REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 72355/2009

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

13 June 2014
DATE

SIGNATURE

In the matter between:

INDIGOLD CELLULAR CC	**1ST APPLICANT**
TARYN CHANTAL PILLAY	**2ND APPLICANT**
JOSHIE PILLAY	**3RD APPLICANT**
VISPANATHAN KRISHNA PILLAY	**4TH APPLICANT**
VINOSHINI PILLAY	**5TH APPLICANT**

and

FORUM 1 & 2 PANORAMA OFFICES ESTATE (PTY) LTD	**RESPONDENT**

J U D G M E N T

KUBUSHI,J

[1] The 2nd to 5th applicants are applying for the rescission of judgment granted against them on 15 October 2013. At the time when the order was granted 2nd to 5th applicants were under provisional sequestration and the 1st applicant was under provisional liquidation.

[2] The facts of the matter are that the 1st applicant entered into a written lease agreement with the respondent in 2009. It is alleged that the 1st applicant breached the agreement by failing to pay rental and vacating the leased premises. The respondent sued the 1st applicant together with the 2nd to 5th applicants for payment of rental and damages. The 2nd to 5th applicants are members of the 1st applicant and were sued in their respective capacities as sureties. Judgment was granted against the 1st applicant and its counter claim dismissed on 19 October 2012. There is no pending appeal against that order nor has the 1st applicant applied for the rescission of that judgment. Therefore the 1st applicant has been erroneously cited in these proceedings – no relief is sought on its behalf.

[3] In terms of uniform rule 31 (2) (b), a court may upon good cause shown set aside a judgment granted in default.

[4] The requirements for an application for rescission of judgment under this sub-rule are that:

4.1 the applicant must give a reasonable explanation of his or her default. The default must not be wilful or due to his or her gross negligence;

4.2 the application must be *bona fide* and not be made with intention to delay the plaintiff's claim; and

4.3 the applicant must show that he or she has a *bona fide* defence to the plaintiff's claim.

See Erasmus: *Superior Court Practice*[1] and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*[2].

REASONABLE EXPLANANTION

[5] The applicants' explanation is that they were under the impression that the liquidator would appear on their behalf at as the court had appointed him to act as their liquidator. They were also of the view that all litigation against them was suspended, like with the first applicant.

[6] The respondent's submission is that the explanation is not reasonable given the fact that on the day set for hearing Advocate Coetzee appeared on behalf of the 2nd to 5th applicants and informed the presiding judge that she was requested by Mr Desai, the applicants' previous attorney, to inform the court that 2nd to 5th applicants were provisionally sequestrated. His contention is that since the sequestration application was later withdrawn there was no valid sequestration order at the time of the trial.

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1 at B1 – 201

2 2003 (6) SA 1 (SCA) at 9E-F

[7] I do not agree with the contention by the respondent's counsel. The judgment of *Fischer v Wessels & Co (Pty) Ltd*[3] to which he referred me to was correctly decided but does not in my view find application in this instance. Factually, at the time of the trial there was a sequestration order against the 2nd to 5th applicants which was subsequently withdrawn. Since the applicants were not in court and were not legally represented in court it cannot be said that the judgment granted against them was not in default. Is their explanation reasonable? I think so. In my view, it could not be expected of the applicants to understand the intricacies of the sequestration and liquidation procedures.

BONA FIDE DEFENCE

[8] In order to establish a *bona fide* defence, it is sufficient if the applicant makes out a *prima facie* defence by setting out averments which, if established at trial, would entitle him or her to the relief asked for. He or she need not deal fully with the merits of the case or produce evidence that the probabilities are actually in his or her favour. See *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd*[4].

[9] The argument submitted by the 2nd to 5th applicants' counsel is that the defence of the applicants revolves around the agreement. The applicants have been sued for arrear rental and damages emanating from the lease agreement. The contention however is that prior to the conclusion of the agreement the parties entered into an oral agreement which was not incorporated into the written agreement and as such the present agreement does not incorporate the true intention of the parties. The

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3 1943 TPD 71 at 74

4 1980 (4) SA 573 (W) at 575H

applicants now seek to rectify the agreement. The terms of the oral agreement which were not incorporated into the written agreement are that: if the 1st applicant's service provider cancels the service agreement the applicants will be released from the lease agreement; and they will be paid for any improvements effected to the leased premises. The applicants assert that should the agreement be rectified the respondent will be liable for the payment of the amount claimed in the counterclaim.

[10] The applicants conceded that judgment has been granted against the 1st applicant, who is the principal debtor, but submit that that does not take away their rights as sureties. Their counsel referred me to a judgment in *Muller and Others v Botswana Development Corporation Ltd*[5]. It was held in that judgment that the general rule relating to sureties is that a surety may rely on any defence which is open to the principal debtor, provided such defence arises upon the obligation (one *in rem*) and not from some personal privilege granted to the debtor (a defence *in personam*).

[11] The respondent's counsel conceded in argument that the applicants as sureties are entitled to use a defence which the principal debtor (1st applicant) may have used. He submitted however, that in the circumstances of this instance, firstly, the applicants cannot avail themselves of the 1st applicant's defence because judgment has been granted against the 1st applicant and its counter claim dismissed; secondly, rectification cannot constitute an answer to the applicants' challenge because the alleged oral agreement is contrary to clause 8 of the written agreement.

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5 2003 (1) SA 651 (SCA) para [6] at 654B – G

[12] The test for whether a *bona fide* defence has been made out for purposes of rescission applications is as set out in the *Sanderson* - judgment above. The applicants should only make averments which, if established at trial, would entitle them to the relief asked for. I am thus satisfied that the averments made out by the applicants if established at trial, will entitle them to the relief asked for. They have, in my view, set out a *bona fide* defence.

BONA FIDE APPLICATION

[13] I am also of the view that the applicants' application is *bona fide*. The respondent is opposing this application on the basis of the previous conduct of the applicants in conducting this case. However on the basis of the strength of the applicants' defence I am inclined to exercise my discretion in their favour and grant them leave to proceed to trial.

COSTS

[14] The applicants in their notice of motion prayed for a cost order against the respondent in the event of opposition. However in argument their counsel was prepared to leave the issue of costs in my discretion. Although the matter proceeded on an opposed basis I am however of the view that the respondent should not be mulcted with a cost order. In my opinion a just cost order in the circumstances of this case is for each party to pay own costs.

[15] Consequently, I make the following order:

15.1 Judgment granted against the 2nd to the 5th applicants under the above case number on 15 October 2013 is rescinded.

15.2 Each party to pay own costs.

E. M. KUBUSHI
JUDGE OF THE HIGH COURT

Appearance

HEARD ON THE	**: 13 MAY 2014**
DATE OF JUDGMENT	**: 13 JUNE 2014**
APPLICANTS' COUNSEL	**: ADV H M BARNAARD**
APPLICANTS' ATTORNEY	**: DES NAIDOO ATTORNEYS**
RESPONDENT'S COUNSEL	**: ADV H R MARC**
RESPONDENT'S ATTORNEY	**: BLACKIE SWART & COETZEE ATTORNEYS**