ 04794/ 06)

HENNING JACOBUS VAN WYK First Defendant
(Identity Number: 66...)

TANYA CHANTAL VAN WYK Second Defendant
(Identity Number: 6...)

JUDGMENT

Poswa-Lerotholi, AJ

Introduction

1. The applicant, Tanya Van Wyk seeks the rescission of a default judgment handed down by this court on 28 March 2018 in favour of the respondent, Absa Bank Limited. Absa opposes the application.
2. The applicant and her ex-husband, Henning Jacobus Van Wyk ("Mr Henning")

bound themselves as surety and co-principal debtor with the principal debtor, Galvaspin CC in favour of the respondent for the repayment on demand of any sums of money which is the principal debtor owed to the respondent. In terms of the deed of suretyship, the extent of the liability of the applicant was R400,000.00. The principal debtor was placed under voluntary liquidation on 21 September 2017. Relying on the deed of suretyship, the respondent then sought repayment of the outstanding amount from the applicant and Mr Henning on 2 February 2018.

3. The applicant did not enter an appearance to defend, as a result, the respondent sought and was granted judgment by default. The applicant contends that she never received the summons and suspects that, due to gale force winds on the day in question, the summons and its attachments were blown away.

The Applicant's Submissions

4. It is common cause that on 6 February 2018, the summons was served by affixing a copy of the summons to the front gate of applicant's property as reflected on the return of service. The applicant asserts that she was not in wilful default and it was always her intention to defend the respondent's action. In support of her contentions, she outlines the following significant events.
5. On 05 March 2018, responding to the respondent's letter of demand, disclosed her defence to the respondent's legal representatives. In response thereto, on 13 March 2018, the respondent's attorney replies directly to the issues raised by the applicant and then goes on to record that –

“Our instructions are to continue legal proceedings against your client

and Judgment is being pursued against the sureties of Galvaspin”

6. The applicant laments the fact that the respondent did not inform the applicant that process had been issued, it merely stated that the legal proceedings will continue. At this stage, the applicant was unaware that summons had been issued and there was no mention of a default judgment. The response from the applicant makes no mention of the summons issued, neither does the respondent's attorney mention the application for judgment by default had been lodged the day before on 12 March 2018.
7. During this period, the parties were engaged in a separate litigation, wherein the applicant lodged an urgent application to compel the respondent to effect the sale and transfer of applicant's property. Evidently, the parties were in contact during this crucial period. According to the applicant, if the respondent had been litigating in good faith, it would have disclosed the action to the applicant. It was during the course of this application, on 20 March 2018, that the applicant heard for the first time, that the respondent had actually issued summons against the applicant.
8. The applicant explains that following this revelation, she took steps to inquire on the elusive summons. Before 27 March 2018, she approached the respondent directly and was advised to speak to the applicant's attorney. In a telephonic conversation with the respondent's attorney, the same inquiry was made. However, on 28 March 2018, the very next day, the respondent wrongfully pursued the default judgment, well-knowing that the applicant had not received the summons and therefore was not in wilful default.
9. In demonstrating a bona fide defence, the applicant presented three main

defences. Firstly, the applicant contends that when Galvaspin (Pty) Ltd was converted from a company to a close corporation, Galvaspin CC in January 2006, the applicant did not sign surety for Galvaspin CC.

10. Secondly, the applicant accuses the respondent of reckless lending. According to the applicant, at all material times, the respondent was the sole banker of Galvaspin CC. As a result, the respondent had intimate knowledge of the financial affairs of the principal debtor. Consequently, at the time further credit of R250 000.00 was extended to the respondent it was apparent that Galvaspin CC could not repay the loan. The fact that Galvaspin went into voluntary liquidation two months later supports the applicant's contention. The respondent's failure to properly assess the ability of Galvaspin to service the debt has caused prejudice to the applicant as surety.
11. Thirdly, the applicant submits that the respondent neglected to carry out the instruction of Mr Henning to release the applicant as surety. On 19 June 2014, the applicant and Mr Henning divorced. The divorce order explicitly stipulated that the applicant will be released as surety. Accordingly, on 19 July 2013, Mr Henning informed his attorneys that he had requested, Ms Danielle Smith ("Ms Smith"), an employee of the respondent to release the applicant as surety. The respondent explains five years later that, according to Ms Smith, the applicant could not be released from the suretyship because there was a dispute between the co-sureties. The applicant contends that there was no such dispute. The applicant submits that, the circumstances around the failure to release her from the suretyship, can only be fully ventilated in a trial where the respondent furnishes the applicant with the relevant documents and the conflicting versions

are tested in open court.

12. The applicant maintained that the proper forum for her to prove her defence was a trial court where, she will be afforded the opportunity to invoke Rules 35(12) and 35(4) to discover the documents relevant to her defence. By way of illustration, the applicant chronicled a list of documents she would require from the respondent in order to prove her case.
13. Finally, the applicant argued that the respondent was underhanded in its dealings with the applicant. In the face of the evidence of an explicit request having been made timeously for the release of the applicant as surety, the respondent persisted in its opposition of this application, refusing to rescind the order. In the circumstances, the applicant asked this court to make a punitive costs order against the respondent.

The Respondent's Submissions

14. In resisting the application, the respondent submitted that the applicant's explanation is without merit. The respondent asserts that the summons was served on the applicant on 6 February 2018, the applicant did not file a notice to defend thus the respondent sought the default judgment. In argument, the respondent did not challenge the applicant's assertion that she had not received the summons.
15. As to the accusation that the respondent deliberately concealed the action from the applicant. The respondent averred that in the correspondence between the applicant and its attorneys, it had made reference to the action. Specifically, in the e-mail dated 13 March 2018, to the Applicant's attorneys, reference was

made to Case no. 304/2018 in the subject heading. Furthermore, a confirmation of instructions to proceed with the legal action against the applicant was made coupled with advice that judgment had been sought in the action. Additionally, reference is made to the legal proceedings on 19 March 2018 and clearly stated that judgment by default has been sought. The Order of Court dated 22 March 2018 mentions the impending action between the parties. In any event, by 20 March 2018, the applicant was aware of the action. With the default judgment having been awarded on 28 March 2018, a week elapsed without the applicant taking any action towards defending the matter. In the circumstances, the applicant failed to discharge the onus of wilful default.

16. The respondent averred that the applicant also did not prove a *bona fide* defence. The change of name of the company does not affect her obligations as surety. The applicant signed as surety in terms of section 27 of the Close Corporation Act No. 69 of 1984.
17. Similarly, the claim of reckless lending is misplaced. As reflected in the particulars of claim, the action concerned two accounts the principal debtor had with the respondent. The amount claimed was R 740 343.94 in respect of the cheque account and R 255 849.81 in respect of the term account. Consequently, judgment was in respect of both the cheque account and the term loan, the exposure of the respondent would have been the same regardless. The respondent denied that it had in anyway prejudiced the applicant as surety. Moreover, if there was any prejudice suffered by the applicant, same did not arise from the deed of suretyship.
18. With regard to the alleged failure by the respondent to release the applicant as

surety. The respondent submitted that it is incorrect to blame the respondent for the failure to release the applicant as surety. The respondent argued that the onus is on the applicant to show that the creditor had the legal duty or obligation to do so. The applicant did not prove such obligation on the part of the respondent. The applicant's contention that the respondent forgot to release the applicant from the surety is unfounded. According to the correspondence dated 19 July 2013, it is clear that Mr Henning was obligated to release the applicant, as surety, not the respondent.

19. Moreover, Clause 11 of the deed of suretyship, stipulates two ways in which the applicant can be released from the suretyship: the applicant must furnish the respondent with a notice of release or the debt has been paid in full. The applicant has not fully complied with Clause 11. In any event, the release is within the discretion of the respondent, where there is non-compliance with the deed of suretyship, the respondent was under no obligation to conduct the release.
20. As to the alleged failure by the respondent to oppose the liquidation application, by the principal debtor. The respondent stated it had conducted a financial assessment and it was found that the principal debtor was indeed in financial distress, therefore it could not oppose the application.
21. Conclusively, the respondent maintains that the applicant has failed to prove a *bona fide* defence, there is no reasonable explanation for the delay and no justification for a punitive costs order.

The Law

22. The defendant must show good cause for the rescission of judgment. It is settled

in our law that ‘good cause’ means that the applicant must (a) give a reasonable explanation for the default; (b) show that the application for rescission is *bona fide*; and (c) show that he or she has a *bona fide* defence, including a *prima facie* case on the merits.¹

A reasonable explanation for the default

23. A reasonable explanation for the default means that the applicant must show that she is not in wilful default, as espoused by King J in *Maujean t/a Audio Video Agencies v Standard Bank of SA Limited*- ²

“More specifically in the context of a default judgment “wilful” connotes deliberateness in the sense of knowledge of the action and its consequences ie legal consequences and a conscious, freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be.”

24. The applicant explains that she was not in wilful default. There was no proper service. Moreover, the respondent deliberately hid the action from her with the intention of obtaining a default judgment against her. The manner in which the respondent conducted itself in obtaining the default judgment should be frowned upon by the Court. The respondent denies the applicant’s assertion and contends that it informed the applicant about the impending action. I am in agreement with

¹ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at page 9E-F.

² 1994 (3) SA 801 (C) at 803H-I cited with approval in *Scholtz and Another v Merryweather and Others* 2014 (6) SA 90 (WCC) at paragraph [66].

the applicant's contention. The respondent was aware that the summons was merely affixed to the gate of the applicant's residence, therefore there was a chance that the applicant did not receive the summons. Moreover, due to a separate application between the parties, throughout this period the parties were in contact.

25. The e-mail dated 13 March 2018 from the respondent to the applicant bears mention. Instead of the respondent pointedly informing the applicant that it shall seek a default judgment, the respondent makes a perfunctory reference to a case number and simply states *"Our instructions are to continue legal proceedings against your client in the above matter and Judgment is being requested in the Action against the Sureties for Galvaspin."* The respondent had already filed the application for default judgment on 12 March 2018, the applicant and its legal representatives were entitled to assume that the summons were yet to be served.

26. Considering the context within which the e-mail is sent, I find the content of the e-mail to be insufficient to alert an opponent of an impending default judgment. To the contrary, having learnt for the first time on 20 March 2018 that the respondent had issued summons against her, the applicant then took the initiative to obtain the summons from the respondent and respondent's attorneys respectively. This coupled with the explanation for the default demonstrates that the applicant was not in wilful default. I am satisfied that the applicant has given a reasonable explanation for the default.

The application for rescission is bona fide

27. There is nothing in the conduct of the applicant that demonstrates signs of mala fides, or an attempt to evade the responsibility she has towards the first

respondent. In fact, none was alleged by the respondent.

A bona fide defence in the main action.

28. The threshold to be met by the applicant when demonstrating a *bona fide* defence is merely that there is a *prima facie* defence to the respondent's claim in the main action. The applicant will succeed if she can demonstrate a triable issue for determination by the court if the application for rescission were to succeed. The defence must have existed at the time the default judgment was handed down. In *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC ("EH Hassim")*³ the Supreme Court of Appeal held that-

"It is trite law that an applicant in an application for rescission of judgment need only make out a prima facie defence in the sense of setting out averments which, if established at trial, would entitle her or him to the relief asked for. Such an applicant need not deal fully with the merits of the case and produce evidence that shows that the probabilities are in its favour. That is the business of the trial court."

29. The applicant avers that the rescission application is *bona fide*, furthermore, she asserts that she has a *bona fide* defence in the main action. She has tabulated the form and nature of her defence to the claim of the respondent. The applicant challenges the respondent's claim on at least two fronts. The respondent's reckless lending, which compromised the applicant as surety. And, the failure by the respondent to release the applicant as surety when requested to do so.

30. In resisting the application, the respondent referred me to the dicta of *Bozalek J*

³ (1129/2016) [2017] ZASCA 145 (unreported) at paragraph [28]

*in Absa Bank v Expectra*⁴ (“Expectra”)–

“...the general rule [is] that our law does not recognise an unbounded ‘prejudice principle’ to the effect that, if a creditor should do anything in its dealings with the principal debtor which has the effect of prejudicing the surety, the surety is released.”

31. The thrust of the principle in our law as stated by Bozalek J is that a surety will not be automatically released from his obligations if the surety suffers prejudice as a result of the conduct of the creditor. The surety can only be released if, the prejudice caused to the surety is as a consequence of a breach of a term of the deed of suretyship, or a breach of a legal or contractual obligation.⁵ For reasons that will become more apparent hereunder, I find that there is prima facie evidence that the respondent was in breach of its legal obligation.

32. Relying on the common-law principle which postulates that if reckless lending is proved against the creditor, then the surety can be released. The basis of her claim is that during July 2017, the respondent granted Galvaspin CC, a further loan in the amount of R255 849.81 under account number 3046.... A mere two months later, Galvaspin CC instituted an application for voluntary liquidation. The applicant avers that the respondent managed the bank account of Galvaspin CC and was aware of its dire financial position. Therefore, the extension of such credit was reckless in that at all material times the respondent knew or ought to have known the incapability of Galvaspin CC to make the re-payment. The respondent had an obligation to manage the accounts of Galvaspin CC so as not to prejudice the applicant as surety. In the circumstances, the applicant has been

⁴ 2017 (1) SA 81 (WCC) at paragraph [42]

⁵ *Expectra* at paragraph [42]; *Absa Bank Ltd v Davidson* 2000 (1) SA 1117 at paragraph [19]

prejudiced by the conduct of the respondent and should be released from the suretyship.

33. The respondent denies that it recklessly extended credit to the close corporation. It maintains that the loan of R250 000.00 advanced to Galvaspin CC concerned a separate account. In any event, the exposure of the applicant is limited to R400 000.00 only and would not be affected by the alleged reckless lending.
34. Citing the case of *Di Giulio v First National Bank of SA Ltd* ⁶ the respondent further argued that the applicant has not met the very stringent threshold which requires the surety to prove the prejudice was substantial, unreasonable or undue burden. The *Di Giulio* case is distinguishable from this matter in that the test van Zyl J referred to would be applicable at the trial stage, not in an application for the rescission of judgment.
35. There can be no doubt the respondent has a legal obligation not to grant credit recklessly. It is not necessary for me to make any finding as to the legal validity of the defence raised by the applicant. It is sufficient that the applicant proves a *bona fide* defence which is *prima facie* based on reasonable grounds.⁷ The legitimacy of the applicant's claim will be proved at trial.
36. A further defence raised by the applicant is that the respondent neglected to release her from the suretyship when explicitly requested to do so. The explanation by Smith clearly supports the applicant's claim that Mr Henning had requested that she be released from the suretyship. It was only on 23 July 2018, more than 5 years later, that the respondent reacted claiming that Ms Smith

⁶ 2002 (6) SA 281 (C) at paragraph [40]

⁷ *Investec Bank Ltd v Lewis* 2002 (2) SA 111(C) at 119E/F-H.

explained that the applicant had not been released as surety due to a dispute between the applicant and Mr Henning. It is noteworthy that this explanation had been elicited by the applicant's attorney from the respondent. It is questionable that a specific request is made by Mr Henning to the respondent and simply ignored and only addressed in litigation, five years down the line. This uncertainty raises a triable issue and proves *prima facie*, that the applicant has a *bona fide* defence.

37. It must be emphasised that, an application for rescission of judgment is not concerned with whether a party should be punished for failure to abide by the court rules. It is primarily designed to enable courts to do justice between the parties. The paramount consideration is whether the explanation for the delay gives rise to a *bona fide* defence in the main action.⁸⁹ This court is required to exercise its discretion in light of all the facts and circumstances of the case.¹⁰
38. It is evident from the two versions that there are triable issues. The issue of reckless lending for example, raises questions of whether the respondent conducted a proper risk assessment, at the time credit was extended to Galvaspin CC. In order to do so, the applicant must have access to the relevant documentation. Similarly, the question as to whether there was compliance with the terms of the deed of suretyship, in requesting the release of the applicant from the suretyship, the role played by Ms Smith in the process and the relevant documentation.

⁸ *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (W) at page 575H–576A.

⁹ *Riddles v Standard Bank South Africa* [2009] 2 All SA 407 at paragraph [15]

¹⁰ *EH Hassim* at paragraph [13]

39. In all the circumstances, mindful that the object of rescinding a judgment is to restore the opportunity for a real dispute to be ventilated.¹¹ All the above issues clearly raise triable issues and serve to demonstrate that the applicant has a *bona fide* defence. The applicant has also shown that these triable issues have reasonable prospects of success. I am satisfied that the applicant met all the requirements for rescission of judgment.
40. I now turn to deal with the question of costs. The applicant prayed for punitive costs against the respondent due to the manner in which the respondent conducted itself before the default judgment coupled with the unwarranted defence of this application. I am not persuaded that the conduct of the respondent attracts punitive costs.
41. I find that the default judgment must be set aside.
42. The following order is granted: -
- (a) The judgment by default in case no. 304/2018, dated 28 March 2018, is rescinded and set aside.
 - (b) The applicant is granted leave to file her plea and counterclaim (if any) within 20 days from the date of the rescission of judgement being granted.
 - (c) The respondent be ordered to pay the costs of this application.

S POSWA-LEROTHOLI

¹¹ *Lazarus & another v Nedcor Bank Ltd, Lazarus & another v ABSA Bank Ltd* 1999 (2) SA 782 (W) at

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH**

Appearances:

Heard on: 14 February 2019

Delivered on: 26 March 2019

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