

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: 2338/2020

In the matter between:

**SIKHOSONKE TRADING AND
INVESTMENTS (PTY) LTD**

APPLICANT

and

ABSA BANK LIMITED

FIRST RESPONDENT

**SHERIFF OF THE HIGH COURT,
LUSIKISIKI**

SECOND RESPONDENT

In re:

ABSA BANK LIMITED

PLAINTIFF

and

**SIKHOSONKE TRADING AND
INVESTMENTS (PTY) LTD**

DEFENDANT

JUDGMENT

Rugunanan J

[1] The applicant seeks a rescission of an order of this Court granted by default on 9 March 2021 per Lowe J. On 30 October 2020, the first respondent (as plaintiff)

instituted action against the applicant (as defendant). The claim arose from the applicant's breach of a written agreement for the lease of an excavator from the first respondent for a five year term at a monthly rental of R30 196.15. As at 9 March 2021, the date on which the order was granted, the applicant's arrears amounted to R165 045.29.

[2] The sheriff for Lusikisiki has been cited as second respondent in these proceedings but has not participated therein. In what follows hereafter I shall refer to the first respondent as 'the respondent'.

[3] The applicant's notice of motion does not identify the specific rule of court in terms of which the application was instituted, though the founding affidavit indistinctly indicates that reliance is sought on Uniform rule 42(1)(a), alternatively rule 31(2)(b) or the common law. It is trite that an application for rescission can be entertained on any of these bases if the requirements are met.¹

Uniform rule 42(1)(a)

[4] The prerequisite jurisdictional factors for granting rescission in terms of this rule are firstly, that the judgment or order must have been erroneously sought or erroneously granted; and secondly, that it must have been granted in the absence of the applicant. Once these requirements are established, the applicant would ordinarily be entitled to relief, *caedit quaestio*.²

[5] A rescission on grounds of error requires an applicant to show that there existed at the time of the judgment or order a fact which the court was unaware of and which would have induced the court, if aware of it, not to grant the judgment.³

[6] The rule has also been held to cater for a mistake in the proceedings – the mistake may either appear on the record of proceedings or it may subsequently

¹ *Mutebwa v Mutebwa* 2001 (2) SA 193 (TkHC) paras 11-12 ('Mutebwa').

² *Mutebwa supra* at 199G.

³ *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; 2021 (11) BCLR 1263 (CC); para 62; *Rossitter & Others v Nedbank Ltd* [2015] ZASCA 196 para 16.

become apparent from the information made available in the application for rescission.⁴

[7] The interaction between Lowe J and the legal representative for the respondent who moved for the order by default is unknown as the record of those proceedings is not before this Court. The applicant posits its case on mistake or error subsequently becoming apparent from information extrapolated from the court file. The error suggested is that service of the summons was defective.⁵

[8] It matters not in my view whether the error (if indeed it were) becomes apparent from the information presently made available, or whether it existed at the time of the judgment or order. In either instance it makes no difference to the order intended to be made at the conclusion of this judgment.

[9] Beginning with the question of absence it is not disputed that the order was granted in circumstances where no notice to defend was delivered. Mr Xolani Daniso, the applicant's sole director who is also the deponent to the founding affidavit, avers that the applicant had no knowledge of the action instituted by the respondent nor did the applicant have knowledge of the order granted by default. He attributes the applicant's lack of knowledge to defective service of the summons and for that reason, he maintains that the applicant did not wilfully fail to enter an appearance to defend. He goes on to state that it was only upon gaining access to the court file after the sheriff attempted to execute a warrant for the delivery of goods during June 2021 that the applicant became aware for the first time that the sheriff's return indicating that service of the summons was effected on '10-11-12' was a 'doctored' or fraudulent document, and that the order it now seeks to set aside was erroneously granted.

⁴ *Kgomo v Standard Bank of South Africa and Others* 2016 (2) SA 184 (GP) at 187I-188A.

⁵ See *Topol and Others v Group Management Services (Pty) Ltd* 1988 (1) SA 639 (WLD) at 648D-649F for a discussion on as to what constitutes an error for purposes of Uniform rule 42(1)(a).

[10] In considering the rescission sought under the rule aforementioned the scenario commences with three purported returns of service, each bearing the name of the sheriff, 'L Tonjeni'.⁶

10.1 The first return indicates that a 'Notice of Agreement Form 27' was served on the applicant on '10-11-20' at 09h00 (I add that Form 27 is the notice under Uniform rule 41A dealing with the referral of a dispute to mediation before proceeding with litigation).

10.2 The second return indicates that 'Summons' was served on the applicant on '10-11-12' at 09h00. The document however bears a date stamp for 10 November 2020.

10.3 Both returns show that service was effected at 'Dubana A/A Lusikisiki 4820' on V Tshezi (Secretary).

10.4 The third return indicates that 'Summons & Form 27 Notice of Agreement' was served on '10-11-20' at 12h00 at 'Dubana A/A Lusikisiki 4820' on V Cacadu (Secretary).

[11] Relevant to the second return of service the error relied on in the founding affidavit differs from the contention/s raised in the applicant's heads of argument. Adverting to the second return, Mr Daniso impugns the service of summons effected on 10-11-12. He denies that the applicant has a registered office at Dubana Administrative Area and maintains that it is his residential address at which there is no other person, whether male or female, by the name of V Tshezi designated as the applicant's secretary.

[12] Parenthetically, the answering affidavit points out that there is no denial attributed to V Cacadu who features as secretary in the third return of service, nor is it denied that the applicant had been served with the Form 27 which is the notice under Uniform rule 41A.

⁶ For completeness, the returns are attached to the respondent's answering affidavit as annexures at pages 66, 67 and 71.

[13] In the founding affidavit, it is apparent that the applicant engenders the belief that the order was erroneously granted with reference to the sheriff's return indicating service of the summons on 10-11-12. To augment this belief and indeed the basis for asserting that it is a fraudulent document the applicant also places reliance on an affidavit by the sheriff Mr Luyanda Tonjeni in which the latter denies having served any process on 10 November 2012 'or on any other day in connection with this matter'. The contents of this affidavit will be dealt with later in this judgment.

[14] In heads of argument, applicant's counsel assailed the first and third returns of service. The proposition is that they are three hours apart on the same date and they identify two different people who are said to be secretaries whom Mr Daniso maintains are fictitious individuals. This discrepancy, so the argument went, undermines the reliability of the returns; hence the failure to have brought it to the attention of the presiding judge occasioned the erroneous granting of the order.

[15] The argument appears to be made without reference to the record and is misconceived. It overlooks a telling deficiency in the founding affidavit. While Mr Daniso, in the vaguest of terms, seeks to distance himself or the applicant from V Tshezi, he does not categorically state that no person by the name of V Cacadu is employed by the applicant or that the said person is unknown to the applicant or to himself. Mr Daniso has indisputably and opportunistically failed to disclose material information to this Court to deflect attention from the third return of service which quite remarkably is attached to the founding affidavit.⁷

[16] Although the argument by counsel does not accord with the case presented in the founding affidavit, his arguments in either instance are untenable. Focus ought to have been directed more specifically at the third return of service and the lease agreement attached to the summons. The return indicates that: 'Summons & Form 27 Notice of Agreement' was served on '10-11-20' at 12h00 at 'Dubana A/A Lusikisiki 4820' on V Cacadu (Secretary).

⁷ Annexure SIKHO2.

[17] In my view this return of service is manifest of effective service under Uniform rule 4(1)(a)(v).⁸

[18] What follows are my reasons.

[19] In the lease agreement, the applicant's registered address and its physical address is indicated as 'Dubana A/A Lusikisiki 4820'. The address falls within the jurisdiction of this Court, which exercises its jurisdiction over the entire province of the Eastern Cape.⁹ Service at the registered address within the Court's jurisdiction is good service¹⁰ even if the registered address is not the place of business of the applicant.¹¹ Hence, the denial by Mr Daniso that the applicant has a registered office at Dubana Administrative Area is at odds with the address indicated in the lease which he signed on behalf of the applicant as its director when the agreement was entered into in June 2019.

[20] Moreover, nothing turns on the contentions raised by applicant's counsel about discrepant returns as indicated in the applicant's heads of argument. Counsel's approach overlooks the fact that the third instrument is a self-standing return of service which, for reasons aforementioned, *prima facie* constitutes evidence of the matters stated therein¹² and has been shown to be reliable and effective.

[21] In the light of the finding that there was effective service of the summons, the applicant's explanation that it did not wilfully fail to enter an appearance to defend because it had no knowledge of the pending action recedes into insignificance. Where there had been proper service of the summons and a failure to enter appearance to defend, the respondent was procedurally entitled to obtain its order in the absence of the applicant. Expressed differently, a court which grants a judgment or order by default does so on the basis that the defendant has been notified of the

⁸ To the extent considered relevant for present purposes the rule essentially provides that service of process directed to the sheriff shall be effected 'in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction...'

⁹ *Thembani Wholesalers (Pty) Ltd v September and Another* 2014 (5) SA 51 (ECG).

¹⁰ *Erasmus Superior Court Practice* [Service 2, 2016] at D1-35.

¹¹ *Federated Insurance Co Ltd v Malawana* 1986 (1) SA 751 (AD) at 759E.

¹² Section 43(2) of the Superior Courts Act 10 of 2013; see also *Van Vuuren v Jansen* 1977 (3) SA 1062 (T).

plaintiff's claim as required by the Uniform rules, that the defendant, 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.

[22] In the premises, I am not persuaded that the order against the applicant was erroneously granted and that is liable to be set aside.

Good cause as a requirement under Uniform rule 31(2)(b) or the common law

[23] Under Uniform rule 31(2)(b) the court may set aside a default judgment upon 'good cause' shown. The relief under the common law is available on the basis of 'sufficient cause' being shown.¹³ Whereas 'good cause' identifies a rescission under rule 31(2)(b), 'sufficient cause' is associated with the common law. The distinction is semantic; the terms mean the same thing¹⁴ and their requirements are identical namely, an applicant must satisfy the court: (a) that there is a reasonable explanation for its default; (b) that the application for rescission is *bona fide* in the sense that it is not made with the intention of merely delaying the plaintiff's claim;¹⁵ and (c) that it has a *bona fide* defence which *prima facie* carries some prospect of success.¹⁶

[24] As to the meaning of requirement (c) it is considered apposite to quote from *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd*¹⁷ in which it is stated:

'It is sufficient if [the applicant] makes out a *prima facie* defence in the sense of setting out averments which if established at trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case or produce evidence that the probabilities are actually in his favour.'

¹³ *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F-1043A; see also *Athmaram v Singh* 1989 (3) SA 953 (D&CLD) at 954E.

¹⁴ *Athmaram v Singh supra* at 957C; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A); also *Mosenogi NO and Another v 22 Webster* [2020] ZAGPPHC 127 para 9; and *Mutebwa supra* at 198I.

¹⁵ *Mutebwa supra* at 197E-F.

¹⁶ *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (ECD) at 708H-J; *Athmaram v Singh supra* at 957C. As to what is meant by the words 'a *prima facie* defence', the court in *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (WLD) at 575H-576A, stated: 'It is sufficient if he sets out a *prima facie* defence in the sense of setting out averments, which if established at trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case or produce evidence that the probabilities are actually in his favour.'

¹⁷ *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (WLD) at 575H-576A.

[25] The requirements in (b) and (c) are interconnected in that proof of a *bona fide* defence may indicate that the application is not made merely for delaying the plaintiff's claim but that the applicant does have a valid defence in law. On the other hand, the absence of a *bona fide* defence would generally lead to the conclusion that the applicant is engaged in delaying tactics where there is no valid defence to the plaintiff's claim.¹⁸

[26] I turn to consider whether the applicant has established a *bona fide* defence.

[27] The essence of the applicant's alleged defence is that there was a verbal agreement between Mr Daniso and the respondent's branch manager at Lusikisiki to settle the applicant's arrears by the end of March 2021, the arrears having been occasioned by the Covid-19 pandemic in 2020.

[28] The averment by Mr Daniso that the applicant was given until the end of March 2021 is denied by the respondent on the basis that clause 24 of the lease agreement precludes any amendment or variation thereof unless reduced to writing. The applicant filed a replying affidavit which was struck out in terms of an order granted by Bloem J on 29 March 2022. Technically there is no reply to the respondent's denial.

[29] For that reason the respondent's denial stands to be accepted as uncontested.¹⁹

[30] It is obvious from the lease agreement that its terms are binding. As at 9 March 2021 when the court order was granted against the applicant its account was in arrears. Payment bringing the arrears up to date was made on 15 March 2021. This occurred a few days after the lease agreement was cancelled and judgment by default was obtained.

¹⁸ *Mutebwa supra* at 197G.

¹⁹ *Nedbank Limited v Dinah Rampersad and Another*, unreported judgment of the Pretoria High Court, Case No 58806/2018 (3 November 2021) para 4.

[31] At the time the order was granted there existed a *lis* between the parties. The applicant mistakenly presumes that the agreement between Mr Daniso and the respondent's branch manager discharged that *lis*. In the absence of clear proof of the reduction to writing of the alleged payment arrangement, the arrangement is ineffective and lends no credence to what is stated in the founding affidavit.

[32] In the applicant's heads of argument an attempt is made to raise as a defence the provisions of section 129(3) of the National Credit Act 34 of 2005. The section permits a consumer who is in default, at any time before a credit provider has cancelled a credit agreement, to re-instate the agreement by paying all overdue amounts and default charges up to the time of re-instatement. The Act does not apply to a juristic person. To this end the provisions of section 4(1)(a) read with section 4(1)(b) of the Act have been pleaded in the summons. It is also noted that the applicant's founding affidavit says nothing about seeking reliance on the section and indeed no case is made out for relying thereon as a defence. Heads of argument do not constitute evidence given under oath. They are merely persuasive comment by the parties or their legal representatives with regard to questions of fact or law and offer no substitute for sworn evidence.

[33] I am of the opinion that the circumstances are such that this Court is unable to come to the assistance of the applicant neither under Uniform rule 31(2)(b) nor the common law. The absence of a *bona fide* defence is indicative of the applicant employing delaying tactics.

[34] The order complained of was correctly granted but to set it aside in circumstances where, absent a *lis* between the parties and no *bona fide* defence is shown, would be an exercise in futility and would be tantamount to granting the applicant an order that has final effect. From that perspective the factual disputes raised by the respondent become an obstacle to the applicant.²⁰

[35] Because the application has no merit, the norm is that costs must follow the result. There is another dimension to the question of costs. This application was

²⁰ *JAN v NCN* [2022] ZAECKMHC 47 paras 13-14.

initially brought in two parts, the first of which was for an order sought on urgency for the stay of the warrant of delivery issued on 6 April 2021 at the instance of the respondent – and the second part of the application was in respect of the present rescission application. On 25 June 2021, this Court per Beshe J granted an order staying the warrant pending the outcome of the application for rescission. In addition, the order directed that the costs of the application relevant to the first part of the proceedings are to stand over for determination in the rescission application. For the respondent it was submitted that the costs of the first part be costs in the cause in the determination of the outcome of the rescission application.

[36] I have no inclination to disagree with this approach.

[37] Before concluding, a matter that needs to be mentioned concerns the affidavit by the sheriff, Mr Tonjeni.²¹

[38] My own emphasis in italics, he states the following:

‘I wish to clarify that I personally never went to serve any papers at Lusikisiki on 10 November 2012 *or on any other day in connection with this matter*. I never authorised any person to draft the return of service in this matter. I did not sign the return either. Someone may have forged my signature. I do not even know where Dubana Administrative Area is.’

[39] It appears that the sheriff distances himself from the second return indicating service on 10 November 2012. Whether he does so in relation to the first and third returns of service requires clarification taking into consideration the italicised portion of his affidavit. On the version of the respondent,²² supported by confirmatory affidavits by its legal representatives,²³ the sheriff emailed a statement of account to its attorneys on 10 November 2020 for the amount of R988. This amount was paid on 16 November 2020.

²¹ The affidavit is dated 14 June 2021 and is attached to the applicant's founding affidavit at pages 32-34.

²² See answering affidavit Basetsana Matolong, dated 12 July 2021 paragraphs 5 to 15.

²³ Marileze Marais at 72 and Jason Myles De Klerk at 74.

[40] What followed in February 2021 was a further statement of account from the sheriff for the amount of R709. The respondent's attorneys requested the sheriff to reverse this amount which had not been done as at 12 July 2021 being the date of signature of the respondent's answering affidavit. By maintaining that he did not serve papers on any other day in connection with the matter, it begs of the sheriff to address the following questions: (a) for which return of service is the statement of account of 10 November 2020 applicable? And (b) for which return of service is the statement of account forwarded in February 2021 for the amount of R709 applicable?

[41] The other issues arising from the sheriff's affidavit are identified in the respondent's answering affidavit.

[42] I quote directly from the applicable paragraphs:

'15. The supporting affidavit from the sheriff ... is vague in that:

15.1 there are two returns of service in this matter, one for the summons and one for the Rule 41A notice. The Sheriff does not indicate in respect of which return of service, or both, he is referring to;

15.2 the sheriff states that he did not personally serve the papers, however [he] does not state that nobody from his offices such as a deputy sheriff served the summons and/or [the] Rule 41A notice;

15.3 whilst he states that he "did not sign the return", he also states that "Someone may have forged my signature". If he did not sign the return of service, it must consequently follow that his signature was forged as he does not state that his signature is different to that of his own ... nor does he state what steps, if any, he is taking to resolve the issue which relates to himself directly.'

[43] In short, and arising from what is put out hereinabove read in conjunction with the respondent's answering affidavit and supporting annexures, are issues: (a) relating to the unidentified returns of service for which statements of account were

rendered in November 2020 and in February 2021; and (b) in relation to the alleged forging of the sheriff's signature.

[44] It is not intended to cast disrespectful reflections upon the sheriff but the material before this Court does raise concerns about his conduct and motives if left unexplained to date. For this reason, the registrar of this Court will be directed to forward a copy of this judgment to the Board for Sheriffs for its consideration and possible further investigation of the matter.

Order

[45] The following order will issue:

1. The application for rescission of the order granted by this Court per Lowe J on 9 March 2021 is dismissed.
2. The applicant shall pay the costs of the application, such costs shall include those in respect of Part 1 thereof.
3. The registrar is directed to send a copy of this judgment to the Board for Sheriffs.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

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Date heard:

17 November 2022

Date delivered:

17 March 2023