IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO 2855/2010

In the matter between:

TRAPEL FARMS CC	FIRST APPLICANT
SANDRA LE PART	SECOND APPLICANT
PIERRE HYLTON LE PART	THIRD APPLICANT

and

RODEL FINANCIAL SERVICES (PTY) LTD	RESPONDENT

JUDGMENT

Date: 20 October 2011

PLOOS VAN AMSTEL, J

[1] On 19 August 2010 judgment was granted against the three applicants, without opposition, for payment of the sum of R3 708 757 together with interest and costs. They now apply for a rescission of that judgment.

[2] The claim which gave rise to the judgment arose out of a written agreement in terms of which the respondent lent an amount of R1 350 000 to the first applicant on or about 6 July 2007, and deeds of suretyship executed by the second and third applicants. The loan was repayable after a period of six months. Nothing has been

repaid by the applicants, neither in respect of the capital nor in respect of interest.

[3] The proceedings which resulted in the judgment were brought on notice of motion. The application papers were served on the first applicant at its registered office (a firm of accountants) on 20 April 2010. The second applicant is the sole member of the first applicant. The papers were served on the same day at the third applicant's chosen domicilium citandi et executandi at 8 Daljeith Road, Ashburton, Pietermaritzburg, which, according to the founding affidavit in those proceedings, was his place of residence. A return of service indicates that the papers were served on the second applicant personally on 4 August 2010, but she denies this. The deputy sheriff who signed the return of service insists in his affidavit that he had served the papers on her personally.

[4] In addition a notice of set down was served on the first applicant at its registered office on 28 July 2010 and at the third applicant's domicilium citandi on 31 July 2010. The return of service which evidences the service of a notice of set down on the second applicant is also disputed by her.

[5] The second applicant does not say in her affidavit that the accountants at the registered office of the first applicant failed to bring the application papers to her notice. Nor is there an affidavit from anyone at the registered office to this effect.

[6] The court file indicates that on 17 May 2010, which was the date specified in the notice of motion, the application was adjourned to 26 May 2010, with costs reserved. On 26 May 2010 the application was adjourned sine die, by consent, with costs reserved. The fact that the adjournment was by consent is not only endorsed on the court file, but also appears from the order made by Koen, J on that day.

[7] Counsel for the respondent informed me from the bar, without objection from counsel for the applicants, that according to her attorney the reason for the adjournment by consent was that the parties were trying to settle the matter. Their efforts were

unsuccessful.

[8] The matter was thereafter set down on the motion court roll and the order was granted unopposed.

[9] Against this background the second applicant's statement that she and the third applicant cannot recall whether or not they became aware of the respondent's application before or after the judgment was granted on 19 August 2010 rings hollow. In any event, her evidence falls short of saying that they were not aware of the application before the judgment was granted. She does say that according to their recollection they became aware of the application before the writ of execution was served. There is no suggestion that upon becoming aware of the application they took any steps to oppose the matter.

[10] It seems clear to me, on the evidence and the probabilities, that the applicants received the application papers, entered into negotiations with the respondent and, when these failed, decided not to oppose the application. They obviously did not think they had a defence. It is worth noting that in 2008 already the applicants were represented by an attorney in their negotiations for an extension of the loan period.

[11] According to the second applicant the efforts to settle the matter continued after the writ was issued and only broke down finally in April 2011. The applicants apparently terminated the services of the attorney who had been representing them until then and consulted a new attorney, who arranged for them to consult with counsel. It was only then that they were advised of the existence of the in duplum rule and that the judgment appeared to have been granted in contravention of the rule. The application for the rescission of the judgment was issued on 11 May 2011.

[12] The applicants base the application for rescission on rule 42(1)(a) of the Uniform Rules, alternatively rule 31(2)(b) and in the further alternative on the common law.

[13] Rule 31(2)(b) does not apply as the default judgment was not granted in an action where the defendant was in default of delivery of a notice of intention to defend or a plea.[1]

[14] Counsel for the applicants submitted that the judgment was erroneously sought and granted as contemplated in rule 42(1)(a). He argued that the judgment was granted in contravention of the in duplum rule, which is based on public policy, and that therefore the judgment was wrong in law and without any legal foundation.

[15] The fact that a default judgment is wrong on the merits of the matter does not mean that it was erroneously sought or granted.[2] The judgment was not granted because the applicants had no defence to the claim. It was granted because they did not oppose the application and the judge was satisfied on the papers before him that the respondent was entitled to the order. There was no irregularity or mistake in the proceedings.[3] In Lodhi[4] the court said that a judgment granted against a party in his absence cannot be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the judge who granted the judgment. Streicher JA said at 95 F that the existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.

[16] Counsel submitted that although there was no error in the proceedings, the judgment was without legal foundation and therefore it was erroneously granted for the purposes of rule 42(1)(a). As authority for this proposition he relied on Athmaram v Singh,[5] where Nienaber J dealt with an application for the rescission of an order striking out a defendant's defence and granting judgment against him. He said that if the order

1 See rule 31(2) and, by way of comparison, Athmaram v Singh 1989 (3) SA 953 (D) at 954 E.
2 Seal v Van Rooyen NO and others; Provincial Government, Northwest province v Van Rooyen NO and others 2008(4) SA 43 (SCA) para 18.
3 Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA); Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (ECD) at 471 G-H; Lodhi 2 Properties Investments CC and another v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA).
4 Ibid, at 91 H.
5 Supra, fn 1, at 957 A.

had been 'legally incompetent' it would have been erroneously granted for the purposes of rule 42 (1)(a).

[17] The judgment against the applicants was not legally incompetent, even if the interest was in contravention of the in duplum rule.[6] In F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van SA Bpk[7] Harms JA said :' Natuurlik sal 'n Hof nie rente in stryd met die in duplum-reël gelas as die feite duidelik is nie, net so min as wat 'n Hof betaling van woekerrente in sulke omstandighede sal beveel. Dit beteken egter nie dat die Hof op eie houtjie 'n soektog op tou moet sit om vas te stel of so 'n reël oortree is nie. Ook handel die Hof nie op grond van 'n blote suspisie nie.' Further on in the judgment he said[8]:' 'n Eis om betaling van rente of die betaling daarvan in stryd met die in duplum-reël is nie onwettig ("illegal") nie.' This is therefore not a basis for finding that the judgment was erroneously granted for the purposes of rule 42(1)(a).

[18] It remains to consider whether the judgment should be rescinded in terms of the common law. Here, as Nienaber J said in Athmaram v Singh,[9] the focus is on the conduct of the applicant rather than on the methods employed by the respondent or the propriety of the earlier order of the court. In Chetty v Law Society, Transvaal[10] the court said: '… it is clear that in principle and in the long-standing practice of our courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success.'

[19] With regard to the defence that the in duplum rule has been contravened it must be borne in mind that the applicants do not have to show a probability of success in the

6 F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van SA Bpk 1999 (1) SA 515 (SCA) at 526 B.
7 Ibid, 525 E.
8 At 526 A.
9 Supra, fn 1, at 957 B.
10 1985 (2) SA 756 (A) at 765

main application. It is enough to show that the defence raises an issue which is deserving of being tried.[11] I shall assume in their favour that this has been established. There is no reason to believe that the defence is not bona fide.

[20] The remaining question relates to the reason why the applicants did not oppose the application which led to the judgment against them. I have already found that they knew about the application, received the papers, entered into negotiations with the respondent and, when these failed, took a conscious decision not to oppose the application. This is a case of wilful default.[12] Mr Morkel, the deponent to the respondent's answering affidavit, says that after the writ was issued the applicants requested the respondent not to execute on it and tried to negotiate repayment terms favourable to them. In doing so they acquiesced in the judgment, at a time when they were represented by an attorney. In Schmidlin v Multisound (Pty) Ltd[13] Van den Heever J (as she then was) said that acquiessense in the execution of a judgment must surely in logic normally bar success in an application to rescind on the same basis as acquiessence in the very granting of the judgment itself.

[21] The fact that the applicants were told for the first time some nine months after the judgment had been granted that they appeared to have had a defence to a part of the claim does not seem to me in the circumstances of this case to constitute sufficient cause to rescind the judgment. It is important and in the interests of the administration of justice that finality should be reached in litigation.[14] It would be unfair and prejudicial to the respondent to allow the applicants to reopen the case in circumstances where, when they had the opportunity to oppose it, they chose not to do so.

[22] The application is dismissed with costs.

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11 Riddles v Standard Bank of South Africa Ltd 2009 (3) SA 463 (T) at para 9.
12 Maujean t/a Audio Video Agencies v Standard Bank of South Africa Ltd 1994 (3) SA 801 (C)
13 1991 (2) SA 151 (C) at 156 B
14 Firestone South Africa (Pty)Ltd v Genticuro A.G. 1977 (4) SA 298 (AD) at 309 A.

PLOOS VAN AMSTEL J