IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 29686/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

19/8/15

DATE SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2015 -08- 19
JUDGE'S SECRETARY
REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

GERTRUIDA MAGRIETA LATEGAN APPLICANT/DEFENDANT

and

ALS RENTALS (NORTHWEST)(PTY) LTD RESPONDENTPLAINTIFF

Coram: HUGHES J

JUDGMENT

Heard on: 22 April 2015

Delivered on: 19 August 2015

HUGHES J

[1] The applicant, who was the defendant in the main application, seeks rescission in term of Rule 42(1)(a) or Rule 31(2)(b) read with Rule 27(1) or the common law, of the main application in total of the judgment granted in favour of the respondent, plaintiff in the main application. At the outset I must state that even though the applicant stated in its founding affidavit that rescission was sought under

Rule 42(1)(a) it transpired that in its heads of argument and argument in court that in fact it sought rescission under Rule 42(1)(c) instead.

[2] Filapro (Pty) Ltd ("Filapro") was a business entity of which the applicant was the sole director. Filapro owed the respondent an amount of R3 514 949.39 for good sold and delivered. The applicant had signed as surety in respect of the aforesaid debt. Filapro fell upon hard times and entered into business rescue on 12 March 2014. On 17 April 2014 the respondent issued the main application against the applicant as surety.

[3] Proceedings in respect of setting aside the business rescue and a final winding up of Filapro were instituted by W. Ferguson Investments CC and Capital Acceptance (Pty) Ltd on 25 April 2014. The rescue practitioner of Filapro brought a counter application for an extension of time to lodge his report which was refused by the court and a final winding up order was granted on 29 May 20014.

[4] The service of the main application was at the *domicilium* address of the applicant by affixing the summons to the outer door on 14 May 2014. The applicant alleges that she did not receive same. Judgment by default was granted on 3 July 2014.

[5] On the 4 July 2014 the applicant became aware that summons was supposed to have been served upon her. After some enquiries were made by her erstwhile attorneys correspondence was sent to the respondent's erstwhile attorneys on 4 July 2014 expressing the applicants position that she had not yet received the summons she had heard had been served and they requested that service of the said summons be made upon them. The respondent attorney's replied on 16 July 2014, advising that summons had been served on the applicant's *domicilium* address and they granted the applicant an extension of three day from the date of the letter to file her intention to defend, failing which default judgment would be sought.

[6] It would seem that unbeknown to both attorneys the correspondent attorney of the respondent had already attained default judgment in the matter. The applicant seeks rescission on the grounds that both were under the common mistake that

default judgment had not been sought. In addition the applicant states that, as surety, she was entitled to the protection of the moratorium in term of section 133 of the Companies Act 71 of 2008 ('the Act") that was operative against creditors of Filapro. The respondent had instituted proceedings against her, as surety, during that moratorium period and this constitutes an irregularity which falls to be set aside.

Service of Summons

[7] In terms of the suretyship agreement the applicant agreed that legal processes be served on her *domicilium* address. The respondent submits that it duly served the summons on this address. The applicant take issue with the manner of service, arguing that the sheriff could not have served on "the outer door" as indicated on the return of service as there was no access to the outer door due to the gates and the sheriff would have required someone to let him onto the premises to proceed to the outer door. See *section 43(2) of the Superior Courts Act10 of 2013.*

[8] It is trite that the return of service of the sheriff, *prima facie* the return, is sufficient proof of what it purports to state therein. In this instance the sheriff comments that he attempted to ring the bell of the address where he was to serve, he noted that there were vehicles in the driveway but no one opened for him or attended to him thus the only manner possible was to affix the process to the door.

[9] The applicant argues that as a return of service of the sheriff is *prima facie* proof it is thus open to be challenged and I was referred to *Greeff v Firstrand Ltd 2012 (3) SA 157(NCK)* at *paragraph [10]*. The applicant argued further that in the circumstances of the service of this summons it cannot be concluded that the process was indeed served upon the applicant.

[10] The respondent on the other hand submits that the applicant has failed in it challenge in that there is no evidence, but for mere speculation on the part of the applicant, that the sheriff did not serve the summons as per the return, in fact there is evidence to the contrary based on the circumstances set out by the sheriff who has nothing to gain or lose as an office of the court when he avers that the summons was served.

[11] I agree with the submissions of the respondent, there is evidence that the sheriff was at the premises, that he called those instructing him to serve and advised that vehicles were on the premises but they refused to open or attend to him whilst he buzzed at the *domicilium* address provided. The *prima facie* return together with the confirmatory note and the two affidavits, of the sheriff and Ms Preez (Ward) of the respondent's attorney is in my view sufficient proof that the sheriff did in fact serve as stated in the return of service.

[12] Whether it is a gate or door the important factor to me is that he affixed it at the address. This being a valid means of service therefore the quest for rescission on this ground must fail.

The common mistake

[13] The applicant's argument here is that both parties laboured under the common mistake that default judgment had not been granted when they communicated with each other and the respondent granted the applicant the three day extension to file its intention to defend.

The respondent argued that if one wanted to rely on this defence, in terms of Rule 42(1)(c) the mistake should have a causal link to the judgment or order, refer to *Tshivhase Royal Council Tshivhase 1992 (4) SA 852 (A) at 863C-E* for easy reference the extract is set out below:

"Secondly, there must be a causative link between the mistake and the grant of the order or judgment; the latter must have been 'as the result of' the mistake. This requires, in the words of Eloff J in *Seedat v Arai and Another*1984 (2) SA 198 (T) at 201D, that the mistake relate to and be based on something relevant to the question to be decided by the Court at the time. Other cases which illustrate this are *Ex parte Barclays Bank* 1936 AD 481 and *Van Zyl v Van der Merwe*1986 (2) SA 152 (NC) . The principle is that you cannot subsequently create a retrospective mistake by means of fresh evidence which was not relevant to any issue which had to be determined when the original order was made. The reason is obvious: the Court would at that time have had before it no evidence and thus no wrong evidence on the point; hence there would have been no mistake. Contrast this with the case where the subsequent evidence is aimed at showing that the factual material which led the Court to make its original order was, contrary to the parties' assumption as to its correctness, incorrect. Here one would have the type of situation envisaged by Rule 42(1)*(c)*.

One finds in the reports examples of the successful invocation of Rule 42(1)*(c)* (see *Ex parte Jooste en 'n Ander*1968 (4) SA 437 (O), *Ex parte Kruger*1982 (4) SA 411 (SE) as also, in relation to the corresponding provisions in the magistrate's court, the cases cited by Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 8th ed at 139-40). But there do not appear to be many such cases. The reason, I would apprehend, is that the circumstances giving rise to the operation of the Rule are inevitably somewhat unusual. In my opinion, however, our matter is such a case. It provides a textbook example of a judgment granted as a result of a mistake common to the parties. Plainly, both Kennedy and John believed the statement in the letter dated 11 January 1988 ((ix) above) that the Khoro had 'after deliberating on this matter . . . resolved that (John) be (the chief)' and that the President 'has accepted the advice given to him by the . . . Khoro'. They, therefore, assumed a state of affairs which, as it turned out, was a wrong assumption. In other words, they laboured under a common mistake."

[14] The reliance of a mistake common to the parties raised as a ground for rescission, in my view must also fail, as there was no mistake common to the parties. What transpired is that the respondent was not aware that the default sought from the registrar had been attended and was granted by the registrar on the day in question. The extension of three days together with the threat of seeking default was given to the applicant on that very premise. At the time when the order or judgment was sought there had been no extension granted or sought. These factors were after the judgment had been granted this was not the situation before the court granted the judgment and as such does not amount to a mistake common to the parties.

<u>Business rescue</u>

[15] The applicant argued that as surety she was entitled to protection of the moratorium in term of section 133 the Act afforded to the principle debtor that was operative against creditors of Filapro.

[16] This issue was settled by the Supreme Court of Appeal in *New Port Finance Company (Pty) Ltd v Nedbank Ltd (30/2014)[2014] ZASCA 210 (1 December 2014)* which dealt with whether the business rescue proceedings affords the sureties relief of its indebtedness.

[17] The applicant is sued by the respondent in the main application on the deed of suretyship. The purpose of the deed is to cater for situations where the principle debtor for some reason or the other defaults and is not able to pay the debt. That being the case the deed of suretyship is coached in a specific fashion to ensure that if this situation arises the creditor can still recover from the surety. To this end, in the paragraphs below I set out the relevant paragraphs of the suretyship agreement that

illustrate that notwithstanding the position that the principle debtor is in regarding the moratorium in this case the creditor is still entitled to pursue the surety.

[18] The deed of surertyship is clear at paragraph 8 that the surety's liability is not affected in anyway whatsoever by the estate of the principle debtor being liquidated, sequestrated, placed under judicial management, administration, compromise or arrangement either by way of statute or otherwise.

[19] In addition paragraph 9 of the deed of suretyship provides that no indulgence, latitude or extension of time to the principle debtor or the surety is a waiver of the rights of the principle debtor or novation of the surety's liabilities.

[20] As per paragraph 12 (12.2) of the deed of suretyship the benefit of excussion against another party was excluded.

[21] The deed of suretyship clearly permits the creditor to pursue the surety notwithstanding the position that the principle debtor might be in. This is the purpose of a deed of suretyship and any default by the principle debtor permits the creditor to sue the surety.

[22] In the circumstances set out above the creditor is entitle to demand from the surety that which was due by the principle debtor notwithstanding any indulgence that was granted to the principle debtor. Thus the fact that section 133 provides the protection of the moratorium to the principle debtor does preclude the surety from being sued. This falls in the realm of paragraph 8, 9 and 12 (12.2) of the deed of suretyship. See *Cape Produce Co (Port Elizabeth) (Pty) Ltd v Dal Maso and Another NNO 2002 (3) SA 752 (SCA)* at *paragraphs [9] to [11]*; *New Port Finance Company (Pty) Ltd* at *paragraphs [10], [11] and [12].*

Compliance with Rule 18(6)

[23] The applicant submits that it is prudent for the plaintiff when setting out its case to ensure that if written documents form a link to the chain of the cause of action; such written documents referred to in the particulars of claim must be

attached. The applicant refers *Absa Bank Ltd v Studdard & Another [2012] ZAGPJHC 26 (13 March 2012) at [24] – [25].*

[24] The plaintiff in this case refers to hire agreements, which were attached to the particulars of claim. However, within those agreements mentioned is made of the terms and conditions of the hire agreement. These terms and conditions were not attached and as such the applicant contend that the respondent has failed to comply with Rule 18 (6) in that these omitted terms and conditions form an integral link in the chain of the plaintiffs of the cause action. This failure results in the plaintiff having not properly disclosed a cause of action and judgment cannot be granted on a summons that is defective.

[25] The plaintiff concedes that it did not attach the terms and conditions of the hire agreements. The stance taken by the plaintiff is that it has complied with Rule 18(6) as it is not necessary to attach the entire agreement in terms of the said rule, as it has attached that which it relies upon in respect of its claim against the applicant. The plaintiff argues that the reliance of the terms and conditions is on the part of the applicant for its counter-claim against the plaintiff. In any event, the terms relied upon are in the documents attached encompassing the parties' details (item 1 of hire agreement), the equipment hired (item 2), the rental rate thereof (item 2), the payment terms (clause 2 of the hire agreement) and interest (clause 3) applied thereupon and the signatory binding himself as surety in terms of the suretyship agreement (clause 7).

[26] Rule 18(6) reads as follows:

"A party who in his pleadings relies upon a contract shall state whether the contract is in writing or oral and when, where and by whom it was concluded, and if the contract is written <u>a true copy thereof or of the part relied on in the pleadings shall be annexed to the pleadings.</u>" [My emphasis]

[27] The contention of the plaintiff is that, that which it relies upon, in respect of the annexed documents put up, are the documents which set out its cause of action in its case against the applicant.

[28] To my mind, that which is annexed is what reliance is placed upon by the plaintiff in respect of its case against the applicant. Those documents that were annexed are what the applicant is entitled to assume the plaintiff would rely on for its case. See *Stern NO v Standard Trading Co (Pty) Ltd 1955 (3) SA 423 (A) at 429F-H.*

[29] I have examined the particulars in respect of the cause of action in the particulars of claim. In my view the reliance by the plaintiff lies in the suretyship agreement which emanates from the hire agreement. The particulars relevant for the plaintiff's cause of action, that is from the hire agreement and from the suretyship agreement are set out in paragraphs 8, paragraph 6 supposed to be 9, paragraph 7 which supposed to be 10, paragraph 8 and 9 which supposed to be 11 and 12 on pages 8 and 9 of the indexed and paginated particulars of claim.

[30] From the particulars of claim and that annexed thereto, I find that the plaintiff sets out its case with its cause of action building up as follows: the parties entered into a hire agreement which made provision for the suretyship agreement. The hire agreement set out as submitted by plaintiff *"the parties' details (item 1 of hire agreement), the equipment hired (item 2), the rental rate thereof (item 2), the payment terms (clause 2 of the hire agreement) and interest (clause 3) applied thereupon and the signatory binding himself as surety in terms of the suretyship agreement (clause 7)".* The link in the chain with regard to the cause of action is the hire agreement and the suretyship agreement, those terms necessary between the two are as appears in the hire agreement and the terms and conditions referred to by the applicant which are lacking, do not render the cause of action wanting in these circumstances. Rule 18(6) is formulated on the assumption that the pleader is able to attach a copy of the written contract. In those circumstances the copy or the relevant part thereof must be annexed. See *Superior Courts Practice Erasmus at B1-132B.*

[31] In dealing with the case referred to by the applicant of *Absa Bank Ltd v Studdard & Another* above, I must point out in that instance the contract that the plaintiff relied upon regarding its cause of action was not annexed at all to the simple summons. In this instance the hire agreement and the suretyship agreement relied upon in respect of the plaintiff's cause of action is annexed but for the addendum terms and conditions.

[32] In the circumstances I find that there has been compliance with Rule 18(6).

Bona fide defence and the counterclaim

[33] In terms of Rule 31(2)(b) the applicant in terms of the common law must establish that the judgment needs to be rescinded on good cause shown, this relies on a bona fide defence being advanced and that the application was also bona fide. In this case the court needs to look at whether the defence raised and counter-claim are bona fide.

[34] The applicant's defence is that the quantum claimed in the particulars of claim is not supported by the documents put up by the plaintiff. There is a concession that an incorrect certificate was used in the quantification of at least one piece of equipment's invoice. The plaintiff replies by saying that at best *"...the certificate reflects R3 000.00 more than the statement, with the judgment merely to be corrected accordingly"*. To this end the plaintiff submits that the challenge to the quantum does not equate to a bona fide dispute.

[35] The plaintiff makes reference to clause 10 of the hire agreement where the responsibility lies with the applicant to sign off weekly time sheets for the piece of equipment held. Failure to do so *"the Hirer by his omission agrees to the correctness thereof and shall be invoiced accordingly"*. In this instance the manager of Filopro signed off the weekly time sheets and the site manager signed off on the pro forma invoices issued by the plaintiff. Thus the site manager had signed the acceptance of the quotes and orders upon which the plaintiff claim relies upon.

[36] In addition to the above, regard should be had to the fact that the applicant made large substantial and payments in respect of the invoices, accounts and orders. These were made after the hire agreement had been terminated in addition on 14 March 2014 V. Lategan of Filopro provided the plaintiff with an undertaking to pay the liability due to the plaintiff. There has been no evidence advanced by the applicant to the contrary and in these circumstances the disputes raised by the applicant in my view fall short of being bona fide disputes and the applicant has failed to raise a bona fide defence to the plaintiff's claims.

[37] Turning to deal with the counter-claim the applicant argued that it had a counter-claim based on loss of profit because of certain equipment breaking down. The applicant states that this should be set off against the amount claimed by the plaintiff. To this counter-claim the plaintiff, in its defence, places reliance on the terms and conditions of the hire agreement. According to Filopro, who in this application placed reliance on the terms and conditions not being annexed to dismiss the plaintiff claims, now shuns the same hire agreements term and conditions by stating that when presented with same they had refused to sign. The causes pertinent to the counter-claim of the applicant are clause 6.3.4, 4.13 and 8.5. These clauses as correctly pointed out by the plaintiff amount to exclusionary clauses.

[38] In the circumstances, the applicant being bound by these clauses is precluded from claiming that which it seeks in the counter-claim. The parties also contracted that any legal cost incur as a result of the agreement between the parties would be on the scale as between attorney and client.

Conclusion

[39] For the reasons I have set out above the rescission is dismissed with costs on an attorney and client scale.

[40] In the result the following order is made:

[40.1] The rescission application is dismissed with costs on an attorney and client scale.

W. Hughes Judge of the High Court