

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED: YES/NO

6/9/23

DATE

SIGNATURE

In the matter between:

Case No: 48677/16

DJ VAN DER WESTHUIZEN

APPLICANT

and

HJH VAN DER HOVEN

RESPONDENT

AND

Case No: 8676/2022

HJH VAN DER HOVEN

APPLICANT

and

DJ VAN DER WESTHUIZEN

RESPONDENT

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is **06 September 2023**.

JUDGEMENT

FRANCIS-SUBBIAH J:

[1] This matter is enrolled by the applicant, Mr van der Westhuizen for recession of a default judgment. In the event the rescission is dismissed the matter proceeds on application for the sequestration of Mr van der Westhuizen's estate alternatively for an

order declaring his immovable property specially executable by Mr Van der Hoven referred herein as the respondent.

[2] The matter was enrolled on the 5th of November 2021 on the unopposed motion roll for hearing by Van der Schyff, J who refused the substantive application for postponement and granted the default judgment on the same day in the amount of R1,350,000. The reasons for refusing the postponement were given on the 8th of November 2021 in a written judgment. This clarifies any ambiguity relating to the issue of two incompatible orders.

Background facts

[3] The parties had a long-standing commercial relationship which can be characterized by contentious and various commercial disputes. The commercial agreements reached between the parties took place during or about 2008. Mr Van der Westhuizen contends that the parties had agreed that their commercial disputes would be resolved by arbitration. For this very reason he contends that any judgment in the main action was subject to what would have been a sustainable point *in limine* however he was constrained in advancing his defence.

[4] His defence was constrained at the default judgment hearing because his correspondent attorney had passed on and he was not able to be assisted by another attorney with some knowledge of the matter. The arbitration point was not placed before

Van der Schyff, J and she had not considered it in dismissing the postponement and granting default judgment.

[5] According to the Applicant the commercial agreement reached with the respondent, Mr Van der Hoven would invest in a company to be formed in an amount of R1,350,000. Respondent required security for his investment and applicant understood that any obligation for security would be fulfilled by the issue of shares. Applicant was told that such security in the form of a registered mortgage bond in favour of the respondent would never be given effect to and that same was simply to serve as some form of security to the respondent until the land was subdivided and transferred into the operating company.

[6] Applicant contends that the R1,350,000 was only part of the obligation of respondent. He was under the impression that the respondent would perform on all his further obligations. Instead, the respondent dispatched demands for the applicant to perform by way of registration of companies and transfer of properties which did not confirm with the express terms of the oral agreement between them.

[7] It is trite that rescission of default judgment must establish in terms of uniform rule 31(2)(b) firstly, the reasons for absence or default. And secondly, the applicant must satisfy the court of his grounds of defence to the main action by showing good cause in terms of the uniform rule or sufficient cause according to the common law which defence

must have some prospect of success. According to *Swart v ABSA Bank Ltd*¹ good cause must be proved.

[8] The court in *Grant v Plumbers (Pty) Ltd*² held that whether a sufficient or good cause exists in an application for a rescission of a default judgement, the applicant must present the following:

“(a) reasonable and acceptable explanation of his or her default; and if it appears that the default is wilful or that it was due to gross negligence, the court should not come to his assistance.

(b) the application must be bona fide and not be made in an intention to delay the plaintiff's claim;

(c) has shown the existence of a bona fide defence, that has some prospect or probability of success.”

[9] The court further in *Grant*³ held that in proving a bona fide defence to the plaintiff's claim it is sufficient if he makes out a *prima facie* defence. In the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

¹ 2009 (5) SA 219 (C).

² 1949 (2) SA 470 (O).

³ 1949 (2) SA 470 (O). at 476.

[10] In this regard applicant contends that the respondent never factually paid the full sum of money as contended by himself in terms of the oral agreement and was therefore in breach of his own alleged agreement. The applicant failed to perform other obligations in terms of the agreement and had these issues been ventilated in the main action the respondent would not have been entitled to judgment. The default judgment procured by the respondent purports to rely on a loan alternatively a misrepresented basis that respondent seeks to place reliance on a denied terms of an alleged loan agreement. Accordingly, this creates a low evidentiary onus in the trial action.

[11] He further raises a defence of prescription on the basis that the oral agreement leading to the contract is in dispute and the basis of the claim brought by the respondent was not predicated on the registration of a mortgage bond at the time of the institution of the claim. The basis of the respondent's claim was an alleged loan. The loan was entered into with the respondent on behalf of Polycraft Pty Limited which was the entity duly created because of the oral agreement and this company should be joined in the trial action.

[12] Another element to satisfy is that of wilful and negligent default, In *Hendricks v Allen*⁴ Gardiner JP determined the test for the requirement of wilful default and held that:

".....If he knows that a case is coming on, and whatever his motive, deliberately refrains from entering appearance, then it seems to me there is wilful default. His reason need not be, to my mind, that he knows he has no defence; he may have some other motive, but, knowing that he is summoned to appear, if he deliberately fails to enter an appearance, from whatever motive, it seems to me there is wilful default."⁵

[13] The applicant was present at the hearing and contends that once the postponement for default judgment was refused, the default judgment application would be required to be formally heard and considered and it is his contention that this did not occur. He further did not have the assistance of his attorneys. He desired to defend the matter as he had vigorously done so prior to his attorney being struck off.

[14] He argues that any inability to cogently articulate his efforts and the difficulties encountered by procuring some of his files to defend this matter was not considered by the court refusing postponement at the default judgment hearing. He submits that the documentation does exist which evidence is essential to enable him to properly defend

⁴ 1928 CPD 519.

⁵ *Ibid* at p521.

the civil claim. He further submits that the contentions that COVID-19 national lockdowns have severely impeded his ability to obtain the documentation.

[15] In *Chetty v Law Society*⁶ the court further elaborated on the onus to be discharged by the applicant, and held that:

"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."⁷

[16] In the circumstances the applicant contends that having filed an exception, argued same, litigated the interlocutory step it is abundantly clear evidence of his *bona fide* desire to defend the matter. The circumstances of him facing the passing of the correspondent attorney and the striking off his attorney from the practicing roll was never disputed when he applied for a postponement at the default judgement hearing.

⁶ [1985] 2 All SA 76 (A).

⁷ Ibid at p79.

[17] A *bona fide* defence must establish that the grounds on which they do so are reasonable. In *Hulse-Reutter and another v Heg Consulting Enterprises (Pty) Ltd [Lane and Fey NNO Intervening]*⁸ it was held as follows:

“Apart from the fact that they dispute the applicants’ claims and do so *bona fide*; what they must establish is no more and no less than the grounds on which they do so are reasonable. They do not have to establish even on the probabilities that the company under their direction will as a matter of fact succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not have to prove the company’s defense in such proceedings. All they have to satisfy me is that grounds which they advance for their claims and the companies disputing these are not unreasonable. To do that I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they rely on at such trial. This is not an application for summary judgment in which a defendant who resists such an application by delivering an affidavit or affidavits must not only satisfy the court that he has a *bona fide* defense to the action, but in terms of the Rule must also disclose fully in his affidavit or affidavits “the material facts relied upon therefor”...It seems to me to be sufficient for the [respondent] in the present application, as long as they do so *bona fide*, ... to allege facts, which if proved at a trial would constitute a good defence to the claims made against the company.”

⁸ 1998 (2) SA 208 (C) at 219F – 220A.

[18] Applicant pleads that he has a *bona fide* defense as elaborated above. He contends that where a debt exists, liquidation and insolvency proceedings are an inappropriate remedy for resolving such a dispute in the circumstances.

[19] For the reasons expounded in the preceding paragraphs I am satisfied of the explanation provided for the default and that there are reasonable and *bona fide* prospects of success in the trial action. The reasons for the delay in bringing the application are satisfactorily explained. I therefore grant recession of the default judgment. It follows that the application for sequestration, alternatively the application for attachment of immovable property is therefore dismissed.

[20] As a result the following order is made:

- 20.1 The late filing of the rescission application is condoned.
- 20.2 The default judgment in case no 48677/16 is hereby rescinded.
- 20.3 The bar to the plea is uplifted and the applicant is ordered to file a plea within twenty (20) days of this order.
- 20.4 Costs are in the cause.
- 20.5 The application in case no 8676/2022 for sequestration or alternatively attachment of immovable property is dismissed with costs.



R FRANCIS-SUBBIAH

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

Counsel for the Applicant/Respondent : Adv MP Van Der Merwe SC
Instructed by : Tim Du Toit & Co.- Alewyn Grove

Counsel for the Respondent/Applicant : Adv L Morland
Instructed by : VDMS Attorneys Inc.

Date of the hearing : 28 August 2023
Date of Judgment : 06 September 2023