

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

15/11/13

CASE NO: 71646/2011

	DELETE	WHICHEVER	IS	NOT
	APPLICABLE			
(1)	REPORTABLE:	YES /NO		
(2)	OF INTEREST	TO	OTHER	
	JUDGES:	YES /NO		
(3)	REVISED			
	DATE:	15 Nov 2013		
	SIGNATURE:	[Signature] Jansen		

In the matter between:

DR MOHAMED ADAM

Applicant

and

ERNST JOHANN BOTMA N.O.

Respondent

In re:

**RESCISSION OF JUDGMENT IN THE MATTER
BETWEEN:**

ERNST JOHANN BOTMA N.O.

Plaintiff

and

DR MOHAMED ADAM

Defendant

JUDGMENT

JANSEN AJ

Nature of Application:

- [1] The application is explicitly stated to be an application for rescission in terms of the Uniform Rules of Court Rule 42(1)(a) to the effect that “... *the order or judgment in question was erroneously sought or erroneously granted in my absence ...*” as stated by the applicant.
- [2] The order, which the applicant (hereafter referred to as **Dr Adam**) wishes to set aside, is a default judgment granted on 26 January 2012. The notice of enrolment indicates that the matter was set down on 26 January 2012, and that no notice of opposition was filed.
- [3] “Irregularity” in the sense envisaged by Rule 42(1) entails an irregularity in the proceedings or if the court was unaware of facts, if known to it, which would have precluded it, from a procedural point of view, from making the order.¹
- [4] A warrant of execution in respect of movable property was obtained pursuant to the court order and **Dr Adam**’s six bank accounts with First National Bank, Pretoria Central, were attached. From these the Deputy Sheriff was enjoined to realise

¹ **Harms Civil Procedure in the Superior Courts Procedure in the High Courts** Lexis Nexis B-42.4 at B-300 (Issue 41) *et. seq.* and the cases cited therein.

the sum of R2 059 734.36 together with payment of legal costs in the amount of R10 000.00 plus interest plus further costs incurred. The bank accounts were duly attached. (In the answering affidavit **Botma N.O.** states that “... *the attachment of the bank accounts was lifted prior to the application being brought by the Applicant in this matter*” which allegation is admitted by **Dr Adam** in reply.) Why this was done is unclear to the court.

[5] In what follows the applicant/defendant is referred to as **Dr Adam** and the respondent/plaintiff as **Botma N.O.**

[6] **Dr Adam** contended that a consideration of the whole summons reveals that it is, in fact, a provisional sentence summons. This appears, it was argued, from page 3 thereof where it is stated that “*provisional sentence may forthwith be granted*”. From the court order, however, it is clear that a final order was granted against **VIADOR SA Limited** and that **Dr Adam** had not been cited as a defendant.

[7] **Dr Adam** had bound himself as a surety and co-principal debtor for **VIADOR SA Limited** for any amount due to **Botma N.O.** in terms of a purchase agreement. In terms of the said court order **VIADOR SA Limited** had been ordered to pay an amount of R2 059 754.36 to **Botma N.O.** as follows: —

“ORDER

By agreement between the parties it is order that:

- 1. The Defendant pays to the Plaintiff the sum of R2 059 754.36 which shall be paid by the Defendant as follows:***
 - 1.1 An amount of R138 922.41 on or before 30 November 2011;***
 - 1.2 An amount of R138 922.41 on or before 30 December 2011;***
 - 1.3 An amount of R50 000.00 on or before 7 December 2011 and monthly thereafter on or before the 7th day of each subsequent month until the full amount has been settled.***
- 2. Should one instalment not be paid on due date, the whole outstanding amount will become immediately due and payable.***
- 3. The Defendant shall pay interest on the amount of R1 850 000.00 at a rate of 17% per year from 1 December 2011 until date of settlement.***

4. The Defendant shall pay the legal costs of the Plaintiff in the amount of R10 000.00.

REGISTRAR”

[8] It was sought to be argued by **Botma N.O.** that the suretyship signed by **Dr Adam** was a liquid document in that it should be read with the court order referred to above. It bears mention that the suretyship clause, clause 2 in the purchase agreement of 29 January 2009, is for an unlimited amount and reads as follows: —

“I, Dr Mohamed Adam hereby bind myself as surety and co-principal debtor, jointly and severally, to and in favour of Paragon for any amount due to Paragon by Viador in respect of this agreement. I hereby waive and renounce the exceptions of excussion, from my division and session of action.” [emphasis added]

[9] The court order was annexed to the provisional summons as annex “**X**”. That it was a provisional summons is clear from paragraphs (2) and (3) of the summons which read as follows: —

“(2) That failing such payment, he or she is hereby called upon to appear before this Court

personally or by an advocate or by an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), has the right of appearance in the High Court, at CNR. PAUL KRUGER AND VERMEULEN STREETS, PRETORIA, GAUTENG on 26th January 2012 at 9h30 in the forenoon (or as soon thereafter as the matter can be heard) to admit or deny his or her liability for the said claim, and to state why the mortgaged property should not be declared executable.

- (3) *That if he denies liability for the same, he shall not later than noon on the 24th of January 2012, file an affidavit with the registrar of this court and serve a copy thereof on plaintiff's attorney, which affidavit shall set forth the grounds of his defense (sic) to the said claim, and in particular state whether he admits or denies his signature to the said Addendum Agreement or whether he admits or denies the signature or authority of his agent."* [emphasis added]

[10] It bears mention that paragraph 2 is incorrect as no mortgage bond was ever registered in respect of the property which was purchased in terms of the purchase agreement. To call upon **Dr Adam** *inter alia* to state “... ***why the mortgaged property should not be declared executable***” was simply inaccurate.

[11] There was also annexed to the provisional summons a Purchase Agreement dated 29 January 2009 (including, as a paragraph, the suretyship by **Dr Adam**) and an addendum agreement dated 6 October 2011. The said addendum agreement attached to the summons contains a restricted payment schedule given the fact that **VIADOR SA Limited** had not made payment on time. **Dr Adam** is not a party to this agreement and did not sign it. (This agreement refers to a purchase agreement dated 11 May 2005, and yet a further agreement dated 4 August 2010, amending the agreement of 29 January 2009. The purchase agreement of 11 May 2005 and the amendment agreement of 4 August 2010 have not been appended to the summons.)

[12] The summons was not served at the chosen *domicilium citandi et executandi* for **VIADOR SA Limited** and the surety – **Dr Adam** – in the purchase agreement. The return of service specifically states that on the third attempt at **Dr Adam**’s place of residence, namely 4 Krona Place, Eldo Glen, Centurion, service was effected upon a housekeeper Mrs S.L. Mashepo,

whereas the *domicilium citandi et executandi* set out in the purchase agreement was 4th Floor, West Wing, Louis Pasteur Building, 374 Schoeman Street, Pretoria.

[13] **Dr Adam**'s counsel, in his heads of argument, stated "... (t)hat a claim based on a Deed of Surety does not meet the requirement of liquidity for purposes of provisional sentence proceedings as it has evolved in practice over a long period of time, in terms of which requirement of liquidity, the existence and extent of the debt must appear from the written instrument. (See: *Wollach v Barclays National Bank Ltd* 1983 (2) SA 543 at 552G–H read against the background of p. 552D–F.)" However, **Botma N.O.**'s counsel argued that read with a court order the suretyship clause was a liquid document.

[14] However, it is trite that in order to qualify as a liquid document the instrument upon which a plaintiff relies must, on its face, reflect an acknowledgment of indebtedness or an undertaking to pay.² A covering bond that provides for future advances and a certificate certifying the amount due at any given stage, does not comply with this requirement. In the instant case, as stated, there is a reliance on a court order against **VIADOR SA**

² *Fraser & Chalmers South Africa (Pty) Ltd v Tuckers Land Development Corporation (Pty) Ltd* 1977 (2) SA 465 (W); *Kopke v Ship and Tank Services (Pty) Ltd* 1972 (4) SA 339 (C).

Limited read in conjunction with a suretyship. It is pointed out that the suretyship is contained in a clause within the purchase agreement dated 20 January 2009, which refers to an amount of R7 250 000.00. This amount was later amended by an addendum agreement. One therefore has to lead *álvinde* evidence not only of one document, but several. It is akin to a covering bond that has to be read with a certificate stipulating the amount owing. It would, of course, have been different if the court order had been granted against **VIADOR SA Limited** and **Dr Adam**. Hence, it cannot be stated that the court order which was granted on 6 December 2011 constitutes a liquid document. Neither can one argue that the suretyship clause to be found in the purchase agreement referring to R7 250 000.00, constitutes a liquid document.

[15] The delay in launching the application for rescission is explained fully. The judgment was granted by default because the summons was served on **Dr Adam**'s housekeeper during his absence. **Dr Adam** did not receive the summons and it came to his attention, for the first time, after his attorney, Mr Stolp, obtained a copy from the court file and when his bank accounts were attached. When the summons was served as aforesaid on 9 January 2012, **Dr Adam** was overseas. An extract from **Dr Adam**'s passport was attached to this affidavit confirming the latter fact. It is also emphasised that the application for

rescission was launched on 5 April 2012. However, no explanation is given as to why the index to the application was only prepared on 15 February 2013 and served on the **Botma N.O.** on 20 August 2013. This delay, and lack of any explanation therefore, is disconcerting. However, nothing was said about this delay in argument or in any further affidavit(s) by **Botma N.O.**. Hence, the court is not in a position to take this delay into account. There must be a reasonable explanation for the delay because had it been otherwise, the respondent, no doubt, would have made much of the delay.

[16] In the matter of *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank, and Another* 2011 (3) SA 1 (CC) the following is stated: —

“The primary element of provisional sentence, which was inherent to the institution from the start, is that it is only available to a plaintiff who is armed with a liquid document.³ Over the centuries, the issue whether a particular document can be described as ‘liquid’ for purposes of provisional sentence has given rise

³ See, for example, *Harrowsmith v Ceres Flats (Pty) Ltd* 1979 (2) SA 722 (T) at 727G.

to much debate in litigation.⁴ In principle, however, a document is liquid if it demonstrates, by its terms, an unconditional acknowledgment of indebtedness in a fixed or ascertainable amount of money due to the plaintiff.⁵ Many different sorts of documents have been found to qualify as 'liquid' in terms of this definition, and therefore sufficient to found provisional sentence. They include acknowledgments of debt, mortgage bonds, covering bonds, negotiable instruments, foreign court orders and architects' progress certificates.⁶

[17] A provisional sentence has a further inherent characteristic in that it only leads to an interlocutory order. Final judgment is still to be considered in the principal case. Furthermore, although a plaintiff may seek payment of the judgment debt immediately, before entering into the principal case, the defendant has the right to insist on security for repayment pending the final

⁴ See, for example, Menzies "**Prefatory Remarks on Provisional Sentence**" 1 Menzies (1828) n13 at 7 – 8. See also Malan et al **Provisional Sentence on Bills of Exchange, Cheques and Promissory Notes** (Butterworths, Durban 1986) n13 at 14 – 15; Herbstein & Van Winsen **The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa** 5 ed vol 2 (Cilliers et al) (Juta, Cape Town 2009) n10 at 1328 – 74; and Erasmus **Superior Court Practice** (Farlam & Van Loggerenberg) (Juta, Cape Town 2010) n14 at B1-63 n 1.

⁵ See, for example, **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)** at 10C – D and **Rich and Others v Lagerwey 1974 (4) SA 748 (A)** at 754H.

⁶ See, for example, Herbstein & Van Winsen *supra* n10 at 1328 – 74 and Erasmus *above* n14 at B1-65.

outcome. The court has no discretion to dispense with the requirement that a defendant is entitled to security for repayment of the debt, as held by Grosskopf J in ***CGE Rhoode Construction Co (Pty) Ltd v Provincial Administration, Cape, and Another*** 1976 (4) SA 925 (C).⁷

[18] It is also trite that security has to be provided against payment, in other words simultaneous with payment.⁸

[19] It is clear to the court that the proceedings were irregular. Once a court holds that an order was “erroneously” sought or erroneously granted, it should without further enquiry rescind or vary the order, and it is unnecessary for a party to show good cause for the subrule to apply.⁹

[20] It bears mention that, *ex facie* the court order annexed to the provisional summons, a final order was granted by agreement between the parties on 25 November 2011 in the terms set out above. As stated, this court order was used as a liquid document in order to obtain a second court order on 26 January 2012 against **Dr Adam** as surety for **VIADOR SA Limited** in the following terms: —

⁷ At 927E, with reference to Van der Keessel Praelectiones in Gonin's trans vol IV at 179.

⁸ ***Van der Merwe v Bonaero Park (Edms) Bpk 2000 (4) SA 329 (SCA)*** at para 8.

⁹ Erasmus Superior Court Practice Juta at B1-308A and cases cited in footnote 4 therein.

“IT IS ORDERED

- 1. THAT the defendant (Dr Adam) pay the plaintiff the balance outstanding as on 25 November 2011, amounting to R2 059 754.36 as per the Court order annexed hereto marked “X”, together with interest on the amount of R1 850 000.00 at the rate of 17% per annum per annum (sic) as from 1 December 2011, payable to the plaintiff by Viador S.A. Limited in terms of the Annexed Court order.***
- 2. THAT the defendant (Dr Adam) pay the costs of this action.***

REGISTRAR”

[21] This order was not obtained by agreement.

[22] Although a costs order was sought on an attorney and client basis the court is not persuaded that it is justified. In particular, it was argued that the opposition to the application for rescission consisted mostly of bald denials. Given the fact that there is no necessity to set out legal arguments in an affidavit, the bald denials do not warrant a special costs order.

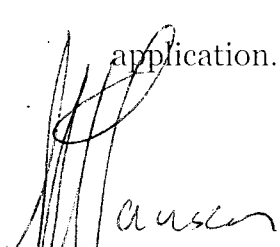
[23] In the instant case, the main irregularities lie in the grant of a final order on an illiquid document, which was not competent. **Dr Adam** was deprived of the right to put forward a defence.

[24] In the premises, **Dr Adam** has satisfied the requirements of Rule 42(1).

Order

In the event, the following order is made: —

1. The judgment granted in favour of the plaintiff (Botma N.O.) against the defendant (Dr Adam) on 26 January 2012, is set aside.
2. The warrant of execution in the above matter dated 13 February 2012, is set aside.
3. The attachment in execution of the bank accounts of the defendant (Dr Adam) dated 13 February 2012, is set aside.
4. The plaintiff (Botma N.O.) is ordered to pay the costs of this application.



MM JANSEN AJ
ACTING JUDGE OF THE HIGH COURT

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