IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED
DATE: 8 July 2016
SIGNATURE:

12/07/2016

CASE NO: 22030/2015

In the matter between:

THOMANI, RENDANI First Applicant

THOMANI, AZWINNDINI MAVIS Second Applicant

and

MR T F SEBOKA N.O. IN HIS CAPACITY AS

SHERIFF OF THE HIGH COURT, CENTURION EAST First Respondent

D'AGUAR CORINE THERESA	Second Respondent
SWANEPOEL THEO JOHN	Third Respondent
ABSA BANK LIMITED	Fourth Respondent

JUDGMENT

JANSEN J

Background:

[1] This matter is an application for rescission of a default judgment and the setting aside of a sale in execution of the immovable property of the first and the second applicants who are married in community of property. It is emphasised that pursuant to the sale in execution, the property has not yet been registered in the names of the purchasers, namely the second and third respondents.

[2] Initially the sheriff, who had sold the property in execution, and the purchaser of the property were not joined as parties. This was formerly done by way of an application for joinder, which was granted prior to the hearing of this application, on an unopposed basis. The application for joinder, which contains an opposing and replying affidavit, was also relied upon during argument. In fact, the opposing affidavit in the joinder application and the application opposing the rescission of the default judgment were deposed to by same deponent Rumark Creswell Watson. In the joinder application the application for rescission was fully dealt with,

whereas in the opposing affidavit in the rescission judgment the version in the joinder application is proffered in a somewhat condensed fashion.

***Bona fide* defences:**

[3] In the joinder application, the fourth respondent goes into greater detail and it is therefore of greater assistance to the court. The grounds relied upon by the fourth respondent remained the same throughout.

[4] In argument it was pointed out that there had also not been proper service of a notice on the applicants, as owners of the immovable property, advising them of the attachment of the property or the date of the sale in execution. This constitutes a contravention of rule 46(3)(a). The registrar of deeds was also not served with the requisite notice.

[5] Rule 46(3)(a) reads as follows: —

> "***(3)(a) The mode of attachment of immovable property shall be by notice in writing by the sheriff served upon the owner thereof, and upon the registrar of deeds or other officer charged with the registration of such immovable property, and if the property is in the occupation of some person other than the owner, also upon such occupier.***"

[6] The application for rescission is clothed in such a manner, it is contended for the applicants, that a case for relief in terms of rule 42 and the common law has been made out.

[7] The applicants contend that the summons was furthermore not properly served on them as it was served on their previous domicile which they had changed as early as 2012, and they further contend that the fourth respondent was aware of this fact. The applicants also contend that even had service of the summons at their previous domicile been proper, it never came to their notice. They allege that they only became aware of the default judgment on or about 29 January 2014. The application for rescission was filed at court on 28 May 2014.

[8] It is further submitted that both in terms of rule 42, and at common law ("sufficient cause" having been demonstrated), the applicants' actions were reasonable and that the application for rescission was launched within a reasonable time.

[9] The applicants bound themselves as sureties and co-principal debtors in favour of a company called Abrina 1591 (Pty) Ltd.

[10] The applicants contend that the fourth respondent's claim against them has prescribed. The last payment made by the principal debtor, a company called Abrina 1591 (Pty) Ltd, was on 5 April 2008. This can be ascertained from an extract from ABSA Bank statement of Abrina 1591 (Pty) Ltd, which is attached to the founding affidavit in the rescission application. On the said date, the applicants contend, the entire amount became due and payable, and prescription began to run from 5 April 2008.

[11] This cannot be accurate as payment had to be made monthly. Strictly speaking, prescription would have run from 5 May 2008. However, the precise date does not have any impact on the outcome of this judgment. (The fourth respondent contends that the last credit granted to the principal debtor was on 19 August 2008 and refers to a bank statement allegedly attached to the answering affidavit. It has not been attached. However, a bank statement was attached to the application for joinder. This printout only refers to the year 2007. What this bank statement demonstrates is that the principal debtor defaulted in 2007 already.)

[12] It is unclear from where the date of 19 August 2008 was obtained. Furthermore, the answering affidavit in the rescission application contains an allegation to the effect that the last credit which was granted to the principal debtor was 1 January 2009. Without any supporting documentation these conflicting allegations carry no weight and must be disregarded.

[13] Some five years later, on 18 April 2013, summons was issued and served on the applicants at their old *domicilium citandi et executandi.*

[14] The "**Sectional mortgage bond hypothecating a unit**" which was granted by the fourth respondent to the applicants to secure their personal home loan agreement contains a clause 4 which reads as follows: —

> "***CONTINUING COVERING BOND***
>
> ***The Bond shall remain in force as continuing covering security for the capital amount, the Interest thereon and the additional amount, notwithstanding any intermediate settlement, the Bond shall be and***

remain of full force, virtue and effect as a continuing security and covering bond for each and every sum in which the Mortgagor may now or hereafter become indebted to the Bank from any cause whatsoever to the amount of the capital amount, interest thereon and the additional amount. " (Emphasis added.)

[15] The question to answer is whether the phrase "***...for each and every sum in which the mortgager may now or hereafter become indebted to the Bank from any cause whatsoever***" can be construed to cover the applicants' liability to the fourth respondent in terms of the suretyship agreement. (Such a clause constitutes an indeterminate obligation, the constitutionality of which can be challenged. However, for purposes of this judgment, it is unnecessary to investigate this issue.)

[16] What was not emphasised during argument on behalf of all the parties. Under the following clause in the suretyship agreement, namely clause 5, captioned "Additional Security", the following is stated: -

"***I/We acknowledge and admit that this suretyship is additional to any security which the Bank currently holds or may hereafter hold in respect of the obligations of the debtor (Abrina 1591 (Pty) Ltd) and that this suretyship shall not detract in any way from other security already furnished by me/us in favour of the Bank, which security shall remain in force until terminated in writing by the Bank.***" (Emphasis added.)

[17] Clause 11 of the suretyship agreement was also not emphasised. This clause reads as follows: —

> "***CONTINUING SECURITY***
>
> ***This suretyship shall be a continuing covering security notwithstanding any intermediate settlement <u>of the amount owing</u> and notwithstanding my/our death or legal incapacity until the Bank has received notice in writing from me/us or my/our executor, trustee or other legal representative, as the case may be, terminating the same, <u>and until the amount owing in terms of this suretyship at the date of receipt of such notice plus interest and costs until date of payment, has been paid</u>; provided that such notice shall have no force or effect and shall not terminate this suretyship unless it is accompanied by a copy of a notice addressed by me/us to the Debtor in terms of which the Debtor is advised of the termination of this suretyship.***" (Emphasis added.)

[18] This clause most certainly does not assist the fourth respondent.

[19] It was hence necessary for the fourth respondent to rely on clause 4 of the initial "***Sectional mortgage bond hypothecating a unit***" which the applicants entered into to secure their home loan. The question is whether clause 4 can be interpreted to cover the indebtedness of the applicants as sureties to Abrina 1591 (Pty) Ltd. Clause 4 has been quoted earlier in this judgment.

[20] The matter of ***F.J. Hawkes & Co Ltd v Nagel*** **1957 (3) SA 126 (W)** was quoted as authority for this submission.

[21] In that case, however, the continuing indebtedness was for all debts incurred by the principal debtor. Hence this matter takes the case no further.

[22] The matter of ***Netherlands Bank of South Africa v Stern N.O. and Another*** **1955 (1) SA 667 (W)** makes it clear that: —

> "***A pledge, similar to a mortgage bond, is dependent upon and accessory to a valid principal obligation. Any lawful obligation, civil or natural, absolute or conditional, present or future can be secured by way of a pledge.***"

[23] In ***Netherlands Bank of South Africa v Stern*** *supra* it was held that a pledge given as security for any amount due or which thereafter may become due given by a customer of a bank in consideration of banking facilities having been granted may be enforced by a Bank in respect of a promissory note issued by a customer to the creditor and therefore discounted by the Bank.

[24] In ***Barclays National Bank Ltd v Umbogintwini Land and Investment Co (Pty) Ltd (in liquidation) and Another*** **1985 (4) SA 407 (D)** at pages 410–451, the following was held: —

> "***It may be correct to infer (though this has not been pleaded) that but for the suretyship and mortgage bond the subsequent loans would not have been made. To this extent there is a causal connection but the fact remains that these dispositions were separate***

from, though ancillary to, the loan agreement and the rights and obligations flowing from it. This is the position in law notwithstanding the fact that the first defendant bound itself as co-principal debtor as well. (Cf Wiehan NO v Wouda 1957 (4) SA 724 (W) at 726A.) "

[25] In ***Zietsman v Allied Building Society*** **1989 (3) SA 166 (C) SA** at page **166** it was held that the words "***enige bedrag wat ingevolge die gemelde verband betaalbaar mag word***" referred to an amount included within the obligatory part of the bond: this had to be so because what was required was that the amount had to be payable under the bond, not merely secured by the bond. It was further held that as the suretyship had been drafted by the respondent, the *contra proferentem* rule had to be applied against the respondent and the key words of the deed of suretyship, correctly interpreted, did not render appellant liable for the amounts advanced to the mortgagor on other bonds.

[26] It is clear from the wording of the clause in the mortgage bond in respect of the applicants' home loan that it related to the obligatory part of the bond – namely the capital amount, the interest thereon and the additional amount payable in respect of the home loan. The phrase "***any cause whatsoever***" is also limited to the amount of the capital amount, interest thereon and the additional amount. It should also be emphasised that clause 5 of the surety agreement cited above refers pertinently to the obligations of the principal debtor.

[27] Furthermore, one can hardly believe that the bank would rely on one mortgage bond to secure a home loan in an amount of approximately R500,000 and, in addition thereto, to secure an amount of R921,322.00 loaned to Abrina 1591 (Pty) Ltd.

[28] It should also be noted that the following is pleaded in the particulars of claim: "***As backing security for* inter alia *the aforementioned term loan agreement (i.e. the loan to Abrina 1591 (Pty) Ltd) the First and Second Defendants caused to be registered in favour of the Plaintiff,*** (sic) ***a Mortgage Bond NO SB 1/5143/2004...***" over the sectional unit. The pleading was never amended.

[29] This statement is, on the facts set out above, wholly inaccurate. This incorrect pleading, no doubt, persuaded the judge hearing the default application to grant it.

[30] The suretyship agreement is annexed to the application for rescission and reflects that the second applicant signed the suretyship agreement as did the first applicant who signed it in terms of the peremptory provisions of the Matrimonial Property Act 88 of 1984 (as the applicants were married in community of property). According to the suretyship agreement it was entered into on 24 May 2007. The suretyship agreement pertinently states that the loan agreements of the applicants are also ceded to the fourth respondent. This suretyship agreement includes the following important clauses: —

"***LIMITATION***

Notwithstanding anything to the contrary herein contained, the amount contained, the amount that the Bank shall be entitled to recover from under this suretyship shall be:

All the liabilities that the Debtor now has or in future may have to the Bank (the "Debtor" being the principal debtor)

~~***Limited to a maximum of R..... (.....) together with such further amounts in respect of interest and costs as have already accrued or which will accrue until the date of payment of the amount.***~~"

[31] The deed of suretyship, dated 24 May 2007, predates the loan agreement between the fourth respondent and Abrina 1591 (Pty) Ltd which was allegedly entered into during or about 7 June 2007. A physical address of 6 Silver Creek, Eco Park Estate, Centurion 0157 was furnished by the sureties to the fourth respondent. This loan agreement was allegedly destroyed in a fire and an example of a standard loan agreement was attached to the particulars of claim (*ex facie* the wording of the particulars of claim). The amount loaned was allegedly R921,322.00. It bears mention that the annexes to the particulars of claim have not been included in the answering affidavit of the fourth respondent in the rescission application.

[32] When Abrina 1591 (Pty) Ltd's liability prescribed, the applicants' liability would also have prescribed.

[33] The "***Sectional mortgage bond hypothecating a unit***" on which the respondent relies, does not pertain to the applicants as sureties to the

principal debtor, but to a mortgage bond in respect of property purchased by them in their personal capacities. The unit loan mortgage bond relates to an amount of R401, 900.00, and an additional amount of R80 380 was registered on 17 November 2004.

[34] These issues are traversed in more detail below.

Rescission of the default judgment:

[35] Service, as stated, was effected on the applicants' erstwhile domicile which they had already vacated in 2012. The applicants submitted that the fourth respondent was aware of this fact as their current residential address is reflected in the fourth respondent's records pertaining to them. The fourth respondent refused to acknowledge this fact, although it was clear from the documentation attached that the fourth respondent was aware of this fact. The "**ABSA COMPREHENSIVE CUSTOMER INFORMATION**" lists the applicants' residential address correctly as 17 Schipol Street Highveld x 8, Centurion. This document also reflects the husband, namely the first applicant's, telephone number. The fourth respondent harped on the fact that in terms of clause 12 of the suretyship agreement, a change of *domicilium citandi et executandi* had to be in writing. Nonetheless, if the bank knew that the applicants no longer resided at this address (which it did, according to the fourth respondent's records) it would amount to *mala fides* to serve the summons on an erstwhile residential address.

[36] What the fourth respondent does acknowledge, however, is that the summons never came to the applicants' attention. When they became aware

thereof, on 29 January 2014, they immediately contacted their erstwhile lawyer, Mr Oupa Motaung, who could not assist them, with the result that on 12 May 2014, they contacted their current attorneys of record who launched an application for rescission on 28 May 2014. The applicants therefore contend that the application was brought within a reasonable time.

[37] In the answering affidavit in the rescission application it was submitted that in the absence of an affidavit from attorney Motaung, the applicants have not proved that they consulted another attorney. That it may be difficult to persuade an attorney to depose to an affidavit to the effect that he was the cause of a delay and possibly incorrect legal advice, can readily be understood. This argument on behalf of the fourth respondent is therefore of little value.

[38] The question is whether such service, on an "old" *domicilium citandi et executandi*, renders the grant of the default judgment procedurally defective.

[39] In Herbstein and Van Winsen **The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa** Fifth edition Juta *sub. cap.* ***C Judgments and Orders*** at page 931 the following is stated: —

> "*C* ***Erroneously sought or erroneously granted in the absence of any party affected thereby***
>
> ***The question of what constitutes an error for the purposes of rule 42 has been the subject matter of a number of decided cases.***[1] ***It has been stated that it seems that a judgment has been erroneously granted if there existed at the time of its***

[1] ***Topol v L S Group Management Services (Pty) Ltd*** **1988 (1) SA 639 (W)** at 648E–650C. See also ***Rail Commuter Action Group v Transnet Ltd t/a Metrorail (No 2)*** **2003 (5) SA 593 (C)** at 594.

issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment."[2]

[40] In view of the aforesaid, it is held that there was no unreasonable delay and that Rule 42 (and the common law) have been complied with by the applicants.

[41] The main defence is that the applicants stood surety for a company called Abrina 1591 (Pty) Ltd, whereas the bond on which the fourth respondent relies was a normal housing bond over the applicants' sectional unit and not a surety bond.

[42] I pause to point out that the fourth respondent, in its answering affidavit, in the joinder application, states that: "***(i)t should be kept in mind that, at the state of granting financial assistance to the principal debtor, the (fourth) respondent had no knowledge of the principal debtor, except that the applicants were involved and that the applicants stood suretyship for the indebtedness of that entity.***" This allegation is bizarre, to put it mildly. It is not often that one hears that a bank loans money to an unknown entity.

[43] That this allegation is inaccurate is borne out by the bank statement attached to the founding affidavit in the rescission application which clearly relates

[2] ***Nyingwa v Moolman NO*** **1993 (2) SA 508 (Tk GD)** at 510.

to Abrina 1591 (Pty) Ltd, P.O. Box 114 Newtown 2113 (account number 40-6805-6685).

[44] The fourth respondent further alleges in its affidavits in the rescission applications: "***At the stage of binding themselves as sureties to the (fourth) respondent, the applicants knew that they were accepted as sureties on behalf of the principal debtor on the basis that they owned immovable property and that, as sureties, their immovable property may be executed upon in the event of the principal debtor failing to pay the amounts owing by it to the respondent. The respondent granted financial assistance to the principal debtor on condition that the principal debtor supply to the respondent valid and valuable Deeds of Suretyship signed by the first and second applicants who are married in community of property. The applicants complied therewith.***"

[45] The answering affidavits in the rescission and joinder application also contains the following convoluted reasoning as to why the applicants' personal property was allegedly mortgaged in respect of an unidentified debtor's loan: —

> "***The principal debtor's indebtedness to the respondent was, at all material times, secured by a mortgage bond registered against a property being the property that was sold in execution. I say that for the reasons that follow. The respondent's claim for repayment of the amounts owing by the principal debtor is against the entire financial scheme designed to support the principal debtor and to keep it in***

business. The scheme was designed by, **inter alia**, *the applicants to operate as follows:*

a) An application to the (fourth) respondent for the lending of an amount to the principal debtor on condition that the applicants, who are registered owners of an immovable property, sing Deeds of Suretyship in favour of the respondent;

b) the immovable property remains of vital importance in that the amount advanced to the principal debtor was secured by the immovable property which, in turn, was bound and remains bound by virtue of Deeds of Suretyship entered into by the applicants;

c) but for the fact that the applicants owned immovable property, the principal debtor would never have obtained any financial assistance from the respondent.

As a result, the (fourth) respondent's claim and the principal debtor's indebtedness is underwritten by an immovable property that is subject to a mortgage bond granted by the respondent in favour of the applicants. The mortgage bond only prescribes after a period of 30 years from date upon which the claim, which forms the subject matter of the plaintiff's claim against the applicants, as sureties, arose. That claim arose on a date other than the date alleged by the applicants;"

[46] It is significant that the fourth respondent cannot rely on a written or oral agreement which supports its convoluted reasoning.

[47] That the fourth respondent has to resort to such convoluted reasoning is, in itself, telling.

[48] The fourth respondent further seeks to tie up loose ends in the rescission application by stating the following: —

> "***The (fourth) respondent will not only, during argument, rely upon the financial design and structure more fully set out above, but also upon the fact that:***
>
> - ***the deeds of suretyship provides that the applicants bound themselves as sureties and co-principal debtors in*** **solidum** ***with the principal debtor for the repayment on demand of all amounts owing by the principal debtor to the respondent;***
> - ***the aforesaid necessarily entails that the amount owing by the sureties is secured by a mortgage bond and that such amount, secured as aforesaid, is subject to the provisions of the Prescription Act 68 of 1969. In terms of section 11 of that Act it is provided that a debt secured by a mortgage bond only prescribes after a period of 30 years.***"

[49] The allegation that "***the aforesaid necessarily entails***" that the amount owing to an unknown debtor is secured by a mortgage bond is wholly inaccurate. This is pure wishful thinking on the part of the fourth respondent. When one enters into a suretyship agreement one does not

necessarily thereby mortgage one's property. It needs only be stated to be rejected.

[50] From the date upon which the principal debtor was deregistered until the date upon which the directors and shareholders, including the applicants, applied for the reregistration thereof and the date upon which the fourth respondent became aware of the fact that the principal debtor was *"in the process of reregistration"* the fourth respondent alleges that it had no knowledge of the identity of its debtor and the facts upon which it could rely in order to hold the principal debtor liable. (There is a not so subtle difference between the version proffered in the rescission application and the version proffered in the joinder application, which has been quoted above.) These facts were allegedly withheld from the fourth respondent and the fourth respondent had to rely upon searches undertaken by itself, subsequent to the launch of the rescission application, in order to ascertain that the principal debtor was being reregistered.

[51] Of great significance is that it is pleaded by the fourth respondent that the loan agreement which it entered into with the principal debtor was partly written and partly oral. Furthermore, the particulars of claim read as follows: —

> ***"During or about 7 June 2007 and at Pretoria, the Plaintiff and ABRINA 1591 (Pty) Ltd (Reg. NO: 2005/025100/07) deregistered, hereinafter referred to as 'The Principal Debtor', both parties duly represented, entered into a partly written, partly oral, Term Loan Agreement."*** (Emphasis added)

[52] On the face of it, and what was presented to the judge hearing the default application, the Term Loan Agreement was entered into with a deregistered company.

[53] This renders the particulars of claim vague in the extreme.

[54] It is very difficult to fathom who signed the written loan agreement on behalf of an unknown debtor. Conveniently, the said written part of the loan agreement was, so it is alleged, destroyed in a fire. Furthermore, as stated, no particulars are given regarding the alleged oral part of the loan agreement. Express terms of the loan agreement are merely pleaded without a distinction being drawn between the terms of the written agreement and the terms of the oral agreement. Where, when and by whom the oral agreement was entered into are not pleaded which, in any event, renders the particular of claim fatally defective.

[55] The fourth respondent's deponent then continues to state that, to the best of his knowledge, the principal debtor has not yet been reregistered. This is followed by the statement that, "***(i)f not, I believe it will be registered within the very near future***". (In the supplementary heads of argument filed for the respondent, reference is made to an extract from the register.) This extract reflects the following: -

2009/11/13	*AR IN DEREGISTRATION (ANNUAL RETURN NON COMPLIANCE – DEREGISTRATION*

	REGSITRATION DATE: 14/07/2005AR DUE DATE: 01/07/2006AR LATE DATE: 01/09/2006DEREGISTRATION COMMENCE DATE: 01/03/2007DEREGISTRATION ACTION DATE: 13/11/2009)
2010/07/16	*AR FINAL DEREGISTRATION (FINAL DEREGISTRATION FOR ANNUAL RETURN NON COMPLIANCE)*
2012/10/02	*AR - RE-INSTATE INTO BUSINESS (THABO LESLEYTHATANA7406175575085)*

[56] It is not for a court to analyse documents annexed to an affidavit but for a deponent to explain them to a court. According to the fourth respondent, it states on oath that it does not know whether the principal debtor has been reregistered. Hence, the history reflected against the date of 2012/10/02 may simply mean that reregistration proceedings had been commenced.

[57] The following statement is then made by the deponent for the fourth respondent: —

> *"I respectfully state that, under the aforesaid circumstances, the applicants cannot rely upon a defence of prescription as the entity, being the principal debtor, was deregistered. The respondent was entitled to look to the sureties for payment, and knew that the amount owing by the applicants to the (fourth) respondent was secured by a mortgage bond. That amount remains so secured."*

[58] How one enters into agreements with an unknown entity which no longer exists, is difficult to fathom.

[59] The fourth respondent's remedy was to apply for the reregistration of the company. However, as it did not even know, on its version, with whom or with entity it had entered into an agreement (partly written and partly oral) the fourth respondent's allegations are nonsensical.

[60] All these convoluted arguments would not have been necessary had the bank obtained a second bond over the applicants' property to secure Abrina 1591 (Pty) Ltd's or the applicants' suretyships.

[61] The fourth respondent's desperate attempts to tie the applicants' liability (in terms of their suretyship agreements to an unknown, non-existing debtor) to the existing mortgage bond obtained to secure their personal sectional unit loan, is clearly because the fourth respondent believes that in the absence of a mortgage bond, its claim has prescribed. In any event, on its own version, it has no claim as no principal debtor existed.

[62] The summons was only served upon the applicants, *qua* sureties, on 18 April 2013. The principal debtor's name and registration number appears clearly on the suretyship agreement, rendering the fourth respondent's version that it did not know who the principal debtor was at certain different points in time (when regard is had to the different versions in the affidavits in the joinder and rescission applications) patently inaccurate. Even if the fourth respondent were to be believed, then it could have argued the

requisite knowledge by exercising reasonable care as contemplated in section 12(3) of the Prescription Act 68 of 1969.

[63] It is stated by the fourth respondent in its answering affidavit in the rescission application that the first applicant and two other people became directors and shareholders of the principal debtor in approximately September 2006, and that the principal debtor was deregistered on 16 July 2010. This is not how the pleadings read which indicates that a loan agreement was entered into with a deregistered company. Allegedly the principal debtor (which the fourth respondent states "includes" the applicants) applied for the re-registration of the principal debtor on 2 October 2012. (A third director, a certain Malada Awelani's status is reflected as "resigned" in the WINDEED CIPC Company Report.)

[64] It is also not denied in the answering affidavit to the rescission application that on or about 29 January 2014, the second applicant became aware of the attachment of the applicant's property due to a phone call from the fourth respondent's attorney. Neither is it denied that the applicants then contacted their attorney Oupa Motaung of the firm Malebye Motaung Motembulnc, nor that the first applicant was dissatisfied with the advice received as it differed from the research he had done on the internet.

[65] The fourth respondent's deponent states that he has in his possession and control the account of the principal debtor, as well as all documents pertaining to the applicants and a Mr Thabane (sic). He also stresses that "to the best of his knowledge", the applicants never contacted the fourth respondent regarding the default judgment. The use of this phrase in

quotation marks and the reference to a Mr Thabane underscores the applicants' doubt whether the deponent truly has any knowledge of the loan agreement and, most importantly, the oral part thereof.

[66] This sectional mortgage bond over the applicant's sectional unit was obtained by the applicants in their personal capacity and it was registered three years before the loan agreement was entered into by the fourth respondent with an unknown entity.

[67] The bond is also referred to as a first mortgage bond over the property.

[68] The applicants contend that the fourth respondent obtained judgment against them, based on this bond, which they entered into in their personal capacities in order to obtain a loan in respect of the unit section number 3, known as Crystal Springs situate at Erf 29338, Highveld, Extension 50 Township City of Tshwane Metropolitan Municipality.

[69] As stated, the fourth respondent relied on a suretyship agreement which the applicants and a certain Thabo Lesly Thatana had entered into in respect of an entity called Abrina 1591 (Pty) Ltd. I have referred to the wording of clause 21 thereof above.

[70] It is clear that the applicants stood surety only for the amount loaned to Abrina 1591 (Pty) Ltd. It is also important to note that it is stated that ***"this suretyship shall be a continuing covering security.***" Hence, the security

which the Bank obtained for the payment of Abrina 1591 (Pty) Ltd's debt was the deed of suretyship and not a mortgage bond.

[71] As set out above in the particulars of claim, it is pleaded therein that during or about 7 June 2007, the plaintiff and Abrina 1591 (Pty) Ltd deregistered (sic) entered into a loan agreement, which was partly written and partly oral. The standard loan agreement, referred to as annex "**A**" in the particulars of claim is not attached to the application. The loan which was granted to Abrina 1591 (Pty) Ltd, in terms of the particulars of claim, was an amount of R921 322.00 which qualifies as a large agreement with the result that the National Credit Act 34 of 2005 does not apply to it.

[72] The standard mortgage bond and mortgage conditions are, similarly, not attached to the particulars of claim. All that can be gleaned from an annex attached to the application, is that the first applicant was a director of the said company (in terms of the WINDEED search) together with other directors. (The second applicant was never a director of Abrina 1591 (Pty) Ltd).

[73] It is clear that the first mortgage bond, dated 17 November 2004, is for a personal loan and not in the nature of a bond in respect of a suretyship.

[74] What the current status of Abrina 1591 (Pty) Ltd is, is unknown. In any event, prescription started running against the principal debtor as soon as the whole amount was due, owing and payable. This date is stated to be April 2008 in the application for rescission. As stated, when a company is

deregistered the relief which a creditor such as the fourth respondent has is to seek its reregistration and then to sue it. This did not happen.

[75] The last payment made by the principal debtor was the sum of R61 077.23 which the fourth respondent appropriated from Abrina 1591 (Pty) Ltd's bank account on 5 April 2008. This was the last amount paid by Abrina 1591 (Pty) Ltd, as set out in the application for rescission.

[76] From the transactional history it is clear that during 2007 there were already unpaid debit orders.

[77] Miller JA held in ***Chetty v Law Society, Transvaal*** **1985 (2) SA 756 (A)** 764I–765F, that: —

> "***As I have pointed out, however, the circumstance that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission.***"

[78] Miller JA then referred to the judgment of ***Melane v Santam Insurance Co Ltd*** **1962 (4) SA 531 (A)** at page 532 and held: —

> "***But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default.***

An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits. In the light of the finding that appellant's explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success. Nevertheless, in the interests of fairness to the appellant, it is desirable to refer to certain aspects thereof."

[79] It is trite that a surety's liability is accessory to the principal debtor's debt.

[80] The further argument that a *pignus iudiciale* was created between the fourth respondent and the *bona fide* purchasers of the immovable property is also incorrect in law. This principle is discussed in depth in the matter of ***Knox NO v Mafokeng and Others*** **2013 (4) SA 46 (GSJ)** as follows: —

"[17] The common-law principles are ... reflected in Badenhorst, Pienaar & Mostert Silberberg and Schoeman's The Law of Property (5 ed) at 261 in the following terms, with reference to the relevant common-law authority:

'Property sold at judicial sales cannot, after delivery in the case of movables or registration in the case of immovables, be vindicated from a bona fide purchaser. Even when an article is sold by mistake as belonging to a judgment debtor, the true owner cannot vindicate it from a bona fide purchaser (though Matthaeus states that he or she can do so on refunding the purchase price to the purchaser). Thus, section 70 of

the Magistrates' Courts Act provides that the sale in execution by the Sheriff of the court will not, in the case of movable things after delivery thereof or in the case of immovable things after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.'

In fn 192 on the same page, the authors qualify the general statement by stating that: —

'(t)he sale, however, has to be a valid sale complying with the applicable rules of court and statutory measures: see Van der Walt v Kolektor (Edms) Bpk 1989 (4) SA 690 (T); Joosub v JI Case SA (Pty) Ltd 1992 (2) SA 665 (N) at 679B'.

[18] It follows that the first common-law principle to be applied in the present instance is that, as a general rule, property sold at a sale in execution in terms of a valid, existing judgment cannot be vindicated from a bona fide purchaser once the property had been transferred to the purchaser, provided the sale in execution was not a nullity."

[81] Thus, so long as transfer has not yet been effected, a sale to a *bona fide* purchaser is not binding.

[82] The entire application is rendered troublesome is that no further reference is made to consequences of the status of Abrina 1591 (Pty) Ltd *qua* a deregistered company as at the date when summons was issued. On a

reading of the particulars of claim alone, default judgment could not have been granted absent an allegation that the company had been reregistered.

[83] In this regard it is important to note that section 73(6) of the 1973 Companies Act was repealed by s 224 of the Companies Act 71 of 2008 which came into operation on 1 May 2011. In the matter of ***Insamcor (Pty) Ltd v Dorbyl Light & General Engineering 2007 (4) SA 467 (SCA) para 23*** Brand JA, in an *obiter diclum* held that section 73(6) "seems to validate, retrospectively, all acts done since deregistration – including, for example, the institution of legal proceedings – on behalf of a company which did not exist."

[84] It is useful to begin by considering the general effect of a deeming provision such as the one in the instant case. The use of the word 'deemed', Innes J held many years ago, is . . . ***"not a very happy one, because that term may be employed to denote merely that the persons or things to which it relates are to be considered to be what really they are not . . . ."***[3] However, usually it is a species of retrospective legislation *which* ***"changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction. . . . A retrospective statute operates as of a past time in a sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future"***. (Emphasis added.)[4] This means that it will almost always have

[3] ***Chotabhai v Union Government & another 1911 AD at p 33.***

[4] ***Driedger, Construction of Statutes (1983) at 185-6 referred to in Devenish op cit at 188.***

the effect of changing the consequences of the transaction – also for third parties – unless there is some limitation in the statute itself.

[85] In ***Ex parte Sengol Investments (Pty) Ltd***,[5] Van Dijkhorst J described the general effect of the deregistration of a company: -

"The effect of restoration to the register is that the company is deemed not to have been deregistered at all. This entails that all parties who have by deregistration of the company or thereafter acquired rights to assets which the company had upon deregistration will lose those rights as the assets will revert to the company. This includes assets which have become **bona vacantia** ***and as such accrued to the State. Likewise debtors and creditors of the company at time of deregistration may upon restoration find their obligations or rights resuscitated."*** (Emphasis added.)

[86] However, in the matter of ***CA Focus CC v Village Freezer t/a Ashmel Spar 2013 (6) SA 549 (SCA)*** it was held in paragraph 22 that: -

"In conclusion it is interesting to note that ss 26(7) of the Act and 73(6) of the 1973 Companies Act were repealed by s 224 of the Companies Act 71 of 2008, which came into operation on 1 May 2011. Section 82(4) of the 2008 Act now allows the registration of deregistered company or close corporation to be reinstated, but the provision permitting the restoration to operate retrospectively was omitted, perhaps because the lawmaker is now aware of potential anomalies." (Emphasis added)

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[5] ***Ex parte Sengol Investments (Pty) Ltd*** *1982 (3) SA 474(T)* ***at 477C-D.***

[87] These anomalies lie in the fact that "the finger moves on" and parties may change their positions radically and enter into new agreements and the like which may be acutely affected should the reregistration of a company have retrospective effect.

[88] All the parties to the rescission application overlooked the problems caused by the deregistered status of the company and it was only addressed when the court requested further heads of argument on this issue.

[89] Given the fact that the parties were not alive to the problems created by the deregistered status of the company, this aspect was only dealt with tangentially in the application for rescission. On the respondents' version, only when the application for rescission was brought, Abrina 1591 (Pty) Ltd was in the process of reregistration. The respondents expressly stated that they did not know whether the company has been reregistered.

[90] The question to be answered then is whether the sureties (the applicants in the application for rescission) could be sued, whilst the principal debtor Abrina 1591 (Pty) Ltd was no longer in existence.

[91] The appellate division in Traub v Barclays National Bank Ltd 1983(3) SA 619 (A) held that: -

The final defence relied on by the appellants' counsel against the Bank's claim for the capital amount was based on the fact that Dancor was deregistered on 21 December 1979. This came about because the company had become dormant; it

had lost all its assets and it was not carrying on any business. It is common cause that the Registrar of Companies acted in accordance with the provisions of s73 of the Companies Act 61 of 1973 when Dancor was deregistered. Taurog was aware of the developments and so, according to his evidence, was the Bank. The appellants pleaded that Dancor's deregistration had extinguished its debt to the Bank, with the result that the appellants' liability to the Bank was also extinguished (see the reported judgment of MYBURGH J at 294D – F). In my opinion this defence is without merit. In support of it, counsel said: there cannot be a debt without a debtor. Whatever validity such a statement may have in other contexts, it certainly cannot be applied to the facts of this case. It is not the law that a surety is freed from liability to the creditor when the principal debtor ceases to exist. If the principal debtor is a natural person and he dies, his surety remains liable to his creditor; and a surety for a company remains liable to its creditor if it is liquidated and dissolved under s 419 of the Companies Act. In short, there is no foundation for the argument that Dancor's deregistration released the appellants from liability to the Bank."

[92] The Supreme Court of Appeal held in ***Jans v Nedcor Bank Ltd [2003] 2 All SA 11 (SCA) (24 March 2003)*** an analysis was undertaken whether the principal debtor and suretyship's obligations prescribe at the same time. It was emphasised that the agreement between a creditor and a surety is usually that the surety binds him/herself as surety and co-principal debtor.

[93] It was pointed out by ***Trollip JA in Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron 1978 (1) SA at 471 c – a ... "that the effect of a surety***

binding himself as a co-principal debtor is not to render him liable to the creditor in any capacity other than that of a surety who has renounced the benefits ordinarily available to a surety against the creditor (e.g. that payment be sought from the principal debtor first). But where the surety is bound as a co-principal debtor he or she will be jointly and severally liable with the principal debtor and prescription will begin to run in favour of both at the same time."

[94] In the Traub matter it was held as was done in ***Kilroe-Daley v Barclays National Bank Ltd 1984 (4) SA 609 (A)***: -

"In that case the surety executed a mortgage bond securing his obligation in terms of a contract of suretyship. It was held that when the claim against the principal debtor became prescribed the claim against the surety likewise became prescribed and the creditor was accordingly precluded from invoking s 11(a)(i) of the Prescription Act which provided for a period of prescription of 30 years in respect of a mortgage bond."

[95] In ***Jans v Nedcor Bank supra*** Scott JA undertook an extensive analysis of the old authorities and cited the following dictum from ***Cronir v Meerholz 1920 TPP 403***: -

"By our common law the surety undertakes to pay the debt of the principal debtor so long as that debt exists in law and has not in fact been paid by the debtor. If, therefore, the debt is extinguished by prescription or the remedy is barred by a

limitation of actions the surety is either discharged or the remedy against him is also barred. But if the debt is kept alive by judgment, so that neither prescription nor limitation will run, the surety's obligation by the common law continues to exist, because his obligation and that of the principal debtor is one and the same."

[96] Scott JA also stated the following in ***Jans v Nedcor Bank*** paragraph [21]: -

"With regard, in particular, to the reasoning in Cronin v Meerholz, supra, De Wet points out that while the accessory nature of the surety's obligation has the effect that prescription of the claim against the principal debtor results in prescription of the claim against the surety, it does not necessarily follow that interruption of prescription against the principal debtor interrupts prescription against the surety. He says that to accept that it does, is to put the cart before the horse. (De Wet and Van Wyk op cit at 398-399 n 53.) The metaphor is, of course, not entirely accurate. If completion of the principal debtor's period of prescription results in completion of the surety's period of prescription, even if prescription in favour of the latter began to run at a later date than in the case of the former, it is neither a big nor an illogical step to accept that an interruption of prescription against the principal debtor has the effect of interrupting prescription against the surety. But in any event, in arriving at the conclusion it did, the Court relied not only on the accessory nature of the surety's obligation but also on its commonality with the principal debtor's obligation."

[97] Scott JA in paragraph [30] of ***Jans*** concludes, however, that when a principal debtor's claim is interrupted or delayed, so is the liability of a

surety. He emphasised that sureties assume obligations of others with their free consent and has a commercial interest in the principal debt. In doing so, he accepted Voet's viewpoint on this issue. Scott JA added that provided that the surety exercises some vigilance in relation to the fortunes of the claim against the principal debtor, there will be no prejudice. In fact, in order to protect the claim against a surety to prescribe before the claim against the principal debtor would subvert the purpose of a suretyship agreement ***(Wessels JP Union Government v Van der Merwe 1921 TPP 318 at p 320).***

[98] As a result, Scott JA held in ***Jans*** at par 32 as follows: -

"In my view therefore the position in the South African law is that an interruption or delay in the running of prescription in favour of the principal debtor interrupts or delays the running of prescription in favour of the surety. If, of course, prescription in respect of the claim against the surety has not yet commenced to run, any interruption or delay relating to the claim against the principal debtor will not affect the position of the surety, but in the present case, of course, prescription began to run in respect of both the principal debtor and the surety at the same time."

[99] Finally, it should be borne in mind that reregistration does not validate acts retrospectively but only operates prospectively due to the wording of s 224 of the Companies Act 71 of 2008.

[100] It should be recalled that even where it was deemed under the old section 76(3) that a reregistration of a company had retrospective effect, the court was approached for an order to that effect which contained a rule *nisi* calling upon all interested persons to show cause why the company's restoration should not be restored. This was held in cases such as ***Ex Parte Sengol Investments (Pty) Ltd 1982 (3) SA 474 (T)*** and ***Ex Parte Jacobson: In Re Alec Jacobson Holdings 1984 (2) SA 372 (W).***

[101] The reasoning behind the practice appears from the following statement by Van Dijkhorst J in ***Sengor*** (at 477 C – F): -

[20] 'The effect of restoration to the register is that the company is deemed not to have been deregistered at all. This entails that all parties who have by deregistration of the company or thereafter acquired rights to assets which the company had upon deregistration will lose those rights as the assets will revert to the company. This includes assets which have become bona vacantia and as such accrued to the State. Likewise debtors and creditors of the company at time of deregistration may upon restoration find their obligations or rights resuscitated.

It follows that the restoration of the registration of a company in terms of s 73 (6) may have wide-ranging effects. Although the applicant alleges that the company had no other assets than the mineral rights, and that it had no liabilities, the possibility does exist of the discovery of forgotten assets. That this is not illusory is evidenced by the cases where this fact necessitated an application like the present . . . .'

(See also Goldstone J in Ex Parte Jacobson at 377F-H): -

[21] The statement by Van Dijkhorst J must, of course, be understood against the background of s 73(6). It provides:

'6(a) The Court may, on application by any interested person or the Registrar, if it is satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that it is just that the registration of the company be restored, make an order that the said registration be restored accordingly; and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered.

(b) Any such order may contain such directions and make such provision as to the Court seems just for placing the company and all other persons in the position, as nearly as may be, as if the company had not been deregistered.'

[102] This reasoning was followed by Brand JA in ***Isamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd, Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd; [2007] SCA 6 (RSA) (12 March 2007)*** at paragraphs [30] and [31].

[103] The sections of the Prescription Act 68 of 1969 as amended which find application in this case are the following: -

3. Completion of prescription postponed in certain circumstances

(1) If –

(a) the person against whom the prescription is running is a minor or is insane, or is a woman whose separate property is controlled by her husband by virtue of his marital power, or is a person under curatorship, or is prevented by superior force from interrupting the running of prescription as contemplated in section 4; or

(b)the person in favour of whom the prescription is running outside the Republic, or is married to the person against whom the prescription is running, or is a member of the governing body of a juristic person against whom the prescription is running and;

(Section 3(1)(b) substituted by section 10 of Act 139 of 1992)

(c) the period of prescription would, but for the provisions of this subsection, be completed before or on, or within three years after, the day on which the relevant impediment referred to in paragraph (a) or (b) has ceased to exist,

the period of prescription shall not be completed before the expiration of a period of three years after the day referred to in paragraph (c).

(Emphasis added)

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10 (2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.

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13. Completion of prescription delayed in certain circumstances

(1) If -

(a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1);

(b)the debtor is outside the Republic; or

(Section 13(1)(b) substituted by section 11(a) of Act 139 of 1992)

(c) the creditor and debtor are married to each other; or

(d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or

(e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person;

[104] (Whether the first applicant was still a director of Abrina 1591 (Pty) Ltd is unclear but clearly he was not whilst the company was unregistered.) On what is set out in the answering affidavits, the sureties (the applicants in this application), before the company had been reregistered, brought the application for default judgment prematurely. This, in itself, is also, as set out above, a fatal flaw.

Conclusion

[105] In the premises, it is held that the mortgage bond which was registered as security for the applicants' home loan, could not be used as security for a loan to Abrina 1591 (Pty) Ltd.

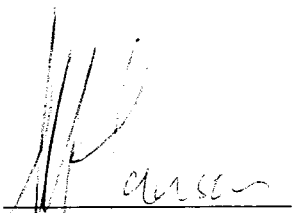
[106] Furthermore, the sureties were sued prematurely when Abrina 1591 (Pty) Ltd had not yet been reregistered. This, in itself, renders the default judgment procedurally defective.

[107] Furthermore, the loan agreement had been inaccurately pleaded and reference was made in the particulars of claim to the wrong bond agreement.

[108] In the premises, the following order is made: —

Order

1. The judgment granted by default against the applicants on the 27th of September 2013 is rescinded.
2. The sale in execution which took place on the 19th March 2014 pursuant to the grant of the default judgment is set aside.
3. Costs of the application is to be paid by the fourth respondent.
4. The applicants are ordered to pay the costs occasioned by the filing of yet a further set of heads of argument.



JANSEN J
JUDGE OF THE HIGH COURT

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