THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 1303/18

In the matter between:

ZEPHAN (PTY) LTD	**FIRST APPELLANT**
NICOLAS GEORGIOU N.O.	**SECOND APPELLANT**
MAUREEN LYNETTE GEORGIOU N.O.	**THIRD APPELLANT**
JOE CHEMALY N.O.	**FOURTH APPELLANT**
NICOLAS GEORGIOU N.O.	**FIFTH APPELLANT**
and	
SURAIYA BEGUN NOORMAHOMED	**RESPONDENT**

Neutral Citation: *Zephan (Pty) Ltd & others v Noormahomed* (1303/18) [2019] ZASCA 162 (29 November 2019)

Coram: Navsa and Nicholls JJA and Tsoka, Gorven and Weiner AJJA

Heard: 20 November 2019

Delivered: 29 November 2019

Summary: Practice and Procedure – application for rescission of default judgment – whether defence *prima facie* established – whether application for rescission correctly refused.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Swanepoel AJ sitting as court of first instance):

The appeal is dismissed with costs including costs consequent on the employment of two counsel, where applicable.

JUDGMENT

Tsoka AJA (Navsa and Nicholls JJA and Gorven and Weiner AJJA concurring):

[1] This appeal, with leave of this court, is against an order and judgment of the Gauteng Division of the High Court, Pretoria (Swanepoel AJ) in terms of which an application for rescission launched by the appellants against a judgment granted in favour of the respondent was dismissed with costs. In terms of the default judgment the appellants were ordered to pay Ms Suraiya Begun Noormahomed (the respondent) the sum of R6 000 000, together with interest at 15,5 per cent per annum with effect from 9 August 2014, and costs, jointly and severally against delivery to them of share certificate HSF 2234137 in Highveld Syndication (Pty) Ltd (HS22).

[2] Default judgment was obtained by the respondent on the basis of a buy-back agreement (the agreement) in terms of which the first appellant had irrevocably agreed to repurchase the respondent's shareholding held in HS22 at a specified price and after an agreed period of five years. The second to the fifth appellants guaranteed the first appellant's performance in terms of the said agreement.

[3] The issue in the application for rescission and in the appeal was whether the appellants disclosed a bona fide defence to the respondent’s

claim in the sense of setting out averments, which, if established at trial, would entitle them to relief. The court below, having held that the appellants failed to establish such a defence, dismissed the application for rescission of the judgment, with costs.

[4] In the founding affidavit the appellants contended that the respondent's claim had been novated by way of a duly adopted business rescue plan in relation to associated entities and/or by way of a scheme of arrangement in terms of s 155 of the Companies Act 71 of 2008 (the Act). The appellants contended that HS22 investors voted in favour of accepting the scheme of arrangement (the arrangement) in respect of a third party company namely Orthotouch Ltd (Orthotouch). It was contended that the effect of the arrangement was that HS22's liabilities to its creditors had been re-arranged and sanctioned by the court. It was submitted further on behalf of the appellants that an acceptance by the respondent of payments of interest in terms of that arrangement had the effect of the respondent accepting that the agreement had been novated.

[5] The respondent disputed the appellants' defence. She was adamant that whatever arrangements had been made, involving others, court sanctioned or not, her claim for specific performance for the repurchase of the shares at a specified rate by the first appellant was unaffected. She insisted that the agreements between her and the appellants were not novated. It is the respondent's evidence that her claim is unaffected by the arrangement nor had it been novated by her receipt of interest received from Orthotouch. According to her, she was entirely unaware of the arrangement and the interest payments arrived without her requesting them. She maintained that her claim is against the first appellant in terms of the agreement and that the court below was correct in refusing the appellants' application for rescission with costs.

[6] It is now necessary to have regard to the detailed, factual background. As alluded to earlier, the respondent instituted a claim against the appellants for specific performance. Her claim was founded on the agreement read

together with the prospectus issued by HS22. The agreement formed part and parcel of the prospectus so issued. On 9 August 2009, the extended date of the offer to subscribe for shares in HS22, the first appellant took up and acquired all the unsubscribed shares in HS22. The first appellant then mandated PIC Syndication (Pty) Ltd (PIC) to offer these shares for sale to the general public on the same terms and conditions as set out in the prospectus. In May 2010, the respondent accepted the first appellant's offer and bought 3 000 shares from the latter worth R3 000 000.

[7] In terms of the agreement the first appellant contracted to buy the shares back from the respondent after a period of five years from the initial investment date at the pre-agreed repurchase price of a 100 per cent premium. This essentially meant that upon maturity she would receive double the amount invested. The second appellant, Nicholas Georgiou, the third appellant, Maureen Lynette Georgiou, the fourth appellant, Joe Chemaly, the joint trustees of the N Georgiou Trust and the fifth appellant, Nicholas Georgiou, guaranteed the due performance by the first appellant of its obligations in terms of the agreement towards the respondent. During 2014 the five year period in terms of the agreement expired. This is the basis of the respondent's claim against them. The respondent demanded that the first appellant repurchase the shares, as agreed, against tender of the share certificate in respect of the shares acquired earlier but the first appellant failed, despite demand, to fulfil its obligations in terms of the agreement. The respondent approached the high court to enforce the terms of the agreement against the first appellant and the other appellants. As stated above, the respondent obtained judgment by default. This was followed by the application for rescission by the appellants. The only issue before the court below and before us was whether or not a triable issue was raised by the appellants.

[8] Prior to determining whether the appellants' affidavit raised a bona fide defence, it is necessary to deal with a preliminary issue. It is common cause that on 7 November 2019, the first appellant resolved in terms of s 129 of the Act to voluntarily begin business rescue proceedings. Further steps envisaged

in s 129(3) of the Act were taken. Conventionally, a moratorium in respect of legal proceedings, in terms of s 133 of the Act then takes effect. It may, however, be lifted by leave of a court.

[9] At the commencement of the hearing of the present appeal, we were informed that the first appellant, as well as the Business Rescue Practitioner appointed, were agreed that the appeal be proceeded with and finalised. That appeared to us to be in the interests of justice.

[10] I now turn to determine whether the court below correctly refused the application for rescission of judgment on the basis that the first appellant did not establish a bona fide defence. In relation thereto, see *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 and *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764I-765H.

[11] The appellants' reliance on the arrangement and in particular the provisions of s 155 of the Act for the assertion that the respondent's claim against the first appellant was novated when HS22 was placed under business rescue or when the arrangement was sanctioned by the court, is misconceived.

[12] The respondent's evidence is that her claim is founded on the agreement guaranteed by the three trustees and the fifth appellant. In terms of this agreement, on expiry of the period of five years, the first appellant was obliged to repurchase her shares at double the amount she paid for the shares. According to her, the agreement reached between HS22 and Orthotouch, the third party company, which was also placed under business rescue, is irrelevant to the enforcement of the specific performance guaranteed in terms of the agreement.

[13] That the respondent's claim in terms of the agreement is unassailable, is clear from the terms of the agreement. In terms of this agreement, to which neither HS22 nor Orthotouch, a related entity, were a party, there was an irrevocable undertaking to repurchase all of the shares in HS22 sold by the

first appellant to the respondent. That the undertaking is independent and insulated from the affairs of HS22, is clear.

[14] Counsel on behalf of the appellants submitted that the respondent's conduct in receiving interest as a result of the business rescue and re-arrangement of the debts of HS22 is indicative of novation of the agreement on which her claim was based. The respondent's claim is for specific performance against the first appellant to enforce the terms of the agreement. In this context, the receipt of interest from Orthotouch is irrelevant to her claim against the first appellant. This court, in dealing with a similar issue in *Zephan (Pty) Ltd & others v De Lange*[1], in the context of an application for summary judgment, said the following:

'The BRP relates only to the restructuring of the business of the HS companies and not the *appellants*. When the HS companies went into business rescue the appellants were the primary carriers of the obligation to buy back Mrs De Lange's shares. The fact that the HS companies might have been in business rescue was *irrelevant to the appellants' discharge of their obligations under the buy-back agreement. Neither was the fact that she had accepted payments of the reduced annual interest. Such interest was never part of the buy-back agreement. There could be no basis for a finding that Mrs De Lange had compromised her rights under the buy-back agreement.*' (My emphasis.)

[15] The court below correctly refused the application for rescission. In the result, the appeal is dismissed with costs including costs consequent on the employment of two counsel, where applicable.

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M Tsoka
Acting Judge of Appeal

[1] *Zephan v De Lange* (1068/2015) [2006] ZASCA 195 [2 December 2016] para 19.

APPEARANCES:

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