

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

Case No: 240/2019

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES
2023-01-23

In the matter between:

CLIVE KRISHNA CHETTY
(Identity No: [....])

Applicant

And

BARLOWORLD SOUTH AFRICA
(Registration No: 1946/021661/07)

Respondent

Delivery: This judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic tile of this matter on Caselines. The date for handing down is deemed to be 23 January 2022.

JUDGMENT

PHAHLAMOHLAKA A.J.

INTRODUCTION

□1] According to the Notice of Motion the Applicant is seeking a rescission of judgment granted against the applicant in his absence on 11 March 2021. The Applicant further prays, *inter alia*, that in the event the Court not dismissing the Respondent's warrant of Execution order against the Applicant, *"that the Respondent's interim order be set down for hearing on the opposed roll, within 10 days of service of this order."*

□2] The Applicant is prosecuting this applicant in person.

□3] In terms of the Notice of Motion the Applicant seeks an order in the following terms:

"3.1 *The judgment granted on the 14th of March 2021 under the undermentioned case number be rescinded/dismissed.*

3.2 *In the event of the Honourable Court not dismissing the Respondents warrant of execution order against me, the (Applicant), that the respondent's interim order to be set down for hearing on the opposed roll, within 10 days of service of this order.*

3.3 *That I (the Applicant) get an opportunity to present my case, noting that I was not even aware that the Respondent is acting against me and I was under the impression that the Respondent has accepted a letter given to the Respondent on the 14th of October 2015 from my attorney at the time, (Haydn venter form Turner Inc. Attorneys stating the following: Kindly note*

that we act on behalf of Mr Clive Chetty and the following correspondence serves to confirm that he no longer has interest in BCG Recruitment/Show travel and Events CC as a result of his resignation as a member of the company on the 31st January 2014. In light of this, we urgently request that Avis release Mr Chetty from any surety previously engaged whilst he acted as member of BCG Recruitment / Showtravel and Events CC. We trust you find the above in order and await your confirmation of the surety."

3.4 *Condoning the Applicant's late service and filing of this application for rescission of Judgment if necessary.*

3.5 *Further and/or alternative relief."*

□4] It is common cause that on the 29th of January 2020 my sister Potterill J made an following order:

"After having heard counsel on behalf of the plaintiff and after perusing the papers, the following order is granted by default:

The second and third defendant shall pay, jointly and severally, the one to pay the order to absolved:

1. *The amount of R216 748.80 (TWO HUNDRED AND SIXTEEN THOUSAND SEVEN HUNDRED AND FORTY EIGHT AND EIGHTY CENTS);*

2. *Interest on the amount of R216 748.80 at the rate of 9.0% percent per annum calculated from 21 January 2016 to date of final payment; and*

3. *Cost of suit on a Magistrate's Court scale."*

□5] The applicant is unrepresented and it is no wonder that he would not present his case like a trained legal practitioner.

□6] It is correct as the Respondent argued, that in the Notice of Motion the Applicant seeks rescission of a judgment that was granted on 11 March 2021. It is further clear that in his heads of argument the Applicant seeks an order to rescind judgment that was granted on the 29th of January 2020 under case number: 12979/2016. On reading the papers there seems to be no order dated 11 March 2021.

□7] It is common cause that judgment by default was granted against the Applicant on 29 January 2020 under case number 12979/2016 and thereafter a warrant of execution was granted on 11 March 2021 against the Applicant.

□8] In his Heads of Argument the Applicant seeks a rescission of Judgment in terms of Rule 42(1) (a) of the Uniform Rules of Court.

APPLICABLE LAW

□9] Rule 42(1) (a) of the Uniform Rules of Court provides as follows:

9.1 "42. (1) *The Court may in addition to any other power it may have, mero motu or upon 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."*

[10] I will also consider if there is merit to rescind the judgment in terms of common law.

[11] In order to obtain a rescission of judgment under Rule 42(1) (a) the Applicant must show that the prior order was erroneously sought or erroneously granted in the absence of any party affected thereby. Should I find that the order or judgment was erroneously sought or erroneously granted I am bound to rescind the order without even holding any further enquiry.

□12] Under common law, in order for the Applicant to succeed the Applicant must show good cause.

□13] The Applicant raises a defence in that he avers that he had resigned from BCG Recruitment and Training CC and therefore had to be released from any surety with Avis.

[14] It would be apposite to sketch a brief background leading to this proceedings and the Chronology of Events are succinctly as follows:

14.1 The Applicant is cited as the Third Defendant in action proceedings instituted by the Respondent against *inter alia* the Applicant under case number 12979/2016, ("the main Action") based on a suretyship agreement.

14.2 BCG Recruitment and Training, trading as Show Travel CO National Youth Development Agency, a close corporation with registration number: 1999/03453/23, ("Show Travel"), is cited as the First Defendant in the main action.

114.3 Brenda Ann Assenheim, ("Assenheim"), who signed the suretyship agreement together with the applicant is cited as the second defendant in the main action.

14.4 The Applicant and Assenheim, signed the suretyship agreement on 10 September 2012.

14.5 The Applicant and Assenheim, are intermittently referred to as "the sureties".

14.6 In terms of the suretyship agreement the respondent is "the creditor" and Show Travel is the "debtor".

14.7 The suretyship agreement, *inter alia*, informs that the applicant together with Assenheim bind themselves jointly and severally as guarantor

and co-principal debtor with the debtor (Show Travel) for:

"(a) the proper and timeous payment by the debtor of all amounts whatsoever (including all damages of whatsoever nature and all costs, both as between party and party and as between attorney and client) which the debtor may now or in the future owe to the creator from whatsoever cause arising and;

(b) the proper and timeous performance in all other respects of all the debtor's obligations to the creditors in terms of any existing or future contracts between the creditors and the debtors ("the contracts");

(c) Without limiting the generality of the foregoing, all amounts owing or to become owing arising out of or following from the enforcement or cancellation of any agreements between the debtors and the creditors."

14.8 Clause 4 of the suretyship agreement specifically informs that the sureties acknowledge that the deed of suretyship and their liabilities thereafter may only be terminated with the respondent's written consent thereto.

14.9 The selected *domicilium citandi et executandi* for the service of all processes, in terms of the suretyship agreement constitutes an address known as "1 Hyde Park Corner First Floor, North Block Hyde Park Shop Centre, Hyde Park, Gauteng".

14.10 Pursuant to the deed of suretyship and as a result of Show Travers (the debtor) failure to make due and punctual payment to the respondent in respect of vehicle rentals, the respondent on 18 February 2016, issued summons against debtor and the two sureties claiming an amount of R216 748.80

14.11 The return of service inform that the combined summons was served on the applicant on the 25th of February 2016 at his chosen *domicilium citandi et executandi* personally, in terms of the provisions of Uniform Rule 4(1) (a) (i).

14.12 The second return of service informs that the applicant accepted services as the manager in charge on behalf of Assenheim.

14.13 Show Travel and Assenheim, defended the action and the matter proceeded on an opposed basis.

14.14 The Applicant did not enter an appearance to defend the action.

14.15 The matter was set down for trial on 29 January 2020. The Defendants failed to appear on the date of the hearing and judgment was granted by default, by the Honourable Madam Justice Potterill on that day against the sureties.

14.16 The applicant in support of the application for rescission, *inter alia*, alleges the following in his founding and/or replying affidavits.

[15] In the circumstances I am satisfied that the applicant signed the suretyship agreement and therefore his contention that he did not look at it, signed in a haste cannot hold and should therefore be rejected.

[16] I have already alluded to the fact that the applicant is unrepresented and therefore he would not be in apposition to present a case as a trained lawyer. However, legal representation is a choice and it is a choice that the Applicant took, namely not to engage the services of a legal representative. This court will therefore deal with the matters as is presented by both parties.

[17] It is not quite clear on what basis is the applicant seeking the rescission of judgment, but clearly the judgment or order was not made erroneously, nor was it sought erroneously.

[18] I have already said that I am satisfied the Applicant signed a deed of suretysip. I am also satisfied that the Applicant received the summons. I am not convinced that the Applicant has a defence either.

[19] In the result I am of the view that the Application for rescission should fail with costs against the Applicant.

[20] Consequently I make the following order:

(a) The application is dismissed with costs.

**KGANKI PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH
COURT OF SOUTH AFRICA**

Heard on: 01 February 2022

Judgment reserved on: 01 February 2022

For the Applicant: In person

For the Respondent: Adv. L Kotze

Instructed by: Snyman De Jager Attorneys