IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3)

9 December 2020 .....

DATE SC Mia

CASE NO: 2019/20259

ANNELISE CILLIERS N.O.	First Applicant
KAREL FREDERICK CILLIERS N.O.	Second Applicant
ANNELISE CILLIERS	Third Applicant
and	
FIRSTRAND BANK LIMITED trading inter alia as FIRST NATIONAL BANK	Respondent

In re:

FIRSTRAND BANK LIMITED trading inter alia as FIRST NATIONAL BANK	Applicant
and	
ANNELISE CILLIERS N.O.	First Respondent
ANDREW JAMES HAN NINGTON N.O.	Second Respondent
KAREL FREDERICK CILLIERS N. O	Third Respondent
ANNELISE CILLIERS	Fourth Respondent

JUDGMENT

MIA, J

[1] This was an application for a rescission of a default judgment (the rescission application), and setting aside of a warrant of execution of property, obtained by the respondent against the Spreading the News Trust (the "Trust") represented by the first and second respondents, in their capacities as trustees and against the third respondent as surety. The order granted was in terms of a facility loan agreement where this court, per Vuma AJ, granted a default judgment in the amount of R838 928 .06 against the applicants and declared the [….] property, a secondary property specially executable. The application was opposed by the respondent. In its opposition, the respondent raised two points *in limine* and disputed the various defences raised by the applicants.

[2] The first applicant was Ms Annelise Cilliers N.O., cited in her capacity as a trustee for the time being of the SPREADING THE NEWS TRUST, registration number 115356/94 ('the Trust'). Her *domicilium citandi et executandi* (*domicilium*)for the purpose of proceedings with the respondent was the address situated at [….], Johannesburg. The second applicant was Mr Karel Frederick Cilliers N. O., cited in his capacity as a trustee for the time being of the Trust. The third applicant was Ms Annelise Cilliers; who was cited as a surety. She resides in the Western Cape. Her *domicilium* in the agreement with the respondent was the address situated at [….], Johannesburg. The respondent was First Rand Bank Limited, a bank duly registered and incorporated in terms of the company and banking laws of the Republic of South Africa, having its registered address at Group Company Secretary's Office, 4 Merchant Place, Corner Fredman Drive and Rivonia Road, Sandton, Gauteng.

[3] On 2 June 2011 the respondent and the third applicant representing the Trust entered into a written facility agreement. The respondent's standard terms and conditions applied to the structured facility agreement. A facility sum of R2 480 000.00 was made available to the Trust. This was repayable over 240 months. As security for the facility sum, however, the respondent required mortgage bonds to be registered over the [….] immovable property in Cape Town and the immovable property situated at [….], as well as having a deed of suretyship executed by the third applicant in favour of the respondent. According to the respondent, the Trust breached the agreement, and the full outstanding amount became due and payable during the term of the facility agreement. It thus demanded payment of the full balance outstanding. It served its demand on the [….] address which was the *domicilium* whilst knowing that the property had been sold. This was so as it was required to provide a bond cancellation amount to enable the transfer of the property.

[4] The respondent placed before the court certain factors to persuade it to declare the property executable. It stated in its founding affidavit in the main application that the property appeared to be a holiday home. A registered valuer, Mr Breet, appointed by the respondent, indicated that he could not gain access to the property after several unsuccessful attempts to contact the contact number provided for the representative of the Trust. He then conducted the valuation of the property externally, based on the comparative sales of properties in the surrounding area. He estimated that the market value of the property was R650 000.00 and a forced sale value of R450 000.00. True copies of a Searchworks Deeds Office, and conveyancer's certificate, generated and drawn respectively by Ms Michelle Da Costa, a conveyancing attorney in the employ of the respondent's attorneys of record, reflected that the only bond registered against the property was in favour of the third applicant.

[5] The respondent indicated it did not know the Trust or the third applicant's current financial position. The respondent indicated the relevant section 129 Notices in terms of the National Credit Act No 34 of 2005 (the NCA), were sent to the *domicilium* reflected as the [….] in the agreement. This was

because the applicants furnished no change of address once the [….] property was sold. The result was that judgement was granted, and the property was declared specially executable after service upon *domicilium,* which the respondent was aware had been sold. The court granting judgment had also been labouring under the impression that the property was not a primary residence, but was a second property used as a holiday home.

[6] The applicants place reliance on Uniform Rule 42(1)(a) for the application. They allege that the rescission of the judgment granted on 15 July 2019 is necessary as it was an order erroneously granted in the absence of a party affected by it, namely them. The third applicant contended that in her negotiations with the respondent, the latter was aware that the [….] property was in the process of being sold. The sale was at the behest of the respondent, as was evident from the communication attached to the application. The respondent was aware of the sale and received the full benefit thereof as the full proceeds of the sale of [….] property was paid into the facility account which resulted in the arrears being paid up and the Trust being ahead with its payments on the account. The facility only required R969 33.20 to be paid up at that stage whilst R 2 200 000.00 had been paid into the account. The Trust was therefore ahead in its payments by an amount of R1 230 66.80 where monthly payments due were R 22 303.00. It was therefore on this basis that the applicant asserted that the application for the order was erroneously granted in the absence of the applicants. Furthermore that the respondent did not disclose the full facts to the court when the application was made to grant the default judgment when seeking the warrant to declare the property specially executable. The orders were granted without service on the Trust or the applicant as the surety.

7.1 Three points *in limine* were raised by the parties. The first the applicant took was that the deponent to the respondent's founding affidavit in the main application and the answering affidavit in the present application did not have personal knowledge of the matter and the affidavit amounted to hearsay. The application for rescission was thus unopposed.

7.2 The second point *in limine* which was raised by the respondent was that the applicant ought to have applied for condonation for the late filing of the application for rescission as it had 20 days after the judgment came to its attention to apply for rescission of the judgment.

7.3 The third point *in limine* which was also raised by the respondent was the *locus standi* of the Trust to bring the rescission application, which was disputed. The respondent alleged that the resignation of one of the trustees, Mr Andrew Hannington was not valid, and since no Masters letter of Authority had been attached to show that only the first and second applicants were indeed the trustees of the Trust - that the Trust has no *locus standi* due to the general legal principle that all trustees act jointly.

[8] a. A determination of the points *in limine*.

b. Whether the applicant had made out a case in terms of Uniform Rule 42 for rescission of the judgment and setting aside the order declaring the property specially executable.

c. The quantification of the amount outstanding, how it was calculated and whether the applicants were entitled to a debatement of the account.

[9] On the issue whether the respondent's affidavit constituted hearsay the respondent referred to the decision of *Rees and another v Investec Bank Limited*

[2015] JOL 33635 (SCA), where the Supreme Court of Appeal held "*First hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions and large corporations.*"

In my view and in line with the *dictum* quoted, the respondent's affidavit is not hearsay. The contents of the file would have been under the control of the deponent and he would have had insight into the file before deposing to the affidavit.

[10] The respondent raised the point *in limine* that the applicant ought to have applied for condonation for the late filing of the application for rescission as it

was required to apply for rescission of the judgment timeously after it came to its attention, namely twenty days. In this regard, the applicants relied on Uniform Rule 42(1)(a) and stated that the main application had been erroneously sought and granted due to lack of service on the Trust and the surety. This was so since service of notices and the application took place on immovable property, being the [….] property, years after the Trust and the surety had vacated the property after its sale. The respondent was aware of this fact. Thus, the service of the main application would not have, and did not, reach the notice of the applicants. In fact, the respondents were required to consent to the sale of the property and its transfer to a third party. The application for rescission was not brought in terms of Uniform Rule 31(2)(b) but rather in terms of Uniform Rule 42(1)(a) where the applicant relied on the application being erroneously sought and being erroneously granted. The applicant relied on the service aspect as well as an overpayment on their interpretation of the agreement. On the basis that the reliance was on Uniform Rule 42(1)(a), I find in favour of the applicants on this point as they are not bound by time limits in terms of this latter rule. In any event, on the respondent's own admission, there was no service upon the applicants.

[11] The third point *in limine* raised by the respondent was the legal standing of the Trust to bring the rescission application. The respondent alleged that the resignation of one of the trustees, Mr Hannington was not valid, and since no Masters letter of Authority had been attached to show that only the first and second applicants were indeed the trustees of the Trust - that the Trust has no *locus standi* due to the general legal principle that all trustees act jointly. The applicants, however, contended that they were in fact acting jointly. The second applicant deposed to a confirmatory affidavit which confirmed that the first applicant was authorised to bring the rescission application on behalf of the Trust as stated in the founding affidavit. The respondents were informed about the resignation of and furnished with proof of resignation of Mr Hannington in 2015; this was prior to the institution of the main application. They contend further that such resignation is clearly in line with clause 20.2 of the Trust Deed that provides for resignation by written notice. In any event, the Trust Deed and resignation by Mr Andrew Hannington, does not contravene

Section 21 or any provisions of the Trust Property Control Act 24. The Master's Letter of Authority is merely an additional method of proof; consequently, I am satisfied that the Trust has established its *locus standi*. I note further that if the Trust lacked locus standi that the third applicant as surety has the locus standi to bring the application and raise the defences.

[12] Uniform Rule 42(1) (a) states:

"The court may, in addition to any other powers it may have *mero moto* or upon the application of any party affected, rescind or vary-

(a) An order or judgment erroneously granted in the absence of any party affected thereby"

[13] Our courts have usually granted relief and rescinded the orders in circumstances where one of the affected parties have been absent or the true facts have not been brought to the attention of the court. A party would be absent if notice were not given or in the circumstances where there was no proper notice given. This would follow irrespective of whether the order or judgment was otherwise correct.[1] In the present matter, the respondents were aware that the *domicilium* which was reflected in the agreement had been sold as they had, in fact, given consent to sell the property. Furthermore, they had received the full benefit of the sale of the property. Once the full proceeds of the sale of the property were paid into the account, the applicants were no longer in arrears.

[14] The applicants stated that the requirement of the NCA notice-of-default requirements were not met in that the notices was not served on them on including the requisite notices and application. Besides the issue of the lack of notice, the court which was requested to grant default judgment was unaware of the full extent of the facts. To this extent, the applicants suggest that the proceedings were irregular as the court was not aware that the respondent

[1] *Custom Credit Corporation Ltd v Bruwer* 1969 (4) SA 564 (D); *Theron v United Democratic Front (Western Cape Region)* 1984 (2) SA 532 (C); *Topol v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W); *Clegg v Priestley* 1985 (3) SA 950 (W); *Athmaram v Singh* 1989 (3) SA 953 (D); *Fraind v Nothmann* 1991 (3) SA 837 (W), a case of a fugitive from justice; *Kili v Msindwana* [2001] 1 All SA 339 (Tk); *Brangus Ranching (Pty) Ltd v Plaaschem (Pty) Ltd* [2008] 4 All SA 542 (N).

was aware (in consenting to the sale and transfer to a third party) that neither the Trust nor the surety occupied such property, and that such service of the main application would not, and did not, reach the notice of the applicants. Furthermore, the respondents did not attempt to find a substituted method of service or an alternative address besides the [….] property. The respondent continued to send notices by registered post to the [….] property on 22 July 2016, 16 May 2017, 17 April 2019 after the [….] property had already been transferred to a third party in 2015. At this stage, the property was no longer occupied by the applicants, and the notices could not have come to their attention. The respondent would clearly have been aware of this fact when it brought the main application.

[15] The respondent in paragraph 13 of the main application whilst knowing that the property was sold and that transfer of the property took place, suggested to the court in the main application that the third applicant, despite the sale of the property, may nevertheless be residing at the premises. If the deponent to the founding affidavit of the respondent seeks to depose to the affidavit and states that the information is within his personal knowledge, it appears that he misrepresented the facts to the court. The respondent further later accepts that the applicant learnt of the judgment when the documents were found at the [….] property in Cape Town whilst service was on the [….] property. This property is different from the [….] property on which the main application and preceding notices were served. The returns of the Sheriff are referred to but not attached. It is evident that the respondent has not satisfactorily dealt with the issue of proper service.

[16] On the issue of the payment, the applicant's case was that upon the receipt of the proceeds of the sale of the [….] property; the account was paid up and was no longer in arrears. There appears to be a disagreement between the applicant and the respondent that if the extra amount was paid in the applicant would not be required to pay the monthly amounts for a further period and would be afforded a payment holiday. I do not doubt that if the applicants understood that this was not the position only the arrears would have been paid into the account and the remaining proceeds from the sale of the [….]

property would have been kept aside to service the monthly payments on the facility account. The applicants state that the respondent delayed the transfer of the property when it was opportune to do so and this increased the interests due and the costs ultimately. Under the circumstances it would be appropriate to request detailed statements and to ascertain why there were delays and whether the applicant was prejudiced financially under the circumstances. If a debatement is the appropriate method to do so I see no reasons why the respondent would be reluctant if their conduct was within good practice at all times. I am satisfied on the submissions made and on the papers before me that it is clear that the main application was in fact erroneously granted in the absence of the applicants and the default judgment and warrant should be set aside on this basis.

[17] Costs should merely follow the result of this rescission application.

ORDER

[18] For the reasons above, I make the following order:

1.The default judgment granted under the above case number on 15 July 2019 in favour of the respondent (being the applicant in the application for judgment) is hereby set aside and rescinded.

2.The warrant of execution granted against immovable property under the above case number and dated 14 August 2019 in favour of the respondent (being the execution creditor in the request for issuance of such warrant), is hereby rescinded and set aside.

3. The costs of the application is to be paid by the respondent.

4. The order declaring the property specially executable is set aside with costs which shall include the costs of two counsel.

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JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	: Adv GV Meijers
Instructed by	: Dawes Law richard@dawes.co.za
On behalf of the respondent	: Adv M De Oliveira
Instructed by	: Jason Michael Smith Incorporated melinda@jmsainc.com
Date of hearing	: 3 August 2020
Date of judgment	: 9 December 2020