



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 24526/2019

(1)	REPORTABLE: <i>no</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>no</i>
(3)	REVISED.
15 MARCH 2024	

In the matter between:

RUANNE WILLIAM SCHOEMAN

Applicant

and

MORGAN ABATTOIR (PTY) LIMITED

First Respondent

HIGHROAD WHOLESALE MEAT CC

Second Respondent

DAVID FLEISCHMAN

Third Respondent

In re:

MORGAN ABATTOIR (PTY) LIMITED

Plaintiff

and

HIGHROAD WHOLESALE MEAT CC

First Defendant

DAVID FLEISCHMAN

Second Defendant

RUANNE WILLIAM SCHOEMAN

Third Defendant

JUDGMENT

DEN HARTOG AJ

INTRODUCTION

1. This is an application for a rescission brought by the Third Defendant as Applicant in an action to set aside a judgment granted against him as a surety for the debts of the First Defendant. This judgment was granted on 19 August 2020 and directed the Applicant to make payment in an amount of R3 849 768.59 together with interest and costs to the Plaintiff (present First Respondent).

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EASE OF CONVENIENCE

2. The parties will be referred to as “the Applicant” (being the Third Defendant in the action) and “First Respondent” (being the Plaintiff in the action).

3. The First Respondent is an entity known as Morgan Abattoir (Pty) Limited and the First Defendant in the action was the principal debtor, being Highroad Wholesale Meat CC ("the principal debtor").
4. In terms of Rule 31(2)(b):

"(b) A defendant may within 20 days after acquiring knowledge of such judgment apply to Court upon notice to the plaintiff to set aside such judgment and the Court may, upon good cause shown, set aside the default judgment on such terms as it deems fit."

5. In this instance judgment was granted on 19 August 2020 and the application to set it aside was launched in March 2023, some 2 years and 5 months later.

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6. It is not clear under which auspices the Applicant originally relied on for the setting aside of the judgment, but various points were raised in argument:

- 6.1. Whether it be Rule 31(2)(b);

- 6.2. Whether it be Rule 42;
- 6.3. Whether it be in terms of the common law.
7. Should the application be brought in terms of Rule 31(2)(b), such application must be brought within 20 days of which the judgment has come to the knowledge of the Applicant and in the event of the common law, within a reasonable time.
8. Insofar as the Applicant's case is possibly premised upon Rule 42, it is submitted on behalf of the Applicant that it is common cause that the summons was never served on him. As much as this might be true, and in the absence of a return of service of the summons, I must accept that there was proper service, which was accepted by Matsimela AJ before granting default judgment, albeit that such service was at a chosen *domicilium* address, which would have satisfied the Court that service was proper. The Applicant, even on his own papers, assumes that is probably what happened.

para 14, 0000-8

9. The above then takes care of any reliance on Rule 42 as a basis to set aside the default judgment as it was correctly granted.

10. The Applicant's case is simply that he never received the summons and consequently he cannot be in wilful default. He submits that he discloses a proper defence.
11. The First Respondent's case, as I understand it, is that it might be true that the Applicant never received the summons, but the existence of the judgment did come to his knowledge more than 2 years ago and he has been avoiding the execution of the writ by the Sheriff and consequently the application for condonation for the late filing of the application for rescission should be refused.

EVALUATION OF THE MATTER

12. I am not going to repeat all of the evidence presented in the affidavits, but it is clear on accepting that which is said by the Respondent in the answering affidavit, which I can do based on the **Plascon-Evans** Rule as well as the absence of an affidavit of the Applicant's wife, who is intricately involved in this whole saga that the Applicant has certainly been playing ducks and drakes with the Sheriff for some time.

**Plascon-Evans Paints Limited v Van Riebeek Paints (Pty)
Limited 1984 (3) SA 623 (A)**

13. Various attempts were made to serve the writ at 12 Burne Crescent, Glen Ashley, Virginia, Durban of which the following events are common cause, *inter alia*:

13.1. It is the place of residence of the Applicant albeit at the back of the offices.

13.2. It is the place from where the Applicant's wife conducts her business as an attorney.

13.3. The Sheriff was told by one Alta who is employed by the Applicant's wife that the Applicant is based somewhere in Johannesburg.

13.4. The Sheriff was refused entry to the premises on 7 July 2021.

13.5. The First Respondent's attorney was told by the Applicant's wife of divorce proceedings under circumstances where they are not divorced nor are there any proceedings pending.

13.6. The Applicant's wife has failed to make an affidavit explaining all these anomalies.

14. Having regard to all of the aforesaid, the Applicant's conduct and failure to receive the writ and his explanations for not having received same, leaves much to be desired.
15. Good cause must be shown to set aside a judgment, which consists of:
 - 15.1. an explanation for the default; and
 - 15.2. the disclosure of a *bona fide* defence.
16. The same good cause must be shown in an application for condonation in the event of an application being brought out of time, namely:
 - 16.1. an explanation for the failure to bring the application timeously;
 - 16.2. the disclosure of a *bona fide* defence.
17. It is clear that the Defendant was not in wilful default in that there is no evidence that he *de facto* received the summons.
18. It is however clear that the Defendant's explanation for the time delay in his application for condonation is very poor.

19. I now turn to the issue of a *bona fide* defence. At the outset, the Respondent concedes that the Applicant has illustrated a *bona fide* defence and the only reason why the application for rescission is opposed is because of the poor explanation for the delay.
20. In this regard the particulars of claim require closer scrutiny.

016-5 to 016-17

21. The First Respondent sued the First Defendant as principal debtor and the Second and Third Defendants as sureties.
22. The First Respondent pleads that a credit agreement was concluded on or about 11 March 2009 between the First Respondent and the principal debtor, which credit agreement encompassed a suretyship in respect of the Applicant as well as a further Defendant.
23. The First Respondent then goes on to plead that during or about 1 September 2016, the First Respondent transferred its entire business as a going concern to an entity known as Morgan Beef Investments (Pty) Limited ("MBI"). MBI in turn did on 2 September 2016 transfer the entire business, including its right, title and interest into the credit agreement, to its subsidiary company, Morgan Beef (Pty) Limited ("Morgan Beef").

24. The First Respondent goes on to allege that Morgan Beef, being the subsidiary company, proceeded to conduct the business of an abattoir up until 30 August 2017 and supplied meat products to the principal debtor during 6 April 2017 and 15 August 2017.
25. Morgan Beef duly invoiced the principal debtor in respect of the meat products who made payments from time to time, however with a balance of R2 698 297.75 outstanding on 21 August 2017.
26. Prior to the issue of summons and on 3 June 2019, Morgan Beef cedes its claim against the principal debtor to the First Respondent, who then proceeds to issue summons against the principal debtor as well as the Second Defendant and the Applicant as surety.
27. On the pleadings it seems to me that the First Respondent has not made out a case to hold the Applicant liable as the surety which the Applicant signed is unrelated to the dealings with Morgan Beef.
28. In addition, the Applicant alleges that on 3 November 2016, the Second Defendant in the action, representing a new company, concluded a new credit agreement, including a new deed of suretyship with Morgan Beef and that the debt incurred, was incurred under the new agreement.

29. To all of the above, the Respondent has no answer, but simply concedes that the Applicant has disclosed a good defence.

para 25, 0002-27

30. In **Harris v Absa Bank Limited t/a Volkskas** 2006 (4) SA 527 (T) at 529 E-F, it was said that while wilful default on the part of the Applicant is not a substantive or compulsory ground for refusal of an application for rescission, the reasons for the Applicant's default remain an essential ingredient of the good cause to be shown.
31. It was further said in **Carolus v Saambou Bank Limited; Smith v Saambou Bank Limited** 2002 (6) SA 346 (SE) that where the Applicant has provided a poor explanation for default, a good defence may compensate. In circumstances where the strength of the defence on the merits becomes crucial, the Applicant must furnish sufficient information to satisfy the court that he has a good defence.
32. In my view the disclosed defence seems to be, *prima facie*, a rock solid defence, which, if true, and on the papers before me seems to be so, should succeed.
33. In addition, it was pointed out to me that pursuant to the launching of

this application, an order was granted against the principal debtor and the other surety on 24 July 2023 for payment in an amount of R2 698 297.75 together with interest and costs.

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34. From the order it appears that there was also in the granting of that order no appearance for the Defendant as the Court only considered the papers as well as counsel on behalf of the Plaintiff.
35. Having regard to all of the above, I am of the view that the application for rescission should succeed.

COSTS

36. It is common practice in applications such as these, that the Applicant seeks an indulgence from the Court and that a Plaintiff/Respondent should not be mulcted in costs unnecessarily.
37. However, in this matter I am of the view that the conduct of the Applicant in his approach to the avoidance of the writ and the explanations proffered is unsatisfactory and reprehensible.

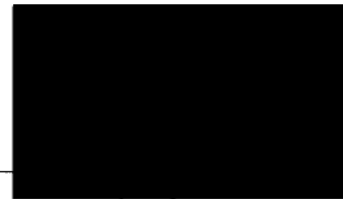
38. In the result I am of the view that I should mark my disapproval of his conduct by granting a punitive order against him.

39. In the result I make the following order:

39.1. The default judgment granted in favour of the First Respondent against the Applicant on 19 August 2020 by this Honourable Court is rescinded;

39.2. The Applicant is granted leave to proceed with his defence to the claim and deliver a plea and/or any other pleadings he might deem fit, within 10 days of date of this order;

39.3. The costs of this application is to be borne by the Applicant on an attorney and client scale.



A P DEN HARTOG
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: this judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation

to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date of the judgment is deemed to be 15 March 2024.

Hearing date:	5 March 2024
Delivered:	15 March 2024
Counsel for the Applicant:	Adv J Scheepers
Attorneys for the Applicant	Du Preez (Morne) Attorneys
Counsel for the First Respondent:	Adv Hewitt
Attorneys for the First Respondent	Steinberg Law Inc