REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: A5042/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

09/05/13
DATE

SIGNATURE

In the matter between:

JOHANNES PETRUS VAN ZYL	First Appellant
JACOBUS IGNATIUS VAN LOGGERENBERG	Second Appellant
and	
STANDARD BANK OF SOUTH AFRICA LIMITED	Respondent

JUDGMENT

MILTZ, AJ:

INTRODUCTION

1. This is an appeal against the judgment and order, including the order for costs, handed down in the above Honourable Court on 26 August

2011 when the appellants' application for rescission of judgment was dismissed with costs. The Court *a quo* granted the appellants' leave to appeal to this Court on 30 May 2012. I shall revert to deal with the order so granted after dealing with two ancillary issues of condonation for non-compliance with certain of the rules pertaining to appeals.

2. The first is that the appeal record was filed 30 days late, that is, on 1 November 2012 instead of by 17 September 2012. The reasons for the late filing of the record were fully explained in the affidavit of Vuyelwa Manse Sisulu and the application for condonation for the late filing of the record was not opposed by the respondent. In the premises, condonation was granted to the appellants for the late filing of the record.

3. The second issue of condonation related to the late delivery by the appellants of their heads of argument. The appellants' heads of argument were filed at Court on 17 January 2013 but were not served at that time at the offices of the respondent's attorneys. The point was then taken in the respondent's heads of argument that the appellants' heads of argument were out of time. They were then served at the offices of the respondents attorneys by facsimile and then properly, albeit very late, in terms of the rules of Court. The respondent also did not oppose the application for condonation for the late service of the heads of argument. In the circumstances, the application for

condonation for the late delivery of the appellants' heads of argument was also condoned.

4. The appellants tendered to pay the costs of the condonation applications on the unopposed scale.

BACKGROUND FACTS

5. On 9 July 2007, the respondent sold a crushing metal plant ("the plant") to a company known as Insizi Minerals (Proprietary) Limited ("Insizi"). In terms of the instalment sale agreement pertaining to the sale ("the agreement"), Insizi would pay monthly amounts of R119 789.32 to the plaintiff over the period 15 August 2007 to 15 July 2011. Once all the instalments had been paid by Insizi, Insizi would become the owner of the plant.

6. On 20 April 2007, the first appellant bound himself as surety and co-principal debtor in *solidum* with Insizi to the respondent for all its current and future obligations in respect of the plant. The first appellant's suretyship was limited to an amount of R1 350 000 plus interest and attorney and own client costs in the event of it becoming necessary for the respondent to recover monies pursuant to the suretyship.

7. On 16 March 2007, the second appellant bound himself as surety and co-principal debtor in *solidum* with Insizi to the plaintiff. Material differences between the respective deeds of suretyship of the appellants were firstly that the second appellant's was not limited as to amount and secondly that whereas the first appellant's suretyship required the respondent to seek payment first from Insizi, the second respondent's suretyship did not.

8. On 2 September 2010 the respondent, in writing, demanded payment from Insizi within seven days of the arrear amount of R1 037 551.10. The demand for Insizi to pay the arrears may have sufficed for the purpose of the first appellant's suretyship. However nothing turns on this in the appeal. Insizi did not pay and on 21 September 2010, the respondent in writing cancelled the agreement.

9. On 29 March 2011, the respondent sought and obtained judgment by default against the appellants. The Court *a quo* dismissed the appellants' application to rescind the judgment concerned. This appeal is concerned with the dismissal of that application. The Court *a quo* found that the explanation furnished by the appellants for their default was more than reasonable and therefore that they were not in wilful default of filing their plea.

10. The Court *a quo* in its judgment referred to three defences on the papers. These were respectively, the defence of excussion, the defence of misrepresentation and the defence that the indebtedness of Inzisi, and therefore the appellants, had been discharged.

11. The order of the Court *a quo* granting the appellants' leave to appeal provides that "... leave to appeal is granted to the Full Court of this Division to determine the issue of eviction." It is clear with reference to the judgment of the Court *a quo* and the order granting leave to appeal that what this order means is that leave to appeal was not granted in respect of the defences of excussion and discharge of the indebtedness.

12. Proper consideration of the order and judgment granting leave to appeal discloses that the "issue of eviction" is the second defence which was referred to in the judgment as the defence of misrepresentation. The reason therefor probably was the complaint in the founding affidavit that the respondent had misrepresented to the appellants that it owned the plant at the time it sold it to Insizi whereas a third party was the true owner.

13. In essence therefore leave to appeal was granted in regard to the question whether the facts and averments surrounding the attachment of the plant provided the appellants with a defence based on the warranty against eviction to the respondent's action which was bona

fide. Of course, if the warranty against eviction constituted a good defence to the respondent's claim, then the indebtedness of Insizi might have been extinguished. See: *Alpha Trust (Edms) Bpk v Van der Watt* 1975 (3) SA 734 (A) at 748F-H; *Dickinson Motors (Pty) Ltd v Oberholzer* 1952(1) SA 443 (A) at 449 G-H. However it is not necessary to decide this issue in the appeal.

14. The appellants complained in their founding affidavit that the plant was attached on 9 February 2010 pursuant to a court order obtained by the Industrial Development Corporation of South Africa Limited ("IDC") on 11 January 2010. According to the appellants' affidavits the court order was obtained pursuant to the provisions of a Notarial General Covering Bond ("the Bond") over all the movable property and effects of whatsoever nature and description and wheresoever situate of Ruslyn & Minerals (Proprietary) Limited ("Ruslyn").

15. An order of this Court dated 9 February 2010, a copy of which was attached to the founding affidavit, authorised IDC to dispose of all the movable property and effects of Ruslyn. Presumably the order of 9 February 2010 was granted after the perfection of the Bond allegedly on 11 January 2010 as aforesaid.

16. Nothing in the founding affidavit supported the bald and uncorroborated statement by the first appellant that the plant was attached pursuant to the perfection by IDC of the Bond. The appellants failed to attach a

copy of the order of 11 January 2010 or of any writ of attachment to their affidavits. Indeed nothing in the founding affidavit tied the plant to Ruslyn at all.

17. The respondent denied that a breach of the warranty against eviction had occurred, *inter alia*, because of the paucity of information set out in and documentation attached to the founding affidavit. In the replying affidavit however the appellants alleged that the plant that was attached was indeed the property of Ruslyn.

18. According to the affidavits the first time that the appellants complained to the respondent about the attachment was on 29 September 2010 after the agreement had been cancelled. A short while later Insizi was wound up by the Court.

RESCISSION AND THE REQUIREMENT OF GOOD CAUSE

19. The Court may set aside default judgment on such terms as it deems meet if it is satisfied that good cause therefor has been shown. One of the requirements for good cause is that the defendant must show that he has a *bona fide* defence to the plaintiff's claim. *Bona fide* defence in this context means a *prima facie* defence setting out averments which if established at the trial would entitle the defendant to the relief asked for. See *Silber v Ozen Wholesales (Proprietary) Limited* 1954 (2) SA 345 (A) at 352 G to H; *De Vos v Cooper and Ferreira* 1999 (4) SA 1290

(SCA) at 1304H; *Sanderson Technitool (Proprietary) Limited v Intermenua (Proprietary) Limited* 1980 (4) SA 573 (W).

20. Mr Strydom, who appeared for the appellants, also referred to the judgment of Brink J in *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) for the proposition that in making out his case for rescission an applicant must show that his application is bona fide and not made with the intention of merely delaying the plaintiff's claim. In respect of the need for an applicant to show that he has a good defence on the merits, Brink J referred (at 475) to the following words of Curlewis J in *Joosub v Natal Bank* (1908 T.S. 375) - "I do not think the Court should scrutinise too closely whether the defence is well-founded, as long as *prima facie* there appears to the Court sufficient reason for allowing the defendant to lay before the Court the facts he thinks necessary to meet the plaintiff's claim."

21. At 476 to 477 Brink J stated further in respect of the requirement of showing that he has a *bona fide* defence that "(i)t is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. (***Brown v Chapman*** (1938 T.P.D. 320 at p. 325)". (Brink J's judgment was referred to with approval by Jones AJA in *Colyn v Tiger food Industries Limited t/a Meadow Feed Mills (CAPE)* 2003 (6) SA 1 (SCA).)

22. If good cause is shown the Court should grant the application for rescission. In the application under consideration in this appeal, where the liability of the appellants as sureties is based on that owed by Insizi as principal debtor to the respondent, if it was established that the principal debtor had a defence *in rem* to the plaintiff's claim against it then that defence would avail the appellants as sureties. See Caney's *The Law of Suretyship* (Sixth Edition) at pp 187-188; *Ideal Finance Corp v Coetzer* 1970 (3) SA 1 (A); *Wiehahn NO v Wouda* 1957 (4) SA 724 (W) at 726F.

THE DEFENCE OF EVICTION FROM THE PLANT

23. The appellants complain in their affidavits that it "... was an implied, alternatively tacit term of the agreement, further alternatively a common law warranty (the warranty against eviction), that Insizi would be entitled to free and undisturbed possession, use and enjoyment of the plant."

24. The appellants complain further that "In breach of the aforesaid term, alternatively common law warranty, Insizi was evicted from the undisturbed possession of the plant by the (IDC). The plant was attached on 9 February 2010 pursuant to a court order obtained by the IDC on 11 January 2010 in this Court in terms of which the IDC perfected (the Bond) over the assets of (Ruslyn)."

25. They then contend that "The principal debtor was evicted from possession and accordingly is entitled, as are we in our capacities as sureties and co-principal debtors, to raise this as a defence".

26. It is a well-known principle of the law of sale that although a seller need not be the owner of the object that he sells, unless excluded by the contract, the warranty against eviction is a residual term of every contract of sale. See AJ Kerr *The Law of Sale and Lease* (Third Edition) at pages 177 to 180 and *The Law of South Africa* (Second Edition) Volume 24, paragraphs 75 to 79.

27. It is also a well-known principle that a purchaser, when deprived or threatened with deprivation of possession as was alleged to be the case when IDC attached the plant, is obliged to put up a *virilis defensio* or put the seller on notice to honour the warranty against eviction. If no notice was given or no *virilis defensio* was conducted then the plaintiff's title must be shown to have been unassailable. See *Lammers & Lammers v Giovanno*ni 1955 (3) SA 385 (A); *Gobel Franchises CC v Kadwa and Another* 2007 (5) SA 456 (C) at 464 para [27].

28. In the averments in the affidavits that are referred to above, the appellants disclosed the existence of a defence. If these averments are proved at the trial, the defence based on the breach of the warranty against eviction probably will succeed.

29. As a matter of law, it does not matter whether Insizi gave notice to the respondent of the attachment or whether Insizi put up a *virilis defensio* against the IDC claim. There are no allegations that Insizi or the appellants did either. Therefore it probably will be necessary for Insizi to allege and prove at the trial that the title of IDC in the plant was unassailable. In the application for rescission however, it was not necessary for the appellants to prove that this was so.

30. In *Grand National Transport (Pty) Ltd v Du Plessis* 1989 (2) SA 495 (W) at 498, Preiss J held that all that the dispossessed purchaser needed to show was that the third party (IDC *in casu*) had sufficient title to deprive him of his possession. He also suggested that a person with an order of attachment, on the face of it is such a person (at 498I).

31. None of the triable issues needed to be determined in the application. All that was required was for the Court to be satisfied that the defence sought to be raised was bona fide.

DISCUSSION

32. Although the judgments referred to above suggest that all that is required to be put up by an applicant for rescission are averments that, if proved at the trial, will constitute a valid defence to the plaintiff's action, these passages should not be interpreted too literally. Without sufficient facts sworn to in a manner that is not unconvincing, a court

cannot be satisfied that the defence is bona fide at all. See *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A).

33. Aspects of the appellants' presentation of their defence in the application for rescission suggest that the eviction defence was raised belatedly by them to avoid having to comply with their obligations as sureties for Insizi. However if Ruslyn's (and therefore IDC's) title in the plant was unassailable then the appellant's motive for raising the eviction defence is irrelevant.

34. In my view it would not be in the interests of justice to close the door on the appellants in the circumstances. Although I have reservations about the manner in which the appellants raised the defence, nevertheless I am satisfied that they have raised a substantial defence the basis of which appears from the affidavits. It is significant in this regard that at the rescission stage at least, the respondent was unable to deal issuably with the facts, contentions and averments put up by the appellants in respect of the defence. If at the trial the defence does not succeed then any prejudice suffered by the respondent will be alleviated by the cost order that I propose should be made.

35. In the circumstances I consider that the appeal should succeed for the reason that the Court *a quo* should have found that there was good cause within the contemplation and meaning of Uniform Rule of Court

31(2)(b) to rescind the default judgment obtained by the respondent against the appellants on 29 March 2011. The Court *a quo* should have been satisfied that the appellants disclosed a *bona fide* defence to the respondent's action.

36. Finally Mr Silver, who appeared for the respondent, referred to the dictum of Corbett JA (as he then was) in *Attorney-General Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) at 670D-F that "(t)he power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The Court of Appeal cannot interfere merely on the ground that it would itself have made a different order".

37. Mr Silver submitted that there is no basis upon which this Court is entitled to interfere with the discretion exercised by the Court *a quo* in dismissing the application for rescission. I do not agree. The Court *a quo's* understandable failure in the circumstances to consider the legal consequences of the eviction of Insizi from the plant upon the respondent's rights and the appellants' obligations in terms of the suretyships, in my view constituted a misdirection which entitles this Court to interfere with the exercise of the discretion and the order made.

CONCLUSION

38. Accordingly the appeal against the dismissal of the application with costs should be upheld. The order of the Court *a quo* should be set aside and the following order should be made:

1. The appeal is upheld.

2. The judgment granted by default against the appellants on 28 March 2011 is rescinded.

3. The appellants are granted leave to deliver their pleas within 20 days of the date of this order.

4. The appellants are to pay the costs of the applications for condonation on the unopposed scale.

5. The costs of the appeal, including the costs of the application for leave to appeal, are costs in the cause of the action.

DATED THE 9th DAY OF MAY 2013 AT JOHANNESBURG

I. MILTZ
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree and it is so ordered:

C.J. CLAASSEN
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

N.D. TSHABALALA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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ARGUMENT TOOK PLACE ON 24 APRIL 2013