IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

Reportable: NO

Of interest to other judges: NO

Revised.

20/2/2017

Date of hearing: 15 February 2017 Date of judgment: 20 February 2017

In the matter between: Case number 32115/2015

WILLIAM ARTHUR DARIER Applicant

and

FIRSTRAND BANK LIMITED Respondent

JUDGMENT

BRENNER, AJ

1. This application involves the rescission of an order for default judgment against the applicant, William Darier, ("William Darier"), on 17 June 2016.

2. On 15 March 2011, and In advance of the loan facility adumbrated below, William Darier stood surety for and agreed to act as co-principal debtor in solidum with principal debtor Cimco SA Pipes CC ("Cimco") for Cimco's debts to the respondent, Flrstrand Bank Limited ("FRB"). On the same date, his parents, Eric and Jean Darier, also agreed to stand surety for the debts of Cimco.
3. Six months later, on 20 September 2011, a written loan agreement was concluded between FRB and Cimco, in terms of which R8,9 million was agreed to be lent to the latter.
4. From time to time, the facility was revised and whenever this occurred, the deeds of suretyship were revised to ensure that same applied to the variations of the loan agreement with FRB. This is not in issue.
5. Messrs Eric and Jean Darier, married in community of property, secured their obligations in terms of the facility by way of a mortgage bond over their property situate at portion 2 of erf […] Northcliff Extension 1, Gauteng. This property was acquired on 25 July 2011and registered on 20 January 2012. The purchase price was R9,5 million and the property was encumbered in favour of FRB for R6,5 million.
6. On 15 September 2014, some three years after the grant of the loan, Cimco voluntarily liquidated itself by order of Court. This followed Cimco's initial business rescue application.
7. Circa mid 2014, Cimco had fallen into arrears with the repayment of the loan to FRB.
8. On 10 September 2015, FRB launched motion proceedings for judgment against all of the Dariers, jointly and severally. The application was opposed. They were represented by Greeff Attorneys. On 19 October 2015, Eric Darier deposed to a fourteen page answering affidavit, supported by confirmatory affidavits dated 19 October 2015 from William and Jean Darier. All of these affidavits were signed before one Louisa van den Berg at Postnet Northcliff.
9. On 17 February 2016, certain Immovable property situate at erf […] Northcliff Extension 12, Gauteng, purchased on 8 July 2015, for R3,8million,was registered In William Darier's name, subject to a bond for R2,6million in favour of SB Guarantee Co RF (Pty) Ltd.
10. On 22 March 2016, Messrs Eric and Jean Darier were provisionally

sequestrated at the behest of Blue Strata Trading (Pty) Ltd, and finally sequestrated on 11August 2016. Their trustees are not joined to this application, and no objection to this omission was preferred at the hearing of this matter.

11. On 17 June 2016, considering the intervening provisional sequestration of Messrs Eric and Jean Darier, FRB abandoned its claim in the main application to declare the encumbered property of Eric and Jean Darier specially executable. Instead, it applied for default judgment against William Darier. Judgment was granted against him for payment of the sum of R6 258 481,36, plus mora interest and costs.
12. On 14 July 2016, a writ against movable property was Issued against William Darier. Same was served on 20 July 2016, when the sheriff rendered a nulla bona return of service.
13. On 16 August 2016, FRB brought an application under Rule 46(1) of the Rules to declare William Darier's property specially executable. A notice to oppose was served on 6 September 2016, by Greeff Attorneys on William Darier's behalf.
14. On 26 September 2016, William Darier served the rescission application on. FRB. The Rule 46(1) application was accordingly postponed at FRB's election, pending the outcome of the rescission application.
15. William Darier relies on the provisions of Rule 31 (2) (b) of the Uniform Rules of Court and/or the common law in this application. Under this Rule, an applicant may, within 20 days after it has knowledge of the judgment, apply to rescind same upon good cause shown. "Good cause" requires that the applicant provides a reasonable explanation for the default, proof that the application is bona fide and was not made with the intention of delaying the claim against him, and that he has a bona fide defence to the respondent's claim.
16. A prima facie defence suffices. It is not necessary for the applicant to traverse the merits in the same detail as required for a trial hearing or to produce evidence that the probabilities are in his favour.
17. I refer to the condonation sought by William Darier. His application was out of time under Rule 31(2)(b). In reliance on the common law, it was served over two months after he had first learnt of the judgment, on his version. He

provides no explanation for this delay. He simply asks for condonation, which is in indulgence. t is his obligation to prove at common law that the lapse of time between 10 July 2016 and 26 September 2016 was reasonable. He made no effort to provide evidence to substantiate this.

18. Nevertheless, for the purpose of this judgment, I will assume that condonation is warranted. Objectively speaking, the delay was not inordinate.
19. The requirements for condonation were enunciated in **Minister of Safety and Securlty v Scott and Another 2014 (6) SA 1 (SCA);**

    "The principles relating to condonation are well established. The factors that this court will have regard to in considering such an application include the adequacy of the explanation, the extent and cause of the delay, any prejudice to the parties, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the avoidance of unnecessary delay in the administration of justice and the applicant's prospects of success on the merits. Condonation is an Indulgence, not to be had for the asking. A litigant who does not comply with the rules is required to show "good cause" why the rules should be relaxed. "
20. Succinctly summarized, William Darier's version is as follows. In his opinion, an answering affidavit was filed on his behalf by Eric Darier In the main application but no defences were advanced regarding his position qua surety. This was because his father had assured him that the matter would be dealt with properly and that his direct involvement was not required. On the morning of the application there was no appearance on his behalf. He asserts that, although his application is out of time under Rule 31(2)(b), it is in time under the common law, having being launched within a reasonable period of time of 20 July 2016.
21. In his defence on the merits, he asserts In his seven page affidavit that FRB was *reckless and irresponsible in the manner that it conducted itself in relation to the principal debtor, directly and the sureties Indirectly."* RMB, so he states, had approved a facility of R8 million in 2011with monthly instalments of R71 000,00, only for Cimco to have been liquidated three years later. In his view, the facility should not have been approved as Cimco was unable to service same at the time. RMB had permitted Cimco to regularly draw on the loan when Cimco was Insolvent. This constitutes reckless conduct which

prejudices not only the principal debtor but also the sureties. In the result, so he argues, the sureties should be released from their obligations. This is the sum total of the defence raised by Wiiiiam Darier on the merits.

22. Although not obliged to do so, I interpose to summarise the defences raised in the answering affidavit In the main application. The Dariers had argued that:
    a. RMB had undertaken not to issue summons until after 31 December 2015;
    b. RMB may lack locus standi because the debt may have been securitized;
    c. RMB had prejudiced the sureties by virtue of reckless trading;
    d. The National Credit Act 34 of 2005 ("the NCA") did not apply to the facts in casu.
23. The judgment of **Colyn v Tjger Food Industries Limited t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)** involved a case in which the Bellville office of a firm of attorneys were instructed to defend the case but the proper address for service of process was that of Its Cape Town office. The Cape Town office received a summary judgment application but failed to notify the Bellville office as it should have done. Summary judgment was duly granted. The Court had this to say, at page 9F et sequitur, about the explanation for the default of the applicant In its rescission application:

    "I have reservations about accepting the defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable Inefficiency on their part. It is difficult to regard this as a reasonable explanation. While the Courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there Is no alternative but to make the client bear the consequences of the negligence of his attorneys (Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A)) Even if one takes a benign view, the Inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to

put up a bona fide defence which has not merely some prospect, but a good prospect of success (Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)").

(my emphasis)

24. In casu, the explanation for the circumstances under which judgment was granted In absentia is conspicuous by its absence. Whatever the case, Inexcusable inefficiency resided somewhere.
25. Heads of argument were filed by Counsel on behalf of the Dariers in the main application. Yet William Darier does not venture to explain why there was no appearance at Court on his behalf. At all material times, Greeff attorneys were his attorneys of record. There is no supporting affidavit from Greeff or the attorney who deal with the case for Greeff to apprise the Court of precisely what occurred and whether Greeff took instructions from· the Dariers on this most crucial of aspects.
26. Assuming that William Darier relied implicitly on his father's assurances that the matter would be dealt with properly, such reliance was neither responsible nor reasonable. There is no supporting affidavit from Eric Darier to confirm this and to apprise the Court of his communications with Greeff. There is also no explanation why Greeff did not establish the outcome of the application on or shortly after 17 June 2016,after the notice of enrolment had been served on his office as far back as 12 February 2016.
27. I refer to the defence on the merits which, if it reveals good prospects of success, on a prima facie basis, may potentially compensate for the poor explanation for the default. The gist of William Dariers defence in the rescission application is that of reckless lending by RMB leading to prejudice to Cimco and the sureties. This was already mentioned in the previous answering affidavit. It is not res nova which was incorrectly omitted from the first affidavit, as Intimated by Wllllam Darter in this application. It is an embellished reiteration of what was said in Eric Darier's affidavit.
28. William Darier makes bald, unsubstantiated denlals on issues which fall squarely within his personal knowledge. Albeit that these are peripheral to the material issues, he provides no evidence to substantiate proof of a pactum de non petendo with RMB, nor of the purported securitlzation of the debt in casu such as to vitiate RMB's locus standi.

29. He provides no evidence of the enquiries made and documents and information sought by RMB of which he must have had personal knowledge prior to RMB extending the substantial advance. He provides no detail at all of the nature and extent of Information given to RMB by Cimco and the sureties, nor its accuracy, before the loan was approved. He does not specify what RMB should have done but did not do before authorizing the advance. He provides no proof that RMB was made aware or was aware at any stage that Cimco was trading under insolvent circumstances when further amounts were paid to it.
30. He fails to state when he first became aware of Cimco's insolvent circumstances. He was in a far better position to assess Cimco's financial position from time to time than RMB ever was.
31. In the process, William Darier appears to inexplicably abdicate all responsibility for the manner in which the business of Cimco was managed, despite his having been a member of this corporation. The ultimate point of diminuendo is his patent omission to explain how and why Cimco came to spend R8,9 million over three years, what became of this money, and why Cimco was subsequently liquidated.
32. As pertinently pointed out by Counsel for RMB, the loan agreement, signed by the sureties, at clause 1 page 3 states:

    "The Bank is obliged to assess *whether you are able to afford the repayment of the total credit facility applied for. To do so, the Bank is reliant on Information requested from you and furnished by you. "*
33. And at clauses 5 and 7 of the loan agreement, signed by Eric Darier on behalf of Cimco:

    "To the best of our knowledge and belief, the information provided to the Bank is true, accurate and complete;

    We are able to afford the repayments set out herein. "'
34. I refer to the dictum in **Wightman t/a JW Construction v Headfour (Pty) Ltd and another 2008(3) SA 371 (SCA),** at paragraph 13, which, while dealing with disputes of fact, traverses the consequences of bare allegations, (my emphasis included):

    "A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit

seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader factual matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual a/legations made by the other party. But -when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter. "

35. I was referred by Counsel for William Darier to the judgment in **Absa Bank Limited v Lowting 2013 JDR 1826 (GNP).** At paragraph 55 of this judgment, the Honourable Ms Justice Jansen spoke of a situation where:

    ".....the banks may see a loophole to advance exorbitant amounts of credit to juristic persons such as close corporations and have the members sign suretyship and co-principal debtor agreements in the full knowledge that they will not be able to repay the credit granted."

36. The sureties in casu are plainly not individuals who are financially constrained, nor illiterate, on the objective facts. Eric and Jean Darier could afford to buy a property in Northcliff for R9,5 million two months before RMB granted the loan. William Darier was able to acquire another property, In Northcliff, in February 2016, for R3,8 million, post Cimco's liquidation, and the

launch of the main application.

37. To qualify for mortgage bonds, the Banks conduct rigorous enquiries to ensure that repayment of instalments are fully sustainable. To qualify for substantial loans to corporate entities, the Banks are similarly rigorous and usually call upon members or directors to stand surety, (and Indeed co-principal debtor), conducting similar checks on the sureties to ensure that the suretyships obtained will provide for potential recovery. I may take judicial notice of the aforegoing as established commercial banking practice.
38. No facts are advanced to establish that RMB would or could have had full knowledge of Cimco's or the sureties' Inability to repay the credit granted In casu. I respectfully disagree with the findings in the **Lowting** case. This case was referred to me to support the argument that sureties may rely on the NCA where they are individuals who stand on the same footing as the principal debtor by standing surety as co-principal debtor in solidum with the principal debtor, despite the principal debtor being a juristic person.
39. I endorse the ratio in **Neon and Cold Cathode Illuminations (Pty) Ltd y Ephron 1978(1) SA 463 (A)** which held, where a surety was also a co-principal debtor, that this did not transform the contract into any other species of agreement other than a suretyship. This was affirmed in a case post the NCA's promulgation, namely: **Firstrand Bank Limited v Carl Beck Estates (Pty) Ltd and another 2009 (3) SA 384 (T).**
40. I pause to mention the practical consequence of a surety for a juristic corporate body being able to rely on the NCA for a defence of reckless lending. The juristic body may safely argue that it should be treated in similar fashion, without discrimination, and that the NCA should apply equally to it, despite clear statutory provisions to the contrary. The economic ramifications could be dire.
41. Banks may be dissuaded from lending large amounts of money to potential corporate debtors where suretyships are sought, but which may not be legally actionable. The banks' interest in the lending of money for the generation of economic activities in the open market could be seriously compromised as a result of a defence which the NCA does not entertain for large debts. This cannot be consistent with what the legislature intended. After all, the NCA exists to protect both money lenders and borrowers.

42. The alleged prejudice In this case was plainly caused by conduct which fell within the terms of the loan agreement read with the suretyships. Accordingly, whatever prejudice may have been suffered was prejudice which the sureties undertook to suffer. See **Absa Bank Limited v Davidson 2000 (1) SA 1117 (SCA).**
43. Finally, for the sake of comprehensiveness, I refer to the NCA. Under section 78(1) of the NCA, the reckless credit provisions of sections 81, 82 and 83 do not apply to consumers who are juristic persons, such as Cimco in this case.
44. The principal debt exceeds R250 000,00. Under section 4(1)(b), section 9(4)(b),section 7(1)(b), section 4(2)(c) and section 8(5) of the NCA, the NCA does not apply to the loan In question, and the loan does not apply to ancillary debts undertaken by sureties. See **RMB Private Bank v Kaydeez Therapies cc (in liquidation) and others 2013(6) SA 308 (GSJ).**
45. There was no reasonable explanation for William Darier's wilful default in failing to argue the matter on the date of enrolment of the main application. Nor was William Darier able to prove a bona fide, genuine, prima facie defence with a good prospect of success. His founding affidavit was devoid of any relevant factual substantiation for the bald statements made by him to prove even a prima facie defence which would justify the case being referred to motion or trial proceedings.
46. On a totality of the evidence, William Darier failed to prove good cause for the setting aside of the order against him dated 17 June 2016.
47. The rescission application was without foundation and Ill conceived. The deed of suretyship accommodates a claim for costs on the attorney and client scale. For these reasons, an exemplary award of costs is indicated.
48. In the result, the following order Is made:
    a. The application is dismissed;
    b. The applicant is directed to pay the costs of the application on the attorney and client scale.

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T BRENNER

ACTING JUDGE OF THE HIGH OURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

20 February 2017

Appearances

Counsel for the Applicant:	Advocate Humphries
Instructed by:	Greeff Attorneys
Counsel for the Respondent:	Advocate M de Oliviera
Instructed by:	Jason Michael Smith Inc Attorneys