IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 1077/2013
DATE: 1 JUNE 2016

In the matter between:

THOMPSON, CT **Applicant**

and

RADIOSOURCE AFRICA CC **Respondent**

JUDGMENT

MULLINS AJ:

INTRODUCTION:

[1] As a means of resolution of civil contention, litigation is certainly preferable to personal violence.... Our forensic system, with its machinery of cross-examination of witnesses and forced disclosure of documents, !S characterised by a ruthless investigation of truth. Nevertheless, the law recognises that the process cannot go on indefinitely[1]

[2]This is in essence an application for rescission, and a counter-application to declare certain fixed property executable.But that is not all. There is also an application (by the applicant) for condonation of the late filing of the applicant's replying affidavit, and an application (by the respondent) to strike out certain matter from that affidavit.I shall deal with

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[1] Lord Simon of Glaisdale, on p423 of The Ampthill Peerage Case [1976] 2 All ER 411 (HL).

all of these applications in what follows.

THE PARTIES:

[3] The applicant is CATHERINE HELEN THOMPSON, and the respondent is RADIOSOURCE AFRICA CC. In what follows, I will refer to them respective as "Ms Thompson", and "Radiosource".I will also refer to another entity, INDUSTRIAL LIFTING INSTRUMENT & PUMP SUPPLIES (PTY) LIMITED, as "ILIPS".

A RELEVANT CHRONOLOGY:

[4] The various applications in this matter must be seen against the following chronological background:

[4.1] Ms Thompson signed surety for the debts of ILIPS on 25 July 2012[2].[4.2] ILIPS was placed in provisional liquidation on 20th[1] December 2012.
This was apparently then set aside on 8 May 2013, but the provisional liquidation was then reinstated and made final on 26 September 2013.

[4.3] Radiosource issued summons against Ms Thompson on 13 February 2013 for payment of R357 682,25, interest and costs, on the strength of the suretyship and ILIPS's debt to Radiosource.

[4.4] Ms Thompson entered appearance to defend the action, and Radiosource applied in May 2013 for summary judgment against her.

[4.5] Ms Thompson deposed to an answering affidavit on 10 June 2013, which was served on 14 June 2013 The answering affidavit raised two defences, viz that although the suretyship on its face covered ILIPS's debts to Radiosource past and future, Ms Thompson's intention had only been to cover debts incurred from date of her signature to the suretyship, and the contention[3] that the suretyship was invalid by virtue of an unequal bargaining position

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[2] The circumstances under which she signed surety will figure in this judgment.

[3] Presumably in the alternative to the contention that the suretyship was intended to cover future debts only.

between Ms Thompson and Radiosource.

[4.6] The matter came before Van Nieuwenhuizen J (then Van Nieuwenhuizen AJ), who granted judgment in favour of Radiosource on 2 October 2013.Van Nieuwenhuizen AJ held that the suretyship document was plain on its face in terms of covering both past and future debts and that Ms Thompson had not alleged or established that she had been misled into signing it, and that a defence based on unequal bargaining positions, if available in our law, is in essence a constitutional challenge, which Ms Thompson had not made out.

[4.7] Ms Thompson applied for leave to appeal to the SCA, which Van Nieuwenhuizen AJ granted on 7 November 2013, limited to the constitutional challenge (the unequal bargaining power argument).

[4.8] Although the papers don't make this plain, it would appear that the appeal to the SCA was timeously noted, with the result that it didn't lapse[4] .However, Ms Thompson's then attorney, Mr Jaco Roos, withdrew the appeal on 18 June 2014 because, says Ms Thompson in paragraph 5.12 of her founding affidavit, she was ... advised that the constitutional points [were] ... not good in law.[4.9] Ms Thompson says in paragraphs 5.12 and 5.13 of her founding affidavit that, the SCA appeal having been withdrawn, she was advised to consider making an offer of settlement. I decided to rather investigate the cause of action, more particularly the alleged ... debt of ILIPS.

[4.1O] In due course, Ms Thompson established grounds on which she believed - and believes - either that IUPS was not in fact indebted to Radiosource, or that it was at least not indebted to Radiosource on the grounds alleged in Radiosource's particulars of claim, or that she was not indebted to Radiosource in terms of the suretyship, and she launched the application for rescission in early February of 2015.The application was specifically brought on the basis of Rule 42(1)(c), and/alternatively the common law[5] .Ms Thompson represented herself in

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[4] Radiosource suggested that it had lapsed. But Advocate de Beer for Ms Thompson was able to point to a formal notice attached to Mr Roos' letter of 18 June 2014 bearing an SCA case number which, he said and I agree (and Ms Lottering for Radiosource conceded), would only have been allocated had the appeal been timeously noted. So I accept that the appeal was indeed timeously noted.

[5] See paragraphs 3.1.1.1 and 3.1.1.2 of Ms Thompson's founding affidavit. There is a further alternative, a declarator that the judgment has been settled in full. I will deal with this in what follows, to the extent necessary

bringing the application.

[4.11] Radiosource opposed the application and brought its Rule 46(1)(a)(ii) counter-application [6] . Its answering affidavit was delivered to Ms Thompson personally during, it would appear, March of 2015.

[4.12] Ms Thompson failed to file a replying affidavit, and Radiosource enrolled the matter for hearing on 30th November 2015. Ms Thompson then obtained legal assistance[7] , and an order was given by agreement between the parties by Olivier AJ on 2 December 2015 postponing the matter, and requiring Ms Thompson to file her replying affidavit by 15 January 2016.

[4.13] Ms Thompson did not file her replying affidavit by the date allowed of 15 January 2016.That being so, Radiosource on 27 January 2016 again set the matter down for argument, on 23 May 2016[8].

[4.14] Ms Thompson's replying affidavit was delivered on 2 February 2016. This was twelve days after the last date allowed by the order of Olivier AJ.

[4.15] Ms Thompson on 25 April 2016 filed an application for condonation in terms of Rule 27(1).

[4.16] Radiosource on 18 May 2016 filed an affidavit in opposition to the Rule 27 application and, simultaneously, an application to strike out certain matter in the replying affidavit as constituting prejudicial new matter, alternatively inadmissible hearsay. For the Monday of a week, but are often only heard on later days. In this instance, the application was heard on Tuesday 24 May 2016. And that is how things came before me.

GETTING A FEW THINGS OUT OF THE WAY FIRST:

[5] It is as well to get a few things out of the way before I proceed to the meat of the matter. In this regard:

[5.1] Radiosource's Rule 46(1) (a)(ii) counter-application is not opposed - the parties are (correctly, on the papers) agreed that Radiosource is entitled to the relief which it seeks in the counter-application, should Ms Thompson's application fail.

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[6] To declare fixed property executable.

[7] Phillip Venter Attorneys, and not her previous attorneys Jaco Roos Attorneys.

[5.2] I am prepared to condone the late filing of Ms Thompson's replying affidavit.It is so that the replying affidavit should have been delivered during April of 2015 so that it was in fact filed a year late and, at that, was filed beyond the period granted by Olivier AJ. But history fell away once Ms Thompson was granted up to 15 January 2016 within which to file her replying affidavit, so that we are really only dealing with a delay of twelve days. Ms Thompson has furnished an explanation for that delay, and I note from paragraph 59 of the answering affidavit of Mr Mitchell for Radiosource that that affidavit was itself filed a few days late[9] . Had Ms Thompson required Radiosource to seek condonation, this would very much have been a situation of the sauce for the goose being good for the gander as well.

WHAT REMAINS FOR DECISION:

[6) What remains for decision is the primary issue of whether Ms Thompson has made out a case for rescission, and the secondary issue of whether matter should be struck from her replying affidavit. It is convenient to deal with both issues together.

THE ACCOUNTING DEFENCE. AND THEN THE CREDIT DEFENCE:

[7] [7.1] I mentioned in paragraph [4.1OJ above that Ms Thompson's application was brought on the basis of Rule 42(1)(c), and the common law. An applicant bringing application for rescission on these grounds must meet certain requirements, one of which is promptitude[10]. However, it is best before dealing with those requirements to outline something of the bases on which Ms Thompson sought rescission.

[7.2]Ms Thompson's founding affidavit made the following points:
[7.2.1] In paragraph 3.3 that she would show that there is no indebtedness by the principal debtor (i.e. by ILIPS].
[7.2.2] In paragraph 6 and 7.3, that whereas Radiosource's statement of 30 November 2012 attached to the particulars of claim showed an outstanding amount of R357 682,25 (and payments totalling R27 833,10), payments had been made which had been intended by ILIPS to meet the outstanding (i.e. latest) invoices, but which payments Radiosource had allocated to

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[8] The date for hearing of this matter before me. Opposed applications in Pretoria are set down

[9] It was deposed to on 18 March 2015, but because service on Ms Thompson was personal, I can't make out precisely whether it was served on her on that date or on a date thereafter. It was apparently due on 12 March 2015.

[10] Applications for rescission, whether in terms of Rule 42 or in terms of the common law, must be brought within a reasonable time. More of this later.

the earlier invoices.Thus, in essence, although Ms Thompson did not deny (or did not effectively deny) that ILIPS owed Radiosource R357 682,25, she denied that it owed that amount *in respect of the latest invoices listed on Radiosource's statement of 30 November 2012, as opposed to in respect of earlier invoices*[11]

[7.2.3] Ms Thompson's case in this regard was in essence that

(a) the invoices which Radiosource's statement of 30[1]November 2012 listed as [h] outstanding all post-dated July 2012, (b) Ms Thompson became ILIPS's CEO in June 2012, and (c) as per paragraph 4.5 of her founding affidavit (I have added the emphasis in what follows),

[a]s CEO I was extremely concerned over the ability of ILIPS to pay its debts and decided that ILIPS should, as far as possible, do business on a cash basis. *As* a *result, /LIPS thereafter only concluded cash transactions with the respondent.*[7.3] Ms Thompson's explanation for the fact that this defence (if defence it is) had not been raised in the summary judgment proceedings was as follows:[7.3.1] In paragraph 3.4, she said that the true facts only came to my knowledge recently ....

[7.3.2] Ms Thompson elaborated as follows in paragraphs 5.5 and 5.8 of her founding affidavit:At this juncture I wish to point out that ILIPS was under provisional liquidation [at the stage of the summons and summary judgment proceedings].... All documentation was in the possession ... of the liquidators and I had no or limited access to it. Furthermore, I was not in contact with the staff that had dealt with these transactions during the latter part of 2012. As a consequence, I could not investigate the allegations in detail and I could not reconcile the statement provided [i.e. the statement of 30 November 2012] with source documents. I could only rely on the simple truth that ... all transactions were paid in cash [after June 2012).Unfortunately, I only recently became aware of the true state of the respondent's bookkeeping system. I then realised that the respondent's representatives, as a result of shambolic bookkeeping, laboured under the same aberration that their records were accurate. The alternative of course is that the respondent's representatives misrepresented the true facts.

[7.4] It can be seen that the defence which Ms Thompson put forward in her founding affidavit

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[11] Ms Thompson's attack on the statement was broader than that in the papers. But Radiosource's answering affidavits explained the alleged discrepancies, and the debate crystallised in argument before me into the question of whether Radiosource had been entitled to allocate payments to earlier debts rather than the debts which ILIPS had in mind.

related to accounting issues.In essence, and shorn of attacks on Radiosource's accounting system that transpired in my view not to have merit, the argument was that whilst the amount claimed by Radiosource might well have been due and payable by ILIPS, it was comprised of invoices that *pre-dated* June 2012, as opposed to the invoices relied upon by Radiosource in its statement of 30th November 2012 and thus in

its particulars of claim as being outstanding, which *post-dated* June 2012.

In what follows, I will call this "the accounting defence".

[7.5] In her replying affidavit, Ms Thompson replied to Radiosource's retort to the accounting defence. And she raised a new defence. In this regard:

[7.5.1] I shall call the new defence "the credit defence". It was this:

(a) Ms Thompson had, as explained above, become CEO of ILIPS in June 2012.

(b) As Ms Thompson had explained in her founding affidavit, ILIPS was at the time in dire financial straits[12], and to some extent dependent on Radiosource as a supplier[13] .

(c) Presumably because of the fact that ILIPS had fallen into arrears, Radiosource required ILIPS to apply for a new credit facility [14].

(d) On 25 July 2012, ILIPS placed an order for delivery with Radiosource, and applied for a new credit facility.

Ms Thompson signed the documentation comprising the application for a new credit facility, which included the suretyship on which she was subsequently sued.

(e) Later that day, Radiosource informed ILIPS's creditors manager Ms Slabbert (who of course

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[12] See paragraph 4.3 of her founding affidavit: "I became the CEO of ILIPS during June 2012, and remained so until its final demise on 26 September 2013. At the time, ILIPS was in dire straits".

[13] See paragraph 4.4 of Ms Thompson's founding affidavit: "The respondent was an important supplier of radio supplies to ILIPS".

[14] See paragraph 5.2 of the replying affidavit.

relayed this information to Ms Thompson[15] that the application for credit had been declined.

Yet, having declined the application for credit, Radiosource retained the suretyship. Ms Thompson says the following in this regard in paragraphs 5.17 and 5.19 of her replying affidavit:

It makes no commercial sense for a new CEO of a company to bind herself as surety and co-principal debtor for existing debts in circumstances where she had no involvement in the incurring of such debts. Since my involvement ..., all orders placed with [Radiosource] ... were promptly paid.

In the same vein, if no new credit facility had to be applied for, I would not have been requested to sign as surety and co- principal debtor for debts already incurred by ILIPS. ILIPS would have purchased orders on a cash only basis, if not from Radiosource, then from other suppliers in the market.

[7.5.2] Ms Thompson suggests that, in those circumstances, Radiosource was under a duty to disclose these facts (the facts underlying the credit defence, as outlined in paragraph [7.5.1] above) in its summons.

[7.6] Although the replying affidavit is ambivalent on the question of whether the credit defence, as disclosed in the replying affidavit, constituted new matter[16], it clearly was new matter which had not been raised before, prompting Radiosource's application to strike out.

THE REQUIREMENTS FOR RESCISSION:

[8] [8.1] I shall now deal with the requirements for Rule 42(1)(c) applications and rescission applications brought under the common law, before reverting to the accounting and the credit defences, and the issues surrounding them.

[8.2] Rule 42(1)(c) provides as follows: **Variation and rescission of orders**
The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a)…

(b)…

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[15] See paragraph 5.6 of the replying affidavit: "Ms Slabbert contacted me and informed me of this fact and I instructed her to cancel the application for credit facilities as a whole".

[16] In paragraph 6.4 of her replying affidavit, she says that the "issue is not a new issue. I have merely provided a full explanation ....", but in paragraph 6.2 of that same affidavit, she says that she is "advised by my legal representatives that I will need to make application to the Honourable Court to permit the introduction of this evidence, insofar as it may be considered to be new".

(c) an order or judgment granted as a result of a mistake common to the parties.

[8.3] See, as to the meaning of the phrase "mistake common to the parties", Van Loggerenberg *Erasmus Superior Court Practice* (2nd ed) pD1-575:

[Mistake common to the parties] ... means that both parties are mistaken as to the correctness of certain facts; such a mistake occurs where both parties are of one mind and share the mistake. A typical case would be where the parties had agreed upon a statement of facts which was afterwards found to be incorrect.... A common mistake would cover the case of a judgment entered by consent where the parties consented in *justus error*....

[8.4] Common law rescission is generally more stringent than rescission under one of the subrules of Rule 42. See in this regard Melamet J (with whom Boshoff AJP and Curlewis J concurred) at 776H of De Wet and Others v Western Bank Limited 1977 (4) SA 770 (T):

Under the common law a judgment can be altered or set aside only under limited circumstances and the additional relief extended by the Rules of Court (Rules 31(2)(b) and 42] is intended to modify such rigid provisions but within the confines of such Rules.

[8.5] As to the grounds for rescission in terms of the common law, see *Van Loggerenberg* pD1-563:

At common law a judgment can be set aside on the following grounds:

(a) fraud;

(b) *justus error* (on rare occasions);

(c) in certain exceptional circumstances when new documents have been discovered

(d) where judgment had been granted by default; and

(e) in the absence between the parties of a valid agreement to support the judgment, on the grounds of *Justa causa.*

[8.6] The fraud requirement, as referred to in paragraph [8.5] above, needs no explanation. But as for *iustus error*, see the following:

[8.6.1] See Melamet J (with whom Boshoff AJP and Curlewis J concurred) at 776F-G of De Wet and Others v Western Bank Limited 1977 (4) SA 770(T):

Before a judgment would be set aside under the common law, an applicant would have to establish a ground on which *restitutio in integrum* would be granted by our law, such as fraud or *Justus*

error in certain circumstances. Childerley Estate Stores v Standard Bank of SA Limited 1924 OPD 163 at pp166-168; Seme v Incorporated Law Society 1933 TPD 213 at p215; Makings v Makings 1958 (1) SA 338 (AD) at p343; Athanassiou v Schultz 1956 (4) SA 357 (W).

[8.6.2] See Van Zyl AJ in Groenewald v Gracia (Edms) Beperk 1985 (3) SA 968 (T) (headnote):The question of negligence on the part of an applicant for rescission of judgment on the common law ground of *Justus error* has not been discussed in any depth in the reported judgments dealing with such an application. Nothing more ought, however, to be inferred from the requirement ... than that an applicant who is himself negligent and is 'the author of his own problem' will not succeed with his application for rescission.

Groenewald was perhaps a very good example of *iustus error*. the respondent had served a provisional sentence summons on the applicant, and thereafter a notice of withdrawal. Attached to the notice of withdrawal transpired to be a new provisional sentence summons, otherwise identical to the previous one, which in fact served as a new institution of action. The applicant thought that the summons was withdrawn without more, and informed his attorneys thereof, and that they need consequently not take any further steps. Judgment was granted against him. Van Zyl AJ held that the applicant acted quite reasonably, and that he was consequently entitled to rescission.

[8.6.3] Van Zyl J on pp281-283 of MEC for Economic Affairs, Environment and Tourism v Kruisenga ad Another 2008 (6) SA 264 (CkHC) drew a distinction between three categories of cases, viz (a) defended cases, (b) defaults, and (c) consents. He said the following:

[A] distinction may conveniently be drawn between three categories of judgment. The first is a judgment that has been granted in a defended case after evidence had been adduced on the merits of the dispute and both parties have been heard. Such a judgment is capable of rescission under the common law on very limited grounds. In Childerley Estate Stores v Standard Bank of SA Limited 1924 OPD 163, a judgment that has often been referred to with approval on the subject of setting aside of judgments under the common law, the court found this to be limited to fraud and in exceptional cases on the ground of *instrumentum noviter repertum*.... Neither *justus error* nor

innocent misrepresentation on the part of a litigant is a ground for rescinding this category of judgment. If it were, there would be no end to litigation....The second category consists of judgments that have been granted without going into the merits of the dispute between the parties. Acknowledging that there may be other exceptional instances, De Villiers JP held in the Childerley case that, in addition to fraud, a *justus error* may establish a ground for restitution in respect of default judgments and judgments entered by consent. In De Wet and Others v Western Bank Limited 1979 (2) SA 1031 (A) where the court dealt with a judgment that was granted in the absence of appearance, it was held that at common law the courts had a relatively wide discretion and that a more lenient attitude was adopted.... It was accordingly held that under the common law the court's power to grant relief in cases where a judgment was obtained on default of appearance, was not confined to fraud or *justus error,* but also extended to the granting of rescission on sufficient cause shown.More relevant for purposes of the present matter is, what has for the sake of convenience been referred to as a 'consent judgment' ....

In the Childerley case De Villiers JP stated *obiter*, with reference to a passage in *Voet* and an earlier decision ... that, except for fraud, 'judgments by consent may be set aside under certain circumstances on the ground of *justus error*.

[8.7) As pointed out in fn 10 above, courts require applications for rescission to be brought with promptitude, whether they are brought under Rule 42, or under the common law[17]

[8.8) In addition to the aforegoing, it appears from Colyn v Tiger Food Industries Limited 2003 (6) SA 1 (SCA) p9 and National Pride Trading 452 (Pty) Limited v Media 24 Limited 2010 (6) SA 587 (ECP) 596-597 that, whether under Rule 42 or the common law, a party seeking rescission in circumstances such as this where the judgment in question was not granted in the absence of such party, must establish good cause in the form of demonstrating a *bona fide* defence which *prima facie* has at least some prospect of success.

APPLYING THOSE REQUIREMENTS TO THE APPLICATION:

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[17] See Trollip JA (Rabie, Muller, Corbett and De Villiers JJA concurring) at 306F-G of Firestone South Africa (Pty) Limited v Genticuro AG 1977 (4) SA 298 (A), where he said that rescission of a judgment may be granted "provided the court is approached within a reasonable time....". See also, to the same effect, Eloff JP (Van der Walt and Preiss JJ concurring) at 6818-G of First National Bank of Southern Africa Limited v Van Rensburg NO and Others 1994 (1) SA 677 (T), where the learned judge spoke of "[t]he need to proceed rapidly to correct an order mistakenly granted.... under Rule 42(1)".

[9] I am mindful of the fact that the credit defence was raised for the first time in Ms Thompson's replying affidavit, and that there is an application to have it struck out.

Of course if it is struck out, then there is no need for me to deal with it. But I prefer to deal with everything together.

[1O] I am satisfied that there are any number of reasons why Ms Thompson's application cannot be granted. These reasons are:

[10.1] Her application was not brought with any promptitude, and her explanation for the delay in bringing the application is vague and unsatisfactory.

[10.2] Ms Thompson has not made out the jurisdictional fact necessary for a Rule 42(1)(c) application, viz a mistake common to the parties. This is so both with regard to the accounting defence, and with regard to the credit defence.

[10.3] Turning to the common law, Ms Thompson has not established fraud or *iustus error*, or any of the other grounds existing in common law.

[10.4] Ms Thompson has not shown good cause. She has not established the accounting defence. Whether she has established the credit defence or not is something I will deal with below, but in either event, her explanation for her failure to have raised these defences at the time of the summary judgment proceedings is totally lacking.

[10.5] In addition, the credit defence was raised as new matter in the replying affidavit, and falls as per Radiosource's application to be struck out. Ms Thompson has no good explanation for why she only raised the defence in February of this year, let alone for why she never raised it before Van Nieuwenhuizen AJ.

[11] In what follows, I shall deal as briefly as necessary with each of the grounds listed in paragraph [1O] above.

[12] To start with, it is fully apparent that the essential facts pertaining to both the accounting defence, and the credit defence, were fully available to Ms Thompson throughout. In this regard:

[12.1] The essence of the accounting defence is that (a) the invoices listed in the statement attached to Radiosource's particulars of claim all post-date June 2012, and (b) all those invoices [18] were in fact paid by ILIPS.

[12.2] There can be no doubt that these are facts of which Ms Thompson was fully aware throughout.As I have shown above, she states in her founding affidavit that ILIPS only concluded

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18 In contrast with earlier invoices.

cash transactions with Radiosource after her involvement, and as Mr Nel for the respondent showed me in the course of argument, Ms Thompson's then attorney Mr Roos' letter to Radiosource's attorneys of 31 January 2013 (Annexure "CHT8" to Ms Thompson's founding affidavit) specifically stated in the context of the denial that Ms Thompson had intended to sign surety for past debts, that

[a]II current invoices that were received by our client were paid immediately and by way of cash transactions. In the premises our client denies liability to your client's outstanding invoices.

(12.3) The same can be said of the credit defence.Although not couched this way by Ms Thompson, I would think that the essence of the credit defence is to say that it was a tacit condition of Ms Thompson's signing the suretyship document together with the credit application forms that the suretyship was offered conditionally upon the credit application being granted, and would fall away automatically should the credit be turned down. More of this later, but for the present, it must be fully apparent that if this is so, i.e. if the credit defence has any merit, then this will have been evident to Ms Thompson the moment the credit was turned down[19].

(12.4] It follows that both the accounting defence and the credit defence were in fact available to Ms Thompson from the outset. Her explanations for why they were not raised earlier are either absent (in connection with the credit defence), or vague and unconvincing (in connection with the accounting defence; the suggestion that she"had no or limited access" to documentation, and "could not investigate the allegations in detail" is vague in the extreme).

[13] I dealt in paragraph [8.3] above with the content of the Rule 42(1)(c) requirement of mistake common to the parties.Ms Thompson has not made out a case in this regard, either regarding the accounting defence, or regarding the credit defence.Ms Thompson's suggestion that Radiosource was under an obligation to disclose that it had allocated payments to old invoices as opposed to new invoices confuses *facta probantia*[20] with *facta probanda* [21] - all that was necessary was for Radiosource in its particulars of claim to outline what it contended was owing to it by ILIPS, and on what basis it was owing. Later evidence as to the exact composition of the amount

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[19] In fact, there are suggestions in Ms Thompson's replying affidavit that she raised the credit defence with her attorney of the time, Mr Roos, and that he decided not to take it further. See paragraphs 6.4 and 6.5 of her replying affidavit. If a conscious or unconscious decision was taken not to raise an available defence, then that certainly cannot constitute good cause. If the credit defence was a good one, and if in fact Ms Thompson did raise it with her attorney of the time and it was his decision not to pursue it (none of which fully emerges from the papers}, then it might be that Ms Thompson's remedy lies in pursuing her erstwhile attorney for bad advice. I express no view on this, though.

[20] *Facta probantia* are facts which need not be specifically pleaded by a party, and which relate to evidence which will be led in proof of the *facta probaganda*

[21] *Facta probanda* are the essential averments making up a cause of action.

would not have ndetracted from this.Radiosource's claim was always that ILIPS was indebted to it in a certain amount, that Ms Thompson had signed suretyship for that debt, and that she was consequently indebted to it. It was not obliged to go into accounting detail of how payments were allocated, or into detail of the circumstances under which the suretyship was signed. All of this detail was, in any event, as pointed out by me in paragraph [12] above, fully within the knowledge of Ms Thompson.

[14] Turning to the common law, and paragraph [10.3] above:

[14.1] Although Ms Thompson has suggested fraud on the part of Radiosource, she has not established it.

[14.2] As far as the accounting defence is concerned, a quick perusal of Radiosource's statement of 30[1] November 2012 as attached to the particulars of claim shows that Radiosource's case was that the later invoices were unpaid, and that payments were allocated to the earlier invoices. There can be no suggestion of fraud, or of *iustus error* as dealt with by me in paragraph [8.6] above.

[14.3] Turning to the credit defence:

[14.3.1] I am mindful, to begin with, of the fact that I am dealing with a defence that was raised for the first time in the replying affidavit, in paragraphs which Radiosource seeks to strike out, and without benefit of Radiosource's version[22] .

[14.3.2] I therefore approach the credit defence with caution. Doing so, I am unpersuaded that Ms Thompson has established misrepresentation or fraud on the part of Radiosource. Ms Thompson suggests that Radiosource might have fraudulently offered ILIPS the opportunity to apply for credit, fully intending to turn it down whilst grabbing at the suretyship which it knew she would have to sign. Not only do I not think that Ms Thompson has made out such a case (in our law, fraud is not easily assumed. See Gates v Gates 1939 AD 150 at 154-155; on the few facts available to me, an innocent explanation is far more plausible), but even if such fraud was established, it would relate to the claim itself, and not to any attempts to cover it up. As I pointed out above, Ms Thompson was always fully aware of the essential facts.

[14.3.3] And precisely because Ms Thompson was always aware of the essential facts, there can be no suggestion of *iustus error*.

[15] Turning from there to the requirement of good cause, the following:

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[22] Radiosource had the right to file a rejoining affidavit dealing with the new matter in the event that it isn't struck out. It took the tactical decision not to do so. There can have been any number of reasons for this decision, including simply the standpoint that enough is enough. I can draw no inference from Radiosource's decision in this regard.

[15.1] The accounting defence has in any event not been established.See in this regard paragraph [13] above. It does not appear that Ms Thompson can contend that ILIPS was not indebted to Radiosource in the amount claimed. All she suggests is that the indebtedness was comprised differently. That is not a defence.

[15.2] This applies equally to Ms Thompson's further alternative claim for a declarator that the judgment has been settled in full. The mere fact that Ms Thompson believes[23] that ILIPS's indebtedness to Radiosource was comprised differently does not mean that ILIPS was not indebted to Radiosource and, if the suretyship stands[24], then that indebtedness is covered by the suretyship, whenever the indebtedness accrued.

[16] I am finally, for reasons that will be apparent from the aforegoing, satisfied that Ms Thompson's raising in her replying affidavit in February of 2016 a defence which, if valid, was always within her knowledge and always available to her, constitutes prejudicial new matter which does indeed fall to be struck out. See Shephard v Tuckers Land & Development Corporation (Pty) Limited (1) 1978 (1) SA 173 (W) 177G-178A, Skjelbreds Rederi and Others v Hartless 1982 (2) SA 739 (W) 742 and Shepherd v Mitchell Catts Seafreight (SA) (Pty) Limited 1984 (3) SA 202 (T). Ms Thompson's explanation for the failure to have raised the credit defence in her founding affidavit, let alone in her affidavit in opposition to the application for summary judgment, is simply absent. In those circumstances, the application to strike out must in any event succeed(which conclusion renders it unnecessary for me to deal with the alternative basis of Radiosource's attack on the particular paragraphs of the replying affidavit, as constituting inadmissible hearsay - I express no view thereon, because I need not do so).

CONSEQUENTLY:

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[23] Perhaps correctly; with reference to Ebrahim {Pty) Ltd v Mahomed 1962 (1) SA 90 (D) pp97-100 and Christie The Law of Contract in South Africa (61 ed) p446, in our law payments are indeed appropriated to the oldest debt (as per Radio source's accounting system), unless the parties agree otherwise. I suspect that ILIPS and Ms Thompson could have made out a case to the effect that the arrangement which apparently applied after June 2012 in terms of which goods were only delivered in return for payment, constituted such an agreement. But as I say, that would alter only the composition of the indebtedness, and not the fact thereof.

[24] Which, in terms of the judgment of Van Nieuwenhuizen AJ, it does.

[17] [17.1] It follows that the application must be dismissed, and that the consequently unopposed counter-application must be granted.

[17.2] I must say in this regard, that I am perturbed by the fact that I am thereby closing the door to Ms Thompson on the credit defence, which as I said to the parties in argument, strikes me as quite possibly being valid[25] . *However.*

[17.2.1] If the credit defence is valid, then it would surely have been evident to Ms Thompson from the very beginning, and that begs the question of why it wasn't raised from the very beginning.

[17.2.2] Mr Nel for Radiosource drew my attention in argument to the content of paragraph 5.3 of Ms Thompson's affidavit in opposition to the summary judgment application, where she said that

….in the event that I did not undersign the deed of surety, [Radiosource] ... would not have made available the goods and services to the principal debtor.It *might* thus be that the reason why Ms Thompson never raised the defence until so late a stage, is because there was never any substance to it, i.e. because Ms Thompson signed the suretyship not just to obtain credit, but also simply to persuade Radiosource to keep supplying, even against cash.I don't know whether this is so. But, coupled with Ms Thompson's otherwise surprising failure to have raised the defence until so late in the day, it *might* be so.

[17.2.3] In any event, to return to the quotation with which I commenced this judgment, litigation cannot go on indefinitely. Even if the credit defence is good, there is no explanation for its first being raised in February of 2016, fully three years after summons was issued. If it was a good defence, there can be no basis for suggesting that Radiosource was obliged to have offered it to Ms Thompson, and there is no (or no adequate) explanation for Ms Thompson's failure to have raised it at the appropriate time..

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THE SCALE OF COSTS:

[18] Radiosource sought costs against Ms Thompson on the punitive scale of attorney and client. Costs are within my discretion. Ms Thompson has fought valiantly, if not necessarily particularly

[25] Ms Thompson's protestations that she would not have signed the suretyship had she known that the credit application was going to be turned down has the ring of plausability about it. But I say that on the strength only of her say-so, and I can thus express no firm view on the point.

well, and although she has failed, I do not believe that I can or should describe her conduct as vexatious, or abusive. I am consequently not disposed to granting costs other than on the ordinary scale.

THE RESULT:

[19] In the result, I grant judgment in the following terms:

1. The Applicant's application for condonation of the late filing of her replying affidavit is granted.
2. The Respondent's application to strike out matter from the Applicant's replying affidavit as constituting new matter is granted.
3. The Applicant's application to rescind the judgment of Van Nieuwenhuizen AJ delivered on 2 October 2013 is dismissed.
4. **4.1** The Applicant's undivided half-share in the following immovable property is declared specially executable:

Farm Zeekoewater, Farm 311, Portion 112, Emalahleni Local Municipality, Registration Division JS, Mpumalanga, measuring 8737 square metres and held by Deed of Transfer T5480/2007.

4.2 The following immovable property is declared specially executable:Sectional Title Unit 73, SS Ridgeview Village 2, in the scheme known as SS Ridge View Village 2, scheme number 68/2008, situated at Reyno Ridge Ext 25, 1868, Registration Divison JS, Mpumalanga, measuring 59 square metres, and held by Deed of Transfer ST9754/2008.

4.3 Writs of Execution against the immovable properties described in paragraphs 4.1 and 4.2 above are hereby authorised.

5. The Applicant is ordered to pay the costs of the application, including those of applications described in pararagraphs 1 and 2 above and the Respondent's also of the Respondent's counter-application in

JF MULLINS

ACTING JUDGE,

GAUTENG DIVISION, PRETORIA

HIGH COURT OF SOUTH AFRICA **1 JUNE 2016**