



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case Number: 25649/2019

- (1) REPORTABLE: No
- (2) OF INTEREST TO OTHER JUDGES: No
- (3) REVISED: No

9 Nov 2020

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DATE

A handwritten signature in black ink, appearing to be "P. J. J. J.", is written over the signature line.

SIGNATURE

ELRIDGE MATHLOGONOLOL LEGODI

MOTHLAKE

Applicant

and

INDUSTRIAL DEVELOPMENT CORPORATION

OF SOUTH AFRICA

First Respondent

EML ENGINEERING AND

CONSTRUCTION (PTY) LIMITED

Second Respondent

THE SHERIFF: WONDERBOOM

Third Respondent

JUDGMENT

COETZEE AJ

[1] This is an application for rescission of a summary judgment granted in favour of the first respondent against the applicant. The first respondent ("the IDC") obtained judgment against the applicant for payment of R 9 926 300 (nine million nine hundred and twenty-six thousand and three hundred Rand), interest thereon at prima rate and other related relief. The applicant also applies for condonation for the late filing of his rescission application.

[2] The judgment relates to loan agreements entered into between the IDC and second respondent ("EML").

[3] The loan agreements provided that in the event of EML breaching any of the loan agreements, all amounts owed by EML to IDC shall become immediately payable without notice.

[4] The applicant entered into a guarantee agreement with the IDC. In accordance with the guarantee agreement, applicant guaranteed on behalf of the EML complete payment of all amounts owed by EML to the IDC as a result of the loans. The guarantee is a separate debt

and provides for the payment of costs as between attorney and own client in respect of any legal proceedings in respect thereof.

[5] On 15 July 2019, due to being in financial distress EML declared and filed for business rescue.

[6] On 23 July 2019, the IDC instituted legal action against applicant and EML claiming payment of the amount of R 9 926 300 from EML and applicant jointly and severally, the one to pay the other to be absolved, together with interest and legal costs.

[7] Applicant's erstwhile attorneys delivered a plea. The IDC delivered an application for summary judgment set down for hearing on 29 October 2019.

[8] The Court granted summary judgment in the absence of the applicant or his legal representative and an affidavit opposing the application.

[9] This is an application for rescission of the default summary judgment granted in favour of the IDC against the applicant. The applicant launched this application seeking the following relief:

[9.1] condonation for late filling of this application;

[9.2] rescission of the summary judgment granted on 29 October 2019 against the applicant;

[9.3] alternatively, suspension of execution of the said order until the business rescue procedure regarding EML has been finalized; and

[9.4] staying of the operation of the writ/warrant of execution or the sale in execution, pending the finalisation of this application or the business rescue process.

The condonation application

[10] The test for the granting of condonation in *Melane v Santam insurance Co Ltd*¹ balancing primarily the degree of lateness, explanation therefore, prejudice and prospects of success is trite law and is applied by this Court as a matter of course.

[11] In terms of Rule 31(2)(b) a defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.

[12] The application was delivered on 5 March 2020 and should have been delivered by the end of November 2019. It is approximately 3 months late.

[13] The applicant recorded that his then attorneys on an unspecified date informed him of the judgment. The applicant then terminated their mandate and appointed new attorneys. He states that his new attorney only informed him on 20 January 2020 of the judgment having perused the Court file that day.

[14] That means that if the delay in bringing the application is calculated from 20 January 2020, it is not substantial. As appears below the applicant's first set of attorneys must have informed him prior to 14 January 2020 of the judgment as he appointed his current attorneys who waited until they reopened their offices on 14 January 2020 before rendering assistance.

The explanation for the delay in launching the condonation application

[15] The applicant did not attend the summary judgment proceedings. When he was informed of the judgment, he instructed his current attorneys of record. When they re-opened their offices on 14 January 2020, they attended at Court on 20 January 2020 to uplift the court file in this matter, as his previous attorneys of record retained the contents of their file due to outstanding legal fees. They informed him of the judgment.

[16] Given that all the relevant documents relating to EML had been surrendered to the business rescue practitioner, the applicant then explains that he had to request a meeting with the business rescue practitioner, which was subsequently held on 24 January 2020 and he then furnished the applicant with a progress report regarding the business rescue including documents that were required in support of this application.

¹ 1962 (4) SA 531 (A) at 532 C-F)

[17] The IDC takes issue with the explanation for the delay. According to them the case for condonation is premised on the applicant being required to obtain documents required to launch this application from the business rescue practitioners. However, on his own version, his current attorneys accessed the court file in the main action on 20 January 2020. There is no reason in the circumstances, why they did not obtain all necessary agreements and the like at that time. The applicant has attached to his founding affidavit the agreements on which the first respondent relied in obtaining judgment but not any of the business rescue documents.

[18] In my analysis the delay is not substantial. The applicant fails to give any detailed acceptable and reasonable explanation for the failure to launch the application timeously. The prospects of success of the rescission application will determine whether condonation should be granted. The prospects of success are discussed below.

The rescission application

[19] While the court retains a discretion whether to grant rescission, after having properly considered all relevant circumstances, the legal requirements to be satisfied by the applicant under the common law are that there must be a reasonable explanation for the default, the application must be made bona fide and there must be a bona fide defence which prima facie carries some prospects of success².

Is there a reasonable explanation for not opposing the application for summary judgment?

[20] Applicant stated that he is a businessman that travels abroad on a regular basis in order to attend to his business interests and as such he was not available to give instructions to his legal team and to sign the relevant affidavit resisting summary judgment. In addition, given that EML was in business rescue, he engaged with the business rescue practitioner to determine as to how far the process was and the likelihood of EML being able to fully settle the debt owed to the IDC.

[21] His erstwhile attorneys advised him that in his absence they were unable to secure the necessary funds required to brief counsel and they were under the impression that the matter would be resolved by the business rescue practitioner making full payments to the IDC.

² De Wet v Western Bank Ltd 1979 (2) SA 1031 (A) at 1042F-1043A and Government of the Republic of Zimbabwe v Fick 2013 (5) SA 325 (CC) at para 350D.

[22] His erstwhile attorneys also refused to engage counsel and to continue assisting him with the matter as he had not placed them in funds to cover their fees. They advised him that they would cease to do any further work on this matter and subsequently, he then decided to terminate their mandate and to seek other lawyers to assist him.

[23] It is, the IDC submits, that the explanation for the applicant's failure to have opposed the summary judgment application is spurious at best. The applicant merely refers, in bald and sketchy allegations, to having travelled and not having placed his former attorneys in funds to enable them to brief counsel or to file an affidavit resisting summary judgment. He does not deny that he knew about the application.

[24] According to the IDC not a single explanation was given as to why the applicant himself, having, it would appear, known of the date on which the application was to be heard, did not attend at court to state his case or request a postponement.

[25] The IDC further argues that the applicant has failed to attend court or instruct his attorneys or to provide a reasonable explanation.

[26] What the applicant herein has done is to make generalized allegations as to his difficulties in opposing the application, without any supporting evidence. This has the effect that the first respondent can only baldly deny the allegations and point out the lack of detail as being yet another factor why, it submits, the applicant also is not *bona fide*.

A bona fides application and bona fides defences

[27] In his plea, the applicant's defence to the first respondent's claim against him was to the effect that the business rescue process pertaining to EML prohibits the IDC from taking any action against the applicant, because "there exists a moratorium on legal action pending the finalization of the business rescue process".

[28] In his founding affidavit in this rescission application, the defences relied upon are the following:

[28.1] The IDC ought to receive payment *in lieu* of the indebtedness of EML out of the proceeds from the business rescue process; and/or

[28.2] There exists a moratorium on legal action pending the finalization of the business rescue process.

[28.3] The IDC is possessed of other security for EML's indebtedness, notably the perfection order and certain cessions granted by EML in the IDC's favour.

[29] In relation to the alleged bar the business rescue process has on the IDC's claim against the applicant *qua guarantor*, the IDC is correct to say this ignores the fact that the guarantee given is a primary obligation in itself. The SCA decision of *New Port Finance Company (Pty) Ltd and Another v Nedbank Limited*³ which held that section 154 of the Companies Act 71 of 2008 does not deal with the existence of the debt itself, but only with the capability of a person to sue the principal debtor is against the applicant. The liability of a surety in business rescue proceedings would be unaffected by any moratorium.

[30] As to the defence that there exists other means by which the IDC can allegedly claim payment of the amount due to it there is no obligation in law for the IDC to await the outcome of the business rescue process before being entitled to proceed against any of its security. This is made clear in clause 6.2 of the guarantee agreement.

[31] Also section 134(1)(c) of the Companies Act 71 of 2008 prevents any person from exercising any right in respect of any property in lawful possession of the company in business rescue (EML) without the consent of the business rescue practitioner. This section precludes the IDC from selling the property subject to the perfection order and from enforcing its rights under the cession agreements.

[32] Even if the IDC was inclined to exercise its rights relative to other security or to await the outcome of the business rescue, prior to taking steps against the applicant, the applicant has not put up one fact indicating that the business rescue process is likely to yield any form of payment to the IDC.

[33] The applicant has poor prospects of succeeding with any of his defences in the main action. His lack of a clear and detailed explanation for his default coupled to a lack of defences add up to the application not being *bona fides*.

³ 2016 (5) SA 503 (SCA) at para 14

[34] The absence of an adequate explanation for the applicant's default in not opposing the summary judgment application, the absence of an adequate explanation for the delay in bring the condonation explanation and the poor prospects on the merits in the main application means that

[34.1] The application for condonation stands to be dismissed, and

[34.2] The application for rescission of the judgment stands to be dismissed.

[35] There is no reason why costs should not follow the result.

[36] It is ordered that the application for condonation and the application for rescission are dismissed with costs on the tariff that applies as between attorney and own client.



H S COETZEE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES**On behalf of Applicant****: Adv. G. Lebethe****Instructed by****: NTABENI ATTORNEYS****On behalf of First Respondent****: Adv Sandra Freese****Instructed by****: MNGADI ATTORNEYS INC****Date of Hearing****: 9 November 2020****Date of Judgment****: 9 November 2020**