IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

Case Number: 57429/2018

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

31 October 20222

In the matter between:

NICHOLAS LOUIS JANSE VAN RENSBURG **(Identity Number: [....])**	Applicant
and	
ABSA BANK LIMITED **(Registration No. 1986/004794/06)**	1st Respondent
N AND C TECHNOLOGIES (PTY) LTD **(Registration No.: 2006/010894/07)**	2nd Respondent
CLAUDIUS HENDRIK SCHOEMAN **(Identity number: [....])**	3rd Respondent
SUSANNA MARIA HAMAN **(Identity number: [....])**	4th Respondent

ALBERTUS JOHANNES ANDRIA JACOBUS HAMAN 5th Respondent
(Identity number: [....])

JUDGMENT

NYATHI J

A. Introduction

[1] This is an opposed application for rescission of a default judgment granted on the 20 November 2018.

[2] The Applicant simultaneously seeks condonation for the late filing of the application for the rescission as well as costs in the event of opposition of this application.

[3] The Applicant bases his application on the ground that there is good cause for the rescission of the Order, alternatively, that the order was erroneously sought and/or granted, further alternatively, that it is just in the circumstances for the Order to be granted.

B. Background:

[4] During September 2006 the Applicant and Third Respondent entered into a loan agreement, more specifically an overdraft facility with the First Respondent ("The Bank") and simultaneously entered into a surety agreement.

[5] During the course of 2013 the Applicant and the Third Respondent sold their interest in the Company ("Second Respondent") to new purchasers.

[6] Following the sale of their interest in and to the Second Respondent, the Applicant and the Third Respondent immediately settled any and all debt of the Second Respondent due to the Bank.

[7] At the same time, all the parties to the Sale of Business Agreement attended at the offices of the Bank, which was at the time represented by one “Tersia Olivier”, during the course of which Tersia Olivier was informed that the Applicant and the Third Respondent’s interest in and to the Second Respondent had been sold and that the “new directors” were taking over the accounts of the Second Respondent/the Company (and, as such, that the Applicant and the Third Respondent would no longer have anything to do with the Company.)

[8] Tersia Olivier was acting in her capacity as the representative of the First Respondent. She noted and confirmed the information provided to her, following which the Applicant accepted that the Suretyship Agreement had been cancelled in accordance with its terms.

[9] During the course of April 2018, the Applicant received a notice in terms of section 129 of the National Credit Act 34 of 2005 from Phatshoane Henny Attorneys purportedly acting for the First Respondent, in terms of which the First Respondent demanded payment from the Applicant in terms of the Suretyship Agreement.

[10] During the course of May 2018, the Applicant, via his then attorney of record responded to the above letter restating that the Applicant’s interest in the Second Respondent had been sold during 2013. Following this letter, the Applicant never received any further communication from the First Respondent.

[11] On 6 April 2022, which is almost 4 years later, the Applicant was served with a Warrant of Execution, which is how the Default Judgment came to the Applicant’s attention.

[12] The combined summons was not served on the Applicant at any stage.[1]

[1] Para 7.11, founding affidavit.

[13] The Applicant seeks rescission in terms of Rule 31 of the Uniform Rules of Court, alternatively, in terms of Rule 42, further alternatively, that it is just in the circumstances for the order to be granted.

[14] The Application is opposed by the First Respondent, who filed an answering affidavit on or about 13 June 2022. From the First Respondent's answering affidavit, it is apparent that the opposition is based on the following grounds, namely the allegation that:

> 14.1 The Applicant does not have a bona fide defence, in that the Applicant is under the mistaken impression that the suretyship was cancelled and that the claim against the Applicant could not have prescribed, and
>
> 14.2 The Applicant did not bring the current application within 20 days of becoming aware of the judgment in question.

C. <u>The legal requirements for rescission:</u>

[15] The requirements for an application for rescission under Rule 31(2)(b) have been stated to be as follows:

> *'(a)* The applicant must give **a reasonable explanation** of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.
>
> *(b)* His application must be **bona fide** and not made with the intention of merely delaying plaintiff's claim.
>
> *(c)* He must show that he has **a bona fide defence** to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.' (emphasis added).

D. The Applicant's version:

[16] In his founding affidavit, the Applicant has stated the chronology of events leading up to the first time that he became aware of the existence of the default judgment against him. That was at the time when the notice in terms of section 129 of the National Credit Act was served on him. He therefore was not in wilful default but was unaware of the existence of the order.

[17] He asserts that he brings his application bona fide in that as soon as he became aware of the order he took steps to deal with the matter. The matter is accordingly being heard a month and 3 days later.

[18] The Applicant lays claim to a bona fide defence. As he tabulated in his founding affidavit, he and the new directors of the Company had attended at the Bank in 2013. His mission had been to introduce the directors and to notify the Bank that he is no longer responsible for the suretyship, having settled his indebtedness to the Bank. This is the meeting where the Bank was represented by Ms Tersia Olivier.

[19] The Applicant was assured by Tersia Olivier that everything was in order and he assumed that all ties were broken and that his suretyship was terminated.[2]

E. First Respondent's version:

[20] In its opposition to the grant of a rescission of judgment, the First Respondent relies on clause 11 of the Suretyship Agreement. It states that this particular clause prescribes a particular process that one needs to comply with for one to be released from Suretyship.

[21] The Applicant did not follow the procedure for cancellation as set out in the suretyship.[3] Counsel for the First Respondent Mr. Els argued that in terms of the provisions of clause 11 of the Surety agreement, notice must be given to the Bank of the termination of the suretyship. Such termination shall be of no force and effect unless it is accompanied by a copy of a written notice to the principal debtor in which

[2] Paras 7.6.3 and 7.6.4 founding affidavit
[3] Paras 14.5 and 14.6, opposing affidavit

the Bank informs the former of such termination. *(clause 11 loosely translated from Afrikaans).*

[22] No record of any note or entry made by Tersia Olivier could be found.[4] This much is alleged by Ms Khethiwe Buthelezi, who deposed to the opposing affidavit on behalf of the First Respondent. She denies that the Applicant has a bona fide defence to the main action. This is the crux of the First Respondent's opposition.

[23] Tersia Olivier was not authorised to release the Applicant from his obligations under the suretyship.[5]

[24] The Applicant cannot rely on any representation made by Tersia Olivier.[6]

[25] The combined summons was served at the chosen *domicilium citandi et executandi* of the Applicant[7] by affixing at the main door.

F. <u>Applications for condonation:</u>

[26] In the course of this hearing two applications for condonation were made by each side.

[27] Having laid out the chronology of events, it was submitted on behalf of the Applicant that in the event that the court may find that Applicant's application was out of time as regards the 20 days required by Rule 31, then Applicant applies for condonation for such delay. This was not opposed by the Respondents. I accordingly grant the condonation sought.

[28] Counsel for the First Respondent brought an application for condonation owing to the fact that whilst the opposing affidavit deposed to by Ms. Khethiwe Buthelezi was stamped and signed by a Commissioner of oaths, somehow the date of such commissioning was not filled in. This was similarly not opposed by the

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[4] Para 14.2, opposing affidavit
[5] Para 14.4, opposing affidavit
[6] Paras 14.7 and 14.8, opposing affidavit

[7] Para 17.2, opposing affidavit

Applicant. In light of submissions that there was substantial compliance with the requirements for commissioning[8], I exercised my judicial discretion and granted the condonation as sought and admitted the affidavit.[9]

G. Analysis of the evidence and application of the law to the facts:

[29] There is uncontroverted evidence that Applicant and Third Respondent sold their interests in Second Respondent/The Company to new directors. The Applicant then attended at the premises of the Bank to introduce the new directors. Further, at that time Applicant and third Respondent had settled all indebtedness to the Bank and declared his intention to be released from the Suretyship obligations at the time in the presence of Tersia Viljoen, the Bank representative.

[30] There is also the correspondent by and on behalf of the Applicant to the Bank that went unanswered. For example, the letter by Helandi Calaca attorneys specifically asking for a copy of the Suretyship agreement to enable them to more properly advice the Applicant. This request failed to elicit a response from the Bank.

[31] The Bank is more meaningfully resourced than Applicant who is at this stage a Seventy-three-year-old pensioner. The Bank cannot rely on its own inaction and negligently having advanced further overdrafts to the new directors to saddle the Applicant with liability.

[32] In the result of the aforegoing, I am satisfied that the Applicant has met the requirements set out in Rule 31 as regards showing good cause for a rescission to be granted.

[33] It would accordingly be superfluous to venture into the alternative and further alternative applications in terms of Rule 42(1) and the common law respectively.

[34] I therefore make the following order:

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[8] S v Munn 1973 (3) SA 734 (NC)
[9] Standard Bank of South Africa Ltd and Another v Malefane and Another 2007 (4) SA 461 (TK) at 465

(i) The default judgment granted on 20 November 2018 by the Registrar of the above Honourable Court under case number 57429/18 is rescinded;

(ii) The First Respondent to pay the Applicant's costs for this application on an attorney and client scale including costs of Counsel.

J.S. NYATHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	26 October 2022
DELIVERED ON:	31 October 2022

Appearances

For Applicants:	Adv. B.C. Bester
Instructed by:	Chantel van Heerden Attorneys chantel@cvhattorneys.co.za REF: C VAN HEERDEN/M J/CN0056
FOR THE RESPONDENTS:	Adv. J. Els PHATSHOANE HENNEY ATTORNEYS (ATTORNEY FOR FIRST RESPONDENT) BLOEMFONTEIN REF: JPO/tp/ABS131/0991

C/0 TIM DU TOIT INC
LYNWOOD PRETORIA
REF: MW LETSOALO/MO/P 11998

DATE OF JUDGMENT: 26 October 2022

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 31 October 2022.