IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 14796/2013

DATE: 12 MARCH 2014

In the matter between:

UMHLOBO TRADING CC 1st Applicant

THAMAYANTHY MOODLEY 2nd Applicant

and

NEDBANK LIMITED Respondent

J U D G M E N T

ROGERS, J:

This is an application by the defendants in the main case for the rescission of a summary judgment which was granted against them at the instance of the plaintiff on 28 October 2013.

The brief background to the action is the following as it appears from the particulars of claim. In late January and early February 2013 the bank concluded a loan agreement and an overdraft facility agreement with the first defendant. In terms of the loan agreement, a sum of R1,05 million was advanced, repayable in instalments over 16 months. In terms of the overdraft facility agreement, the overdraft limit on the cheque account was to be R250 000. It was alleged, and is common cause, that the National Credit Act did not apply to either of these agreements.

The second defendant, who appears to be the member of the first defendant and its controller, signed a suretyship, limited in the sum of R1,3 million, as did the third defendant. In addition, there already existed at that time two covering mortgage bonds over property owned by the third defendant in KwaZulu Natal in favour of the bank; and a third covering mortgage bond was registered on 5 March 2013, as a security requirement of the agreements which I have mentioned.

According to the bank, the first defendant fell into default by missing an instalment on the loan agreement and also by virtue of its overdrawn account having a balance in excess of R250 000. On 9 September 2013 summons was issued. It was duly served. A defective notice of intention to defend on behalf of all three defendants was delivered on 17 September 2013. The bank's attorneys drew the defendants' then attorneys, Voss Attorneys, to the error in the notice of intention to defend, the said error being the stating of two conflicting service addresses.

On 26 September 2013 the defendants delivered a valid notice of intention to defend, again on behalf of all three defendants. On 10 October 2013 the bank delivered an application for summary judgment for hearing on 28 October 2013. No answering papers were filed and there was no appearance when the matter served in the Motion Court on 28 October 2013. Le Grange, J thereupon granted summary judgment against all three defendants. He also granted an order declaring the mortgaged property belonging to the third defendant as specially executable.

The present rescission application was delivered on 25 November 2013. The second defendant, who deposed to the affidavit in support of the rescission, stated that his then attorney, Mr Voss, had not informed the defendants concerning the summary judgment application, which the bank had delivered on 10 October 2013, and that the defendants had been unaware that the matter was serving before court on 28 October 2013. He says that it was only on 28 October 2013 that he learnt that an order had been made when Mr Voss sent him a text message to that effect. The second defendant says that Mr Voss' mandate was immediately terminated and new attorneys, namely N Hassan Attorneys, were appointed for the defendants.

The bank gave notice to oppose the rescission application. The matter served in 3rd Division on 12 December 2013 before Savage, AJ, on which occasion, by agreement, the application was postponed to today for hearing on the semi-urgent roll with a timetable for papers and with costs to stand over. On 30 January 2014 the bank filed its answering affidavit in the rescission. Somewhat out of time, on 17 February 2014, the defendants filed their replying papers, but nothing is made of the fact that it was a few days late. By this stage they had again changed their attorneys of record.

The rescission application stated that it was being made in terms of Rule 31(2)(b). In the answering affidavit it was pointed out, correctly in my view, that that rule is inapplicable, because the judgment which was granted on 28 October 2013 was not granted by virtue of the defendants being in default of a notice of intention to defend or in default of a plea. Those are the only circumstances in which rescission under Rule 31(2)(b) applies.

Mr Filand, who appeared this morning for the defendants, did not press that point, but based his argument on the requirements of the common law. For the sake of completeness and since it was dealt with in the plaintiff's heads of argument, I accept that Rule 42(1) is of no application to the present matter.

Although the founding affidavit in the rescission application did not in terms place reliance on the common law, the manner in which the common law was explained in De Wet & Others v Western Bank Limited 1979 (2) SA 1031 (A) clarified that, in addition to certain other fairly narrowly circumscribed grounds of rescission at common law, which were not in dispute, there was also a jurisdiction at common law to rescind default judgments on sufficient cause shown. The requirements of sufficient cause were explained in that case and were again set out in Chetty v Law Society Transvaal 1985 (2) SA 756 (A) at 764J-765D and in Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) para 11. These requirements are very similar to those which are imposed by Rule 31(2)(b), which states that a defendant may seek rescission upon good cause shown. The element of good cause shown in that rule covers materially the same ground as the common law on good cause shown. I therefore do not think that the mislabelling by the defendants of their application as being based on Rule 31(2)(b) has any significance, and I shall approach the matter in accordance with the common law.

The requirements in the common law, as laid down in the cases which I have mentioned, state, firstly, that the party seeking rescission must present a reasonable and acceptable explanation for his default. Secondly, that party must, on the merits, show that he has a *bona fide* defence, which *prima facie* carries some prospect of success.

Turning to the explanation for default, I have briefly summarised what the second defendant said in the founding affidavit in that regard. His explanation was criticised by Ms Titus, who appeared this morning for the bank, on the basis that it was somewhat threadbare. The defendants were criticised in particular for not filing a substantiating affidavit from their erstwhile attorney, Mr Voss. I nevertheless think the explanation passes muster. The defendants had clearly taken steps to instruct attorneys to oppose the matter. As soon as they became aware of the summary judgment on 28 October 2013, they fired their then attorney and engaged other attorneys and have since then dealt timeously with the matter. It appears unlikely that they intended, in the intervening period, to allow the matter to go by default.

Although they do not explain why no affidavit in support was filed by Mr Voss, one might infer from the circumstances that their relationship with him is no longer good and that he may not have co-operated in making an affidavit which indicated that he was the one who was at fault in not keeping them informed of events. I thus would not dismiss the application merely on the basis that there is not an acceptable explanation.

I turn then to the question whether the defendants have shown a *bona fide* defence, which *prima facie* carries some prospect of success. That inquiry can in turn be approached in two legs. The first is whether the defendants are *bona fide* at all in opposing the litigation, in other words are they putting up a defence which they really wish to pursue at a trial. In that respect, I am satisfied that the defendants are seeking rescission *bona fide*. They have set out circumstances as I shall presently adumbrate, indicating that they, or more accurately the first defendant, was the subject of fraud by a third party and I have no doubt that they have been advised, rightly or wrongly, that those circumstances, and certain others to be mentioned presently, give them a good defence to the bank's claim. However, the fact that they are genuine in seeking rescission with a view to opposing the main case, does not mean that they have met the second leg on the merits, which is a defence which *prima facie* carries some prospect of success, or as it is sometimes said, a *prima facie* defence.

The defendants' defence on the merits depends, in brief, on the following factual allegations. They say that shortly after the conclusion of the two agreements with the bank, they developed the idea of consolidating the first defendant's indebtedness with a new financier. To that end, second defendant had certain discussions with a Mr Rudi Wilson, who apparently indicated to the second defendant that his brother could make, or facilitate the making of a loan to the first defendant of R5,5 million. In early April 2013 the second defendant received a loan application from a certain Sean Bailey in that connection. Wilson indicated a few days later that in order to process the matter further, it was necessary for the second defendant to make a payment of R20 000 for administrative purposes, which the second defendant apparently did. That is probably where the fraud came in and where the second defendant was fleeced out of R20 000.

As April 2013 drew to an end, the second defendant, who had not yet received the larger loan of R5,5 million, was in need of funds for the first defendant's business to purchase petrol for the service station which the first defendant operated. He approached Wilson, who said he could provide an advance on the proposed loan of R450 000. That, according to the second defendant, was stated on Friday 26 April 2013. The following day, which was Saturday 27 April 2013, the second defendant says he went to Mr Wilson and collected the cheque and deposited it into the first defendant's cheque account. He said that after about three days, in other words on or about Tuesday 30 April 2013, he received advice from the Parow Branch of Nedbank, which is where the account was held, that the deposited funds were now available. The second defendant says that he thereupon caused various amounts totalling slightly more than R365 000, to be drawn out of the first defendant's cheque account.

In early May 2013, according to the second defendant, he was contacted by the bank, who pointed out that there was a discrepancy in the cheque for R450 000 which had been deposited, because although the amount in digits on the cheque indicated that sum, the amount spelt out in words was missing a zero and thus indicated an amount of only R45 000. He says that the bank asked him to arrange a replacement cheque. He states that on 3 May 2013 he supplied the branch with a replacement cheque and that was again deposited to the account. However, he says on 7 May 2013 he was contacted by the bank to say that that cheque had been dishonoured by the drawee bank, because the issuer's account had been closed.

The result of this, according to the defendants, was to place the first defendant's cheque account in a very substantial overdraft, because the bank reversed the two cheque deposits of R450 000. This created difficulties for the business and ultimately led it to be unable to meet the monthly instalment on the loan agreement which was met, customarily, out of the cheque account. The gross negligence of the bank, according to the defendants, disentitles it to claim the relief it does. Alternatively, the defendants say the bank is estopped from saying that the deposited amount was not cleared and that the defendants were not entitled to draw against it.

Before I allude to certain aspects of the bank's answer to this, it is necessary to refer briefly to the legal position regarding the depositing of cheques in a bank account. In <u>Absa Bank Limited v I W Blumberg & Wilkinson</u> 1997 (3) SA 669 (SCA) the court, in the course of judgement, referred to evidence from which it appeared that it was accepted banking practice that, if a cheque deposited to a bank account was not paid, the bank would be entitled to debit the customer's account with the amount of that cheque. That appears at 678b-c of the judgment.

The matter was dealt with somewhat more fully in Burg Trailers SA (Pty) Ltd & Another v Absa Bank Limited & Others 2004 (1) SA 284 (SCA), para 9, where Harms, JA said the following:

> "According to standard banking practice, cheques are accepted subject to a hold period, in this case, of ten days. It is common cause that the client may not during that period insist upon payment of the amount, even if it otherwise had been "paid". This means that the bank is not unconditionally liable for the amount standing to the credit of the client and that the credit may be reversed during that period."

I interpose here to note that at this point the learned judge of appeal refers to a passage from Absa Bank Limited v Standard Bank of SA Limited 1998 (1) SA 242 (SCA) at 252c-d. Continuing then with the quotation from the paragraph by Harms, JA:

> "Morgan submitted that this banking practice is in direct conflict with the contract between it and Absa and that a banking practice cannot override the express terms of an agreement. The statement of law is probably correct, but I do not agree that there is a conflict. I understand the contract to mean no

more than that it gives the right to Absa to withhold payment until a cheque has been cleared. It does not detract from its right to make provisional payment and it does not oblige it to pay unconditionally upon clearance. One can test this submission by way of an example: if it should transpire that a cheque, after having been cleared, was forged, would the banker nevertheless be obliged to pay according to the credit entry raised by it? That cannot be so. The bank would be entitled to reverse the entry."

The facility contract in the present case does not contain any particular terms which would detract from the position which ordinarily prevails according to banking usage.

If one then looks at the first cheque for R450 000, one must have regard to some additional facts which were disclosed in the bank's answering papers. The bank annexed the bank statements for the relevant period. In fairness to the defendants, I should mention that in their founding papers they say that they had asked for the bank statements but the bank refused to provide them. Be that as it may, the bank statements show that the first cheque for R450 000 was deposited on 26 April 2013. The cheque, which was annexed to the founding affidavit, has the error, or the discrepancy, in the amount of the cheque which I have previously summarised. The cheque, I may add, was dated 25 April 2013 and purported to be drawn by G R E Middelburg Security Services, and was in favour of the first defendant. The bank pointed out that, as reflected in the bank statements, the first defendant immediately began to draw substantial amounts from the current account on the same day that the cheque was deposited, namely Friday 26 April 2013, and in fact the bulk of the amounts were withdrawn on 26 April 2013 and then again on 29 April 2013. The only amount that was debited on 30 April 2013, before the reversal of the cheque, was a transfer of R40 000 from the cheque account to the term loan account, presumably in payment of one or more instalments.

According to the bank, the first cheque was refused by the drawee bank, Standard Bank, because the issuing customer's account had been closed. That differs from the version of the defendants who say that they were told that there was a problem because of the discrepancy in the amount. I also note that there is a handwritten note on the cheque which says "amount differs". Be that as it may, it seems to be common cause that by 30 April 2013 it had become apparent that the first cheque was bad. The bank statement shows that it was in fact reversed on that very day, 30 April 2013. Accordingly, if there is room for a complaint of negligent conduct by the bank, or conduct giving rise to an estoppel, that conduct must, insofar as it concerns the first cheque, be conduct which happened over the period 26 to 29 April 2013.

If one looks at the founding affidavit, one does not find an allegation which would point to negligence or a relevant representation giving rise to an estoppel by the bank. What we have, and it is shown irrefutably by the bank statements, is that the cheque for R450 000 was deposited on Friday 26 April 2013, and that amounts were immediately drawn against it. There was no delay of three days as alleged in the founding papers. The statement in the founding papers, that it was only on or about 30 April 2013 that the first defendant began to draw on the amounts deposited in the current account, is simply not correct. There is no allegation that on the very day that the cheque was deposited, 26 April 2013, the amount of the deposited cheque was specially cleared.

One knows from banking practice and experience that a special clearance requires a special procedure. It normally entails the payment of a special clearance fee. There is nothing on the papers to indicate that, if the bank had been asked to give this cheque a special clearance, it would have done so. The cheque had the discrepancy in the amount and it appears that, in any event, the issuing customer's account had been closed.

What seems to have happened is that the amount was provisionally credited to the account on 26 April 2013 and that, although the bank could have refused to honour withdrawals against those uncleared effects, it did not refuse to do so, but instead honoured them. That certainly does not indicate that it represented to anybody that if the deposit turned out not to be cleared in accordance with usual banking practice, the bank would be deprived of its usual right to reverse the credit.

In regard to the detail of what was drawn out of the accounts, I point out that on the very day of the deposit, Friday 26 April 2013, an amount of R191 000 was drawn as a petrol payment and a few other modest amounts. On Monday 29 April 2013 an amount of about R76 000 was drawn out in favour of Vishay, which is the first name of the second defendant, and a further amount of about R189 000 (again for petrol purchases). At that stage, there is no evidence or allegation by the defendants that any representation had been made to them that the amount of the cheque had been cleared.

In regard to the type of defence which might potentially arise in this situation, I can again refer to the case of <u>Absa Bank v</u>

I W Blumberg supra, where, at 683e-g, Zulman, JA referred to the three categories of cases which arise in this situation. The first category were cases where a claim for damages is made by a customer against its bank because the bank has dishonoured a cheque drawn by the customer. The second category is where the bank is a holder for value of a cheque and seeks to hold its customer liable. The third category are cases where estoppel is relied upon by the customer. As will be apparent from the discussion which follows in Blumberg, the first two categories are of no relevance to this case, but the third category of estoppel might be.

That third category was discussed by the learned judge of appeal at 684g-685b. He referred, as an example of that type of case, to the judgment of Trust Bank of Africa Limited v Wassenaar 1972 (3) SA 139 (D). In the I W Blumberg case, Zulman, JA said the following in that regard:

> "The Wassenaar case, to which I have referred in another context, affords an example in the third category. It concerned an application for summary judgment. The defendant submitted that his affidavit disclosed a defence to the claim made on two bases. The first was that he never concluded the contract relied upon by the plaintiff. The

second was that the plaintiff was estopped from claiming on an overdraft in excess of R800."

Zulman, JA continues:

> "The court *a quo* quoted with approval the following passage in the judgment of Milne, J..."

I interpose that the judgment of Milne, J was the judgment in Wassenaar. That quotation reads thus:

> "If, as a result of some conduct on the part of the bank, the customer believes that his account is in credit and, acting in the faith of such belief, draws a cheque for an amount which would, if that belief were correct, not result in his account being overdrawn, circumstances may well arise where the bank would not be entitled to recover from the customer, if it turned out that the effect of meeting the cheque was to overdraw the account."

Zulman, JA continues:

> "The passage indicates that Milne, J was there considering the defence based upon estoppel.

Relying on this dictum, the court *a quo* stated the following:

> "The present case appears to me to be an instance of "conduct on the part of the bank", which causes a customer to believe that his account is in credit. Having acted on the faith of that belief, the contract between the parties does not, in the present circumstances, permit the bank to hold him liable for its discovery that it should not have permitted him to draw against an uncleared effect."

This passage fortifies my belief that the court *a quo* approached the matter on the basis of an estoppel. It erred in doing so. I repeat that no estoppel was pleaded and the ingredients for a successful defence of this estoppel did not, in any event, emerge from a proper consideration of the evidence led."

There are two other cases to which I can refer in which the possible application of estoppel in similar circumstances was considered. The first is <u>Absa Bank Limited v De Klerk</u> 1999 (1) SA 861 (W) at 865d-866a and the second is <u>Standard Bank of South Africa v Sarwan</u> [2002] 3 ALL SA 49 (W) at 55c-55i. I should note that neither in the <u>Wassenaar</u> case nor in the <u>De</u>

Klerk and Sarwan cases, nor for that matter in the I W Blumberg case, did the defence of estoppel in fact succeed, and I am not aware of any case in South Africa where the defence has as a fact succeeded, though it appears to be accepted that estoppel might apply in such circumstances. In the Sarwan case to which I have made reference, Van der Walt, AJ quoted from I W Blumberg and then continued as follows at 55g:

> "Even where the parties agreed, as in this matter in respect of the prestige account, that the account holder may draw immediately upon "uncleared effects", the principle remains the same. Such a privilege does not distract in the least from the fundamental principle that the risk of non-payment, for whatever reason, of a cheque deposited for collection, falls on the customer and not the bank. It would, if otherwise, not be in accordance with sound, financial and commercial common sense. There may be exceptional circumstances - perhaps in the case of a special clearance of a cheque. I express, however, no view in this regard.
>
> Apart from being a term *ex lege* of the contract between the plaintiff and the defendant, the right of reversal in the case of non-payment of a cheque

> deposited for collection in a current account is, at the same time, an independent and substantial principle of the body of banking law as developed over a long period by commercial practice, custom and usage. Its existence and applicability is not dependent upon consensus, intention or knowledge on the part of the parties. It is an integral part of the objective law pertaining to banking practice and the relationship between banks and their account-customers."

Applying those principles to the circumstances surrounding the first cheque deposit of R450 000 on 26 April 2013 and its reversal on 30 April 2013, the case put up on behalf of the defendants does not show that there are any special circumstances which deprived the bank of its right to reverse the provisional credit once it became clear that Standard Bank would not pay the cheque. As I have said, it is clear from the bank statement that this happened on 30 April 2013, which was well within the customary 10-day holding period during which credits, in the form of deposited cheques, are provisional and may be reversed.

Mr <u>Filand</u> argued that even if such a right of reversal existed, the bank's true claim was not a claim for monies lent in advance, but was an enrichment claim. His argument was that the drawings which the bank honoured in the intervening period between the deposit of 26 April 2013 and the reversal of 30 April 2013, represented payments which the bank would not have made but for the fact that the cheque had been erroneously credited to the account. In other words, these were payments made in the mistaken belief that the bank was paying an amount which it was obliged to pay within the limits of the overdraft facility.

The complaint that the original particulars of claim should have been framed with reference to the *condictio indebiti* rather than on the basis of monies lent and advanced, was not raised in the rescission application, was not addressed in the heads of argument, and thus is not a matter which the bank has had an opportunity of dealing with. But in any event, I think the argument is misconceived.

Where, as here, a bank provisionally credits the amount of a cheque deposit to the customer’s account, the credit is exactly that, it is provisional and is subject to the ordinary banking practice that it may be reversed. When the bank, prior to the clearance of the cheque or prior to the elapsing of the period during which the provisional credit can be reversed, nevertheless honours debits which would be in excess of the facility, but for the provisional credit, the bank is knowingly lending money to the client against uncleared effects. The bank cannot be compelled to so, if that would take the balance of the account in excess of the overdraft, but the bank is not precluded from doing so. And if a bank honours withdrawals against uncleared effects, it is clearly lending money at the request of the client in circumstances where it may not have been obliged to lend the money but was certainly entitled to lend the money. In that regard the position was very clearly laid out in the I W Blumberg case which I mentioned earlier. In a different passage in that case, Zulman, JA said the following at 675i through to 676d:

> "The fact that the appellant may have permitted the respondent to draw cheques against uncleared effects, despite there being no agreement in this regard, would not excuse the respondent, in law, from liability to make payment to the appellant. The appellant was perfectly entitled to choose to honour such cheques, notwithstanding the fact that the effects earlier deposited had not been cleared, and to waive any benefit afforded to it in this regard by its agreement with the respondent. It would be strange indeed if it were permissible for a customer of a bank to draw a cheque on the bank, requesting

the bank to honour the cheque, and thereafter, when the bank honoured the cheque despite the absence of an overdraft facility, to then plead that this would have resulted in an overdraft facility which had not been agreed upon. In essence, this is precisely what the respondent is contending for. It hardly lies in the mouth of the respondent, who drew the two cheques in question against uncleared effects, albeit contrary to the agreement between the parties, to be heard to complain that the bank should not have honoured the cheques and debited its account. Put differently, it is the appellant, so it is suggested, who must bear the loss if the uncleared effects were not met. This cannot be so."

Zulman, JA then cited certain South African authorities and continued:

"As pointed out by Cozens-Hardy, Master of the Rolls, in Cuthbert v Robarts Lubbock & Co [1909] 2 Ch 226 at 233:

"If a customer draws a cheque for a sum in excess of the amounts standing to the credit of his current account, it is really a request for a loan and if the cheque is honoured, the customer has borrowed the money."

That shows very clearly that where an uncleared effect which has been provisionally credited to the account is later reversed, intervening withdrawals against those uncleared effects represent monies lent and advanced and the claim is correctly framed as one on an overdraft rather than as a *condictio indebiti*. That disposes of the provisional crediting and reversal of the first cheque for R450 000.

As regards the second cheque of R450 000, that was deposited on 3 May 2013 and was timeously reversed on 6 May 2013. On that occasion it is undisputed that it was refused because Standard Bank had returned the cheque to Nedbank unpaid on the basis that the issuing customer's account had been closed. The defendants do not say that in the period between 3 and 6 May 2013 the bank said or did anything which prejudiced them. The defendants' focus is rather on the period following the depositing of the first cheque not the period following the depositing of the second cheque.

With reference to the reason for which the second cheque was refused, namely the closure of the account, I have already alluded to the fact that, according to the bank in its answering papers, that was also the reason why the first cheque of

R450 000 was not honoured and why it was, therefore, reversed on 30 April 2013. There is some support for that view in the letter which Ms Schroder, on behalf of the bank, wrote to the second defendant on 7 May 2013 by way of e-mail. She said the following:

> "Attached hereto please find a copy of the cheque that was unpaid (for the second time) as per "account closed". Vishay, as per our telephonic discussions this morning, please revert back urgently as the overdrawn position on the account needs to be rectified immediately. I urge you to please not attempt to rectify the position with yet another cheque from the drawer of the cheque, but to request either an electronic transfer or alternatively, a bank guaranteed cheque."

This provides contemporaneous support for the view that the second cheque, like the first cheque, was dishonoured because the issuing customer's account was, according to the paying bank, a closed account. But the conclusions I have reached are not affected by whether the first cheque was ultimately refused and reversed on 30 April 2013 due to the issuing customer's account having been closed or because of the discrepancy in the amount of the cheque.

What I have said thus far is sufficient to show that the essential element for an estoppel in these circumstances, namely a negligent representation by the bank, is completely lacking and that nothing has been put up to show why the bank was not entitled to reverse the deposited cheques of R450 000 and to sue its customer for the resultant substantial overdrawn balance. Had the defendants overcome this hurdle, they would also have needed to address, for purposes of estoppel, the question whether, as a result of any representation by the bank, they acted to their prejudice. In the present case, this is not a situation where the money which was drawn out by the first defendant over the period 26 to 30 April 2013 was lost to it through some fraudulent transaction. The money was actually spent in buying petrol or in the one instance seems to have been paid to the second defendant personally, though no doubt in connection with the first defendant’s business. The petrol and other goods acquired with the withdrawn money thus took the place of the funds advanced by the bank.

All that seems to have happened is that the bank has become the first defendant’s creditor for the amounts used to buy the petrol, whereas if the defendants had not been duped by Wilson and others, the new financier would have been the person who would have lent them those funds. Either way, the first defendant would have been indebted for the amounts drawn to buy petrol. They have the petrol, or had it, and would have had to pay either Nedbank or the new financier for the borrowed funds. It is questionable in those circumstances whether the negligent conduct on which the defendants rely caused the first defendant to act to its prejudice.

If the first defendant is liable for the reasons I have explained, it is not in dispute that the second and third defendants, as sureties, are liable subject to the limits of their suretyships.

Mr Filand argued that if the plaintiff had, in the summary judgment proceedings, fully disclosed the circumstances under which the first defendant came to be unable to honour its loan instalment, namely through conduct of the bank which effectively froze its current account, the court hearing the summary judgment would not, or might not, have granted summary judgment. For the reasons I have explained on the merits of the matter, a full explanation of all of these matters would not have led to a different conclusion. Put differently, if the defendants had not been in default of appearance at summary judgment and had filed an affidavit opposing summary judgment along the lines of their papers in the rescission application, I think summary judgment would still have been granted.

In any event, the bank's claim was correctly framed in its particulars of claim as a claim for monies lent in advance. The reason why the loan instalment on the term loan had not been paid was not something which needed to be pleaded. Beyond that, the bank did not have opportunity or occasion to disclose anything more, because as is well known, the verifying affidavit in summary judgment proceedings cannot go beyond stating the deponent's personal knowledge and the confirming the allegations in the particulars of claim. Further evidence may not be placed before the court by the plaintiff in summary judgment proceedings.

The last aspect I need to consider is the rescission directed at the order declaring the third defendant's property in KwaZulu especially executable. All that is said in the rescission application in that regard is that the property is the primary residence of the third defendant and that she resides there with her 17 year old son. If the third defendant had said that, and said no more, in opposing summary judgment, I do not believe that a court would have refused summary judgment. It is not enough, in order to ward off executability of immovable property in accordance with the principles which have been laid down in regard to section 26 of the Constitution, to say that one occupies a property as one's primary residence. It is necessary to show that eviction will deprive the person of adequate housing, which is what the Constitution entitles a person to have.

I do not know, and have not been told, anything about the value of the property, except that I know that it was put up on at least three occasions as security for the first defendant's liabilities. One must assume that it is a property of reasonably substantial value if the bank was willing to have registered over it the three covering mortgage bonds mentioned in the papers. The bank was also willing to take a suretyship from the third defendant in an amount of R1,3 million. There is thus no reason to infer that, if the property is in due course sold in execution and if, as a result, the third defendant and her 17 year old son need to vacate it, the third defendant will not have resources to procure another similar or more modest property for her and her son, which will still constitute adequate housing. As has been stated in several cases, the right to adequate housing to which the Constitution refers in section 26 is not the right to stay in a house of one's choice, even though one cannot afford it.

For all of those reasons, the application for rescission must be refused. Ms Titus, for the bank, said that in accordance with the two contracts between the bank and the first defendant, and also in accordance with the suretyships, the bank was entitled to costs on the attorney/client scale. Although there are provisions in the relevant contracts and in the suretyships for the payment of attorney and client costs in general terms, it is trite that the court always has a discretion in regard to the scale on which costs should be paid. There also may be a question whether the agreement for the payment of costs on the attorney and client scale extends not only to actions by the bank to enforce its right but also to a defence by the bank when a rescission application is brought.

Whatever the correct legal position may be, I am inclined in this case to exercise my discretion against making a special costs order. Firstly, I have some sympathy for the predicament in which the defendants found themselves, because on these papers, at any rate, I must assume that they have been victims of a fraud, and that they were acting in good faith in bringing these proceedings. Secondly, I am inclined to think that the costs which will be recoverable by the bank on the attorney/client scale are not going to be materially different from those which it would recover on the ordinary scale in a case such as the present, where only one counsel has been engaged in a relatively straightforward matter.

The order I therefore make is:

1. The application for rescission is dismissed.
2. The defendants are jointly and severally liable to pay the costs of the respondent in the rescission application (the plaintiff in the main action) on the ordinary scale, including those reserved by this court on 12 December 2013.

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ROGERS, J