IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

20 March 2023

DATE SIGNATURE

CASE NUMBER: 54103/2012

In the matter between:

SHACKLETON CREDIT MANAGEMENT CC	APPLICANT
and	
STANDARD BANK of SOUTH AFRICA LTD	1st RESPONDENT
MZANZI BED AND LOUNGE MANUFACTURERS CC	2nd RESPONDENT
FAADHIL ADAMS	3rd RESPONDENT

In Re

FAADHIL ADAMS	APPLICANT
and	
SHACKLETON CREDIT MANAGEMENT CC	1st RESPONDENT
STANDARD BANK of SOUTH AFRICA LTD	2nd RESPONDENT

MZANZI BED AND LOUNGE MANUFACTURERS CC 3rd RESPONDENT

SUMMARY: *Notice of Motion- Two applications- (a) Entry of monetary judgment in terms of Rule 41 (4) of the Uniform Rules. (b) Rescission application – Requirements for rescission. Whether the Settlement Agreement constitutes novation- test for novation. Whether the debt has prescribed in terms of the Prescription Act 68 of 1969.*

ORDER

HELD: The main application is granted in terms of Rule 41(4). Applicant is substituted as Plaintiff in the above proceedings.
HELD: Judgment is granted against the third respondent in the sum of R134 287,96 ((one hundred and thirty four thousand two hundred and eighty seven rand and ninety six cents) plus interest at the rate of 21% per annum calculated daily and compounded monthly in arrears from 15 August 2014 to date of final payment. Third respondent is ordered to pay costs of suit.
HELD: The counter- application is dismissed with costs.

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] There are two applications before this court. In the main application the applicant seeks the following relief-

‘1. *That the Applicant be substituted as the Plaintiff in the above proceedings;*

2. That the Deed of Settlement annexed to the founding affidavit marked ‘B’ is made an order of the above Honourable Court;

3. That judgment is granted against the Third Respondent in the sum of R 134 287,96 plus interest thereon at the rate of 21%from 15 August 2014;

4. Costs of suit.

5. Further and or alternative relief.’

[2] The counter- application is lodged by the third respondent to the main application in which he seeks the following relief-

‘1. Staying the application to compel set down for hearing on 30 May 2022 pending the outcome of this rescission application.

2. Rescinding the Court Order made by the Honourable Madam Justice Molefe on 21

November 2012 under case number 54103/2012;

3. Declaring that the debt, in respect of the Settlement Agreement concluded on 21 November 2012, has prescribed;

4. The applicant (in the main application) is to pay the costs;

5. Further and / or alternative relief.'

[3] In the main application, the applicant is Shackleton Credit Management CC. The first respondent is Standard Bank of South Africa Limited, the second respondent is Mzanzi Bed and Lounge Manufacturers CC and the third respondent is Faadhil Adams. In the counter-application, the applicant is Faadhil Adams, who is the third respondent on the main application. The first respondent is Shackleton Credit Management CC, the second respondent is Standard Bank of South Africa Limited and the third respondent is Mzanzi Bed and Lounge Manufacturers CC. Adv. Stevenston appears on behalf of the applicant (in the main application) and Adv. Brammer appears on behalf of the third respondent (in the main application). For ease of reference, the parties in both applications are referred to as cited in the main application.

[4] For purposes of convenience I will deal with the two applications separately on the basis that they are mutually destructive[1]. The most expedient and practical manner of dealing with this conundrum is to deal with the main application first and thereafter deal with the counter- application.

FACTUAL BACKGROUND:

[5] . The factual background leading to both applications is interlinked. On 17 September 2012, the first respondent Standard Bank of South Africa Limited issued summons against the second respondent, Mzanzi Bed and Lounge Manufacturers CC and the third respondent, Faadhil Adams. The claim was for the payment of a sum of R181 439, 11 (one hundred and eighty one thousand, four hundred and thirty nine rand and eleven cents) plus interest on the sum at the rate of 21% per annum.

[6] The salient facts are that monies were loaned to the second respondent after it opened a business account with the first respondent. The third respondent bound himself as surety and co- principal debtor in solidum for the second respondent's indebtedness to the first respondent.

[1]These two applications are mutually exclusive, each one with different jurisdictional requirements. The Court is called upon to enter judgment in terms of Rule 41(4) of the Uniform rules while it is called upon to rescind the very judgment in which the main application is based.

The second respondent defaulted in making payment resulting in the first respondent applying for summary judgment. The application for summary judgment was set down for hearing on 21 November 2012. On that day a Settlement Agreement was entered into between the first respondent and the second and third respondents which agreement was made an order of court on 21 November 2012. The terms of the Settlement Agreement were that the second and third respondents undertook to repay the debt as reflected in the summons by making monthly repayments in the sum of R20 000 (twenty thousand rand) commencing on 25 October 2012 until the debt was fully repaid. The second and third respondents defaulted and only repaid an amount of R63 836, 36 (sixty three thousand rand eight hundred and thirty six rand and thirty six cents). On 28 February 2015 the second respondent was deregistered.

[7] Subsequently on 22 December 2017, the first respondent then ceded all its right to the book debts including the debt owed by the second and third respondents to the applicant (Shackleton Credit Management CC). On 4 February 2019, the applicant was granted an order by Mngqibisa-Thuli which substituted it as plaintiff and making the Settlement Agreement an order of Court together with entry of judgment. That order was rescinded on 8 September 2020 by Avvokoumides AJ prompting the applicant to lodge the current application. The third respondent lodged a separate counter- application to rescind the court order dated 21 November 2012.

MAIN APPLICATION:

Applicant's case:

[8] The applicant's case in the main is based on the evidence by Ms Nikita Groenewald and Mr Jeremy Andrew Brink. In the founding affidavit, Ms Groenewald states that pursuant to the written cession agreement that was concluded on 22 December 2017 between the applicant and the first respondent, all files pertaining to the outstanding debt by the second and third respondents were placed in possession of the applicant's attorney of record. During the course of her employment she had access to the files and personally inspected them. She avers that she personally investigated the indebtedness of the second and third respondents to the applicant. She states that the purpose of the application is to have the deed of settlement be made an order of Court and to enter judgment in favour of the applicant against the third respondent. The averments by Ms Groenewald are that on 21 November 2012 the parties entered into a written deed of settlement which was made an order of Court on the same day

without entry of judgment being recorded. The Settlement Agreement was concluded as a result of the breach of a credit agreement. The material terms of such agreement were that the second and the third respondents would pay monthly instalments of twenty thousand rand with effect from 25 October 2012 until the amount was paid in full.

[9] Ms Groenewald states that she perused the bank account statements and found that the second and third respondents effected three payments in the sum of twenty thousand rand which were made on 5 November 2012, 1 December 2012 and 18 January 20113. On 15 August 2014 one payment in the sum of three thousand eight hundred and thirty six rand and thirty six cents was made. The second and third respondents were in breach of the Settlement Agreement and are liable to the applicant in the sum of R134 287, 96 (one hundred and thirty four thousand two hundred and eighty seven rand and ninety six cents). She states that the second respondent has been deregistered and judgment against it would be unenforceable.

[10] Mr Jeremy Andrew Brink who deposed to a replying affidavit avers that he is duly authorised to represent the applicant in the proceedings and that the facts are within his own personal knowledge and belief. He states that by signing the Settlement Agreement, the third respondent agreed to the terms thereof and agreed that the applicant would be entitled to apply for entry of judgment in terms of Rule 41(4). He makes further averments avers that the third respondent disregarded the time periods in terms of Rule 6 to notify the applicant of the intention to oppose the application. He states that the third respondent failed to apply for condonation as stipulated in Rule 27. He avers that the applicant has not agreed to condone the late filing of the third respondent's answering affidavit. In respect to the issue of transferring the matter to the Magistrates' Court, the order of Avvakoumides AJ does not compel the applicant to do so. Mr Brink states that the action was filed in 2012 when the outstanding amount was above the Magistrates' Court limit. He denies that the debt has prescribed on the basis that summons were served on the second and third respondents on 1 October 2012. He states that when the Settlement Agreement was signed, it was made an order of Court which amounted to an interim judgment and the prescription period for Court Order is 30 years. He avers also that when the applicant took cession, it approached the Court in 2019 and obtained a judgment the proceedings were still before the Court in 2019.

[11] Mr Brink states that by signing the application form for the account and the surety, the third respondent committed to service the debt in respect of the business account. He avers that by signing the suretyship and the Settlement Agreement, the third respondent took

responsibility to service the debt. The averment is that the applicant did not intend to give up its rights by novating the original cause of action instead it amplified the rights by having the Settlement Agreement made an order of Court. He states that the Settlement Agreement did not amount to a compromise as it provides that the entry of judgment would be in terms provided in the summons. The reference to 'give and take' is denied and Mr Brink avers that the amount owed was not reduced and it was a payment arrangement.

Respondent's case:

[12] In opposition, the third respondent states in the answering affidavit that the affidavit is filed in terms of Rule 41 (4) and avers that the debt has prescribed. He states that the applicant on a previous occasion on an ex parte basis obtained judgment against him on 4 February 2019 which was subsequently set aside. During the rescission hearing, Avvoukomides AJ suggested to the parties that the matter should be referred to the Magistrate Court. The application for transfer was not forthcoming. He states that the second respondent was a close corporation which was operated by his father while being a student he was requested to stand as surety for the credit provided to the second respondent which he did. During 13 February 2012 the second respondent opened a business account with the first respondent (Standard Bank of South Africa). On 17 September 2012 action was instituted against the second respondent for payment of an overdrawn amount on the business account. He states that during a summary judgment the parties entered into a settlement agreement which was made an order of court. He states that the Settlement Agreement was negotiated between the first respondent, his father and legal counsel and he was not present during the proceedings. He agreed to sign the Settlement Agreement on the basis that the terms be recorded without entry of judgment and it was never the intention that the settlement agreement would constitute a judgment debt.

[13] He states that his father assured him that the matter was resolved and he would not be liable for the debts of the second respondent. He avers that to his knowledge, his father settled the debt. The second respondent was deregistered on 28 February 2015. On 27 February 2020 he was informed that judgment had been entered against him for the outstanding debt. He avers that his father made monthly repayments of twenty thousand on 5 November 2012, 1 December 2012 and 18 January 2013 where after the payment stopped. He states that on 5 March 2015 the first respondent wrote off the outstanding debt which was one hundred and thirty eight thousand one hundred and twenty four rand and thirty two cents and waived the

debt owed in terms of the Settlement Agreement. The report from his father was that his father entered into a new agreement with the first respondent and the terms of the new agreement was that his father would pay three thousand eight hundred and thirty six rand and thirty six cents. He avers that neither he nor the second respondent agreed to any new payment agreement.

[14] He avers that during the rescission proceedings he obtained the court file under case 30749/2017 which the applicant makes no mention of where an undertaking was made to deduct the cost of the action from the debt. He states that when the debt was ceded to the applicant, the debt had already prescribed. He states that the Settlement Agreement entered into between the parties amounted to a transactio as it gave rise to a new distinct debt which had the effect of res judicata. According to the third respondent, there was a reciprocal give and take of rights and obligations from both parties. He states that the debt prescribed on or about March 2016 and prays for the dismissal of the application.

Issues for determination:

[15] These are two issues for determination in the main application-

1. Whether or not the Settlement Agreement constituted a compromise and was therefore a novation.
2. Whether or not the debt has prescribed.

Submissions:

[16] All submissions made and authorities relied upon I have considered. On the issue whether or not the Settlement Agreement dated 21 November 2012 constituted a novation, Counsel for the applicant contends that the third respondent concedes that the amount is owed. Counsel argues that the Settlement Agreement was not a novation as there was no clear evidence of a novation. The submission is that the negotiations between the original plaintiff (Standard Bank of South Africa Limited) and the defendants were directed at restructuring an admitted liability which did not amount to a compromise. The parties did not intend to novate existing rights.

[17] Counsel for the applicant submits that an agreement to pay at a certain time is not a novation and relies on ***Carter Trading (Pty) Ltd v Blignaut 2010 (2) SA 46 (ECP***). The facts of

that matter are that the application was for summary judgment for amounts due in terms of an acknowledgment of debt which was concluded for goods sold and delivered. The issue in that matter was whether an acknowledgement of debt is a credit agreement or not. The court in that matter held that an acknowledgement of debt was in fact a credit agreement. Based on the facts of that matter, at para [25] the court found that an acknowledgement of debt was not a novation.

[18] Counsel argues that a novation must be clear and unequivocal and there is a presumption against novation. To substantiate this argument plaintiff places reliance to ***Rodel Financial Services (Pty) Ltd v Naidoo and Another 2013 (3 SA 151 (KZD)*** where at para [10] the court held that since novation involves a waiver of right there is a presumption against novation and the onus is on the party asserting such.

[19] Counsel for the third respondent contends that the Settlement Agreement constituted a compromise between the parties unless it is expressly recorded that the parties will go back to the original cause of action. Counsel argues that the applicant relies on the Settlement Agreement which was erroneously made an order of court and the plaintiff was not a contracting party to the Settlement Agreement therefore is not in a position to the intentions of the parties. Counsel argues that the reference to the words 'settlement of the matter', the intention of the parties to be looked at and referred to ***Tesven CC and Another v South African Bank of Athens 2000 (1) SA 268 (SCA).*** The contention is that a novation was concluded with the first respondent (Standard Bank of South Africa). Counsel argues that the summons are stale and referred to ***Mohlomi v Minister of Defence 1997 (1) SA 124 (CC).***

[20] The third respondent raises as a *point in limine* on the correct interpretation of the applicant's founding affidavit as deposed to by Ms Groenewald as well as the notice of motion which reflects that the applicant was in doubt about the validity of the Court order granted on 21 November 2012. Another submission is that the applicant should make a formal application withdrawing the affidavit which contains an error rather than to file a supplementary affidavit. The contention is that the supplementary affidavit is not able to amend the evidence given by Ms Groenewald whose affidavit is premised on the words that the facts are within personal knowledge and belief true and correct. The argument is that based on the applicant's failure to meet the requirements to withdraw evidence, the supplementary affidavit ought not to be considered.

[21] On the issue whether or not the claim has prescribed, Counsel for the applicant argues that the issuing of summons interrupted prescription. The contention further is that that case is still pending which interrupts prescription. Counsel places reliant on ***Cadac (Pty) Ltd v Weber – Stephen Products Company and Others 2011 (3) SA 570 (SCA)*** para [19 the Court held the notice of motion was a process instituted as a step in the enforcement of a claim for payment which found the application of section 15 (1) of the Prescription Act 68 of 1969.

Applicable legal principles:

[22] The main application is premised on the provisions of Rule 41 (4) which provides- '*Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties.'*

[23] One of the defences that the third respondent is raising to the application is that the debt has prescribed. In terms of the Prescription Act 68 of 1969, a debtor has a specific period of time within which to institute a claim. The Prescription Act makes provision for different categories of claim which has specific prescription periods[2]. Prescription begins to run as soon as a debt is due and a debt is said to be due when it is immediately enforceable by the creditor and immediately payable by the debtor[3]. Prescription will begin to run only when the creditor is in a position to enforce his right. Extinctive prescription involves two enquiries to wit firstly the determination of primary facts and secondly ascertainment of when the primary facts were known or should have been known.[4]

[24] In ***Truter v Deysel 2006 (4) SA 168 (SCA***) para 15 it was held 'A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.'

[2]See section 11.
[3]See *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd 2017 (1) SA (SCA*) para 24.
[4]See *MEC for Health, Western Cape v MC (1087/2019) [2020] ZASCA 165 (10 December 2020* para 8.

[25] Another defence to the application is that the Settlement Agreement constitutes a novation. There is a presumption against novation because it involves a waiver of existing rights[5]. A novation entails that parties replace a valid contract with another valid contract. In ***Acacia Mines Ltd v Boshoff1958 (4) SA 330 (A) at 337 D*** it was held that novation is a question of intention. Trengove AJA in ***Swadif v Dyke 1978 (1) SA 928 (A)*** at 940G expressed similar sentiments when he stated that novation is essentially a matter of intention and consensus. The onus of proving novation rests with the party alleging novation[6]. The legal principle is that the passage of time to pay does not in itself amount to novation.[7]

[26] The test to determine if a novation has taken place was compounded in ***Prinsloo v Derksen and Others (32705/2005) [2007] ZAGPHC 96 (7 June 2007***) para 15 where Mavundla J held 'In order to determine whether by concluding the subsequent contract, there was a novation, it is necessary, in my view, to consider whether such contract obliterated the rights and obligations that were created by the original contract.'

Evaluation:

[27] I deem it necessary to first deal with certain aspects which were raised in the evidence including *the point in limine* raised by the third respondent that this court should not consider the supplementary affidavit. Mr Brink raised the issue that the third respondent failed to apply for condonation as stipulated in Rule 27 and that the applicant has not agreed to condone the late filing of the third respondent's answering affidavit. When the matter was heard, the applicant abandoned the non- compliance with Rule 27 and proceeded with the merit of the main application.

[28] *The point in limine* of the supplementary affidavit deposed to by Ms De Combes which the third respondent takes issue with and states that it constituted an abuse of process as it was not deposed to by Ms Groenewald. It is trite that in motion proceedings three sets of affidavits are filed. The Court has discretion to allow the filing of further affidavits. The proper function of the Court is to adjudicate disputes between litigants who have real grievances and to see to it that justice is done.[8] Litigants and legal practitioners should strive to observe Rules of Court for the proper administration of justice. The Court even had discretion to condone non-

[5]See *Van Coppenhagen v Van Coppenhagen 1947 (1) SA 576 (T)* at 578 to 581.
[6]See *Barclays National Bank Ltd v Smith 1975 (4) SA 675* at 683 C-D.
[7]See *Barclays* supra at 684B.
[8]See *Khunou and Others v Fihrer & Sont1982 (3) SA (WLD)..*

compliance with Rules, if this will ensure that there is proper ventilation of issue. Depending on the facts, issues and prejudice, the Court in the exercise of its discretion may condone the failure to seek leave for filing of further affidavits or regard the affidavit as *pro non scripto*.[9]

[29] In ***Standard Bank of South Africa Ltd v Sewpersadh and Another 2005 (4) SA 148 (C)*** para [13] Dlodlo J held 'Clearly a litigant who wishes to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Court's file (as it appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as pro non scripto.' I share the same sentiments. I have observed that a supplementary affidavit was purportedly filed by Ms De Combes without consent of the parties and without the leave of the Court. The third respondent rightfully so, has taken issue with this supplementary affidavit and implores this court to disregard it. It is trite law that 'a litigant who wishes to file a further affidavit must make formal application for leave to do so.' Consequently, I exercise my discretion to disregard supplementary the affidavit for the purposes of this application.

[30] On the merit of the main application, it is common cause that the parties signed the Settlement Agreement on 21 November 2012 for the repayment of the principal debt which was made an order of Court. It is common cause that the Settlement Agreement contained a substantive condition in a form of monthly repayments. It is also common cause that there was a default resulting in an outstanding amount of R134 287, 96 (one hundred and thirty four thousand, two hundred and eighty seven rand and ninety six cents).

[31] The third respondent avers that the Settlement Agreement constitutes a novation. I am mindful that a Settlement Agreement by its very nature is a contract of the parties who reduce the terms as agreed upon into writing. Counsel for the third respondent argues that the Settlement Agreement constituted a transactio. The third respondent's version is that it was not the intention of the parties to have entered judgment on the Settlement Agreement and refers to ***Gollach Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others 1978 (1) SA 914 SA (A)***. The legal principle in ***Gollach*** in respect of a mistake cannot be faulted

[32] All the parties to the Settlement Agreement which was concluded on 21 November 2012 agreed that in the event of a default, the first respondent will be entitled to pursue its rights

[9]See *Meropa Communications (Pty) Ltd & Another v Verb Media (Pty) Ltd (29646/2016*) [2017] ZAGPJHC 464(11 August 2017) para 9.

in terms of Rule 41(4). The first respondent ceded over all rights to the debt owed by the second and third respondents to the applicant. When the first respondent transferred all rights to the debts to the applicant by means of the written cession agreement over to the applicant (the terms of such cession proves same to be an absolute cession agreement), the applicant obtained the right to invoke Rule 41 (4). The parties agreed on Rule 41(4) as expressed on the Settlement Agreement to wit-'*In the event that the Dependants fail to comply with any of the terms hereof timeously, Plaintiff shall be entitled to apply in terms of Rule 41(4) for entry of judgment in terms of the prayers contained in the summons filed herein without further notice to the Defendant.'*

[33] The third respondent contends that it was never the intention of the parties to make the Settlement Agreement an order of Court prompting the application of legal principles on interpretation of documents including court orders. See ***Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) Sa 593(SCA)*** para [8]. The third respondent avers in his answering affidavit '*It was therefore never the intention, nor was it agreed, that the settlement agreement would constitute a judgment debt*.' The mere fact that the parties opted to invite the Court into the proceedings rather than to settle out of court is relevant and material. See ***Zweni v Minister of Law and Order 1993(1) SA 523 (A)*** para [12] it was held 'In determining the nature and effect of a judicial pronouncement "not merely the form of the order must be considered but also and predominantly, its effect'. The Court in ***Zweni*** proceeded to outline the general principle of a judgement or order and held 'A "judgment or order" is a decision which, as a general principle, has three attributes, first the decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.' The interpretation I am giving to the Settlement Agreement dated 21 November 2012 applying the general principle or what a judgment or order is, it is my view that all three attributes find application. The parties invited the Court to note the terms of the Settlement Agreement rather than settling out of court. The parties wanted to dispose of a substantial portion of the relief claimed.

[34] The third respondent in his answering affidavit avers as follows 'To the best of my knowledge my father had settled the debt with Standard Bank years ago'. On the other hand he avers 'My father made monthly repayments of R20 000 towards the outstanding debt on 5 November 2012 (IB payment from Aboo Patel), 1 December 2012 ("cash deposit") and 18 January 2013 ("cash deposit"), thereafter the payments in terms of the settlement agreement

ostensibly stopped.' These contentions cause as a probability that the third respondent was aware about the debt. I find the contention that a new agreement was concluded for the payment of three thousand eight hundred and thirty six rand and thirty six cents to be improbable and not persuasive.

[35] . The third respondent's own version is that he was not present during the proceeding which gave rise to the Settlement Agreement even though he signed it yet surprisingly he attests that the Settlement Agreement came as a result of 'give and take' of rights and obligation. In any event, the contention that there was give and take is speculative and not substantiated by any credible evidence. The contention is therefore not persuasive on the basis that the agreement is for the repayment of the same amount of debt owed. I am persuaded by the applicant's contention that the Settlement Agreement enhanced it's the rights to the debt.

[36] The third respondent contends that the debt has prescribed and has referred to ***SA v JHA 2022 (3) SA149 (SCA)*** which was dealing with extinctive prescription relating to maintenance orders. In that matter, the Supreme Court of Appeal correctly held that a maintenance order is a judgment debt subject to 30 year prescription period. I am persuaded that the debt has not prescribed on the basis that it was a court order. It is improbable that the parties legal representative would have left the alleged glaring error on the Court Order to continue when the facts were fresh and also contrary to their respective mandates. The probability is that the parties intended to have the Settlement Agreement an order of Court from its inception.

[37] The third respondent has referred to ***Tesven CC and Another v South African Bank of Athens 2000 (1) SA 268 (SCA).*** The issues and facts in that matter are distinguishable from the issues and facts in these proceeding. Only the third respondent contends that it was a mistake to enter the Settlement Agreement as a judgment while in the ***Tesven*** matter it appears that the parties laboured under error relating to the oral part of the agreement. One material difference is that the deed of surety signed in the ***Tesven*** was conditional and limited to five hundred thousand rand.

[38] To sum up, the contention that it was not the intention of the parties to make the Settlement Agreement an order of court stands in contrast to the words *'having heard the counsels for the parties'* which appears in the Court Order dated 21 November 2012. The legal representatives made submissions to the court a quo on the strength of which the Settlement

Agreement was made an order of Court. The context and interpretation to the term ‘without entry of judgment’ was conditional- it was dependant on the payment being fulfilled not that there was never an intention to make the Settlement Agreement an order of Court. It is common cause that there was default. The only reasonable inference I can draw in view of the agreement incorporating Rule 41 (4) is that the parties intended the entry of judgment to be made at the time the agreement was concluded upon default.

[39] Having considered the various authorities cited by the third respondent, the submissions made and the evidence, I am not convinced by the version that the Settlement Agreement constitutes a novation. This is on the basis that nothing suggests that the obligations have been obliterated, instead the evidence and the facts prove that the first respondent and later the applicant have always pursued the obligations that were contained in the original agreement. It is clear that the Settlement Agreement instead of obliterating the debt it enforced it hence the reference to the summons.

[40] The defence that the debt has prescribed is without merit for the simple reason that the Settlement Agreement on the facts of this matter constitutes an order of court thereby falls within the ambit of section 11 (a) (ii) of the Prescription Act 68 of 1969.

Conclusion:

[41] In conclusion, on the issue whether or not the Settlement Agreement constituted a compromise and was therefore a novation, I find that the third respondent has failed to prove that it was the intention of parties to conclude a novation. On the issue whether or not the debt has prescribed, I am satisfied that third respondent who has the onus to prove novation has failed to prove that the Settlement Agreement constitutes a novation. I am satisfied that the debt has not prescribed on the basis that the Settlement Agreement constitutes a court order subject to section 11(a) (ii) of the Prescription Act 68 of 1969. I am satisfied that the applicant has made a case for entry of judgment.

Costs:

[42] The basic principles on costs are that the Court has a discretion which has to be exercised judicially and costs follow the course. In this matter a just and equitable cost award is that the third respondent (Faadhil Adams) pays costs on a party and party scale.

Order:

[43] In the circumstances the following order is made:

(1) The application is granted in terms of Rule 41 (4). The applicant is substituted as Plaintiff in the proceedings.

(2) Judgment is granted against the third respondent in the sum of R134 287, 96 (one hundred and thirty four thousand two hundred and eighty seven rand and ninety six cents) plus interest at the rate of 21% per annum calculated daily and compounded monthly in arrears from 15 August 2014 to date of final payment.

(3) Third respondent is ordered to pay costs of suit.

COUNTER- APPLICATION:

Third respondent's case:

[1] In his founding affidavit the third respondent avers that the facts are within his personal knowledge and belief. He sets out the background and states that on 1 March 2010 his father wanted to open a business and needed him to register the business in his name which he did as a dutiful son. He states that it is for that reason he was registered as the sole member of Mzanzi[10]. On 13 February 2012 his father opened a business account with Standard Bank (first respondent) in the capacity as a de facto director of Mzanzi and his father signed an agreement for overdraft while he signed as surety as sole member of Mzanzi. Mzanzi fell into arrears which prompted Standard Bank to lodge proceedings which culminated in the matter being set down for summary judgment. Prior to the hearing, a Settlement Agreement was entered into and he was assisted by a legal representative, Farhaana Suder.

[2] He avers that it was agreed that the Settlement Agreement was recorded without entry of judgment and expressly recorded that the terms represent a settlement between the parties. He states that fact that the Settlement Agreement contained a repayment plan does not negate the fact that it was expressly contracted to be a settlement which altered the obligations which were created and upon which the application had been instituted. He avers that the Settlement Agreement constituted a compromise alternatively a novation. On 21 November 2012 the

[10] The founding affidavit reflects Mzanzi- the abbreviated name for Mzanzi Bed and Lounge Manufacturers CC.

Settlement Agreement was signed and it came before AJ Molefe who recorded that the Settlement Agreement was made an order of Court. He states that he did not instruct his legal representative to have the Settlement Agreement made an order and he would not have signed as he was under the belief that it would not be made an order of Court. It was the intention of all the parties as can be seen from the plain reading of the Settlement Agreement.

[3] He believes that had the learned Judge been made aware of this term, the 2012 Court Order would not have been made and it was granted erroneously. He avers that he was oblivious that the Settlement Agreement was made an order of Court. He believed that his father was adhering to the payments. He states that he has never been involved in the day to day business of Mzanzi. On 22 December 2017 Standard Bank (first respondent) ceded the debt to the applicant. The applicant instituted action proceedings against Mzanzi under case 30749/2017 which was eventually withdrawn. The applicant brought an ex parte application under case 54103/2012 and on 4 February 2019 Judge Mngqibisa- Thuli granted the order. He was astonished to learn on 27 February 2020 when he was contacted by the applicant's legal representative that judgment was entered against him and informed that an application for sequestration was being prepared and he sought legal advice. The country went into national lockdown and not further steps were taken. When the country entered into level 4 of the national lockdown, the applicant addressed a letter to his attorneys of record but to an administrative oversight, the letter was never made available to him. He states that he was taken aback when he was notified by his bank on 2 June 2020 that his bank accounts had been blocked and the applicant had obtained a garnishee order against his salary.

[4] An urgent application was brought before Acting Judge Avvakoumides on 8 September 2020 which rescinded an order that was granted on 4 February 2019. He requests that the lengthy time period be condoned and explains that he approached Ms Ferreira in December 2021 who considered the matter and instructed counsel during January 2022 and counsel eventually advised Ms Ferreira that she did not have capacity to attend to this application. Ms Ferreira instructed a new counsel during the first week of March 2022. He avers that while he successfully obtained a rescission of the 2019 order, the legal advice did not raise the issue of the 2012 Court Order he only became aware after instructing Ms Ferreira in December 2021.

[5] He states as reasons for rescission that the 2012 Court Order superseded the parties contractual intention and inadvertently interfered with the parties' right to contract and the sanctity thereof. He avers that the rescission is sought on reasonable and bona fide grounds.

He indicates that he is being held liable for a debt which arose as a result of the conclusion of the Settlement Agreement entered into on 20 October 2012. The parties agreed to settle the dispute thus bringing the litigation to an end and the Settlement Agreement is a new cause of action and the last payment was made on 15 August 2014. He states further that had the Settlement Agreement not been made an order of Court, the debt would have prescribed on 14 August 2017. The Settlement Agreement created a debt per section 11 (d) of the Prescription Act 68 of 1969, however the Settlement Agreement was mistakenly made an order of Court it would constitute a judgment debt which prescribes in 30 years. The debt that the applicant seeks to enforce has prescribed.

[6] The third respondent in the replying affidavit avers that he agreed to sign as surety and he was twenty one years old and a third year student and had no involvement with the day to day management of the business. He states that he trusted his father who was an experienced businessman and relied solely on his father's business acumen. He avers that he was raised in the Islamic faith and culture wherein the fathers are the heads of their households and it did not occur to him to question his father's request. This was not done. He became the sole member of the second respondent (Mzanzi) which failed to repay the debt which had accrued. Subsequently to having concluded the Settlement Agreement in 2012 his father told him that he would make requisite payments and he had no reason to doubt his father who had always provided for their family. He states that for ten years he remained under the impression that the debt was being paid or had been paid. He believed that had the contrary been true his father would have alerted him. He avers that when the Settlement Agreement was entered into, the matter was settled prior to the filing of opposing papers and the content of his defence was not filed.

[7] He states that it was his belief that the defence of reckless credit was sufficient to overcome a summary judgment application and that a settlement was convenient for all parties. He avers that the terms of the Settlement Agreement replaced the original Agreement and the Settlement Agreement made provision for payments by way of instalment in addition there was a change in the interest charged to be at a prevailing rate of 8.5 %. He states that the 21% interest rate was only in the event of default. He states that the applicant was not a party to the proceedings and cannot attest to what had transpired. He is in a position to state that the intention of the parties was to novate the original agreement. He states that the judgment had not been entered and the debt was not a judgment debt and it falls to prescribe within three years. He denies that he seeks to delay the court process. He states that the applicant cannot

speak to the bona fide error made the erstwhile attorney as they were not party to the original agreement. He states that the applicant should not have used the case number 54103/2012 as the matter was concluded by the Settlement Agreement and any process is *res judicata*. He avers that the TransUnion report shows that he respects and adheres to his financial obligations.

[8] Mr Mugamat Shafik Adams in the confirmatory affidavit avers that the facts falls within his personal knowledge and are true and correct. Having perused the founding affidavit and the annexures he confirms the contents as it relates to him.

Applicant's case:

[9] In opposition to the counter –application, the applicant has filed an answering affidavit deposed to by Ms Victoria Lynne Bissett who avers that she is duly authorised to represent the applicant and that the facts and allegations are within her personal knowledge and belief. She had access to the file pertaining to this matter and has personally investigated the indebtedness of the third respondent to the applicant. She states that she finds the third respondent's version implausible. She avers that before the hearing of the application for summary judgment, the parties concluded a Settlement Agreement which constituted a repayment arrangement in respect of the principal debt which agreement was recorded to be without entry of judgment. Agreement concluded on the day of the hearing by making such agreement an order of court. On the third respondent's contention that the order was granted erroneously, Ms Bissett avers that this is denied by the applicant. She states that it was highly unlikely that the legal representative of the second respondent would have made an order of Court without the consent or knowledge of the legal representatives of the first respondent and the principal debtor.

[10] She states that it is a common practice to record terms of a Settlement concluded on the day of the hearing by making such agreement an order of court. The 2012 order simply recorded the agreement of the parties to ensure strict adherence. She states that there is no evidence that a novation was concluded rather there was acknowledgement of liability. There is no intention either tacit or express to novate the original cause of action, the Settlement Agreement strengthened the original cause of action. On the issue of non- compliance with time limits, she states that the application for rescission was made before the hearing of the application to compel which demonstrates that the application is made for the purpose of

frustrating the Court process. The third respondent waited for two years before launching the application to rescind. The third respondent has extensive knowledge in the legal field, the contention that he signed without reading is disputed. She avers that the Settlement Agreement is not a stand -alone agreement hence the use of the same case number.

[11] Ms Bissett avers that compromise depends on the intention of the parties and there is nothing in the Settlement Agreement to indicate that the parties intended the document to be a compromise and there is no common intention to replace the existing obligation for a new obligation. She states that upon the finding that there is no compromise and no novation the issue of prescription becomes moot. She avers that the words 'recorded without entry of judgment' on the Settlement Agreement did not prohibit the Court from making the Settlement Agreement an order of Court. She avers that the Acting Judge Molefe (as she was then) ordered the Settlement Agreement to be made an Order of Court and did not grant judgment. She states that the terms of the Settlement Agreement were such that on breach of terms, it would invoke entitlement for entry of judgment. The agreement was with the applicant and the principal debtor (third respondent) and it is a repayment arrangement and not a new obligation. She denies that the Settlement Agreement was made an order of Court by error.

[12] Ms De Combes in the confirmatory affidavit avers that the facts are within her personal knowledge and are correct and true. She states that she has read the affidavit deposed to by Ms Bissett and confirms the contents as they relate to her.

[13] Ms Magdalena Cornelia Ludik avers in the confirmatory affidavit that the facts are within her personal knowledge true and correct. She states that she read the affidavit by Ms Victoria Lynne Bissett and confirms the contents as they relate to the standard practice regarding the making of settlement agreement orders of court at the hearing of summary judgment applications. She refers to the correspondence in annexure 'X'.

Issue for determination:

[14] The main issue for determination is whether the third respondent has made out a case for rescission of judgment (incorporating the aspect of prescription).

Submissions:

[15] All submissions made and authorities relied upon I have considered. Counsel for the third respondent contends that the cession agreement did not interrupt the running of prescription and places reliance on ***Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd 1996 (1) SA 382 (WLD)***. Counsel argues that the applicant is attempting to rely on proceedings that have long become dormant and refers to ***Mohlomi v Minister of Defence 1997 (1) SA 124 (CC).*** The contention is that the debt arose automatically upon default and is deemed to be deferred when the debt only becomes due upon fulfilment of a condition. Counsel has referred to ***Standard Bank of South African v Miracle Mile Investments 67 (Pty) Ltd and Another 2017 (1) SA 185 (SCA).***

[16] Counsel for the applicant submits that there is no version from the third respondent's attorney at that relevant time what their instructions were. The issue of the Settlement Agreement made an order of Court was not mentioned in the previous rescission application. Counsel for the applicant argues that the Settlement Agreement is a payment plan not a novation.

[17] Counsel for the third respondent submits that the third respondent has explained why he took long to make the application. The contention further is that the third respondent has made out a proper case for rescission and has referred to ***Occupiers, Berea v D Wet NO and Another 2017 (5) SA 346 (CC).*** Counsel prays for punitive cost order against the applicant.

Applicable legal principles:

[18] In the High Court a judgment may be rescinded in terms of Rule 31, Rule 42 (1) of the Uniform Rules or the Common Law.[11] The court exercises discretion to rescind a judgment in order to do justice between the parties. The mere fact that an application for rescission is brought in terms of one Rule does not mean that it cannot be entertained pursuant to another Rule or common law, provided that the jurisdictional requirements of each procedure are met. See ***Mutebwa v Mutebwa 2001(2) SA 193 (Tk)*** para [12].

[19] Rule 31 (2) (b) provides that-

'A defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause

[11] See *De Wet and Others v Western Bank Ltd 1977 (4) SA 770(T).*

shown, set aside the default judgment on such terms as to it seems meet.' Under Rule 31(2)(b) the requirements for setting aside a judgment are the following:

1. The judgment must have been granted by default due to the failure to enter appearance or a plea.
2. The application must be made within twenty days after the defendant obtains knowledge of the judgment.
3. The application must be done on notice.
4. The defendant must show good cause for the rescission of judgment.

[20] Rule 42(1) provides that-

'*The court may, in addition to any other power it may have mero motu or upon the application of any party affected, rescind or vary –*

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

(b) *An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.*

(c) *An order or judgment granted as result of a mistake common to the parties.'*

[21] In ***Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others [2021] ZACC 28*** para [53] it was stated 'It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court "may", not "must", rescind or vary its order- the rule is merely an "empowering section and does not compel the court "to set aside or rescind anything. This discretion must be exercised judicially.'

[22] Under common law, a final judgment may be rescinded for fraud, Justus error and justa causa. See ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)*** para 4. The court has a wide discretion in evaluating 'good cause' in order to ensure that justice is done. In other words, in order to succeed in a rescission application, an applicant must prove that there is 'good cause' or 'sufficient cause' to warrant rescission- an applicant must furnish a reasonable and satisfactory explanation for the default and show a bona fide defence with some prospect of success. Good cause depends on whether the two common law requirements for rescission are met.[12] An application for rescission must be lodged timeously

[12]See Zuma supra para[71].

within the stipulated time periods in the Rules and where there is non-compliance with the time periods, an application for condonation must be made.

[23] In ***Grant v Plumbers (Pty) Ltd 1949(2) SA 470 (O)*** Brink J held that in order to show good cause the following requirements should be complied –

'(a) An applicant must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance.

(b) The application must be bona fide and not made with the intention of merely delaying plaintiff's claim, and

(c) The applicant must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.'

[24] In ***Zuma*** supra para [71], the Constitutional Court held '"Good cause" depends on whether the common law requirements for rescission are met, which requirements were espoused by the erstwhile Appellate Division in Chetty, and affirmed in numerous subsequent cases, including by this Court in Fick. In that matter, this Court expressed the common law requirements thus-

"the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in the refusal of the request to rescind" Thus, the existing common law test is simple: both requirements must be met.'

[25] On the facts, it appears that the application for rescission is premised on Rule 42(1) (c). Rule 42(1) (c) has two requirements which must be satisfied- (i) there must be a common mistake which relates to the issue to be decided by the court and (ii) there must be a causal link between the common mistake and the resultant order. Pertaining to the requirement of a common mistake, in ***Tshivhase Royal Council and Another v Tshivhase and Another, Tshvhase and Another v Tshivhase and Another 1992 (4) SA 852 (AD)*** paras [36] to [37] it was held 'In relation to subrule (c) thereof, two broad requirements must be satisfied. One is that there must have been a "mistake common to the parties'. I conceive the meaning of this expression to be what is termed, in the field of contract, a common mistake. This occurs where

both parties are of one mind and share the same mistake; they are, in this regard, ad idem (see Christie: Law of Contract in South Africa, 2nd ed, 382 and 397-8). A mistake of fact would be the usual type relied on. Whether a mistake of law and of motive will suffice and whether possibly the mistake must be reasonable are not questions which, on the fact of our matter, arise. Secondly, there must be a causative link between the mistake and the grant of the order or judgment; the latter must have been "as a result of" the mistake.'

[26] In ***Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis 1992 (3) SA 234 (A)*** at 238H the Court defined a mistake as implying a misunderstanding, misrepresentation, and resultant poor judgment. I agree with this definition.

Evaluation:

[27] On the facts, Rule 31 (2) (b) does not find application. As indicated supra, it appears from the papers that the third respondent invokes Rule 42 (1) (c) for the rescission application on the basis of the averment in his founding affidavit in which he states '*That having been said, I believe that had the learned Judge been made aware of this term, the 2012 Court Order would not have granted. It was, accordingly, granted erroneously.'*

[28] The third respondent has to meet the jurisdictional requirement which is a common mistake before the application for rescission is granted in terms of Rule 42 (1) (c). Rescission application under the common law, still the third respondent has to meet the jurisdictional requirements to wit-

(i) 'To prove 'good cause' or 'sufficient cause' to warrant rescission;
(ii) To furnish a reasonable and satisfactory explanation for the default and;
(iii) To show a bona fide defence with some prospect of success.

[29] To determine whether there is merit to the application for rescission, the evidence and facts have to be assessed cumulatively. The facts clearly show that on 21 November 2012 the parties were present in court and were legally represented. The application for summary judgment was settled by means of a Settlement Agreement which was reduced into writing. At the instance and request of the parties, who requested the Settlement Agreement to be made an order of Court on the agreed terms, the Court a quo per Molefe AJ (as she was then) made the following order *'It is ordered that the Settlement Agreement made an order of Court.'*

[30] The third respondent's averments that *'I believe that had the learned Judge been made aware of this term, the 2012 Court Order would not have been granted. It was, accordingly granted erroneously'* presupposes that Acting Judge Molefe (as she was then) did not have insight to the Settlement Agreement and blindly endorsed a document. This is improbable. In relation to the contention that it was never the parties' intention to make Settlement Agreement an order of Court is in my view unfathomable. The very endorsement by the Court a quo of the Settlement Agreement, in my view changes the form of the document and makes it a judgment of the Court as settling a *lis* between the parties to wit a summary judgment. In my view, it would have been irrelevant whether the order dated 21 November 2012 had been phrased differently. The essence of the parties reaching a settlement and reducing into writing and importantly inviting the Court into the proceedings is material. The mere fact that the parties opted to invite the Court into the proceedings rather than to settle out of court is equally relevant and material in this counter-application. From the papers, I cannot discern how the Court a quo could have laboured under a mistake. The averment by the third respondent that had the learned Judge Molefe been apprised of the term, she would not have granted the order is with respect incorrect on the basis of this reference '***having heard the counsels for the parties'*** on the Court Order dated 21 November 2012. The legal representatives made submissions to the court a quo on the strength of which the Settlement Agreement was made an order of Court. The context and interpretation to the term 'without entry of judgment' was conditional- it was dependant on the payment being fulfilled which was not done.

[31] Applying the provisions of Rule 42(1) (c), the third respondent's contention that the Court a quo erroneously made the Settlement Agreement an order of Court is not persuasive for the following reasons-

a) The Court Order reflects as follows '*Having heard counsel(s) for the party(ies) and having read the documents filed on record'* which proves (by applying trite principles of interpretation[13]), that the Court a quo had read the document which was the Settlement Agreement. The only reasonable inference I can draw is that the Court a quo was well appraised about the document it had before it. There is no credible evidence on which a finding of mistake can be made.

b) It is further unlikely that the first respondent (Standard Bank of South Africa Limited), the legal representatives together with the Court a quo all were operating under a common mistake of what the real intention of the parties was.

[13]See *Firestone South Africa (Pty) Limited v Gentiruco AG 1977 (4) SA 298 (A)* at 309.

c) At the very least, accepting for a moment the third respondent's version that he operated under a mistake (which is not persuasive because the terms of the Settlement Agreement are clear and unambiguous), based on the third respondent's version it amounts to a unilateral mistake which is not common to the other party to the Settlement Agreement. The legal requirement under Rule 42 (1) (c) is that the mistake must be common to the parties, which should include the first respondent, the third respondent and the Court a quo. See ***Van Reenen Steel (Pty) Ltd v Smith NO and Another 2002 (4) SA 264 (SCA)*** para [7].

d) It is clear that the Court a quo made the Settlement Agreement an order of court however it was without entry to judgment as agreed upon. The terms of the Settlement Agreement were clearly read by the Court a quo. The terms clearly set out the intention of the parties. The Settlement Agreement included a substantive condition and set out what would happen in the event of failure or default. There was indeed a default which entitles the applicant to then bring the current application to enter judgment in terms of Rule 41 (4) as per agreement.

[32] Even applying principles for rescission under common law, the third respondent has failed to meet the jurisdictional requirements of giving a reasonable explanation for the default and that he has a bona fide defence with prospects of success. The reliance to the case of ***Berea*** does not assist on the facts of this matter for the simple reason that in Berea, the Constitutional Court found that there was good cause to rescind based on Justus error. The contention by Counsel for the third respondent that he has explained why he took long addresses one part of the requirement even then partially. It does not cover the full period. The third respondent requests for condonation due to the lengthy time periods. As trite, condonation is a matter of discretion of Court.[14] The third respondent in my view has not addressed fully covering the whole period. For example, having being appraised on 27 February 2020 of the intention by the applicant to seek his sequestration in the event he defaults to make payments, he does not explain what caused the delay until 26 March 2020 when the National State of Disaster was declared. The applicant duly sent a letter to the third respondent's erstwhile attorneys of record and which by his own admission an administrative oversight occurred. Remissness on the part of a legal representative may in certain circumstances not be condoned[15]. On the facts of this matter, what were the prevailing circumstances giving rise to

[14]See *Evander Caterers (Pty) Ltd v Potgieter 1970 (3) SA 312 (T).*
[15]See *Saloojee and Another v Minister of Community Development 1965 (2) SA 135 (A)* at 141C where it was stated that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence.

the administrative oversight is not adequately explained. To simply aver that there was an administrative oversight is insufficient to warrant the indulgence to grant condonation.

[33] In assessing whether the third respondent has a bona fide defence to the claim, the facts of the matter has been considered. It is my view that he does not have a valid defence. It appears to me that the third respondent wants to recant from the agreement the by the terms of which he concluded without cohesion duly assisted by a legal representative by raising a defence that there was a mistake to make it an order of court. That purported defence is not sufficient to render the Settlement Agreement as invalid thus warranting a rescission. See ***Botha v Road Accident Fund 2017 (2) SA 50 (SCA)***. In that matter, the Court a quo faced a similar issue of a party who concluded a settlement agreement and then applied for rescission which was dismissed. On appeal, the issue was whether the appellant was bound by a settlement agreement and the contention was that the court should use its discretion under Rule 42 (1) to set aside the judgment. The Court in that matter held 'But where, as here, the court's order recorded the terms of a valid settlement agreement, there is no roof for it to do so.' Applying Botha to the facts, I am not persuaded that there was a mistake in the intention.

[34] The third respondent makes several averments in support of this application which I have are assessed as follows-

[34.1] The giving the context to the phrase 'The terms of this order represents a settlement between the parties' to be a compromise and or a novation is not persuasive. There is presumption against a novation unless the intention is clear. This is on the basis that it is not reflected in the terms of the Settlement Agreement that the settlement was in relation or inclusive of the main action pr. At the very least, the settlement was in relation to the summary judgment. I cannot find any evidence to suggest or infer that the applicant waived his rights to the debt. At the very least accepting that there was a 'settlement', the agreement was putting to rest summary judgment which the parties were embroiled it and settling that *lis* of summary judgment. It cannot be correct in my view , when interpreting the contract, to mean the original cause of action was to obliterated. It is also not correct in my view when assessing all the evidence and facts to equate the settlement of summary judgment to mean a novation or compromise without clear intention. I cannot find at any given instances that the rights have been obliterated. It follows that the third respondent has failed to prove the requirement that there was a common mistake. He has also failed to prove a causal link between the common mistake and the resultant order.

[34.2] He avers that there was a change in the interest rate to 8.5% yet by applying the trite principles of interpretation on contracts, the Settlement Agreement sets out the background the interest rate reflected is 21 %. The term 'with the prevailing interest rate' can only mean the 21%. No other reasonable inference or meaning can be drawn. It follows that this averment is incorrect if not speculative. The contention that the Settlement Agreement was either a compromise or a novation due to the change in interest rate is with respect incorrect. Assessing the averment that the 21% interest rate was now changed, it is strange why the parties who have settled the issue of the new purported interest rate would revert to the 21% interest. There is no concession by the applicant that the interest rate was changed to 8.5% which shifts the probabilities towards the fact that the interest rate was never changed

[34.3] In the ordinary course in respect of Settlement Agreement, the agreement settles the lit. However, in this matter the parties chose to contract their Settlement Agreement in this unique manner by incorporating Rule 41 (4) as means of opening the avenue for the application to pursue the claim by entering judgment. Under these unique sets of facts that I find that the contention that the matter is res judicata applying the principles of res judicata to the facts is with respect not convincing.[16] The Settlement Agreement had a substantive condition in that the default will revive the matter under Rule 41 (4) on the same terms as contained in the summons. The failure to adhere to the substantive condition means that the applicant is within its rights to utilize Rule 41(4) which it has rightfully done. In view of the default of payment I am not persuaded that the *lis* came to finality.

[35] The third respondent avers that the debt has expired and Counsel for the third respondent places reliance on the ***Standard General Insurance*** supra. In that matter, the creditor Stangen did not originally claim payment of the debt. The original summons was issued by two other entities and after the amendment of the particulars of claim substituted the two entities for Stangen on the basis that they ceded their claim to Stangen. The notice of the application for amendment to substitute Stangen had been given more than three years after the debt became due. Streicher J held that by ceding the debt the two entities transferred all their rights in respect to their claim to Stangen. Importantly in that matter, by the time the amendment was applied for the debt had become prescribed. Standard General Insurance is distinguishable. In this matter, the third respondent himself concedes that the prescription period is thirty years. When the Settlement Agreement dated 21 November 2012 was placed before Molefe AJ (as she was then), it became a judgment of the court within the ambit of

[16] See *Ascendis Animal Health (Pty) Ltd v Merck Shape Dihme Corporation and Others [2019] ZACC 41* paras 69 to 71.

section 11(a) (ii) of the Prescription Act 68 of 1969. See ***Zweni v Minister of Law and Order 1993(1) SA 523 (A).*** It follows that the defence of prescription must fail.

[35] Counsel for the third respondent contends that the proceedings had become long dormant and refers to the case of ***Mohlomi*** supra quoting para [11]. The context of that paragraph was in regard to an application for condonation. In as much as I fully agree with the sentiments expressed by the Constitutional Court reliance to this quote is with respect misplaced. In this matter, the fact reflects that as soon as the debt was ceded over, the applicant acted on the debt in 2019 and 2022. I opt not to comment on the real reason that motivated the parties to reach the Settlement Agreement save to indicate that in my view the said agreement was neither a compromise nor a novation on the facts of this matter as reflected in the third respondent's founding affidavit.

Conclusion:

[37] On the issue whether the third respondent had made out a case for rescission, applying Rule 42(1(c), I am satisfied that he has failed to discharge the onus to prove the requirement of common mistake as stipulated. Even if I am wrong in this finding tha, I ascribe to the sentiments expressed in ***Wilsom Bayly Holmes (Pty) Ltd v Maeyane and Others 1995 (4) (W)*** at 344I where the Full Court held 'a common mistake relating to the existence of a particular state of affairs will not render the contract void unless it can be said that the parties expressly or tacitly agreed that the validity of the contract was conditional upon the existence of that state of affairs.' Similarly applying the common law, I am satisfied that the third respondent has failed to show that he has a bona fide defence to the applicant's claim In terms of the common law jurisdictional requirements, and has failed to prove good cause as 'Good cause depends on whether the two common law requirements for rescission are met.' Consequently the application for rescission fails including the alternative relief he was seeking.

Costs:

[38] The basic principles on costs are that the Court has a discretion which has to be exercised judicially and costs follow the course. In this matter a just and equitable cost award is that the third respondent (Faadhil Adams) pays costs on a party and party scale.

Order:

[39] In the circumstances the following order is made:

Application for rescission is dismissed with costs.

_____

MNCUBE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Applicant	: Adv. R. Stevenston
Instructed by	: Lynn and Main Attorneys
	: First Floor, Block E, Upper Grayston Office Park
	: 150 Linden Street, Strathoven
On behalf of the Third Respondent	: Adv. B. Brammer
Instructed by	: Ferreira Attorneys
	: 15 Club Street
	: Linksfield, Johannesburg
Date of Judgment	: 17 March 2023