REPORTABLE

CASE NO: SA 45/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CHRISTOFFEL JOHANNES LABUSCHAGNE	**Appellant**
and	
SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD	**First Respondent**
FOUREK INVESTMENTS SIXTEEN CC	**Second Respondent**
HARRIET ELIZABETH LABUSCHAGNE	**Third Respondent**
JAN HENDRIK BASSON LABUSCHAGNE	**Fourth Respondent**

Coram:	MAINGA JA, SMUTS JA and O'REGAN AJA
Heard:	**17 June 2015**
Delivered:	**7 August 2015**

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and O'REGAN AJA concurring):

[1] This is an appeal against the dismissal of an application for the rescission of a summary judgment by the High Court (per Parker J). The issues which arise in this appeal concern whether the summary judgment in question could be rescinded in terms of rule 44(1)(a) of the then applicable High Court Rules and

whether the appellant had shown sufficient cause for rescission under the common law and, if so, whether it would be open to him to raise this ground after agreeing to confine the rescission application to rule 44 at judicial case management.

[2] The appellant was one of four defendants against whom the first respondent had issued summons in October 2011. All four defendants entered an appearance to defend on 21 November 2011. The third and fourth respondents are the parents of the appellant and were cited as third and fourth defendants respectively. And the second respondent is a close corporation, in which the appellant, third and fourth respondents are members.

[3] The claims arose from five financial lease agreements between the first respondent and the close corporation, cited as first defendant (second respondent in this appeal). The financial lease agreements related to the use and acquisition of Scania trucks by the close corporation in its business. They were required by the first respondent to sign suretyships for the indebtedness of the close corporation to the first respondent. The latter's action was based upon a breach of the financial lease agreements against the close corporation and to hold the appellant and his parents liable as sureties for the amounts payable by the close corporation under the financial lease agreements in claim A and for certain further damages claimed in claims B, C and D.

[4] After the defendants entered their appearances to defend, the plaintiff (the first respondent) on 29 November 2011 applied for summary judgment against the defendants. It was set down for 20 January 2012.

[5] No affidavit resisting summary judgment was lodged by the defendants and summary judgment was granted on 20 January 2012. On 7 February 2012, a writ of execution was issued by the Registrar of the High Court. It was served on the appellant by the Deputy-Sheriff on 20 February 2012.

Application for rescission

[6] On 1 August 2012, nearly six months later, the appellant filed a notice of motion applying for rescission of the summary judgment. The application and founding affidavit pertinently refer to rule 44(1)(a) as the basis for the rescission application.

[7] In his founding affidavit, the appellant said that at the time he signed the deed of suretyship (on 16 November 2009), he was still a minor and 20 years old. He attained his majority on 8 November 2010. He further said that he signed the surety at a farm near Otjiwarongo when two representatives of the first respondent called upon his parents and himself. He said he was required to sign the documents by his father who 'had earlier explained to me that I had to sign these documents because I was a member of the close corporation and that the close corporation would not be able to acquire the trucks from first respondent if my mother and I did not sign – as we were members . . .'

[8] The appellant said that he was a minor at the time which appeared from his identity number inscribed on the deed of suretyship annexed to the particulars of claim. His identity number was also included in his description in the particulars of claim and summons.

[9] He further said that he was not assisted by his parents when he signed the surety and that they were not even in the same room with him (on the farm) when he signed it. He also said that he was not involved in the management of the close corporation. But he said elsewhere that he drove trucks for it from 2009 until the end of 2010 (which would cover the date of signature of November 2009) and that thereafter (since the beginning of 2011), he trades as a trader in livestock using his own truck.

[10] The appellant also stated that after the summons had been served on him, his father took his summons and other documents to their erstwhile firm of legal practitioners. He was assured by his father that 'the case was being taken care of by our appointed lawyers'. He intended to defend the matter. Three months later, on 20 February 2012, the Deputy-Sheriff served the writ upon him and he realised that judgment had been obtained against him. He instructed another lawyer on 24 February 2012 to investigate what had happened. The file from his erstwhile legal practitioners was sent to his current legal practitioner on 19 March 2012, but it did not include a copy of the court order. An inspection of the court file did not reveal that order. On 26 April 2012, his legal practitioner requested a copy from the first

respondent's practitioner who promptly provided it on 2 May 2012. The rescission application was delivered on 1 August 2012.

[11] First respondent opposed the application and filed an answering affidavit on 4 September 2012. It confirmed that first respondent requires that all members of a close corporation must sign as sureties for a close corporation's obligations under financial lease agreements with it. It is also asserted that the suretyship was signed with the necessary consent of the appellant's parents and that this is apparent from the appellant's founding affidavit. Alternatively, it is contended that there was tacit consent. In the further alternative, ratification and tacit emancipation are also raised.

[12] The appellant filed a reply on 24 September 2012 reiterating what was said in his founding affidavit.

[13] The case management process commenced and a case management report was concluded on 1 November 2012 in which the appellant and first respondent agreed to a case management report in terms of rule 6(5)(A)(d) 'narrowing and limiting the issues' in which it is made clear (in para 2.1) that the application is based on rule 44(1)(a). The matter was set down for argument on 2 April 2013.

[14] At the hearing of the application, counsel for the appellant sought to argue for rescission on common law grounds as well, despite the limitation agreed to at judicial case management.

Approach of the court below

[15] The court below on 30 May 2013 held that the appellant had elected to bring the application under rule 44(1)(a) and confine his argument to this basis. The court found that it was precluded from entertaining the application on common law grounds by reason of the appellant's agreement to confine the basis of the challenge in case management. The court further found that the appellant failed to show an irregularity or error in the proceedings and held that summary judgment was not granted in error for the purpose of rule 44(1)(a).

Submissions on appeal

[16] Mr Strydom, who together with Mr Small appeared for the appellant, argued that the court below misdirected itself by declining to consider the application on common law grounds. He contended that the appellant had established the requisites for rescission on common law grounds, raising an acceptable explanation and a defence – being an unassisted minor – which, he said, enjoyed prospects of success. He submitted that the rescission application was in good faith as the appellant had always intended to defend the action. Mr Strydom also argued that the summary judgment had been erroneously granted and had in any event been correctly brought under rule 44(1)(*a*). He relied upon a passage in

Nyingwa v Moolman N.O.[1] to the effect that a judgment may be erroneously granted if there existed at the time of its issue a fact which the judge was unaware of which would have precluded the judge from granting that judgment. The fact raised in that matter was the defendant's ignorance of his attorney's withdrawal after an application for summary judgment had been postponed. The defendant was represented by counsel when the application was postponed. The defendant's lack of knowledge of the postponement date was correctly found to be insufficient to constitute an error for the purpose of the similarly worded rule 42(1) in that matter. The statement relied upon by counsel in that matter should be understood within its factual context and would not serve to wrest the ambit of the remedy wider than its procedural context, as is further explained below.

[17] Mr Barnard, on behalf of the first respondent, argued that the appellant had elected to argue the application on the basis of rule 44(1) and was precluded from raising common law grounds. He also contended with reference to authority that the requisites for rescission under both rule 44 and the common law had not been met by the appellant. Mr Barnard also stated that the first respondent abandoned its judgment in respect of claims B, C, and D.

Legal rules relating to rescission of summary judgment orders

[18] There are two legal bases upon which an order of summary judgment granted in the absence of an affidavit by the respondents resisting summary judgment may be rescinded: under the common law and under rule 44(1)(a). The

[1] 1993 (2) SA 508 (TK GD) at 510 G.

common law requires an applicant for rescission to show sufficient or good cause, which requires both an explanation for the default (in this case the failure to file the affidavit resisting summary judgment) and a *bona fide* defence that has some prospects of success.[2]

[19] Under rule 44(1)(a), there is no requirement of good cause.[3] Instead an applicant must show that the order was 'erroneously sought or erroneously granted in the absence of a party affected thereby'. As the South African Supreme Court of Appeal (SCA) said in a recent decision referred to by the first respondent *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*[4]:

> 'The trend over the years is not to give a more extended application to the Rule to include all kinds of mistakes or irregularities'.[5]

[20] There is a reason for this: the rule supplements the common law rule, which, as long as good cause is shown, is relatively open-ended as to the circumstances in which an order may be set aside. Rule 44 on the other hand is designed to deal with a narrow class of cases where it is not necessary to show good cause, but simply to show that an order has been erroneously sought or

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[2] *De Wet and Others v Western Bank Limited* 1979 (2) SA 1031 (A), cited with approval by this court in *De Villiers v Axiz Namibia (Pty) Ltd* 2012 (1) NR 48 (SC) para 9 and followed by the High Court, in *Grüttemeyer N.O. v General Diagnostic Imaging* 1991 NR 441 (HC) at 448; *Jack's Trading v Minister of Finance and Ohorongo Cement* 2013 (2) NR 491 (HC) para 31.

[3] See *De Villiers v Axiz Namibia (Pty) Ltd, supra*, at para 10.

[4] 2003 (6) SA 1 (SCA).

[5] Para 8.

granted.[6] The focus of rule 44 is procedural and not substantive as the SCA has recently confirmed in *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd.*[7] A judgment to which a party is procedurally entitled cannot be considered to have been erroneously granted by reason of facts of which the judge who granted the judgment, as he was entitled to do, was 'unaware'[8] or 'in the light of a subsequently disclosed defence.'[9] These two SCA judgments have been recently followed by the High Court in *Jack's Trading*.[10]

Error on the face of the record?

[21] There is some doubt on the South African authorities as to whether it is necessary for the error to appear on the face of the record. The conflicting authorities on this are *Bakoven Ltd v GJ Howes (Pty) Ltd*[11] where Erasmus J held (contrary to the assertion by appellant's counsel in this case) that it is necessary for the error to appear on the record, and *Tom v Minister of Safety and Security*.[12] The SCA in *Lodhi 2* discussed this conflict with reference to the underlying facts of these and other cases in a thorough survey and found that the approach in *Bakoven* to be too narrow.[13] Streicher JA in *Lodhi 2* appeared to accept a narrow

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[6] See *De Villiers v Axiz Namibia,* para 10.

[7] 2007 (6) SA 87 (SCA).

[8] *Supra* para 25.

[9] *Supra* para 27.

[10] *Supra* in fn 2.

[11] 1992 (2) SA 466 (E).

[12] [1998] 1 All SA 629.

[13] *Supra* para 24.

exception to the error appearing on the face of the record. It relates to whether the party against whom an order has been made was aware of the hearing date. Inherent in the reasoning of the court and its discussion of prior cases is the importance of placing pronouncements on the rule within their factual context, particularly with reference to the nature of the error or irregularity contended for or found to have existed in earlier cases. Streicher JA held that where there has not been proper notice of the proceedings to the party seeking rescission, whether the fact of the absence of notice appears on the record or not, any order granted will have been granted erroneously. This would seem to be the correct approach – only in narrow circumstances will errors that do not appear on the face of the record lead to rescission in terms of rule 44. The focus of the enquiry should rather centre on the nature of the procedural error and whether there has been any procedural irregularity or mistake committed in the issuing of the order when determining whether an order has been granted erroneously.

[22] Streicher JA in *Lodhi 2* concluded that in cases where a plaintiff is procedurally entitled to judgment in the absence of the defendant, the judgment cannot be said to have been granted erroneously in the light of subsequently discovered evidence.[14] He summed up the position:

> '. . . A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant,

[14] *Supra* para 27.

> not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment'[15].

[23] The approach of the SCA in *Colyn*[16] and amplified in *Lodhi 2*[17] in my view correctly reflects the narrow procedural ambit of errors and mistakes contemplated by rule 44(1)(a) as a basis for rescission and should be followed in Namibia.

Application of legal rules to the facts

[24] Turning to the facts of this case, counsel for the appellant argued that the failure to plead the minority status of appellant in the summons meant that the order was sought and granted erroneously and should lead to its rescission in terms of rule 44. It does not follow from the fact that the particulars may have been open to a special plea or an exception that the order granted on the summons was erroneously granted. As was made clear in *Lodhi 2*, the existence or non-existence of a defence on the merits does not, without more, transform a validly obtained summary judgment into one erroneously granted. The adversarial process is after all geared to address the question as to whether a defence is valid or not.

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[15] *Supra* para 27.

[16] *Supra* fn 4.

[17] *Supra* fn *7.*

[25] The category of errors which give rise to rule 44 rescission is narrow, relating to procedural matters and should remain so.

[26] The error contended for in this matter goes wider than the narrow procedural ambit contemplated by rule 44(1)(a). The finding of the court below that the granting of summary judgment was not erroneous cannot be faulted in dismissing the rescission application on this ground.

The common law grounds

[27] The appellant also argued that, although the notice of motion, founding affidavit and case management report indicated that the rescission application was based on rule 44(1)(a), he could nevertheless rely upon common law grounds for rescission if sufficient or good cause were established upon the papers.

[28] The first respondent's counsel countered that the appellant had made an election at case management and was bound by that and could not argue for rescission on common law grounds.

[29] Whilst the founding affidavit relies upon and makes direct reference to rule 44 as the ground for rescission, it nevertheless attempts to deal with the requisites for sufficient or good cause required by the common law. It sets out an explanation for the failure to file an opposing affidavit, refers to the defence and makes a submission that it is *bona fide*. Although there is no express reference to the remedy under common law, the application may be said to sufficiently alert the

first respondent that rescission on this basis may also be argued. During judicial case management subsequently, the appellant, however, again made it clear that he only intended to proceed under rule 44(1)(a) for rescission.

[30] The first respondent's position, upheld by the court below, was that it was not open to the appellant to argue for rescission on common law grounds in view of his election made at case management to confine himself to rule 44(1)(a) and that he was thus bound by his agreement.

[31] Whilst different considerations may arise in a trial, it is not necessary in this appeal to decide in which circumstances a party may resile from an agreement to confine issues in judicial case management in an application of this kind. The reason for this is that, even if it were accepted that the appellant could resile from that agreement, an issue expressly left open, the appellant has not made a case for rescission at common law.

[32] The appellant's case for rescission under common law is based on the fact that he was a minor when he signed the suretyship. On his own version, the appellant, however, signed the agreement on the 'instructions' of his father, who also signed the agreement, as did appellant's mother. The appellant was 20 years old at the time and a member of the close corporation along with his mother and father who also bound themselves as sureties. It seems clear from the evidence before us that both the appellant's guardians[18] were aware of the contents and

[18]Under s 14 of the Married Persons Equality Act 1 of 1996.

nature of the contract which the appellant was signing and supported his signing the agreement. Counsel could not suggest any basis on which the appellant could assert otherwise.

[33] In the circumstances, the appellant has not established a *bona fide* defence that has prospects of success. An application for rescission under the common law would thus fail.

[34] I accordingly dismiss the appeal with costs. These costs include the costs of one instructing and one instructed counsel.

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SMUTS JA

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MAINGA JA

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O'REGAN AJA

APPEARANCES

APPELLANT:	J A N Strydom (with him A J B Small) Instructed by Delport Attorneys
FIRST RESPONDENT:	P C I Barnard Instructed by Van der Merwe-Greeff Andimba Inc.