

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1651/2013

In the appeal between:-

ARTHUR BENJAMIN DE BRUYN

Applicant

and

CHAVONNES BADENHORST ST CLAIR
COOPER N.O.

First Respondent

STAMATIOS TSANGARAKIS N.O.

Second Respondent

SIMON MALEBO RAMPOPORO N.O.

Third Respondent

HEARD ON:

15 AUGUST 2013

JUDGMENT BY:

PHALATSI, AJ

DELIVERED ON:

5 SEPTEMBER 2013

- [1] The three respondents are the liquidators of the Waverley Construction CC (In liquidation) the close corporation of which the applicant was one of the three members. The said Waverley Construction CC was initially a private company, but it was converted into a close corporation during September 2007.

- [2] The respondents, in their said capacities as liquidators of the close corporation, issued summons against the applicant in which they claimed an amount of R507 414.03, being for personal expenses of the applicant, which were paid for by the close corporation. This amount appears in the loan account as set out in the financial statements for the close corporation for the year ended 2009, as well as the report of a certain Sean Bernard Saffy, a chartered accountant who the respondents had engaged to verify the financial affairs of the close corporation. Judgment by default was granted against the applicant on 19 March 2013, the applicant having failed to file notice of intention to defend within the prescribed time period. It is this default judgment that the applicant has applied to rescind in the present application. The respondents filed their opposing affidavit on 31 May 2013 and the applicant replied thereto on 18 June 2013. After the applicant filed his replying affidavit, the respondents made an application that certain parts of paragraph 12, as well as paragraphs 13 and 18 of the applicant's replying affidavit be struck out from the said affidavit, in terms of Rule 6(15) of the Uniform Rules of Court. The basis of the said application is that the said parts in the replying affidavit should have been in the founding affidavit. Both these applications were heard on the same day.

APPLICATION FOR RESCISSION OF JUDGMENT

- [3] In support of his application for rescission of judgment, the applicant filed an affidavit, setting out the reasons for his

default in defending the action, as well as his defence. In short, he alleges that he did not receive the summons, as, according to the sheriff's return of service, the said summons was served at 130 Eland Street, Martindale, Bloemfontein, by attaching a copy thereof at the door. He states that he had not been residing at the said address for more than 10 years. In respect of his defence, he states that he is unable to respond to the allegation that he owes the close corporation R507 414.03, as no documentation as to how the said amount is computed and arrived at, is attached to the particulars of claim. According to the particulars of claim, this amount is the amount which the close corporation allegedly paid for the personal expenses of the applicant, in terms of the oral agreement between the applicant and the other two members of the close corporation. He, however, denies that he borrowed any money from the close corporation, nor that any of his personal expenses were paid for by the close corporation. He further states that he was not involved with the administration of the close corporation and even brought an application against the other members of the close corporation, to enable him to have access to all the documents and financial records of the close corporation. This he did because he was not happy with the way in which the other members were dealing with the affairs of the close corporation. The application was never proceeded with because there were too many factual disputes and the close corporation was liquidated. The applicant further alleges that, according to the draft financial statements attached to his affidavits, it is the close

corporation that owes him money. Counsel for the applicant, however, abandoned this defence, (correctly in my view), when it was shown by the respondents that the applicant interpreted the financial statements incorrectly, as it was in fact the applicant, according to the said financial statements, who owed the close corporation and not the other way round.

- [4] The respondents oppose the application for rescission of judgment on the basis that the applicant has failed to show a *prima facie* defence to the respondents' claim. They claim that the claim is based on the loan account as reflected in the close corporation's approved financial statements, the amounts of which have been verified by Sean Bernard Saffy.
- [5] The respondents further state that the applicant proved a claim against the close corporation, after its liquidation, in the amount of R2 813 273.66, in terms of section 44 of the Insolvency Act. This claim was based on a report of an audit by a certain G.R. Erasmus, who had been engaged by the applicant. This claim was later found to be unfounded and baseless during the insolvency questioning in which the said G.R. Erasmus testified. The applicant's response to this allegation is one of the subject matters of the application to strike out, which I will deal with later. Counsel for the respondents argued that Erasmus could not have compiled a report on behalf of the applicant, if the applicant did not have any documents, as he claimed. This fact, so the argument goes, negates the applicant's averment that he could not

respond to the claim, as no documents in support thereof had been attached to the particulars of claim and this indicates that the applicant is not acting *bona fide*.

[6] In the case of **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A) at 765 the court stated that an applicant for rescission of judgment must show “sufficient cause” for rescission and stated the essential elements, as follows:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success.

6.1 **Reason for default.**

The applicant has stated that he did not receive the summons and this fact seems to be conceded by the respondents and needs no further attention. I therefore find that the applicant has given satisfactory reason for his default.

6.2 **Prima facie defence.**

I will deal with this aspect without referring to the contents of the paragraphs which are the subject matters of the application to strike out and my finding will determine whether it is necessary to deal with the said application or not.

- [7] The applicant denies that the close corporation paid any of his personal expenses on his behalf, which at face value appears to be a bare denial. He, however, states that he cannot fully respond to the claim as there are no documents attached to the particulars of claim in support of same. The argument that the applicant must have had documents on the basis of which Erasmus compiled a report, does not mean that those documents include or relate to the respondents' claim against the applicant. Furthermore, the fact that the claim is apparent *ex facie* the close corporation's approved financial statements does not preclude the applicant from challenging the veracity thereof, on receipt of supporting documents. The fact that applicant instituted proceedings against the other members of the close corporation to have access to the records and financial information of the close corporation before receipt of summons, clearly shows that the applicant was concerned with the way in which the financial affairs of the close corporation were handled.
- [8] It is true that the applicant does not deny the existence of an oral agreement between himself and other members that their personal expenses should be paid by the close corporation, but that does not mean that he admits that his own personal disbursements were incurred and paid for by the close corporation. In fact, this is what he expressly denies, which the respondents will have to prove.

- [9] I therefore find that the applicant has shown that he has a *prima facie* defence against the respondent's claim and has therefore made out a case for the rescission of judgment.
- [10] In the light of this finding, I do not find it necessary to deal with the application for striking out, as that will in no way affect the outcome of this application. I also make no order as to costs in respect of the said application.
- [11] On the question of costs in respect of the application for rescission, I find that the applicant was indeed at no fault in not defending the action in that he did not receive the summons, but I also find that the respondents were not unreasonable in opposing the application. In the premises, I find that it is appropriate that the costs of this application be costs in the main action.

ORDER

- [12] I accordingly make the following order:

12.1 Default judgment which was granted by the Registrar of this court against the applicant on 19 March 2013 under Case Number 4945/2012 is hereby rescinded and set aside.

12.2 The applicant is granted leave to defend the action under Case Number 4945/2012.

12.3 The costs of this application to be costs in the main action.

N.W. PHALATSI, AJ

On behalf of applicant:

Adv P.R. Cronjé
Instructed by:
L & V Attorneys
BLOEMFONTEIN

On behalf of respondents:

Adv Paul Zietsman SC
Instructed by:
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