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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 19327/01

2002-08-29

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

DATE 23/10/2002 SIGNATURE

In the matter between

ERROL JOHN FRIEDMAN Applicant

and

THE STANDARD BANK OF SA LTD Respondent

J U D G M E N T

WILLIS, J: This is an application for rescission of a judgment granted by default. On 25 October 2001 the respondent obtained default judgment against the applicant in the office of the Registrar as follows:

"1. Payment of the sum of R4 750 000;

2. Interest on the sum of R4 750 000 at the rate of 16,5% per annum from 28 August 2001 to date of payment,

both days inclusive calculated on daily balance and capitalised monthly in arrears.

3. Attorney and client costs to be taxed."

The applicant has explained his failure to enter appearance to defend by reason of the fact that the summons was served on the *domicilium citandi et executandi*. Subsequent to signing the document in which the *domicilium citandi et executandi* appears, he changed his address and was not aware that the summons had been served.

Although the respondent submits that the applicant has only himself to blame for the fact that the summons never came to his notice, the respondent does not really take any issue with the explanation for the failure to enter an appearance to defend and submits rather that the applicant has not shown any *bona fide* defence. In my view this concession was correctly made.

The claim of the respondent rests upon a suretyship document. It is common cause that this document was indeed signed by the applicant and there is no dispute as to its validity. The suretyship document upon which the respondent relies is a standard form used by the respondent. It was signed by the applicant to secure the indebtedness of Erf 3296 Ottery Investment (Pty) Ltd to the respondent. I shall hereinafter refer to Erf 3296 Ottery Investment (Pty) Ltd as the principal debtor.

Clause 12.1 of the standard form contains the standard clause which reads as follows:

"The surety hereby renounces the benefits of excussion and division and all other benefits and legal exceptions that could or

might be raised or pleaded by the surety in answer to any claim by the bank under this suretyship."

The words "excussion and" appearing immediately before division were deleted and initialled by the parties to this document. In other words, it is patently clear and no issue was taken of the fact, that the applicant deliberately and pertinently declined to renounce the benefit of excussion.

In October 1995 the applicant and the respondent and the principal debtor and various other parties entered into a comprehensive agreement which was referred throughout the submissions on behalf of the parties as the shareholder agreement. I read paragraph 4.1 of this agreement:

"SCMB (i.e. the respondent) and the designated persons have agreed to undertake a limited joint venture in order to undertake the development on the property in accordance with the footprint plan, the viability and brief specification annexed marked 'A' on the basis that two separate buildings shall be erected on the property in two separate phases."

Clause 4.3 of this agreement reads as follows:

"The parties agree that no steps whatsoever shall be undertaken concerning the first or the second phase of the development unless and until 50% of the first phase or the second phase, as the case may be, by rental value is pre-let in terms of duly concluded leases approved by the directors of the company."

It is common cause that in respect of the second phase referred to in clause 4.3 duly concluded leases approved by the directors of the company were not obtained.

In December 1995 the applicant, respondent and the principal debtor together with various other parties entered into an agreement which has been referred to by counsel throughout their submissions as the loan agreement. This document takes the form of a letter addressed by the respondent to the principal debtor which provides for acknowledgements and agreements to the loan agreement as a whole to be signed by all the various parties to whom I have already referred. Clause 4 of this loan agreement reads as follows:

> **"Purpose of the Loan**
>
> The Company acknowledges that the loan is being granted under the provisions of clause 13.2 of the Shareholders Agreement to assist it to pay for the Development and for no other purpose whatever."

Clause 13.2 of the aforesaid shareholders agreement reads as follows:

> "The Company shall borrow a sum of R9 500 000 from SCMB (the respondent) on SCMB's usual terms and conditions. Such loan shall not be subject to the provisions of the remainder of this clause. The designated persons shall bind themselves as sureties and co-principal debtors in favour of SCMB in respect of 30% of such loan."

The loan agreement and the shareholders agreement are therefore clearly fundamentally linked to each other and the two must, in my view, be read together.

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On 27 August 1998 the applicant addressed a letter to the respondent. The relevant portions of this letter read as follows:

"1. I write in my capacity as a prejudiced surety for the obligations of Erf 3296 Ottery (Pty) Ltd.

2. I refer to a meeting held on 21st August 1998 attended by Messrs Brett Shaw, Michael Henning, Lisa Forshay and one other. I was not invited to attend the meeting but was requested to join it for a brief period.

3. Thereupon Brett Shaw invited me to sign a document apparently authorising an increase in the sum of the bond. I declined to do so and repeated my previous opposition to the development of phase 2 of the project.

4. During a subsequent meeting with Brett Shaw on 25th August I again reiterated that Standard Bank by virtue of the invitation had contrived surreptitiously to reinstate my surety which had already been breached and which I considered to be of no force or effect.

5. I again place on record the following:

5.1 When about 11 months ago the proposed development of phase 2 was brought to my attention indirectly and by Mike Henning I recorded my opposition.

5.2 I specifically rejected the proposal because it was in breach of our mutual agreement that no

development could proceed until such time as 50% of the space was pre-leased in terms of rental and via signed leases.

5.3 At the same time Mike Henning notified me that a neighbouring property owner had offered to pay R1 million for phase 2 ground and that he, the neighbour, would develop the phase 2 ground. The two developed entities would result in synergy to bring critical mass to the entire development."

He ends saying:

"Finally, given that the project was only an apparent six weeks away from completion, it appeared ridiculous to stop the project now. Under these circumstances I agreed that it was appropriate and proper for Standard Bank to ensure that the project be completed. However, in giving this view, Standard Bank should not construe it as a condonation of the breach of the shareholders' agreement."

On 22 October 1998 the parties, namely the applicant, respondent, the principal debtor and various others, entered into a so-called addendum to the limited joint venture agreement. And also in the same month the parties entered into a further loan facility which appears in a document dated 11 September 1998 which again had been prepared by the respondent and which the applicant signed. The applicant signed a clause which reads as follows:

"I, having bound myself to The Standard Bank of South Africa Limited ("SBSA") as surety and co-principal debtor with Erf

3296 Ottery Investment (Pty) Ltd ("the Company") for all the indebtedness of the Company to SBSA in terms of a suretyship for R4 750 000 signed by me on 8 December 1995, do hereby acknowledge and consent to the amendments and variations to the terms of the loan referred to in the aforegoing letter."

However, at the top of this document it is common cause that the applicant wrote the following words:

"Furnished pursuant and subject to the Addendum signed by all parties thereto other than Standard Bank, on 29 September 1998, to the limited Joint Venture agreement dated 6th October 1995".

The applicant explains his having signed this facility letter in the following terms:

"I admit that Annexure AA4 to the answering affidavit constitutes a facility letter dated 11 September 1998. I also admit that it was signed by Henning and myself. I only signed the document on 22 October 1998. At the time that I appended my signature thereto it was manifestly my view that I have been released from my suretyship in consequence of the conduct of the respondent. I have been urged to sign by the respondent's attorney of record upon the basis that my right to contend that I have been released of my obligations as surety would not be affected thereby. I specifically refer this Honourable Court to Annexure 'L' to my founding affidavit being a letter addressed by me to respondent's attorney of record at the time, Paul Winer, and in terms of which I

reiterated that my perspective as surety was set out in my fax of 27 August 1998 which I despatched on 30 August 1998 (vide Annexure 'B' to the founding affidavit). I also refer this Honourable Court to Annexure 'N' being a letter from the respondent's attorney of record, Winer, to me in which he pertinently advised me as follows:

> 'I do not believe that this amendment is prejudicial to you but in any event as I have mentioned in my telephone discussion with you, you can sign the amendment to the shareholders' agreement on the basis that you reserve whatever rights you had in respect of the shareholders' agreement prior to the amended agreement being signed. I am sure that if you intend reserving your rights in terms of the suretyship, my client will have no objection. If you believe that you have been prejudiced as a result of the second phase of the project proceeding, you will be able to raise this defence at a later stage. In this regard I again reiterate that it would be far better for you to take the risk that the project will succeed than you "dig your heels in' in which event there is a strong possibility that the company will be placed in liquidation. In this event my client would then take action against you in terms of the suretyship and if your defence does not succeed you will surely have exercised the wrong option because the claim against you in terms of the suretyship may not eventuate in the event of the second phase being

completed. I have read the allegations recorded in your telefax of 27th August 1998 and addressed to my client. My client does not intend to comment on the merits of your defence to the suretyship and I believe that it is inappropriate for my client to do so at this stage of the proceedings. I, however, believe that you should reserve your rights to raise a defence but that phase 2 of the development should proceed immediately for the reasons referred to in my telefax. You certainly cannot suffer any further losses. Your position would, in my view, be strengthened by the development being completed and would possibly be worth far more than if liquidation of the company were to be contemplated."

He continues to say:

"Even if it is true that Ottery (i.e. the principal debtor) were to face financial collapse if phase 2 had not been proceeded with, such a collapse would have occurred in circumstances where Ottery's indebtedness to the respondent did not significantly exceed its assets, if it exceeded those assets at all. Stated at its lowest, even if Ottery's assets were exceeded by its liabilities in such an eventuality, it is highly improbable that I would have been exposed to the capital sum by respondent to the tune of R4 750 000."

The respondent replies to these allegations as follows:

"7.4 I am informed by Henning that at or about the time of the completion of phase 1 of the development when it

became apparent that Ottery had overspent in respect of phase 1 and that because of insufficient rental recovery phase 1 was unable to meet the interest charges in respect of the loan from the plaintiff, Ottery was left with certain alternatives. Henning informs me that these alternatives were discussed at the meetings referred to in 7.3 and were advised by Henning to the defendant.

7.4.1 Sell the entire development as it then existed;

7.4.2 Sell the completed phase 1 development and retain the phase 2 land for later development;

7.4.3 Sell the phase 2 land;

7.4.4 Complete phase 2 with a view to enhancing the whole development and either thereafter selling the entire development or from the projections which Ottery made at the time derive sufficient income from the entire phase 1 and phase 2 development so as to meet the commitments of Ottery.

7.5 To this end I am advised by Henning that Ottery attempted to proceed with all four alternatives referred to in 7.4 simultaneously.

7.6 Ottery did indeed receive a few informal offers for the purchase of the entire development as it then stood and for the vacant land on which phase 2 was to be constructed.

7.6.1 One such offer was from a Mr R du Plooy who

wanted to assemble a property fund under the name of West Cape. His offer was to purchase phase 1 for R3 million. It was obviously a totally inadequate offer having regard to the then outstanding amount to the plaintiff.

7.6.2 A second offer was received by Mr Ralph Garlick for approximately R1,8 million for the vacant land which was to constitute phase 2. This offer was also unacceptable and would most certainly not have rescued Ottery from its then existing predicament with which I shall deal below. Mr Garlick's officer was subject to the granting of an enormous loan and restructure of the approved development plan. It was considered at the time to be highly unlikely that Ottery would have qualified for the land and that attempts to obtain the land would has resulted in substantial delays and uncertainties. Mr Garlick's offer was for these reasons alone quite unacceptable.

7.6.3 A third offer was received from a Mr James Gorey to purchase the phase 2 land for approximately R1,125 000. Gorey's offer was similarly unacceptable.

The outstanding amount of the indebtedness of the principal debtor to the respondent at the conclusion of phase 1 was in excess of R6 million. This fact is common cause.

It is trite that a suretyship agreement is accessory to another agreement. In other words, it has no life on its own and depends for its legal enforceability on the existence of a valid principal debt. The debt of the principal debtor in this case is, however, clearly bound up with the shareholders agreement. The two must clearly be read together. It seems to me that as the respondent was a party to the agreement relating to phase 2 of the development, then if there was a failure to comply with the terms and the applicant did not agree thereto or waive his rights in respect thereof, the applicant may indeed have a good defence to any claim that arose from phase and2. In other words, although the suretyship was signed "as continuing security", legal consequences favourable to the applicant would arise from (a) the failure of all the parties to the shareholders agreement and the loan agreement to comply with the terms relating to phase 2 and (b) the applicant's clear protest with regard to this failure. It seems to me also that legal consequences favourable to the applicant may well arise from the letter from the respondent's attorney to him, especially as he had protested with the continuing of phase 2 and his continuing liability as surety.

The respondent's case *inter alia* was that in any event the liabilities of the principal debtor exceeded R6 million at the end of phase 1. The applicant says that if there was indeed a valid debt of the principal debtor at the end of phase 1, the applicant would have been entitled to raise the benefit of excussion and the respondent would first have to seek to recover from the principal debtor. It submits that there is at this stage no way of knowing precisely what

would have been recovered from the principal debtor if an attempt had been made to recover from it at that stage.

With regard to the benefit of excussion, I shall for the sake of convenience quote from Caney's well-known work, *The Law of Suretyship*, 2nd ed at 101:

> "The benefit of excussion is the right of a surety against the creditor to have him proceed first against the principal debtor with a view to obtaining payment from him if necessary by execution upon his assets before turning to the surety for payment of the debt or of so much of it as remain unpaid." (my emphasis)

The applicant, therefore, does not dispute the amount which the principal debtor owes or owed but disputes the amount that would have been owing by him if the respondent had first had recourse to the principal debtor.

The respondent has replied by way of argument that it has an election at any stage within three years of the principal debt having arisen to decide when to recover from the principal debtor. This is undoubtedly correct but Mr Eloff, who appears for the respondent, has, in my respectful view, missed the point: If the loans which arise from phase 2 are open to attack (and in my view they are), then the amount that would have been paid by the principal debtor at the end of phase 1 to the respondent (and therefore the balance, if any, owing by the applicant) must be determined *ex tunc* (i.e. at the end of phase 1) and not *ex nunc* (i.e. during or after phase 2). Crisply stated, the applicant's case is this: I do not know what amount would have been

owing by me if the respondent had sought to recover from the principal debtor at the end of phase 1 and I am entitled to put the plaintiff to the proof thereof.

The applicant is not merely casting suspicion on the *prima facie* indebtedness of the principal debtor, nor indulging in hypothetical speculation. It is his case that although there may indeed have been a valid debt owed by the principal debtor to the respondent in an amount exceeding R6 million, he still does not know how much the principal debtor would have paid if called upon at the appropriate stage to do so.

I refer to the well-known case of *Chetty v The Law Society Transvaal* 1985 (2) SA 756 (A) where the following is said at 765B:

> "It is clear that in principle and in the long standing practice of our courts two essential elements of 'sufficient cause' for rescission of a judgment by default are:
>
> (i) that the party seeking relief must present a reasonable and acceptable explanation for his default;
>
> (ii) that on the merits such party has a *bona fide* defence which, *prima facie* carries some prospect of success."

The test for granting rescission of default judgment has been expressed slightly different with varying degrees of emphasis. Another way of expressing the test is whether the applicant has shown a *prima facie* case or the existence of an issue which is fit for trial. See *PLJ Van Rensburg & Vennote v Den Dulk* 1971 (1) SA 112 (W); *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (W). Another way of expressing the test has been to say that

"the object of rescinding a judgment is 'to restore a chance to air a real dispute'." See *Lazarus v Nedcor Bank Ltd; Lazarus v ABSA Bank Ltd* 1999 (2) SA 782 (W). It has also been said that the applicant need not deal fully with the merits of the case but the grounds of the defence must be set forth with sufficient detail to enable the court to conclude that there is a *bona fide* defence and that the application is not made merely for the purpose of harassing the respondent. See *Ngcezulla v Stead* 1912 EDL 110; *Scheider v Abel* 1916 CPD 346; *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476. And see generally Erasmus, *Superior Court Practice* B1-204.

In my view accordingly the applicant has indeed established that he has a *bona fide* defence which has some prospect of success.

An order is made as follows:-

1. Rescinding the judgment granted in the above matter on 25 October 2001 in the fault of appearance by defendant against the defendant for payment of the sum of R4 750 000 together with interest thereon at the rate of 16.5% per annum from 28 August 2001 to date of payment and attorney and client costs.
2. Granting defendant leave within seven days of this order to enter an appearance to defend the action.
3. Directing plaintiff to file plaintiff's declaration within 30 days of an appearance to defend having been entered.
4. Directing plaintiff to bear the costs of this application.

ON BEHALF OF APPLICANT	:	ADV A G SAWMA
Instructed by	:	Graham Greenstein
ON BEHALF OF RESPONDENT:		ADV C M ELOFF SC
Instructed by	:	Ramsey Webber & Co
DATE OF JUDGMENT	:	29 AUGUST 2002