REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 31948/19

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE:

SIGNATURE:

In the matter between:

SASFIN BANK LTD	First Plaintiff/Respondent
SUNLYN (PTY) LTD	Second Plaintiff/Respondent
and	
MELAMED AND HURWITZ INCORPORATED	First Applicant/Defendant
STEPHEN MELAMED	Second Applicant/Defendant

JUDGMENT

Todd AJ

1. The Applicants seek the rescission of an order granted by default judgment on 26 November 2019, to set aside a warrant of execution issued pursuant to that order, and certain ancillary relief.

2. Judgment was granted in favour of the First Respondent only. The rescission application cites both Respondents, but in this judgment I will refer simply to the First Respondent, or the Respondent, being the party in whose favour judgment was granted.

3. The application for rescission is brought under the provisions of Rule 42 of the Uniform Rules, alternatively under Rule 31(2)(b), alternatively under the common law. The application was instituted during June 2021, more than 18 months after the judgment was handed down and approximately 10 months after the judgment first came to the attention of the Second Applicant.

4. The Second Applicant was an attorney practicing as a director of the First Applicant firm from an address situated at No. 70 Oxford Road, Riviera in Johannesburg. The firm ceased practicing during 2013 and the Second Applicant is the sole surviving director of the firm.

5. The order which the Applicants seek to rescind was for payment of an amount of R115,819.72 together with interest on that amount, being the amount due under an agreement for the lease of business machines by the First Applicant under arrangements which required the Second Applicant to stand as surety. The summons and particulars of claim were served on both Applicants at their chosen *domicilium citandi et executandi*, being the erstwhile address of the First Applicant at the business premises referred to above. Service was effected by affixing a copy to the principal door of the premises.

6. The Applicants state that the proceedings did not come their attention. As a result, they did not enter appearance to defend. Judgment was granted by default on 26 November 2019.

7. The Applicants first came to learn of the proceedings, the Second Applicant states, when he was contacted by the Sheriff during August 2020 and was notified that the Sheriff had been instructed to execute a warrant of execution.

8. This resulted in various interactions between the Applicants' attorney of record, Mr Woolf, and the Respondent's attorney of record, Mr Winterton.

9. The respective attorneys exchanged various letters and emails during the period between August and October 2020. In the course of those exchanges Mr Woolf, for

the Applicants, alleged certain deficiencies in the pleadings that in his view rendered them excipiable. He expressed the view that there were consequently grounds on which the Applicants were entitled to seek the rescission of the order. He also raised concerns about the terms of the order itself which, it transpires, had been incorrectly typed by a court typist after the order had been granted.

10. These points were made in a lengthy email sent by Mr Woolf to Mr Winterton dated 19 October 2020. The email concluded with the assertion that "*the order is thus rescindable in terms of the provisions of rule 42 of the Uniform Rules of Court*", and the Respondent's attorneys were requested to give an undertaking that they would not attempt to execute against the Applicants in these circumstances. Mr Woolf clearly stated his view that the Respondent should approach the court "*to have the default judgment removed premised on the occurrence of a mistake having occurred*."

11. Mr Winterton's response to this was communicated in an email dated 28 October 2020 in which he referred to Mr Woolf's email of 19 October 2020, advised that he did not intend "*litigating by way of correspondence*" and recorded a reservation of all of the Respondent's rights. Importantly, Mr Winterton continued as follows:

> "*Please advise whether or not your client wishes to settle this matter and apply for rescission thereafter alternatively if your client wants to apply for rescission immediately. My instructions are not to apply for rescission on your client's behalf.*"

12. For a reason that is not explained, Mr Woolf appears to have treated this communication as an indication that "*the matter was at an end*". He explained this in a subsequent email to Mr Winterton, sent several months later in June 2021, after the Respondent again sought to execute the court order. There Mr Woolf explained that he had "*formed the view that for all intents and purposes, the matter could not proceed given inter alia, the status of the order obtained, particularly the grounds upon which the order was ab initio obtained*".

13. Mr Woolf continued, explaining that he had assumed that the matter was "*at an end and that your client would not proceed to execute against my client in this regard*". He accepted that this assumption was incorrect, but asserted that this was the sole reason why his client did not at that juncture proceed with an application to rescind the default judgment.

14. The Applicants then instituted the rescission application, which as indicated earlier was delivered approximately 10 months after the judgment first came to the attention of the Second Applicant.

15. In regard to the merits of the rescission application Ms Vergano, who appeared for the Applicants, submitted that the award was erroneously granted because the particulars of claim were excipiable in various respects. She submitted that the cessions on which the Respondent had relied to establish their claims had not been properly pleaded, that a lost document referred to in the particulars of claim had not been properly dealt with in the pleadings, and that as regards the suretyship under which the Second Applicant was held liable there was an error on the face of the suretyship document that created uncertainty as to the identity of the creditor, leaving the suretyship agreement "open to interpretation".

16. Insofar as the Applicants rely on Rule 42, Ms Vergano submitted that the fact that the particulars of claim were excipiable meant that the order was erroneously sought or erroneously granted.

17. As regards the errors that were apparent on the face of the incorrectly typed court order, Ms Vergano submitted that this was not relevant to the rescission application but that it was relevant instead to the relief sought regarding the writ of execution that had been issued pursuant to that order.

18. Insofar as the Applicants rely on Rule 31(2)(b) or the common law, the Applicants seek condonation for the late delivery of the rescission application outside the 20-day period provided for in Rule 31(2)(b), and Ms Vergano submitted that the Applicants had shown good cause for rescission, whether under that rule or under the common law.

19. An application for rescission brought under the provisions of Rule 31(2)(b) must be brought within the 20-day period provided for in that rule, and if brought under Rule 42 or the common law must be brought within a reasonable time: see *First National Bank of Southern Africa Limited v van Rensburg N.O.: in re First National Bank of Southern Africa Limited v Jurgens* 1994 (1) SA 677(T) at 681B-G; *Promedia Drukkers and Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411(C) at 421G.

20. What is a reasonable time depends on the facts of each individual case. Determining what is reasonable depends on an assessment of the time that has lapsed before the application is brought and the explanation given for the delay.

21. In my view the Applicants fall at the first hurdle. They fail to set out a proper explanation for their failure to bring the application timeously after the order was first brought to their attention, and in any event following the exchange of correspondence in October 2019 referred to above. There are no reasonable grounds on which the Applicants' attorney could, following that exchange, have concluded that the matter was at an end, or that it was unnecessary for the Applicants to bring an application to rescind the order if that is what they wanted to do. The explanation that the attorney erroneously thought that no such step was necessary at that stage is in fact no explanation at all, and certainly is not an explanation that establishes good cause to condone a delay of several months in bringing such an application.

22. For those reasons I find that the application has not been brought within a reasonable time and should be dismissed for that reason alone. Insofar as the Applicants rely on the provisions of Rule 31(2)(b), there are no grounds on which to condone their failure to bring the application within the time period referred to in the Rule.

23. Even were it not for my conclusion that there has been an unreasonable delay in bringing the present application, I am in any event not persuaded that the complaints raised on the face of the particulars of claim warrant a conclusion that the order was erroneously granted as contemplated in Rule 42. To succeed on this score the Applicants must show that absent amendment to the particulars of claim an exception would have succeeded and the claim would have been dismissed. In my view none of the matters raised by the Applicant are matters which a court would ordinarily have been expected to observe *mero motu* in deliberating on whether or not to grant default judgment, and for that reason it cannot be said that the judgment was erroneously granted.

24. Furthermore, and as submitted by Mr Aucamp, who appeared for the Respondent, for any such exceptions to have been upheld the Applicants would have had to satisfy the court that the issues raised could not have been resolved by the leading of evidence in relation to the cause of action: see *Lowenfell v Street Guarantee (Pty)*

Limited 2017 JDR 618 ([2017] ZAGPJHC 83) referring in turn to *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-E.

25. Insofar as the Applicants seek to rely on Rule 31(2)(b) or the common law, their explanation given for their default is that the summons and particulars of claim were served by affixing under the Rules on a *domicilium* address from which the Applicants no longer conducted business. In my view this explanation falls short of a reasonable explanation for their default. Their explanation should in my view have canvassed the circumstances in which the Applicants left the premises, who currently occupies the premises, what arrangements were made to ensure that any documents served on or delivered for the attention of the Applicants would still reach them to the extent necessary, whether and to what extent they had given notice of a change of *domicilium* address, and questions of that nature. Absent a detailed and candid summary of these facts I would not in any event have been satisfied that the Applicants had shown a reasonable explanation for their default. Nor have they shown a bona fide defence to the claim. In the circumstances, it seems to me, this is a matter in which the application is made with the intention of merely delaying the Respondent's claim rather than seeking to ventilate legitimate defences to it.

26. As regards the warrant of execution, the facts show that there was indeed an error in the formulation of the order made by this Court on 26 November 2019. I am satisfied on the evidence before me that the error was a typist error, and that the order was in fact made in the form as subsequently corrected on 22 July 2021. This was, however, after the second writ of execution, which was issued on 8 April 2021. In those circumstances, it seems to me, that writ should be set aside and any execution should proceed on the basis of the correctly formulated order.

27. As regards costs, the Applicants sought costs *de bonis propiis* on the attorney and client scale. They based this on a range of allegations of improper conduct by Mr Winterton. The Respondent, for their part, sought a punitive cost order against the Second Applicant for making vexatious and scandalous allegations against Mr Winterton in the founding affidavit.

28. In my view the allegations and counter allegations do little credit to either of the attorneys involved or to the Second Applicant. It is so that Mr Winterton should not have sought to execute on the strength of an incorrectly typed order, albeit the

mistakes were those of a typist. Mr Woolf, on the other hand, had no reasonable grounds for demanding that the Respondent should seek rescission of the order or that his own analysis of alleged deficiencies in the pleadings was dispositive of the matter. The suggestion that the order granted was a nullity in light of those deficiencies was groundless.

29. Ultimately this is a matter in which unnecessary litigation has been generated that is disproportionate in volume and intensity to the underlying issue. The Applicants have secured an order setting aside the warrant issued in reliance on the incorrectly formulated order, but the Respondent remain entitled to execute the order as subsequently amended. The Respondent has been substantially successful and it seems to me that it is entitled to an order for a proportion of its costs.

ORDER

In the circumstances I make the following orders:

29.1 The warrant of execution issued by the Registrar dated 8 April 2021 is set aside.

29.2 The application to rescind the default judgment order granted on 26 November 2019 is dismissed.

29.3 The Applicants are to pay 75% of the Respondent's costs, jointly and severally, the one paying the other to be absolved.

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C Todd

Acting Judge of the High Court of South Africa.

REFERENCES

For the Applicants:	Mr. Howard S Woolf
Instructed by:	Howard S Woolf Attorneys
For the Respondents:	Adv. S Aucamp
Instructed by:	Smit Jones & Pratt
Judgment reserved:	16 August 2022
Judgment delivered:	24 August 2022