

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

CASE NUMBER: 26992/2019

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES
20/09/2021

In the matter between:

NALE TRADING CC

First Applicant

THINGAHANGWI EDWIN MUTHIGE

Second Applicant

and

FREYSSINET POSTEN (PTY) LTD

Respondent

In re:

FREYSSINET POSTEN (PTY) LTD

Applicant

and

NALE TRADING (PTY) LTD

First Respondent

THINGAHANGWI EDWIN MUTHIGE

Second Respondent

JUDGMENT:

MINNAAR AJ:

1. The applicants are seeking an order rescinding the order granted by this court (Siwendu J) on 5 September 2019. Further ancillary relief is also prayed for.

2. Applicants have failed to specify whether the application is brought in terms of the provisions of Rule 31(2)(b), Rule 42(1) and/or the common law. In the applicants' heads of argument, the wording of Rule 42(1)(a) is quoted: this does not assist this court in any way as no further reference or submissions are made by the applicant as to how, and why, the provisions of Rule 42(1)(a) would apply. On a reading of the founding affidavit, no mention is made, and no evidence advanced, that the granted order was erroneously sought and/or granted and as such it is evident that Rule 42(1)(a) does not apply. The submission in paragraph 2 of the applicant's heads of argument is thus misleading and improper. I pause to mention that more care should be taken when submitting heads of argument to court: it contains the written submissions relied on by a party to assist the court in understanding what the case is for it to adjudicate on. To include irrelevant, and wrong, legal principles in the heads of argument is of no assistance and is frowned upon by this court. Counsel (in this instance it would appear that the attorney was responsible for the heads of argument) has a duty to court to be diligent and utmost honest in this regard.

3. In support of their case the applicants refer to a defence to the respondent's claim and attempts to make out a case that they were not in wilful default in defending the action. Premised on these allegations this court accepts that it is the applicants' case that this application is premised on the provisions of Rule 31(2)(b) of the Uniform Rules of Court.

4. The respondent (as applicant in the main application) issued an application against the applicants (as respondents in the main application) to enforce payment of all outstanding debt owed to the respondent by the first applicant in terms of an

acknowledgement of debt ("the AOD") entered into between the respondent and the first applicant and a subsequent deed of suretyship entered into by the second applicant.

5. The AOD was entered into on 27 March 2019. In terms thereof the first applicant, amongst other, irrevocably acknowledged that it is indebted to the respondent. First applicant undertook to pay the respondent monthly instalments towards the settlement of the debt until such time as the debt would be settled. First instalment was due on 25 May 2019 in the amount of R200 000.00 and thereafter monthly payment in the amount of R200 000.00 would be made to settle the debt. It was agreed that first applicant will settle the debt on or before 28 July 2020.

6. On 27 March 2019 the second applicant entered into the deed of suretyship for the due and punctual payments in the amounts due by the first applicant to the respondent arising from the AOD.

7. First applicant failed to make the first payment in the amount of R200 000.00 which was due on 25 May 2019. Following a letter of demand, first applicant made payment in the amount of R100 000.00. No further payments were made.

8. The main application was served on the applicants, by affixing same at Number [...] M[...] Street, Lindhaven, Roodepoort on 5 August 2019. According to the return of service this address is the registered address of the first applicant. This address was also the chosen address in terms of the AOD and the deed of suretyship. In the founding affidavit this address is confirmed as the address at which the applicants are conducting business from.

9. I pause to state that the notice of motion in the main application clearly indicated that the application will be set down for hearing on 5 September 2019.

10. The second applicant, as deponent to the founding affidavit, states that he has not been personally served with the main application as service was by way of affixing.

11. In terms of the provisions of Rule 31(2)(b) a defendant may within 20 days after he 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.

12. In *Grant v Plumbers (Pty) Ltd*¹ the requirements for an application for rescission under this subrule have been stated to be as follows:

12.1 The applicant must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance;

12.2 The application must be *bona fide* and not made with the intention of merely delaying the plaintiff's claim;

12.3 The applicant must show that he has 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 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.

13. This subrule does not require that the conduct of the applicant for rescission of a default judgment be not wilful, but it has been held that it is clearly an ingredient of the good cause to be shown that the element of wilfulness is absent.² Hence the element of wilfulness is one of the factors to be considered in deciding whether or not an applicant has shown good cause.

14. 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.³

15. Before a person can be said to be in wilful default, the following elements must be shown:⁴

¹ 1949 (2) SA 298 (E) at 476-7

² *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 803J

³ *Harris v ABSA Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 529E-F

- 15.1 Knowledge that the action is being brought against him or her;
- 15.2 A deliberate refraining from entering appearance, though free to do so;
and
- 15.3 A certain mental attitude towards the consequences of the default.

16. Save to decry the lack of personal service the applicants blatantly failed to inform this court that on 4 September 2019 an email was sent from Denga Incorporated, on behalf of the applicants, to the respondent's attorney. In terms of this email reference was made to the main application being set down for hearing on 5 September 2019. It was further noted in this email that the applicants have brought the main application to Denga Incorporated for assistance and a request was made that the main application be postponed for a period of a month to enable the applicants to commence with the undertaking to repay the debt.

17. From this email it is evident that the applicants clearly received the main application and for them to aver otherwise is dishonest and misleading. It follows that the applicants were aware of the main application and that they have deliberately refrained from entering an appearance to defend same. Instead they sought the indulgence of a postponement to get their house in order. It is thus clear to this court that the applicants were in wilful default in defending the main application.

18. Regarding their *bona fide* defence to the main application the applicants are attempting to blame Denga Incorporated by stating that they caused the applicants to enter the AOD and the deed of suretyship under duress in light of pending liquidation proceedings. Much reliance is also placed on the misjoinder of an entity by the name of Splish Splash Construction to the AOD. According to the applicants the first applicant and Splish Splash Construction was a joint venture when the initial contract with the respondent was entered into and as such Splish Splash Construction had to be a party to the AOD.

⁴ Erasmus Superior Court Practice on B1-202

19. The AOD is clear in its terms that same was entered into between the first applicant and the respondent. No mention is made of any involvement of Splish Splash Construction. Since the cause of action in the main application was premised on the breach of the AOD, the involvement of Splish Splash Construction to negotiations and agreements prior to the conclusion of the AOD is of no influence herein.

20. What is important, is that the first applicant made payment in the amount of R100 000.00 subsequent to its breach in terms of the AOD and following a letter of demand. In making this payment the first applicant clearly aligned itself to the terms and obligations of the AOD. Prior to the issuing of this rescission application no mention was made of any irregularities in terms of the AOD and as such the applicants' attempt to now cast aspersions on the conditions of same raises serious concerns as to their *bona fides* herein.

21. In the email from Denga Incorporated it was confirmed that the first applicant has not been able to honour its commitments and an undertaking was given to repay the debt. It is accepted that Denga Incorporated acted upon the instructions of the applicants and as such it is improbable, if not totally impossible, that this undertaking and the request for a postponement was not the clear instructions of the applicants.

22. Considering the above, the muddying of the water by the applicants takes this matter no further. There is just no *bona fide* defence to the respondent's claim in the main application.

23. Applicants attempt to place the blame on Denga Incorporated for entering into the AOD does not assist the applicants in any way as first applicant subsequently made partial performance and sought an indulgence to honour its commitments.

24. Rule 31 imposes on the applicants the burden of actually proving, as opposed to merely alleging, 'good cause' for a rescission⁵. In *Silber v Ozen Wholesalers (Pty)*

⁵ *De Vos v Cooper & Ferreira* 1999 (4) SA 1290 (SCA) at 1304H.

*Ltd*⁶ the Appellate Division, as it then was, held that the requirement of 'good cause' cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence but, in addition, the *bona fide* presently held desire on the part of the applicants to actually to raise the defence concerned in the event of the judgment being rescinded. *In casu* the applicants have failed to meet this requirement and it follows that the application cannot succeed.

25. Respondent sought a dismissal of the application with costs on the scale as between attorney and client. The Applicants lack of *bona fides* and their election to withhold crucial information from this court would justify such a punitive costs order.

ORDER:

In the premises the following order is made an order of court:

1. The application for rescission is dismissed;
2. The applicants, jointly and severally the one paying the other to be absolved, to pay the costs of this application on the scale as between attorney and client.

⁶ 1954 (2) SA 345 (A) at 352 G - H

J MINNAAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed electronically by uploading same on CaseLines and by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 22 September 2021.

Appearances:

Applicant's Counsel:	Mr Leshabana
Applicant's Attorney:	CHSM Incorporated Attorneys
Respondent's Counsel:	Adv M Louw
Respondent's Attorney:	Barnard's Incorporate Attorneys
Date of hearing:	17 August 2021
Date of judgment:	22 September 2021