IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 3820/2020

In the matter between:

ABSA BANK LIMITED	Plaintiff
and	
SRECKO ANTUN BILOBRK N.O.	First defendant
KEVIN MARK BAILEY N.O.	Second defendant
DELIA VANESSA BAILEY N.O.	Third defendant
KEVIN MARK BAILEY	Fourth defendant
DELIA VANESSA BAILEY	Fifth defendant

JUDGMENT DELIVERED ON 10 MARCH 2022

VAN ZYL AJ:

Introduction

1. The plaintiff sued the defendants on seven mortgage loan agreements concluded between the plaintiff and the first to third defendants ("the Trust") between 21 June 2000 and 21 June 2007, and upon suretyships executed by the fourth and fifth defendants ("the sureties") in which they bound themselves jointly and severally as sureties and co-principal debtors *in solidum* in favour of the plaintiff for due payment by the Trust of all amounts owing to the plaintiff under the mortgage loan agreements.

2. In terms of the provisions of the suretyships, the sureties would be liable for the payment of legal costs on the scale as between attorney and client in proceedings taken by the plaintiff to enforce the suretyships.

3. The loans were secured by mortgage bonds registered against the immovable property situated at Erf 11232 Durbanville, also known as 23 Belvedere Street, Belvedere Estate, Durbanville. The property is registered in the name of the Trust. In terms of the provisions of each of the mortgage bonds, the Trust would be liable for the payment of legal costs on the scale as between attorney and client in proceedings instituted to obtain payment under the bonds.

4. The Trust subsequently failed to pay the bond instalments punctually and incurred substantial arrears, hence the action. The defendants gave notice of intention to defend the action. As a result of their failure timeously to deliver their plea, they were placed under bar under Rule 26 during June 2020.

5. There are, arising from this background, three applications before this Court.

6. The first is the sureties' application to uplift the bar to deliver their plea and counterclaim, which application was launched on 24 March 2021 ("the upliftment application").

7. The second is the plaintiff's application for default judgment against the sureties, should the upliftment application be unsuccessful.

8. The third is an application brought by the first to third defendants ("the Trust", being the principal debtor in the proceedings instituted by the plaintiff) for the rescission of a default judgment granted by this Court (the Honourable Mr Justice Samela presiding) on 27 October 2021 ("the rescission application"). The rescission application was set down in the unopposed motion court for 3 February 2022, but the parties agreed that such application would be postponed and heard together with the other two applications.

9. In a practice note delivered by the defendants' counsel prior to the hearing,

and (albeit obliquely) in the founding affidavit delivered in the rescission application, the defendants indicated that, in the alternative to rescission, they sought a variation to the reserve price placed on the sale of the property for the reason that the reserve price set by the Court was, so the defendants indicated, only about half of the price actually realised in a private sale.

10. The history pertaining to these applications will be set out below, as it is important to see where the applications fit in the context of the litigation as a whole. I shall thereafter discuss the merits of, respectively, the upliftment application (in conjunction with the plaintiff's application for default judgment) and the rescission application.

The history of the litigation to date

11. The plaintiff's summons was served on the defendants during February 2020. On 6 March 2020 the defendant's counsel (who, I understand, holds a trust account under the provisions of the Legal Practice Act, 2014, and may thus be briefed by his clients directly) emailed to the plaintiff's attorneys a notice of intention to defend the action.

12. On 18 June 2020 the plaintiff served a demand for plea in terms of Rule 26 on the defendants. The defendants failed subsequently to deliver their plea within the five-day period prescribed in Rule 26, and they were therefore barred from doing so afterwards.

13. On 30 June 2020 the second/fourth defendant ("Mr Bailey"), purporting to act on behalf of all of the defendants, served a plea and counterclaim. The plea and counterclaim were signed by Mr Bailey in person.

14. On 15 July 2020 Mr Bailey, again purporting to act on behalf of all of the defendants, brought an application for upliftment of the bar in terms of Rule 27 ("the first upliftment application"). The first upliftment application was argued on 27 January 2021 before the Honourable Justice Steyn. The Court handed down judgment on the same day, ordering as follows:

"*10.1 The application for upliftment of the bar vis-à-vis the first, second and third defendants is dismissed, with no order as to costs;*

10.2 The application for the upliftment of the bar brought by the fourth and fifth defendants is struck from the roll and the fourth and fifth defendants shall pay the wasted costs occasioned by the matter being struck from the roll on an attorney and client scale."

15. In the first upliftment application the plaintiff also disputed Adv. Shaw's authority to act on behalf of the defendants and delivered a Rule 7(1) notice requesting Adv. Shaw to provide proof of its authority to act on behalf of the Trust. Adv. Shaw failed to respond to the Rule 7(1) notice and therefore lacked the authority to act on behalf of the Trust. This was dealt with in the judgment of the Honourable Justice Steyn.

16. On 24 March 2021 Mr Bailey brought a further application for upliftment of the bar. This is the present upliftment application. In the upliftment application Mr Bailey again purported to act on behalf of all of the parties, including the Trust. A comparison between the founding affidavit in the present upliftment application and the grounds advanced in the first upliftment application reveals that the present application is brought on the same basis as the first one.

17. The first upliftment application had been dismissed on 27 January 2021 in relation to the Trust. In the premises, the plaintiff raised the defence of *res judicata* to the Trust's attempt to revive the issue, and proceeded with an application for default judgment against the Trust as well as against the sureties, including an order declaring the Trust's immovable property specially executable. This application for default judgment was set down in motion court for 27 October 2021.

18. Mr Bailey (assisted, it seems, by the defendants' counsel, Adv. Shaw), set the second upliftment application (that is, the present upliftment application) down for hearing on 15 October 2021. On that day the matter was heard virtually by the Honourable Justice Mangcu-Lockwood. The Court struck the matter from the roll, with costs, on the basis of the irregular set down of the matter by Mr Bailey and/or

the defendants' counsel.

19. On 20 October 2021 the plaintiff's attorneys received an email from advocate Shaw setting down what appeared to be the present upliftment application, purporting to act on behalf of the second to fifth defendants. The matter was "set down" for 27 October 2021 at 09:30 "*for an online hearing*" together with the plaintiff's application for default judgment and Rule 46A application declaring the immovable property executable.

20. On 27 October 2021 the plaintiff's counsel, Mr Wessels, appeared before the Honourable Justice Samela in the unopposed motion court to move the application for default judgment and for an order in terms of Rule 46A. The Court granted default judgment against the Trust, including an order declaring the immovable property executable. It postponed the application for default judgment against the sureties as well as the present upliftment application to 7 February 2022, given that the fate of the sureties' upliftment application would influence the further conduct of the application for default judgment against them.

21. Mr Bailey thereafter launched a rescission application, seeking to rescind the default judgment and execution order granted against the Trust on 27 October 2021.

22. I proceed to deal with the three applications now serving before the Court.

The upliftment application

The relevant legal principles

23. Rule 27(1) and (2) of the Uniform Rules of Court read as follows:

> ***"27 Extension of time and removal of bar and condonation***
>
> *(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.*

(2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules."

24. Rule 27(1) requires a party to show good cause for extending or abridging any time period prescribed by the rules. Although there is no exhaustive definition of what constitutes good cause, two principal requirements must be satisfied:

24.1. First, the applicant should satisfactorily explain the delay (*Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at 571F and 572C). The defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it came about and to assess his conduct and motives (*Silber v Ozen Wholesalers Ltd* 1954 (2) SA 345 (A) at 353A). A full and reasonable explanation, which covers the entire period of delay, must be given (*Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) at 477E-G).

24.2. Secondly, the applicant should satisfy the court on oath that he has a *bona fide* defence or that his action is not ill-founded, as the case may be (*Dalhouzie supra*). The applicant must show that his defence is not patently unfounded and that it is based upon facts, which, if proved, would constitute a defence (*Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 217H).

25. Further to the issue of good cause, the requirements for the successful removal of a bar have been held to be the following (see *Smith N.O. v Brummer N.O.* 1954 (3) SA 352 (O) at 358A):

25.1. The applicant must give a reasonable explanation for his delay.

25.2. The application must be *bona fide* and not made with the object of delaying the opponent's claim.

25.3. There should not be a reckless or intentional disregard of the Rules of Court.

25.4. The applicant's action (or defence, in the present matter) must not be ill-founded and any prejudice caused to the opposite party by the grant of the indulgence sought by the applicant must be able to be compensated for by an appropriate order as to costs.

26. Lastly, in *Ferris v Firstrand Bank Limited* 2014 (3) SA 39 (CC) at 43G-44A the Constitutional Court held that the test for condonation is whether it is in the interests of justice to grant it. An applicant's prospects of success and the importance of the issues to be determined are relevant factors to be considered.

The sureties' upliftment application

27. This Court (the Honourable Justice Steyn presiding) dismissed the Trust's first upliftment application in January 2021. The Trust has not sought to impugn that decision on any legal basis available to it. It is therefore not before me. The only issue that falls to be decided is whether the sureties have established good cause for uplifting the bar. The defendants' counsel acknowledged this to be the case in the course of argument.

28. The sureties' explanation as to why they were unable timeously to deliver the plea or counterclaim is, in my view, insufficient. Mr Bailey mainly blames the Covid-19 lockdown for the defendants' difficulties in consulting with their counsel (who lives in Johannesburg) and for their lack of funds to pay their counsel. He fails to give a full account of the entire period of delay. Given the electronic means available (the present matter was dealt with virtually) the Covid-19 lockdown cannot be an explanation for their delay. The plaintiff's notice of bar was delivered on 18 June 2020, well after the commencement of lockdown.

29. Mr Bailey states that his counsel was unable to access the files relating to the case, and was unable to consult legal libraries or to discuss aspects of the case with other legal professionals. No details are given as to why his counsel was isolated to

such an extreme extent. Moreover, given that a plea and counterclaim were in fact produced shortly after the defendants had been placed under bar, the excuse relating to counsel's inability to access the necessary documentation and to take instructions rings hollow.

30. The sureties have also not given a satisfactory explanation as to why they elected to instruct counsel who lives in Johannesburg, especially under Covid-19 circumstances. Mr Bailey lives in Cape Town, where there are many competent counsel at the defendants' disposal. In a replying affidavit Mr Bailey indicates that he knows Adv. Shaw and that the latter has experience in "*assisting against banks*". He is "*not aware of anyone in Cape Town that does this though there may be, of course.*"

31. Mr Bailey explains further that the defendants were under the impression that the *dies* would not apply during the lockdown. How the defendants came to this conclusion is not explained. A further explanation proffered is that Mr Bailey received an application for the sequestration of the Trust, to which he had to devote his resources. As a result he had to "*ignore the ABSA matter for the time being*". This was an intentional disregard of the Rules of Court.

32. Lastly, Mr Bailey pointed out that "*it has transpired that the same or similar fraud has been committed by the same ABSA staff against another person and my counsel has been trying to contact him (now living in Ireland) to establish the facts in that case. This would have been difficult with or without lockdown and has caused delay*". This is not a reason for failing timeously to deliver pleadings in a separate action. Any relevant information obtained from such other person could have been used at a later stage; if necessary, by an appropriate amendment to the plea and counterclaim.

33. In the circumstances, the sureties have not properly explained the delay in delivering their pleadings.

34. The second requirement the sureties must meet is to satisfy the Court that they have a *bona fide* defence or that their defence is not ill-founded. In the present

case, that entails that they have presented a *bona fide* defence in their plea and a *bona fide* counterclaim, or that such defence and counterclaim are founded on facts which, if proven in due course, would establish a defence and counterclaim against the plaintiff.

35. It has already been mentioned that the plea and counterclaim delivered on 30 June 2020 were signed on by Mr Bailey seemingly in his personal capacity. There is no credible evidence on record that he had been authorised to prepare and deliver the pleadings. The confirmatory affidavit by the fifth defendant, in which she authorised Mr Bailey to act on her behalf, was deposed to on 15 February 2021, eight months after delivery of the plea and counterclaim. A power of attorney purportedly granted to Adv. Shaw to represent the defendants is dated 15 June 2021, three months after the institution of the second upliftment application, and a year after the delivery of the pleadings.

36. There is no evidence indicating that the Trust and the fifth defendant were aware of the contents of the plea and counterclaim and they were in agreement with its contents.

37. Be that as it may, an analysis of the counterclaim attached to the replying affidavit in the second upliftment application indicates, *inter alia* the following:

> 37.1. The defendants purport to claim R45 million in damages against the plaintiff and a certain Mr Royd, jointly and severally. However, Mr Royd is not a party to the proceedings. There is thus a material non-joinder of Mr Royd to the proceedings.
>
> 37.2. The counterclaim lacks the necessary factual averments to sustain a damages claim for R45 million against the plaintiff and is excipiable.
>
> 37.3. The alleged losses (including the R45 million) relied upon in the counterclaim occurred – according to the allegations in the counterclaim - more than three years ago, in 2010. Consequently, any claim that the defendants might have had in this regard became prescribed in terms of

section 11(d) of the Prescription Act, 1969.

38. In the plea (also attached to the replying affidavit in the second upliftment application), the defendants mainly rely on their intended counterclaim as their defence. As mentioned with above, the counterclaim fails to disclose a cause of action against the plaintiff. The defendants also alleges that the bonds on which the plaintiffs rely have been securitised, but fails to plead any facts in support of such allegation. This is clearly a speculative defence.

39. In all of these circumstances, the sureties have not made out a case that their defence and counterclaim are well-founded and that there are at least some prospects of success in a trial in due course. The information at the Court's disposal does not indicate that the defence and counterclaim can be regarded as being *bona fide* (see *Dalhouzie supra* at 574H-575A).

40. Considering all of these issues, I conclude that the sureties have failed to establish good cause within the meaning of Rule 27(1), and that it is not in the interests of justice to uplift the bar.

The plaintiff's application for default judgment against the sureties

41. It follows then that the plaintiff is entitled to default judgment against the sureties, jointly and severally with each other and with the first, second and third defendants, the one paying, the other to be absolved, for:

41.1. Condonation of the plaintiff's failure to annex to its particulars of claim true copies of the mortgage loan agreements in terms of Rule 18(6).

41.2. Payment of the amount of R3 551 823,79.

41.3. Interest on R3 551 823, 79 at the rate of 10,00% per annum, calculated on daily outstanding balances and capitalised monthly on the first day of each month from 7 January 2020 to date of payment, both dates inclusive.

41.4. Costs of suit on the scale as between attorney and client.

The rescission application

The relevant legal principles

42. The application for the rescission of the default judgment granted against the Trust on 27 October 2021 has been instituted by Mr Bailey on behalf of the Trust. The application is brought in terms of Rule 42(1)(a) on the ground that the default judgment was erroneously sought or granted in the absence of Mr Bailey.

43. Rule 42(1)(a) provides as follows:

> "*The 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 judgement erroneously sought or erroneously granted in the absence of any party affected thereby".*

44. It has been held that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment (*Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510D-G).

45. The applicant need not show good cause in the sense of an explanation for his default, or a *bona fide* defence. Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission. When he cannot rely on an error he has to proceed in terms of Rule 31(2)(b) (where he was in default of delivery of a notice of intention to defend or of a plea) or on the common law (in all other cases). In both of the latter instances he must show good cause (*Bakoven Limited v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471H).

46. The Court is not confined to the record of the proceedings in deciding whether a judgment was erroneously granted (*Lodhi 2 Prop Inv CC v Bondev Devs (Pty) Ltd* 2007 (6) SA 87 (SCA) at paras [22]- [24]).

47. In *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz & Others* 1996 (4) SA 411 (C) at 417G-I the Court summarised the circumstances under which relief will be granted under Rule 42(1)(a) as follows:

> *"Relief will be granted under this Rule if there was an irregularity in the proceedings …; if the Court lacked legal competence to have made the order …; and if the Court, at the time the order was made, was unaware of facts which, if known to it, would have precluded the granting of the order …. It is not necessary for an applicant to show 'good cause' for the Rule to apply …."*

48. I proceed to consider the Trust's application for rescission.

The plaintiff's point *in limine*

49. The plaintiff has raised a point *in limine* as regards Mr Bailey's authority to institute the rescission application on the Trust's behalf. Mr Bailey does not state in his founding affidavit in what capacity he is bringing the application, that is, whether in his personal capacity as fourth defendant or in his representative capacity as trustee of the Trust. If the application is brought in his representative capacity, he fails to state that the institution of the application was duly authorised by the Trust, and that he had been authorised to act on behalf of all of the trustees.

50. This omission is significant, because the Trust has three trustees, being the first to third defendants in the action. This is apparent from the Letters of Authority issued by the Master on 19 November 2018. Mr Bailey argues that the first respondent has since been removed as trustee by resolution of the second and third defendants. There is no indication on the papers before the Court that the Master has issued amended Letters of Authority. There is, however, a copy of a resolution taken by the second and third defendants on 29 April 2021 to the effect that the first defendant be removed as trustee. In terms of clause 9.6 of the trust deed the office of any trustee shall be vacated if such trustee "*is removed from office by majority vote of all trustees*".

51. On a proper interpretation of clause 9.6, I am not convinced that the first defendant has in fact been removed as trustee. The resolution is signed by only two trustees, and there is no indication on the papers that all three trustees were present at the meeting at which the resolution was taken. Clause 9.6 requires a majority vote of "*all trustees*", that is, all three trustees should be afforded the opportunity to vote. Without the first defendant's involvement, the remaining trustees could not act in terms of clause 9.6 so as to remove the first defendant from his office. It is unlikely that the first defendant is aware of the fact that the rescission application has been instituted on the Trust's behalf.

52. In addition, on 25 November 2021 the plaintiff delivered a notice in terms of Rule 7(1) disputing the authority of Mr Bailey and Adv. Shaw to represent the Trust in the rescission application. There has been no response to that notice, and it is not dealt with at all in the replying affidavit, despite it being raised by the plaintiff in its answering affidavit in opposition to the application. Rule 7(1) provides as follows:

> *"Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."*

53. It is trite that under common law the trustees must act together in binding the trust, save where the trust deed stipulates differently (*Land & Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) at 85A-C). All trustees must participate or act together either by way of unanimous or majority vote. A decision taken in absence of all of the trustees and without their knowledge is irregular. In legal proceedings by and against a trust, a resolution is required authorising the institution of legal proceedings, otherwise the trust is not properly before the court (*Steyn v Blockpave (Pty) Ltd* 2011 (3) SA 528 (FB) at para [40]).

54. The power of attorney dated 15 June 2021 provided in the upliftment application (it was not included in the record of the rescission application) stipulated that "*Kevin Bailey and Delia Bailey in our personal capacities and as trustees of the Bailey Trust*" appoint Adv. Shaw to act on their behalf. In the absence of the first defendant, the power of attorney could not validly have been given on the Trust's behalf, and thus Adv. Shaw may not represent the Trust in the rescission application.

55. In the present case, Mr Bailey has not proven that he is duly authorised on behalf of the Trust to bring the rescission application. In the circumstances, I agree with the plaintiff that the Trust is not properly before the Court and that the institution of the rescission application was not properly authorised.

The merits of the rescission application

25. In case I am wrong in my conclusion upon the point *in limine*, I shall deal with the merits of the rescission application. The litigation history leading up to the granting of the default judgment has already been set out. The events of 26 and 27 October 2021 are particularly pertinent to the application.

26. The plaintiff brought the application for default judgment against the defendants during August 2021. It was set down for hearing in the motion court on 27 October 2021. As mentioned earlier, Mr Bailey purported to set down the second upliftment application (instituted in March 2021) for hearing on 15 October 2021. It was struck from the roll because of the improper set down. On 20 October 2021 the plaintiff's attorneys received an email from Adv. Shaw with a notice of set down relating to what appeared to be the second upliftment application. The matter was set down for 27 October 2021 at 09:30 "*for an online hearing*" together with the application for default judgment.

27. Neither Mr Bailey nor Adv. Shaw filed a practice note in respect of the second upliftment application so set down for 27 October 2021. On 26 October 2021 Mr Jonker, the plaintiff's counsel, filed his practice note. The practice note set out some of the history of the litigation and included submissions as to why the default judgment should be granted. Mr Jonker pointed out that the application for default judgment against the sureties should be postponed to the semi-urgent roll to be

heard together with the second upliftment application.

28. Mr Jonker became unavailable to attend to the matter on the plaintiff's behalf on 27 October 2021, and Mr Wessels was briefed to appear. The Honourable Justice Samela was the duty judge for motion court on 27 October 2021, and the Honourable Acting Justice Montzinger was the urgent duty judge who dealt with urgent applications, which did not include the application for default judgment or the second upliftment application.

29. A day before the hearing, on 26 October 2021, Adv. Shaw sent an email to Acting Justice Montzinger's registrar, Ms Veerapen, indicating that he would appear on behalf of the defendants and that "*this would be a virtual hearing*". He requested the invitation to the virtual hearing to be emailed to him. The plaintiff's attorney, Mr Fourie, was copied in on the email.

30. Ms Veerapen replied to the email, advising that the matter was not on the urgent roll for the next day. Mr Fourie forwarded Adv. Shaw's email to Mr Wessels, who addressed an email to Ms Veerapen and Adv. Shaw on 26 October 2021 at 15:10 in which he indicated, *inter alia*, that he had been briefed to appear in the application for default judgment on the plaintiff's behalf. The application was on the motion court roll before Justice Samela, and would be dealt with "*in open court (and not virtually*)". There was no application relevant to the matter before Acting Justice Montzinger on the urgent roll for the next day.

31. In a subsequent email sent at 16:27, Mr Wessels referred to the notice of set down received on 20 October 2021 and enquired from Ms Veerapen whether the second upliftment application was in fact on the urgent roll. On 27 October 2021, at 09:07, Adv. Shaw sent a further email to Mr Veerapen, requesting her to confirm that neither matter was on the urgent roll. At 09:12 Mr Wessels replied to Adv. Shaw, indicating that Ms Veerapen had confirmed to him that the applications were not before Acting Justice Montzinger. He added that the application for default judgment was "*enrolled as matter no. 24 on the motion court roll before Judge Samela and would be dealt with in open court in court 16 at 10:00 or as soon thereafter as the matter may be heard*".

32. Also at 09:12, Adv. Shaw sent an email to Ms Veerapen in which he stated: "*Please also note that should either of the matters be on the roll, that I am in Johannesburg and generally appear online as a result of the risk of the pandemic*".

33. At 10:01, after the commencement of motion court and despite the earlier email from Mr Wessels as to where the application for default judgment was to be dealt with, Adv. Shaw again emailed Ms Veerapen, as follows:

> "*I spoke to my client Mr Kevin Bailey and he mentioned that he gave the file to you on Monday for the removal of bar and mentioned that I was in Johannesburg. The removal of bar was to be heard with (or instead of) the other applications. He tells me you informed him it would be heard by another honourable judge who heard the online hearings.*
> *None of the hearings for this case have ever taken place in open court, they have always been online. ABSA's and its legal team are well aware of this.*
> *Obviously if any of these matters are held in open court my client will be severely prejudiced as I won't be there to defend him being in Gauteng. Even my client himself is far from Cape Town at this time.*
> *Please can you arrange for the matter to be enrolled on the online roll or for all the matters to be removed from the roll until be can sort this out.*"

34. This email did not immediately come to Mr Wessels' attention, as he was, by that time, in motion court before Justice Samela.

35. When the matter was called, Mr Wessels brought the all of the email exchanges between Adv. Shaw, Ms Veerapen and himself to the Honourable Justice Samela's attention, except for the email sent at 10:01, of which he was at that stage unaware. In his address to the Court, Mr Wessels identified the nature of the applications before the Court and highlighted the submissions made by Mr Jonker in the plaintiff's practice note. He handed up the email correspondence between the parties, as well as Adv. Shaw's email of 20 October 2021 with the attached notice of set down.

36. Having heard Mr Wessels, Justice Samela was prepared to grant default judgment against the Trust and to postpone the application for default judgment against the sureties and the second upliftment application to 7 February 2021.

37. The matter stood down thereafter to allow Mr Wessels to correct an error in the draft order. Upon his return to chambers, Mr Wessels noticed the email sent by Adv. Shaw at 10:01. He replied to the email at 12:04, advising Adv. Shaw that an order had been granted and attaching the draft order. Upon his return to motion court, Mr Wessels informed Justice Samela of Adv. Shaw's email of 10:01 that morning. Despite this, Justice Samela declined to set aside the default judgment granted earlier.

38. The Court thus granted the default judgment against the Trust with full knowledge of all of the circumstances and of the correspondence between the parties in relation to the matter.

39. It is clear from the correspondence that neither Adv. Shaw nor Mr Bailey arranged with the plaintiff's representatives for the matter to be heard virtually. Such a request was also not made by Mr Shaw in a practice note. Adv. Shaw was, a day before the hearing, expressly made aware of the fact that Justice Samela would not hear the matter virtually, and that it was enrolled on the motion court roll in open court. Adv. Shaw as a practising and, according to Mr Bailey, experienced advocate, must further have known that Ms Veerapen, as registrar, was not empowered to set down or remove matters from any roll. It served no purpose directing the debate at her. She had already indicated that the matters were not before Justice Montzinger on the urgent roll. When and how Adv. Shaw formed the impression that an "online roll" existed is unclear.

40. Mr Bailey's founding affidavit in the rescission application relies on the same circumstances set out in the correspondence referred to above. All of these circumstances were known to Justice Samela when he granted the default judgment against the Trust.

41. There was accordingly no irregularity in the proceedings, and no situation

arose in which the Court was unaware of facts which, if known to it, would have precluded the grant of default judgment. The Trust's application for the upliftment of the bar had been dismissed in January 2021, and default judgment against the Trust could properly be obtained. The Court did not grant default judgment against the sureties, but duly postponed the application for default judgment against them to be heard together with the second upliftment application.

42. In all of these circumstances, I have come to the conclusion that no case has been made out for rescission under Rule 42(1)(a). The rescission application stands to be dismissed for one or both of the following reasons:

42.1. The fact that the Trust is not properly before the Court.

42.2. The failure to make out a case under Rule 42(1)(a) for the default judgment against the Trust to be rescinded.

The reserve price and the constitutional argument

43. At the hearing of the applications the defendant's counsel raised what was referred to as a "constitutional element". This related to the reserve price placed on the sale of the property in execution in the default judgment granted by the Honourable Justice Samela against the Trust. The defendants argued that the reserve price was too low and thus unconstitutional, infringing their rights to housing and property. Thus, they argued, the plaintiff's action and "*the law itself is in violation of the constitution in so far as it allows this unconstitutional practice by the bank*".

44. This "constitutional" argument had not previously been raised and was not seriously pressed. As to the variation of the reserve price, I decline to do so. In fact, I cannot do so. I have already found that the default judgment, which included the setting of a reserve price in declaring the immovable property specially executable, is not to be rescinded. In any event, the circumstances prescribed in Rule 46A(c) for the reconsideration of the reserve price are not present, and information in relation to the factors to be taken into account as set out in Rule 46A(b) and (d) is not before me.

Order

45. In the circumstances, it is ordered as follows:

45.1. The fourth and fifth defendants' application to uplift the bar is dismissed, with costs on the scale as between attorney and client.

45.2. Default judgment is granted against the fourth and fifth defendants jointly and severally with each other and with the first, second and third defendants, the one paying, the other to be absolved, for:

45.2.1. Condonation of the plaintiff's failure to annex to its particulars of claim true copies of the mortgage loan agreements in terms of Rule 18(6).

45.2.2. Payment of the amount of R3 551 823,79.

45.2.3. Interest on R3 551 823, 79 at the rate of 10,00% per annum, calculated on daily outstanding balances and capitalised monthly on the first day of each month from 7 January 2020 to date of payment, both dates inclusive.

45.2.4. Costs of suit on the scale as between attorney and client.

45.3. The first to third defendants' application for rescission of the default judgment granted against them on 27 October 2021 is dismissed, with costs on the scale as between attorney and client.

P. S. VAN ZYL, AJ

HEARING DATE: **7 February 2022**

Appearances:

Counsel for the plaintiff: W. Jonker, instructed by Fourie Basson & Veldtman

Counsel for the defendants: D. Shaw (trust account advocate, briefed directly)