IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

Case No: 25905/2010

In the matter between

ABSA BANK LIMITED Plaintiff

And

NONGOMA MEDICAL CENTRE CC First Defendant

LIONEL PATRICK BARNARD Second Defendant

ANNA CHRISTINA BARNARD Third Defendant

HESTER ELIZABETH VAN ROOYEN Fourth Defendant

JUDGMENT DELIVERED ON 25 AUGUST 2015

VAN ROOYEN, AJ:

[1] During November 2010 the plaintiff ("*ABSA*") issued summons in this court under the abovementioned case number against the defendants for payment of an amount. The claim against the first defendant ("*Nongoma*"), a close corporation, was based on a sum owing to ABSA by Nongoma in terms of a loan agreement. The claims against the other defendants were based on suretyships signed by those defendants in favour of ABSA.

[2] The summons was served on Nongoma at its registered address and on the other defendants at their chosen *domicilia citandi et executandi.*

[3] The defendants did not file notices of intention to defend and on 19 September 2011 ABSA obtained default judgment ("*the judgment")* from the Registrar of this court in terms of Uniform Rule 31(5)(b) against the defendants for payment of the sum claimed in the summons.

[4] These are applications for the rescission of the judgment. I shall refer to the parties as in the action.

THE APPLICANTS

[5] On 10 February 2012 the fourth respondent ("*Van Rooyen")* launched an application for rescission of the judgment in terms of Rule 42(1)(a).

[6] On 25 May 2012 Van Rooyen filed a notice of intention to amend, seeking to add the other defendants as applicants in this application for rescission. In an accompanying affidavit she stated that "*I have locus standi to bring this application on behalf of second, third and fourth applicants as I will be severely prejudiced should the default judgment granted against above applicants remain in place*". That does not support the *locus standi* claimed by her and no affidavits were deposed to by the second and third defendants, the members of Nongoma.

[7] On 22 June 2012 an application for rescission of the judgment in terms of Rule 42(1)(a) was launched, purportedly on behalf of Nongoma. One Gysbert Loots ("*Loots*") deposed to the founding affidavit and he claimed *locus standi* to bring the application for the following reasons: (a) He is a creditor of Nongoma; (b) He is a lessee of "*the Property*"; (c) He was duly authorised under a power of attorney granted to him on 13 January 2011.

[8] The mere fact that Loots is a creditor of Nongoma does not bestow him with *locus standi*. In Rule 42(1) it is contemplated that an "*affected*" party may bring an application. Such a party must have an interest in the subject-matter of the judgment "*sufficiently direct and substantial*" to entitle him to intervene[1]. The subject-matter of the judgment: (a) as between ABSA and Nongoma, is Nongoma's liability in terms of a loan agreement; and (b) as between ABSA and the other defendants, relates to suretyship agreements. Loots was not a party to those agreements, he is not a party to the action and the judgment has no bearing on him. In these circumstances he does not have a "*sufficiently direct and substantial"* interest in the subject-matter of the judgment to entitle him to intervene.

[9] Loots' reliance on his status as "*a lessee of the Property"* makes no sense as "*the Property"* is not identified and the judgment does not relate to a property.

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[1] Erasmus, *Superior Court Practice*, B1-308

[10] In any event, Loots did not bring the application in his own name, and for that reason too the first two bases offered by him for his asserted *locus standi* have no merit.

[11] Loots does not annex the power of attorney allegedly granted to him on 13 January 2011. He presumably refers to a power of attorney attached to an e-mail dated 14 January 2011 from Van Rooyen, annexed to ABSA'S application. That power of attorney provides for "*managing and transacting our business … with full power and authority to sell all fixed property and settle all outstanding bonds registered in our name*". Read contextually, it therefore appears to be for a narrow purpose, i.e. the selling of fixed property for purposes of settling outstanding bond debts. In any event, it does not authorise Loots to represent Nongoma in litigation. Moreover, there is no explanation for the members' failure to depose to affidavits. Further, and in any event, Nongoma was deregistered on 24 February 2011 and with that the power of attorney lapsed. That is so because deregistration put an end to the existence of Nongoma [2] and with that change of status the power of attorney lapsed[3]. When the registration of Nongoma was subsequently re-instated, it revested Nongoma with its property and validated its corporate activities <u>during</u> the period of its deregistration[4]. However, it did not revive the power of attorney which was granted <u>prior to</u> deregistration and which lapsed on deregistration.

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[2] *Miller v Nafcoc Investment Holdings* 2010(6) SA 390 (SCA) at para [11]

[3] *Law of South Africa*, Vol 1, para 147

[4] *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) at para [29]

[12] In these circumstances the applications, purportedly brought on behalf of Nongoma and its two members, cannot succeed and only Van Rooyen's application for rescission remains to be decided.

<u>VAN ROOYEN'S APPLICATION</u>

[13] Van Rooyen brought the application in terms of Rule 42(1)(a). However, in argument her counsel also relied on Rule 31(2)(b) and he referred me to the following passage from Erasmus [5]:

> "*The fact that the application for rescission of judgment is brought under this subrule does not mean that it cannot be entertained under any other rule such as rule 31(2)(b) or the common law, provided the requirements thereof are met."*

[14] I therefore accept that Van Rooyen is entitled to rely on the provisions of Rule 31(2)(b) too. She does not rely on the common law.

<u>RULE 31(2)(b)</u>

[15] In terms of Rule 31(2)(b) the judgment may be set aside if good cause has been shown by Van Rooyen. The requirements for an application for a rescission under that subrule have been stated as follows [6]: (a) The applicant must give a reasonable explanation of her default; (b) The application must be

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[5] At B1-306G
[6] Erasmus, B1-201

bona fide and not made with the intention of merely delaying the plaintiff's claim; (c) The applicant must show that she has a *bona fide* defence to the plaintiff's claim.

[16] A court has a wide discretion in evaluating good cause in order to ensure that justice is done.[7]

Reasonable explanation:

[17] Proper service of the summons was effected at Van Rooyen's chosen *domicilium citandi et executandi* and at Nongoma's registered address. Van Rooyen asserts that she did not <u>receive</u> the summons and it appears from her affidavit that she resides at another address. It is common cause that a letter in terms of s129 of the National Credit Act, 34 of 2005, was delivered at her chosen *domicilium citandi et executandi* and that she received it. Moreover, it appears from the affidavit of Loots that his residential address is Van Rooyen's chosen *domicilium citandi et executandi.* Van Rooyen describes Loots as her "*partner"* in her affidavit. In these circumstances it is improbable that the summons did not come to the attention of Van Rooyen. Significantly, she says that she did not receive it but she does not say that it did not come to her attention. She chose a *domicilium citandi et executandi* and if she wanted to change it she should have communicated with ABSA in this regard. In these circumstances I am not satisfied that Van Rooyen gave a reasonable explanation of her default.

[7] Erasmus, B1-204

Defences:

[18] As part of showing good cause, Van Rooyen has to show that she has a bona fide defence. It is sufficient if she makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle her to the relief asked for. [8]

Founding Affidavit

[19] In her founding affidavit Van Rooyen raised a single defence, namely that ABSA, by not acting timeously and reasonably, prejudiced her. In amplification she asserted that it was a ten year term loan agreement concluded on 19 August 2002, but ABSA waited for seven years before enforcing its rights in terms of the loan and surety agreements.

[20] Van Rooyen never claimed the benefit of excussion and in any event the general principle is that, after a surety has claimed the benefit of excussion, no defence is afforded a surety if the creditor delays in excussing the principal debtor [9].

[21] Van Rooyen therefore failed to raise a *bona fide* defence in her founding affidavit.

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[8] Erasmus, B1-201

[9] Forsyth and Pretorius, *Caney's The Law of Suretyship*, 6th ed, at 137

Affidavit in support of "Notice to Amend"

[22] In her affidavit in support of her "*Notice to Amend*" Van Rooyen asserted that the judgment was irregular because ABSA, in conflict with the provisions of Rule 18(6), failed to attach a copy of the written contract that it is relying on.

[23] The only written agreements referred to by ABSA in the summons are the suretyship agreements between ABSA, Van Rooyen and the members of Nongoma. Copies of those agreements were attached to the summons.

[24] Moreover, clause 14 of the suretyship agreements reads as follows:

> "*'n Sertifikaat onderteken deur enige bestuurder van die Bank sal* ***voldoende bewys*** *wees van enige toepaslike rentekoers en van die bedrag hierkragtens verskuldig of van* ***enige ander feit met betrekking tot die borgstelling vir doeleindes van vonnis****, insluitende voorlopige en summiere vonnis, bewys van eise teen insolvente en bestorwe boedels of andersins en indien ek/ons die korrektheid van sodanige sertifikaat betwis, sal die bewyslas op my/ons rus om die teendeel te bewys. Dit sal nie nodig wees om in sodanige sertifikaat die aanstelling of bevoegdheid van die ondertekenaar te bewys nie*." (emphasis supplied)

[25] Such a certificate was annexed to the summons, stating *inter alia* that Nongoma, Van Rooyen and the other sureties "*are indebted to ABSA Bank Ltd, as follows in respect of* ***the abovementioned Term Loan Agreement: 3008719901***" (emphasis supplied). It therefore constituted sufficient proof of the loan agreement and shifted the onus to Van Rooyen to prove the non-existence of the agreement.

[26] In any event, it is evident from correspondence between Van Rooyen and ABSA/ABSA's attorneys, including the letter in terms of s129 of the National Credit Act referred to earlier, that the term loan account number 3008719901 (relied on in the summons and referred to in the certificate attached to the summons) was referred to expressly and was not denied by Van Rooyen in the correspondence. On the contrary, she requested time to sell Nongoma's assets to pay Nongoma's debt to ABSA.

[27] In these circumstances, the purpose of the rules of court has been achieved, namely "*to facilitate the ventilation of disputes arising from substantive law"* and to allow Van Rooyen to hide behind Rule 18(6) will make this court "*a slave to the rules of court"*. [10]

[28] Van Rooyen's reliance on Rule 18(6) is therefore without merit and does not constitute a *bona fide* defence.

Replying Affidavit

[29] In reply Van Rooyen, for the first time, raised additional defences. Quite apart from the general principle that an applicant must make out her case in her founding affidavit, it will be illustrated that the additional defences raised in the replying affidavit are not *bona fide*.

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[10] *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and Another* 2014 (2) SA 119 (WCC) at para [11]

[30] Before I deal with those defences, it needs to be mentioned that the sole defence raised in the founding affidavit does not even feature in the replying affidavit.

[31] Van Rooyen surprisingly asserts in the replying affidavit that ABSA did not conclude an agreement with Nongoma but with the two members of Nongoma in their personal capacity. That flies in the face of Van Rooyen's stance in correspondence referred to earlier and does not explain why the members (and Van Rooyen) signed suretyship agreements for Nongoma's debt to ABSA. Finally, counsel for ABSA and Van Rooyen agreed in oral argument that I may have regard to an application under case number 12401/2011 brought by Loots in this court for an order placing Nongoma under business rescue in terms of s131(4)(a) of the Companies Act, 71 of 2008. In terms of a court order made by agreement on 30 April 2015 that application was to be heard together with Van Rooyen's application for rescission. Both applications were therefore before me and it was only after I had heard the application for rescission that the parties agreed that the business rescue application be postponed. In the founding affidavit in the business rescue application, Loots states that ABSA and Nongoma entered into a loan agreement, that the members of Nongoma failed to "*adhere to their obligations in terms of the aforesaid agreement*" and that ABSA consequently issued summons out of this court on 23 November 2010 under case number 25905/2010. The business rescue application is not opposed by Nongoma. This defence raised by Van Rooyen in the replying affidavit is therefore opportunistic and not *bona fide*.

[32] In her replying affidavit Van Rooyen further, for the first time, asserts that ABSA's claim has prescribed as the summons was launched seven years after ABSA's claim arose. No details are provided as to why the claim arose more than seven years ago and on what date exactly the claim arose. In any event, the correspondence in 2010/2011 emanating from Van Rooyen who purported to act on behalf of Nongoma constituted an acknowledgement of debt. This defence too is not *bona fide*.

Bona fides

[33] Van Rooyen's failure to give a reasonable explanation of her default, her failure to raise substantial defences and the way in which she changed the single defence relied on in her founding affidavit to other defences in her replying affidavit after she had failed to raise any of those defences in her correspondence with ABSA, lead me to conclude that her application for rescission is not *bona fide*.

Discretion

[34] I am mindful of the "*proper function*" of a court, namely "*to try disputes between litigants who have <u>real grievances</u> and so to see to it that justice is done*" [11]*.* (underlining added)

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[11] *Khunou and Others v M Fihrer & Son (Pty) Ltd and Others* 1982 (3) SA 353 (W) at 355F-356A, referred to with approval in *Absa Bank Ltd v Zalvest Twenty, supra.*

[35] It has been illustrated that Van Rooyen does not have "*real grievances*" [12]. In the circumstances I conclude that she has failed to show good cause contemplated in Rule 31(2)(b) and that justice will not be done if I exercise my discretion in her favour.[13]

<u>RULE 42(1)(a)</u>

[36] According to Van Rooyen the judgment was "*erroneously sought or erroneously granted*" as contemplated in Rule 42(1).

[37] The court has a discretion whether or not to grant an application for rescission under this subrule. The purpose is "*to correct expeditiously an <u>obviously wrong</u> judgment or order*" (emphasis supplied) [14]. The trend by the courts over the years is not to give a more extended application to the rule to include all kinds of mistakes or irregularities. [15]

[38] A judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously within the meaning of the subrule by reason of facts of which the judge who granted the judgment was unaware[16].

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[12] *Khunou, supra.*
[13] Erasmus, B1-204
[14] Erasmus B1-306G
[15] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para [8]
[16] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at para[25]

[39] Van Rooyen's reliance on Rule 42(1)(a) can only conceivably relate to her argument that there was non-compliance with Rule 18(6).

[40] I have already illustrated, when I dealt with Van Rooyen's reliance on Rule 31(2)(b), why there is no merit in her argument based on Rule 18(6). For the same reasons, it cannot be said that the judgment was "*obviously wrong*" [17] and that it was "*erroneously sought or erroneously granted*".

[41] In these circumstances ABSA was procedurally entitled to the judgment.[18]

[42] The considerations dealt with earlier when I considered Van Rooyen's reliance on Rule 31(2)(b), and that caused me to exercise my discretion against Van Rooyen, equally apply in respect of her reliance on Rule 42(1)(a).

<u>CONCLUSION</u>

[43] Van Rooyen is therefore not entitled to rescission of the judgment against her.

[44] Nongoma and its members cannot be held liable for the costs of these applications as they did not authorise Van Rooyen or Loots to represent them in these applications.

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[17] Erasmus B1-306G

[18] *Lodhi 2, supra*

[45] Consequently, the applications are dismissed with costs (such costs to be paid by the fourth defendant only).

R F VAN ROOYEN, AJ