

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 426/2007

In the case between:-

BRIGHT FOCUS CC

First Applicant

MARCUS COETZEE

Second Applicant

and

MARTHINUS JOHANNES BAM

Respondent

HEARD ON:

18 OCTOBER 2007

JUDGMENT BY:

MABESELE, AJ

DELIVERED:

1 NOVEMBER 2007

[1] This is an opposed application for the rescission of a default provisional judgment which was granted against the first and second applicants on 16 August 2007.

[2] The first and second applicants, who were cited as the first and second defendants in the main action, are sued on the basis of an acknowledgement of debt in terms of which the second applicant, who also acted on behalf of the first

applicant, acknowledged indebtedness to the respondent in an amount of R650 000,00. The second applicant is the sole member of the first applicant, a close corporation, which is registered in terms of the Close Corporation Act.

- [3] According to the document which was signed by the second applicant, the second applicant undertook to pay the said amount in monthly instalments of R325 000,00 per month.
- [4] The document also provided that, should the second applicant fail to pay any one such instalment on its due date, the full outstanding balance would immediately become due and payable and the respondent may take any legal action against the second applicant, arising from the said document.
- [5] The respondent opposed this application on two grounds. Firstly, that, the second applicant did not show sufficient cause for failure to appear in court on 16 August 2007. Secondly, the first and second applicants have no *bona fide* defence.

[6] The second applicant stated, firstly, that he did not appear in court, on 16 August 2007, to defend the claim against him because he thought that his legal representative would appear on his behalf. He stated that he only became aware on 18 August 2007, that his legal representative did not appear in court on 16 August 2007.

[7] In paragraph 13 of the founding papers, the second applicant stated as follows:

“Ek was derhalwe geskok toe ek op Saterdag 18 Augustus 2007 ‘n kennisgewing per geregistreerde pos by my adres ontvang tot die effek dat my prokureur, Mnr. Vermaak, as prokureur van rekord aan die saak onttrek het. Hierdie kennisgewing van onttrekking is gedateer 14 Augustus 2007, naamlik, twee dae voordat die saak aangehoor sou word ...”

[8] The second applicant stated that he would have appeared in court on the said date had he known that his legal representative would not attend.

[9] On the contrary, Mr. Vermaak stated in his affidavit that he

warned the second applicant per letter dated 10 August 2007 of his intention to withdraw as his attorney of record, should the second applicant fail to pay a deposit of R7 500,00 before 16 August 2007.

[10] The letter reads:

“Ten spyte van verskeie telefoniese versoeke om die tjek wat deur die bank gemerk is ‘verwys na trekker’ te vervang met kontant, bly u in versuim .

Hiermee ons koste rekening tot datum en ontvang ons betalings binne 7 dae na datum van hierdie skrywe, by gebreke waarvan ons dagvaarding sal uitreik vir die verhaal daarvan.”

[11] In the above quoted letter, Mr. Vermaak made no indicating of his withdrawal as the second applicant’s attorney of record.

[12] Mr. Vermaak sent his notice of withdrawal to the second applicant, per registered letter dated 14 August 2007, which letter the second applicant received on 18 October 2007. In my view, Vermaak did not inform the second applicant timeously of his withdrawal as attorney of record. Therefore,

there is merit in the second applicant's explanation for his failure to appear in court on 16 August 2007.

[13] The second applicant resists the main action on the basis of misrepresentation, which he alleges the respondent made to him, as a result of which he entered into an agreement of sale with Calandra Trading CC and subsequently signed an acknowledgement of debt.

[14] The second appellant stated that he purchased collection contracts from the Calandra Trading CC, which was represented by the respondent, after he was made to believe of the success of the business. But it emerged later that the said business was running at the loss.

[15] The claim against the first and second applicants is based on the unconditional acknowledgement of indebtedness for an ascertained amount of money.

[16] With regard to a debt acknowledged unconditionally,

Wessels JA, in **RICH AND OTHERS v LAGERWEY** 1974 (4)

SA 748 (A) at 754G – H stated:

“... If the document in question, upon a proper construction thereof, evidences by its terms, and without resort to evidence extrinsic thereto, is an unconditional acknowledgment of indebtedness in an ascertained amount of money, the payment of which is due to the creditor, it is one upon which provisional sentence may properly be granted.”

(See also **JENKINS v DE JAGER** 1993 (4) SA 534

(N).)

[17] The second applicant signed an unconditional acknowledgement of indebtedness in an amount of R650 000.00, the payment of which is due to the respondent.

[18] In the light of what has been stated in **RICH AND OTHERS v**

LAGERWEY, *supra*, I am of the view that the first and second applicants may not sustain the respondent's claim should the matter proceed to trial. Therefore, the application should be dismissed.

[19] In the premises, I make the following order:

1. The application is dismissed.
2. The first and second applicants are ordered to pay costs.

M.M. MABESELE, AJ

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