



**IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF
KWAZULU-NATAL
HELD AT DURBAN**

Case no:KZN/DBN/RC

903/2019

In the matter between:

VALUECORP 422 CC

First Applicant

KASAVELJAJH RAMCHANDRA APPALRAJU

Second Applicant

KRUSHENDRA NANDGIPAUL NAIDOO

Third Applicant

and

**GARAGESURE CONSULTANTS AND
ACCEPTANCES (PTY) LTD**

Respondent

Judgment delivered: 02 MARCH 2020

[1] This is an opposed Rescission of Judgment application launched by the Kasaveljajh Ramchandra Appalraju pursuant to an order granted against the Applicants on 30 May 2019. In light of the fact that the First and Third Applicants cited herein brought a independent application which was argued on the same day, this judgment

deals only with the application on behalf of Mr Appalruju who will be referred to as the Second Applicant herein for ease of reference. The application was argued on 14 February 2020.

[2] Ms T Naiker appeared for the First and Third Applicants and Advocate JHF Le Roux instructed by DBM Attorneys appeared for the Respondent.

Principle submissions by the parties

[3] A number of submissions were made by the parties in the papers and also during argument. In light of the conclusion to which I will come I do not deem it necessary to deal with each of the points raised *ad seriatim*, and will for the purposes of this judgement, focus on the salient submissions made by the parties.

[4] The Second Applicant asserted that he was not residing at the chosen *domicilium* address when the summons was served. It was submitted that the Second Applicant was not in wilful default as he had no knowledge of the fact that action was instituted against him and only became aware when the warrant of execution was served.

[5] In addition it was submitted that the Applicant has a bona fide and good defence to the Respondent's claim as:

- (a) The First Applicant operated a service station under the branding name of TOTAL since 1992 which business was subsequently sold on 30 April 2018;

- (b) The guarantee in the sum of R250 000.00 was cancelled on 1 May 2018 and all outstanding debts were settled in full;
- (c) On 4 May 2018, members of the First Applicant met where it was resolved that the Second Applicant would resign as member of the business and
- (d) The claim against the First Applicant arose on 4 October 2018 and as such the Applicant cannot be held liable for such claim.

[6] It was contended that all amounts owing to the Respondent whilst the Second Applicant was a member of the First Defendant had been paid. The Respondent accordingly moved for an order rescinding the judgement granted against the Second Applicant and requested that the warrant of execution be set aside.

[7] The Respondent on the other hand, referring to the entrenched legal principle that Rule 49(2) creates a presumption that the Applicant would have been aware of the judgment ten days after it was granted, unless proved otherwise, argued that in the absence of substantiation or documentary proof, the Second Applicant ought to have applied for condonation of the late filing of the application for rescission in accordance with Rule 60(5), which was not done. It was also argued that the Second Applicant failed to prove that he only became aware of the judgment on 15 August 2019 and merely makes a bald allegation in this regard.

[8] In the circumstances, it was mooted that that the application is brought out of time, without condonation being sought and that the application should be dismissed with costs.

[9] The Respondent referring to the trite legal principles to be considered in applying for a rescission, illuminated that the Applicant was bidden to show *inter alia*, a substantial defence by at least providing an explanation of his default sufficiently full to enable the court to understand how it really came about to assess his conduct and motives. In this regard it was mooted that the Applicant was called upon to prove and not just allege good cause for the rescission. In addition, it was submitted that that sufficient cause may be shown by giving a satisfactory explanation for the delay, which was not done.

[10] In the circumstances, it was argued, that Rule 32(2) imbues the court with the power to dismiss the defence and grant judgment in the absence of the Defendant who fails to appear in court which request was duly considered by the court resulting in the judgment being granted in favour of the Respondent.

[11] Moreover, it was argued that the Second Applicant failed to show good cause for the rescission of judgment. In this regard it was highlighted that the Second Applicant failed to set out his defence against the suretyship agreement in the founding affidavit. It was argued that the Applicant failed to show good cause for the rescission as the founding affidavit did not set out a *prima facie* case and neither was a defence set up against the suretyship agreement. Additionally, the Respondent referred to the guiding legal principles pertaining to suretyship agreements, illuminating that it is not a requirement for a valid suretyship that the principal obligation must be in existence when the contract of suretyship is entered into. In this regard it was argued that the principal debtor is not a party to the contract and need not consent or be aware of it.

The consequence that flows is that the surety renounces the benefits of excussion and division and that *vis a vis* the creditor, becomes liable jointly and severally with the principal debtor.

[12] The Respondent submitted that the Second Applicant failed to satisfy the court that good cause existed for the rescission of judgment, that the Second Applicant has a bona fide defence that is good in law to be tested at trial or that the Second Applicant was not in wilful default and called for a dismissal of the application with costs.

Legal Principles

[13] It is trite that an order of a court of law stands until set aside by a court of competent jurisdiction¹. Until that is done, the court order must be obeyed even if it may be wrong;² there is a presumption that the judgment is correct. At common law a court's order becomes final and unalterable by that court at the moment of its pronouncement by the Judicial Officer, who thereafter becomes *functus officio*. Save in exceptional circumstances it cannot thereafter be varied or rescinded. Section 36 is an exception and it is submitted that a Magistrate's Court may correct or vary its judgment only in those cases that are covered by the section."³

[1] It is trite that an Applicant is to give a reasonable and acceptable explanation for his or her default; that that application is made in good faith and that on the merits Applicant has a *bona fide* defence which *prima facie* carries some prospect of success.⁴

¹ *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B-C; *MEC for Economic Affairs, Environment and Tourism v Kruissenga* 2008 (6) SA 264 (CKHC) at 277C; *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA) at 439G-H.

² *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W) at 473C; *Culverwell v Beira* 1992 (4) SA 494A-C.

³ Jones and Buckle 'The Civil Practice of the Magistrates' Courts in South Africa' Juta Law [service 25, 2010]

⁴ *Scholtz and Another v Merryweather and Others* 2014 (6) SA 90 (WCC) at 93D-96C.

[2] Furthermore, there is no exhaustive definition of the meaning of “good cause” and “sufficient cause” giving a court a wide discretion in this regard. **Silber v Ozen Wholesalers**⁵ is instructive on the requirements of good cause and the giving of a full explanation by a party in default. In this regard, Schreiner JA stated that:

‘The meaning of “good cause” in the present sub-rule, like that of the practically synonymous expression “sufficient cause” which was considered by this Court in Cairn’s Executors V. Gaarn, 1912 A.D. 181, should not lightly be made the subject of further definition... There are many decisions which have the same or similar expressions have been applied in the grant or refusal of different kinds of procedural relief. 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.’

[3] The idiosyncratic test for a *bona fide* defence has been described in **Saphula v Nedcor Bank Ltd**⁶ as:

‘...the hallmark of what lawyers call a bona fide defence (which has to be established before rescission is granted), that defendant honestly intends to pursue before a Court a set of facts which, if true, will constitute a defence.’

[4] *A pro pos* to the *bona fide* defence requirement, Bliden J in **Mnandi Property Development CC v Beimore Development CC**⁷, refers to a substantial defence to underpin the requirement of good cause and states that:

‘...good cause cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence but in addition of a bona fide presently held desire on the part of the applicant for relief actually to defend the case in the event of the judgment being rescinded.’

⁵ 1954 (2) SA 345 (A) at 352H-353A.

⁶ 1999 (2) SA 76 (W) at 79C-D.

⁷ 1999 (4) SA 462 (W) at 464H-I.

[5] It is trite that *'[s]uretyship is a contract in terms of which one person (the surety) binds him or herself as debtor to the creditor of another person (the principal debtor) to render the whole or part of the performance due to the creditor by the principal debtor fails, without lawful excuse, to render the performance him- or herself.'*⁸

The common law on discharge of sureties

[6] The general legal position is that extinction of the principal obligation extinguishes the obligation of the surety.⁹ It is trite that a surety is discharged following payment in full by the principal debtor. Also entrenched is that the rule finds application, where the principal debt is discharged by settlement or is extinguished by prescription.¹⁰

Pothier, states that:

'It results from the definition of a surety's engagement, as being accessory to a principal obligation, that the extinction of the principal obligation necessarily induces that of the surety; it being of the nature of an accessory obligation, that it cannot exist without its principal; therefore, whenever the principal is discharged, in whatever manner it may be, not only by actual payment or compensation, but also by a release, the surety is discharged likewise; for the essence of the obligation being that the surety is only obliged, on behalf of a principal debtor, he therefore is no longer obliged, when there is no longer any principal debtor for whom he is obliged.'

[7] This general principle is that the source of the defences are often described as defences *in rem* which is to be distinguished from defences *in personam*. The accepted

⁸ The Law of South Africa, second edition, volume 26, paragraph 281.

⁹ Forsyth & Pretorius *Caney's The Law of Suretyship* 6th Ed at 188.

¹⁰ Voet *Commentary on the Pandects* (tr Gane) 46.1.36; 46.3.13; 46.4.4; Van Leeuwen *Roman Dutch Law* (tr Kotze) 4.4.7; Pothier *Obligations* (tr Evans 1853) para 377; Wessels *The Law of Contract* 2nd ed paras 3951-3952 and 4038-4039.

legal principle, that the accessory debt of a surety is discharged when the principal debt is discharged, has been stated in numerous authorities.¹¹

[8] In the English decision of **Wides v Butcher & Sons**¹² Dove Wilson J stated the legal position thus:

'There is no doubt that a simple discharge of a debtor by a creditor discharges also the surety, upon the simple ground that if it were otherwise, it would be a fraud upon the debtor, to profess to discharge him of the debt due to the creditor, and at the same time to leave him open to recourse against him by the surety. But a discharge of the debtor does not liberate the surety if the remedy against the surety is expressly reserved, because in that case the discharge is not an absolute release, but is merely a pactum de non petendo. The reservation has the effect, because it rebuts the presumption which ordinarily exists that if you liberate the principal debtor, you mean to liberate also the surety, and it has the effect of preserving the right of recourse by the surety against the principal debtor. The test whether or not the discharge which has been given is absolute, or merely a covenant not to sue, is whether the debtor is, after the discharge, put in the position of being able to say to the creditor that "It is inconsistent with the discharge which has been given to him that there should be any right of recourse against him by the surety." If the debtor is not in a position to say so, then the surety is not discharged.'

¹¹ *Colonial Government v Edenborough & Others* (1886) 4 SC 290 at 296 (in the context of an allegedly material alteration in the principal debt); *Trust Bank van Afrika Bpk v Ungerer* 1981 (2) SA (T) at 225 *in fine* (in the context of a settlement with the principal debtor); *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) 609 (A) at 622I-623I (in the context of prescription of the principal debt); *Leipsig v Bankorp Ltd* 1994 (2) SA 128 (A) at 132H-133A (again in the context of prescription); *Millman & Another NNO v Masterbond Participation Bond Trust Managers Pty Ltd (under Curatorship) & Others* 1997 (1) SA 113 (C) at 122C; *Cape Produce Co (Port Elizabeth) (Pty) Ltd v Dal Maso & Another NNO supra* paras 3-7 (in the context of a subordination agreement executed between the creditor and the principal debtor); *BOE Bank Ltd v Bassage* 2006 (5) SA 33 (SCA) para 9 (waiver by creditor of portion of the debt releases the surety to that extent but not if the arrangement is a mere *pactum de non petendo*).

¹² (1905) 26 NLR 578 at 584.

[9] Dove Wilson J cited, as authority for this proposition, the test laid down by the House Of Lords in *Muir v Crawford*¹³. In my view, the preferred reasoning is that the surety's release is a result of the accessory nature of his obligation. A unilateral intention on the part of the creditor to reserve his right against the surety is insufficient. If the creditor and the principal debtor reach agreement that the creditor will not sue the principal debtor but that the creditor preserves his right to sue the surety, with the resultant risk that the surety will be entitled to exercise his right of recourse against the principal debtor, the principal debtor's defence may be regarded as personal. The arrangement between the creditor and principal debtor does not prejudice the surety, because his right of recourse remains.

Discussion

[10] It is settled law that the Applicant is to give a reasonable and acceptable explanation for his or her default; that that application is made in good faith and that on the merits Applicant has a *bona fide* defence which *prima facie* carries some prospect of success.¹⁴

[11] Also trite is the notion that public interest dictates that there is finality in litigation, which is the reason why time limits are set. Accordingly, the Applicant still bears the onus to persuade the court.

¹³ 1875 LR 2 HL at 456.

¹⁴ *Scholtz and Another v Merryweather and Others* 2014 (6) SA 90 (WCC) at 93D-96C; *Colyn v Tiger Food Industries LTD t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9E '...the underlying approach the Courts generally expect an applicant to show good cause (a) by a giving reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success...'

[12] In order for Applicant to succeed with his application to set aside the judgment, it is incumbent on it to show “good cause”. The court is given a wide discretion in relation to what is reasonable as well as defining “good cause” This imputes a measure of flexibility to the court in making this overall determination which should be done when regard is had to the conspectus of the evidence.

[13] The Applicant provided an explanation as to why no appearance to defend was entered. The court is given a wide discretion in terms of the rule as to whether the Applicant has indeed given a reasonable explanation for the default. In determining what constitutes good cause, a court is obliged to take all the relevant facts and circumstances of a case into consideration when exercising its judicial discretion. Each case must be assessed on its own merits. Accordingly, taking into consideration the reasons proffered by the Applicant as to when the judgment came to his knowledge. I am satisfied with the adequacy of the Second Applicant’s explanation and the reasonableness thereof and according find, in the exercise of my discretion, that there was no need for the Second Applicant to launch a formal application for condonation as argued by the Respondent.

[14] In ***Standard Bank of South Africa Ltd v Roestof***¹⁵ ‘...the court found that a plaintiff should not be non-suited if the papers are not technically correct due to obvious and manifest errors, causing no prejudice to the defendant,...’

¹⁵ 2004 (2) 492 (WLD) at 496F – H

[15] In the circumstances, on the explanation presented by the Second Applicant, I am satisfied that he provided a reasonable explanation for the default and find that the default was not wilful.

[16] Turning to the whether the Second Applicant has put up a *bona fide* defence. In terms of the minutes of a meeting held on 4 May 2018, the Second Applicant indicated that he intended resigning from the business.¹⁶ This intention was formalised by way of a Resolution signed by the Second and Third Applicant.¹⁷ On 22 May 2018 the member amendment was signed on the CK2 form indicating the resignation of the Second Defendant as member of the First Applicant.¹⁸ The Second Applicant mooted that this indicates that the Third Applicant held 100% members interest in the First Applicant and would consequently be solely liable for all the debts of the First Applicant. In terms of the Resolution it was recorded that:

'8. Any claims by creditors arising:

- a) Prior to the effective date when Naidoo took over the business shall be for the account of Applraju; and*
- b) After the effective date when Naidoo took over the business shall be for the account of Naidoo.*

9. Once the parties have resolved their dispute over the adjustments APPALRAJU shall transfer the member's interest and cede his loan account in the Corporation to Naidoo and neither party shall have any further claim against each other. In this regard he shall have the amended founding statement duly signed for NAIDOO to have registered with CIPC.¹⁹

[17] It is interesting that the resolution was signed on different dates by the respective members. The Second Applicant contended that the debt arose on 4 October

¹⁶ Page 18 of the Index, Annexure "KA4".

¹⁷ Page 19 of the Index, Annexure "KA5".

¹⁸ Page 20 of the Index, Annexure "KA6".

¹⁹ Pages 21-22 of the Index, Annexure "KA7".

after he resigned and the date upon which he signed the resolution was the 11 December 2017. The Second Respondent in this regard contended that he cannot be held liable for the Respondent's claim.

[18] It was submitted that a member cannot resign; and that there was no sale of members interest and that the defence cannot be upheld. Moreover, there was nothing to prove that the indebtedness arose after the sale. The debt, it was argued, occurred prior to 4 May 2018.

[19] Of seminal importance is the Deed of Indemnity, more specifically clause 5 thereof which states that:

'5. Our obligation in terms of this Deed of Indemnity will continue and remain of full force and effect as a continuing covering security until the Insurance Company has been entirely and finally released and discharged from all its obligations, contingent or otherwise, under the Guarantee, and it has been reimbursed in respect of all costs, charges, liabilities and expenses incurred. We will not be entitled too withdraw from this Deed of Indemnity until the Insurance Company has been finally released, discharged and reimbursed and all premiums payable in respect of the Guarantee have been paid.'

[20] It was accordingly argued that this suggests that the Second Applicant is not alleviated from the suretyship; that the R250 000.00 was paid to TOTAL. There is a clear dispute of fact as to whether the debts were settled in full in light of the assertion that the guarantee was cancelled on 1 May 2018 and that all debts were settled in full. In this regard, the Respondent contended that the principal debt had not been satisfied by the First and Third Applicants and that such obligation which came into existence

through the suretyship agreement remained of full force and effect in circumstances where the Second and Third Applicants had bound themselves to the Respondent as suretyship and co-principal debtors. The question arises therefore whether the Second and Third Applicants would be absolved from liability towards the Respondent if the obligation may not have existed on 1 May 2019.

[21] It is trite that a Suretyship Agreement is the exclusive memorial of the transaction between the Second Applicant and the Respondent which on the face of it constitutes a binding contract of the purported terms of the agreement. It is therefore important to establish whether the Second Applicant, at the time when the indebtedness arose should be held liable if he was purportedly released from liability towards the Respondent. It was contended that the Second Applicant did not make this assertion in the founding papers and failed to deal with the suretyship agreement entered into by him in favour of the Respondent. The Respondent's argument in this regard is that the obligation had not been extinguished or waived in any manner.

[22] It is an accepted legal principle that the requirement for a valid suretyship that the principal obligation must be in existence when the contract of suretyship is entered into; a person may bind him or herself as surety for a principal obligation which will arise in future.²⁰

²⁰ Sapirstein v Anglo African Shipping Co (SA) Ltd 1978 (4) SA 1 (A).

[23] In light of the averments made, the question arises whether the Second Applicant was released of the principal debtor; was suretyship signed by the Second Applicant a continuing one and / or was his obligation extinguished?

[24] It is trite that one of the general principles is that, if the principal debt is discharged by a compromise with or release of the principal debtor, the surety is released unless the deed of suretyship provides otherwise. Furthermore, as earlier stated there is a distinction between a defence *in rem*, which strikes at the existence of the principal debt, and a defence *in personam*, which provides a personal defence to the principal debtor while leaving the debt in existence. Additionally, it is furthermore trite that a suretyship could not survive the discharge of the debt.

[25] Where the facts are disputed the court is not permitted to determine the balance of probabilities on the papers, but must apply the **Plascon-Evans** rule²¹ where Corbett JA held that a Respondent's version might not always be accepted:

'There may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.'

[26] There are however two exceptions to the general rule. The one is where a denial by Respondent of a fact alleged by Applicant is not such as to raise a real, genuine or *bona fide* dispute of fact.²² It is now trite that a bare denial of Applicant's material averments cannot be regarded as sufficient to defeat an Applicant's right to secure relief by motion proceedings in appropriate cases.²³ The second exception to the

²¹ *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (AD) at 634H-635C.

²² *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 35.

²³ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 155 (T).

Plascon-Evan's rule is where the allegations or denials by Respondent are so clearly untenable, improbable or unrealistic that the court is justified in rejecting such denials on the papers.²⁴

Conclusion

[27] The court is further mindful that in an applications for rescission, the Applicant is required in terms of the rule to set out a defence with sufficient particularity so as to enable the court to decide whether or not there is a valid and *bona fide* defence. It is for this reason that I have considered the application holistically and not in a vacuum.

[28] On a conspectus of the evidence before me, and without pronouncing on any of the issues, whether factual and/ or legal, ought to be, in my view, ventilated at the trial, I am persuaded that Second Applicant has met the requirements and placed a set of facts before me that if true, may constitute a defence. It is trite that the existence of a substantial defence does not mean that Applicant must show a probability of success, it is sufficient for Applicant to show a *prima facie* case or the existence of an issue that is fit for trial. Consequently, I am of the view that the Applicants should be allowed to defend the action and have these defences ventilated in the trial.

[29] As earlier stated, I am satisfied that the Second Applicant has given a reasonable and acceptable explanation the default. In the circumstances, I find that the

²⁴ *TruThe Verification Testing Centre CC v PSE Truth Detection CC* 1998 (2) SA 689 (W) at 699F-G, *NDPP v Geysers* [2008] 2 All SA 616 (SCA) (25 March2008) at para 11.

Applicant is not in willful default of delivery of a notice of intention to defend the action brought against them by the Respondent.

[30] I am furthermore satisfied that the Applicant has launched this application in good faith and that on the merits the Applicant have a *bona fide* defence which *prima facie* carries some prospect of success. In the circumstance, I am satisfied that the Applicant demonstrated the necessary *bona fides*; have set out the grounds of its defence with sufficient details so as to enable the court to conclude that it does have a *bona fide* defence to the Respondent's claim and that Applicant has succeeded to show good cause for the rescission of the judgment.

Costs

[31] Turning now to the issue of costs. The Respondent argued that costs be awarded on an attorney and client scale, including the costs of Counsel, in terms of Rule 33(8) as well as travelling and preparation costs.

[32] It is an accepted legal principle that costs ordinarily follow the result and a successful party is therefore entitled to his or her costs. It is fundamental legal principal that the issue of costs is in the unfettered discretion of the court.²⁵ In view of the fact that there are many issues that should be fully ventilated in the trial, it is my view that a costs order at this stage will in any event be premature. The trial court will be in a

²⁵ *Fusion Hotel and Entertainment Centre CC v eThekweni Municipality and Another* [2015] JOL 32690 (KZD) '[12] It is common cause that in this matter the issues at hand remained undecided and the merits were not considered. When the issues are left undecided, the court has a discretion whether to direct each part to pay its own costs or make a specific order as to costs. A decision on costs can on its own, in my view, be made irrespective of the non-consideration of the merits. I am stating this on the basis that an award for costs is to indemnify the successful litigant for the expense to which he was put through to challenge or defend the case, as the case may be...'

better position to make a final pronouncement in this regard after having heard the evidence in relation to the issues in dispute. Therefore, in the exercise of my judicial discretion, I am of the view that the issue of costs should stand over for later determination.

Order:

[33] In the result, after considering the submissions made by Counsel on behalf of both the parties and having considered the documents filed on record, the following orders are made:

- (a) The Default Judgment granted in this matter against the Second Applicant on 30 May 2019 is rescinded;
- (b) The Second Applicant is hereby granted leave to defend the action which was instituted by the Respondent under case number: **KZN/DBN/RC 903/19;**
- (c) Costs are to stand over for later determination.

P ANDREWS
Regional Magistrate: Durban