IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

15/01/2016

CASE NUMBER: 28016/2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

SPINAZZE RUGGGERO GUIDEPPE **APPLICANT**

And

NEDBANK LIMITED **RESPONDENT**

JUDGMENT

MAVUNDLA J

[1] The applicant seeks an order in terms of which a judgment granted by default in favour of the respondent in this Court on 29 September 2014 is rescinded with a cost

order against the respondent.

[2] The application is brought in terms of rule 42(1) {a) or rule 31(2) {b) of the Uniform Court rules. It was contended on behalf of the applicant that the order was erroneously sought or erroneously granted and or that there is good cause for the rescission of the judgment, given that it was in the absence of the applicant.

[3] The claim against the applicant was set out in a simple summons and the cause of action is based upon a suretyship given by the applicant in favour of the respondent on 29 November 2004 in terms of which the applicant bound and obliged himself as surety and co-principal debtor for the repayment of all or any sum of money owing to the respondent by Quality Sleep (Pty) Ltd, a company which subsequently changed its name to Renegade Bedding (Pty) Ltd.

[4] Renegade was placed into final liquidation on the 8 November 2011. The respondent alleged that as at 27 January 2014, Renegade remained indebted to it in the amount of R80 996, 02. It supported its allegation by attaching a certificate of balance to its summons, signed by Jacques Pienaar, Senior Manager: Specialist Legal Recoveries at the respondent, which certificate specified the indebtedness of Renegade to be "in respect of an overdrawn current account". The respondent in its answering affidavit confirmed that the monies alleged to be due to it arose from an overdraft facility from which "the principal debtor could draw... whether the account was in credit or otherwise".

[5] It is not in dispute that the applicant's liability to the respondent arises from a suretyship he signed in favour of the respondent on 29 November 2004 in terms of which the applicant bound and obliged himself as surety and co-principal debtor for the repayment of all or any sum of money owing to the respondent by Quality Sleep (Pty) Ltd, a company which subsequently changed its name to Renegade Bedding (Pty) Ltd.

[6] The applicant contended in his papers that he was not in will default because he was not served with the summons nor a notice in terms of s129 because he had relocated from the initial chosen *domicile citandi et executandi* address [...] K... Drive, Linksfield Ridge Johannesburg. The summons was served at the aforesaid address by affixing to

the principal door on the 15 April 2014, according to the sheriff's return, after he had relocated.

[7] The respondent in its summons, alleged, *inter alia,* that it complied with the provisions of the National Credit Act 34 of 2005 in that on 12 February 2014 it caused a notice in terms of section 129(1)(A), read with section 123 to be despatched to the defendant. The notice was delivered to the receiving post office of the chosen address of the applicant, which post office, by delivery of a registered item notification slip, duly informed the defendant that the notice was available for collection. The relevant address was the chosen domicile address […] K… Drive, Linskfield Ridge Johannesburg.

[8] The applicant averred in its papers that he neither received the summons nor the notice in terms of s129, because he had relocated to […] L… Lane, Melrose North, Johannesburg. He further averred that he had informed the respondent of his current address during about November 2005. In this regard he attached a copy of a note titled "To Whom It May Concern"[1], stating *inter alia:* "As discussed with you, I have sold my house at […] K… drive, Links field and have moved to […] L… Lane, Melrose North.

I would appreciate it if the bank statements for Renegade Bedding and all correspondence with regards to myself (sic) or Renegade Bedding will be forwarded to […] L… Lane, Melrose North."

[9] The applicant further attached a copy of a letter dated 19 September 2011, from the respondent's attorneys Smit Joness & Pratt[2] . This letter although addressed to the applicant, "to be collected", does not reflect any address, as such it is of no assistance in proving that the respondent knew of the changed address of the applicant. However, the copy of letter dated 9 September 2011 from the respondent's other attorneys, Brooks Luyt lnc[3] was addressed to the applicant at the new address. The applicant further attached a copy of a letter from Nedbank addressed to the applicant at the new address, dated 28 September 2011[4]. In my view, it is clear that the applicant brought to the attention of the respondent his new address and therefore the s129 letter

[1] Annexure RGS2 paginated page 12.
[2] Annexure RGS3 paginated page 13.
[3] Annexure RGS4 paginated page 14.

should have been served at the current address; Vide *Sebola v Standard Bank.*[5] I am therefore not satisfied that s129 was complied with.

[10] It was submitted on behalf of the applicant that the respondent has prematurely issued the summons, without complying with the NCA, in that both the s129 and the summons were served at the previous chosen domicile address, after it had been brought to its attention of the new address. The registrar, who issued the order, erroneously did so, without being aware of the changed address and the noncompliance with sl29 of the NCA. In my view, there is merit in this contention made on behalf of the applicant. The error, arises from the very fact that had the registrar been aware of the fact that the services was effected at an address, which the applicant has already abandoned, and the court process was not likely to come to his attention, the registrar would not have issued the order by default, as such the judgment was erroneously granted. In this regard my view is fortified by what was held in *Lodhi 2 Properties Investments CC v Bondev Developments.*[6]

[11] There is merit in the submission made on behalf of the applicant that under rule 42(1)(a}, the applicant need not show good or sufficient cause to succeed with an application for rescission; relying on the matter of *Topal and Others v L S Group Management Services (Pty) Ltd*[7] and *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd.*[8]

[12] In so far as further submissions were made on behalf of the respondent, it is instructive to point out that in *Topal* matter the Court further held that once it was found that the matter fell to be decided under rule 42{1)(a), it was not necessary to decide further submissions for or against the grant of the rescission; *vide Topal* matter *supra at* 6518-C. In the premises I deem it not necessary to deal with the submissions regarding rule 31(2)(b), which seemingly was the respondent's main point in resisting the rescission application. By so saying it does not mean that the respondent's submissions in that regard were unassailable.

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[4] Annexure RGS5 paginated page 15.
[5] 2012 (5) SA 142 {CC} at para [45] et [64]
[6] 2007 (6) SA 87 (SCA) at 92A-B et 94C-D.
[7] 1988 (1) SA 639 (WLD) at 6500-J.
[8] 2010 (6) 587 (ECP) at 5971-598B.

[13] In the result the following order is made

1. That the judgment granted against the applicant in favour of the respondent under case number 2014 / 28016 by this Court on the 29 September 2014 is hereby rescinded;
2. That the respondent is ordered to pay the costs of the opposition of the application.

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N.,M MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING: 02/12 /2015

DATE OF JUDGMENT: 15/01/2016

APPLICANTS' ADV: ADV J. GROENEWALD

INSTRUCTED BY: RAYMOND C. KOSVINER ATIORNEYS

SECOND RESPONDENTS' ADV: ADV B.R. EDWARDS

INSTRUCTED BY: DRSM ATTORNEYS