



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 10040/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 17 MARCH 2022

SIGNATURE

In the matter between:

LETHWELE LISTER MOKOTOANE

First Applicant

KINDAH EVENLYN MATABOGE

Second Applicant

THEKISO SAMUEL MATABOGE

Third Applicant

STEPHEN WHYTE NANO MATABOGE

Fourth Applicant

and

COLT LOGISTICS CC

First Respondent

THE SHERIFF: TSHWANE (PRETORIA) EAST

Second Respondent

J U D G M E N T

This matter has been heard by way of a virtual hearing and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

On 5 December 2021, the plaintiff in the main action (Colt Logistics) obtained a default judgment against the first defendant, being erstwhile director of M2 Precious and Base Metals (Pty) Ltd (the principal debtor) as well as three other defendants, representing the Nano Mataboge Family Trust as trustees thereof (the trust). The judgment was obtained after the trust was unsuccessful in uplifting the bar imposed on the delivery of a plea. The trust now seeks to have the default judgment rescinded.

[2] The nature of the cause of action

- 2.1 On 23 December 2019 Colt Logistics and the principal debtor entered into an agreement with each other which agreement was subsequently amended, the last addendum being dated 24 April 2020.
- 2.2 In terms of the agreement (as amended) Colt Logistics loaned and advanced some R5,2 million to the principal debtor.
- 2.3 Colt Logistics' particulars of claim states that a "default event" had occurred in respect of the principal debtor's obligations, entitling Colt Logistics to seek payment of the outstanding amount from the erstwhile director and the trust as "guarantors".
- 2.4 Both the principal debtor and the trust's interests in respect of the agreements and the ensuing litigations were in the hands of the erstwhile

director, who had also instructed the trust's previous attorneys. It is these attorneys who had failed to deliver a plea in this matter.

- 2.5 In separate litigation against the principal debtor, the said director had settled with Colt Logistics on the basis that liquidation proceedings would not continue against the principal debtor and, instead of making repayment, it would transfer thirteen prospecting rights for chrome and platinum and other precious metals (estimated to be some R300 million in value) to Colt Logistics.
- 2.6 The settlement agreement is now subsequently under attack (to which aspect I shall refer more fully hereunder), which caused Colt Logistics to proceed against the trust as co-principal debtor and "guarantor".
- 2.7 Although Colt Logistics continues to view the trust as a co-principal debtor, the nature of its liability was at all relevant times accessory to the debt of the actual principal debtor. Had the principal debtor paid off the loan or, for example, repaid half of it, the trust could either no longer be held liable or only liable for the outstanding half of the debt. The trust's accessory liability, although jointly and severally, is therefore of the same nature as that of a surety.
- 2.8 So far, Colt Logistics' cause of action.

[3] Was the judgment erroneously sought or granted?

- 3.1 Adv Strauss, who appeared for Colt Logistics in this application, had also represented it during the default judgment application. That application was proceeded with after Moosa AJ declined to uplift the bar and allow the trust's plea to be formally delivered. Pursuant hereto and, at the instance of Adv Strauss, Moosa AJ was urged to disregard the contents of the affidavit in support of the application for upliftment, and all arguments

based thereon, which she did. (These facts are not in dispute and was confirmed by a new attorney for the trust who was present in court at the time).

3.2 At the time when the default judgment was sought:

- The principal debt on which Colt Logistics had relied on initially, was no longer relied on as a cause of action against the principal debtor in winding up proceedings. The reason was that the debt has been extinguished by way of a settlement.
- However, the settlement agreement whereby the debt was extinguished has since become the subject of pending litigation in case no 45837/21 in this court. This was launched by a prospecting company who is also a creditor of the principal debtor, Geoprospect Investment Holdings (Pty) Ltd. Colt Logistics is a party to that litigation.
- A separate action had been instituted by the principal debtor, also in this court, in case no 60127/21 wherein fraud and a contrivance is alleged between Colt Logistics and the erstwhile director. Colt Logistics is also a party to that action wherein the loan agreement is sought to be declared invalid.
- The erstwhile director has been removed as a director of the principal debtor and his attorneys (which were also the principal debtor's attorneys and the ones who caused a bar to have descended on the trust's plea) have been reported to the Legal Practice Council.
- Objections to the transfers of prospecting rights (perpetuating the stripping of the principal debtor's assets) have been lodged at the

Department of Mineral Resources and Energy. Colt Logistics was aware of this.

- 3.3 Noting that none of the above issues, which all impact on the nature, validity and extent of the principal debt, featured in Adv Strauss' Heads of Argument furnished to Moosa, AJ, at the time the default judgment was applied for, I enquired whether any of it was disclosed to the court at the time. Adv Strauss responded, after some thought, that to the best of his knowledge, it had not.
- 3.4 In my view, Colt Logistics' purely procedural view of its cause of action, namely simply a loan to a principal debtor, a default and a claim against the trust as a surety and in respect of which no plea has been allowed, is manifestly over-simplistic and inappropriate in these circumstances. The pending litigation attacking the whole validity of the loan agreement and the possible use thereof as a front to asset-stripping might result in the principal debt being unenforceable or, at best, it becoming an enrichment claim. I need not express any view on this as it is certainly a matter for the hearing of oral evidence.
- 3.5 To amplify further: in this matter, there is both an action and an application (wherein facts have been confirmed on oath) pending, to which Colt Logistics is a party. Colt Logistics, as an applicant seeking default judgment, was aware that this litigation may impact on or destroy its cause of action. For Adv Strauss to hold the unilateral view that the allegations in the pending litigation are "nonsense allegations" do not, in my view, justify it being simply ignored at the instance of Colt Logistics. As least, a court should have been placed in a position to consider whether, despite the pending litigation, it would be justified in granting default judgment. Alternatively, if Adv Strauss' contentions of a "nonsense" attack on the

settlement hold water, then the principal debt had been extinguished by the settlement and judgment against parties in the position of sureties should not have been sought.

- 3.6 I am therefore satisfied that the tests for rescission in terms of both Rule 42 and the common law, which are trite and need not be restated, have been met. In the exercise of this court's discretion, I am of the view that this is clearly a matter which should have gone on trial, separately or on conjunction with the action in case no 60127/21. The matter is further to be distinguished on the facts from *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) to which I had been referred where, without sufficient explanation, consequential damages pursuant to alleged defects in feed was tentatively raised as a factor why it should have been found that default judgment was erroneously sought and should be rescinded. That is a far cry from the present matter.

[4] Procedural aspects

- 4.1 A point which Adv Strauss repeatedly and vehemently argued, was that the trust should be non-suited because the appropriate relief would be an appeal.
- 4.2 Adv Strauss is bolstered in his argument due to the fact that the trust had indeed delivered an application for leave to appeal the default judgment. This was however, done subsequent to the delivery of the rescission application and because Colt Logistics refused to hold over execution pending the hearing of the rescission application. The rescission application was, however prior in time and the trust is entitled in the exercise of its Constitutional Rights to have the disputes raised therein considered by a court, hence this judgment.

- 4.3 Moreover, our courts have already previously indicated that there may be instances where the grounds (or procedure) for a rescission application and those for leave to appeal might overlap. This is one of those cases. See *Silver Falcon Trading 333 (Pty) Ltd and others v Nedbank Ltd* 2012 (3) SA 371 (KZP) at paragraph [4] “*It has been held, in relation to Rule 42(1)(c) that an appeal is no bar to an application for rescission under that rule and I can see no basis why this should not apply equally to Rule 42(1)(a). It may be, therefore, that a judgment is both appealable and subject to rescission under this rule*”.
- 4.4 The general proposition advanced by Adv Strauss that, absent an appeal (for which leave is necessary) a court, once it has delivered a judgment, is *functus officio* and that it cannot revisit its own order is correct, but that proposition does not preclude a rescission application of an order granted in the absence of a party. Rule 42(1)(a) provides that a court may, either on the basis of that rule or the common law, rescind an order or judgment despite it being *functus officio* if, at the time the order was made, the court was unaware of facts which, if known to it, would have precluded the granting of the order. See *Promedia Drunkkers & Uitgewers (Edms) Bpk v Kaimowitz and others* 1996 (4) SA 411 (CPD) at 416J – 417I. This judgment also confirms that a court hearing such a rescission application has a discretion, to be exercised judicially and dependent on the facts. Such a discretion would include the consideration of whether a rescission should be granted, despite the fact that subsequently an application for leave to appeal has (also) been delivered. In this instance the delivery of the second application did not have the effect of negating the first, particularly not on the facts of this case.
- 4.5 I am mindful of the fact that, if the default judgment is rescinded and the trust be given leave to pursue its defence, the effect would be as if the bar

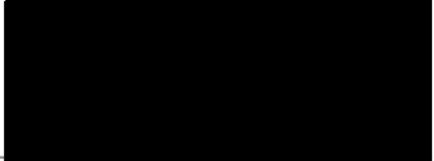
had been lifted. This consequence would “kick in” despite the application for such upliftment having been refused but that is simply the practical and procedural necessity which is to follow (and which would follow) despite the previous proceedings. It is simply a corollary of the present application which has been legitimately brought and which has separately been considered. The plea has already been delivered and for practicality and case management’s sake the Rules as for trials should henceforth apply and it shall be so ordered.

[5] Costs

Ordinarily, costs should follow the event but, having regard to the nature of the allegations and, to be fair to Colt Logistics who might disprove the allegations of fraud and collusion, thereby keeping the principal debt or liability intact, costs should be costs in the cause.

[6] Order

1. The judgment granted by default on 2 December 2021 in this matter is rescinded and set aside.
2. The second to fourth defendants’ plea uploaded under item 004:2 in the Caselines index on 26 May 2021 is formally allowed and the Rules of this court pertaining to further exchange of pleadings, discovery and trial, shall henceforth apply from date of this order.
3. Costs of this application shall be costs in the cause.


N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 7 March 2022

Judgment delivered: 17 March 2022

APPEARANCES:

For the Applicants:

Adv T Scott

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