IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: **NO**

Date: ***12 July 2022*** Signature:

Case Number: 66890/2010

In the matter between:

SOLOMON MOTSHWANE Applicant

and

NEDBANK LMITED Respondent

JUDGMENT

NYATHI J

Introduction

[1] The Applicant is before court seeking a rescission of a court order that was granted against him on 13 August 2012. The Applicant is a qualified medical doctor of many years standing.

[2] The Applicant bases his application on the fact that:

2.1 He had not read the documents presented to him when he signed as surety and was not aware of their significance;

2.2 He had received summons, but assumed it was not against him in his personal capacity and elected not to read it; and

2.3 He was legally represented at the time and assumed his lawyer would handle the matter.

Summary of substantial facts

[3] The Applicant was a shareholder of a company called Interlink Airlines (Pty) Ltd ("Interlink"). Interlink entered into three instalment sale agreements on 27 June 2006, 30 June 2006 and 21 August 2006 (the "Instalment Agreements")

[4] On 27 June 2006, the Applicant entered into a suretyship agreement wherein he bound himself as surety and co-principal debtor in solidum for the repayment on demand of all amounts that Interlink owed to the Respondent (the "Suretyship Agreement.)"

[5] Interlink defaulted in its payment obligations. The Respondent instituted proceedings against the three parties who signed surety on behalf of Interlink, for the payment of the amounts owing plus interest, in terms of the 3 instalment sale agreements, the one paying, the others to be absolved. Applicant is one of the three parties.

[6] On **13 August 2012** the Honourable Justice Ebersohn AJ granted an order wherein the Applicant (the Third Defendant in the proceedings before Acting Judge Ebersohn) was ordered to effect payment to the Respondent in respect of three instalment sale agreements ("the Order").

[7] The Applicant applied to rescind the Order during or about **May 2021.** His explanation for the delay, gleaned from his replying affidavit, is that:

7.1 He did not know he could apply for rescission;

7.2 His erstwhile attorney of record that assisted him in 2013 did not advise him of this option and instead assisted him with an interpleader;

7.3 He assumed because the Respondent took no further steps to execute on the Order for the years 2014 to 2019 that the matter was moot;

7.4 His second set of attorneys also did not advise him of this possibility when they assisted him in 2020.

[8] The Applicant states in his founding affidavit that whilst he had paid an attorney a deposit. This attorney drafted a plea. On the face of it, the plea is in respect of all the defendants to the proceedings. The Applicant then avers that he was never consulted by the attorney who on his own included an averment that Applicant was married in community of property and was therefore not bound by the deed of suretyship which was allegedly void

due to provisions of the Matrimonial Property Act.[1] Applicant appears to rely on this fact to support his version that the said attorney acted without his direct instruction because in actual fact he was married out of community of property with accrual.

[9] The Applicant states that he had assumed, incorrectly, that the summons claimed payment from him personally. He had assumed that the matter pertained only to Interlink and did not attend court. He also did not enquire from the attorneys who represented him whether he should attend court.

[10] The Applicant is thus raising a defence of *iustus error*. In this regard:

10.1 He admits signing the Suretyship Agreement;

10.2 He does not recognise the handwriting of the portions which were filled in manuscript, yet he admits to having initialled next to it; and

10.3 He did not read the Suretyship Agreement and had not intended entering into such agreement.

<u>The law on rescission applied to the facts</u>

[11] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)* the Supreme Court of Appeal ("SCA") held that:

> *"With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence*

[1] Section 15 (2) (h) of Act 88 of 1984.

to the plaintiffs claim which prima facie has some prospect of success..."

[12] In *Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)* Brink J held that in order to show good cause an Applicant should comply with the following requirements:

(a) He must give a reasonable explanation of his default;

(b) His application must be made bona fide;

(c) He must show that he has a bona fide defence to the plaintiff's claim.[2]

[13] The Applicant's explanation of his default is rather lacking in substance, to start with, he elected not to read the summons which were properly served. He is an intelligent, well-educated professional who is not deficient of the ability to read and appreciate a document placed before him. His decision not to read the summons therefore amounts to negligence on his part.

[14] On the Applicant's defence that he had signed the Suretyship Agreement without reading it and had not intended to enter into such an agreement, and obviously be bound by it, there is a decision which is on point. It is the matter of *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) *at paragraph [9]*, where the SCA held:

"The respondent's defence is that he lacked the intention to be bound and therefore that no agreement of suretyship was concluded. Contractual liability however arises not only in cases where there is consensus or a real meeting of the minds but also by virtue of the

[2] Excerpt from Rieks Towing (Pty) Ltd & Another v Nienaber & Another ZAGPJHC/2020/437 (Case No. 8553/2019) at Paragraph 19 per Vukeya AJ (as she then was).

doctrine of quasi-mutual assent: Even where there is no consensus, contractual liability may nevertheless ensue. The respondent's mistake is a unilateral one. Referring to the mistake of the kind the respondent laboured under, it was said in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board:*

> ‘Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered but where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded.’
>
> *‘the decisive question to be asked in cases such as this has been formulated as follows:*
>
> ‘Did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?... To answer this question, a three-fold enquiry is usually necessary, namely, firstly was there a misrepresentation as to one's intention secondly who made that misrepresentation and thirdly was the other misled thereby? ... The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?

[15] The Applicant did not make any averments as to having been misled due to a misrepresentation. Instead, the Applicant states that he would sign documents placed before him by the First Defendant which "related to the affairs of Interlink." This is not a reasonable explanation, nor does it constitute a valid basis to rely upon *iustus error*.

[16] The legally recognized defences which could help a signatory to a contract avoid liability are: misrepresentation, fraud, duress and undue influence. Absent any of these, liability will follow.[3]

[17] What flows from the above is that the Applicant was not able to present and sustain a bona fide defence. What seems to have spurred the Applicant on to launch this application is when the Sheriff came knocking to attach his assets.

[18] Similarly in *Rieks Towing (Pty) Ltd v Nienaber*[4], after the judgment was obtained against the Respondents, it took them eight (8) months to bring an Application for rescission of judgment. This was after the Sheriff attended to their property to remove attached assets. In the Rieks Towing matter the application for rescission was successful, the Applicants having proffered a defence which was found by the court to be valid.

[19] I reiterate the fact that in casu the Applicant's evidence as presented, did not persuade me that he has a bona fide defence with good prospects of success.

[3] The Law of Contract – RH Christie (5th Edition) Chapters 7, 8 and 9

[4] Rieks Towing (Pty) Ltd & Another v Nienaber & Another ZAGPJHC/2020/437 (Case No. 8553/2019) at Paragraph 8.

[20] I accordingly make the following order:

The application is dismissed with costs.

J.S. NYATHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

PRETORIA

CASE NUMBER: 66890/2010

HEARD ON: 15 March 2022

DATE OF JUDGMENT: 12 July 2022

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