

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, EAST LONDON)**

Case No: EL1044/2018

In the matter between:

NEDBANK LIMITED

Plaintiff / Respondent

And

GOOSEN MARKETING CC

First Defendant / Applicant

GIDEON JOUBERT GOOSEN

Second Defendant / Respondent

JUDGMENT

BESHE J:

[1] This is an application in terms of *Rule 31 (2) (b)* for the setting aside of a default judgment granted against the applicant (second defendant in the main action).

[2] Plaintiff issued summons against applicant and his co-defendant for payment of a sum of R962 992. 64, interest and costs of suit. The claim against the second defendant so it was alleged, was due by reason of a suretyship entered into by the second defendant.

[3] There having been no declaration of intention to defend by both defendants, plaintiff applied for default judgment. Same was granted on the 26

September 2018 against both defendants jointly and severally the one paying the other to be absolved.

[4] It is that judgment that second defendant seeks to have rescinded on the basis mainly that: No default judgment was granted against his identity number – as the particulars of claim in this matter were issued against a different number. He did not bind himself to an unlimited suretyship.

[5] The merits of the application are opposed by the plaintiff. Plaintiff also raised a number of points *in limine*.

[6] Second defendant is not legally represented in the proceedings, he is conducting his case in person.

[7] One of the points *in limine* taken is that the application was served one day late and second defendant has not sought condonation in this regard. Secondly, that the notice of motion does not substantially comply with *Form 2 (a)*. The third point *in limine* is that part of second defendant's prayer is that the judgment "not be granted against first and second defendants jointly and severally". Yet notice of these proceedings was not given to the first defendant. (Non joinder)

[8] In my view, granted that the second defendant is not legally qualified (according to him), I am of the view that there has been substantial compliance with the rules that apply to applications. First defendant is a CC - second defendant claims to represent the first defendant.

[9] It is trite that in order for an application in terms of *Section 32 (2) (b)* for rescission to succeed, the following must be shown by the applicant:

(a) absence of wilfulness.

(b) reasonable explanation for the default.

(c) that the application is *bona fide* made and not made with the intention to delay plaintiff's claim.

(d) that the applicant has a *bona fide* defence.

[10] It is common cause that the defendants did not file an appearance to oppose the action and plea timeously. This is admitted by the second defendant in paragraph 32 of his affidavit in support of the rescission application. However no attempts is made to explain the default. That is the delay in entering an appearance to defend and plea. In the absence of an explanation for the default and any suggestion of absence of wilfulness, I am unable to find that that appellant has succeeded in showing that the existence of first two requirements.

[11] Does he have a *bona fide* defence? Second defendant does not deny that he stood as surety and co-principal debtor for moneys that may be due by the first defendant to the plaintiff. He suggests that the said suretyship was not unlimited. But essentially that the identity number appearing on the suretyship signed on the 13 July 2011 is not that of the second defendant. Incidentally, the surety agreement signed by the second defendant with Identity Number 00... is for an "UNLIMITED" sum of money and is a continuing cover. This is apparent from the words for the repayment of all amounts which the principal debtor may now or anytime hereinafter owe plaintiff. Second defendant does not deny that the signature appearing thereon is his. His defence is that no judgment was granted against his identity number. I fail to understand this reasoning. Judgment was sought against two defendants, one of whom is the applicant in this matter, judgment was granted against both defendants. No judgment was granted against an identity number. This defence is seriously unconvincing and is not good in law. Accordingly, it does not amount to a *bona fide* defence.

[12] The applicant has not made out a case for the rescission of the judgment granted against him, jointly and severally with the first defendant in the main action.

[13] In the result, the application is dismissed with costs.

NG BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff / Respondent	:	Adv: TS Miller
Instructed by	:	BATE CHUBB & DICKSON INC. Suite 3 – Norvia House 34 Western Avenue Vincent EAST LONDON Ref: Mr KJ Chambers/leone/N301 Tel.: 043 – 701 4500

For the 1 st and 2 nd Defendant/Applicant	:	Mr GJ Goosen
Instructed by	:	2 ND DEFENDANT/APPLICANT IN PERSON C/o Gerhard Stoltz Debt Counsellors Unit 2, Vancott House 16 – 17 Devereux Avenue Vincent EAST LONDON Ref: Mr GJ Goosen Tel.: 043 – 726 0403

Date Heard	:	21 February 2019
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Date Reserved : 21 February 2019

Date Delivered : 2 April 2019