



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

Case Number: **41994/2021**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: NO  
DATE: 20 July 2023  
SIGNATURE: *JANSE VAN NIEUWENHUIZEN J*

In the matter between:

**INFINI INNOVATION (PTY) LTD**

Applicant

and

**CORPFIN SA (PTY) LTD**

First Respondent

**EVERLINK (PTY) LTD**

Second Respondent

**INNOCENTIA JACQUELINE NCUBE**

Third Respondent

**SIBUSISO GERALD NCUBE**

Fourth Respondent

---

**JUDGMENT**

---

**JANSE VAN NIEUWENHUIZEN J:**

[1] This is an application for the rescission of a judgment granted by default on 8

February 2022 against the applicant, Infini Innovations (Pty) Ltd (“Infini”) for payment of an amount of R 6 271 748, 58 with interests and costs.

- [2] Only the first respondent, Corpfin SA (Pty) Ltd (“Corpfin”) opposes the application.

## **BACKGROUND**

- [3] On or about 24 November 2020, Corpfin entered into a written loan agreement with the second respondent, Everlink (Pty) Ltd (“Everlink”) in terms of which Corpfin advanced an amount of R 5 000 000, 00 to Corpfin. The third and fourth respondents (“the Ncubes”) stood as sureties for the performance of Everlink’s obligations in terms of the loan agreement.
- [4] Everlink defaulted in terms of the agreement and Corpfin brought an application against Everlink and the Ncubes for payment of the outstanding amount together with interests and costs. The application was brought under case number 32666/21, during June 2021.
- [5] The application was not opposed and on 13 December 2021, judgment was granted against Everlink and the Ncubes.
- [6] Subsequent to the proceedings under the case 32666/21 being launched, Corpfin and Everlink entered into an addendum to the loan agreement in terms of which a further amount of R 500 000, 00 was advanced to Everlink. The agreement was concluded on 28 June 2021 and Infini was included as a further surety for the amount due and owing by Everlink to Corpfin.

- [7] Everlink remained in breach of its payment obligations to Corpfm and in August 2021 proceedings were launched under the above case number, in terms of which judgment was sought against Infini in the amount of R 6 521 748, 58. The application was not opposed, which resulted in the judgment that forms the subject matter of this application, being granted by default. Although it is clear from the notice of motion that relief is sought in respect of the judgment under case number 41994/21, the attorneys representing the applicant at the time, initially launched this application under case number 32666/21.
- [8] Nothing much turns on the incorrect case number and the merits of the rescission application was fully concassed in the papers.

## **RESCISSION**

### **Legal framework**

- [9] The judgment was obtained in motion proceedings and not in terms of rule 31 of the Uniform Rules of Court. In the result, the application must be considered in terms of the common law and the applicant must satisfy the following two requirements:

- 9.1 a reasonable and acceptable explanation for his/her default; and
- 9.2 a *bona fide* defence which, *prima facie*, carries some prospect of success.

[See: *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A)].

### **Explanation for default**

[10] Refiloe Florence Mbuyane (“Mbuyane”), the sole director of Infini, deposed to the founding affidavit and stated that the applicant did not receive service of the application.

[11] Mbuyane explained that the applicant only became aware of the legal proceedings when the judgment was emailed to her on 9 February 2022 by Gerbrand Gildenhuis (“Gildenhuis”).

[12] The events preceding the email of 9 February 2022 is significant to Corpfin’s opposition of the matter. On 17 August 2021, Gildenhuis sent an email to Mbuyane, seeking payment of the amount of R 6 521 749, 59. On 18 August 2021, Mbuyane responded to the email and stated the following:

*“Good day*

*Email received, this could just be a confusion, I am trying to find clarity on the involvement Infini Innovations Pty Ltd in this regard, please let us know what is exactly happening,*

*Please get back to me as soon as possible.”*

[13] On 19 August 2021, Gildenhuis supplied Mbuyane with a copy of the original loan agreement, the addendum thereto, the resolutions and suretyship agreement. Mbuyane was informed of the basis of the claim against Infini and that payment is sought.

- [14] Mbuyane did not respond and on 26 August 2021, Gildenhuys sent a further email stating the following:

*“Kindly find a copy of the High Court application that has been issued under case number 41994/21 attached hereto.*

*Take note that the application will be physically served on Infini (Pty) Ltd via sheriff in due course.*

*Furthermore, we confirm that we have applied for court date and will provide notice of such date at the relevant time.” (own underlining)*

- [15] Mbuyane did not respond. On 21 September 2021, Gildenhuys sent another email attaching a copy of the notice of set down for the matter to be heard on the unopposed roll for 8 February 2022. The contents of the email reads as follows:

*“Dear Madam,*

*We refer to the above matter and hereby serve Notice of Setdown electronically by e-mail.*

*Service by Sheriff of the above will follow in due course.”*

*(own underlining)*

- [16] Mbuyane responded to the email as follows:

*“Can you kindly remove my company Name and details from the following matter, I do not know, nor acknowledge ever doing any business with you*

*or your client, I am (Refiloe Mbuyane) the sole owner of Infini Innovation, there are no other Shareholders in the company.”*

- [17] Mbuyane telephonically requested the documents forming the basis of the claim against Infini on 21 September 2021. The documents were forwarded to Mbuyane via email on 22 September 2021, which prompted the following response from Mbuyane:

*“Please note I did not sign any surety documents, nor am I in any way involved in the following, Please note I have made no agreements with Mr Ncube and your client, Mr Ncube takes full responsibility for all agreements he got into with your client, we also called him and all I am saying was confirmed, please remove my Name and my company Name.”*

- [18] Mbuyane’s version was confirmed in an email sent by Ncube to Gildenhuys.
- [19] On 30 September 2021, Gildenhuys sent a further email to Mbuyane stating *inter alia* the following:

*“If you did not sign these documents that clearly purport to be signed by yourself, this will have to be proven to the High Court upon adjudication of the matter.”*

- [20] In view of the aforesaid email correspondence, Corpfin submitted that Infini was in wilful default when the order was granted.
- [21] On behalf of Infini, it was submitted that mere awareness of legal proceedings does not equate to service and does not satisfy the requirements of the rules

of court. I agree. The mere fact that the application and set down was emailed to Mbuyane, does not equate to service in terms of the rules of court.

[22] It is not in dispute that the application served by the sheriff did not come to the attention of Mbuyane. Rule 6(5)((b)(iii) of the Uniform Rules of Court provides that a notice of intention to oppose an application must be filed within 10 days after service of the application.

[23] Should a party not be aware of the service, one can hardly find that such party is in default. One should, furthermore, bear in mind that Gildenhuys in the emails pertaining to the application and notice of set down, expressly stated that the documents will be served by the sheriff.

[24] Without having been served with the application by the sheriff, it is unreasonable to expect Infini to indicate its intention to oppose the application.

[25] In the result, I am satisfied that Infini provided a reasonable and acceptable explanation for its default.

### ***Bona fide defence***

[26] Mbuyane denies that she signed the suretyship agreement, on behalf of Infini, in favour of Corpfina. The *bona fides* of the defence is manifestly clear from the email correspondence exchanged between Mbuyane and Gildenhuys and I am satisfied that the defence, *prima facie*, carries some prospect of success.

## Delay

[27] Lastly Corpfin submitted that Infini unreasonably delayed in launching the application and that the application should for this reason alone be dismissed.

[28] The application was launched on 14 June 2022, some four months after Infini became aware of the judgment.

[29] It is trite that an application for rescission in terms of the common law must be brought within a reasonable time. The rationale for the principle was explained by Eloff JP in *First National Bank of Southern Africa Ltd v van Rensburg NO and Others: In Re: First National Bank of Southern Africa Ltd v Jurgens and Others* 1994 (1) SA 677 (T) at 681E – F:

*“It is in the interest of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders of Court. Persons affected by such orders should be entitled within a reasonable time after the issue thereof to know that the last word has been spoken on the subject.”*

[30] The application in the *First National Bank* matter, *supra*, was brought within three years after judgment was granted and the court held that the delay was unreasonable.

[31] Mbuyane explained that various factors caused the delay in the launching of the application, such as, enquiries directed at Gildenhuis and Corpfin; the inability of two attorney firms to represent Infini and the difficulties Infini’s attorneys experienced in obtaining access to the court file. Corpfin has,

justifiably, criticised Infini for not acting with more haste in the launching of the application.

[32] It is, however, equally noteworthy that Corpfin did not take any steps in the four months after judgment was granted, to execute the judgment against Infini. In the result, the four-month period did not materially interfere with Corpfin's rights flowing from a final judgment and I do not deem the period of four months to be unreasonable in the circumstances.

### **COSTS**

[33] Although Infini has achieved substantial success in the application, I do not deem Corpfin's opposition of the application to be unreasonable.

[34] In the premises, I am of the view that it will be fair to both parties if costs of the application is costs in the cause.

### **ORDER**

The following order is issued:

1. The judgment granted on 8 February 2022 is rescinded and set aside.
2. Costs of the application is cost in the cause.

  
**N. JANSE VAN NIEUWENHUIZEN**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**DATE HEARD:**

16 May 2023

**DATE DELIVERED:**

20 July 2023

**APPEARANCES**

For the Applicant: Advocate R Andrews

Instructed by: Dhooge Law Inc

For the First Respondent: Advocate M Louw

Instructed by: Cilliers & Gildenhuys Inc