Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 3300/2012

In the matter between:

JOSEPH LANDMAN	First Applicant
RIAAN VISSER	Second Applicant
DEBBIE VISSER	Third Applicant

and

ABSA BANK LIMITED	First Respondent
SHERIFF OF THE HIGH COURT	Second Respondent
LAURA ROSS NO	Third Respondent
GRANT JOHN JURGEN ECKERMANS NO	Fourth Respondent
HENRY ROSS	Fifth Respondent
LAURA ROSS	Sixth Respondent

JUDGMENT

REVELAS J

[1] This is an application for the rescission of a judgment of this court obtained by the first respondent ("the bank") on 23 October 2012, against the applicants jointly and severally, in their capacities as sureties and co-

principal debtors for the obligations of JAH Packaging ("the principal debtor"). The latter was held to owe the bank R957 598.83 and R28 984.74 together with interest and costs on an attorney and client scale. The moneys were due and payable in respect of a loan secured by a mortgage bond and overdrawn cheque account respectively.

[2] The credit agreements in respect of which the aforesaid sums were advanced to the principal debtor were concluded prior to 1 July 2007. As at 6 July 2012, when the principal debtor was in liquidation, the bank issued two certificates of balance in terms of which the amounts in the judgment were certified as owing.

[3] The applicants, and also the fifth and sixth respondents herein, stood surety for payment of the principal debtors' obligations towards the bank. When the principal debtor went into liquidation the bank sued the sureties including the applicants, for the amounts owed by the principal debtor. The judgment sought to be rescinded was obtained in their absence.

[4] The bank pointed out that the applicants have not stated whether why their application was in terms of the Rules of Court or the Common Law. That may be so, but the applicants are before me in person, their erstwhile attorneys having withdrawn at the eleventh hour.

[5] When the matter was postponed by Msizi AJ on the, previous occasion (4 September 2014) she had cause to issue a rule in terms of Practice Rule 7A, calling upon the applicants' attorneys to explain why an order should not be made that the attorneys pay the costs occasioned by the postponement *de bonis propriis.*

[6] In my view, such an order is justified since Misizi's AJ's rule had come to the attention of the attorney concerned. I am informed he was present in court when she gave her *ex parte* ruling.

[7] The judgment in the main action was granted in the absence of the applicants by the registrar, not the court. Therefore Uniform Rule 31(2)(b) finds no application. The applicants mainly rely on the defence that they never received the notices in terms of section 129 of the National Credit Act, 34 of 2005 ("the Act").

[8] In court the second applicant said that the reason for not receiving the notice was because they had moved to a new address. They did not however, as they were obliged to do, notify the bank of their change of address. The bank can therefore not be faulted for serving at the notices in terms of section 129 of the Act on their chosen *domicilium.*

[9] The second and third applicants, relying on their marriage being in community of property, contended that the suretyships signed by them did not contain the necessary consents in terms of section 15(2)(h) of the Matrimonial Property Act, 88 of 1984. This section prescribes that a spouse married in community of property shall not bind himself as surety without the written consent of his spouse. Section 15 of the Matrimonial Property Act has as its purpose the prevention of spouses binding their joint estate without the consent of each other. By acting jointly and signing the suretyships together, thus binding their joint estate, it is not open to them to deny that they gave their consent. It can be inferred with certainty from their conduct.

[10] The applicants consequently do not have a *bona fide* defence and they have no reasonable explanation for their default. They also did not pursue any *bona fide* defence with much vigour during argument. They are of the view that the bank should not look to them for repayments as they did not expect the principal debtor to run into financial difficulties, such as being liquidated. They also correctly pointed out that their liability was limited to R600 000.00. The bank has properly conceded that the amounts contained in the order made against the applicants ought not to have been in excess of R600 000.00, as that was the maximum amount for which they could be held liable in terms of the suretyship.

[11] The second applicant, who represented himself and his wife, stressed that the property of the principal debtor (at Geduldsriver) was still in its name, but was tied up in the deceased estate of a Mr Kacnis who had purchased the property for R1 million but had died before transfer could take place. His widow had apparently indicated that she was prepared to pay rental arrears on the property.

[12] The second applicant stated that he has been unsuccessful in persuading the bank to rather pursue the sale of the property than excussing the sureties. Mr Richards, counsel for the bank, informed me that his client's attorney had given an undertaking to open the channels of communication between the bank and the second and third applicants (who stand to lose their home) regarding the sale of the property.

[13] In the circumstances the following order is made:

1. The application for rescission of the judgment obtained by the first respondent is dismissed, save to the extent that the second and third applicants are entitled to have that portion of the judgment that exceeds R600 000.00, rescinded as against them, and it is hereby so rescinded.

2. The first respondent's attorneys of record are to arrange a meeting between a representative of the first respondent and the second and third applicants with a view to investigate whether the property at Geduldsrivier, (presently in possession of Mrs Kacnis) could be sold and any of the proceeds of the sale or rental utilized to extinguish the principal debtor's indebtedness to the first respondents, thus discharging the indebtedness of the applicants towards the first respondent in terms of the sureties signed by them.

3. The costs of this application is to be paid by the applicants, save to the extent that the second and third applicants are only liable for one third of such costs.

4. The costs occasioned by the postponement of 4 September 2014 are to be paid by the applicant's erstwhile attorneys Leon Keyter Attorneys, *de bonis propriis.*

_____

E REVELAS
Judge of the High Court

For the applicant's Mr Landman, Mr & Ms Visser in person.

Counsel for the first respondent, Adv JG Richards, instructed by Sandenbergh Nel Haggard.

Date Heard: *12 November 2014*

Date Delivered: *27 November 2014*