IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: 1752/2008
Date heard: 30 August 2012
Date delivered: 6 September 2012
NOT REPORTABLE

In the matter between

ARGENT STEEL GROUP (PTY) LTD t/a PHOENIX STEEL **Plaintiff**

and

BONGILE SAMUEL NKOLA **Defendant**

JUDGMENT

PLASKET J:

[1] The plaintiff took default judgment against the defendant in the amount of R914 712,12. The defendant now applies for the rescission of that judgment. Before dealing with the basis upon which rescission is sought, it is necessary to set out the background to this application.

[2] The plaintiff instituted action against the defendant, in his capacity as surety for the debts of School Furniture and Timber Products (Pty) Ltd (SFTP), in which it claimed the amount of R2 851 504,91. A deed of settlement was entered into by the parties in which the defendant agreed to pay the plaintiff R200 000,00 per month until the debt was paid. The defendant then signed a judgment on confession in terms of rule 31(1) in the amount of R2 851 504,91 or such lesser sum as may be due and payable and shortly thereafter the deed of settlement was made an order of court.

[3] Paragraph 6 of the deed of settlement is of importance. It provides, to the extent relevant to these proceedings:

'In the event of any one instalment not being paid on or before due date, and in the event of the Defendant failing to remedy his default within FOURTEEN (14) ordinary or calendar days reckoned from the date upon which a demand (arising from the Defendant's default) is

telefaxed to the offices of Messrs Neville Borman & Botha (who acknowledge that they hold the irrevocable authority of the Defendant to receive on his behalf communications of the nature in question) then and in such event, the full amount of capital and interest, as well as legal costs, shall immediately become due, owing and payable without notice and the Plaintiff shall be entitled, summarily, to take Judgement and proceed by way of a Warrant of Execution or otherwise to:

6.1 recover the balance of capital, interest and costs aforesaid;

6.2 execute against the movable goods of School, Furniture and Timber Products CC which are the subject of a Notarial Bond in favour of Plaintiff. . .'

[4] It is not in dispute that the defendant defaulted on his payments. On 21 June 2011 the plaintiff's attorneys wrote a letter to the defendant's attorneys in which they attached a schedule of payments that had been made since the deed of settlement had been made an order of court including 'payments made in respect of the purchases subsequent to the settlement which were not paid for c.o.d'. After stating that the defendant had not paid any money since 23 August 2010, despite his undertakings to do so, the letter then stated:

'Client's are not prepared to grant any further indulgences and they have instructed us to give this final notice in terms of Clause 6 of the Settlement Agreement, that if the full capital balance of R914 612,12 is not paid at our offices within fourteen (14) calendar days of the date of this telefax transmission, Application for Default Judgment will be made without further warning.'

[5] On 14 July 2011 Pickering J granted default judgment in favour of the plaintiff and against the defendant in the amount of R914 712,12, interest thereon and costs on an attorney and client scale.

[6] On 18 July 2011 the defendant's attorneys wrote to the plaintiff's attorneys. They said that the defendant had finalised 'a reconciliation of both the indebtedness which was the subject of the settlement agreement and the COD purchases' and came to the conclusion that he only owed the plaintiff R351 504,95, interest and costs. The plaintiff's attorneys replied by saying that as their demand had not been complied with default judgment had already been taken. They disputed the correctness of the defendant's reconciliation.

[7] In mid August 2011, the application for rescission of the default judgment was launched. In order to succeed in an application for default judgment, an applicant must establish good cause and that he or she has a defence.

[8] In his founding affidavit the defendant states that he is entitled to the rescission of the judgment because he was never given notice of the application for default judgment and because he has a defence on the merits. That defence is that while he admits that he is in breach of the deed of settlement, he does not owe the amount stipulated in the default judgment but only R333 169,54.

[9] There are two definitive answers to the defendant's contention that the application for default judgment was procedurally flawed because he was not given notice. The first is that the application was brought in terms of rule 31(1)(c) which does not provide for notice being given to the defendant, presumably because he or she has confessed the claim contained in the summons[1] and has personally signed it.[2] In *Sunset Investments (Pty) Ltd v Brandan & others*[3] Van Heerden J said that the rule 'not only provides for the giving of judgment against a defendant on confession but it furthermore provides that such judgment may be applied for and given without any notice to the defendant'. The second answer is that when he agreed to the deed of settlement the defendant agreed to a procedure through which, if he defaulted on his obligation to pay, default judgment could be taken against him without notice. He therefore waived any reliance on notice. The defendant is in a position similar to that of the debtor in *Nedbank Ltd v Morsead Securities (Pty) Ltd*.[4]

[10] In my view the defendant is not able to show good cause for his default. When he was given notice that he was in arrears he failed to rectify the situation. The inevitable consequence of this failure was that, as he had been warned and as was provided for in the deed of settlement, default judgment would be taken against him. He was in a situation similar to a debtor who either acquiesces in the execution

[1] Rule 31(1(a).
[2] Rule 31(1)(b).
[3] *Sunset Investments (Pty) Ltd v Brandan & others* 1973 (2) SA 415 (D), 418E-F.
[4] *Nedbank Ltd v Morsead Securities (Pty) Ltd* 1978 (3) SA 633 (W), 634H-635C.

of a judgment or in the granting of a judgment. In *Schmidlin v Multisound (Pty) Ltd*,[5] Van den Heever J stated:

'Delay is however relevant in this case, not *per se*, but because that judgment was not a mere paper tiger but was being executed albeit in minuscule monthly instalments, via the s 65 proceedings in the magistrate's court. Acquiescence in the execution of a judgment must surely in logic normally bar success in an application to rescind on the same basis as acquiescence in the very granting of the judgment itself would.'

[11] The final issue that I now turn to is whether the defendant has set out a defence. In his founding affidavit he explained that he was sued as surety for SFTP which had contracted with the plaintiff for the supply of steel tubing and related products on credit. When SFTP defaulted, the defendant was sued as surety. After the matter was settled by way of the deed of settlement, SFTP 'subsequently made payments to the plaintiff in terms of the said court order and Settlement Agreement via two of my other companies Rickshaw and Cashmere Trade'.

[12] Despite the litigation the plaintiff continued to do business with SFTP but it 'only allowed SFTP to purchase materials on a COD basis and on the basis that payment would be made shortly after delivery of certain deliveries'. In the result, SFTP owed what was termed in the papers 'old debt' – that for which summons had been issues – and 'new debt' – that arising from the later arrangement.

[13] In the period after the deed of settlement was made an order of court various payments were made to the plaintiff. These, according to the defendant were meant to be allocated to the old debt but instead the plaintiff allocated them to the new debt. If it had allocated the payments as the defendants asserted it should have, his indebtedness on the old debt would have been R333 169,54 plus interest and costs and not R914 712,12.

[14] The plaintiff response to this is that payments had to be allocated to the new debt because transactions in respect thereof were initially on the basis of cash on delivery and later on short term credit 'on the basis that deliveries would be paid for

[5] *Schmidlin v Multisound (Pty) Ltd* 1991 (2) SA 151 (C), 156A-B.

within a week or two and not prior to dispatch as had been the arrangement up until then'. There had been no misallocation between new and old debt as alleged:

'The Defendant avers that the Plaintiff "cannot" purport to utilize monies paid for the "old" debt for the "new" debt. This is not correct as the defendant at no stage stipulated that the payments of R200 000,00 on the 30th April 2010 and R250 000,00 on the 23rd August 2010 were in respect of the "old" debt. He was paying his indebtedness generally and in terms of the arrangement with him payments were allocated firstly to the current purchases and only payments not utilized in respect of the current purchases could be allocated to the "old" debt. All of the payments subsequent to October 2009 were made by way of electronic funds transfer and simply appeared as credits in the plaintiff's banking account without any stipulation as to whether they were in respect of "new" or "old" debt and all of the allocations were made from October 2009 to the "new" debt right up to the final payment on the 23rd August 2010 when the surplus of R136 792,92 was allocated to the "old" debt.

[15] On this basis the amount owed on the old debt was indeed R914 612,12 – the amount for which judgment had been granted.

[16] In motion proceedings such as this, when a conflict of fact arises, it is resolved, in essence, by the acceptance of the respondent's version.[6] For present purposes, that means that the plaintiff's version as to how and why payments were allocated is to prevail. That version is, in any event, logical, while the defendant's version makes no sense in the context of the terms upon which he was allowed to incur the new debt. Why would the plaintiff allow him to pay off the old debt and not pay the new debt on the terms upon which the credit was granted, especially in view of the fact that the credit was extended on a short term basis precisely because of the existence of the old debt and the defendant's poor track record in repaying what he owed.

[17] When the plaintiff's version is accepted, it follows that the default judgment was taken for the amount that was owed and that means that the defendant has no defence. His application for the rescission of the judgment cannot therefore succeed.

[18] In the result, the application is dismissed with costs.

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[6] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), para 26.

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C PLASKET

JUDGE

APPEARANCES:

For the applicant/defendant: Ms K Watt, instructed by Borman and Botha, Grahamstown

For the respondent/plaintiff: Mr G Dugmore, instructed by Netteltons, Grahamstown