THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between	Appeal Case A466/15
HENDRIK JOHANNES BASSON NO	**1st APPELLANT**
KARIN BASSON NO	**2nd APPELLANT**
and	
ORCREST PROPERTIES (PTY) LTD	**RESPONDENT**
And in the matter between	Appeal Case A467/15
FREDRIK JOHANNES BASSON NO	**1st APPELLANT**
WILHELM JOHANNES BASSON NO	**2nd APPELLANT**
ELIZABETH MARLENE BASSON NO	**3rd APPELLANT**
and	
ORCREST PROPERTIES (PTY) LTD	**RESPONDENT**
And in the matter between	Appeal Case A468/15
HENDRIK JOHANNES BASSON NO	**1st APPELLANT**
KARIN BASSON NO	**2nd APPELLANT**

FREDRIK JOHANNES BASSON NO	**3rd APPELLANT**
WILHELM JOHANNES BASSON NO	**4th APPELLANT**
ELIZABETH MARLENE BASSON NO	**5th APPELLANT**
WILHELM JOHANNES BASSON	**6th APPELLANT**
HENDRIK JOHANNES BASSON	**7th APPELLANT**
KARIN BASSON	**8th APPELLANT**

and

ORCREST PROPERTIES (PTY) LTD	**RESPONDENT**

Coram: DESAI, ROGERS & MANTAME JJ

Heard: **27 JULY 2016**

Delivered: **2 SEPTEMBER 2016**

JUDGMENT

ROGERS J:

Introduction

[1] There are three appeals before us: two against final sequestration orders, the other against the dismissal of a rescission application. The orders were granted by Traverso DJP who heard the cases together. Mr van Riet SC leading Mr W van Niekerk appeared for the appellants and Mr Goodman SC leading Ms PS van Zyl for the respondent.

[2] The parties who were sequestrated are two family trusts, the one associated with Mr HJ and Ms K Basson, the other with Mr WJ Basson. I shall refer to these trusts as the Basson trusts and to the three individuals just named as the Bassons. For convenience, and meaning no disrespect, I refer to Mr WJ Basson by his first name Willem. In the sequestration applications the Bassons were cited, with other family members, as the trustees of the Basson trusts. In the action which gave rise to the rescission application the defendants were the Basson trusts and the Bassons in their personal capacities. In all three matters the claims were based on deeds of suretyship. I shall refer to the Basson trusts and the Bassons collectively as the Basson sureties.

[3] The applicant in the sequestration applications and the plaintiff in the action was the present respondent ('OPPL'). OPPL is a wholly-owned subsidiary of Orcrest Investments (Pty) Ltd ('Orcrest'). Orcrest's shareholders are the Janiel Trust and the Habets Trust which are associated with Mr DJ van Breda ('Van Breda') and Mr M Habets ('Habets') respectively. I shall refer to these trusts as the Orcrest trusts. Orcrest, the Orcrest trusts, Van Breda and Habets signed suretyships in respect of the same obligations as the Basson sureties. I shall refer to them collectively as the Orcrest sureties.

[4] The parties agreed that the fate of the sequestration appeals depends on the rescission appeal.

Factual background

[5] During 2010 a company called Dynmar Twaalf (Pty Ltd ('Dynmar') bought a property in Stellenbosch for R56 million. Dynmar's shareholders were the Basson trusts (40% and 20% respectively), Van Breda (20%) and the Habets Trust (20%). The purchase price was funded by loans of R48 326 088 from Investec Bank Ltd ('Investec') and R9 726 915 from Orcrest. It was a condition of the former loan that the Basson sureties and the Orcrest sureties sign deeds of suretyship. Investec also registered a mortgage bond over the Stellenbosch property.

[6] In accordance with the Investec loan agreement, five deeds of suretyships, each limited to R15 million plus interest and costs, were signed, the parties to these five deeds being respectively (i) Mr HJ Basson, Ms K Basson and their family trust; (ii) Willem and his family trust; (iii) Orcrest; (iv) Van Breda and the Janiel Trust; (v) Habets and the Habets Trust. Viewed in the context of the loan agreement, the suretyships meant that Investec could not recover more than R15 million plus interest and costs collectively from the parties to any particular suretyship. In respect of any particular suretyship, the liability of the sureties thereunder was, up to the specified limit, joint and several.

[7] During September 2011 Dynmar fell into default towards Investec. In December 2011 Investec issued letters of demand to Dynmar and the sureties. Unlike the Basson sureties, Van Breda and Habets entered into discussions with Investec with a view to avoiding claims. The eventual outcome of these discussions was that in April 2013 OPPL, a wholly owned subsidiary of Orcrest established in January 2012, purchased Investec's claims against Dynmar and the sureties by way of a cession agreement.

[8] In the meanwhile Orcrest in January 2012 had brought an application for Dynmar's liquidation, based on its shareholding in and loan claim against the company. Dynmar was placed in final liquidation in July 2012. Having been authorised by the Master, the liquidators in September 2012 sold the Stellenbosch property to OPPL for R46,5 million.

[9] While the liquidation application was pending Investec in March 2012 issued summons against the Basson trusts. The trusts entered appearance to defend. Investec applied for summary judgment. In their opposing papers filed in October 2012 the Basson trusts alleged (i) that the Investec loan agreement had lapsed due to the non-fulfilment of suspensive conditions; (ii) that Investec, Orcrest, Van Breda and the liquidators had procured the sale of the Stellenbosch property for less than its market value and that this conduct, which was to the prejudice of the Basson sureties, brought about their release.

[10] On 2 April 2013 the cession agreement previously mentioned was executed. The purchase price was the outstanding balance of the Investec loan after deducting (i) the dividend to be received by Investec as a secured creditor from the sale of the Stellenbosch property and (ii) a discount of R520 000 which Investec was to write off against the loan. The price was to be paid on confirmation of Dynmar's liquidation and distribution account. OPPL was required to deposit R8 million with Investec as security, which amount Investec was authorised to appropriate and deduct from the price when it became payable. The deposit was in fact made in Orcrest's name.

[11] Dynmar's first liquidation and distribution account was confirmed on 30 May 2013. In terms thereof Investec received a secured dividend of R42,7 million. After deduction of this amount and the write-off of R520 000, the unpaid balance of the Investec loan, and thus the purchase price payable by OPPL in terms of the cession agreement, was about R11,5 million. On 13 June 2013 the price was settled through an appropriation by Investec of the R8 million deposit (inclusive of interest thereon) and a balancing payment from Orcrest of R3 431 515,76.

Procedural history

[12] Investec having fallen out of the picture and withdrawn its pending action against the Basson trusts, OPPL as cessionary issued summons against the Basson sureties in November 2013 for (i) R11 431 515 (being the unpaid balance of the Investec loan) plus interest from 31 May 2013; (ii) R1 820 547 (being liquidation costs and fees for which the sureties were alleged to be liable by way of an indemnity contained in the deeds of suretyship). In regard to the first of these claims, OPPL pleaded an alternative claim based on unjust enrichment. This was no doubt a precaution in the light of the defence foreshadowed in the Basson trusts' opposition to Investec's application for summary judgment.

[13] The Basson sureties entered appearance to defend. Their attorneys of record at that time were Assheton-Smith Inc ('ASI').

[14] In December 2013 OPPL issued applications for the sequestration of the Basson trusts. On 13 December 2013 these applications were, as a result of opposition, postponed for hearing on the semi-urgent roll on16 April 2014.

[15] On 24 January 2014 OPPL served a demand for plea in the action. There was correspondence between OPPL's attorneys (Edward Nathan Sonnenberg – 'ENS') and ASI. On 5 February 2014, the defendants now being under bar, OPPL filed an application for default judgment on the first claim in an amount of R11 085 435,64, being the unpaid balance of the Investec loan plus interest less R800 000 which OPPL had received on 26 November 2013 pursuant to the confirmation of Dynmar's second liquidation and distribution account. On the same day ASI wrote to ENS complaining that it was not fair to proceed with default judgment given that there was a realistic prospect of settlement. ASI attached a plea which was formally served later that day. ENS replied that their instructions were to go ahead unless the bar was lifted.

[16] Willem, who subsequently became the Basson sureties' principal deponent, says that he learnt the next day of OPPL's intention to proceed with default judgment in the absence of condonation. ASI required an additional deposit from the defendants of R150 000 before taking further action. The defendants were not able to provide this sum. Willem nevertheless asked ASI to bring a condonation application but this was not done.

[17] On 11 February 2014 ENS notified ASI that they would be proceeding to take default judgment. On 12 February 2014 ASI replied that OPPL was not entitled to do so, the defendants having served a plea. Willem says that he knew of these developments. He instructed ASI to continue settlement discussions which he was confident would succeed. On 13 February 2014 ENS responded to ASI, stating that because the defendants came under bar on 1 February 2014 their plea was of no consequence. Willem says that he was confident that default judgment would not be granted. He did not explain the source of his confidence.

[18] On 28 February 2014 the registrar referred the application for default judgment to open court, given that a plea had been filed albeit late. OPPL enrolled

the matter in third division for hearing on 6 March 2014. On that date Blignault J granted default judgment against the defendants in the reduced amount prayed. The rescission appeal relates to this default judgment.

[19] On 10 March 2014 ASI wrote to ENS making certain settlement proposals, including that execution under the default judgment be held over until 30 May 2014. It is thus clear that the Basson sureties were by 10 March 2014 aware of the default judgment.

[20] The sequestration applications were scheduled to be heard as opposed matters on 16 April 2014. As a result of the Basson trusts' failure to comply with a direction, given through the chamber book on 11 March 2014, for the filing of their answering papers within five days, OPPL set the matter down on an unopposed basis in third division for hearing on 1 April 2014.

[21] In late March 2014 OPPL issued applications for the sequestration of the Bassons personally. The Bassons bestirred themselves and on 27 March 2014 engaged new attorneys, Vanderspuy ('VDS'). On 31 March 2014 the Basson trusts served an application for the postponement of the sequestration applications due to be heard the next day. By agreement the matters were put back onto the semi-urgent roll for hearing on 16 April 2014 though in the event they were heard on 22 April 2014. Answering and replying papers were filed.

[22] On 14 April 2014 the Basson sureties delivered an application to rescind the default judgment. (As will appear, this was the first of two rescission applications and I shall thus where appropriate refer to it as the first rescission application.) Opposing and replying papers in the rescission application were filed in short order. The sequestration and rescission applications were heard together by Traverso DJP on 22 April 2014. The Basson trusts seem to have accepted that unless the default judgment were set aside so that they could contest OPPL's claim, they were insolvent and that their sequestration would inevitably follow. On 21 May 2014 Traverso DJP delivered judgment, dismissing the rescission application and granting provisional orders of sequestration with return days on 30 June 2014.

[23] On 26 June 2014 Traverso DJP dismissed the Basson sureties' application for leave to appeal the dismissal of the rescission application. Because the Basson sureties wished to petition for leave to appeal, the provisional orders of sequestration were extended. On 25 September 2014 the Supreme Court of Appeal ('SCA') dismissed the petition.

[24] One might have expected this to be the end of the road and that final orders of sequestration would follow unopposed. The extended return day was 23 October 2014. On 7 October 2014 VDS notified ENS that the Basson sureties were considering a second rescission application. This was served on 17 October 2014 and resulted in the provisional orders again being extended.

[25] After the filing of answering and replying papers, the second rescission application and the extended return days were argued before Traverso DJP on 25 November 2014. On the same day she dismissed the second rescission application and granted final sequestration orders. She delivered her reasons on 11 December 2014.

[26] The Basson sureties brought an application for leave to appeal the dismissal of the second rescission application and the Basson trusts brought applications for leave to appeal their final sequestration orders. These were dismissed by Traverso DJP on 25 March 2015. The Basson sureties petitioned the SCA for leave which the latter court granted on 18 June 2015, the appeals to be heard by a full bench. Thus it was that these three appeals came before us on 27 July 2016.

The first rescission application

[27] The defences which the Basson sureties advanced in the first rescission application were in summary the following:

(i) One or more of the suspensive conditions of the Investec loan agreement were not fulfilled with the result that OPPL as cessionary had no contractual claim against the sureties.

(ii) As to the alternative enrichment claim, the defendants had not undertaken to stand surety for enrichment claims. In any event Investec had not advanced the money in the genuine and reasonable belief that the suspensive conditions had been fulfilled. Furthermore Dynmar's liquidation showed that it was not enriched.

(iii) The Stellenbosch property was sold at way below its market value in breach of a tacit or implied duty owed by Investec to the Basson sureties.

(iv) Investec from the outset had no intention of holding the Orcrest sureties liable. By failing to disclose this, Investec induced the Basson sureties to sign the suretyships. Investec's initial intentions were said to be evident from its subsequent conduct in suing the Basson sureties but not the Orcrest sureties and in ceding its claim to OPPL, a wholly owned subsidiary of Orcrest whose directors were Van Breda and Habets.

(v) Furthermore, Investec's conduct in ceding its claim to OPPL prejudiced the Basson sureties because if the Orcrest sureties had settled the Investec claim (rather than procuring OPPL's purchase of the claim) they would not have been entitled to sue the Basson sureties for the full amount of the claim.

(vi) Investec's rights had in any event not passed to OPPL because the suspensive condition in the cession relating to proof of authority had not been complied with and because OPPL had not paid the purchase price. (Willem, who made the affidavit in support of rescission, does not appear to have claimed personal knowledge of either of these supposed failures.)

[28] Similar allegations were made by the Basson sureties in the affidavits opposing their sequestration. The allegations were traversed by Van Breda in OPPL's replying affidavit in the sequestration proceedings. Van Breda's said affidavit was attached to and incorporated into OPPL's opposing affidavit in the first rescission application. It is unnecessary to deal with what Van Breda said concerning the defences I have summarised in (i), (ii) and (iii) above. In regard to (iv), (v) and (vi), I mention the following aspects of Van Breda's response:

(i) It was untrue that Investec never intended to hold the Orcrest sureties liable. Investec had sent demands to them, pursuant to which they entered into negotiations with Investec, these culminating in the cession agreement.

(ii) Investec had not released the Orcrest sureties from liability.

(iii) If Investec had not ceded its claim to OPPL, Investec could have sued the Basson sureties for the full amount of its claim. The cession thus did not place a greater burden on the Basson sureties.

(iv) The purchase price payable in terms of the cession agreement was duly settled. Van Breda attached proof of payment of the amounts of R8 073 879,08 and R3 431 515,76. The attached proof indicated that the R8 million deposit was made in Orcrest's name. (In his replying affidavit Willem highlighted that the amount of R8 073 879,08 had been paid by Orcrest, not OPPL.)

[29] Traverso DJP's reasons for dismissing the first rescission application were in summary the following: (i) The Basson sureties had not provided a satisfactory explanation for their failure to file a plea. (ii) The application was in any event not brought within the 20-day period permitted by rule 31(2)(b). (iii) On the merits, the defences were not bona fide. There is no general rule of law that a surety is released because of a creditor's prejudicial conduct. Investec's actions were permitted by the terms of the suretyships. No impropriety in regard to the sale of the Stellenbosch property had been made out.

The second rescission application

[30] In the second rescission application the Basson sureties alleged that the purported cession on which OPPL had obtained default judgment was a sham transaction which had been structured so as to enable its holding company, Orcrest, to recover the full balance of the Investec loan (about R11,43 million) in circumstances where Orcrest, if it had paid Investec R11,43 million in its capacity as surety, would only have been entitled to recover 10% of such balance (about R1,143 million) from each of the Basson sureties. The latter consequence was said to follow from the fact, so Willem alleged, that it had been 'understood and accepted' by the ten sureties (the five Basson sureties and the five Orcrest sureties) that inter se they would each be liable for 10% of the indebtedness to Investec. OPPL was alleged to have obtained default judgment fraudulently by misrepresenting to the court the true state of affairs.

[31] Willem recorded that the Basson sureties had attempted to introduce the fraud defence during the hearing of the application for leave to appeal against the dismissal of the first rescission application but that Traverso DJP had upheld OPPL's objection and thus not decided the point. The Basson sureties had also relied on the fraud defence in their petition to the SCA and again OPPL had resisted. It could not be said that the SCA, in dismissing the petition, had adjudicated the fraud defence on its merits. Accordingly, so Willem submitted, the fraud defence, unlike the defences raised in the first rescission application, was not res judicata. (According to Van Breda, the Basson sureties in the application for leave to appeal and in the petition abandoned their previous defences and relied only on the fraud defence.)

[32] In support of the fraud defence, Willem jettisoned his earlier claim that Investec had never intended to look to the Orcrest sureties for payment, instead adopting what Van Breda had said in that regard in the previous proceedings. The fact that Investec had been demanding payment inter alia from Orcrest and that Orcrest rather than OPPL had settled the price owing in terms of the cession agreement was said to show that the cession was a sham, that Orcrest had in fact discharged the Investec debt in its capacity as a surety, that any monies recovered from the Basson sureties would find their way through OPPL to Orcrest, and that in this way Orcrest would recover more from the Basson sureties than if it had sought, in its capacity as a surety, to recover a contribution from the Basson sureties. In explanation for the late raising of the fraud defence, Willem said that the Basson sureties only learnt that Orcrest rather than OPPL had paid the purchase price upon receipt of the replying papers in the sequestration proceedings. This was just a few days before the first rescission application was argued.

[33] In OPPL's opposing papers Van Breda contended that the fraud defence, if it were tenable, could and should have been advanced in the first rescission application. The matter was thus res judicata.

[34] On the merits Van Breda denied the alleged fraud. Orcrest had sought legal advice in regard to the payment of the shortfall to Investec, as a result of which it was concluded that it would not be in Orcrest's best interests to pay the shortfall

itself. The Investec loan agreement and the suretyships permitted Investec to cede its claim. It was thus decided that OPPL would purchase Investec's claim, to which Investec was amenable. There was nothing untoward about this. Orcrest had settled the purchase price on OPPL's behalf by way of an inter-company loan, in confirmation of which a letter from the companies' auditors was attached. (The attached letter recorded that as at 28 February 2014 OPPL was indebted to Orcrest on loan account in an amount of just under R78 million. Presumably this included, apart from the purchase price of the cession, the price OPPL had paid for the Stellenbosch property.) Van Breda denied that any agreement had been concluded between the sureties as to how they would share the Investec liability inter se.

[35] Traverso DJP's reasons for dismissing the second application were in summary the following: (i) The application was an abuse of process. The Basson sureties were 'trying to get in through the backdoor what they could not get in the ordinary course'. (ii) The issues raised in the second application were res judicata by virtue of the dismissal of the first application, which had become final upon the dismissal of the first petition.

Explanation for default

[36] A defendant who seeks rescission must provide a full and satisfactory explanation for his default. In terms of the notice of bar the Basson sureties had to file their plea by 31 January 2014. Having failed to do so, they were ipso facto barred. They purported to file a plea on 5 February 2014 but this was not accompanied by an application for condonation. There was still no condonation when Blignault J granted default judgment on 6 March 2014 – this despite ASI having been warned on several occasions that OPPL would proceed with default judgment in the absence of condonation. The plea which the defendants filed on 5 February 2014, I may add, was threadbare. The defendants denied the cession and put OPPL to the proof thereof. In regard to Dynmar's indebtedness to Investec, they claimed not to be in a position to verify OPPL's allegations and said they required a detailed and comprehensive debatement of account. None of the defences subsequently asserted in the rescission applications was advanced.

[37] Traverso DJP, in dismissing the first rescission application, said that the defendants had been dilatory in the extreme and had displayed a wilful disregard of the rules. This was one of the grounds on which she dismissed the application. The defendants having unsuccessfully exhausted their appeal remedies, I do not think it is open to another court to revisit the issue, at least not in the absence of material new facts. For this reason alone the second rescission application was bound to fail. In any event I agree with Traverso DJP's conclusion that there was no satisfactory explanation for the default.

The delay in bringing rescission proceedings

[38] In the second rescission application the Basson sureties relied on rule 31(2)(b), rule 42(1)(b) and the common law. The Basson sureties had knowledge of the default judgment by 10 March 2014. The second rescission application was delivered on 17 October 2014, about seven months later. This was not within the 20 court days permitted by rule 31(2)(b), which expired on 8 April 2014. Insofar as rule 42(1)(b) and the common law are concerned, rescission must be sought within a reasonable period of time. The 20-day period prescribed by rule 31(2)(b) affords some guidance as to what constitutes a reasonable period (*Nkata v FirstRand Bank Ltd* 2014 (2) SA 412 (WCC) para 27).

[39] The first rescission application, which was delivered on 14 April 2014, was itself late. Traverso DJP said that the first application was 'a month out of time'. This is incorrect – it was four court days late. Nevertheless it was out of time. Since the defendants had already been guilty of default in relation to their plea, they should at least have complied with the 20-day limit. Their failure to comply with this time period was another ground on which the first application was dismissed.

[40] For the rest, the delay in the bringing of the second rescission application is tied up with the question why the so-called fraud defence was not advanced in the first application. If one assumes in favour of the Basson sureties that the fraud defence was a new defence and not an old one in a new guise, I do not think there was a satisfactory explanation for the Basson sureties' failure to raise it in the first application. When they launched the first application they knew that Investec had

ceded its claim to OPPL and that OPPL was a wholly-owned subsidiary of Orcrest, with Van Breda and Habets being directors of both companies. Since they alleged that the Orcrest sureties, if they had settled the Investec claim in their capacity as sureties, would not have been entitled to sue the Basson sureties for the full amount, they must already have received legal advice along those lines (ie that the Orcrest sureties would have had to deduct 'their share' of the liability when suing the Basson sureties). If, as Willem later claimed, the sureties agreed from the outset that any liability to Investec which they had to bear would be shared equally inter se (10% each), the Basson sureties obviously had knowledge of such agreement when they brought the first application.

[41] These are essentially the same facts on which the Basson sureties relied in the second application for their conclusion that the cession was a sham. The only additional fact, one which they put to the forefront of the second application, was that Orcrest rather than OPPL had provided the cash with which to settle the purchase price of the cession. This was something they learnt on 14 April 2014 when OPPL filed its replying papers in the sequestration proceedings. It so happens that this was the same day on which the Basson sureties served the first rescission application. I accept that the replying papers came too late for this additional fact to be included in the founding papers in support of rescission. But if Orcrest's settlement of the purchase price was a critical new fact, the Basson sureties could have supplemented their first rescission application, particularly since OPPL incorporated into its opposing papers filed on 15 April 2014 the allegations inter alia concerning the settlement of the purchase price. In his replying affidavit of 16 April 2014 Willem observed that it was clear from the proof of payment that Orcrest rather than OPPL had settled the price.

[42] In argument before us Mr van Riet submitted that there were two other vital pieces of evidence which were not available during the first rescission application: (i) that OCCP had a duty to account to Orcrest for the proceeds of the ceded claim; (ii) that the Orcrest sureties had received legal advice prior to the execution of the cession.

[43] I shall deal presently in a little more detail with these two points when discussing the merits of the fraud defence. For present purposes the following brief observations suffice. OPPL's supposed 'duty to account' was an inference which Willem drew in his founding affidavit in the second rescission application, an inference based on facts known to the Bassons sureties when the first rescission application was argued (the said facts being in essence that OPPL was a wholly-owned subsidiary of Orcrest, was controlled by the same persons and had been provided with the money needed to pay Investec for the cession). If the inference was warranted, it could have been asserted in the first rescission application.

[44] As to the legal advice, it is true that Van Breda did not in terms disclose during the course of the first rescission application that the Orcrest sureties had received legal advice. I would have thought, though, that it was reasonably obvious that they must have done so. It was known to the Basson sureties that Investec had made demands for payment to the Orcrest sureties. The cession was a detailed document drawn by lawyers. If, as the Bassons sureties alleged in the first rescission application, the effect of the cession was to enable OPPL to recover more from the Bassons sureties than Orcrest could have done, it is unlikely that the Orcrest sureties would have known about this favourable difference in treatment without taking legal advice.

[45] In any event, the fact that the Orcrest sureties had taken legal advice before the execution of the cession had nothing to do with the launching of the second rescission – the fact of such legal advice was mentioned for the first time in OPPL's opposing papers in the second rescission application.

[46] I thus consider that there was not a full and satisfactory explanation for the Basson sureties' failure to include the fraud defence in the first rescission application, from which it follows that the delay in launching the second application has not been satisfactorily explained.

[47] Mr van Riet argued, with reference to a passage in Erasmus *Superior Court Practice* at B1-561, that a reasonable explanation is not a requirement where rescission is sought on grounds of fraud. I think that is a misreading of the passage.

The learned authors are there dealing with what constitutes fraud for purposes of rescinding a judgment and not with the additional requirements which apply to cases of default judgment. (A judgment can be rescinded on grounds of fraud even where the defendant appeared and opposed the case.) Where a defendant allows a case to go by default he always needs to provide a satisfactory explanation as to why he did not raise his defence timeously. That is so even if the defence is one of fraud.

[48] For the sake of completeness I should say that the default judgment in this case was not 'erroneously granted' within the meaning of that phrase in rule 42(1).

Res judicata

[49] The Basson sureties did not in their first rescission application assert that the cession agreement was a sham. It was raised for the first time in argument during the hearing of the application for leave to appeal. I disagree with the submission advanced on behalf of OPPL that the decisions of Traverso DJP and the SCA dismissing the applications for leave to appeal can be regarded as determining the fraud defence on its merits. The issue is thus not res judicata in the usual sense.

[50] However the policy which underlies the principle of res judicata is that nobody should be permitted to harass another with second litigation on the same subject. Such litigation can be viewed as an abuse of process. The same policy prevents a litigant from advancing, by way of second proceedings, something which he could and should have raised in the earlier proceedings, provided that in all the circumstances his conduct in so doing can be regarded as an abuse of process (*Janse van Rensburg & Others NNO v Steenkamp & Another; Janse Van Rensburg & Others NNO v Myburgh & Others* 2010 (1) SA 649 (SCA) paras 27-30).

[51] OPPL contended in the court quo, and Traverso DJP accepted, that the second application was an abuse of process in the above sense. It will be apparent from what I have already said regarding the Basson sureties' delay in bringing the second application that I agree.

The merits

[52] The matters discussed thus far provide a sufficient basis for dismissing the appeal. But since this might leave the appellants with lingering discontent that their case has not been considered on its merits, I shall say something about it.

[53] On the appellants' case, Orcrest orchestrated the alleged sham to avoid the deduction it would have had to make if it had paid Investec as surety and sued the Basson sureties for a contribution. The premise is that because there were ten sureties the aliquot share which Orcrest could have recovered from the five Basson sureties was 10% each (50% in total).

[54] For purposes of discussion I assume that all the co-sureties were solvent at all material times. The entitlement of a co-surety who has paid the principal debt to recover money from his co-sureties may be based on cession from the creditor or on the equitable right of contribution (see Pretorius *Caney's The Law of Suretyship* 6th Ed Chapters X and XII respectively). The extent of recovery is affected by any agreement the sureties may have among themselves as to how they will bear the ultimate burden of the principal debt. The fact that they became co-sureties does not mean that they reached any such agreement. If there is such an agreement, the paying surety can only recover a pro rata share from each co-surety in accordance with the agreement. This may be so even where the paying surety has a cession and each co-surety undertook, as towards the creditor, to be liable as a co-principal debtor for the full debt (*Gerber v Wolson* 1955 (1) SA 158 (A); Pretorius op cit 151).

[55] More difficult is the question whether, where there is no agreement among the sureties inter se, the paying surety who seeks recovery based on a cession can sue a co-surety for the full balance after deducting his own aliquot share or whether he can only sue for the other surety's aliquot share (aliquot here being based on the number of sureties). *Gerber* supra, where one of seven co-debtors sought to recover six-sevenths of the debt from one of the other co-debtors, cannot be regarded as settling this question, given the particular factual findings on which the majority judgments were based.

[56] OPPL's counsel referred us to *Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd* 1983 (3) 619 (A) at 633B-F, which they submitted was dispositive of the appellants' attack on the cession. In that case there were effectively three sureties one of whom had died. The executors reached an agreement with the creditor, a bank, in terms whereof the bank was to sue the other two sureties at the estate's cost and in accordance with the estate's directions. The executors deposited the full amount of the outstanding debt with the bank. In dismissing a challenge based on prejudice to the other two sureties, Botha JA said that it was irrelevant that the litigation was controlled by the estate:

'[T]he Bank could lawfully have ceded its claims against the appellants to anyone, including the estate; and the appellants are no worse off than if that had been done.'

[57] *Gerber* does not appear to have been mentioned in argument in *Traub*. I do not think the court intended to decide that if the bank's claim had been ceded to the executors (who stood in the same position as the deceased surety), the latter could have sued the other sureties without deducting the deceased surety's aliquot share. The statement I have quoted seems to have been directed to an argument that the appellants had been prejudiced because the estate, which had control of the litigation, was – unlike the bank which probably would not have sued the appellants – a 'vengeful remorseless foe'.

[58] In the present case the Basson sureties failed to allege any facts in support of Willem's statement that the sureties agreed on an equal division among the ten of them. OPPL did not allege the existence of an agreement among the sureties on different terms. Unlike *Gerber*, the co-sureties did not sign one and the same document. There were five separate deeds of suretyship, each with a limit of R15 million. Given the groupings of the sureties, the limits on the respective groups' liability, the fact that only some of them held shares in Dynmar, and that they held shares in differing ratios, there is no natural inference that the sureties intended an equal ten-way split rather than some other split. But this is by the way because no sharing agreement at all was properly alleged.

[59] Orcrest, if it had paid Investec as surety, could have obtained a cession from Investec. Given the absence of an agreement among the sureties, and depending on the answer to the difficult question mentioned previously, Orcrest could then (i) have sued each of the Basson sureties for at least 10% of what it had paid to Investec, and thus recovered at least 50% from them in total; or (ii) perhaps have sued one or more of the Basson sureties jointly and severally for up to 90% of what it had paid to Investec.

[60] On either approach Orcrest would have been bound to make a deduction which OPPL, because it was not a surety, did not have to make. It is reasonable to infer that Van Breda and Habets arranged things as they did so that the Basson sureties, when sued, could not limit their liability to an aliquot share or require the claimant to deduct a surety's aliquot share. It is also reasonable to infer that the legal advice which the Orcrest sureties received, but the content of which they did not disclose, was to this effect. Indeed Mr Goodman accepted that we could adjudicate the appeal on the basis that this was the reasonable inference. That is a best-case scenario from the appellant's perspective.

[61] The appellants did not say in their second rescission application that the law prohibits a creditor from ceding its rights to a person associated with one of several sureties merely because the cessionary would not be subject to aliquot sharing. There was also no submission to that effect in the appellants' heads of argument. When the court raised this point with Mr van Riet SC at the opening of the appeal, he initially confirmed that this was not the appellants' case though he retreated somewhat when the implications of the concession became clear. I am not aware of any such legal rule. As *Hippo Quarries v Eardley* 1992 (1) SA 867 (A) demonstrates, a cession is not unlawful because the parties thereby obtain some advantage which would not otherwise have been available. This is part of the general principle that the law permits parties to arrange their affairs so as to obtain a benefit that a different arrangement would not have permitted or so as to avoid a prohibition which the law imposes (*Roshcon (Pty) Ltd v Anchor Auto Body Builders CC & Others* 2014 (4) SA 319 (SCA) para 26). In any event, a case along these lines is closed to the appellants because they could have raised it in the first rescission application.

Indeed one of their prejudice defences in the first application essentially rested on this idea.

[62] Accepting, therefore, that in law Investec was entitled to cede its claim to OPPL, the question is whether that it in fact did so. The appellants' fraud defence is that the purported cession was a sham, that there was no contract between Investec and OPPL, and that what in truth happened is that Orcrest in its capacity as surety paid Investec the amount of about R11,5 million. The cession was a ruse under cover of which Orcrest, through its puppet OPPL, is trying to recover the full amount from the Basson sureties, thus evading aliquot sharing. OPPL is in truth not a creditor and thus lacked locus standi to sue the Basson sureties and to apply for their sequestration. OPPL knew this but failed to disclose it when seeking default judgment.

[63] Since OPPL relied on a signed contract of cession, the evidentiary burden in the main case would rest on the Basson sureties to show that the true arrangement between Investec, Orcrest and OPPL differed from the signed contract (*Skjelbreds Rederi A/A & Others v Hartless (Pty) Ltd* 1982 (2) SA 710 (A) at 733E-G; *Hippo Quarries* supra at 873D-E). A sham is in essence a dishonest transaction (*Roshcon* supra para 30; *Commissioner for the South African Revenue Service v Bosch & Another* 2015 (2) SA 174 (SCA) para 40).

[64] In my view the appellants' fraud case has no prospect of success. For there to have been a sham, Investec must have been party to it. What incentive did Investec have to do participate in a fraud? The law did not prohibit Investec from ceding its claim to OPPL, and Investec had the contractual right to do so. Subject to receiving payment of the outstanding balance, it was a matter of indifference to Investec whether it ceded its claim to OPPL, Orcrest or anyone else.

[65] There was a suggestion in argument that Investec was advised by the same attorneys as the Orcrest sureties, namely ENS. While I do not think it matters, there is no evidence to that effect. Investec was represented by different attorneys (De Klerk & Van Gend) in its prior litigation against the Basson sureties. Mr Goodman

told us from the bar that those attorneys, not ENS, were Investec's advisers in relation to the cession.

[66] There would also have been no incentive for the Orcrest parties to contrive a simulated contract. Since the law did not prohibit OPPL from taking cession of Investec's claim, since such a cession held the advantage that aliquot sharing could not be invoked in any litigation between OPPL and the Basson sureties, and since this accorded with legal advice received, why would the Orcrest parties have failed to do the very thing which would bring about this advantage (cf *Bosch* para 41)?

[67] The fact that OPPL is a wholly-owned subsidiary of Orcrest militates against, rather than strengthens, the fraud case. If the cession had been in favour of an entity in which the Orcrest parties held no economic interest, the settling of the purchase price on its behalf by Orcrest would have raised eyebrows (as it did in *Skjelbreds*, which I discuss more fully below). But because OPPL was a wholly-owned subsidiary of Orcrest, the Orcrest parties suffered no economic disadvantage through the cession of the claim to OPPL.

[68] Needless to say, the fact that Orcrest held all the shares in OPPL does not entitle one to disregard their separate corporate personalities and to say that any act by OPPL is in truth an act by Orcrest (see *Dadoo Ltd & Others v Krugersdorp Municipal Council* 1920 AD 531 at 550-551; *Wambach v Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (A) at 674H-675E).

[69] In regard to the settlement of the purchase price, it is very common for holding companies to lend money to subsidiaries. Money can be, and often is, lent by payment from the lender directly to a creditor of the borrower. One knows that OPPL bought the Stellenbosch property. The fact that Orcrest provided the funds does not mean that Orcrest rather than OPPL bought the property.

[70] It is also irrelevant that Investec initially looked to all the sureties, including the Orcrest sureties, for payment. One or more of the Orcrest sureties could have effected payment in their capacity as such. The question is, did they? The fact that Investec initially looked to them for payment explains why the Orcrest parties

entered into discussions with Investec; it tells one nothing about what arrangement was arrived at pursuant to the discussions.

[71] In argument Mr van Riet latched onto a passage from Van Breda's answering affidavit in the first rescission application. Van Breda was answering the allegation (subsequently abandoned) that Investec had never intended to look to the Orcrest sureties for payment. In denying this, Van Breda said that the contrary was shown by the fact 'that it was in fact the Orcrest sureties which settled Investec's exposure as they had the wherewithal to do so by way of the purchase and cession of claims agreement'. It is clear from the quoted words themselves as well as from the context of the affidavit as a whole that Van Breda was not saying that the Orcrest sureties themselves made payment to Investec qua sureties. The point he was making was that the Orcrest sureties took steps to ensure that Investec's claim was settled, something they would not have if Investec had not been intent on enforcing the suretyships.

[72] As to OPPL's supposed duty to account to Orcrest, Mr van Riet argued that Van Breda had not in his opposing affidavit in the second rescission application denied Willem's statement in the founding affidavit that OPPL would no doubt have to account and pay over to Orcrest any money it recovered from the Basson sureties. Van Breda did not admit this statement, which was not based on any underlying facts. What he said was that he did not understand its logic or relevance. Having regard to the answering papers as a whole, OPPL's case is that it borrowed from Orcrest the money required to pay Investec for the cession. Although this may have the effect that some or all of the proceeds of the claim will eventually find a way back to Orcrest, this is by virtue of the debtor-creditor relationship (inter-company loan) and not by virtue of a duty to account (such as an agent or nominee would owe to its principal).

[73] I take Mr van Riet's point that heightened scrutiny into the genuineness of a transaction may be called for where it achieves some legal advantage which would not otherwise have been available. The purpose of achieving the advantage is not itself illegal but it may provide a motive for the parties to go through the motions of a transaction without really intending it to take effect. Mr van Riet devoted some time

in argument to *Skjelbreds* case supra. It is a good illustration of the point but the important factual differences between that case and the present one must not be lost sight of. In *Skjelbreds* a Panamanian company, Tramping Enterprises, purported to cede to a local company, Hartless, a claim which Tramping Enterprises had against a Norwegian company, Skjelbreds. Tramping Enterprises, as a peregrinus, would not have been entitled to sue Skjelbreds, another peregrinus, in South Africa. Hartless, as an incola, did not suffer from the same disability. The purported cession thus allowed Hartless to bring proceedings in this country which Tramping Enterprises was not able to bring.

[74] In delivering the court's judgment in *Skjelbreds*, Rabie JA did not say that the purported cession was illegal or could not in law bring about the advantage in question (at 733H-734A). But the purpose of obtaining this advantage, taken together with certain other facts, justified a conclusion that Tramping Enterprises and Hartless had not intended there to be any cession. Among the other facts were the following. Hartless was a shell company owned by and acting as nominee for the attorneys who were advising Tramping Enterprises. Hartless looked to Tramping Enterprises for instructions. The document recording the purported cession did not require Hartless to make payment to Freedom Tramping for the rights purportedly acquired. The document did not mention a material part of the actual agreement as subsequently admitted by Hartless, namely that it had to account to Freedom Tramping for the proceeds of the action against Skjelbreds.

[75] The fundamental differences between that case and the present one are immediately apparent. Here there was an arm's length relationship between the cedent, Investec, and the cessionary, OPPL. The latter is not a nominee for the former. The deed of cession records a substantial purchase price for the claim and Investec in fact received the purchase price. OPPL has no duty to account to Investec for the proceeds of the claim. Investec has fallen completely out of the picture, just as one would expect with an out and out cession.

[76] When these differences were pointed to Mr van Riet he felt constrained to argue that a court might find the cession to be a simulation even though Investec was not a party to the sham. That is untenable.

[77] I thus consider that the fraud defence did not constitute a reasonable and bona fide defence justifying the grant of rescission.

Conclusion

[78] From everything I have said it will be apparent that the appeals stand to be dismissed with costs including those attendant on the employment of two counsel.

[79] It does not follow that the Basson sureties will be without recourse if they make payment to OPPL. It is unnecessary to decide, and I do not decide, the issues which might arise in that event but the following possibilities may be mentioned. OPPL has stepped in to Investec's shoes. There is no evidence that Investec or OPPL has released the Orcrest sureties. Van Breda specifically stated in the course of the proceedings below that there had been no such release. Although the deeds of suretyship incorporate a renunciation of the benefit of cession of actions, this may mean no more than that the Basson sureties cannot raise the absence of a tendered cession as a dilatory defence to OPPL; if they make payment, they would be entitled to require OPPL to cede its claim to them (Pretorius op cit 158 and fn 101). They could then proceed against the Orcrest sureties to recover the latter's aliquot shares. Even without cession, they could do so based on the equitable right of contribution.

[80] If the Basson sureties were only able to pay part of the debt, the question would arise whether they could still proceed against the Orcrest sureties for a contribution. In *ASA Investments (Pty) Ltd v Smit* 1980 (1) SA 897 (C) it was held that the surety had to pay the whole debt before recovering from co-sureties. The outcome is criticised in Pretorius op cit 179 and was left open by Griesel J in *Bester NO & Another v Scholtz* [2013] ZAWCHC 108 paras 12-13.

[81] The appellants may fear that with the dismissal of their appeal OPPL will exercise its contractual power under the deeds of suretyship to release the Orcrest sureties. In that event various questions will arise, including (i) whether such a release would operate only as between OPPL and the Orcrest sureties or would also take away the Basson sureties' right to recover a contribution from their co-

sureties; (ii) if the latter question were answered against the appellants, whether the discretionary power of release contained in the deeds of suretyship is impliedly subject to the arbitrium boni viri (cf *NBS Boland Bank v One Berg River Drive & Others, and Other Cases* 1999 (4) SA 928 (A) paras 25-27; *Blake & Another v Cassim & Another* 2008 (5) SA 393 (SCA) para 22) and/or to a duty to exercise the power in good faith rather than with a view to harming the Basson sureties and unduly benefiting the Orcrest sureties (cf *Nedbank Ltd v Puricare CC & Others* [2014] ZAWCHC 17 para 18); (iii) and if so, whether the release power was exercised inconsistently with one or other of these qualifications.

[82] I would thus make the following order: The appeals are dismissed with costs including those attendant on the employment of two counsel.

DESAI J:

[83] I concur and it is so ordered.

MANTAME J:

[84] I concur.

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DESAI J

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ROGERS J

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MANTAME J

APPEARANCES

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