OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: 18656/2018

In the matter between:

THEUNIS VAN WYK NEL	**Applicant**
and	
CRYSTAL INVESTMENT TRADE COMPANY LTD	**First Defendant**
JOHANNES JACOBUS VERMEULEN	**Second Defendant**
IVAN MARE	**Third Defendant**
JOHANNES BOSMAN LOUW	**Fourth Defendant**
HEATH FAMILY INVESTMENTS CC	**Sixth Defendant**
ROLF WEICHELT	**Sixth Defendant**
STEPHANUS LAFRAS UYS	**Seventh Defendant**

Date of Hearing: 30 November 2020
Date of Judgment: Delivered electronically on: 08 February 2022

JUDGMENT 08 FEBRUARY 2022

LEKHULENI J

INTRODUCTION

[1] This is an opposed application for rescission of judgment under rule 42 of the uniform rules. For the sake of convenience, the parties are cited as in the claim in convention. The third, fourth and sixth defendants (*"the defendants"*) seek an order that the summary judgment granted against them on 27 May 2019 for payment of the sum of R 12 087 800, 25 be rescinded and that the plaintiff be ordered to pay the costs of this application. The plaintiff opposed the application and contended that the defendants have no bona fide defense to his claim and have failed to explain their default on 27 May 2019 when the application was heard. The plaintiff seeks an order dismissing the rescission application with costs.

FACTUAL BACKGROUND

[2] The plaintiff issued summons against the defendants claiming the sum of R12 087 800, 25 arising from a suretyship agreement and an acknowledgement of debt allegedly signed by the defendants pursuant to a loan that the plaintiff allegedly advanced to the defendants. Summons were served upon the third defendant on 12 October 2018 and upon the fourth defendant on 05 November 2018. On 22 October 2018 well within the time limits prescribed by law, the third and fourth defendant filed their notices of intention to defend the matter. The sixth defendant received the plaintiff's summons on 06 March 2019 and filed his notice to defend timeously. Subsequent thereto, the plaintiff served and filed a notice of bar upon the defendants on 14 January 2019. In response, the defendants delivered their pleas. The plaintiff thereafter filed an application to amend his particulars of claim. The defendants did not object to the proposed amendment. Instead, they filed amended pleas to the

plaintiff's amended particulars. Subsequent thereto, the plaintiff applied for summary judgment against the defendants.

[3] The summary judgment application was enrolled for hearing on 27 May 2019. The defendant did not file opposing affidavits resisting the application for summary judgment. They however instructed an attorney one Mr Louw to represent them at court. The defendants assert that Mr Louw did not represent them at court when the application was heard. At court their names were called and they were in default. As a result, the court granted summary judgment against them as claimed. In addition, the defendants' contended that the plaintiff filed his application outside the time limit prescribed by the rules of court and as such, the court should not have granted default judgment against them. They seek an order setting aside the default judgment granted against them.

SUBMISSIONS BY THE PARTIES

[4] At the hearing of this application, Mr Claasen who appeared on behalf of the defendants argued that there were a number of procedural irregularities at the hearing of the summary judgment application which vitiates the order the court granted against the defendants. Among others, the defendants' counsel submitted that the amendment of rule 32 does not apply retrospectively to applications initiated before the 01 July 2019, the date on which the amendment took effect. Counsel contended that after the summons were served upon the defendants, the third and fourth defendant delivered their notice of intention to defend on 22 October 2018. The notice of intention to apply for summary judgment was filed on 24 April 2019. The plaintiff applied for summary

judgment outside the peremptory time frame of 15 days after the delivery of a notice of intention to defend prescribed by rule 32(2) prior to its amendment.

[5] Significantly, counsel submitted that the plaintiff did not apply for condonation for the late filing of his summary judgment application notwithstanding the fact that more than five months elapsed before the plaintiff could deliver his application for summary judgment. To this end, it was argued that the judgment granted against the defendants was erroneously sought and granted. Mr Claasen also impugned the plaintiff's verifying affidavit supporting the application for summary judgment. He submitted that the verifying affidavit does not comply with the regulations issued in terms of the Justice of Peace and Commission of Oaths Act 16 of 1993 in that it was not commissioned before a Commissioner of Oaths. The contents of the attestation show that the deponent signed the affidavit in Cape Town and the Commissioner of Oaths signed the affidavit in Pretoria.

[6] Furthermore, counsel submitted that the plaintiff relied on a suretyship agreement and an acknowledgment of debt and that the default judgment granted against the defendants was based on these documents. It was contended that the third and fourth defendant did not sign both the suretyship agreement and the acknowledgment of debt and that these documents had nothing do with them. It was counsel's contention that the summary judgment granted against the defendants was based on the suretyship agreement which the defendants did not sign and that this constituted the most blatant error which falls clearly under the prescript of a summary judgment erroneously sought or granted.

[7] On the merits, it was denied that the defendants are indebted to the plaintiff as alleged or at all. It was contended on behalf of the defendants that the loans were not advanced to them in their personal capacity but to a corporate entity registered in Cameroon with an identity and juristic personality separate from themselves, namely Crystal Cameroon. The defendants contended that this entity is the plaintiff's true debtor and that the plaintiff has failed to join it to the action.

[8] Meanwhile, Ms Gordon-Turner the plaintiff's counsel argued that summary judgment was correctly granted against the defendants in the presence of their attorney who was in attendance when the application was heard. While a defendant is entitled to be present in court in summary judgment proceedings, counsel contended that he or she is not obliged to be present in person. A legal representative can be present in his stead and this is what happened in this matter. The plaintiff's counsel believes that the defendants are unable to explain their default and to the contrary their version of account proves that they were present during the hearing of the summary judgment application through their legal representative.

[9] It was also contended on behalf of the plaintiff that the defendants were lackadaisical and took insufficient care to ensure that their interests were safeguarded and that representation was made on their behalf at the hearing of the summary judgment application. Counsel submitted that when the application was heard on 27 May 2019, the defendant's legal representative Mr Louw was present at court with counsel. No reasons have been advanced by the defendants why Mr Louw and counsel he had briefed made no submissions on their behalf despite their attendance at the hearing of the summary judgment application. Accordingly, counsel submitted

that the defendants cannot be regarded as having been absent when the summary judgment order was granted. She argued that the defendants followed a wrong procedure in that they should have appealed the summary judgment order and not apply for the rescission of judgment. To this end, she submitted that the defendants did not satisfy the jurisdictional requirements for a rescission application in terms of Rule 42(1)(a).

[10] In response to the preliminary point of failing to apply for condonation, Ms Gordon-Turner argued that when summary judgment was granted, the court considered all the documents that were filed of record as well as the pleas of the defendants. Accordingly, the court found the documents in order and granted the summary judgment. It was also contended that the defendants' explanation of their default is completely unsatisfactory in that the application for summary judgment was brought to their attention by the plaintiff's attorney.

[11] On the merits of the application, the plaintiff' counsel submitted that the defendants have failed to explain why they did not mention the existence of the Cameroonian company in their pleas which they alleged contracted with the plaintiff in respect of the loan. She contended that the defendants are attempting to evade liability to repay monies lent and advanced to them by hiding behind a non-existent corporate veil. She implored the court to dismiss the rescission application with costs.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[12] Rule 42(1) of the uniform rules sets out circumstances under which default judgments may be varied or rescinded. For the sake of completeness, rule 42 provides as follows:

> *"A court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary –*
>
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby:*
>
> *(b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
>
> (c) *An order or judgment granted as a result of a mistake common to the parties."*

[13] At common law, an order of the court, once pronounced, is final and immutable. The guiding principle of the common law is certainty of judgments (see *Colyn v Tiger Food Industries Ltd t/a Meadow Feeds Mills (Cape)* 2003 (6) SA 1 (SCA) at para 4). Once an order is pronounced it may not, thereafter, be altered by the court that granted it. The presiding officer becomes *functus officio* and may not ordinarily vary or rescind his own judgment (*Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A)). That is a function of the court of appeal. However, there are exceptions to the immutability of judgments. First, after evidence has been led and the merits of the dispute have been determined, rescission is permissible in limited cases of a judgment obtained by fraud or, exceptionally, *justus error*. Secondly, the rescission of judgment

obtained by default can be rescinded where the applicant can show good cause or good reason why such an order should be rescinded.

[14] In this case, the defendants have not clearly spelt out which of the sub-rules of 42(1) upon which they rely. However, from the reading of the application as well as the founding affidavit, it is evident that the defendants are relying on rule 42(1)(a). Their case is that the application for summary judgment was erroneously sought or erroneously granted in their absence. The defendants assert that summary judgment should not have been granted because the application was filed outside the time limit prescribed by the rules and that the applicant did not apply for condonation for the late filing of his application for summary judgment. They also contend that they have a bona fide defence to the plaintiff's case.

[15] It must be stressed that at the hearing of the summary judgment application, the plaintiff did not file a substantive application for condonation for the late filing of his application. The defendants as well did not file opposing affidavits resisting summary judgment. However, what is very clear from the record is that the defendants have long declared their intention to defend the matter. The plaintiff's counsel informed the court that when the summary judgment application was heard, the court a quo considered all the relevant documents that were placed before it and granted summary judgment.

[16] In my view, when the application for summary judgment was filed, it was incumbent upon the plaintiff to apply for condonation as the application was filed late and outside the time period set out in rule 32(2) of the rules of court. The plaintiff also

bore the duty to inform the court that his application for summary judgment was outside the time limits prescribed by rule 32(2). For the sake of completeness, the relevant part of Rule 32(2) prior to its amendment provided as follows:

> *"the plaintiff shall within 15 days after the delivery of a notice of intention to defend, deliver a notice of application for summary judgment together…"*

[17] This subrule in my view was peremptory and its provisions had to be complied with. A departure from the provisions of this rule in particular the time frame in my opinion, had to be premised on substantive reasons supporting such deviation. It is trite that courts do not encourage formalism in the application of the rules. See *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) 654B. However, the purpose of the rules in my opinion is to give effect to the constitutional imperatives envisaged in section 34 of the Constitution and should be observed. The rules ensure that the right of access to courts and the right to have disputes that can be resolved by the application of law by a fair public hearing before a court are given effect to. They expedite the resolution of disputes and minimise the proliferation of costs involved.

[18] The third and fourth defendant delivered their notices of intention to defend on 22 October 2018. It is common cause that the application for summary judgment was filed on 24 April 2019. It must be stressed that the notice to defend were filed before rule 32 was amended. In other words, the plaintiff had to file his application for summary judgment within 15 days after the delivery of a notice of intention to defend. The amendment to the rule did not operate retrospectively. In our law a statute does not apply retrospectively unless it provides otherwise. The defendants' notices to defend were filed long before the rule was amended. The plaintiff was therefore bound

to bring his application for summary judgment in terms of that rule as it stood then. In my judgment, the plaintiff failed to comply with the peremptory provisions of rule 32(2) prior to its amendment.

[19] In *Van den Bergh v Weiner* 1976 (2) SA 297 (T) it was held that Rule 32 gives a court power to grant judgment without trial even though a notice of intention to defend the claim had been given by the defendant. The court went on to say that the power to grant summary judgment must be exercised with great care which is achieved, inter alia, by ensuring that the plaintiff brings his case within the scope of the rule. Meanwhile, in *Steeledale Reinforcing v HO Hup Corporation* 2010 (2) SA 580 (ECP) at para 9, the court observed that the normal and unexceptional process envisaged by the rule 32(2) (prior to its amendment) was for summary judgment to be applied for by the plaintiff within 15 days of delivery of the defendant's notice of intention to defend, whether the action was commenced by way of simple summons or combined summons.

[20] In my view, the plaintiff's application for summary judgment was filed outside the time limits prescribed by rule 32(2). The plaintiff also failed to inform the court on 27 May 2019 that its application was filed outside the time limits prescribed by the rules. More importantly, the delay in filing the application for summary judgment was so inordinate that it was absolutely necessary for the plaintiff to have filed a substantive application before the summary judgment application was considered. That would have given the defendants an opportunity to respond to that application.

[21] Accordingly, the plaintiff's legal representative sought the summary judgment erroneously by failing to inform the court of the reasons for bringing the application out of time and failing to seek condonation therefor.

[22] On the merits, it is axiomatic that in order to succeed, an applicant for rescission of a default judgment must show good or sufficient cause. This entails that the applicant must give a reasonable explanation for his default. He must show that his application is bona fide and show that on the merits he has a bona fide defence which prima facie carries some prospects of success. In considering such an application, the court has to weigh up all the relevant circumstances in the exercise of its discretion.

[23] In this matter, it is not in dispute that the defendants did not attend the summary judgment hearing. They did not file the necessary opposing affidavits. They were outside the borders of the republic at the time the matter was heard. The defendants contended that Mr Louw their attorney did not represent them at the hearing as it was suggested by the plaintiff. Mr Louw confirmed under oaths that he was never instructed to appear on behalf of the defendants on 27 May 2019 when summary judgment was granted.

[24] In my view, the preponderance of probabilities are overwhelming that no one appeared for the defendants at the hearing of the application. I am of the opinion that summary judgment was granted in their absence and as a result, the defendants are entitled to bring an application for rescission of the judgment in terms of the rules. Whilst I accept that the reasons for their default and their failure to file opposing affidavit is concerning, I am however alive to the fact that it has always been the

intention of the defendants to defend the matter. They filed their pleas timeously in terms of the rules and subsequent thereto, they filed their amended pleas to the plaintiff's amended particulars.

[25] Most importantly, the defendants have denied that they are indebted to the plaintiff as alleged or at all. They averred that the plaintiff did not advance monies to them personally but to a corporate entity with separate legal personality. They also alluded to the fact that they did not sign the suretyship agreement that the plaintiff relied on when the judgment was granted. They also averred that the purported acknowledgement of debt relied upon by the plaintiff is an email which arises from a meeting between the plaintiff, second, sixth and seventh defendant. The defendants in this application where not part of that meeting. They contended that they did not acknowledge that they are indebted to the plaintiff as claimed in the summons or for any sum of money whatsoever.

[26] In my judgment, the defendants have raised triable issues. Their defence have been set forth with sufficient details and there is no reason to believe that their application is made merely to harass the plaintiff. See *Grant Plumbers (Pty) Ltd* 1949 (2) SA 470 (O). It is my considered view that the defendants have shown that they have a bona fide defence to the plaintiff's claim which prima facie has some prospects of success.

[27] In the circumstances, therefore, I come to the conclusion that the defendants have established sufficient cause for the setting aside of the summary judgment order that was granted against them in their absence.

[28] As far as costs are concerned, it is a trite principle of our law that a court considering an order of costs exercises a discretion. *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC). The court's discretion must be exercised judicially. The defendants in this application seek an indulgence of the court. In my view, they should pay the costs of this application jointly and severally.

ORDER

[29] In the result, the following order is granted:

29.1 The application for the rescission of the summary judgment against the defendants is hereby granted.

29.2 The third, fourth and sixth defendants are hereby ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

[redacted]

LEKHULENI J
JUDGE OF THE HIGH COURT
WESTERN CAPE DIVISION

Appearances:

For the Applicants	Advocate Claasen J, SC
Instructed by	M Toefy Attorneys (ref: Mr. M Toefy)
For the 2nd Respondent	Advocate Gordon-Turner
Instructed by	Carter and Associates (ref: Mr G Carter)