In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 654/2011

In the matter between :

K Govender Civils and Building Contractors CC	1st Applicant
Kelvin Govender	2nd Applicant
Gonasagree Govender	3rd Applicant

and

The Standard Bank of SA Ltd	Respondent

Judgment

Lopes J

[1] The applicants seek rescission, in terms of the provisions of r 31(2)(b) of the Uniform Rules of this Court, of a default judgment obtained by the respondent against them on the 7th April 2011.

[2] In order to succeed in an application for rescission, the applicants are required to demonstrate :-

a) a reasonable explanation for their default;

b) that the application for rescission is bona fide and not made with the intention to delay the respondent's claim; and

c) that they have a bona fide defence to the respondent's claim. In this regard they need to set out a prima facie defence by setting out averments which, if established at the trial, would entitle them to the relief they seek. It is not necessary for them in that regard to deal fully with the merits of the matter and produce evidence that the probabilities favour them.

See *Grant v Plumbers (Pty) Ltd* 1949(2) SA 470 (O) at 476 – 7.

[3] The second applicant who is the sole member of the first applicant and married in community of property to the third applicant, deposed to a founding affidavit in which he purported to set out the defences relied upon by the applicants.

[4] The respondent bank's cause of action was based upon an overdraft facility afforded by it to the first applicant, which it called up; a suretyship obligation on the part of the second and third applicants; and the registration of a continuing covering mortgage bond over immovable property owned by the first respondent. In addition the respondent called up what is described as a 'Medium Term Loan Account' also pertaining to the first applicant.

[5] In view of the allegations in the founding and opposing affidavits it is

relevant for me to set out a summary of the allegations made by the second applicant. They are :-

a) during 2010 the applicants (although it turns out in fact to be only the second and third applicants) elected to register a mortgage bond over the immovable property situated at Erf 563 Sunford, Phoenix in favour of the bank in order to enable them to pay the first applicant's indebtedness to the bank in toto. The proposal was allegedly to consolidate the first applicant's debt with the bank, and this was accepted by the bank who caused a bond to be registered on the 2nd August 2010 over the property belonging to the second and third applicants;

b) when the first applicant fell into arrears with its instalments in respect of the overdraft facility during or about August or September of 2010, the second applicant contacted a number of employees of the bank to enquire 'about why the proceeds of the newly registered bond had not been paid over to the Respondent and to make arrangements in the interim to pay off the arrear instalments should the Respondent require a little more time to transfer out the proceeds of the new bond';

c) the second applicant claims that he was advised by employees of the bank that as the bond had already been registered over his private property it was an administrative and accounting exercise to pay out the bond proceeds into the credit facilities accorded the first applicant;

d) despite promises by the employees of the bank that they would revert to him, the second applicant received no response until he was served with the summons in the present action (it is clear from the returns of service put up by the bank's attorney that this occurred on the 21st January 2011);

e) the second applicant then contacted the bank's personal and business banking credit department, and was informed by an employee that the bank was still in the process of making the necessary payments and adjustments and that the summons had been issued purely to protect the rights of the bank;

f) the second applicant was told that as the bond had already been registered it was merely a question of waiting a period of time for the necessary payment of the proceeds to be made, to clear the first applicant's indebtedness with the bank;

g) during the period between January 2011 and March 2011 and whilst waiting for those funds to be transferred, the second applicant made payments totalling R76 000 into the account of the first applicant held with the bank;

h) from January to the second week in April the second applicant was in constant communication with the bank's personal and banking credit department, and as late as April 2011 was advised that the bank would shortly make payment of the proceeds of the bond;

i) unbeknownst to the second applicant, the bank took default judgment against all the applicants on the 7th April 2011, a fact of which the second applicant only became aware when he saw a notice of attachment and writ on the 22nd August 2011;

j) as the bank had a registered bond over the second and third applicants' property for the sum of R800 000 for which neither of the applicants had received value, the applicants would have entered an appearance to defend had they realised that the bank intended to obtain judgment;

k) the second applicant also maintained that the agreement in respect of the overdraft facility was that the bank was entitled to call it up on reasonable demand, in which case the applicants should have been placed on notice to bring up the arrears within a reasonable period of time. The bank failed to do this;

l) with regard to the medium term loan account which had also been called up, the second applicant disputed the bank's entitlement unilaterally and unlawfully to call it up.

[6] On the basis of the aforegoing the second applicant claims that the applicants have a bona fide defence to the bank's action which entitles them to recission of the judgment.

[7] In the affidavit supporting the bank's opposition to rescission of the judgment, the bank's attorney sets out a somewhat different picture. From his affidavit the following emerges :-

a) that on the 18th November 2010 letters in terms of s 129 of the National Credit Act were dispatched by registered mail to all three applicants;

b) summons was issued on the 19th January 2011 and served personally on the second applicant on the 21st January 2011;

c) on the 24th January 2011 the second applicant sent an email to the bank's attorneys recording that he was in the process of taking out a bond on one of his properties in order to pay his debts to the bank, but that in the meantime he was prepared to make monthly payments of R15 000 for the next six months;

d) on the 1st February 2011 the second applicant was advised telephonically by the bank's attorneys that the bank required payment of the sum of R15 000 per month for three months, whereafter the position would be reviewed. The demand was also that the first payment was to be made immediately, that the bank was to be kept informed and updated on the matter of the registration of the bond;

e) by the 4th March 2011 no payments had been made by the second applicant and in response to an advice to him that the bank's attorneys were instructed to proceed, he recorded that he would be making a payment of R30 000 on the 7th March 2011;

f) on the 14th March 2011 (the payment of R30 000 on the 7th March 2011 not having been forthcoming), a representative of the first applicant advised the bank's attorney that R30 000 would be paid on the 25th March 2011;

g) that payment was not made either, and on the 25th March 2011 the applicants' attorney addressed the bank's attorneys acknowledging the applicants' failure to keep up with the repayment arrangements.

Reference is made to the fact that the immovable property owned by the first applicant was to be sold for the sum of R570 000 pursuant to a purchase and sale agreement which was attached to the letter. Reference is also made to a first mortgage bond registered over the same property which would have to have been cancelled in order for the transfer of that property to take place. The bank's attorneys were requested to take instructions from the bank in that regard;

h) On the 1st April 2011 the bank's attorney wrote to the applicants' attorney stating that the bank had instructed them not to stay proceedings and noted that the sale was subject to a bond to be granted within 30 days;

i) judgment was duly obtained on the 7th April 2011, and a writ issued on the 8th June 2011 which was served on the 4th July 2011. On the 20th July 2011 the second applicant again addressed the bank's attorney stating that he wanted to make payment arrangements until he could find a suitable buyer for his office block, whereafter he would be able to settle the amount outstanding in full;

j) on the 29th July 2011 the bank's attorneys notified the second applicant telephonically that the sale was proceeding and he was given the latest balance outstanding;

k) on the 26th August 2011 new attorneys appointed by the applicants addressed the bank's attorneys raising for the first time the issue of the possibility of a rescission application and making certain proposals, presumably in order to resolve the matter;

l) on the 1st September 2011 the bank's attorneys advised the applicant that they would proceed with the sale in execution of the property, unless a property guarantee in line with the bond could be provided.

[8] What is significant about the second applicant's founding affidavit is that he paints a picture listing ongoing and continuing negotiations with the bank's employees. These negotiations indicate a willingness on the part of the bank to comply with the second applicant's demands. His affidavit suggests that any delays were the fault of the bank's employees and that the mortgage bond which had been registered on the 2nd August 2010, was one pursuant to which the first applicant was entitled to receive funds. Those funds would be received in due course in order to be set off against the first applicant's indebtedness to the bank. The only mention of communications between attorneys arises out of the letter of 26th August 2011 written by the applicants' new attorneys to the bank's attorneys.

[9] That picture which is painted by the second applicant, is an entirely misleading one. I say this because :-

(a) the mortgage bond to which the second applicant makes reference is a continuing covering mortgage bond registered over what is apparently a residential property belonging to the second and third applicants. That mortgage bond does not record that it is granted in consideration of a loan to be advanced to the second and third applicants. Instead, it records that it is a continuing covering mortgage bond up to the sum R800 000 arising from ' existing, future and contingent indebtedness …'. Continuing covering mortgage bonds are commonly registered by banks in order to cover financial indebtedness which already exist or which may come into existence. Any loan which is advanced to the mortgagor is the subject of separate documentation – i.e. a loan, overdraft facility, etc;

(b) although the second applicant claims that he and the third applicant were entitled to be advanced the sum of money referred to in the continuing covering mortgage bond, no basis is set out as to why that should be so. Indeed, no such basis appears from the continuing covering mortgage bond itself. Had the bank agreed to loan the second and third applicants an amount of money in consideration for the passing of the continuing covering mortgage bond, I would have expected the applicants to have said so. They could easily have set out the terms and conditions of such a loan, the persons who concluded it on behalf of the bank, the circumstances thereof, and, almost certainly, written evidence thereof. None of this was suggested or produced;

(c) indeed, the applicants raise no defence to the overdraft and the 'Medium Term Loan Account' which were called up by the bank, save to deny the bank's entitlement to have done so. The second applicant claims in respect of the overdraft facility that he was entitled to be accorded reasonable notice. That was clearly what was done by the bank on the 18th November 2010 when notices in terms of s 129 were addressed to the applicants by the bank. In addition, and up until at least March of 2011 (some four months later) the bank was still prepared to entertain repayments made by the applicants provided they accorded with the repayment plan demanded by the bank. Despite having agreed to comply with those payment requirements the applicants did not do so. That the applicants were afforded a further reasonable period within which to make payments and bring their affairs into order is clear from the correspondence exchanged between the parties' attorneys;

(d) the exchange of correspondence between the parties' attorneys is revealing in what that correspondence does not deal with. I refer here to the defence raised by the applicants that they were entitled to have been advanced monies in respect of the continuing covering mortgage bond registered over the property belonging to the second and third applicants. Had they been entitled to such monies there is no doubt that the applicants' attorneys' letter of the 25th March 2011 would have made reference to that fact. Instead the applicants' attorneys confess their failure to comply with the repayment arrangements, record the difficulties facing the applicants, and refer to the sale of the immovable property presumably owned by the first applicant over which a continuing covering mortgage bond had also been registered (this time on the 30th September 2009).

[10] In addition to the aforegoing, it would seem that the second applicant's

statement that he had only become aware that judgment had been granted when he saw a notice of attachment and writ on the 22nd August 2011, cannot be correct. On the 29th July 2011 the bank's attorney notified the second applicant that the sale was proceeding. This is confirmed in a telephone note put up as an annexure to the opposing affidavit, and confirmed by the attorney who wrote it. It seems inconceivable that a businessman such as the second applicant who had concluded numerous financial arrangements with the bank and who had communicated with his attorneys regarding the matter, would not have appreciated and understood that the property could not be sold unless judgment had already been obtained.

[11] In all the circumstances I do not accept that the applicants have provided a bona fide defence to the bank's claim. The complete lack of detail regarding the arrangements claimed by the second applicant, coupled with his unwillingness to place all the negotiations and correspondence before the court, leads me to the inevitable conclusion that the applicants' defence is not bona fide.

[12] The only other defence raised by the applicants is the lack of authority of the bank's attorney to depose to the bank's opposing affidavit. In my view that lack of authority was cured by an affidavit from the bank confirming his authority. In my view that point has no merit.

[13] In all the circumstances I make the following order :-

1) the application for rescission is refused;

2) the applicants are to pay the cost of the rescission application, jointly and severally, the one paying the other to be absolved.

Date of hearing : 28th October 2011

Date of hearing : 2nd November 2011

Counsel for the Applicants : D Sridutt (instructed by (K Maharaj Incorporated)

Counsel for the Respondent : B S M Bedderson (instructed by Goodrickes)