



**HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: Electronic reporting only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED: Yes

16-07-2021 P.A. Meyer

Case No: 39276/2019

In the matter between:

LEOPARD LINE HAUL (PTY) LTD t/a ELITE LINE

Applicant

and

NEW CLICKS SOUTH AFRICA (PTY) LTD

Respondent

In Re:

NEW CLICKS SOUTH AFRICA (PTY) LTD

Plaintiff

and

LEOPARD LINE HAUL (PTY) LTD t/a ELITE LINE

Defendant

Case Summary: Judgment – by default of entering a notice of intention to defend – Rescission - either in terms of r 42(1)(a) or r 31(2)(b) of the Uniform Rules of Court or in terms of the common law – whether the judgment was ‘erroneously granted’ as contemplated in r 42(1)(a) because it was not legally competent for the court to have made such order – whether ‘good cause’ has been shown as required in terms of r 31(2)(b) and the common law.

JUDGMENT

MEYER J

[1] The applicant, Leopard Line Haul (Pty) Ltd t/a Elite Line (Elite Line), seeks an order rescinding a default judgment granted against it by this court (Moultrie AJ) on 4 May 2020,

when it was ordered to pay to the respondent, New Clicks South Africa (Pty) Ltd t/a New Clicks (New Clicks), contractual or delictual damages in the amount of R1 711 650.00 plus interest and costs of suit.

[2] The background facts relevant to the determination of this application are broadly uncontroversial. Insofar as New Clicks disputed certain factual matter raised in Elite Line's founding and supporting affidavits by way of 'bold and hollow denials of [such] factual matter' without countervailing evidence in circumstances where such evidence was required, I take the required 'robust common-sense approach' to the matter. (See *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) 371 (SCA) para 13; *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and another* 2011 (1) 8 (SCA) at 14A-D.) Instead of presenting such countervailing evidence, New Clicks' answering affidavit, which is deposed to by its in-house legal advisor, is made up 'with a pound of legal argument'. (See *Braz v Afonso & another* 1998 (1) SA 573 (SCA) at 577F.)

[3] Elite Line conducts the business of haulage or the conveying of goods. During September 2017, the parties entered into an agreement in terms of which it was agreed that Elite Line would convey goods or stock for New Clicks by road between its storage facilities or warehouses in Centurion and Germiston, for remuneration. It was agreed that Elite Line would carry out its mandate in a proper and professional manner, exercising due care and skill, and that it would take adequate steps to avoid loss of stock being transported (the agreement).

[4] After some months during which Elite Line had conveyed New Clicks' stock, New Clicks, through a stock taking exercise, ascertained stock shortages in its warehouses. It caused an investigation to be conducted, which revealed to New Clicks that its employees had stolen stock from its warehouses and had caused such stock to be conveyed on Elite Line's trucks while Elite Line was fulfilling its obligations in terms of the agreement. *En route* between its warehouses in Germiston and Centurion, the stolen stock had been offloaded from Elite Line's trucks. New Clicks, early in 2018, adopted the stance that Elite Line was liable to compensate it in respect of the alleged stolen stock.

[5] Elite Line referred the matter to its insurer. By letter dated 11 September 2018, its insurer advised it as follows:

'This policy covers the insured's legal liabilities that arise whilst the insured is operating as a transporter.

In this instance however, as the actual time of the theft of the goods must be at the time they were illegally loaded out of the Clicks warehouse, clearly the loss did not occur whilst the goods were in the insured's custody and control, but rather while still under the custody and control of Clicks.' Elite Line adopted a similar stance that it was not liable for the thefts, if such thefts had indeed occurred.

[6] New Clicks, despite demand from New Clicks' attorneys, refused to pay to Elite Line the balance outstanding in an amount of R785 893.20 in respect of the transport services rendered to it during the period November 2017 to January 2018. Elite Line threatened to institute legal proceedings to obtain payment of such amount. Subsequently, by 19 November 2018, New Clicks paid all the monies due to Elite Line in respect of the transport services which Elite Line had rendered to it. New Clicks remained of the view that Elite Line was liable to it for payment of an amount of R1 711 650, because of the involvement of its employee, Mr Mpofu, who was the driver of the trucks on which the stolen stock had been conveyed. The amount of R1 711 650 represents the cost price of the stock shortages in New Clicks' warehouses, which stock shortages its stock taking exercise had revealed. Elite Line, in turn, remained adamant that it was not liable to New Clicks for its alleged loss, and it did not comply with the formal demand for payment of such amount from New Clicks' attorneys. By letter dated 18 October 2019, Elite Line's erstwhile attorneys responded to the demand, *inter alia* by stating:

'We confirm that our client has handed the matter over to its insurers, who have indicated that they will defend any legal proceedings launched by your client against our client as threatened in your letter of demand.'

[7] On 31 October 2019, New Clicks' attorneys of record asked Elite Line's erstwhile attorneys whether they would consent to service of the summons at their offices or whether they should serve it on Elite Line. On the same day, Elite Line's erstwhile attorneys addressed an email *inter alia* to Elite Line's managing director, Mr Henk Adendorff, stating:

'In light of the fact that your insurers are going to handle any litigation launched by New Clicks, please confirm that I can respond to Fairbridges and advise them that we are not authorized to accept service of any summons issued, on your behalf, and that they should proceed to have any summons issued formally served on your offices?'

[8] On 8 November 2019, New Clicks issued summons against Elite Line for payment of contractual or delictual damages in the amount of R1 711 650 plus interest and costs. In its claim *ex contractu* it avers:

- '5. In breach of the Agreement, in the period between 1 December 2017 and 31 January 2018 (the precise dates being unknown to the Plaintiff), the Defendant failed to take adequate steps to prevent the loss of the Plaintiff's stock, and/or failed to perform the Services in a proper and professional manner, exercising due care and skill. The stock that was lost and/or stolen is set out in annexure "A" hereto, which is a schedule showing the shortages of stock, together with the cost price and selling price thereof.
6. In consequence of the Defendant's breach of the Agreement, the Plaintiff has suffered damages in the amount of R1 711 650.00, being the cost price of the stock that was lost and/or stolen.'

[9] And these are the averments in relation to its alternative claim for delictual damages:

- '8. At all times material to this claim, the Defendant employed Siboniso Mpofu ("Mpofu"), as a truck driver.
9. In the period between 1 December 2017 and 31 January 2018, Mpofu unlawfully and intentionally misappropriated stock belonging to the Plaintiff, which was being transported between the Plaintiff's distribution centres in Centurion and Germiston, alternatively allowed such stock to be misappropriated by third parties, the identities of whom are unknown to the Plaintiff. A schedule of the stock that was misappropriated is annexed, marked "A".
10. At all material times Mpofu was acting within the course and scope of his employment with the Defendant, and the Defendant is vicariously liable for the damages sustained by the Plaintiff in consequences of Mpofu's conduct aforesaid.'

[10] The summons was served on Elite Line on 11 November 2019. At 12h26 that morning, an employee of Elite Line forwarded a copy of the summons *inter alia* to its managing director, Mr Adendorff, who in turn sent the summons *inter alia* to its insurance broker, Mr Greg Anderson t/a RMS Brokers, and to its erstwhile attorneys, who at 12h37

enquired from Mr Adendorff whether they should enter an appearance to defend. At 12h54 Elite Line's insurance broker sent the summons to Elite Line's insurer.

[11] Elite Line's insurer addressed an email to its insurance broker on 13 November 2019, advising it as follows:

'We have instructed Savage Jooste & Adams to act on our behalf. They will be in contact with the insured's Attorney to discuss the matter seeing that we have not the (*sic*) added to the summons. We did however request that they take the matter over if that status changes.'

Mr Anderson, who deposed to a confirmatory affidavit, states that he understood the correspondence to mean that Elite Line's insurer confirmed that it was attending to the summons and had appointed attorneys. Mr Adendorff states that he, 'as controlling mind of the Applicant, accepted that the Respondent's action was going to be defended by the Applicant's insurers'.

[12] During January 2020, Mr Adendorff enquired from Elite Line's insurance broker about New Clicks' action, which led to a string of emails. At 11h19, Elite Line's insurance broker requested its insurer for confirmation that its attorneys were still attending to defending New Clicks' action. At 14h02 Elite Line's insurer replied that '[o]ur attorneys are handling the matter on our behalf'. At 16h08 Elite Line's insurance broker informed Mr Adendorff that Elite Line's insurer had acknowledged that its attorneys were handling the matter on the insurer's behalf. At 16h16 Mr Adendorff thanked Elite Line

's insurance broker for the information. Mr Adendorff states that he 'was by virtue of the foregoing confirmation satisfied that the defence of the Respondent's action was in good hands'.

[13] On 28 July 2020, the sheriff served a warrant of execution upon Elite Line pursuant to a default judgment that had been granted against it in the action. Mr Adendorff states that he was surprised and immediately commenced making enquiries as to how it had occurred despite his *bona fide* belief that Elite Line's defence to New Clicks' action was being attended to. It turned out that no notice of intention to defend the action had been filed on behalf of Elite Line, that an application for default judgment on behalf of New Clicks had been issued on 29 November 2019, it had been set down for hearing on 4 May

2020, and that this court had granted the default judgment on 4 May 2020 without evidence, either *viva voce* or by way of affidavit, on the question of damages.

[14] Mr Adendorff states that his investigations revealed that there had been a misunderstanding between Elite Line's insurer on the one hand, and its insurance broker and himself on the other. Its insurer explained to its insurance broker that the exchange of correspondence to which I have referred 'actually meant that Savage Jooste & Adams Inc had been appointed to act on behalf of the insurer should the insurer become involved in the litigation between the respondent and the applicant in view of the insurer having declined liability'. Elite Line, represented by Mr Adendorff, and its insurance broker, represented by Mr Anderson, 'however, interpreted the responses by the applicant's insurer to the effect that the insurer was in fact dealing with the respondent's action as an insurer of an insured normally does when an insured is sued'. It is as a result of this misunderstanding that no notice of intention to defend the action was filed on Elite Line's behalf.

[15] Mr Adendorff states that it has always been the stance of Elite Line that it is not liable to New Clicks and that it would defend its claim. Mr Anderson also states that he, as the insurance broker of Elite Line and who has exclusively been dealing with its insurer on its behalf, held the *bona fide* belief 'that as a matter of fact the Applicant's insurers were attending to defending the Respondent's action against the Applicant'. He further states 'that the Applicant's brokers would not have sent the Respondent's summons and the subsequent correspondence to the Applicant's insurer for any other reason than to ensure that the Respondent's claim would be defended as is normally the case when an insured is sued'. He, 'acting as the individual representing the Applicant's brokers, [has] always been aware that the Applicant denies liability vis-à-vis the Respondent and would defend the Respondent's claim to the hilt. In these circumstances [he] would have ensured that the Respondent's claim be defended had [he] had any clear indication that the Applicant's insurers were in fact not going to do so. There is simply no reason why [he] would not have ensured that other Attorneys entered an appearance to defend on behalf of the Applicant had [he] been aware that the Applicant's insurers were not going to do so'.

[16] Elite Line acted promptly after it became aware of the default judgment on 28 July 2020 when the sheriff served the warrant of execution upon it. The present application for the rescission of the default judgment pursuant to which the warrant of execution was issued and served on Elite Line, was served on New Clicks on 25 August 2020, which is within 20 court days after the default judgment had come to Elite Line's knowledge.

[17] As far as New Clicks' contractual claim is concerned, it relied on the term of the agreement that Elite Line 'would take adequate steps to avoid the loss of stock being transported', which term it avers Elite Line breached by allegedly failing 'to take adequate steps to prevent the loss of the Plaintiff's stock'. Elite Line, on the other hand, avers that the term was not breached. It contends that it was only contractually obliged to take adequate steps to prevent the loss of New Clicks' stock that it conveyed or transported in terms of the agreement ('authorised stock') and not stock that was stolen by New Clicks' employees from its warehouses and uploaded onto its trucks when the authorised stock was uploaded. As far as New Clicks' delictual claim is concerned, Elite Line contends that it is likewise based on the averment that Elite Line's truck driver intentionally misappropriated or allowed misappropriation of New Clicks' stock 'which was being transported between the Plaintiff's distribution centres in Centurion and Germiston'. Elite Line contends that none of the stock entrusted to it in terms of the agreement for conveyance between New Clicks' warehouses was ever lost or stolen. New Clicks, on the other hand, contends that once the 'unauthorised stock' was loaded onto Elite Line's truck, it had the responsibility to take adequate steps to avoid the loss of 'authorised' and 'unauthorised' stock being transported by it.

[18] Elite Line denies that its truck driver was involved in the theft and contends he could at most have been regarded as an accessory after the fact. New Clicks, on the other hand, contends that theft is a continuing crime and that 'theft continues as long as the stolen property is in possession of the thief or of some other person who was a party to the theft, or even some person acting on behalf of or even, possibly in the interest of the thief' and that '[a]ny person who assists the original thief, or his or her *socius* whilst the theft continues, is a thief'. (*Per Dolamo J in Ssengendo v S* [2014] ZAWCHC 147 para 27.)

[19] Elite Line disputes that it is vicariously liable for the alleged wrongs committed by its truck driver. Any such wrongful acts were committed solely for its employee's own interests and purposes. New Clicks, on the other hand, argues that there was nevertheless a sufficiently close link between the employee's wrongful acts and the business of New Clicks for it to be held vicariously liable. Elite Line, in turn, denies that there was such 'sufficiently close link'.

[20] In *Democratic Alliance v President of the Republic of South Africa and Others; Economic Freedom Fighters v State Attorney and Others* [2019] 1 All SA 681 (GP) para 65, the full court said this:

'The general principle of vicarious liability holds an employer liable for the wrongs committed by an employee during the course of employment. Where an act is done by an employee solely for his own interests and purposes, although occasioned by his employment, a subjective and an objective test are applied for determining vicarious liability. This approach for determining vicarious liability was thus formulated by O'Regan J in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) (CC) para 32:

"The approach makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is 'sufficiently close' to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights."

[21] Elite Line also disputes a causal link between its alleged breach of the agreement and the contractual damages claimed by New Clicks as well as the quantum of delictual damages claimed from it as a result of the alleged wrongful acts for which it is allegedly vicariously liable. The contractual or delictual loss claimed from it was ascertained by means of a stocktaking exercise, which revealed a general shortage. Elite Line contends that New Clicks cannot prove that every cent of the general shortage established through

its stocktaking exercise was caused by the stock losses that occurred as a result of stolen stock allegedly conveyed on its trucks. New Clicks has merely raised a bare denial and did not present countervailing evidence of how the amount of damages claimed from Elite Line as a result of its alleged breach of the agreement or the alleged wrongful acts of its truck driver was established; in other words on what basis all the stock losses revealed by means of its stock taking exercise is ascribed to the stolen stock conveyed on Elite Line's trucks.

[22] Elite Line contends that it is entitled to the rescission of the default judgment, either in terms of r 42(1)(a) or of r 31(2)(b) of the Uniform Rules of Court, or in terms of the common law.

[23] Rule 42(1)(a) provides that '[t]he court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary . . . [a]n order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby'. An order or judgment is 'erroneously granted', *inter alia*, if it was not legally competent for the court to have made such an order. (See *Athmaram v Singh* 1989 (3) SA 953 (D) at 956 *in fine*-957A; *Promedia Drukkers & Utgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417G-H.) New Line argues that it was legally incompetent for the court to have granted contractual or delictual damages by way of a default judgment without receiving evidence, either *viva voce* or by way of affidavit, in order to determine the *quantum* thereof. The cost price of the stock shortages in New Clicks' Centurion and Germiston warehouses determined by way of a stock taking exercise, it argues, does not *per se* establish liability on the part of New Clicks for damages in the amount of the cost price of such stock shortages.

[24] I agree that the cost price of the stock shortages in New Clicks' warehouses determined by way of a stock taking exercise does not *per se* establish liability on the part of New Clicks for damages, either as a result of breach of contract or in delict, in the amount of the cost price of such stock shortages. However, such are not the averments made in the particulars of claim, either in pleading the claim *ex contractu* or in delict. In claiming contractual damages, New Clicks avers that stock that was lost or stolen as a result of Elite Line's breach of contract is set out in annexure 'A' to the pleading, which is

a schedule showing the shortages of stock, together with the cost and selling prices thereof. Similarly, in claiming delictual damages, New Clicks avers that Elite Line's employee unlawfully and intentionally misappropriated its stock set out in the schedule to the pleading or allowed such stock to be misappropriated by third parties. Furthermore, the damages claimed by New Clicks in contract or in delict are merely the cost price of the goods as reflected in annexure 'A' to the particulars of claim and could thus easily be determined by the court in granting default without any reference to evidence. (See *Economic Freedom Fighters and others v Manuel* 2021 (3) SA 425 (SCA) paras 91-104, and the authorities therein quoted.) On the pleading, it was thus legally competent for the court to have granted default judgment. The requirements of r 42(1)(a), therefore, have not been met to rescind the order granted in the absence of Elite Line.

[25] Rule 31(2)(a) provides that '[w]henever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of a notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet'. And r 31(2)(b) provides that '[a] defendant may within twenty days after he or she has 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 to it seems meet'. It is trite that the common law also requires good cause to be shown for the setting aside of a default judgment. (*Colyn v Tyger Foods Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA at 9A.)

[26] The principles relating to 'good cause' are well-established: An applicant is expected to (a) give a reasonable explanation of its default; (b) show that its application is made *bona fide*; and show that it has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success. (*Colyn* at 9E-F). The defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives: Schreiner JA in *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A. The court should not come to the assistance if it appears that the default was wilful or that it was due to gross

negligence: Brink J in *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476A. Whilst the respondent has to prove wilfulness of the default, the applicant bears the overall burden of proving good cause for the rescission of a default judgment. (*Silber* at 352G-H.) In *Valor IT v Premier, North West Province and Others* 2021 (1) SA 42 (SCA) para 38, Plasket JA said that 'very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong merits of success may excuse an inadequate explanation for the delay (to a point)'.

[27] New Clicks argues that the explanation proffered by Elite Line for its default, being that it believed that its insurer was entering an appearance to defend on its behalf, is 'extremely unacceptable and highly unreasonable', and depicts Elite Line's conduct 'as being wilful alternatively negligent in the circumstances'. It argues that it is glaringly apparent from the email chain (to which I have referred earlier in this judgment) that there is no possible way in which those emails could have been interpreted in the way Mr Adendorff on behalf of Elite Line and its insurance broker interpreted them. I disagree.

[28] First, the facts presented in this application demonstrate that Elite Line always disputed liability for the losses which New Clicks allegedly incurred as a result of loss, theft or misappropriation of its stock. When New Clicks, as a consequence of its alleged losses, refused to pay to Elite Line the balance outstanding in an amount of R785 893.20 in respect of the transport services rendered to it during the period November 2017 to January 2018, Elite Line denied liability and threatened to institute legal proceedings to obtain payment for its services, which was then subsequently paid. Elite Line did not comply with the demand for payment of New Clicks' alleged loss, but responded that its insurer will defend any legal proceedings instituted by New Clicks. Mr Adendorff's evidence is that Elite Line has always adopted the stance that it is not liable to New Clicks and that it would defend its claim. Mr Anderson also states that he, as the insurance broker of Elite Line and who has exclusively been dealing with its insurer on its behalf, [has] always been aware that the Elite Line denies liability vis-à-vis New Clicks and would defend its claim to the hilt.

[29] Second, Mr Adendorff on behalf of Elite Line dealt expeditiously with New Clicks' summons when it was received by Elite Line by immediately referring it to its insurance

broker, who in turn, on the same day, sent it to Elite Line's insurer. Two days later Elite Line's insurance broker was informed that its insurer had appointed Savage Jooste & Adams to act on the insurer's behalf. Elite Line, as I have mentioned, acted promptly after it had become aware of the default judgment on 28 July 2020, when the sheriff served the warrant of execution upon it. It instituted the present application for rescission of the default judgment on 25 August 2020.

[30] Third, during January 2020, Mr Adendorff enquired from Elite Line's insurance broker about New Clicks' action, which led to a string of emails that resulted in Elite Line's insurance broker informing Mr Adendorff that Elite Line's insurer had acknowledged that its attorneys were handling the matter on the insurer's behalf, which confirmation satisfied Mr Adendorff that Elite Line's defence to New Clicks' summons 'was in good hands'. Elite Line's insurance broker explains that he sent New Clicks' summons to its insurer and exchanged correspondence with it for no other reason than to ensure that New Clicks' claim would be defended as is normally the case when an insured is sued. If he had had any clear indication that its insurer in fact was not going to do so, he would have ensured that other attorneys entered an appearance to defend the action on behalf Elite Line.

[31] Fourth, if the evidence of Elite Line's insurance broker and that of Mr Adendorff is not to be believed, then there seems to be no conceivable reason why the summons was referred to Elite Line's insurer, why Elite Line was prepared to permit New Clicks to take a judgment by default against it since this is what would occur if the insurer did not enter an appearance to defend, and why Elite Line, who had steadfastly refused to pay New Clicks' claim, for no conceivable reason changed its mind and decided not to defend the action. Furthermore, I do not need to determine whether the interpretation which Messrs Adendorff and Anderson placed on the communications from Elite Line's insurer was right, or whether it was wrong as argued by New Clicks. Their interpretation explains why no notice of intention to defend the action on behalf of Elite Line was filed. It furthermore shows that Elite Line's application for rescission of the default judgment is *bona fide*. In all the circumstances it has also not been established that Elite Line's default was wilful or that it was due to gross negligence.

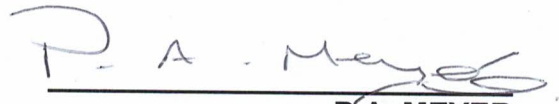
[32] New Clicks further argues that Elite Line's insurance broker did not follow up with its insurer since 24 July 2020 until the warrant of execution was served upon Elite Line on 28 July 2020. This criticism, in my view, has merit and renders New Clicks' opposition to the rescission application reasonable. This will be reflected in the costs order I propose to make. Its failure to further follow up with its insurer during this period, however, is in all the circumstances of this case not dispositive of Elite Line's application for rescission of the default judgment granted against it. Elite Line's default is the failure to have filed a notice of intention to defend. It furnished an explanation of its default sufficiently full to enable this court to understand how it really came about, and to assess its conduct and motives. Mr Adendorff on behalf of Elite Line instructed its insurance broker to follow up on the progress in defending New Clicks' action. Once Mr Anderson reverted to Mr Adendorff and confirmed that Elite Line's insurer had acknowledged that its attorneys were handling the matter, Mr Adendorff was satisfied that Elite Line's defence to the action 'was in good hands'.

[33] I now turn to the question whether Elite Line has established a *bona fide* defence to New Clicks' alternative claims, which *prima facie* has some prospects of success. Elite Line has put forward evidence of the existence of a substantial defence relating to its non-breach of the common cause terms of the agreement, the question of its vicarious liability, and the lack of a causal link between its alleged breach of the agreement and the contractual damages claimed by New Clicks as well as the quantum of delictual damages claimed from it as a result of the alleged wrongful acts for which it is allegedly vicariously liable. These are all triable issues. In addition, Elite Line has put forward evidence of its *bona fide* past and presently desire actually to raise the defence concerned in the event of the default judgment being rescinded. (*Galp v Tansley* NO 1966 (4) SA 555 (C) at 560B-C; *Kritzinger v Northern Natal Implement Co (Pty) Ltd* 1973 (4) SA 542 (N) at 546B-C.)

[34] In all the circumstances, in my view, this is a case in which rescission of the default judgment ought to be granted; good cause has been shown.

[35] In the result the following order is made:

- (a) The default judgment granted against the applicant by this court (Moultrie AJ) on 4 May 2020 is hereby rescinded.
- (b) The date of the granting of this order shall be deemed to be the date upon which the applicant has entered notice of its intention to defend the action instituted against it by the respondent.
- (c) The normal time periods provided for in the Uniform Rules of Court shall further govern the action proceedings.
- (d) The applicant shall pay the respondent's costs of opposing this application.


P.A. MEYER
JUDGE OF THE HIGH COURT

Judgment:	16 July 2021
Heard:	29 April 2021
Applicant's Counsel:	Adv T.A.L.L. Potgieter SC
Instructed by:	Savage Jooste & Adams, Menlo Park, Pretoria C/o Dentons South Africa, Sandton, Johannesburg
Respondent's Counsel:	Adv N. Cheethai
Instructed by:	Fairbridges Wertheim Becker, Cape Town/Johannesburg