IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 5348/2016

In the matter between:

BARENDT MATTHEUS PRETORIUS First Applicant
LISA NICOLE DAMON Second Applicant
JOHAN LOUIS DU PLESSIS Third Applicant

and

ILIAD AFRICA TRADING (PTY) LTD Respondent

JUDGMENT BY: SNELLENBURG, AJ

HEARD ON: 18 MAY 2017

DELIVERED ON: 25 MAY 2017

---

[1] This matter concerns the rescission of a default judgment granted by the registrar against the applicants in favour of the respondent in terms of the provisions of Uniform rule 31(5)(b)(i) on 5 January 2017 in terms whereof the applicants were ordered, jointly and

severally, the one paying the others to be absolved, to pay the respondent the amount of R2 640 584.39, interest and costs on the scale as between attorney and client. The applicants also seek a stay of the attachment of their property, if any, and the sale in execution thereof pending the finalisation of the rescission application[1] as well as a punitive cost order on the scale as between attorney and client, alternatively *de bonis propriis*.

[2] The respondent opposes the application on the basis that the applicants have failed to show good cause for the rescission.

<u>Requirements for rescission of a default judgment granted in terms of rule 31(5)(b)</u>.

[3] A default judgment in terms of rule 31(5)(b) can be set aside by a defendant in terms of the common law[2] or in terms of rule 31(5)(d)[3]. To successfully apply for the rescission of a default judgment in terms of the common law the applicant must show good cause by (a) giving a reasonable explanation of the default; (b) showing that the application is made bona fide; and (c) showing the existence of a bona fide defence to plaintiff's claim which prima facie has some prospect of success.[4]

[1] This order would not have any practical effect at this stage.

[2] See **<u>Chetty v Law Society, Transvaal</u>** 1985 (2) SA 756 (AD) at 764J.

[3] See **<u>Lazarus v Nedcor Bank Ltd</u>**; **<u>Lazarus v Absa Bank Ltd</u>** 1999 (2) SA 782 (W) at 78; **<u>Pansolutions Holdings Ltd v P & G General Dealers and Repairers CC</u>**.2011 (5) SA 608 (KZD) paras [13] – [15].

[4] **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)** 2003 (6) SA 1 (SCA) also applied in **<u>Pansolutions</u>** supra.

[4] In **Pansolutions Holdings Ltd v P & G General Dealers and Repairers CC[5] [Pansolutions]** it was held that the court was accorded the power in terms of rule 35(d) to substitute its discretion for the registrar's and that that the good cause criteria applicable in terms of rule 31(2)(b) is also applicable when the court, in terms of rule 31(5)(d), reconsidered a default judgment granted by the registrar. In reality, save for the requirement in rule 31(5)(d) that the application be made within 20 days after the party acquired knowledge of the judgment, the requirement that needs to be satisfied for rescission in terms of rule 31(5)(d) and at common law is the same, namely good cause.

[5] The applicants apply in terms of the common law insofar as it may have any real effect on the adjudication of the matter.

[6] The evaluation of the 'good cause' criteria that has been applied consistently in relation to rescission applications, whether in terms of the common law or rule 31(2)(b), by Swain, J in **Pansolutions** ***supra*** reveals the following relevant considerations:

(a) A court, in evaluating 'good cause', has a wide discretion in order to ensure that justice is done.[6]

(b) The courts have declined to frame 'an exhaustive definition of what would constitute sufficient cause to justify the grant of an indulgence'.[7]

---

[5] See **fn 3 supra**.
[6] **Wahl v Prinswil Beleggings (Edms) Bpk** 1984 (1) SA 457 (T).
[7] Innes J in **Cairns' Executors v Gaarn** 1912 AD 181 at 186.

(c) The enquiry is directed at establishing the reasons for the aggrieved parties' absence. It is incumbent upon the applicant to show that the default was not wilful.

(d) That an applicant is bona fide in bringing the application, and has a bona fide defence to the claim, as required as part of the obligation to show 'good cause' is equally embraced by the concept of determining whether an imbalance, oppression or injustice has resulted from the judgment granted by the registrar in terms of rule 31(5)(d).

(e) As regards the establishment of a bona fide defence, what the applicant has to do is set out a prima facie defence, by setting out averments which, if established at the trial, will entitle the applicant to the relief asked for. The applicant is not obliged to deal fully with the merits of the case, and produce evidence that the probabilities are actually in his favour.[8]

[7] The overarching obligation to ensure that justice is done applies equally to the applicant and the respondent in a rescission application. It is also well established that the requirements for good cause should not be considered in isolation but rather in conjunction with one another.

[8] **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)** 2003 (6) SA 1 (SCA) at 9E – F.

[8] In light of the various issues that needs to be adjudicated it is necessary to deal with the common cause facts which inform the history of the matter as well as the salient matters that appear from the parties' affidavits in this matter.

The common cause facts

[9] During July 2016 the respondent instituted an action under civil case cover number: 3449/2016 [case 3449/2016] against the applicants. The respondent claimed payment of the amount of R2 640 584.39 from the applicants jointly and severally, the one to pay the other to be absolved, together with interest and costs on the scale as between attorney and client. The applicants were sued on deeds of suretyship in terms whereof they bound themselves as sureties and co-principal debtors with ZPC Hospitality Renovation Specialists (Pty) Ltd, registration number: 2003/021432/07 (the principal debtor) in favour of the respondent for the due and punctual payment of all amounts which may become owing, due and payable by the principal debtor to the respondent from whatsoever cause and howsoever arising.

[10] The summons was served on the respective applicants during July 2016 at 5 Milner Road, Bloemfontein by affixing a copy to the main entrance as the addressees were found to be absent. The said address was alleged in the summons to be the applicants' chosen *domicilium* address and is also indicated in the principal debtor's application for credit as being its business and registered address. On 18 August 2016 the respondent applied to the

registrar for a default judgment. The registrar however gave notice on 23 August 2016 that the matter needed to be referred to open court for confirmation of the terms of the suretyship and *domicilium*.

[11] The applicants defended the aforesaid action on 12 September 2016. The respondent thereafter applied for summary judgment. In resisting the application for summary judgment the second applicant deposed to an answering affidavit which was accompanied by affidavits by the first and third applicant confirming the contents of the answering affidavit and associating themselves with the content thereof. The answering affidavit was duly filed on 7 October 2016.

[12] For reasons that appear later the applicants also rely on the entire content of their aforementioned answering affidavit in the summary judgment application in these rescission proceedings, hence it is necessary to deal with the content thereof. I refrain from quoting the affidavit in its entirety, it is not necessary. I have, as far as practical, used the same choice of words as the applicants used, to give a fair and accurate reflection of the content of the answering affidavit, notwithstanding the fact that I summarise the points raised. The main contentions are:

12.1 The application for summary judgment amounts to an abuse of process as the affidavit in support thereof contains inadmissible evidence in the form of allegations as well as annexures;

12.2 The deponent to the aforesaid affidavit, in support of the summary judgment application, does not possess personal knowledge of the facts he purports to verify;

12.3 The particulars of claim constitutes a nullity and, as result thereof, also the summary judgment proceedings due to the fact that the particulars of claim was signed only by an attorney who does not have the right of appearance in this Division;

12.4 The respondent relies on a written agreement allegedly concluded between it and the principal debtor. It purports to append a copy thereof to the particulars of claim as annexure A. Annexure A is, on the face of it, merely an application for credit facilities signed only on behalf of the principal debtor. It is not a written agreement between the respondent and the applicant as alleged. As result there is an inconsistency between the allegations in the particulars of claim and the document relied upon for the cause of action which renders the pleading vague and embarrassing. The respondent also fails to specify who represented the parties during conclusion of the agreement and merely refers to duly authorised representatives. It is also alleged that the claim premised on the alleged written agreement lacks allegations necessary to sustain a cause of action against the principal debtor. As direct consequence the particulars of claim also lacks allegations necessary to establish liability of the applicants as sureties for the principal debtor's obligations pursuant to the alleged agreement between the respondent and the principal debtor. The applicants' record that they will, in due course, file the necessary notice [in terms of Uniform rule 23];

12.5 The respondent failed to append any written document purporting to be a suretyship by any of the applicants in favour of the respondent. The General Law Amendment Act 50 of 1956 provides that no contract of suretyship entered into after the commencement of the Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety. The plaintiff has thus failed to disclose a cause of action against the sureties. If written deeds of suretyship do exist the same have not been appended and the necessary allegations required in terms of rule 18(6) are not contained in the particulars of claim.

12.6 No proper demand in terms of section 129(1) of the National Credit Act 34 of 2005 was dispatched to any of the applicants or the principal debtor. The provisions of the said section, read with sections 86(9) and 130 are mandatory before any action can be instituted against "any defendant as an alleged debtor". The claim, if there exists a claim against the applicants, is premature. Because the applicants are allegedly also co-principal debtors, their position is markedly different from that of a mere surety and compliance with the provisions of the National Credit Act is therefore mandatory;

12.7 I quote the next point verbatim. The relevance will appear later. ".. as is evident from Plaintiff's very own Particulars of claim, the alleged amount claimed by the Plaintiff is disputed, but notwithstanding this, the Plaintiff persists and moves for summary judgment for the disputed amount,..";

12.8 The principal debtor has been placed under business rescue in terms of section 129 of the Companies Act 71 of 2008 with effect from 30 May 2016. This is the reason why the plaintiff has not instituted action against the principal debtor. The Business Rescue Plan was adopted on 18 July 2016 of which a copy is appended as annexure to the answering affidavit. The implementation in terms of section 150(2)(*b*)(*ii*) constitutes a compromise and discharge of the principal debt and thus the applicants have been released as sureties to the principal debtor.

[13] The summary judgment application as issued notified the applicants that it will be heard (is set down) on 13 October 2016. It appears from the court order of 13 October 2016 that Rampai, J, after hearing counsel for the plaintiff, postponed the summary

judgment application *sine die* and ordered that costs be costs in the cause.

[14] On 4 November 2016 the respondent issued a second combined summons against the applicants under civil case cover number: 5348/2016 (the matter which ultimately gave rise to this rescission application).

[15] Neither the respondent nor its attorney of record or its attorney at the seat of the court informed the applicants of the fact that, whilst the first action was still extant and the summary judgment proceedings were postponed *sine die*, it had instituted a second action against them.

[16] As far as case 5348/2016 is concerned the summons is, save for the differences which is mentioned below, an identical copy in every respect to the summons issued in case 3449/2016. The result is that that the same plaintiff has instituted action against the same defendants for the same thing arising out of the same cause. The summons even bears the same reference number as the summons in case 3449/2016. The only difference between the two summonses are that (i) the particulars of claim is properly signed by an attorney with right of admission in this Division; (ii) the particulars of claim in the second summons contains an additional paragraph numbered 7.3.5, wherein reference is made to the written deeds of suretyship granted in favour of the respondent by each of the applicants and (iii) copies of the said

deeds of suretyship are appended to the pleading as annexures F1, F2 and F3.

[17] The summons in case 5348/2016 was served on the same *domicilium* address (5 Milner Road) where the summons in case 3449/2016 was served on the same day that the second action was issued. The returns of service in respect of all three applicants record that the sheriff was informed by a receptionist of Fresh Harvest, another business, that the defendant is no longer at the aforementioned address.

[18] On 21 November 2016 the respondent applied for a default judgment in case 5348/2016.

[19] On 14 December 2016 the respondent's attorney at the seat of the court deposed to a so-called 'lost document affidavit'. The attorney states that she took the matter over as correspondent from another local attorneys firm and that the original certificate of balance, agreement and suretyship agreements were filed in case 3449/2016 but were amiss when she uplifted the court file for purposes of appending the same as annexures to case 5348/2016. This is of course not correct insofar as the deeds of suretyship were never appended to the summons in case 3449/2016.

[20] On 5 January 2017 the registrar granted the default judgment.

[21] On 19 January 2017 a writ of execution was issued to take into execution the third Applicant's movable property and to realise the same at a public auction to satisfy the judgment debt, costs and charges.

[22] On 20 February 2017 the applicants issued the application for rescission under consideration. After receipt of the applicants' heads of argument in this application the respondent filed a notice of withdrawal of case 3449/2016 wherein costs of the action is tendered. The respondent did not seek the applicants consent nor did it, prior to argument, seek leave from the court.

<u>Relevant evidence contained in the applicants and respondent's affidavits in the rescission application.</u>

[23] The first applicant deposed to the founding affidavit in support of the rescission application. The first applicant avers that he and the other applicants were contacted by the sheriff on 1 February 2017. The sheriff informed them that he had received instructions to proceed with the attachment of their property. Before continuing with the applicants' version two aspects pertaining to the applicants' aforementioned averments need to be addressed. Although there are no documents in the court file pertaining to the execution process against the second and third applicants, these facts are not denied by the respondent, thus confirming that the execution process is pursued against all three the applicants. It should be pointed out however that the applicants' attorney addressed a letter to the respondent's attorney at the seat of the

court on 1 February 2017. In this letter the author states that the sheriff contacted the applicants on 31 January 2017. The purpose of the letter was to record that the applicants had only become aware of the default judgment when the sheriff informed the applicants of his instructions; to inform the respondent that "daar geen bates op die Verweerder se naam is nie" and to enquire whether the respondent intended to persist with the execution in which event the applicants would seek a rescission of the judgment on urgent basis. It does not appear that any reply to the letter was forthcoming. The discrepancy regarding the date that the sheriff contacted the applicants is not material to the adjudication of the matter.

[24] The applicants explain the reasons for the default as follows:

> "The Applicants no longer conducts business at its *domicilium* address in accordance with the written Agreement annexed to the Particulars of Claim, being 5 Milner Road to both Particulars of Claim. The Principal Debtor, ZPC Hospitality Renovation Specialists (Pty) Ltd has since moved to a new location."

The first applicant continues to aver that none of the applicants had knowledge of the proceedings and if they had they would have defended the same. The applicants state that their failure to defend was not wilful.

[25] Regarding the bona fide defence the applicants refer to the defences set out in their answering affidavit to the summary

judgment application in case 3449/2016. They also appended a copy of the answering affidavit.

[26] The applicant deals with the background regarding the first action (case 3449/2016) and appends the majority of documents that form part of the court file in case 3449/2016 to the founding affidavit.

[27] Lastly the applicants moves for a punitive cost order, alternatively costs de *bonis propriis*. This order is sought on the basis that the applicants contend that the respondent acted *mala fide* and the attorneys 'unethically' based on the history of the matter.

[28] The respondent denies that the applicants are bona fide with the application and avers that the applicants default is wilful. Suffice it to say that the respondent takes issue with the fact that the applicants did not give a detailed account of when the premises was vacated (or the business was relocated) and they state that service of case 3449/2016 was effected on the same address. They also rely on the fact that the applicants chose the address as *domicilium* address and also that it is not the applicants' case that the principal debtor changed its registered address.

[29] The respondents deny that the application is bona fide and state that the applicants are merely employing delaying tactics as they have no bona fide defence to the respondent's claim. To this end they deal with each defence in the answering affidavit in case

3449/2016 and conclude that the defences dealt with in the answering affidavit to the summary judgment application do not constitute a bona fide defence for purposes of the rescission application. The defences are evaluated later in the judgment.

[30] The respondent's request that the application be dismissed with costs on the scale as between attorney and client is premised on the provisions of the deeds of suretyship which provides that the respondent is entitled to costs incurred in enforcing any of the provisions of the suretyship on this scale.

[31] In the replying affidavit the applicants aver that the respondent misunderstood the primary grounds upon which the application for rescission has been brought and then proceeds to deal with the fact that when the second action (5348/2016) was issued the respondent knew that the applicants had defended the first case and intended to defend the matter and that the cause of action was clearly *lis pendens* when the second action was issued. This was also the thrust of the argument on the applicants' behalf.

Explanation for default

[32] I am satisfied that the applicants have given a satisfactory explanation for their failure to defend the action.

[33] Although it is correct that:

33.1 service of the summons in case 3449/2016 was effected on the *domicilium* address and notwithstanding the fact that it was affixed to the main entrance it did come to the applicants' knowledge;[9]

33.2 the applicants did not take steps to change the *domicilium* address when the business was relocated;

33.3 the applicants fail to supply any information regarding when exactly the business would have relocated,

the aforementioned must be considered in light of the history of the matter. What must be determined is whether the applicants were in wilful default to defend case 5348/2016.

[34] The respondent had already issued summons against the applicants in case 3449/2016 as sureties. The action was still extant and the applicants could not reasonably be expected to anticipate another action on the same cause of action claiming

---

[9] In **Loryan (Pty) Ltd v Solarsh Tea And Coffee (Pty) Ltd 1984 (3) SA 834 (W)** the court gave a pointed summary of the position relating to service on a *domicilium* address, namely that 'the choice of a *domicilium citandi et executandi* is primarily related to the service of process in judicial proceedings. As appears from Rule 4 (1) (a) (iv), which reflects our common law practice (see Muller v Mulbarton Gardens (Pty) Ltd 1972 (1) SA 328 (W) at 331 in fine to 333H and the authorities there cited), service of any process may be effected by delivering or leaving a copy thereof at the *domicilium* chosen by the party concerned. Such service is then good, even if the process may not be received, for the very purpose of requiring the choice of a *domicilium* is to relieve the party causing service of the process from the burden of proving actual receipt. Hence the decisions in which service at a *domicilium* has been held to be good, even though the address chosen was vacant ground, or the party was known to be resident abroad, or had abandoned the property, or could not be found.'

the same relief being served on them by the respondent. In fact, case 3449/2016 was defended, the summary judgment application had not been finalised and the applicants were represented by attorneys. It can hardly be argued that in those circumstances it should be held against the applicants that they did not think to inform the respondent that the *domicilium* address was vacated or of a new *domicilium* address. The default can never be found to be wilful in the circumstances of this case.

[35] The facts in the matter of **Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd**[10] are distinguishable from the facts in this matter. In that matter the respondent attempted to serve at the same address where the first provisional sentence summons was served. The sheriff was informed that the address was vacated and the respondent then served on the applicant company's registered address. The provisional sentence summons had been withdrawn prior to the issuing and service of the fresh provisional sentence summons. Even in those circumstances the court remarked that the respondent's attorney's failure to inform the applicant's attorneys that they were issuing a new summons "showed a grave lack of courtesy". The Judge remarked that it seemed to be in keeping with the war of technicalities that characterised that case and opined however that he doubts that, that fact is likely to move the trial court to special sympathy for the applicant.

[36] The facts of this matter does not warrant a finding of wilful default.

[10] **1977 (2) SA 576 (W).**

<u>The bona fide defence</u>

[37] The applicants indicated in their replying affidavit and in argument that the principal or main bona fide defence proffered in this rescission application is the fact that when the second action was instituted the matter became *lis alibi pendens*.

[38] It is correct that the moment the second action, case 5348/2016, was issued the plea of *lis alibi pendens* became available to the applicants. This is admittedly so because the all the requirements for *lis alibi pendens* were satisfied at that stage, namely an action against the same defendants for the same thing arising out of the same cause.[11]

[39] As referred to in the background the respondent served a notice of withdrawal of the action under civil case cover number 3449/2016 on 12 May 2017. The costs were tendered on party and party scale. The first question presenting itself for consideration is whether the first action has indeed been properly withdrawn. Uniform rule 41(1) provides that:

> "(1)(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.

[11] **<u>Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others</u>** 2013 (6) SA 499 (SCA); **<u>Nestlé (South Africa) (Pty) Ltd v Mars Inc</u>** 2001 (4) SA 542 (SCA).

(b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs."

The 'withdrawal' was motivated by the specific reference in the replying affidavit to the defence *lis alibi pendens*. The respondent did not obtain the applicants consent nor did it request leave from the court prior to the filing of the notice.

[40] Counsel for the respondent contends firstly that the first action was withdrawn by virtue of the notice of withdrawal and that consent was not required. As result it is contended that there can no longer be any *lis pendens*. The applicants joined issue with the proposition that the action had been withdrawn. They contend that the proceedings had been set down with the result that the respondent required either their consent or leave of court. As the respondent had neither when it filed the notice, the action had not been withdrawn.

[41] The "proceedings" referred to in Rule 41(1)(a) are those envisaged by the Rules in which there is a *lis* between parties, one of whom seeks redress or the enforcement of rights against the other.[12] To my mind the respondent required the applicants' consent or leave of the court to withdraw case 3449/2016 in the

---

[12] **De Lange v Provincial Commissioner of Correctional Services, Eastern Cape** 2002 (3) SA 683 (SE).

circumstances. Counsel for the respondent urged me to grant leave for the withdrawal in the event that I found the same to have been a requirement. It would not be proper to entertain such request. I accept that the fate of this application may be material to those proceedings. Whilst it is not ordinarily the function of the Court to force a person to institute or proceed with an action against his or her will or to investigate the reasons for abandoning or wishing to abandon one[13], the applicants may very well wish to put further facts before the Court pertaining to the order ultimately sought in that case. As far as the evaluation of this application is concerned I therefore proceed on the basis that case 3449/2016 has not been withdrawn.

[42] It appears that the applicants' case is based, on the one hand, on the following: the respondent 'snatched' a judgment in the second action whilst knowing the first action was extant; was actively being defended and that the applicants always intended to defend the action against them as sureties. For these reasons the judgment should according to the applicants be rescinded.

[43] In **Hudson v Hudson and Another** **1927 AD 259 at 268** De Villiers held as follows regarding attempts to abuse court process:

> "Where... the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the duty of the Court to prevent such abuse. But it is a power to be exercised with great caution, and only in a clear case."[14]

---

[13] **Levy v Levy** 1991 (3) SA 614 (A).
[14] Also see **Levy v Levy** 1991 (3) SA 614 (A).

[44] Whilst the respondent's attorneys' lack of courtesy in this matter is to be remarked upon as having "showed a grave lack of courtesy" (to borrow from **Hardroad *supra***), this does not justify a finding that the Court's process was abused on the facts of this matter, or put differently, that this is a clear case as envisaged in **Hudson v Hudson and Another** ***supra***. My findings regarding the outstanding issues are therefore premised on the fact that I have found that there was not an abuse of process.

[45] The applicants, after being confronted in the answering affidavit with the respondent's challenge that the 'defences' raised in the answering affidavit in the first action are either no longer applicable (because the deficiencies were amended) or no longer constitutes a *bona fide* defence for purposes of rescission to the claim in the second action where default judgment was granted, replied that the respondent misunderstood their defence. The applicants state, as pointed out in the background, that they rely on *lis alibi pendens*. It is also of consequence that the applicants did not challenge the respondent's attack on the defence in any manner other than by reliance on the defence of *lis alibi pendens*. The applicants also elected to persist with the defences as formulated to the summary judgment application in the first action.

[46] As point of departure the mere reference to *lis alibi pendens* can never on its own constitute a bona fide defence to case 5348/2016, because in absence of a bona fide defence to the action for the same thing arising from the same cause, there is

little reason to allow a plea of *lis alibi pendens* to succeed.[15] In absence of a bona fide defence it is indeed difficult to envisage grounds that will convince a court that it is not just and equitable to allow the second action to continue, notwithstanding the fact that the same case was instituted earlier.

[47] Insofar as the applicants' reliance on the defence of *lis alibi pendens* is aimed at contending that the judgment in the second case is invalidated merely by reason of the fact that when it was granted the same case which was instituted earlier still existed, I can do no better than to associate myself fully with the following dicta in **<u>Starita v Absa Bank Ltd and Another</u> 2010 (3) SA 443 (GSJ) para 7** which is dispositive of that argument:

"The applicant's first contention is that it is impermissible to have two extant summonses for the same debt, and that that position invalidates the default judgment granted on the second summons. It is true that such a position would afford a defendant the right to raise the defence of *lis alibi pendens*, which is invariably done by way of a special plea. But the defence is merely a dilatory one, since if it is upheld the usual practice is to stay the proceedings in the one matter. The court has a discretion whether to uphold the defence, and could refuse to do so in a proper case. Ordinarily the plaintiff would simply withdraw one of the actions. The mere fact that there is at any point in time two extant summonses does not render one or both of them invalid or inoperative. If it did, the special plea of *lis pendens* would not be merely dilatory and the court would not have a discretion in the matter; it would be dispositive of the case. If the special plea of *lis pendens* is never

[15] **<u>Nordbak (Pty) Ltd v Wearcon (Pty) Ltd and Others</u>** 2009 (6) SA 106 (W).

raised there would be no adverse consequences to the plaintiff other than the fact that it would not be entitled to obtain judgment in both actions, but only in one. Accordingly, in my view, the fact that two summonses had been issued, and that both actions were pending at the time when default judgment was granted on the second, does not invalidate the default judgment granted."

[48] I would also add that insofar as the applicants rely on the fact that when the judgment in the second case was given, the existence of the same case which was instituted earlier was not disclosed, there are two answers. Firstly, the registrar's attention was in fact drawn to the first case in the 'lost documents affidavit'. Secondly it was held in the matter of **Yekelo v Bodlani 1990 (3) SA 970 (TK)** where the court sitting as court of appeal was called upon to decide what the consequence should be of a plaintiff's failure to disclose to the court of first instance that a rescission application for the same relief was pending in the magistrate's court, that the fact that the application for rescission was pending in the magistrate's court was not an absolute bar to the High Court entertaining an application for the same relief. Whilst the institution of two actions is *prima facie* vexatious, it is within the court's discretion to allow an action to continue should that be considered just and equitable despite the earlier institution of the same action. The court held that the Judge would probably still have granted the relief sought had he known of the first action.

[49] This judgment must not be seen as approval to parties who are engaged in litigation to approach another court (or the same court

differently constituted) with a second case whilst the same action which was instituted earlier is still extant without disclosing the existence thereof to the court. This matter is decided on its own facts and, as will appear below, there are circumstances flowing from the applicants defence to case 3449/2016 which contributed to the result.

[50] As stated above, an important factor is whether a party raising *lis alibi pendens* has a proper defence to the action or application. In this matter it appears that the 'invalidity' defence motivated the issue of the fresh summons, obviously rectified in some respects. To this end I point out the obvious: the applicants raised the point that the first summons was invalid. The gist of the defence was therefore that there was no valid process in existence. It would not assist them to cry foul because the respondent decided to issue a valid process.

[51] The question that begs an answer is therefore whether the applicants have shown that any bona fide defence exists to the same thing being claimed arising out of the same cause. The applicants limit their defence to the defences contained in answering affidavit to the summary judgment application. If those defences do not satisfy the requirements of a bona fide defence for purposes of rescission the application is foredoomed to failure. The defences have been set out in paragraph [12] above. For the following reasons they do not constitute bona fide defence to the present action.

[52] The defences referred to in paragraph 12.1, 12.2 and 12.3 above do not constitute a bona fide defence to this action wherein default judgment was granted.

[53] The defence referred to in paragraph 12.4 falls well short in the present proceedings to constitute a bona fide defence. The respondent appended letters (as annexures D1 and D2) to its particulars of claim addressed to it on behalf of the principal debtor by its attorneys. The same attorneys also represent the applicants in these proceedings. The respondent used to trade under the names Buco Rustenburg, Buco Bloemfontein and SAFLOK SA. The letters are addressed to Buco Bloemfontein and SAFLOK. The letters state in the introduction that the author thereof holds instructions to address the letter to the principal debtor's possible creditors. In annexure D1 the amount of R10 540 797.54 is recorded to be owing to Buco Bloemfontein and in annexure D2 the amount of R4 648 433.44 is recorded to be owing to SAFLOK. The applicants, save for the objection raised in the summary judgment application would, to my mind, in these proceedings have had to seriously grapple with the alleged indebtedness and the relationship between the respondent and the principal debtor, more so when the applicants themselves rely on the fact that the respondent is acknowledged to be a creditor in the business rescue. It is clear that the respondent is indeed a creditor of the principal debtor and that an amount of money is owed to it. If the applicants were to deny that the principal debtor was indeed a creditor of the respondent or, for that matter contended that the principal debtor does not owe the respondent any money, then they bore the onus to make averments to

substantiate the defence which, if established at the trial, would entitle them judgment in their favour. They failed to do so.

[54] The defence referred to in paragraph 12.5 is not relevant to the present proceedings as the written deeds of suretyship were appended to the particulars of claim in case 5348/2016. The applicants significantly did not deny the deeds.

[55] The defence referred to in paragraph 12.6 does not constitute a bona fide defence. The respondent specifically relies on the provisions of section 4(1)(a)(i) of the NCA to the effect that the agreement would be excluded from the provisions of the aforesaid Act. The applicants have not advanced any primary facts to refute the reliance on the provisions of section 4(1)(a)(i) or to establish a bona fide defence to the extent that the principal agreement between the respondent and the principal debtor was not excluded from the NCA. The applicants are sued as guarantors to the obligations of the principal debtor in terms of a credit transaction to which the NCA does not apply. The contractual relationship with the applicants remains ancillary to the main agreement between the respondent and the principal debtor. The applicants cannot claim that the NCA applies to them on the basis that their obligations arise in terms of a credit guarantee as set out in section 8(5) of the NCA as that section requires the credit guarantee to apply to the obligations of another consumer in terms of a credit transaction to which the NCA applies.[16] The applicants contend that their position differs from

[16] See **Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another** 2009 (3) SA 384 (T).

that of a mere surety because they are sued as surety and co-principal debtor. Signing as surety and co-principal debtor does not render a surety liable in any capacity other than a surety who has renounced the benefits of excussion and division.[17] The use of the words 'co-principal debtor' does not transform the contract into any other than suretyship.[18]

[56] The defence referred to in paragraph 12.7 reads "as is evident from Plaintiff's very own Particulars of claim, the alleged amount claimed by the Plaintiff is disputed, but notwithstanding this, the Plaintiff persists and moves for summary judgment for the disputed amount,..". What the deponent was referring to is not clear. There are no allegations in the particulars of claim that justifies this conclusion. The applicants have not elaborated upon this allegation at all. If the allegation refers to the difference between the letters addressed on behalf of the principal debtor and the claim amount, the applicants should say so. The claim amount is substantially less than the amounts that the principal debtor acknowledged in its letters. The applicants are however in a better position than sureties are normally. They have intimate knowledge of the business rescue proceedings. In such event they should deal with the amount which they say was owed by the principal debtor.

[57] Lastly the defence referred to in paragraph 12.8 above, namely that the principal debtor is under business rescue; that the implementation of the business rescue constitutes a full and final

---

[17] **Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another**, *supra* par 22; **Maasdorp v Graaff-Reinet Board of Executors** (1906 - 1909) 3 Buch AC 482 at 490; **Du Plessis v Estate Teich Brothers** 1914 CPD 48 at 50; Neon supra at 471.

[18] Per De Villiers, CJ in **Maasdorp v Graaf-Reinet Board of Executors**, *supra* at 490.

settlement of the respondent's claim against the principal debtor and therefore any possible indebtedness by the applicants as sureties have been discharged. Firstly, the respondent stated in its answering affidavit that the business rescue had been converted into provisional liquidation proceedings. The applicants failed to deal with this allegation in their replying affidavit. This is an important issue which at the very least called for an explanation. There are no rational grounds to ignore this statement. Any statutory moratorium as result of the business rescue proceedings that could conceivably assist the applicants, without finding that there would be any, would in any event have lapsed if the business rescue proceedings were terminated.[19] Secondly, for the same reasons there cannot be any suggestion of the discharge of the sureties' obligations where the business rescue proceedings were terminated. Thirdly, I have considered the proposed business rescue plan as appended to the answering affidavit. There does not appear to be any indication that the respondent could not pursue its remedies against the sureties.

[58] When *lis alibi pendens* is raised the Court has a discretion. As stated earlier, if the applicants do not have a bona fide defence, there would be very little reason to allow the plea of *lis alibi pendens* to succeed.

[59] As matters stand the Court would not accede to the request to uphold the defence of *lis alibi pendens* in light of the absence of even a semblance of a bona fide defence to the merits of case 5348/2016.

---

[19] **New Port Finance Company (Pty) Ltd and Another v Nedbank Ltd** [2015] 2 All SA 1 (SCA)

Bona fide in making the application

[60] This aspect can only bear on the costs in light of my conclusion that the application stands to be dismissed. I have no doubt that the applicants were bona fide with the application.

Costs

[57] The applicants were not successful and no reason exists why costs should not follow the result. To my mind however it is appropriate to order that the costs be paid on party and party scale.

[58] Accordingly, **IT IS ORDERED THAT**:

The application is dismissed with costs.

N. SNELLENBURG, AJ

Appearances:

On behalf of the applicants:	Adv PC Ploos van Amstel
Instructed by:	D Muller
	Kramer Weihmann &Joubert Inc
	Bloemfontein
On behalf of the respondent:	Adv BC Stoop SC
Instructed by:	E De Jager
	Botha De Jager Attorneys
	Bloemfontein