IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, PRETORIA)

CASE NO: 25236/2015

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

(4) Signature: Date: 21/04/2017.

21/4/2017

LAMBERTUS NICOLAAS DE BEER **APPLICANT**

and

AGRON MOOSRIVIER (PTY) LTD **RESPONDENT**

JUDGMENT

KHUMALO J

INTRODUCTION

[1] This is an Application for rescission of the Judgement granted in Default by this court on 23 July 2015 in favour of the Respondent or alternatively for the judgment to be suspended until the business rescue procedure with regard to the close corporation, Koedoeskop River Farms Alpha CC ("CC") has been finalised.

[2] The Applicant is the sole director of the CC. The default Judgment was obtained against him as surety on the debt owed by the CC. The following facts are common cause:

[2.1] On 14 July 2014 he on behalf of the CC signed an acknowledgement of debt, acknowledging the indebtedness of the CC to the Respondent in an amount of R6 823 945.99 together with interest in the amount of R48 905.00 in respect of goods sold and delivered. In terms of the acknowledgment of debt the CC undertook to settle the debt amount in three instalments payable on certain stipulated dates.

[2.2] The Applicant signed a suretyship in his personal capacity binding himself as surety and co-principal debtor with the CC for the due payment of the debt in terms of the acknowledgement of debt.

[2.3] The CC failed to perform in accordance with the terms of its undertaking. As a result the Respondent issued summons against the Applicant as surety for payment of an amount of R 5 027 667.50 that was outstanding at the time. **The summons was to be served at Applicant's residence.** Applicant did not enter an appearance to defend. **Default judgment was granted against him on 23 July 2015.** The Respondent proceeded to issue a warrant of execution which was served by the sheriff personally on the Applicant on 5 August 2015. Upon being issued with a nulla bona return, the Respondent served a s 65 Notice in terms of Magistrate Court Act which proceedings are presently awaiting finalisation of this Application.

[3] The Applicant's ground for the rescission of the default judgment is that **he was not in wilful default** when he failed to enter an appearance to defend. He alleges that he did not receive the Summons as they were served by attachment at his place of residence, although he received the Writ and the s 65 Notice that were served also at his place of residence.

[4] He is also applying for condonation of the late filing of his application. He alleges that the first time he got knowledge of the judgment debt was on 5 August 2015 when the writ was served on him and he immediately instructed his attorney to apply for rescission. His attorney was only able to obtain copies of the summons and the ancillary documents on October 2015. His attorney then immediately instructed Counsel to draft the documents. The Counsel was not forthcoming with the documents and his attorney instructed another Counsel in mid-January 2016. The new Counsel advised his attorney that he had no case.

[5] On 7 March 2016 his attorney advised him that he had studied the case and was of the opinion that he has a bona fide defence to the Respondent's claim due to that his position is unique and is not dealt with by the Companies Act. His attorney then drafted the documents which were then served on 15 April 2016. I would assume that reference is being made to his attorney of record. The attorney however has not filed a confirmatory affidavit. The allegations remain unconfirmed. So anything attributable to the attorney is hearsay evidence. The Applicant also does not indicate why the attorney was only able to serve the Application in April 2016, a month after he decided Applicant has got a case when he spent nearly two months studying the matter. The explanation given is not completely satisfactory and what might be slightly convincing is unsubstantiated by a confirmatory affidavit. Consequently the court is not entirely convinced that a proper case has been made for condonation.

Condonation is therefore granted in the interest of justice and there being a good reason for the Applicant to bear the costs.

[6] Furthermore the Applicant did not indicate in terms of what provision he seeks to have the judgment rescinded. In his heads reference is made to Rule 31 (2) (b), the common law and s 42 (1) (a) without specifying the intended rule. The submission made are seemingly in line with Rule 31 (2) (b).

[7] Applicant submits that he has a bona fide defence to the Respondent's claim on the basis that an order was made in **March 2015 placing the CC under provisional sequestration.** Following that, a business rescue Application was served and filed. He argues that the placing of the CC under business rescue places a moratorium on the surety that the company might have signed pending finalisation of the acceptance of the business rescue plan whilst his personal position is untenable because he does not have the same protection.

[8] Further that if the business rescue plan is adopted and the debt of the Respondent is paid in full or a payment is made in full and final settlement thereof, the Respondent cannot proceed with his claim due to the accessory nature of the surety agreement and the principal debt being discharged. On the other hand if the Respondent proceeds with execution proceedings, the business rescue procedure would have been futile and the specific mechanism created by the Companies Act nullified.

[9] He acknowledged that the current position is that the statutory moratorium afforded to the principal debtor is a defence *in personam* and is not extended to the surety who has a recourse against the principal debtor. He however argue that having regard to the positon of how his indebtedness arose, it is necessary that he also obtain the same protection as the company. The application of s 133 of the Companies Act must be read to also include individuals who have signed surety for the debts of a company under business rescue to be afforded the same protection provided by the section to the company. An order that he pay the amount would force him into sequestration which would be detrimental to the CC as he is its sole member and it would lead to the destruction of the company.

[10] Section 133 of the Companies Act sets a general moratorium on legal proceedings against the company under business rescue and reads:

> (1) During rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-
>
> (a) With the written consent of the practitioner;
>
> (b) With the leave of the court and in accordance with any terms the court considers suitable;

[c] As a set off against any claim made by the company in any legal proceedings, irrespective of whether the proceedings commenced before or after the business rescue proceedings began;

....

(2) During business rescue proceeding, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances

[11] The position of sureties under these circumstances has been clearly outlined in *Business Partners v Tsakiroglou* 2016 (4) SA 390 (WCC) with reference to *Investec Bank v Bruyns* 2012 (5) SA 430 (WCC) albeit not in this Division. In Investec the following remarks were made:

> "'If the lawmaker had intended to prohibit creditors from enforcing their claims against sureties of companies undergoing business rescue proceedings it would have said so. Such a prohibition would be a drastic interference with the rights of creditors and would require clear language. Here there is no language at all on which to rest the supposed prohibition."

[12] On the start of the proceedings Counsel for both Applicant and Respondent confirmed that the Application for the CC to be placed under supervision was dismissed by this court on 30 March 2017, therefore as of date of hearing of the Rescission Application neither was the CC under business rescue nor was there a business rescue application or proceedings pending except a submission by Counsel that a Notice for leave to appeal the dismissal has been lodged. Therefore there is no moratorium and no reason for the court to consider the position of the Applicant visa vis the moratorium on the debts of the CC arising from the provisions of s 133 which is only in the event of the company being placed under business rescue. The moratorium argument consequently does not arise in that context.

[13] The Applicant insisted on proceeding with the rescission still on the basis of the s 133 moratorium arguing that since a Notice for leave to appeal is pending which may or may not be granted the alleged defence is still available.

[14] It was therefore important to deal with the status of his defence in the context of a rescission under Rule 31 (2) (b) and or under common law, whether or not the Application for business rescue by the CC has a bearing on his bona fide defence as he persists with the alleged defence, bearing in mind that the Applicant has not denied that at the time judgment was obtained the amount was owing, due and payable and is still owing to the Respondent. He therefore is not disputing his indebtedness to the Respondent. In essence he raises no defence against his indebtedness except the argument about the significance of the company's moratorium to his indebtedness.

[15] In an application for rescission the circumstances that are relevant are those prevailing at the time when the judgment was obtained; see *Morkel v Absa Bank Bpk* 1996 (1) SA 899. The Applicant must have had a bona fide defence to the Respondent's claim at the time when judgement was granted. A possible defence that presents itself or only arises after judgment

has been granted cannot constitute a bona fide defence for rescission. The facts which the Applicant is reliant upon must have been in existence at the time judgment was granted. The rules do not provide for recognition of a defence that only arises after the judgment has been granted. Also once it is known that the judgment was correctly granted, there is no reason to falsify the past and make life easy for the Defendant; *Lazarus v Nedcor; Lazarus v Absa Bank* 1999 (2) SA 782 (W). Even though a judgment may affect one's creditworthiness, there is no reason for a court to participate in granting a rescission of a judgment correctly granted to a party who does not wish to defend the claim for whatever reason: see ErasmusSuperior Court Practice 2nd Ed, Van Loggerenberg D1 -369. The Applicant has indicated that he does not intend to defend the claim but seeks to be afforded a moratorium on the enforcement of the debt. Not only is this not allowed but the situation upon which he is reliant has never been in existence.

[16] Counsel was asked whether at the time when judgment was granted by default whether the proceedings of applying for business rescue had started. It was indicated that according to the documentation the CC was under provisional liquidation since March 2015 and the process of applying for a business rescue had not started. Nevertheless, since the CC was under provisional liquidation the CC would have required a court order for the provisional liquidation to be set aside and for it to be placed under business rescue. The case number under which the Application was brought was issued in 2016, therefore for all intents and purposes a fair inference to be drawn is that the Application was launched in 2016. At the time of the judgment the alleged defence was not a possibility as it was not available to the Applicant. Besides the true facts are that the CC is under liquidation and was never at any given time under business rescue.

[17] It is unnecessary to further deal with his defence reliant upon s 133, his only alleged bona fide defence.

[18] The Applicant has furthermore argued that he was not in willful default when he did not defend the action since he did not receive the summons. He disputes that the sheriff properly served the summons at his residence alleging that it was by attachment and it never came to his attention.

[19] The Respondent's answering affidavit deposed to by one Paul Cook, its financial manager of the Respondent states that the summons was properly served upon the Applicant in accordance with the return of the sheriff which indicates that on 11 May 2015 at 15:24, the sheriff served a copy of the combined summons on Mr J Moraka at the Applicant's place of residence at Farm Rietvlei, Koedoeskop, Thabazimbi, a person apparently not less than 16 years of age and in charge of the premises at the time of service. Respondent alleges that it must have come to the attention of the Respondent as he admitted the premises are his place of residence. The Applicant did not respond to these allegation, he did not file a Replying Affidavit.

[20] In a rescission application the onus of proof that the Applicant was in willful default lies with the Respondent which in some instances he may prove by way of direct evidence if not by way of inference. He has to prove that the Applicant was notified of the action and has

knowingly elected not to enter an appearance; see *Mahomed Abdulha v Chochan* 1933 NPD 334

[21] The Applicant has failed to file a reply in response to the Respondent's allegation of direct evidence of the sheriff's service of the combined summons upon the person that was in charge of his place of residence. The onus is upon the Applicant to rebut the evidence of service upon him in the manner that is indicated by the sheriff since the sheriff's return is prima facie proof of service unless otherwise proven. The assertion by the Respondent, unrebutted would therefore stand against the Applicant.

[22] The Applicant has failed to make a case for either the setting aside or suspension of the default judgment granted by this court:

Under the circumstances I make the following order:

1. The Application for Condonation is granted with Applicant to pay the costs;

2. The Application for rescission or suspension of the default judgment granted on 23 July 2015 is dismissed with costs.

N V KHUMALO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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