

REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: 2928/2010

In the matter between:

SILVER FALCON TRADING 333 (PTY) LTD	First Applicant
DANIEL GABRIEL WANNENBURG	Second Applicant
ELMARIE WANNENBURG	Third Applicant
DANIEL GABRIEL WANNENBURG NO	Fourth Applicant
(in his official capacity as one of the trustees for the time being of the FG VAN NIEKERK EIENDOMS TRUST)	
ELMARIE WANNENBURG NO	Fifth Applicant
(in her official capacity as one of the trustees for the time being of the FG VAN NIEKERK EIENDOMS TRUST)	
ELIZABETH VAN NIEKERK NO	Sixth Applicant
(in her official capacity as one of the trustees for the time being of the FG VAN NIEKERK EIENDOMS TRUST)	

and

NEDBANK LIMITED	Respondent
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In re:

NEDBANK LIMITED

Plaintiff

and

SILVER FALCON TRADING 333 (PTY) LTD

First Defendant

DANIEL GABRIEL WANNENBURG

Second Defendant

ELMARIE WANNENBURG

Third Defendant

FG VAN NIEKERK EIENDOMS TRUST

Fourth Defendant

JUDGMENT

GORVEN J

[1] On 2 June 2010 default judgment was granted against the applicants in this matter. This arose from the foreclosure of a mortgage bond executed by the first applicant in favour of the respondent and deeds of suretyship executed by the second and third applicants and the trustees of the FG van Niekerk Eiendoms Trust (who I will refer to as the other applicants) in which they each bound themselves as sureties for and co-principal debtors with the first applicant for its indebtedness to the respondent arising from the mortgage bond.

[2] The applicants apply, in the present application, for the rescission of that default judgment. The application is brought solely in terms of Uniform rule 42(1)(a). No reliance is placed on rule 31(2)(b) or the common law. The applicants allege that the judgment against them was erroneously granted. A number of alternative bases are mentioned in the

papers but Mrs Hunt, who appeared for the applicants, limited her heads of argument to one basis only and, at the hearing, specifically abandoned the others.

[3] The remaining basis on which the applicants rely is that the judgment was without legal foundation because the simple summons did not contain sufficient averments to sustain a cause of action.¹ The summons pleads that the provisions of the National Credit Act 34 of 2005 (the NCA) do not apply to the mortgage bond. Counsel for the applicants submitted that the summons is, in this respect, demonstrably incorrect. She submitted that the provisions of the NCA do apply to the mortgage bond. As a result of the summons relying on the averment that the mortgage bond is excluded from the operation of the NCA, no averment alleging compliance with s 129(1) and s 130 of the NCA appears in the summons. If the provisions of the NCA do apply to the agreement, she submitted, the absence of such an averment is fatal, the summons is excipiable and it was not legally competent for the court to grant the default judgment.²

[4] If counsel for the applicants is correct in her submission that the summons is excipiable for want of essential averments, the first issue is whether rule 42(1)(a) applies. A court cannot sit as a court of appeal on its own judgment and cannot review it.³ The learned author Harms is correct when he says that the rule is a procedural one and does not affect the

¹ See, for instance, *Athmaram v Singh* 1989 (3) SA 953 (D) at 957A.

² Section 129(1)(b) provides that a credit provider may not commence any legal proceedings to enforce a credit agreement before first providing notice to the consumer as contemplated in s 129(1)(a). Section 130 provides that a credit provider may approach the court only where a consumer has been in default under a credit agreement for at least 20 business days and at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in s 129(1)(a). Section 129(1)(a) sets out what must be contained in the notice to the consumer.

³ D Harms: *Civil Procedure in the Supreme Court* para B42.4 where the learned author bewails the number of *dicta* which give the impression that this basic principle does not apply.

substantive law.⁴ Certain cases seem to suggest that the applicants may be limited to an appeal on the basis that the judgment is wrong in law. In *Seale v Van Rooyen NO & others; Provincial Government, North West Province v Van Rooyen NO & others*⁵ Cloete JA said, in relation to an argument that recourse should have been had to the rule and that an appeal was not competent:

‘The submission by counsel representing the TYC that the rule should be interpreted, “because of its plain and grammatical meaning”, as covering orders wrongly granted, is inconsistent with the interpretation given to the rule in numerous cases, has not a shred of authority to support it and requires no further consideration.’

However, the converse may not hold true. It has been held, in relation to rule 42(1)(c), that an appeal is no bar to an application for rescission under that rule⁶ and I can see no basis why this should not apply equally to rule 42(1)(a). It may be, therefore, that a judgment is both appealable and subject to rescission under this rule. After all, except in situations which I will deal with later, both an appeal and a rescission application under rule 42(1)(a) confine a court to consider only the four corners of the record without recourse to material which was not before the judge who granted the judgment.

[5] This was the *approach adopted by Coetzee J in Marais v Standard Credit Corporation Ltd.*⁷ In that matter he rescinded a default judgment granted on a claim subject to the Credit Agreements Act⁸ where the summons failed to aver that s 6(5) of that Act had been complied with. He

⁴ Ibid.

⁵ 2008 (4) SA 43 (SCA) para 18. See also *Frenkel, Wise & Co (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd* 1947 (4) SA 234 (C); *Holmes Motor Co v SWA Mineral & Exploration Co* 1949 (1) SA 155 (C). In the latter two cases, the judgments were rescinded on the basis that, unbeknown to the court at the time the provisional sentence was granted, *payment* of the amount claimed had been made in full.

⁶ *Tshivhase Royal Council & another v Tshivhase & another; Tshivhas & another v Tshivhase & another* 1992 (4) SA 852 (A) at 865A-B.

⁷ 2002 (4) SA 892 (W).

⁸ 75 of 1980.

held that this was an essential averment absent which the summons was excipiable as not disclosing a cause of action. This was because, he held, s 6(5) of that Act imposed by law a suspensive condition in respect of contracts subject to that Act and that a suspensive condition and its fulfilment must be pleaded.⁹ Dealing with the application of rule 42(1)(a) he said:

‘In terms of Rule 42(1)(a) I can rescind the judgment on application by the party affected. In my view the word “erroneously” covers a matter such as the present one, where the allegation is that for want of an averment there is no cause of action, ie nothing to sustain a judgment, and that the order was without legal foundation and as such was erroneously granted for the purposes of Rule 42(1)(a).’¹⁰

I respectfully agree that this approach accords with principle. If there are insufficient averments to sustain a cause of action, it follows that the judgment must have been erroneously granted within the meaning of those words in the rule because there can have been no legal basis for granting it. I am accordingly entitled to deal with this application.

[6] Counsel for the applicants is correct that, if the NCA does apply to the mortgage bond, the averments in the summons must include facts showing that the respondent has complied with the provisions of s 129(1) and s 130 of the NCA. The failure to plead such facts would render the summons excipiable for want of necessary averments on which to found a cause of action.¹¹ It is clear that facts proving either compliance with s 129(1) or a basis for the exclusion of the mortgage bond from the operation of the NCA must be pleaded. In *Rossouw* the court held that a case for summary judgment was not made out where the plaintiff failed to plead (and prove by way of the affidavit in support of the application for

⁹ At 897E-F.

¹⁰ At 897A-B.

¹¹ *Rossouw & another v Firststrand Bank Ltd* 2010 (6) SA 439 (SCA).

summary judgment) that the notice in terms of s 129(1) had been sent by one of the methods envisaged in the NCA. The bare averment that the provisions of s 129(1) and s 130 had been complied with was not sufficient.¹² Similarly, counsel for the applicants submitted, if I find that the averments in the summons do not show that the mortgage bond was excluded from the operation of the NCA, rescission must be granted due to the absence of factual averments showing compliance with s 129(1).¹³ This approach was correctly not contested by Mr Combrink who appeared for the respondent.

[7] The application of the first applicant, therefore, stands or falls by whether or not the averment that the mortgage bond is excluded from the provisions of the NCA is demonstrably incorrect. The averment in the summons which relates to this aspect is set out in paragraph 9. This reads as follows:

‘The provisions of the Act do not apply to the agreement in that First Defendant is a juristic person which entered into a large agreement and had assets and a turnover in excess of the threshold of R1 000 000.00 as stipulated in the aforesaid Act and regulations thereto.’

[8] The point of departure of the NCA is that s 4(1) makes the NCA applicable to every credit agreement except for those excluded by the various subsections of s 4(1). The first applicant is a juristic person. The relevance of this becomes clear when regard is had to those agreements excluded from the operation of the NCA. Section 4(1)(a) and (b) bear on the application of the first applicant. The relevant parts read as follows:

¹² Rossouw para 38.

¹³ The test is therefore whether an exception to the summons would succeed. It is settled law that, where the claim relies on a statute, specific mention of the section is not necessary; all that is needed is that sufficient facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply. See *Ketteringham v City of Cape Town* 1934 AD 80 at 90.

‘(1) ... this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except-

- (a) a credit agreement in terms of which the consumer is-
 - (i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1); ...
- (b) a large agreement, as described in section 9 (4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7 (1)’

[9] Counsel for the applicants submitted that, because the summons avers that the mortgage bond is a large agreement, the respondent squarely bases its case for an exclusion from the provisions of the NCA on s 4(1)(b). She submitted that large agreements are excluded from the operation of the NCA only if s 4(1)(b) applies and that s 4(1)(a) does not apply to large agreements and therefore to the mortgage bond. Because the first applicant is alleged in the summons to have had a turnover and asset value of more than R1m, she submitted that s 4(1)(b) cannot apply. Accordingly, she submitted, on a construction of the summons, the agreement is not excluded from the operation of the NCA.

[10] The flaw in the reasoning of counsel for the applicants becomes apparent on an analysis of the relevant sections of the NCA. It is common cause that, at the relevant time, the threshold value determined by the Minister in terms of s 7(1) was R1m. The agreement in question is, as already mentioned, a mortgage bond. Section 9 of the NCA provides that

every credit agreement is characterised either as a small agreement, an intermediate agreement or a large agreement. Section 9(4) provides that a ‘... credit agreement is a large agreement if it is...a mortgage agreement’. All large agreements are therefore, first and foremost, credit agreements. The NCA does not envisage any large agreements which are not credit agreements. Put differently, s 9(4) makes it clear that a mortgage agreement, although it is a large agreement, is one only as a category of credit agreement. If this is not sufficiently clear from a reading of s 9, s 1 of the NCA defines a credit agreement as being one which meets all the criteria set out in s 8. Section 8(1) provides that an agreement constitutes a credit agreement for the purposes of the NCA if it is a credit transaction as described in s 8(4). Section 8(4)(d) is to the effect that an agreement constitutes a credit transaction if it is a mortgage agreement. Any way one looks at it, therefore, the mortgage bond sued upon is, as well as being a large agreement, a credit agreement.

[11] There is no warrant, in light of the use of the inclusive term ‘credit agreement’ in s 4(1)(a), for excluding any category of credit agreement from the operation of that section. If the legislature had intended to limit the operation of s 4(1)(a) to only certain categories of credit agreements, it would have made this clear by either specifying those to which it applies or those to which it does not. This it has done in s 4(1)(b) which is made to apply only to large agreements in the circumstances set out there. Far from limiting the credit agreements to which s 4(1)(a) applies, it mentions ‘a credit agreement’ *simpliciter*. This section therefore clearly applies to all credit agreements, whether characterised as small agreements, intermediate agreements or large agreements. This means that s 4(1)(a) applies to large agreements where the annual turnover or asset value of the juristic person exceeds the threshold. Section 4(1)(b) applies to large agreements where

the annual turnover or asset value does not exceed the threshold. A construction of the section shows, therefore, that large agreements with juristic persons are excluded from the operation of the NCA, regardless of the annual turnover and or asset value of the juristic person. Depending on whether, at the relevant time, one of these exceeds the threshold or not, they fall under either s 4(1)(a) or s 4(1)(b). This was elegantly summarised by Satchwell J in the following terms:

‘It is common cause that the first respondent is a juristic person. A mortgage agreement is both a credit transaction and a large agreement. Accordingly the agreement entered into by the first respondent with the applicant falls under both ss 4(1)(a) and ss 4(1)(b). As to which is of application is dependent upon the asset value or annual turnover of the first respondent.’¹⁴

[12] Adopting a purposive approach, as I am obliged by the NCA to do,¹⁵ it is immediately clear that there is a rational basis for excluding from the operation of the NCA all credit agreements where the threshold is exceeded and for excluding all large agreements, regardless of the annual turnover or asset value of the juristic person. The legislature has made it clear that the NCA does not apply to large entities in the role of consumers, whether they are juristic persons or organs of state. It also clearly intended to exclude all large agreements.¹⁶ These exclusions meet the purposes set out in s 3; they certainly do not offend against them. Conversely, I can

¹⁴ *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd & another* 2009 (3) SA 384 (T) para 11 (references omitted).

¹⁵ *Nedbank Ltd & others v National Credit Regulator & another* 2011 (3) SA 581 (SCA) para 2. Section 2(1) of the NCA provides: ‘This Act must be interpreted in a manner that gives effect to the purposes set out in section 3.’ The preamble to s 3 is to the following effect: ‘The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers...’ and goes on to list nine means by which this is to be achieved.

¹⁶ Regarding government, Plasket J said the following in *Nelson Mandela Bay Metropolitan Municipality v Nobumba NO & others* 2010 (1) SA 579 (ECG) para 22: ‘Although the purposes of the NCA appear to be focused on the regulation of what I would term commercial credit, its application is wider than that: while the State and organs of State, when they are consumers, are expressly excluded from its protection, s 4(3)(b)(i) states that the application of the NCA extends to credit agreements entered into by organs of State as credit providers.’

conceive of no rational basis for excluding all other credit agreements but making large agreements subject to the NCA purely because the juristic person had an annual turnover or asset value exceeding the threshold sum at the relevant time. In all the circumstances, the first applicant's interpretation and consequent submission that s 4(1)(a) cannot apply because the agreement sued on was a large agreement cannot be sustained.

[13] Whether s 4(1)(a) or (b) applies depends on the annual turnover or asset value of the first applicant at the date of the conclusion of the agreement. The respondent, in the summons, avers that both the annual turnover and the asset value of the first applicant exceeded the R1m threshold. The summons does not specify the date to which this averment applies. Because a large agreement is relied on and large agreements are excluded under both subsections, it is not necessary to plead the date or even the asset value or annual turnover. It is sufficient to plead that a juristic person entered into a large agreement. The summons accordingly contains sufficient averments to exclude the mortgage bond from the operation of the NCA. Therefore the respondent was not obliged to plead compliance with the provisions of s 129(1). The summons is accordingly not excipiable as lacking necessary averments. If recourse is had to only those papers which were in the court file on the date default judgment was granted, it cannot accordingly be said that the judgment was erroneously granted against the first applicant.

[14] The only part of the applicants' founding papers in the rescission application which touches on this aspect is paragraph 40. There it is stated that the first applicant 'does not have a turnover in excess of R1 million'. The question is whether, in the light of this being a rescission application based on rule 42(1)(a) in which it is contended that the judgment was

erroneously granted, this evidence can be taken into account. No submissions were made on this point by either counsel. It has been authoritatively held, in circumstances where it appears from the court file at the time of judgment that the procedural requirements have been complied with when they were not in fact complied with, that the party in whose favour judgment was granted is not entitled to judgment due to an error in proceedings.¹⁷ In such an instance, evidence to this effect may be taken into account and the judgment can be held to have been erroneously granted within the meaning of that phrase in rule 42(1)(a). It is clear, however, that a defence which did not appear on the papers at the time default judgment was granted may not be taken into account in a rescission application brought under this Rule. In *Lodhi* Streicher JA said the following in this regard:

‘Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence.’¹⁸

The averments cannot, therefore, be taken into account in this application.

[15] Even if a defence raised in the papers can be taken into account, the averments in the applicants’ papers fall short of establishing such a defence. Counsel for the applicants quite properly conceded that the statement in paragraph 40 of the affidavit is framed in the present tense and, accordingly, deals with the situation as at the date on which the affidavit was attested. In order to address s 4(1)(a), the operative date is that on which the mortgage bond was concluded. The statement also does

¹⁷ *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) para 24. In *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd* 2011 (3) SA 477 (KZP) the court appeared to accept the converse; viz that where evidence in the rescission application showed that the summons was in fact served on a person prepared to accept service at the registered office of a company but where the person in question was not a responsible employee of the applicant, this could be taken into account in assessing whether or not there were in fact procedural irregularities.

¹⁸ Para 27. See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) paras 9-10.

not dispute that the assets of the first applicant exceeded R1m. The manner in which s 4(1)(a) is framed makes it clear that if, at the relevant date, either the annual turnover or the asset value exceeded R1m, the provisions of the NCA do not apply to the mortgage bond. Quite apart from these considerations, as stated above, all large agreements concluded with juristic persons are excluded, regardless of annual turnover or asset value. Even if the averments in the applicants' papers dealing with a defence to the claim can be considered in the application, therefore, the provisions of the NCA cannot be said to apply to the mortgage bond. On any approach, therefore, the application for rescission of the default judgment granted against the first applicant in favour of the respondent must fail.

[16] Counsel for the applicants did not contend that, if it was held that the mortgage bond is excluded from the operation of the NCA, the provisions of the NCA nevertheless apply to the other applicants arising from their deeds of suretyship. They do not apply. Section 1 of the NCA provides that an agreement constitutes a credit guarantee if it satisfies all the criteria set out in s 8(5) of the NCA. The relevant part of s 8(5) reads as follows:

'An agreement, irrespective of its form..., constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies'.

A deed of suretyship clearly falls within the ambit of this section and is, accordingly, not a credit guarantee as defined in the NCA because the mortgage bond is excluded. The NCA therefore does not apply to the various deeds of suretyship executed by the other applicants.¹⁹

¹⁹ See also *Nedbank Ltd v Wizard Holdings (Pty) Ltd & others* 2010 (5) SA 523 (GSJ) paras 9&10.

[17] In the result, it is clear that no case for rescission of the default judgment was made out by any of the applicants.

[18] Counsel for the applicants correctly conceded that, because the mortgage bond makes provision for the payment of costs on the scale as between attorney and client, the respondent is entitled to costs on that scale if the application is dismissed.

[19] In his heads of argument, counsel for the respondent drew attention to the fact that the name of the trust in the typed court order was incorrectly rendered. This was clearly a patent error and one which would fall under the provisions of rule 42(1)(a). An amendment to the order to correctly reflect the name of the trust was accordingly not opposed by the applicants. Since this point was neither raised nor relied upon by the applicants, the fact that this results in an amendment to the order does not constitute success on the part of the applicants warranting any change in the usual approach relating to costs.

[20] In the result the following orders are granted:

1. The application is dismissed with costs on the scale as between attorney and client. Such costs are to be paid jointly and severally by the applicants, the one paying the others to be absolved.
2. The order granted on 2 June 2010 is amended to reflect the name of the fourth defendant, wherever it appears, as follows: 'F G van Niekerk Eiendoms Trust duly represented by its trustees being: Daniel Gabriel Wannenburg, Elmarie Wannenburg and Elizabeth van Niekerk.'

DATE OF HEARING: 24 November 2011

DATE OF JUDGMENT: 2 December 2011

FOR THE APPLICANTS: P HUNT, instructed by SPRUYT,
LAMPRECHT & DU PREEZ, locally
represented by NICHOLSON &
HAINSWORTH ATTORNEYS.

FOR THE RESPONDENT: LE COMBRINK, instructed by MASON
INCORPORATED.