

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

Case Number: 5837/2017

In the matter of:

ROBERT - ARMAND BOCHNIG

Applicant

and

ABSA BANK LTD

First Respondent

STEPHANUS GERHARDUS FERREIRA

Second Respondent

In re

ABSA BANK

Plaintiff

and

STEPHANUS GERHARDUS FERREIRA

First Defendant

ROBERT – ARMAND BOCHNIG

Second Defendant

CORAM: NAIDOO, J

HEARD ON: 25 JANUARY 2024

DELIVERED ON: 11 MARCH 2024

**JUDGMENT - APPLICATION FOR CONDONATION AND RESCISSION OF
JUDGMENT**

- [1] This is an application for rescission of a judgment, coupled with an application for condonation in respect of the late filing of the

application for rescission. The application is opposed by the first respondent, Absa Bank Ltd (Absa). The second respondent passed away, apparently, in June 2023, before the launch of this application in August 2023. The applicant alleges that despite diligent efforts, he was not able to ascertain who the executor of the second respondent's deceased estate is. Adv LW De Beer represented the applicant, and Adv HJ Van Der Merwe represented the respondent.

[2] The applicant sought an order in the following terms:

- 2.1 That condonation be granted for the late filing of this application
- 2.2 That the default judgment granted by the registrar of the High Court under the abovementioned case number on 27 December 2017 against the applicant/second defendant be rescinded and set aside.
- 2.3 That the Writ of Execution issued by the registrar of the High Court be rescinded and set aside
- 2.4 That the costs of this application be costs in the main action, alternatively be reserved, save in the event of opposition hereto

[3] The applicant worked for an entity called Ferreira's Catering Equipment CC, who is the principal debtor in this matter. The applicant became a member of the principal debtor in about 2008, with a 30% member's interest. In the same year, he signed a suretyship agreement in favour Absa, in which he bound himself

as surety and co-principal debtor with the principal debtor for payment on demand of any amount then owing by the principal debtor. The other member was the second respondent, who also signed a suretyship agreement in favour of Absa, binding himself as surety and co-principal debtor with the principal debtor.

- [4] The principal debtor was indebted to Absa in respect of two agreements, the first being in respect of an overdraft facility made available to it by Absa and the second being in respect of a term loan. The principal debtor breached the terms of both agreements and was, in fact liquidated, on 31 August 2017. The amount owing in respect of the overdraft facility was R1 200 513.10 and in respect of the term loan, an amount of R141 665.29.
- [5] Absa issued summons against the applicant and the second respondent (Ferreira) in order to enforce the suretyship agreements that they had signed. The applicant was the second defendant in the main action and Ferreira was the first defendant. According to the return of service, in respect of the applicant, rendered by the Sheriff of the Court, the summons was served on 27 November 2017, on a Ms Kehunle Rametseu at 3[...] M[...] Street, Harrismith. The note on the return of service by the Sheriff indicates that the defendant (applicant) is unknown to Ms Rametseu at that address. The action was not defended and the respondent obtained judgment by default against the applicant on 27 December 2017. Following upon the granting of the default judgment, the respondent proceeded to have a Warrant of Execution (the Writ) issued and attempted to execute upon it at various addresses. On 13 February 2018, the Writ, which cited

both defendants was served at two different addresses, namely 3[...] M[...] Street, Harrismith and 7[...] S[...] Street, Harrismith, without indicating which defendant was served at which address. The sheriff's return indicates that the Writ was served on two different people at the mentioned addresses, that the defendants are unknown at the given addresses, and that *"The given business was liquidated in 2017"*

[6] On 30 August 2018, with the Writ still reflecting the names of the applicant and Ferreira, the Sheriff ostensibly again served the Writ at two different addresses, namely 1[...] P[...] R[...] Street, Harrismith and 2[...] O[...] A[...], Kings Hill, Harrismith. The Sheriff indicates that the Writ was served on a Martha Radebe *"in the absence of the defendant at 1[...] P[...] R[...] Street, Harrismith 2[...] O[...] A[...] Kings Hill, Harrismith"*. The Sheriff proceeded to place under attachment a large number of household furniture, appliances and other items. It appears from the papers before me that further steps were taken to execute upon the Writ and serve same on the applicant on 21 June 2023. The applicant alleges to have become aware of the judgment on 22 June 2023.

[7] The applicant's version is that after he became a member in the principal debtor with a 30% member's interest, he continued to be involved predominantly in sales and installation of products supplied by the principal debtor, such as refrigeration systems and cold rooms. He alleges that he was never involved in the management of the finances or the affairs of the principal debtor. Shortly after he became a member, Ferreira approached him and advised that the business needed to increase its overdraft facility

in order to acquire working capital for the expansion of the business.

[8] At some stage thereafter, Ferreira requested him to sign a suretyship agreement, in favour of Absa, in respect of the overdraft facility. Ferreira and the representatives of Absa assured him that the suretyship agreement would be temporary, it would be only in respect of the overdraft facility and it would be limited to the percentage of his member interest. Although he could not recall the date he signed such suretyship agreement, he accepted that it was in September 2008, after having perused the summons and the suretyship agreement which was an annexure thereto. With regard to the term loan, the applicant alleges that he cannot recall that such a facility was either applied for or granted by Absa, nor can he recall that he signed any resolution to give effect to the application for such term loan. With regard to the overdraft facility, apart from the temporary increase in the overdraft facility I mentioned, he alleges that he has no knowledge of any further increases in the facility or resolutions passed authorising same.

[9] The applicant further alleges that he resigned as a member and employee of the principal debtor in about July or August 2015, and according to the records of the Companies and Intellectual Property Commission (CIPC), such resignation was only registered on 30 August 2016. Piet Webb, the auditor of the principal debtor, assured him that he (Webb) had written to Absa to cancel the Deed of Suretyship, and the applicant accepted that Webb had done so. He thereafter worked for a few years in

Harrismith and then relocated to Pretoria at the end of 2019, where he took up employment with an entity known as Insulated Structures. He alleges that Harrismith being the small town that it is, everyone knew of the fallout between him and Ferreira and that he was no longer involved in the business of the principal debtor. Two of Absa's employees who knew him, one of whom was personally acquainted with him and his wife, were well aware of the breakdown in the relationship between him and Ferreira and that the appellant had resigned as a member of the principal debtor.

[10] The applicant's further evidence is that Ferreira had voluntarily liquidated the principal debtor, Ferreira's Catering Equipment CC without the applicant's knowledge, on 31 August 2017. Ferreira then bought the bulk of the principal debtor's assets at an auction and started a new business called Commercial Catering Equipment. The applicant complains further that Absa "looked on" as the principal debtor was liquidated, has not proved any claim against the insolvent estate, had not proceeded against Ferreira in terms of the Deed of Suretyship that the latter had signed approximately a year before the applicant signed his Deed of Suretyship, and has not proceeded with a claim against Ferreira's deceased estate. Prior to his death, Ferreira was also sequestrated, a fact which Absa must have been aware of, yet did not pursue a claim against his insolvent estate.

[11] There are various reasons for the applicant's complaints. He alleges that Absa financed the new business that Ferreira started and advanced credit to Ferreira, in spite of his track record with the

principal debtor in this matter, and allowed the debts in this matter to escalate. Yet it did not proceed against Ferreira but looks to the applicant to settle the debts of the principal debtor. He was never contacted by Absa nor did the latter make any demand for payment from him. He attached financial statements of the principal debtor, showing much lower amounts that were owed to Absa. This was for the financial year end 28 February 2007, which were presented to him shortly before he became a member of the principal debtor. Without admitting liability, he asserts that if Absa had acted diligently, his exposure would have been drastically limited, and that by its actions, Absa has caused him undue prejudice.

- [12] A further annexure to the applicant's founding papers was the financial statements of the principal debtor for the year ending 28 February 2009, from which it is apparent that principal debtor's liability to Absa was secured by bonds over certain immovable properties, one of which was sold during the period 2006 to 2007. A third property mentioned by the applicant is one owned by an entity known as Purple Plum Properties 152 (Pty) Ltd (Purple Plum), and situated at 1[...] M[...] Street Harrismith. This is the premises from which the principal debtor conducted its business. Ferreira and Piet Webb, were directors of Purple Plum. A bond was registered over this property in favour of Absa and was cancelled in 2009. It appears that a bond over this property was then registered in favour of Firstrand Bank Ltd. The appellant asserts that Absa released its security in favour of Firstrand Bank Ltd.

- [13] The applicant also raised a number of issues in respect of the summons and supporting documents, the originals of which Absa claims to have lost. The appellant, in essence, disputes that the documents attached to the summons are a true reflection of the terms he agreed to, and as such, it also does not reflect how the amount claimed in the summons was calculated. I mention that Ferreira and Piet Webb, the accountant, have both passed away. The applicant contends that has been left in a position that he was not able to gather the all the information he needed, in respect of the running of the principal debtor's business. The applicant contends that he has raised triable issues and has demonstrated that he has a good defence to Absa's claims.
- [14] I pause to mention that Absa initially raised a point *in limine*, opposing the application for condonation, in that the applicant did not bring a substantive application for condonation, nor did he give a full or proper explanation for the delay. At the start of proceedings before this court, Absa indicated that they would not pursue their opposition to condonation. The court was satisfied with the explanation tendered by the applicant for the delay in filing the application for rescission and accordingly granted condonation for such late filing.
- [15] In opposing the application for rescission, Absa alleges in Answer that the summons was served on the applicant at the *domicilium citandi et executandi (domicilium)* chosen by the applicant, who has not given any notice to Absa of a change in the *domicilium* address. Further he has not explained why the summons was not, or would not have been received, despite being served on him. He

has therefore failed to show that his default is that his default was not wilful or grossly negligent. Absa alleges further that despite reasonable and diligent efforts it was not able to locate either the applicant or the second defendant.

[16] In February 2018, Absa unsuccessfully attempted to serve a Warrant of Execution (Writ) upon the respondents. A tracer was engaged during April 2018 to trace both respondents but they were unsuccessful in doing so. A further attempt was made to serve the Writ on the defendants on 30 August 2018, resulting in the sheriff attaching the household items I referred to earlier. Due to the sheriff's return being unclear as to whether the attachment was made in respect of the applicant's or the second respondent's assets, the matter was held in abeyance.

[17] In April 2023, a further tracing report was obtained in respect of the applicant and the second respondent, showing their respective residential addresses and that each of them owns immovable property. A writ was then served on the applicant at his current residential address in Gauteng. Absa then concludes that the applicant was aware of the judgment much earlier, and *“was at peace with it, until the writ was served at his current address...”*

[18] Absa denies that the liquidation of the principal debtor or its failure to lodge a claim against the insolvent estate of the principal debtor has any bearing on the applicant's liability, and further that it had the discretion whether or not to institute a claim against the insolvent estate, without the applicant's liability in terms of the

Deed of Suretyship being affected or reduced. Absa also denies that the defences raised by the applicant are *bona fide* for the purposes of rescission, and asserts that none of the complaints raised by the applicant indicate a substantial defence in the main action. The applicant merely skirts the issue of why he should not be held liable for the debts of the principal debtor in terms of the Deed of Suretyship, in respect of which no notice of termination was ever given, nor was it ever validly cancelled. He therefore remains liable for the full amount of the principal debtor's indebtedness to Absa.

- [19] The provisions Rule 31(2)(b) are relevant to this matter and read thus:

“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”.

- [20] With regard to the requirement of ‘good cause’ the court has a wide discretion in evaluating this requirement in order to ensure that justice is done (*Erasmus Superior Court Practice RS 22, 2023, D1 Rule 31-11*). The learned author comprehensively sets out the well established legal position regarding applications for rescission. What follows is a summary thereof. The court in the often quoted case of *Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)* at 476–7, which has been followed in a long line of cases, provided the following guidelines in respect of the requirements for an application for rescission:

- (a) 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.

[21] With regard to wilful default, although it is not a requirement that the conduct of the applicant for rescission must not wilful, the establishment of the absence of wilfulness is clearly a component of the good cause to be shown. The applicant's explanation for the default must be sufficiently full to enable the court to understand how it really came about, and to assess the applicant's conduct and motives. (*Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A*). While the lack of full reasons renders the application improper, if such reasons appear clearly from the explanation, the applicant will still be entitled to the relief he seeks. Before a person can be said to be in wilful default, the following elements must be shown:

- (a) knowledge that the action is being brought against him;
- (b) a deliberate refraining from entering appearance, though free to do so; and

(c) a certain mental attitude towards the consequences of the default.

All three elements must be established before the party can be said to have been in wilful default. The onus of proof rests ultimately on the respondent. It suffices if the applicant shows a *prima facie* case, or the existence of an issue which is fit for trial.

[22] In the present matter, it is clear that the summons was served at the applicant's *domicilium* address on someone unknown to the applicant. His evidence is that he relocated to Gauteng and no longer lived at that address. Absa's assertion that the applicant has not explained why he did not receive the summons does not acknowledge or take into account that the Sheriff's return of service in respect of the summons, states that the applicant is unknown to the person upon whom the summons was served. Therefore, it is highly probable that the summons did not come to the applicant's attention, which explains his failure to react. This appears clearly from his explanation.

[23] I pause to mention that the deponent to the Answering Affidavit indicated more than once that he has no personal knowledge of some matters raised in the Founding Affidavit, despite alleging in para 1.4 of the Founding Affidavit, that the facts fall within his personal knowledge. It is against that position that some of the generic responses in the Answering Affidavit must be viewed. Absa alleges that it engaged tracers in 2018 to trace the applicant without success. Yet a perusal of the tracer's report on 7 May 2018, reflects that the name of the applicant's employer is listed,

together with his physical work address, email address and contact telephone numbers. That is the same entity he was working for at the time this application was launched on 7 August 2023. There is no explanation by Absa for failing to contact the applicant via one of the methods furnished or why the summons was not served on him at his work address. It must also be borne in mind that the applicant had resigned as a member of the principal debtor in 2015, and was assured by Webb that his suretyship was cancelled. It is not unreasonable to conclude that he considered himself no longer bound to the principal debtor.

- [24] The sheriff's return of service in respect of the Writ on 13 February 2018 lists both the applicant and the second respondent, as well as two addresses, without specifying which defendant was serve at which address. The same is true of the return of service on 30 August 2018. On that occasion, a large number of items were attached, but without any indication at which address the attachment was effected, nor the defendant whose address that purportedly was. No explanation is given by Absa for what steps it took, if any, in the intervening three years until the applicant and second respondent were traced in April 2023. At that stage, the second respondent was alive, living in Bethlehem, owned a business called Drakensberg Catering Equipment and owned immovable property in Harrismith. There is no evidence that he was sequestered, nor is there any indication why Absa did not proceed against him in terms of the Deed of Suretyship that he signed in August 2007, fortifying the applicant's evidence that Absa's inaction in respect of the second respondent caused direct prejudice to the applicant. Another point

to bear in mind is the applicant's version that since his resignation from the principal debtor, he started a new business and acquired two immovable properties, which were financed by financial institutions, without any indication that a judgment was recorded against his name.

[25] With regard to the defences raised by the applicant, he set out with supporting documentation why he believed that if he owed anything to Absa, it would be an amount far less than that claimed in the summons. He also seeks the opportunity to lead the evidence of witnesses who would corroborate his version that his suretyship was meant to be for a limited period and only in respect of the overdraft. In addition, it would be relevant to his defence for Absa to indicate why, in the face of ample security that it held, it chose to proceed only against the applicant, albeit that the Deed of Suretyship allowed it to do so.

[26] The fact that Ferreira and Webb are both deceased, places the applicant in an untenable situation in that obtaining the necessary information and documentation he needs to prove his case will require a great deal of effort to obtain and their passing has made it doubly difficult for him to do so. In this regard I point out that the two confirmatory affidavits referred to by Absa in Answer, namely those of Ms L Zietsman and Ms M Mynhardt are neither signed nor commissioned. The court will pay no heed to those affidavits, and accordingly the evidence relevant to those two witness will carry no weight.

[27] In my view, the applicant's explanation for the failure to defend this action and hence his default, is reasonable and clear from the objective evidence. I am also satisfied that he has brought this application with the intention of vindicating his rights and not merely to delay the claims of Absa, and that he has established a *prima facie* case, fit for trial. Absa, on the other hand, has not discharged the onus on it to show that the applicant is in wilful default. Although Absa attached relevant documentation and resolutions indicating that the applicant had bound himself for the payment of the principal debtor's indebtedness to Absa, the points I made regarding the applicant's version and his intention to bring this application still hold true

[28] In the circumstances I make the following order:

28.1 The application for condonation is granted

28.2 The application for rescission is granted

28.3 The Warrant of Execution issued by the Registrar of this Division is hereby set aside

28.4 The costs of this application will be costs in the main action.

S NAIDOO J

On Behalf of the Applicants:

Adv LW De Beer

Instructed by:

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On Behalf of the First

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