

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

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

Case No: 2021/48742

In the case of a surrender application by:-

INNOVATIVE STAFFING SOLUTIONS (PTY) LTD
MARE, RUDOLPH

First Applicant
Second Applicant

AND

SOUTH AFRICAN SECURITISATION
PROGRAMME (RF) LTD

Respondent

JUDGMENT

KAPLAN AJ:

1. The Applicants in this matter seek an order, in terms of Uniform Rule 42(1) alternatively Uniform Rule 31(2)(b), rescinding a default judgement granted against them on 2 March 2022.

2. The particulars of claim on which the default judgement was granted provide as follows:
 - 2.1 Applicants chose Building 10, Boardwalk Office Park, Eros Road, Faerie Glen, as their chosen domicilium citandi et executandi.

 - 2.2
 - 2.2.1 On 31 July 2018, the first applicant and Sunlyn Rentals (Pty) Ltd ("**Sunlyn**") concluded a written Master Rental Agreement ("**the MRA**") in terms of which Sunlyn rented to the first applicant an OKI Digital printer for a period of 48 months at a monthly rental of R9 830.20.

- 2.2.2 On 28 August 2018 first applicant and Sunlyn entered into a second equipment schedule to the MRA in terms whereof Sunlyn rented a Laminator to first applicant for a period of 48 months at a monthly rental of R3 586.85.
- 2.2.3 On 28 September 2018 first applicant and Sunlyn entered into a third equipment schedule to the MRA in terms whereof Sunlyn rented an Engraver to first applicant for a period of 48 months at a monthly rental of R34 954.25.
- 2.3 Sunlyn performed all of its obligation arising out of the MRA (including the second and third equipment schedules) and the goods were delivered and made available for the use of the first applicant.
- 2.4 The first applicant breached the MRA by neglecting and/or failing to pay all rentals due in terms thereof and that as at 31 August 2021, it was in arrears in the amounts of R168 803.66, R57 632.48 and R600 328.77.
- 2.5 On or about 24 July 2018 the second applicant signed an unlimited written deed of guarantee in terms whereof he bound himself as guarantor and co-principal debtor with the first applicant jointly and severally in favour of Sunlyn or its

cessionary for the due and proper fulfilment of all the obligations of first applicant arising from the MRA.

2.6 On 29 March 2006 Sunlyn and Sasfin Bank Limited (“**Sasfin**”) concluded a written main cession agreement and an addendum thereto (“the main cession agreement”) in terms whereof Sunlyn ceded existing and future rental agreements to Sasfin.

2.7 Subsequent to the conclusion of the master rental agreements Sunlyn and Sasfin fulfilled all their obligations in terms of the main cession agreement and “subsequently” Sunlyn’s right, title and interest in the MRA and the second and third equipment schedule thereto “were ceded to Sasfin as per the provisions of the main cession agreement”.

2.8 On 15 August 2018, 17 September 2018 and 17 May 2019 written sale and transfer agreements were entered into by Sasfin and respondent in terms whereof the MRA and the second and third equipment schedule thereto was sold by Sasfin to respondent.

3 The grounds of rescission relied upon by applicants in the founding affidavit are in summary as follows:

- 3.1 The main cession agreement concluded on 29 March 2006 refers only to existing contracts between Sunlyn and its customers and does not apply to the MRA and the schedules thereto which constitute “future rights”. In its terms, the main cession agreement does not constitute the cession of Sunlyn’s future rights to Sasfin.
- 3.2 Applicants moved their principal place of business from the chosen domicilium citandi et executandi under the MRA to another address and they did not receive notice of the summons. They omitted to notify respondent of a change of the applicant’s domicilium citandi et executandi.
- 4 Applicants in their heads of argument raise the following defences:
- 4.1 The judgement was erroneously sought because although the summons was served at the chosen domicilium citandi et executandi,¹ respondent was advised that the equipment had been relocated to a storage address and nevertheless proceeded to serve the summons at the chosen domicilium citandi et executandi.

¹ FA par 27: p 03-59, FA paras 54 and 55 p 03-66

4.2 The judgement was erroneously granted because respondent lacked the necessary locus standi. This is further because:

4.2.1 the main cession agreement makes no reference to future rental agreements or future rights and;

4.2.2 at best for the respondent an undertaking to cede has been pleaded in the particulars of claim, but the actual cession of the MRA's has not been pleaded or referred to at all.

4.3 In regard to the common law, the applicant's explanation for default is reasonable and insofar as a bona fide defence is concerned applicant's repeat what they have stated in regard to the cession of Sunlyn's rights to Sasfin.

5 The Respondent, in its heads of argument avers that:

5.1 In regard to the defence that the judgment was erroneously sought, that it is long established that strict compliance with the domicilium clause is required and it matters not that the defendant had left the domicilium address or that he could

not be found there ² and furthermore that respondent would have been subject to criticism had it caused the summons to be served on a storage facility where the subject matter of the MRA is stored.

- 5.2 In regard to the defence that the judgement was erroneously granted because respondent lacked the necessary locus standi, that the main cession agreement plainly contemplates a cession of rental agreement that were not yet in existence and reference is made in this regard to clauses 2, 4.1, 4.3, 8.1 of the main cession agreement. Furthermore, the applicant's contention that the pactum cessionis was not pleaded overlooks the averment pleaded in the particulars of claim that subsequent to the conclusion of the master rental agreements, Sunlyn and Sasfin fulfilled all their obligations in terms of the main cession agreement and "subsequently" Sunlyn's right, title and interest in the MRA and the second and third equipment schedule thereto "were ceded to Sasfin as per the provision of the main cession agreement".

Findings on the competing contentions

² Amcoal Collieries Ltd v Truster 1990(1) SA 1(A) at 5J-6D and stating that it is a well established practice of the uniform rules of court that, if a defendant has chosen a domicilium citandi, service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad or has abandoned the property, or cannot be found.

See also Shepard v Emmerich 2015(3) SA 309 (GSJ) at 311G to H

6 The applicants contentions that the judgment was erroneously sought and erroneously granted are based on Uniform Rule 42(1). Such contentions lack merit for the following reasons:

6.1 It is common cause that the summons was served on the applicants chosen domicilium citandi et executandi and that respondent failed to advise applicant of its change of address.³ On the facts of this matter and having regard to the authorities quoted in footnote 2, such service is good.

6.2 On a plain interpretation of the main cession agreement ⁴ it provides for contracts to be sold or ceded to Sasfin which are entered into subsequent to the conclusion thereof. In this regard the main cession agreement provides as follows:

6.2.1 The cedent shall offer all contract for sale and cession to Sasfin for the purchase price from time to time (clause 2.1).

6.2.2 Sasfin may accept or reject the offer in its sole and absolute discretion (clause 2.2).

³ FA pa 27: p03-59, FA paras 54 & 55 p03-66

⁴ See Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA) paras 17 to 26; Tshwane City v Blair Athol Homeowners Association 2019(3) SA 398 (SCA)

- 6.2.3 Acceptance of an offer will take place on payment by Sasfin to the cedent of the provisional purchase price less any deduction permitted herein (clause 4.1).
- 6.2.4 The cession of each contract shall be a separate and severable transaction upon the terms and conditions of this agreement (clause 4.3).
- 6.2.5 As security for the discharge of the cedent's obligations hereunder as well as all other obligations which it may now or at any time in the future owe or incur to Sasfin from whatever cause and howsoever arising the cedent hereby irrevocably cedes to Sasfin all claims, rights of action and receivables which are now and which may hereafter become due to it by all persons ("the debtors") from any cause of indebtedness whatsoever and/or any money standing to its account with any bank, hereby undertaking on demand Sasfin to take all such steps as may be necessary to enable Sasfin to enforce the rights granted to Sasfin herein and to deliver to Sasfin on demand all documents (duly endorsed and or completed where appropriate) evidencing and or embodying and/or relating to any such claims, rights of action and receivables" (clause 8.1).

6.3 The applicants contention that at best for respondent an undertaking to cede has been pleaded in the particulars of claim but that the actual cession of the MRA's has not been pleaded or referred to at all is ill founded. This is because:

6.3.1 The respondent pleaded in paragraph 23 of its particulars of claim as follows:

“Subsequent to the conclusion of the master, 2nd and 3rd Master Rental Agreements, Sunlyn and Sasfin fulfilled all their respective obligations as per the Main Cession Agreement and subsequently Sunlyn's right, title and interest in the master, 2nd and 3rd Master Rental Agreements were ceded to Sasfin as per the provisions of the Main Cession Agreement”.

6.3.2 The said paragraph quite clearly pleads that subsequent to the conclusion of the MRA and the second and third schedules thereto, they were ceded to Sasfin in accordance with the terms of the main cession agreement.

6.4 In regard to the applicants reliance on Uniform 31(2)(b) it is necessary for applicants to give a reasonable explanation for the default, that the application is bona fide and not made with intention of delaying the respondents claim and that

applicants have a bona fide defence to respondents claim⁵. I find that although the applicants have established that the default was not wilful, (it is not in dispute that applicants were not aware of the summons), applicants have failed to set out a bona fide defence to the respondents claim.

6.5 In the premises the application is dismissed with costs.

JL KAPLAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

Appearance for Applicant:	Advocate Dean van Niekerk
Instructed by:	Cliffe Dekker Hofmeyr Inc
Appearance for Respondents:	Advocate JG Botha
Instructed by:	ODBB Attorney
Date of hearing:	9 November 2023
Date of judgment:	28 March 2024

⁵ Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476-477
Silver v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 35