

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION JOHANNESBURG**

CASE NO: 2010/44236

In the matter between

LEZMIN 1404 CC

SCHALK WILLEM ERLANK

and

FIRST APPLICANT

SECOND APPLICANT

SCANIA FINANCE SOUTH AFRICA (PRY) LTD

RESPONDENT

Practice - application for rescission of default judgment in terms of Rule of Court 42(1)(a) – requirements - only ground relied on alleged absence of court's jurisdiction to adjudicate main action.

Jurisdiction - rationes jurisdictionis - place where contract concluded and performance to be made by way of payment within court's jurisdiction - jurisdiction established

Court's residual discretion in application for rescission of judgment – factors affecting-applicants authors of their own trouble - discretion exercised against applicants - application dismissed with costs.

J U D G M E N T

VAN OOSTEN J:

[1] The applicants seek an order for the rescission of a default judgment that was granted against them by Mojapelo DJP, on 23 April 2013. The respondent opposes the relief sought. The applicants are the defendants in an action instituted against them by the respondent for payment of arrear amounts in terms of four Financial Lease Agreements concluded between them in respect of certain Scania vehicles (the agreements). The second applicant's liability arises from a written deed of suretyship in respect of the first applicant's indebtedness to the respondent. The applicants defended the action and it was, after exchange of pleadings, enrolled for hearing on 23 April 2013. At the trial roll call before Mojapelo DJP the applicants, in terms of a substantive application, applied for a postponement of the matter. The learned Judge having heard argument refused a postponement. Counsel for the applicants withdrew as the legal representative of the applicants and judgment by default was granted for payment of the amounts as prayed for in the summons together with interest thereon and costs on the scale as between attorney and client.

[2] The present application is brought in terms of rule of Rule of Court 42(1)(a). The basis relied upon is that the default judgment was erroneously granted it being alleged that the court does not have jurisdiction to adjudicate the matter. The applicants are both *perigrini* of this court. The opposing contentions advanced by counsel were based on the provisions in the agreements providing for payment of the monthly lease instalments by the first applicant, as lessee, to the respondent, as lessor. Counsel for the respondent relied on the provision (clause 4.6 of the general terms of the agreements) that such payment had to be made at the *domicilium* address of the respondent, which it is common cause, is in Johannesburg. Counsel for the applicants on the other hand submitted that it was apparent from the agreements that payment was to be made in terms of a debit order authorisation by the first applicant at its bank, which is situated in Kimberley, and therefore not at the respondent's *domicilium*.

[3] In order to establish jurisdiction *rationes jurisdictiones* need to be present (*Gallo Africa v Sting Music (Pty) Ltd* 2010 (6) SA 329 (SCA) para [10]). The respondent, as I have indicated, is situated in Johannesburg. The applicants are both domiciled in

Kimberley. That brings me to the agreements, copies of which are attached to the respondent's summons. In terms of the transaction schedule forming part of each of the agreements, it is recorded that the initiative to enter into the agreement emanated from the lessee, the first applicant. It was signed by a member of the first applicant at Kimberley, on 12 November 2007. On 14 November 2007 it was signed at Aeroton (Johannesburg) on behalf of the respondent. The agreement accordingly was concluded on the date and at the place of the acceptance of the first applicant's offer, being 14 November 2007 and therefore at Johannesburg. The *ratio contractus* consisting of the conclusion of the agreement as well as performance by way of payment by the lessee in terms thereof (*Coloured Development Corporation Ltd v Sahabodien* 1981 (1) SA 868 (C) 870F), both fall within the jurisdiction of this Court which accordingly is sufficient to endow this Court with jurisdiction (*Geyser v Nedbank Ltd: In re Nedbank Ltd v Geyser* 2006 (5) SA 355 (W) para [11]; *Erasmus Superior Court Practice* A1-27)). The fact that the debit order arrangements were made at a bank outside the jurisdiction of this court is of no moment. The objection raised by the applicants accordingly cannot be sustained.

[4] In conclusion and insofar as I am required to exercise a discretion the fact that the applicant are the authors of their own problems in my view militates against them (*De Wet and others v Western Bank Ltd* 1979 (2) SA 1031 (AD)). In addition hereto I take into account that counsel for the applicants who appeared before Mojapelo DJP could have raised the special plea of absence of jurisdiction without going in to the merits of the matter. The application must accordingly be dismissed.

[5] In the result the application is dismissed with costs.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANTS

ADV C CREMEN

APPLICANTS' ATTORNEYS

VAN DEVENTER & THOABALA

COUNSEL FOR RESPONDENT

ADV C VAN DER MERWE

ATTORNEYS FOR RESPONDENT

SENEKAL SIMMONDS INC

DATE OF HEARING

4 NOVEMBER 2013

DATE OF JUDGMENT

4 NOVEMBER 2013