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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no.: 4205/2017

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

AMBROSE DAPAAH

Applicant

and

DUMANSI TRADING CC

Respondent

CORAM: VANZYL, J

HEARD ON: 27 OCTOBER 2022

DELIVERED ON: 26 APRIL 2023

- [1] This is an opposed application for rescission of the judgment which was granted in favour of the respondent against the applicant on 2 November 2017.

- [2] The action was instituted by the respondent, as plaintiff, against Tebcon Developers (Pty) Ltd ("Tebcon") as the first defendant and the applicant as the second defendant. The applicant was cited in his capacity as surety for the obligations of Tebcon towards the respondent.
- [3] The default judgment was granted against the defendants, jointly and severally, the one paying the other to be absolved, for payment in the amount of R559 131.93, with interest and costs.
- [4] I will refer to the parties as cited in the present application.
- [5] The applicant is seeking an order in the following terms:
1. Rescission of the default judgment granted against the applicant on 2 November 2017.
 2. Leave to defend the action.
 3. Costs of the application in the event that the respondent opposes same.
- [6] The application is being brought in terms of Rule 32(1)(b).

Reasons advanced by the applicant for his default:

- [7] According to the applicant he became aware of the default judgment ("the judgment") on 15 June 2022 when a warrant of execution was served upon him. A copy of the warrant of execution is attached to the founding affidavit as annexure "A".
- [8] The applicant's attorney on 22 June 2022 addressed a letter to the respondent's attorney requesting a copy of the summons, the return of

service, the application for default judgment and the default judgment order as such.

[9] From the return of service it is evident that the summons had been served by leaving it at the principal door at "Building number [...], C[...] on Main, 3[...] C[...] Road, Bryanston, being the chosen *domicilium citandi et executandi*" of the applicant.

[10] According to the applicant the aforesaid address was that of Tebcon and that he was no longer in the employment of Tebcon at the time when the summons was served. The summons had consequently not come to his knowledge.

[11] The applicant states that had he received the summons, he would have defended the matter since he has a *bona fide* defence against the respondent's claim.

The applicant's case on the merits of the application:

[12] According to the applicant the Free State Department of Human Settlement awarded tenders to three companies, one of which was Tebcon, to build RDP houses in a section of Thabong, Welkom. Tebcon appointed the applicant as Senior Project Manager. In his capacity as such the applicant was responsible for sourcing of sub-contractors and material to build the houses.

[13] The applicant approached the respondent to open an account for Tebcon to buy the required material. One Lizelle of Tebcon provided the applicant with an application for a credit facility ("the credit application"). The applicant and one Abednego Molosun completed the credit application form and returned same to Lizelle during or about 30 March 2015.

[14] About a week later when the applicant and Abednego followed up on

the said application, Lizelle informed them verbally that Tebcon was not credit worthy and therefore, the application could not be approved. They did not request written proof of the rejection of the credit application.

- [15] The applicant and Abednego thereafter approached a bridging finance company called National Urban Reconstruction & Housing Agency ("NURCHA") to assist Tebcon with financing. According to the applicant NURCHA is a company that deals with financing the construction of houses.
- [16] The director of Tebcon subsequently signed a tripartite agreement with NURCHA and the respondent, a copy of which agreement is attached to the founding affidavit as annexure "G". As a result, an account was opened by the respondent on 11 November 2015, under account number T[...], in favour of Tebcon. Thereafter Tebcon was able to purchase material on credit from the respondent as late November 2015.
- [17] According to the applicant the respondent's claim against the applicant is based on the credit application, in terms of which the applicant and Abednego also bound themselves jointly and severally as sureties and co-principal debtors *in solidum* in favour of the defendant in respect of Tebcon's indebtedness to the respondent, but which credit application is the one which was rejected by the respondent.
- [18] The applicant's first defence is based on misjoinder in that, according to the applicant, Abednego should also have been cited as a party by the respondent, since they both signed as sureties.
- [19] The applicant's second defence is that the respondent's cause of action is based on the credit application which had been rejected by the respondent. The amount allegedly outstanding is not based on the credit application in respect of which the applicant signed as surety. It is based on the tripartite

agreement which the respondent concluded with NURCHA and Tebcon, to which agreement the applicant was not a party.

- [20] According to the applicant he has reasonable prospects of succeeding with his defences should the matter go to trial.

The answering affidavit:

- [21] In the answering affidavit it is pointed out that on 8 November 2021, the sheriff attempted to serve the warrant of execution on the applicant at a certain address in Germiston. The return of service, dated 9 November 2021, which is attached to the answering affidavit as annexure "OA2", indicates that the applicant informed the sheriff telephonically that he had left the given address.
- [22] According to the respondent the applicant would have been made aware of the judgment which was granted against him since the sheriff would have informed the applicant of the reason for the warrant of execution and/or the parties involved therein.
- [23] The respondent points out that the address at which the summons was served was indeed the applicant's chosen domicile. The applicant, however, fails to explain his failure to have informed the respondent of any change of his address, the responsibility of which rested upon the applicant.
- [24] Tebcon applied for a credit limit of R3 000 000.00, which application was signed by the applicant. Tebcon was then advised that it would have to apply for bridging finance, which it did. After the necessary documents had been signed, the account was opened with a credit limit of R3 000 000.00. According to the respondent it never waived the credit application or the suretyships, without which the account would not have been opened, since it is a requirement of the respondent.

[25] According to the respondent it was not necessary for it to have joined Abednego as a party, since it is entitled to proceed against the applicant for payment of the whole of the outstanding amount.

[26] In response to the applicant's second defence, the respondent states that it is clear that Tebcon applied for the credit facility from the respondent, where after it also applied for financing from NURCHA to fund the housing project. NURCHA granted Tebcon the financial assistance and allocated certain amounts to Tebcon which were due to the respondent. Despite having received the funds from NURCHA Tebcon failed and /or refused to pay the respondent.

[27] Clause 4 of the Supplier Payment Undertaking, which is the agreement which the applicant refers to as the tripartite agreement, determines as follows:

"In the event of payment not being effected as envisaged in clause 3 above and on the proviso that the supplier has not, in any manner whatsoever, breached the terms of the Agreement, then and in such event the contractor will be held responsible by the supplier "

The respondent avers that it properly complied with its obligations in terms of the agreement and points out that it is, in any event, not the applicant's case that the respondent breached any of the agreements.

[28] The applicant does also not dispute the amount claimed by the respondent.

[29] The respondent consequently contends that the applicant failed to make out a proper case for purposes of rescission of the judgment.

The replying affidavit:

[30] In response to the allegation that the sheriff previously attempted to serve

the warrant of execution upon the applicant, the applicant explains as follows at paragraph 11 of his replying affidavit:

"11.1 I was contacted by a gentleman in October 2021 or November 2021 who wanted to know if I am still residing at number [...] C[...] Place, Hazeldene, Lambton, Germiston. Since I did not know the gentleman who was phoning me and for the sake of my safety and that of my family, I told the gentleman that I am out of the country. I then proceeded to ask the gentleman who is he and he told me that he is from the sheriff of the court. The sheriff informed me that he would like to serve me with court papers, and I asked him in relation to what matter and his response was he would like to see me personally. I did not inform the sheriff that I have left the given address.

11.2 The sheriff did not disclose the details of the case to me and therefore, there was no way I could have known that it was the matter of the respondent."

[31] The applicant confirms that he did not advise the respondent of his change of address, but states that it does not change the fact that he was not aware of the summons which had been served.

[32] The applicant further explains that the reason why he did not inform the respondent about his change of address is because the credit application had been rejected by the respondent and after that the applicant did not follow up on the application.

[33] The applicant confirms that he is not disputing the amount claimed. However, the amount in the statement is for good sold and delivered by the respondent to Tebcon in terms of the tripartite agreement which the applicant was not a party to.

Legal principles:

[34] Since the application is to be adjudicated on the basis of Rule 31(2)(b), the rescission is to be granted "*upon good cause shown*", as provided in the said rule:

"A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit."

[35] The requirements for "*good cause*" are trite. In **Grant v Plumbers (Pty) Ltd** 1949 (2) SA 470 (O) at 476 - 477 they are set out as follows:

"(a) He (the applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance.

(b) His application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.

(c) He must show that he has a *bona fide* defence to 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 and produce evidence that the probabilities are actually in his favour."

See also **Silber v Ozen Wholesalers (Pty) LTD** 1954 (2) SA 345 (A) at 352G & 353A.

Consideration of the merits of the application:

[36] Mr Nyabane appeared on behalf of the applicant and Mr Van der Merwe appeared on behalf of the respondent. Both counsel addressed me fully on the merits of the application. Mr Nyabane submitted that the applicant

made out a proper case for the judgment to be rescinded. Mr Van der Merwe, on the other hand, submitted that the applicant failed to make out a proper case on both the requirements for good cause. He submitted that the explanation advanced by the applicant for his default, does not constitute a reasonable explanation and that the applicant has only himself to blame for the said default. Mr Van der Merwe further submitted that should I find that the applicant has, by the skin of his teeth, met the threshold for purposes of explaining his default, I should still find that the applicant's alleged defences do not constitute legally sustainable defences which carry *prima facie* prospects of success.

Explanation for the applicant's default:

- [37] In my view it has to be accepted that the summons did not come to the applicant's attention at the time of service thereof. I do not understand the respondent to allege the contrary, in my view correctly so. Not only is it not being disputed by the respondent that at the time of service of the summons the applicant was no longer in the employment of Tebcon, but from the return of service, dated 8 August 2017, it is evident that the sheriff remarked that "*Kerrige Pty Ltd*" is the occupier of the relevant premises and that the applicant is not known at the said address.
- [38] With regard to the attempted service of the writ of execution on the applicant on 8 November 2021, the applicant gave an explanation as to the contents of the telephonic conversation he had with the sheriff on the said date. I cannot find that the applicant's version regarding their conversation is untenable to the extent that I can summarily reject it. I therefore have to accept that the sheriff did not provide him with the detail of the proceedings from which the writ of execution emanated.
- [39] The result of the aforesaid findings is that I have to accept for purposes of this application that the existence of the summons and the default judgment only came to the applicant's attention on 15 June 2022, when the writ of execution was indeed served upon him.

[40] The present application was issued on 13 July 2022 and therefore within the stipulated time period of 20 days.

[41] It is common cause that the summons was served upon the chosen *domilium citandi et executandi* of the applicant. The explanation by the applicant as to why he never informed the respondent about any change of his address, is closely linked to the applicant's defence of the credit application having been rejected by the respondent. I will therefore return to this aspect.

Alleged bona fide defences:

[42] The gist of the applicant's main defence is that the respondent's cause of action against the applicant is based on the credit applicatio, which application had been rejected, with the result that the concomitant deed of suretyship also fell to the wayside. The subsequent selling and delivery of the goods to Tebcon were done in terms of the tripartite agreement, to which the applicant was not a party and for purposes of which he did not bound himself as surety.

[43] Mr Van der Merwe submitted that the tripartite agreement did not replace the credit application and its related agreements, including the suretyship. He further submitted that in view of clause 4 of the tripartite agreement which determines that should NURCHA fail to make payment to the respondent, the ultimate responsibility for payment remains with Nebcon, it does not make sense that the respondent would not have required the security in the form of the previously agreed suretyships. Mr Van der Merwe also pointed out that in terms of the deed of suretyship the suretyship constitutes a so-called open surety and is therefore also for this reason applicable to the indebtedness of Nebcon to the respondent pursuant to goods sold and delivered in terms of the tripartite agreement. Since the fact that it is not in dispute that the goods had indeed been sold and delivered by the respondent to Nebcon in the amount claimed, it

matters not pursuant to which agreement it occurred, the applicant remains liable.

[44] I cannot agree with the last mentioned contention. From a perusal of the particulars of claim, it is evident that the cause of action is not merely goods sold and delivered, but specifically goods sold and delivered in terms of the credit application and the concomitant deed of suretyship. It will therefore be necessary for the defendant to prove same for purposes of its claim.

[45] From a perusal of the documents, it is evident that the credit application and the deed of suretyship were signed on 10 March 2015. It is common cause that no goods were sold and delivered pursuant thereto. It was only after the conclusion of the tripartite agreement on 29 October 2015 that goods were indeed sold and delivered by the respondent to Nebcon, as from 12 November 2015 to 13 June 2017.

[46] Furthermore, at the top of the first page of the credit application at p. 49 of the paginated papers, the following handwritten inscription appears:

"T[...]

Limit R200 000.00

Rep 9-Japie

Open 11/11/2015

Tyd 8:31"

The same "T[...]" appears as an account number on the Debtors Report of the respondent in respect of Tebcon attached to the summons as annexure "D".

[47] It consequently appears that the account which was opened by the respondent in favour of Tebcon, was only opened 11 November 2015, subsequent to the conclusion of the tripartite agreement and a day before the first goods were sold and delivered.

[48] A document titled "Supplier Agreement" forms part of the tripartite agreement, which document was signed on behalf of the respondent on 30 September 2015. It determines as follows:

"1. We hereby accept the Request for Supplies submitted by the contractor and the conditions for payment as confirmed herein by National Urban Reconstruction and Housing Agency (NPC).

2. We hereby further agree to deliver the complete order as per attached construction programme, a copy of which is attached to this Undertaking as Annexure "C", as per the Request for Supplies within... working days from date hereof "

[49] When the totality of the aforesaid facts and circumstances are considered, I am of the view that the applicant's defence that the cause of action of the respondent is based on the credit application which had been rejected (during March 2015), whilst the goods were sold and delivered pursuant to and in terms of the tripartite agreement, pertaining to which the applicant did not bound himself as surety, is not untenable. Should the applicant be able to prove at the trial that the credit application had been rejected and that the goods were sold and delivered in terms of the tripartite agreement, the respondent's claim will probably have to be dismissed, since its cause of action (the credit application and the concomitant deed of suretyship) will then be unsubstantiated and the issue of the suretyship will probably become irrelevant; alternatively, the trial court will have to make a determination, based on the evidence, whether the deed of suretyship is still enforceable against the applicant in those circumstances.

[50] In my view the applicant consequently has a *bona fide* and *prima facie*

defence which, if established at the trial, would entitle him to the relief he will be seeking, being the dismissal of the action.

[51] Having made the aforesaid findings, I return to the applicant's explanation for his default like I earlier indicated I would. In the circumstances I find that the applicant's explanation why he did

not inform the respondent of his change of address, constitutes a reasonable explanation.

[52] Considering my aforesaid conclusions, I do not deem it necessary to deal with the defence of misjoinder which the applicant also raised.

Conclusion:

[53] Considering the totality of the facts and circumstances of this matter, I am satisfied that the applicant's application for rescission of the default judgment is *bona fide* and not made with the intention of merely delaying the respondent's claim.

[54] The applicant is consequently entitled to rescission of the default judgment in terms of Rule 31(2)(b).

Costs:

[55] Since an applicant in an application for rescission of a default judgment is, depending on the circumstances, often considered to be seeking an indulgence from court, such an applicant is generally ordered to pay the costs of the application, especially in the absence of opposition thereto by the particular respondent.

[56] In circumstances where a respondent does oppose an application for rescission of a judgment, the court usually determines whether the opposition is reasonable or not in the particular circumstances and

depending on such finding, decides whether an applicant should also be ordered to pay the opposition of the application, or not.

[57] A further possibility which is also quite frequently ordered in an opposed application for rescission of a default judgment, is where the court hearing the application is of the view that the court who will eventually deal with the trial, will be in a better position to determine an appropriate order as to costs after having determined the merits of the action. In such an instance the costs of the application for rescission will stand over for later adjudication.

[58] In exercising my discretion in this particular instance, I am of the **view** that the last mentioned order will be appropriate.

Order:

[59] The following order is made:

1. The default judgment granted in favour of the respondent against the applicant, dated 2 November 2017, is hereby rescinded.
2. Leave is granted to the applicant to defend the main action, for purposes of which the applicant is to file his Notice of Opposition within 10 days from date of this order, where after the Rules of court will apply.
3. The costs of the application stand over for later adjudication.

On behalf of the applicant:

Adv. V. Nyabane

Instructed by: Maduba

Attorneys

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On behalf of the respondent:

Adv. H.J. van der Merwe

Instructed by:

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