

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
LOCAL SEAT, JOHANNESBURG**

CASE NO: 2020/10763

DATE: 23 July 2021

**DELETE WHICHEVER IS NOT
APPLICABLE**

- 1. Reportable: ~~Yes~~ / No
- 2. Of Interest To Other Judges: ~~Yes~~ / No
- 3. Revised Yes

DATE: 23 July 2021 SIGNATURE:

In the matter between:

LLR PROPERTIES (PTY) LTD

First Applicant

RAMATSHILA-MUGERI:LUFUNO, LESLIE

Second Applicant

and

SASFIN BANK LTD

First Respondent

SUNLIN (PTY) LTD

Second Respondent

LEAVE TO APPEAL JUDGMENT

Johann Gautschi AJ

1. This is an application for leave to appeal against the judgment which I granted on 24 May 2021 dismissing the first and second applicants' application in terms of Uniform Rule 31 (2) (b), alternatively Rule 42 (1) (a), further alternatively in terms of the common law, for rescission of a judgment which had been granted against them by default.
2. The applicants are now represented by a new team of counsel, namely, Adv K Tsatsawane SC and Adv H Salani. The respondents opposed the granting of leave to appeal and are again represented by Adv JG Botha. Counsel for both parties filed written heads of argument in support of their respective contentions.
3. The underlying basis on which leave to appeal is sought is that, by reason of service of the summons at an incorrect address, I should have granted rescission in terms of Rule 42 (1) (a) without any further enquiry as to whether the applicants had shown good cause by way of a *bona fide* defence. This is supported by the two judgments of the Supreme Court of Appeal referred to in the notice of appeal, namely, Rossiter v Nedbank [2015] ZASCA 196 and Lohdi 2 Properties cc: v Bondev Development (Pty) Ltd 2007 (6) SA 67 (SCA).
4. This is undoubtedly correct even though this was not argued at the hearing of the rescission application. On the contrary, the applicant's heads of argument (prepared by applicants' previous counsel) stated: "*It is trite that despite an application that the judgment sought to be rescinded was void ab origine, it is still incumbent on an applicant to show compliance with the requirements for rescission and must set out his defence with sufficient particularity so as to enable the court to decide whether or not there is a valid and bona fide defence*". Consequently, the main dispute addressed

at length by the parties in their heads of argument and at the hearing related to whether a *bona fide* defence had been shown.

5. The relevant dicta in the above-mentioned judgments were not drawn to my attention. I was unaware of them and did not take them into account when I dismissed the application for rescission. The judgment of Rossiter v Nedbank was referred to in the applicants' heads of argument, but in support of a different point, namely, submissions made under the heading of "Bona fide defence" in relation to a different point, namely, *"where material facts are not disclosed in an ex parte application or if fraud is committed (i.e. the facts are deliberately misrepresented to the court)"*.
6. With reference to the first applicant, Adv Botha pointed out that nowhere in the founding affidavit had it been contended that the address for service on the first applicant was the "incorrect address". Moreover, he submitted that service took place at the address provided according to the "terms of business" of the agreements and that consequently there was no "incorrect" service on the first applicant which would amount to a procedural irregularity satisfying the jurisdictional requirements of Rule 42 (1) (a). He referred to legible copies of the master rental agreement for the PABX system which had been uploaded to caselines and which had been provided to the Judge who granted the default judgment. Clause (ii) of the "terms of business" provides as follows:

"The address which you choose to accept service of all documents on yourself will be, for all purposes, your installation address overleaf. The address which you choose to receive any letters or notices on yourself will be your Postal address or Telefax number. You shall therefore be deemed to have received any letter or notice on the 8th day of the date of posting or on the day the notice or letter was delivered or telefax to the above-mentioned address".

7. Relying on the judgment in Müller v Mulbarton Gardens (Pty) Ltd 1972 (1) SA 328 (W) he submitted that the clause permitted service of all documents for all purposes including the service of court process. The respondents contended for a different

interpretation of the judgment and submitted that on a proper interpretation the aforementioned clause does not include service of court process.

8. With regard to the second applicant, Adv Botha pointed out that a legible copy of the guarantee signed by the second applicant in respect of the PABX system showed that there is a legible chosen *domicilium* address inserted, namely, “10 Bluegumspoort Road, Louis Trichardt” and that this was in fact the address at which summons for the second applicant had been served.
9. However, that guarantee only relates to one of the agreements, namely, the master rental agreement for the PABX system which is the subject matter of claim A. He could not show that any such address had been provided in the guarantees provided for the remaining two master rental agreements.
10. Adv Botha further contended that by reason of the use of the word “may” in Rule 42 (1) the Court retains a wide discretion even if the statutory requirements of Rule 42 had been satisfied. Consequently, he submitted that I was justified in having regard to the absence of a *bona fide* defence in exercising such discretion. In this regard he referred to the following judgments: Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another 1992 (4) SA 852 (A) at 862G to 863C, 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 to G and Van der Merwe v Bonaero Park (Edms) Bpk 1998 (1) SA 697 (T) at 702.
11. Whilst I accept that I would have been entitled to exercise a discretion, the fact of the matter is that I exercised my discretion on an erroneous basis, namely, on the incorrect assumption that the applicants had to show the existence of a *bona fide* defence.
12. In the circumstances I am of the view that the applicants have demonstrated that they have a reasonable prospect of success in this appeal and that leave to appeal should be granted against the whole of the judgment even if “incorrect” service on the second applicant might only have occurred in relation to claims B and C and given the disputed interpretation of Clause (ii) of the “*terms of business*” in relation to whether there was “incorrect” service on the first applicant.

13. I am in agreement with the submission in the notice of appeal that leave should be granted to the Full Bench as it does not warrant the attention of the Supreme Court of Appeal

ORDER:

1. Leave to appeal is granted to the Full Bench against the whole of the judgment granted in this matter on 24 May 2021.
2. The costs of this application including the costs of counsel are reserved for the hearing of the Full Bench hearing this appeal.

Johann Gautschi AJ

23 July 2021

Date of judgment: 23 July 2021

Date of hearing: 23 July 2021

Counsel for applicants: Adv Kennedy Tsatsawane SC and Adv Humbulani Salani

Attorneys for applicants: Ramatshila-Mugeri Attorneys Inc

Counsel for respondents: Adv JG Botha

Attorneys for respondents: ODBB Attorneys