5/9/17

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **83756/2014**

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

SIGNATURE 13/9/2017 DATE

In the matter between:

ANDREW MPHUSHOMADI Applicant

and

EASY FLOW CC Respondent

JUDGMENT

TONJENI, AJ:

[1] This is an application for rescission of a default judgement granted by the Registrar of this Honourable Court on the 15th May 2015. The application is brought in terms of

Uniform Rule 31(2) (b); alternatively Uniform Rule 31(5) (d) alternatively Common Law.

[2] The default judgement was granted against the applicant in his capacity as surety and co-principal debtor to Nanga Transport Civil Constructions and Projects CC (Judgement Debtor).

[3] The application also brought a separate substantive application for condonation for the late filing of papers in the main application. Both applications are opposed.

[4] Both parties have raised points of law which go to the core of the issues that are relevant to the determination of the whole application. I will deal with the issues as part of the determination of the application in its entirety.

[5] Applicant, who was the sole director of Nanga Transport Civil Construction and Projects CC (judgement debtor), entered into a written credit agreement with the respondents, for the purchasing of goods and services. This was signed on the 21st November 2012. On the same date applicant bound himself as surety and co-principal debtor to this agreement.

[6] Respondent issued summons against the Judgement Debtor and Applicant on the 25th November 2014, for an alleged breach of the agreement and a failure to settle an outstanding amount of R 926,945.26 which was owing. Applicant is sued as co-principal debtor and surety to the debts of the judgement debtor.

[7] In its particulates of claim, the respondent averrs that on various occasions in the period between June 2014 and August 2014, the Judgement Debtor purchased diesel in the amount of R926 945.26 from respondent; which diesel was used in the course of and furtherance of the judgement debtor's business operations. The amount remains unpaid. The summons was served by affixing to the main entrance at the *domicillium citandi et executandi* address nominated by both the judgement debtor and applicant. On the return of service the remark made by the Sheriff is "... property walled and gates locked...nobody at home and no response to hooting"

[8] Applicant's case is that he was not aware of the claim against himself and never received any communication regarding same although the respondent was well aware of his contact details. He disputed having received the Sec. 129 Notice in

terms of the National Credit Act 34 of 2005. He did not file a Notice to Defend because he was not aware of the summons.

[9] He became aware of the default judgement against himself only on or about the 16th April 2016, when he was applying for the renewal of his mobile phone contract. He claims not to have been living at the address cited as his *domicillium citandi et executandi* at the time of service of summons. The judgement debtor's estate was placed on final winding up on 12th February 2015.

[10] On perusal of the court papers, the track and trace results for the Sec. 129 Notice, is not attached. This casts doubt on whether applicant was ever made aware of the claim against him. The agreement between the judgement debtor and respondent is subject to the National Credit Act 34/2005 and the issuance and service of a Section 129 Notice, is an important step in the process towards debt recovery. Any court process for debt recovery might be premature if Section 86(9) 129(1) has not been complied with.

[11] It is trite law that in an application for condonation, "*applicant must show good cause by (a) giving a reasonable explanation of his default (b) by showing that application is made bona fide and (c) by showing that he has a bona fide defence to the plaintiffs claim which prima facie has some prospects of success*" [*Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003(6) SA1 (SCA) at 9 [11]

[12] *Schreiner JA in Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353, in considering the meaning of "good cause" referred with approval to Cairn's Executors v Gaarn 1912 AD 181 where it was said "*it is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives.*"

[13] Applicant also avers that the certificate of balance attached to the summons is not in line with the terms of credit agreement clause 11 (g) which specifically states "*a certificate of balance signed by the* ***Manager*** *of the Supplier and reflecting the amount of the customer's indebtedness to the Supplier as at date of certificate shall constitute prima facie evidence of the customers indebtedness to the Supplier for the purpose of granting any default judgement against the customer in favour of the Supplier.*"

[14] The certificate of balance (EF3) is signed by James Fourie, in his capacity as a member of the Respondent, on 23 October 2014.

[15] In the premises it cannot be said that document "Certificate of Balance" attached to the Particulars of Claim, and on which the Respondent relied is sufficient proof of the outstanding amount. At best, the amount of the claim is unliquidated.

[16] I turn now to deal with the Respondents Answering affidavit, deposed to buy one René Fourie. She deposed to the affidavit in her capacity as **a member** of the Respondent. However, the resolution confirming same, is not attached to the affidavit.

[17] In *Pretoria City Council v Meerlust Investments (Pty) Ltd* 1962(1) SA 32 (A) @ 325 C-F, Ogilvie Thompson JA points out, "The question of authority to you having been raised, the onus is on the petitioner to show that the prosecution of the appeal in this court has been duly authorised by the council; that it is the Council which is prosecuting the appeal and not some unauthorized person on its behalf. (*C ef. Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Bpk* 1957(2) SA 347 A at 351-2)

[18] As was pointed out in that case, since an artificial person, unlike an individual can only function through its agents, and can only take decisions by the passing of resolutions in the manner prescribed by its constitution, less reason exists to assume, from the mere fact that proceedings have been brought in this name, that those proceedings have in fact been authorised by the artificial person concerned. In order to discharge the above-mentioned onus, the petitioner ought to have placed before this court appropriately worded resolution of the Council. This, the petitioner has failed to do. On a proper construction of the Council's resolution of the 28th of October 1960, the prosecution of an appeal to this court was not authorised."

[19] It follows therefore that without the resolution of the respondent, René Fourie cannot be deemed to have been authorized to oppose this application for rescission of judgement.

[20] The other aspect of the Answering Affidavit is that it is attested to by someone who has no personal knowledge of all the facts.

[21] It is common cause that René Fourie only became a member of the Respondent on the 16th July 2015, 3 years after the agreement in issue was entered into, a year after the period on which the respondent's claim is based; 8 months after the summons was issued and 2 months after the default judgment was granted.

[22] Deponent does not explain how the averments in her affidavit came to her "personal knowledge".

[23] Joffe J in Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others 1999 (2) SA 279 (T) at 336 remarked as follows,

"Evidence is placed before a court in motion proceedings by way of affidavit. That is, a solemn assurance of fact known to the person who states it and sworn to as a statement before some person in authority.

In so far as it is contended that the document complain, the founding affidavit and the replying affidavit contain hearsay matter, it is trite law that our courts have consistently refused to countenance the admission of hearsay evidence."

[24] If a person who can execute an affidavit is one who can lawfully be a witness, and in the circumstances of this case, then René Fourie could never have been a witness to any aspects of this case prior to the 10th July 2015.

[25] I must at this stage mention that Counsel for the respondent purported to hand up from the bar a confirmatory affidavit of one James Henry Fourie, on the date hearing of this application. Applicant's counsel objected to this, indicating that the document had not been served on applicant's attorney and that she had no instructions to any aspect of the document, and that the court should not allow it.

[26] This is a document that no doubt would have a huge impact on the arguments in this matter. It was not explained to the court why a document of this import would only be handed in in this manner and at this stage of the proceedings. This court is not going to allow being ambushed in this manner, and does not permit the handing in of this document to form part of the papers before it.

[27] It follows therefore that without the company resolution to prove it, René Fourie cannot have been duly authorized to oppose this application. What purports to be an

affidavit by her, opposing this application is also unacceptable as it attests to hearsay.

[28] The application for rescission is brought in terms of Uniform Rule 31 (2) (b) alternatively Uniform Rule 31 (5) (d) or Common Law.

[29] In *Ferris and Another v First Rand Bank Ltd* 2014 (3) SA 39 (CC) at 44, Moseneke ACJ said "*as the interests-of-Justice test is a requirement for condonation and leave to appeal, there is an overlap between these enquiries. For both enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors.*"

[30] In terms of Rule 31 (2) (b) an applicant is required to within 20 days of having notice of judgment, apply for rescission. From all above, it is clear that the applicant filed this application way beyond 20 days of the judgment, but the court accepts the explanation tendered for the delay. I may mention also that the absence of the track and trace report on the service of the section 129 Notice casts a lot of doubt that Applicant ever had notification of the breach of contract by the Judgment debtor and himself by extension.

[31] The applicant denies indebtedness to the respondent and no proof of same is clear on the court papers, because the certificate of balance tendered was not in line with the credit agreement. What was tendered did not carry the equivalent of, or evidential value of *prima facie* proof.

[32] It follows therefore that there are quite a few disputes in this matter and applicant should be allowed to present his case properly. After all, the object of rescinding a judgment is to restore a chance to air a real dispute.

[33] In the premises, the following order is made:

1. The late bringing of the application for rescission of judgment is condoned;
2. The default judgment granted on 13th May 2015 under case number 83756/2014 is set aside; and
3. Respondent to pay costs of this application.

T TONJENI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.:	**83756/2014**
HEARD ON:	**SEPTEMBER 2017**
FOR THE APPLICANT:	**ADV.**
INSTRUCTED BY:	
FOR THE RESPONDENT:	**ADV.**
INSTRUCTED BY:	
DATE OF JUDGMENT:	**SEPTEMBER 2017**