

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CHARLES DEETLEFS FIRST APPELLANT

SANDRA DEETLEFS SECOND APPELLANT

and

VOLKSKAS LIMITED RESPONDENT

CORAM : JANSSEN, HOEXTER, NESTADT, KUMLEBEN
JJA et VILJOEN AJA

HEARD : 4 MAY 1988

DELIVERED : 20 MAY 1988

J U D G M E N T

KUMLEBEN JA/

KUMLEBEN JA:

The respondent, Volkskas Limited, instituted action in the Witwatersrand Local Division of the Supreme Court against six defendants for payment of the sum of R38 170,75 jointly and severally. It relied for its cause of action upon a written guarantee signed by the defendants and incorporated in the particulars of claim. The first and second appellants, who are husband and wife, featured as defendants in this action and gave notice of intention to defend. An application for summary judgment followed but, after appellants had lodged answering affidavits setting out their defence, it was by consent not pursued. In response to a request on their behalf, further particulars to the claim were furnished on 6 June 1986 by respondent/

respondent. The appellants failed to plead within the prescribed period of fourteen "court days", as defined in Rule 1 of the Uniform Rules of Court, with the result that on 30 June 1986 a notice of bar was served. In terms of Rule 26 (as it read at the relevant time) they were obliged to plead within three days. Thus appellants had in all some twenty seven days within which to draft and serve their plea. None was forthcoming during that period.

On 9 July 1986 an attempt was made to serve one on respondent's attorneys. They refused to accept late service.

On 15 July 1986 they enrolled the matter for judgment by default of plea. This application was, however, adjourned pending the outcome of an application on the part of appellants in terms of Rule 27 (3) for condonation of their

failure/

failure to plead timeously and for an extension of the period within which to do so. This application came before Leveson J who refused the condonation sought and dismissed the application with costs. Default judgment followed as a matter of course. Leave to appeal against both orders was refused but was subsequently granted by this Court. The issue before us is whether the decision refusing the application for condonation ought to be reversed.

The two essential requirements to establish "good cause", which in terms of Rule 27 (3) must be shown before condonation will be granted, are an explanation for the failure to plead timeously and, on the merits, the prospects of a successful defence. Though

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both requirements are ordinarily to be taken into account, the significance of each, considered independently, was emphasised by Miller JA in Chetty v Law Society, Transvaal

1985 (2) S.A. at 756 (A) 765 D - E in these terms:

"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

Where an explanation is furnished and some prospect of success on the merits is shown to exist, a court is called

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upon to consider these two requirements conjunctively and decide whether they, together with any other relevant considerations, warrant the grant of this indulgence:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts."

per Holmes JA in Melane v Santam Insurance Co. Ltd. 1962

(4) S.A. 531 (A) at 532 C - E. Both these decisions,

I should mention, deal with "good cause" and "sufficient cause" in other contexts but what is said in them applies equally to the former term as used in Rule 27 (3).

Before turning to the allegations in the affidavits, it is necessary to revert to the guarantee, which, as I have said, was the basis of respondent's cause of action. It consists of two sheets of paper. The "first document" is headed

"VOLKSKAS BEPERK"

"WAARBORG DEUR TWEE OF MEER BORGES - ONBEPERK"

and above the Volkskas logotype the reference V22(0) appears. It is a standard form agreement with the terms of the guarantee printed on both sides. On the front page

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at the appropriate place the name of the principal debtor, KELDRO MINING (EIENDOMS) BEPERK, ("KELDRO") and the names of the six guarantors (defendants) have been inserted. On the reverse side at the foot of the printed portion two of the guarantors signed. It is common cause that the first document is, on the face of it, a legal and binding agreement of suretyship. The "second document" is headed

"BYLAAG TOT V22.(O) WAARBORG DEUR TWEE OF
MEER BERGE - ONBEPERK TEN GUNSTE VAN KELDRO
MINING (EIENDOMS) BEPERK."

All that appears on this page of the document, apart from this heading or inscription, are the signatures of the other guarantors, including those of the two appellants; the signatures of witnesses with details of their occupations and addresses; and the place and date of signing. The

reverse/

reverse side is blank. According to this document first appellant signed it on 13 September 1984, that is, the day after the first document was signed, and second appellant on the next day.

Respondent's case is that both documents form part of one agreement of guarantee. On the face of it this plainly appears to be the case. As I have indicated, the names of all six guarantors appear on the first document; the second document purports to be an appendage to the first and refers to the principal debtor concerned; and ex facie the second document no other reason for the four signatories having signed it is evident.

Appellants were in the first place required to explain their failure to plead over the period from 6 June

1986 to 30 June 1986 and, more particularly, their neglect to do so after the notice of bar was served on the latter date. To excuse this omission first appellant alleges that as a commercial traveller he was for long periods away from home; that "communication problems" ("kommunikasie probleme") arising from the nature of his work made regular contact with his attorney by telephone or in any other manner difficult if not impossible; and that over the period from 27 June 1986 to 8 July 1986 both he and his wife were ill and unable to consult with their attorney on 1 July 1986 as arranged. Second appellant in her affidavit repeats these allegations and adds that she does not drive a motor car.

Without any factual allegations to support what

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are no more than general, and essentially inferential, assertions such statements are worthless. The appellants fail to disclose the reasons why they could not get in touch with their attorney, why the telephone could not serve as a means of communication, and, if they were ill and immobilised, why the attorney could not have visited them. Moreover, no details are furnished of the nature of this ailment or of its duration and severity. If the alleged grounds for the failure to plead were genuine, it is hardly conceivable that such essential details in support of them would not have been set forth.

Two medical certificates, identical save for the name of the patient, are relied upon by appellants. Each certificate simply states that the patient was examined

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on 27 June 1986, "is suffering from" some sort of infection and that they "will be" resuming normal activity on 8 July 1986. According to the date appearing at the top of each certificate both were written out and issued on 8 July 1986. That same day they must have been handed to appellants because, as appears from a supporting affidavit of their attorney, the certificates were shown to him on 8 July 1986. Inasmuch as the certificates were issued on that date, it is strange that each should state that the patient "is suffering" from the alleged ailment and "will be" able to resume normal activity on that date. If in fact they consulted the doctor on 27 June 1986 and he had predicted that they would have recovered by 8 July 1986, one would have expected this to have been properly recorded on the certificate. A possible/.....

possible explanation - a far from satisfactory one - for the form the certificate takes is that, when the doctor was visited on 8 July 1986 to obtain the certificates, he, acting on their say-so, certified ex post facto that for the period between the two dates they had been incapacitated and unable to resume normal activities. These comments on the certificates are, however, largely by the way. Whatever the doctor intended to say, since his statement is not on oath, his evidence is inadmissible and cannot be relied upon by appellants to advance their case.

Their attorney, as I have said, furnished a supporting affidavit. In it he confirms that they were due to consult with him on 1 July 1986 and that they failed to keep this appointment. This takes the matter no further

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and his statement that on 8 July 1986 they told him that sickness was the cause of their failure to attend the consultation is, of course, hearsay. His affidavit also lacks detail. He omits to explain how he reacted to their failure to consult with him at the time arranged. One would have expected some reaction on his part having regard to the fact that notice of bar had been served on him the previous day. He does not say whether he attempted to get in touch with his clients who were presumably at home on account of illness and therefore accessible.

In argument Mr Burger, who with Mr van Oosten appeared for respondent, pointed out that in the answering affidavits of appellants in the summary judgment proceedings they set out their defence in more than sufficient detail for a plea to have been drafted without further/.....

further consultation. Counsel submitted that there was no explanation for their attorney not having made use of those affidavits for that purpose. However, I notice that at the time the answering affidavits in the summary judgment proceedings were served on respondent their attorney was a Mr Lazzara Leicher whereas the person they consulted in connection with the plea was a Mr K. R. Aitken. In the circumstances, although both gentlemen were members of the same firm of attorneys, the latter may possibly not have been aware of this other source of information. For this reason the failure to make use of the summary judgment affidavits is left out of account.

In the result, although there was a delay in pleading of no more than six days after service of the notice

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of bar, I consider their explanations to be wholly unsatisfactory, in fact tantamount to no explanation at all, and that on this ground alone the dismissal of the application was justified. (Cf. P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) S.A. 794 (A) at 799 D - E.) The Court a quo, I should add, did not find it necessary to consider the adequacy of the explanation. It refused the application on the ground that the defence raised was without substance.

As to the merits, according to the affidavit of first appellant, both appellants bought shares in Keldro at the instance of one Smit. The banking account of the company was at that time at the Volkskas branch in Nelspruit. As Smit was employed at the Johannesburg Stock Exchange and

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was involved in the affairs of the company, he told them that a banking account in the name of Keldro ought to be opened at the Stock Exchange branch of respondent. First appellant's affidavit, in which his defence is set out, continues:

"5.4 Gemelde SMIT het mettertyd vir my en my eggenote meegedeel dat ter uitvoering van die ooreenkoms, 'n bankrekening geopen sal word by Volkskas Beperk se Effektebeurs-tak, en dat ek en my eggenote 'n dokument daaromtrent moes gaan teken; welke hy aan ons voorgehou het te doen het met die opening van die rekening aldaar. Nooit het hy met my bespreek dat ek 'n onbeperkte waarborg, of enige waarborg hoegenaamd, ten gunste van EISER of enige iemand, sou moes teken nie en dit is ook nie met my eggenote so bespreek nie. Ek vermeld hier ook meteens en kategoriees dat Volkskas Beperk dit ook nie so met my gereël het en/of met my so ooreengekom het nie.

5.5 Ek is toe na die EISER se Effektebeurs-tak, en wel na die beampte van laasgenoemde wie se naam deur die gemelde SMIT aan my verstrekk is. Hierdie beampte het 'n vel papier gereed gehad en ek het dit geteken. Ek was by hierdie amptenaar vir ongeveer 'n minuut of twee en daar het geen bespreking plaasgevind anders dat ek hom meegedeel het dat mnr. SMIT my versoek het om 'n dokument oor die bankrekening te teken nie en dat ek hier is om dit te doen. Soos vermeld, het ek verstaan dat dit te doen gehad het met die opening van 'n bankrekening."

(My underlining.)

and adds:

"Ek vermeld hier kategoriees dat die eerste twee bladsye van die borgstelling, welke bladsye die gedrukte bladsye is, nie aan my voorgelê is nie en ek het dit ook nie toe gesien nie en sien dit vir die eerste keer toe die dagvaarding aan my beteken word."

The evidence of second appellant, who, as I have said,

signed the second document the day after her husband (and not

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in his presence), is to the same effect:

"6.3 Gedurende September 1984 het my eggenoot my meegedeel dat die gemelde SMIT hom versoek het om 'n dokument te teken by VOLKSKAS BEPERK se Effektebeurs-tak en dat dit in verband staan met die opening van die bankrekening aldaar. Blykbaar was dit so ooreengekom dat die bankrekening verskuif moet word vanaf Nelspruit na Johannesburg. Ek dra kennis daarvan dat my eggenoot na Volkskas Beperk se Effektebeurs-tak gegaan het om die dokumente met betrekking tot die opening van die rekening aldaar te gaan teken en ek is toe ook op 'n ander geleentheid na die bank. Aan my was die naam van 'n amptenaar van die tak van die bank gemeld by wie ek moes aanmeld. Ek het my by hom aangemeld en daar het 'n enkel vel dokument gereed gelê en ek het dit bloot net geteken."

(My underlining.)

They both thus deny that they ever concluded

the alleged agreement of guarantee, or for that matter any

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other, in favour of the respondent. In the circumstances one would have expected them to have stated the purpose for which they thought they were affixing their signatures to the document. Instead they restrict themselves to the enigmatic statements which I have emphasised in the quoted passages from their evidence.

What does emerge from their affidavits is that the factual basis of their defence is, firstly, that in signing the second document they had no intention of concluding a guarantee agreement and, secondly, that at the time of signature only the second document was shown to them (with or without the typed inscription on it at the time).

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In reply to the first contention, Mr van der Westhuizen, the manager of the Stock Exchange branch of respondent, in an answering affidavit states that, according to his information, the first appellant was well aware of the fact that he had concluded this suretyship agreement by signing the guarantee. The deponent substantiates this admittedly hearsay statement by annexing to his affidavit a copy of the application of Smit and first appellant, as applicants, for the liquidation of KELDRO. In those proceedings Smit had annexed to his affidavit a copy of an agreement of sale between Smit, first appellant and a third party, as sellers, and one Jonker, as purchaser, to which agreement KELDRO and another company were also parties/.....

parties. The subject matter of the sale was shares in KELDRO. The significance of the agreement for present purposes is that it records that:

"Die verkopers het sekere waarborge aan Volkskas Bank en Satico gelever vir die terugbetaling van die bedrae aan Volkskasbank en Satico verskuldig."

And further that:

"Die Koper sal poog om die Verkopers vry te stel van die borgverpligtinge teenoor Volkskasbank Beperk en Satico."

Smit in his affidavit implicitly acknowledges the authenticity of this agreement of sale and first appellant in his supporting affidavit confirms all the allegations made by Smit. Copies of letters annexed to Smit's affidavit (and of one dated 9 September 1985 addressed to first appellant and furnished in reply

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to a request for further particulars in the main
action) confirm the allegation of van der Westhuizen
that the guarantee in issue in this case is the Volks-
kas guarantee referred to in the agreement of sale.
In the absence of any replying affidavit on the part
of first appellant explaining, or even suggesting,
that the agreement of sale has reference to some other
guarantee in favour of respondent, this can be con-
clusively accepted. The inescapable inference, since
what is alleged by van der Westhuizen and what is
stated in the agreement is not refuted or explained
in any way, is that first appellant was well aware of
the fact that he was signing the guarantee and that
his evidence to the contrary is false. Mr Lawrence,
who with Mr Constantaras appeared for the appellants,
drew/.....

drew attention to the fact that respondent did not furnish an affidavit sworn by the bank official or officials, who must have presented - on respondent's version - the guarantee on each occasion for signature. In such manner, counsel submitted, respondent could, and should, have proved that appellants knew they were signing a guarantee and that both documents were placed before them. It is true that (subject to such person or persons being indentifiable, available and recollecting what took place) such evidence would have been significant. But evidence of this kind would have created a dispute of fact and raised an issue of credibility. The form of refutation relied upon did not present any such problem.

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The acknowledgment of the guarantee in the agreement of sale is restricted to first appellant since second appellant was not a party to the agreement or to the liquidation proceedings. Nevertheless, to my mind, such acknowledgment also serves to refute her contention that she was unaware that she was signing a guarantee. Their defence implies fraud on the part of Smit in that he told them to go to the bank to sign the document "in connection with the banking account" whereas he must have told the bank (since there is no suggestion that it was a party to any misrepresentation) that the appellants would be coming in to sign a guarantee. But if the agreement of sale proves, as I hold, that no such misrepresentation/.....

tation was made to first appellant, it is inconceivable that Smit would have made second appellant, and not both of them, the target of his subterfuge. In other words, he must have told both that they were to sign a guarantee. I say this because he had no assurance that they would not go together to sign the required document at the bank. Moreover he must surely have foreseen the likelihood that first appellant would have told his wife the purpose for which he was required to sign the document.

The conclusion that both appellants were aware of the fact that they had signed the guarantee clearly has a bearing upon the second factual issue to be examined, viz., whether only the second document was shown to them. It is inherently unlikely that

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the bank official or officials concerned, knowing that the guarantee was to be signed and that none of its terms appears on the second document, would not have placed both documents, in all probability attached to each other, before the appellants. Had this not been done, it is as unlikely that appellants would not have noticed the omission and queried it. There are further grounds for rejecting this contention. It is to be noted that their case is not that they were presented with a document with print or writing on it which they then signed, without identifying it or reading its contents, in the bona fide belief that it was an application for the opening of a banking account or for some purpose unrelated to their accepting liability as guarantors. If, as they contend, the

inscription/....

inscription ("Bylaag tot V.22(0) etc") was not on the document at the time of signing, it was to all intents and purposes a blank sheet of paper with provision for persons to sign as witnesses. In these circumstances, unless one concludes that they signed with their eyes closed, their assertion that they did not appreciate what they were signing cannot be accepted. This conclusion applies a fortiori to their alternative contention, namely, that the inscription might have been on the document but they did not see it when signing. As has been stressed, there is a conspicuous failure on their part to state with any degree of precision the purpose for which they thought they were signing the document. This confirms the inference/.....

inference that their defence of nescience is baseless.

The prospect of appellants proving their defence in the main action, if one exists at all, must therefore be minimal.

In the course of the appeal and in the court a quo a number of legal arguments were advanced. All were founded on one or both of the factual premises which have been considered and rejected as false. In the circumstances the need to discuss and decide those legal issues falls away.

In the result, quite apart from the inadequacy of the explanation for the delay, I consider that on this ground, the one relied upon in the court below, the application

for condonation was correctly refused. (See Glazer
v Glazer N O 1963(4) S.A.694(A) at 707E and United
Plant Hire (Pty) Ltd v Hills & Others 1976(1) S.A.
 717(A) at 723 H.)

The appeal is dismissed with costs including
 (i) the costs in regard to the dismissal of the appli-
 cation for leave to appeal in the court a quo, (ii)
 the costs, if any, incurred by respondent in connec-
 tion with the petition to this court for leave to
 appeal and (iii) the costs of two counsel in this
 appeal.

M E Kumleben

M E KUMLEBEN
 JUDGE OF APPEAL

JANSEN) - JA
 HOEXTER) - JA - Concur
 NESTADT) - JA
 VILJOEN) - AJA