IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: **23644/2016**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED:/NO

DATE: 10 APRIL 2023

SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between:

VERNON HEN-BOISEN	**Applicant**
and	
SEAN CHRISTENSEN N.O. (In his capacity as duly appointed Liquidator for Alkmaar Beleggings (Pty) Ltd	**1st Respondent**
BURGERBRUG BELEGGINGS (Pty) Ltd	**2nd Respondent**
THE SHERIFF OF THE COURT PRETORIA EAST	**3rd Respondent**

IN RE:

Alkmaar Beleggings (Pty) Ltd	**Plaintiff**
And	

VERNON HEN-BOISEN **1st Defendant**

WINSOME ELIZABETH COETZER **2nd Defendant**

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] This is an application for the rescission of a default judgment granted on 1 March 2021 and certain ancillary relief.

[2] The first respondent (plaintiff in the action) issued summons against the applicant (first defendant in the action) and Winsome Elizabeth Coetzer ("Coetzer" – second defendant in the action) for payment of arrear rental and for an eviction order.

[3] The action is based on a written lease agreement entered into between the first respondent and Almenta 159 (Pty) Ltd t/a Harvey Junior Education on 1 August 2011. The lease agreement was in respect of an industrial premises situated at 1[...] B[...] Street, Koedoespoort, Pretoria ("leased premises"). The first respondent's claim against the applicant and Coetzer is based on a suretyship agreement.

[4] The summons was served at the leased premises, being the *domicilium citandi et executandi* of the applicant, by affixing to the principal door. The applicant did not enter appearance to defend and the first respondent brought an application for default judgment in 2016.

[5] Due to a series of administrative errors, default judgment was only

granted on 1 March 2021.

[6] On 4 March 2021 the first respondent's attorney obtained a warrant of execution against the movable property of the applicant and Coetzer. On 26 March 2021 the sheriff attended at the applicant's residential property situated at 6[...] R[...] Street, Faerie Glen, Pretoria ("the immovable property") and presented the warrant to the applicant. The sheriff stated in the return of service that no money or disposable assets could be found or were pointed out by the applicant. The return was one of *nulla bona*.

[7] Armed with the *nulla bona* return, the first respondent brought an application in terms of rule 46A of the uniform rules of court. In the application the first respondent requested for an order substituting the second respondent with the first respondent as plaintiff / execution creditor.

[8] An order declaring the immovable property executable and authorising the sale of the property was granted on 2 December 2021 in favour of the second respondent.

[9] On 23 February 2022 the sheriff served a notice of sale in execution of the applicant's immovable property on the applicant. The sale was scheduled for the 30th of March 2022.

[10] This prompted the applicant to issue this application on or about 25 February 2022. In opposing the application, the second respondent raised several points *in limine*.

Points *in limine*

First and second points in limine: Application out of time

[11] The second respondent contends that the application, whether brought in terms of rule 42(1), rule 31(5) or the common law is out of time.

[12] The application was brought almost one year after the order for default judgment was granted without any explanation for the unreasonable time delay and should for this reason alone, according to the second respondent, be dismissed with costs.

[13] I will deal with this point in more detail when considering the merits of the application.

Third point *in limine*: Misjoinder of the first respondent

[14] This point relates to the substitution of the second respondent with the first respondent in terms of the court order 2 December 2021. According to the second respondent and since the substitution order, the first respondent has no direct or substantial interest in the matter nor any legal interest which may prejudicially affected by the court order.

[15] The second respondent prays that the application be dismissed on the point of misjoinder.

[16] The second respondent is not a party to the *lis* between the applicant and the first respondent. The alleged mis-joinder of the first respondent, therefore, has no bearing on the merits of the application as between the applicant and the second respondent.

[17] The application was served on the first respondent. The first respondent has elected not to oppose the application and consequently did not raise the point of misjoinder. It was for the first respondent to raise the point if it was of the view that it should not have been joined in the application.

[18] In the premises, this point has no merit.

Merits

[19] The applicant denies that he entered into a Deed of Suretyship with the first respondent. In amplification of this denial, the applicant refers to clause 9 of the lease agreement that reads as follows:

> *"9. <u>SURETYSHIP</u>*
>
> *9.1 The Lease in its entirety is subject to the condition precedent that the person named in item 13 of the Schedule, if any, bind themselves to the Lessor as sureties and co-principal debtors for the Lessee in terms of a* ***Deed of Suretyship*** *approved by the Lessor.*
>
> *9.2 Should the condition precedent set out in 9.1 if applicable, not be fulfilled within sixty days of the date of signature hereof, the Lessor shall be entitled in its discretion either to declare his lease unconditional and to waive compliance with the said condition or alternatively in addition and without prejudice to all other rights available to the Lessor in Law treat such failure as a breach of this lease, and it's being recorded that the said condition precedent is interested* (sic) *as a condition in favour of the Lessor."* (own emphasis")

[20] In the particulars of claim the first respondent pleaded the conclusion of the written lease agreement, the terms of the agreement and the fact that the agreement was breached. In respect of the Deed of Suretyship referred to in clause 9.1, the first respondent pleaded as follows:

> *"5.9 The Defendants bound themselves to the Plaintiff as surety and co- principal for fulfilment in terms of the lease agreement."*

[21] The date on which and place where the Deed of Suretyship was entered into, are not averred nor is the alleged Deed of Suretyship attached to the particulars of claim. During submissions made by Ms Raymond, counsel

for the second respondent, it emerged that no written Deed of Suretyship exists. Ms Raymond endeavoured to convince the court that the lease agreement contained the written suretyship agreement. A mere reading of clause 9 points to the fallacy of the submission. Almeda and the first respondent being the parties to the lease agreement clearly agreed that a Deed of Suretyship must be entered into and failure to do so had distinct consequences.

[22] If the parties agreed that the lease agreement will also serve as a Deed of Suretyship, such agreement would have been contained in the lease agreement. To the contrary, clause 9 envisages the exact opposite.

[23] In the result, there was no causa of action based on a Deed of Suretyship when the order was granted by the Registrar.

[24] In *Marais v Standard Credit Corporation Ltd* 2002 (4) SA 892 WLD, the court held as follows at 897A - B:

" *….In my view the word 'erroneously' covers a matter such as the present one, where the allegation is that for want of an averment there is no cause of action, i.e nothing to sustain a judgment, and that the order was without legal foundation and as such was erroneously granted for the purpose of Rule 42(1)(a).*" [Also see: *Silver Falcon Trading v Nedbank* 2012 (3) SA 371 KZP]

[25] In the result, the application should succeed.

[26] The question, however, remains whether the application was brought within a reasonable time. If not, the application must be dismissed.

Unreasonable delay

[27] The applicant confirmed that the default judgment came to his attention on 4 March 2021 and proceeded to set out a chronology of all the

investigations his attorney had to do, mostly due to the administrative bungling referred to *supra.* No time frames are mentioned and in paragraph 5.11 the applicant merely states the following:

"I further confirm that there has been no undue time delay in approaching this Honourable Court for the appropriate relief since the relevant facts came to my attention and I and my legal team have done our utmost best to obtain the relevant documents of events that occurred some 7 years ago, which attempts have only been partially successful as I have managed to only obtain fragments of the case record that necessitated the launching of this application."

[28] It is apposite to note that rule 42 does not contain a time limit. It has, however, been held in various authorities that it is in the interest of justice that relative certainty and finality dictates that an application in terms of rule 42 should be brought within a reasonable.

[29] In *First National Bank of SA ltd v Van Rensburg NO and others* 1994 (1) SA 677 T, the applicant in the application in terms of rule 42 was the plaintiff in the action. The order granted by the court did not state that the order against the defendants was granted jointly and severally. The plaintiff sought to rectify the order by bringing the rule 42 application three years after it was granted. In dealing with the delay, the court held as follows at 681 G:

"The power created by Rule 42(1) is discretionary (…) and it would be a proper exercise of that discretion to say that, even, if the appellant proved that Rule 42(1) applied, it should not be heard to complain after the lapse of a reasonable time. A reasonable time in this case is substantially less than the three years referred to."* [*The judgment was delivered in a full bench appeal]

[30] In *Nkata v Firstrand Bank* 2014 (2) SA 412 WCC, the court considered an application that was brought two and a half years after default

judgment was granted. In considering whether it should exercise its discretion in granting the rescission application, the court held as follows at para [28] and [29]:

[28] Nkata has not in the present case satisfactorily explained the lengthy delay in seeking rescission. The absence of a satisfactory explanation appears sufficiently, I think, from my summary of the facts. Even when she learnt in March 2013 of the sale in execution scheduled for 24 April 2013, she took until 13 May 2013 to launch the present application. By then the property had been sold in execution to Kraaifontein Properties and the latter had on-sold the property to a third party. Clearly there will be prejudice to third parties if the default judgment were to be rescinded.

[29] I thus consider that Nkata's prayer for condonation of her non-compliance with the 20-day limit in rule 31(2)(b) should be refused and that in the exercise of the court's discretion I should decline to entertain the application in terms of rule 42(1) or under the common law."

[31] In *Ellis v Eden* 2023 (1) SA 544 WCC, the court considered a delay of almost a year and held as follows at para:

"[64] Rule 42(1)(a) does not impose a requirement of 'good cause'. This does not mean that considerations of a kind which feature in a 'good cause' inquiry may not also come to the fore in an assessment as to whether to grant or withhold a discretionary remedy. If rescission in terms of rule 42(1)(a) is sought promptly after the default judgment comes to the defendant's attention, the merits would, in my view, play little if any role in the exercise of the court's discretion, and there may in truth be no basis on which a court could properly refuse rescission. Cases where rescission was thought to follow almost as a matter of course can probably be explained on the basis that in those cases the rescission applications were brought promptly, so that the court's reasoning was not

directed to the question of delay. ***The longer and more unreasonable the delay, however, the more the merits in the main case might enter the picture."*** (own emphasis)

[32] In exercising my discretion, I take into account that the applicant is currently 72 years of age. The immovable property that will be sold in execution should the judgment stand is the applicant and his wife's primary residence.

[33] Coupled with the aforesaid, the fact that a written Deed of Surety was never signed by the applicant, would entail that the applicant stands to lose his primary residence due to a judgment that was granted on a non-existing cause of action.

[34] I am alive to the fact that the period of almost one year is long. One should, however, bear in mind that it took the second respondent almost seven years to obtain default judgment. Furthermore, the immovable property in question has not been sold in execution and a third party will not be prejudiced should rescission be granted.

[35] In the result and notwithstanding the delay, I am prepared to grant the application.

Costs

[36] In view of the delay in the launching of the application, I am of the view that the second respondent was fully within its rights to oppose the application.

[37] I am therefore not prepared to award costs against the second respondent.

ORDER

In the result, I make the following order:

1. The default judgment granted on 1 March 2021 is rescinded and set aside.

2. The writ of execution issued by the Registrar on 4 March 2021 is set aside.

3. The writ of execution issued by the Registrar on 6 December 2021 is set aside.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD:

21 February 2023

DATE DELIVERED:

11 April 2023

APPEARANCES

For the Applicants:	Advocate L Pretorius
Instructed by:	Phosa Loots Inc
For the 2nd Respondent:	Advocate AM Raymond Instructed by: Johan Nysschens Attorneys