

IN THE HIGH COURT OF SOUTH-AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

DATE:

16 APRIL 2008

CASE NUMBER:

10638/2006

5 In the matter between:

DANIEL JOSHUA LE ROUX

Applicant

And

ABSA BANK LIMITED

Respondent

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JUDGMENT

DAVIS, J:

15 This is an application for a rescission of the judgment granted
by default against applicant in favour of respondent on 5
December 2006.

20 The respondent had instituted action against applicant, the
principal debtors and co-sureties with applicant for the
payment for the sum of R1 603 008.37 in terms of the loan
agreement concluded between respondent and the principal
debtor and suretyships signed by applicant and various co-
sureties who had bound themselves as sureties and co-
principal debtors in *solidum* for the indebtedness of the
25 principal debtor to respondent in respect of the loan

agreement. Summons was served during October 2006. Default judgment was granted as no appearance to defend was entered into by applicant on the 5 December 2006.

5 It is common cause that, in this particular case, the application for rescission of judgment requires the following requirements to be met before such an application can be successful:

1. Applicant must give a reasonable explanation for default.
2. On the merits, applicant must have a *bona fide* defence which *prima facie* carries some prospects of success, see Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills Cape 2003(6) SA 1 (SCA) at 9F.

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Ms Watson, who appeared on behalf of the applicant, referred with regard to the question of the explanation to the founding papers in which the following is stated.

20 "In October 2006 Plaintiff instituted proceedings against myself and various other parties in the above Honourable Court... for payment in the sum of R1 603 008.37 in terms of the suretyship agreement he concluded with myself and the various parties who bound and interposed ourselves as surety and co-principal debtors in *solidum* for

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the indebtedness of the first defendant in respect of the loan advanced to it for the purchase consideration in Evening Star referred to above.

5 The summons in this matter was served on my wife... on or about October 2006. When I received the aforesaid summons from my wife I immediately contacted the second defendant again who advised me that he had spoken to his attorney, Mr Marais, and was advised that the summons was defective and that the respondent had instituted similar proceedings was in the Witwatersrand Local Division under case number 10638/2006 and that the proceedings in the Cape High Court amounts to a duplication of proceedings...

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In addition, they invited me to travel to Johannesburg in order to oppose the matter in that court. I was unfortunately not in the financial position to do so, but believed that given their reactions I would not be required to appoint my own attorney to oppose the matter as I was the fifth defendant and also included as a surety. I was also advised by the second defendant that as regards my suretyship the first defendant that its defence is

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also availed to me. I requested that the second defendant instruct his attorneys to act on my behalf which he undertook to do. Accordingly, I was left under the impression that any proceedings pertaining to the plaintiffs claim would be dealt with by second defendant's attorneys and that I would be included in such defences.

The reason for my failure to defend the action instituted against me is accordingly that I at all times believed that the action having been opposed by the second defendant's attorneys that I would automatically included in their defence especially bearing in mind the advice that the same defence is availed to me at first. I was also under the mistaken belief that the attorneys acting for the second and third defendant would deal with any demands made against me and would do whatever was necessary to protect my interests as I had consulted with the second and third defendants and their attorneys in this regard prior to the plaintiff instituting proceedings and the second defendant undertook to instruct these attorneys to act on my behalf.

Unfortunately, the attorneys acting for the second and third defendants did not oppose the action on my behalf as I now understand that they had been instructed by the second and third defendants.

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On or about 18 January 2007 the plaintiff caused the default judgment to be granted against me"

So much for the narrative as set out in the founding papers.

10 Ms Watson submitted, on the basis of this account, that the applicant had not wilfully failed to take action to defend the claim. He was under a mistaken impression that action would indeed be taken. Furthermore, he had never previously served with a summons and was unaware of the process involved in
15 both instructing attorneys to enter an appearance to defend or the requirements necessary to launch an application for rescission of judgment. He assumed such action would indeed have been taken on his behalf. He therefore showed a clear intention to defend the action because he had a *bona fide*
20 defence to respondent's claim.

Mr Manca, who appeared on behalf of the respondent, characterised, in my view correctly, this explanation as somewhat weak. On this basis, he referred to the approach
25 which the Appellate Division (and now the Supreme Court of

Appeal) have adopted with regard to these matters. It is thus necessary to refer thereto.

In De Wet and others v Western Bank Ltd 1979(2) SA 1031 (A) at 1043 the Court examined an explanation as to why the applicants (appellants in that case) should be granted the kind of indulgence sought in this particular case.

The court at 1043(H – 1044A) per Trengove, AJA (as he then was) said:

“The appellant’s predicament was not solely due to the attorney’s negligence or ineptitude. According to the affidavits the appellants have not been in direct touch with Lebos at any stage of the proceedings. Coligionis was representing them, they left the conduct of the case in his hands entirely and although they were supposed to look after the interests, he also let them down... They appeared to have manifested a complete disinterest in the conduct of the case after the interim settlement... And they have not proffered any acceptable explanation for their failure to keep in touch with Coligionis or with Lebos for that matter as to the progress of the proceedings during the 3

and a half year period subsequent to the interim settlement"

Mr Manca correctly submitted there is considerable similarity
5 between the approach adopted in De Wet's case and the facts
in the present dispute where it appears that after contacting
second and third defendant, the applicant did little to appraise
himself of the progress of a defence which he assumed was
being conducted in his name.

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Similarly, in Colyn supra at 9-10 Jones, AJA said:

"While the courts are slow to penalise a litigant for
his attorney's inept conduct of litigation there
15 comes a point where there is no alternative but to
make the client bear the consequences of the
negligence of his attorneys... Even if one takes a
benign view the inadequacy of the explanation may
well justify refusal of rescission on their account
20 unless perhaps the weak explanation is cancelled
out by the defendant enable to put up a *bona fide*
defence which is not merely some prospect, but a
good prospect of success."

Mr Manca submitted that, in this particular matter, the latter test certainly could not trump the manifest absence of adequate compliance with the first requirement for rescission.

5 This submission compels an evaluation of the case concerning a *bona fide* defence. Ms Watson submitted that a *bona fide* defence had been raised by the applicant. Leaving aside the question of the duplication of an action instituted against applicant in WLD, of which no more, Ms Watson also submitted
10 that the respondent had not performed its obligations in terms of the loan agreement. It had paid the loan amount to a third party (Evening Star) without the proper authorisation of the principal debtor. The principal debtor therefore never received the loan amount. Accordingly respondent could not apply for
15 repayment of the amount it claimed, as it had not legally discharged its obligation under the loan agreement. It followed that, as a surety has any defence to a claim that is available to the principal debtor, the applicant could raise a similar defence. Mr Manca contended that the respondent had
20 acted on the instructions of a director of the principal debtor in which case the so called Turquand rule applied to bind the principal debtor.

However, on the papers, the high watermark of respondents
25 riposte to applicant is the following paragraph in defendant's

affidavit opposing summary judgment where respondent refers to the following passage:

“I have been advised that on 3 November 2005 Syster was requested by Haupt to sign a debit authority on behalf of the plaintiff purporting to authorise plaintiff to pay the full loan amount to Evening Star. I was not aware of this at the time and I if had been aware of it I would never have allowed it to happen”

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But as Ms Watson submitted, it was clear that Syster though he may have been a director of Evening Star, and may also have been a member of the principal debtor he was not a director of the principal debtor, hence the Turquand rule was inapplicable to this case.

There is nothing on the papers which suggests that applicant may not have raised a good defence, to the effect that payment by respondent was not made to the principal debtor. To the extent that there was a dispute in court, the answer must be that respondent as the lending bank should, at least, know whether any legal authority was granted to it by the principal debtor to pay the debt to a third party, being Evening Star. That, of course, is not for this court to determine: it is a matter which will be decided at a trial.

There is one further issue to canvass. It appears to be common cause that the other sureties are in the process of contesting the claims which have been made against them by the respondent, and that this matter will proceed to trial. It is this fact coupled with the argument of a *bona fide* defence that persuades me in favour of granting this application.

To recapitulate: Jones, AJA said at para [12] of the judgment in Colyn that:

“A weak explanation is cancelled out by the defendant being able to put up a *bona fide* defence which is not merely some prospect, but a good prospect of success”

A further qualification should be added to this *dictum*, depending on the circumstances of a case, such as the particular facts of this case: where a refusal to grant the application in an egregious fashion would offend a court's sense of justice, the application may be granted, even if there is a weak explanation regarding the failure to oppose the application for judgment.

In this case, were the application for rescission not to be granted and were a trial to succeed for the other sureties, the

applicant would be placed in a most unfair situation of being liable for an amount which, in law, he was not liable to pay.

Furthermore, he was never given an opportunity to bring his case to court, which, in such a case, may offend section 34 of the Constitution Act 108/1996, that is, the right of access to court or appropriate forum for disputes to be resolved.

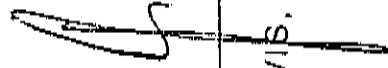
For these reasons, the application must be granted. There is one further issue: the question of costs. The only dispute was whether costs can stand over for the trial or whether they should be born by applicant. In my view, applicant was dilatory in the extreme and the only basis by which the order has been granted is because of a prospect of success on the merits coupled with the principle that I have added, namely that a refusal would offend the interests of justice. Respondent was entitled, on the existing law, to oppose this application and, in my view, applicant has been granted a considerable indulgence.

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For these reasons, an order is made that the judgment granted against the applicant on 5 December 2006 is rescinded. Applicant is granted leave to defend the action. Applicant is to pay the costs of the respondent in opposing this application.

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DAVIS, J