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**IN THE HIGH COURT OF SOUTH AFRICA**

**[GAUTENG DIVISION, PRETORIA]**

**CASE NUMBER: 38685/2010**

In the matter between:

**WILHELM PIETER SCHOLTZ**

**APPLICANT**

**and**

**J FRANCES & SEUNS KLERKSDORP (PTY)**

**LTD**

**FIRST RESPONDENT**

**JACQUES HENDRIK JANSEN**

**SECOND RESPONDENT**

In re:

**J FRANCES & SEUNS KLERKSDORP (PTY) LTD**

**APPLICANT**

**and**

**WILHELM PIETER SCHOLTZ**

**FIRST RESPONDENT**

**JACQUES HENDRIK JANSEN**

**SECOND RESPONDENT**

**JUDGMENT**

**A.J. LOUW AJ**

[1] The Applicant in this application applies for the rescission of a judgment that was granted

against him by this Court on the 9<sup>th</sup> December 2011. In these proceedings (hereinafter called "the rescission application") there was no appearance for the Second Respondent. Before me the Applicant was represented by Ms Da Rocha and the First Respondent was represented by Mr Davis SC.

[2] I will hereinafter refer to the parties by name. Over the past 5 years since 2010 there were more than one application brought under this case number and the parties featuring as Applicants and Respondents changed from time to time. I will accordingly refer hereinafter to the Applicant at the inception of the proceedings in 2010, being J. Frances & Seuns Klerksdorp (Pty) Ltd as "Frances". To Wilhelm Pieter Scholtz, the present Applicant for rescission of judgment, I will refer as "Scholtz". To Jacques Hendrik Jansen, the Second Respondent in the rescission application, I will refer as "Jansen". To the professional company wherein Scholtz and Jansen practised as attorneys and directors, being Jansens Ingelyf I will hereinafter refer to as "Jansens Incorporated". A further party in these proceedings (but not involved in the rescission application) is one Marius Dreyer, the client of Jansens Incorporated and to him I will refer as "Dreyer". Jansens Incorporated also does not feature as a party in the rescission application.

[3] In summary: Scholtz applies for rescission of the default judgment granted against him by Goodey, AJ on the 9<sup>th</sup> December 2011. In the proceedings that resulted in the default judgment ("the contempt application") Scholtz was cited as the First Respondent, Frances as the Applicant and Jansen as the Second Respondent.

[4] On 9 December 2011 Goodey, AJ in this Court granted the following order against Scholtz:

"NA AANHOOR van die regsverteenwoordiger(s) namens die party(e) en na deurlees van die

kennisgewing van mosie en ander stukke geliasseer

### WORD GELAS

1. *DAT die Eerste Respondente (sic) bevind word in minagting te wees van 'n bevel van hierdie Hof in saak nr: 38685/2010 gedateer 2 Julie 2010.*
2. *DAT die Eerste Respondente (sic) gevonnissen word tot gevangesetting vir 'n tydperk van 90 dae na aanleiding van voormelde minagting, welke gevangesetting opgeskort word op voorwaarde dat die gemelde Respondente (sic) binne 7 dae (sic) na betekening op hulle van hierdie bevel aan paragraaf 3 infra voldoen*
3. *DAT die Eerste Respondente (sic) gesamentlik en afsonderlik persoonlik die bedrag van R400 524, 75 tesame met rente daarop teen 15,5% per jaar vanaf 30 Junie 2010 tot op datum van betaling daarvan aan die Applikant se prokureur van rekord oorbetaal/.*
4. *DAT die Eerste Respondente (sic) om gesamentlik en afsonderlik die Applikant se kostes in saak nr: 38685/2010 en 35428/2010 te betaal op 'n skaal soos tussen prokureur en klient*
5. *DAT teen die Tweede Respondente (sic) sine die uitgestel word.*
6. *Koste word voorbehou."*

[5] As can be seen from the order, the application for the same relief against Jansen was postponed *sine die* on 9 December 2011.

[6] Scholtz, under a notice of motion dated the 20<sup>th</sup> June 2013, that is some 18 months later, applied for the rescission of the abovementioned order. For sake of brevity I refer to the order of the 9<sup>th</sup> December 2011 as quoted above as "the 9 December 2011 order".

[7] In terms of the 9 December 2011 order Scholtz was declared to be in contempt of an order of this court dated 2 July 2010. As the 2 July 2010 order is important for purposes of considering Scholtz' rescission application, I quote the full contents thereof:

*"1. Oat hangende die finalisering van die hofverrigtinge onder saak nr: 3081/10 in die Landdroshof van Potchefstroom ("die hofverrigtinge") 'n bevel nisi uitgereik word ingevo/ge waarvan:*

*1.2 Die Tweede Respondent verbied word om die geldbedrag of enige gedeelte daarvan, as fooie of fondse verskuldig deur Eerste Respondent aan die Tweede Respondent:*

*1.2.1 te debiteer; en/of*

*1.2.2 dit oor te plaas na die besigheids rekening(e) van die Tweede Respondent om dit as fooie te neem; en/of*

*1.2.3 dit vir enige ander doe/ te gebruik en/of aan te wend, waardeur die geldbedrag verminder en/of verlore raak;*

*1.3 Die Tweede Respondent gelas word, om indien daar enige uitbetalings gemaak is en/of aanwending was van die geldbedrag soos gehou op die trust en/of besigheids rekening(e) sedert 29 Junie 2010, volledige besonderhede te verskaf van:*

*1.3.1 1 die presiese datum en tyd van elke uitbetaling en/of aanwending daarvan;*

*1.3.2 die presiese geldsom van elke uitbetaling en/of aanwending daarvan;*

*1.3.3 die volledige besonderhede van die persoon of entiteit aan wie*

*hierdie betaling en/of aanwending gemaak is, met insluiting van die volle name en van plus adres van die persoon of entiteit;*

*1.3.4 die spesifieke bank aan wie hierdie oorbetaling gemaak is, die adres van die bank en dorp of stad waar hierdie bank gelee is, die takkode van die bank, die spesifieke bankrekening nommer, asook die houer en/of begunstigde van die rekening, waarin hierdie betaling gemaak is;*

*1.4 Die Tweede Respondent gelas word om die besonderhede vervat in paragraaf 1.3 (met insluiting van die subparagrafe), skriftelik weer te gee per faks aan die Applikant se prokureur teen nie later nie as 09h00 op Saterdag 3 Julie 2010, by faksnommers [0.....] (Pretoria Prokureurs) en [0.....](Klerksdorp Prokureurs);*

*1.5 Die Balju van die Hof gemagtig word om beslag te lê op die fondse gehou in die rekening(e) soos geïdentifiseer uit die skriftelike besonderhede van 1.4, insoverre dit gehou word deur die Eerste en/of Tweede Respondente, alternatiewelik ten behoeve van die Eerste en/of Tweede Respondente;*

*1.6 Die Balju van die Hof gemagtig word om die beslaglegging vermeld in paragraaf 1.5 uit te voer deur die hofbevel deur te faks aan die betrokke instelling waar hierdie fondse gehou word;*

*1.7 Die Eerste en Tweede Respondente verbied word om hangende die voldoening van paragrawe 1.3 tot 1.6, enige van die fondse gehou en/of verkry van die geldbedrag, te vervreem of weg te maak of bewyse daarmee te handel waardeur die Applikant benadeel word;*

- 2. Oat die bevel verleen ingevolge paragraaf 1.1 tot 1.7 (met insluiting van die sub paragrafe) tussentydse werking hou hangende die finalisering van die keerdatum.'*
- 3. Oat die koste van die aansoek sal oorstaan vir beregting op die keerdatum.*
- 4. Oat verlop aan die Applikant verleen word om die Hof op dieselfde stukke te nader vir toepaslike regshulp ter beskerming van die geldbedrag, nadat die inligting vanaf die Tweede Respondent bekom is soos uiteengesit in paragraaf 1.3.*
- 5. Oat die Eerste, Tweede en Derde Respondente, opgeroep word om redes te kom aanvoer, indien enige, op 28 Julie 2010 om 10h00, waarom die voor/opige bevel hierbo verleen ingevolge paragraaf 1 nie bekragtig moet word nie."*

To this order I will hereinafter refer to as "the 2 July 2010 order".

[8] The 2 July 2010 order was enrolled for hearing on the court roll of 28 July 2010. A final order in the following terms was made on the 29th July 2010:

- "1. Die Balju Potchefstroom word gelas en gemagtig om die fondse waarop beslaggele is op 5 Julie 2010 in die Tweede Respondent se besigheidsrekening te ABSA met rekeningnommer [4.....] onmiddellik oor te betaal aan die Applikant se trustrekening gehou te Eerste Nasionale Bank Klerksdorp met rekeningnommer [6.....].*
- 2. Die Balju word gemagtig om alle nodige dokumente by enige finansiële instelling te onderteken wat nodig mag wees om effek te gee aan paragraaf 1.*
- 3. Die Eerste Respondent en Tweede Respondent erken nie dat die fondse ongemagtig uit die Applikant se rekening gehou te die Klerksdorp Tak van die Derde Respondent onttrek is en in die Tweede Respondent se trustrekening gedeponeer is nie. Die Eerste en Tweede Respondente laat ook noteer indien hulle sou slaag met die Appel teen die Agbare Landdros Windell se uitspraak gelewer op 7*

*Julie 2010, hulle, met kennis aan die Applikant, die nodige regstappe sal neem om op die fondse beslag te lê.*

*4. Die Eerste Respondent betaal die Applikant se koste, wat die voorbehoue koste van 2 Julie 2010 insluit op 'n geopponeerde skaal.*

*5. Hiema sal die Applikant geen verdere eise teen die Tweede Respondent he nie."*

To this order I will hereinafter refer to as "the 29 July 2010 order". In the 29 July 2010 order as well as in the 2 July 2010 order any reference to "Applicant" is a reference to Frances, any reference to "First Respondent" is a reference to Dreyer, any reference to "Second Respondent" is a reference to Jansens Ingelyf and any reference to "Third Respondent" is a reference to the First National Bank Limited.

[9] The amount of money that is the subject of the 2 July 2010 order and the 29 July 2010 order, is the sum of R400 524.65. This amount was unlawfully transferred from the fresh produce agent trust account of Frances to the trust account of Jansens Incorporated as a result of a Potchefstroom Magistrate's Court order. That Magistrate's Court order was subsequently set aside. To this day the R400 524.65 has not been paid, and the precise particulars of how it was spent by Jansens Incorporated, whereof Scholtz and Jansen were the only directors, has not been established. This is so despite the 2 July 2010 order.

[10] Dreyer did not authorise the payment and Dreyer did not receive one cent of the R400 524.65 relevant herein. It is common cause that the R400 524.65 were transferred from the trust account of Jansens Incorporated into Jansens Incorporated's business account where it allegedly mixed with other monies in its business account and wherefrom Scholtz and Jansen paid their debit orders and practice expenses. I will return to this aspect of the matter hereinafter. Suffice to say for the moment, no exposition was ever given as to how precisely the trust funds emanating from the fresh produce agent trust account of Frances were spent

by Scholtz and Jansen in their professional company Jansens Incorporated. This is so despite prayer 1.3 of the 2 July 2010 order. As Frances was not repossessed with its R400 524.65 a further order under this case number was granted on 2 September 2011 by Bredenkamp AJ. This order (hereafter referred to as "the 2 September 2011 order") against Dreyer as well as Jansens Incorporated reads as follows:

"1. Dat dit verklaar word dat die "magtiging" van die Eerste Respondent (Dreyer) aan die Tweede Respondent (Jansens Incorporated) om die bedrag van R400 524.65 na verwys in die pleitstukke as "fooie" te kan gebruik en/of aan te wend asook die Tweede Respondent (Jansens Incorporated) se sodanige aanwending nietig verklaar en tersyde gestel word;

*2. Dat die Tweede Respondent (Jansens Incorporated) gelas word om onmiddellik by betekening op hulle van hierdie bevel die bedrag van R400 524.65 oor te betaal aan die Derde Respondent (First National Bank Limited) se Klerksdorp tak tot krediet van die Applikant (Frances) se trustrekening met rekeningnommer [6.....];*

3. Dat, by die Tweede Respondent (Jansens Incorporated) se versuim om gevolg te gee aan hierdie bevel, die Derde Respondent (First National Bank Limited) en die Balju van hierdie hot gelas en gemagtig word om alle stappe nodig te neem ten einde toe te sien tot voonnelde oorbetaling;

*4. Die Eerste (Dreyer) en Tweede Respondente (Jansens Incorporated) word gesamentlik en afsonderlik gelas om die koste van hierdie aansoek te betaa/ op die skaal van prokureur en klient."*

[11] When the 2 September 2011 order did not produce any satisfactory results for Frances, the contempt application was issued against Scholtz personally and Jansen personally by

Frances. The contempt application is dated the 7<sup>th</sup> November 2011 and was issued on the 9<sup>th</sup> November 2011. The contempt application was served personally on Scholtz on the 22<sup>nd</sup> November 2011. Scholtz then explains in paragraph 12 of the founding affidavit of the rescission application that he, through his attorneys of record, delivered a notice of intention to defend to the attorneys of record of Frances on the 2<sup>nd</sup> December 2011. It was filed at court on the 5<sup>th</sup> December 2011.

[12] Clearly the notice of intention to defend did not come to the notice of the attorneys of record of Frances or the court as the 9 December order was granted. During argument before me, Mr Davis SC, who also appeared on the 9<sup>th</sup> December 2011 when the 9 December 2011 order was granted, confirmed that neither he nor his attorney had any knowledge of the notice of intention to defend. That a *bona fide* mistake occurred here is confirmed by the fact that Jansen also filed a notice of intention to defend, that was indeed brought to the attention of my brother Goodey AJ. The contempt application against Jansen was postponed *sine die* as is evident from the 9 December 2011 order.

[13] In due course an order for payment of the R400 524.75 was granted against Jansen by Diedericks AJ on the 4<sup>th</sup> June 2012. At that time the relief for declaration that Jansen is in contempt of the order of 2 July 2010 and imprisonment, in similar terms as are contained in prayers 1 and 2 of the 9 December 2011 order, were postponed. That relief was eventually granted in favour of Frances against Jansen by Strydom AJ on the 3<sup>rd</sup> May 2013. That order is not available in the court file and the judgment thereof is also not available. I add that the affidavits filed in opposition and reply to the opposing affidavit of Jansen in those proceedings are also not in the court file.

[14] Whilst discussing documentation not available, it is necessary to point out that Scholtz

apparently did not attach any of the annexures to the rescission application. I accordingly have not had sight of the correspondence referred to in the founding affidavit of the application for rescission of judgment. In addition the Heads of Argument filed on behalf of Scholtz on the 6th February 2015 did not find its way to the court file. At my request Adv Da Rocha handed the Heads of Argument up when the matter was called before me. The various court orders referred to in the rescission application are available in the court file (with the exclusion of the judgment and order of Strydom AJ of 3 May 2013). The correspondence are discussed in the founding affidavit of Scholtz and the absence thereof did not detrimentally influence the consideration of the application for rescission of judgment. It needs to be pointed out here that the attorneys of record of Frances enrolled the application for rescission of judgment, despite the fact that Scholtz is the Applicant and despite the fact that the answering affidavit of Frances in the rescission application had already been served on the attorneys of record of Scholtz on the 24th July 2013. Scholtz did not file a replying affidavit in the rescission application. Thus the answering affidavit of Frances in these proceedings stands uncontested. The enrolment for hearing occurred on the 5th February 2015.

[15] Scholtz says that he only became aware, through his attorneys of record, of the 9 December 2011 order on the 5th March 2013. However, despite his lack of knowledge of the 9<sup>th</sup> December 2011 order and despite him having filed a notice of intention to defend in the contempt application on the 22<sup>nd</sup> November 2011, Scholtz never filed an opposing affidavit to the contempt proceedings. This significant failure is nowhere explained. I emphasise that Scholtz is an attorney who clearly knew that an opposing affidavit had to be filed. Apart from experience as an attorney the notice of motion expressly invited him to file an opposing affidavit within 15 days after entry of intention to defend.

[16] The absence of an opposing affidavit in the contempt proceedings (always taking into

consideration the fact that Scholtz apparently was not aware of the 9 December 2011 order until the 5th March 2015) and the absence of a replying affidavit in the rescission application are significant because in both those affidavits Scholtz would have had the opportunity to give the information required in prayer 1.3 of the 2 July 2010 order. That has to date not materialised, leaving the court and Frances in the dark as to what was done with the R400 524.65 that unlawfully fell into the hands of Jansens Incorporated already on the 29th June 2010.

[17] The only explanation in purported answer to paragraph 1.3 of the 2 July 2010 order was given under a Jansens Incorporated letterhead in a letter dated the 3rd July 2010. The letter was signed by Jansen. The contents thereof is paraphrased in paragraph 4.12 of the opposing affidavit of Frances. The letter of 3 July 2010 under the letterhead of Jansens Incorporated is in the papers in the court file and is also quoted in the contempt application. It reads as follows:

*"1. Ons verwys na bostaande aangeleentheid en die hofbevel aan ons versend per faks op 2 Julie 2010 om 15:27 welke vanoggend tot skrywer (the letter was answered under the signature of Jansen) hiervan se aandag gekom het. Skrywer het so spoedig moontlik hierdie skrywe opgestel en vra hy omverskoning vir die 40 of so minute vertraging.*

*2. Die inligting versoek en beveel is soos volg:*

*2.1 Oorbetaal deur Eerste Nasionale Bank in hul trustrekening op 30 Junie 2010 - R400 524,65*

*2.2 Fondse betaal uit trustrekening (Absa kode 630238, tjekrekening [0.....]) na besigheidsrekening (Absa kode 630238, tjekrekening [0.....]) sedert 30 Junie 2010 tot 2 Julie 2010 - R550 442,96*

3. *Vennening met ander trust- en/of besigheidsfondse van die betaling in paragraaf 2.1 het plaasgevind.*

4. *Die bedrag in 2.1 genoem is sedert, tesame met ander trustfondse na ans vennelde besigheidsrekening betaal en in ans besigheids rekening ontvang as fooie deur Mnr Dreyer aan ans verskuldig en betaalbaar en ooreenkomstig sy instruksies.*

5. *In die gewone loop van ans praktykbesigheid is verskeie debietorders teen ans besigheidsrekening gehonoreer en ander praktyksuitgawes betaal/. Dit is nie vir ons moontlik om die fondse in paragraaf 2.1 te identifiseer nie.*

6. *Ons vertou u vind bogeme/de in orde."*

[18] In paragraph 1.3 of the 2 July 2010 order Jansens Incorporated were expressly ordered to provide the particulars of any payments of the funds (i.e. the R400 524.65) and the utilisation thereof. The explanation in the letter of 3 July 2010 is not compliance with the contents of prayer 1.3 of the 2 July 2010 order. At no time since the 3rd July 2010 did Jansens Incorporated and Scholtz and Jansen personally explain how the R400 524.65 were spent by them. This is so despite the fact that Scholtz and Jansen are facing imprisonment for non-compliance with the order of 2 July 2010.

[19] Nowhere in the application for rescission of judgment does Scholtz purport to oppose the application on grounds thereof that he and/or Scholtz and the professional company Jansens Incorporated in fact complied with the 2 July 2010 order. A number of defences are raised which will be dealt with hereinlater, but it is significant that there is an absolute silence as to the question whether he regards the letter of 3 July 2010 or for that matter any other explanation as a *bona fide* answer to specifically prayer 1.3 to 1.3.4 of the 2 July 2010 order. Neither is there in the rescission application an attempt to provide an honest and forthright explanation as to how precisely the amount of R400 524.65 were used (actually

misused) by Jansens Incorporated whereof Scholtz and Jansen were the only directors.

[20] In the opposing affidavit of Frances and more particularly in paragraphs 4.12 to 4.14 thereof the deponent on behalf of Frances refers to the insufficiency of the letter of the 3rd July 2010. The Frances deponent also refers to the order of 2 September 2011 when Jansens Incorporated was *inter alia* ordered to immediately pay the amount of R400 524.65 into the Frances Fresh Produce Agent trust account. The Frances deponent also complains that the attachment of the trust account of Jansens Incorporated delivered up only R4 843.00. The Frances deponent also says that the R400 524.65 were used to pay Scholtz' personal motor vehicle and the remainder of the funds were transferred into an account of a girlfriend of Jansen. One would expect an officer of this court who *bona fide* believes in his innocence of contempt of court to take up the opportunity to fully explain, if not in his founding affidavit then in a replying affidavit in these extremely important proceedings for Scholtz personally, what actually happened with the R400 524.75 and why he must be regarded as innocent of contempt of court.

[21] Scholtz himself was deeply involved in the events between the 29th June 2010 and the 3rd July 2010:

21.1 On 30 June 2010 the amount of R400 524.65 was attached as a result of an ex parte application launched by Jansens Incorporated in the Potchefstroom Magistrate's Court.

21.2 Only after the attachment of the R400 524.65 were the papers in the Magistrate's Court ex parte application served on Frances.

21.3 On 1 July 2012 Frances' attorneys of record could not find copies of the writ of attachment on the Magistrate's Court file.

21.4 At 09h15 the Frances' attorneys arrived at the offices of Jansens Incorporated where they met Scholtz. Scholtz informed the Frances' attorneys that they should wait for Jansen.

21.5 At 10h30 on the 1st July 2012 Jansen arrived and he informed Frances' attorney of record that he (Jansen) could not return the amount paid into his trust account or deal with it without instructions from Dreyer.

21.6 At 13h15 Jansen still alleged that he was awaiting instructions from Dreyer. He was informed that Frances intended launching an application that same afternoon for rescission of the unlawfully obtained order and writ of attachment. Jansen undertook to make his appearance at the Magistrate's Court at which time he will disclose his instructions.

21.7 Jansen failed to make any appearance and failed to disclose instructions.

21.8 Frances proceeded with an application for upliftment of the attachment. Jansens Incorporated as represented by Scholtz argued three points *in limine* against the application for upliftment.

21.9 At 17h45 the Magistrate's Court adjourned and reserved judgment.

21.10 During the course of the proceedings before the Magistrate Frances insisted upon an undertaking that the amounts would not be paid out of the trust account of Jansens Incorporated. Scholtz alleged that such an undertaking could not be granted anymore as the funds have been paid out to Dreyer.

[22] It is undisputed in these proceedings, in view of the affidavit of Dreyer and the absence of a replying affidavit, that Dreyer neither gave any instructions with regard to the trust funds nor received any payment thereof nor could Jansens Incorporated debit the full R400 524.65 as

fees.

[23] In fact in the words of Jansens Incorporated in their letter dated the 3rd July 2010, Jansens Incorporated paid their own debts with the unlawfully obtained R400 524.65.

[24] It goes without saying that the letter of 3 July 2010 is untrue in the respects referred to in paragraph [22] above. I again emphasise that both Scholtz and Jansen are attorneys of this court. They (and in any event anybody else) are not entitled to lie to the court even if telling the truth would affect them detrimentally.

[25] It is astounding that Scholtz never took the opportunity to himself explain under oath his conduct as well as the conduct of Jansen and the reasons for their conduct, if there exists and exculpatory explanation. On the contrary, he clearly intentionally refrained to go under oath and give an explanation for the evidence contained in the founding affidavit in the contempt proceedings. I make this deduction on grounds thereof that Scholtz, on his own version, was for approximately a year after the granting of the 9 December 2011 order against him unaware thereof, yet after filing a notice of intention to defend on the 2<sup>nd</sup> December 2011 he never filed an opposing affidavit in the contempt application and does not deal with these vital important matters in his founding affidavit of the rescission application and more astoundingly, fails to file a replying affidavit!

[26] A contempt order with imprisonment and payment of R400 524.65 were claimed in the contempt application. Yet no opposing affidavit was filed and no explanation for this failure is given in the rescission application. In addition Scholtz is afforded a further chance to give an open and forthright explanation in his founding affidavit in support of his application for rescission of judgment. Scholtz, however, does not give the expected forthright explanation. He clearly purposely avoids dealing directly with what precisely happened with the R400 524.65.

[27] The explanation contained in the letter of the 3rd July 2010 simply is inadequate, unacceptable and untrue. The 2 July 2010 order is extremely clear in prayer 3 thereof as to what information must be supplied. In colloquial terms, the 3 July 2010 letter is "a ducking and diving" exercise of giving an answer without providing any detail and especially not the particulars required in paragraph 1.3 of the 2 July 2010 order. Again I emphasise the fact that Scholtz is an attorney of this court and an officer of this court having the obligation to act honestly in his dealings with the court.

[28] Not even in the case of a lay person can the explanation contained in the letter of 3 July 2010 be regarded as adequate and acceptable. In the case of Scholtz, it certainly is unacceptable, him being an attorney, legally qualified and trained and an officer of this court.

In this regard **Fakie N.O. v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at par 42** found that a person in the position of Scholtz who had knowledge of the 2 July 2010 order has an evidential burden in relation to wilfulness and *mala tides* in contempt of court proceedings. Should a person in Scholtz's position fail to advance evidence that establishes a reasonable doubt as to whether his non-compliance was wilful and *ma/a fide*, contempt will have been established beyond reasonable doubt.

[29] In these proceedings for rescission of judgment there is no evidence advanced by Scholtz upon which there exists reasonable doubt as to whether the non-compliance with the contents of the 2 July 2010 order was wilful and *ma/a fide*. In fact, the one aspect that is not raised at all by Scholtz is an explanation specifically dealing with the contents of the order of 2 July 2010 and in particular the order contained in prayers 1.3 to 1.3.4 of that order. There is not even a word mentioned that in his view the letter of 3 July 2010 adequately explains the use of the R400 524.65 in order to negate the inference of wilfulness and *mala tides*. Not even the raising of these aspects in the Frances answering affidavit persuaded Scholtz to

commit himself under oath in a replying affidavit to a version in this regard. He relies on the fact that the default judgment was incorrectly taken on the 9<sup>th</sup> December 2011 because of his absence after entering a notice of intention to defend as well as on a number of "technical defences", which I will deal with hereinafter. About the essence of the matter, namely what happened with the R400 524.65, he does not mention a word.

[30] The action or inaction of Scholtz with regard to compliance with the order of 2 July 2010 must be considered against the background thereof that he is an attorney of this court and is accordingly fully aware of the consequences of not complying with an order of court and of what the order of 2 July 2010 expressly required of Jansens Incorporated.

[31] Both attorneys and counsel have duties and obligations to the Court in particular and to the administration of justice generally that are not confined only to matters connected with his practice. Indeed, to put it bluntly, Scholtz has and had to conduct himself consistent with his obligations as an officer of the court.

See: **Natal Law Socierly v N** [1985] (4) All SA 305 (N) also reported as 1985 (4) SA 115 (N) and the authorities referred to in that judgment.

[32] The essence of any contempt of court is that it violates the dignity, reputé or authority of the Court. The rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.

See: **Fakie N.O. v CCII Systems (Pty) Ltd** 2006 (4) SA 336 (SCA) at para 6 on p332A - C.

[33] The purpose of contempt proceedings usually are to compel the non-complier to comply with the terms of a previous order. This is not the only purpose and contempt proceedings may be brought for the sole purpose of punishing the non-compliant party.

See: **East London Local Transitional Council v MEC for Health, Eastern Cape** 2001 (3)

**SA 1133 (CK) at 1141A.**

[34] The order of 2 July 2010 was an interim order with immediate effect pending the return date of 28 July 2010. Prayers 1.1 (sic) to 1.7 have immediate operation pending the return date. On 29 July 2010 a final order as quoted above was made. The contents of prayers 1.2 , 1.3, 1.4, 1.5, 1.6 and 1.7 did not find their way in some form or fashion into the final order of the 29th July 2010. This point is made pertinently in paragraph 9.1 of the Heads of Argument filed on behalf of Scholtz for purposes of the rescission of judgment application.

[35] In essence this argument on behalf of Scholtz says that the order of 2 July 2010, being a rule *nisi*, was discharged by way of the agreed order of the 29th July 2010 and accordingly lapsed or became inoperative as a result of the final order. It is undoubtedly so that a rule *nisi* that has operation pending a return date lapses or is discharged if a final order in those terms is not granted or if a different order is granted on the return date of the rule *nisi*.

See: **Mphahlele Taxi Association v Lebowakqomo Taxi Owner's Association and Others** [2002] (3) All SA 124 (T) per [11]. **SAB Lines (PtyJ Ltd v Cape Tex Engineering Works (PtyJ Ltd** [1968] (2) All SA 150 at 152.

The submission thus is that Scholtz cannot be found in contempt of the 2 July 2010 order. Possible support for such an approach might be found in the judgments of **Bannatvne v Bannatvne** 2003 (2) SA 359 (SCA) and **Bannatvne v Bannatvne (CGE as amicus curiae)** 2003 (2) SA 363 (CC). At para 14 of the Constitutional Court judgment of **Bannatvne** an order for committal of the appellant for contempt of court was set aside as being incompetent on grounds thereof that upon substitution of a High Court order by a maintenance court order the High Court order ceased to be of force and effect.

[36] The **Bannatvne** judgments must be seen within the specific context of maintenance

orders. A declaration of contempt may follow upon the wilful and *ma/a fide* non-compliance with an interim order or an order that later on lapses or is discharged for some reason. In this regard reference must be made to the matter of **S v Beyers 1968 (3) SA 70 (AD)** which is quoted extensively with approval by the Constitutional Court in *Fakie* **N.O. v CCII Systems-supra**. In **S v Beyers**, Beyers was found guilty of contempt of court for contempt of an interdict against Beyers despite the fact that the interdictory order fell away as a result of a settlement that was reached in terms whereof the complainant, with retrospective operation, waived the relevant sections of the interim interdict as if it never had existed. In **Marlin v French Hairdressing Saloons Ltd and Others 1950 (4) SA 325 (W)** the respondents were found in contempt of court although they had already desisted from contravening the interdict against them at the time when the application for contempt was brought against them.

[37] Accordingly, the fact that the interim order with immediate operation pending the return day in terms of the 2 July 2010 order lapsed or was by implication discharged on the 29th July 2010 is no obstruction to finding Scholtz in contempt of court of the 2 July 2010 order.

[38] Ms Da Rocha in an able argument on behalf of Scholtz argued that Jansen Incorporated was ordered to pay the sum of R400 524.65 in terms of the order of 2 July 2011 and not Scholtz personally. Scholtz resigned as a director of Jansens Incorporated. on 4 April 2011. It was accordingly argued that Scholtz cannot be held in contempt of court after the date of his departure as a director of Jansens Incorporated as since 4 April 2011 he has no ability to ensure compliance with the orders against Jansens Incorporated.

[39] There is no merit in this argument. Scholtz was a director of Jansen Incorporated at the relevant time, namely the period 29 June 2010 to 29 July 2010. He was actively involved in the opposition to the relief sought by Frances and clearly had full knowledge of the order of 2 July 2010 and of the facts relevant in the matter. In addition, nowhere in the rescission

application is it the case of Scholtz that he was not aware of the order of 2 July 2010 on or after 2 July 2010 or of the answer in the letter of 3 July 2010.

[40] It is correct that Scholtz initially was not personally a party to the litigation under this case number. He became so involved as a result of firstly the order of 2 July 2011 when Jansens Incorporated was *inter alia* ordered to pay the sum of R400 524.65 to Frances.

[41] Then the next step in the process of involving Scholtz personally was the contempt application. The contempt application led to the judgment of 9 December 2011. Contrary to the argument of Ms Da Rocha, the contempt of court application firstly makes out a case for contempt of court of the 2 July 2010 order. It secondly intends to force Scholtz to pay the sum of R400 524.65 in order to avoid imprisonment for the contempt of the 2 July 2010 order. The contempt of court application was brought under this case number directly against Scholtz and Jansen personally. The basis of their liability is the fact that Scholtz and Jansen were the only directors of Jansens Incorporated during at least the period 29 June 2010 to 29 July 2010 who both had knowledge and participated in the process of illegally obtaining payment of the R400 524.65 and in the actions of non-compliance with the 2 July 2010 order.

[42] It is trite that the directors of a company, who has knowledge of the contempt of court of their company, are personally liable together with the company for contempt of court.

See: **Twentieth Century Fox Film Corporation and Another v Playboy Films 1978 (3) SA 202 (WLD) at 203 C - D.**

It is necessary to quote from this judgment at 203G - H where the following is stated:

*"This Court must jealously guard the orders which it grants in the interests of the community at large. If persons such a Jagger were permitted to trifle with the orders of this Court without being severely punished therefore the administration of justice*

*would be brought into disrepute and rendered valueless.*" (The reference to "Jagger" is a reference to the director of the respondent in that application for committal to prison of Jagger for contempt of court). See also: **Metlika Trading Ltd and Others v Commissioner, SARS 2005 (3) SA 1 (SCA) at 191.**

[43] The order of 2 July 2010 is not attacked by Scholtz in the rescission application on grounds of alleged non-knowledge of the 2 July 2010 order or on the grounds that the 3 July 2010 letter from Jansens Incorporated is a *bona fide* and adequate answer to prayer 1.3 of the 2 July 2010 order or on grounds that he did not know of the 3 July 2010 letter or on grounds that he disagrees with the contents thereof.

[44] There accordingly is a proper case for personal liability of Scholtz. The fact that he resigned as a director on 4 April 2011 has no bearing on that liability. The contempt was committed long before 4 April 2011 and particularly in the period 3 - 28 July 2010.

[45] This avoidance to provide the information required by prayer 1.3 to 1.3.4 of the 2 July 2010 order tends to bring the court in disrepute and violates the dignity, repute and authority of the court.

[46] Accordingly, contrary to the argument of Ms Da Rocha, a proper case for contempt of court is made out.

[47] Ms Da Rocha further argued on grounds of the matter of **The Master v Mota/a 2012 (3) SA 325 (AD)** that the order of 9 December 2011 is void and can be ignored. Her further argument was that the only reason for Scholtz to attack the 9 December 2011 order (which is according to the argument void), is the contempt order contained in the 9 December 2011 order. This argument is incorrect. In **The Master v Mota/a** the point is made that a null and void court order may be disobeyed without having to declare the purported order null and void

by a court. Unquestionably one of the instances of such invalidity is where legal proceedings are initiated against a party and he is not cited to appear. See for instance **Sliom v Wal/ach's Printing and Publishing Company Ltd 1925 TPD 650**. The answer to this argument is that this is not a similar case. It is common cause on the papers that the contempt application was indeed personally served on Scholtz on the 22nd November 2011 and that he entered a notice of intention to defend on the 2nd December 2011. He thus was properly cited.

[48] The next question to be determined is whether his absence and non knowledge of the proceedings of the 9<sup>th</sup> December 2011 entitles him to a rescission of judgement.

[49] In terms of Rule 42(1) a court may rescind a judgment that was erroneously sought or erroneously granted in the absence of a party.

[50] The contempt application was issued on 9 November 2011 and served personally on Scholtz on the 22nd November 2011. Scholtz filed his notice of intention to defend (paginated as pages 32 - 34 of the contempt application) on 2 December 2011. Throughout these proceedings against Scholtz personally he is represented by Attorneys Francois Uys Incorporated. It is also Francois Uys Incorporated who entered notice of intention to defend on the 2nd December 2011. An odd fact in these proceedings is that Francois Uys Incorporated was delivered with an index and a notice of enrolment for the 4th June 2012 of the contempt application against Jansen. The order of 9 December 2011 formed part of such papers and it must have been clear to all concerned that an order was granted on the 9<sup>th</sup> December 2011. Yet in the application for rescission of judgment it is the case of Scholtz that his attorneys only became aware of the 9 December 2011 order and informed him thereof on or about the 5th March 2013. (I noted that no confirmatory affidavit from Francois Uys Attorney was filed with the rescission application.) No point was made of this oddity by Mr Davis SC and it is nowhere referred to in the papers. Therefore, although I find it odd that the

order of the 9th December 2011 could have escaped the attention of Scholtz and his attorney of record, I will not take this fact into consideration seeing that it is neither canvassed in the affidavits nor in argument.

[51] The application is not specifically stated to be brought in terms of Rule 42 and I approach the matter on the basis that the application covers both Rule 42(1) and the Common Law.

[52] In terms of Rule 42(1) an applicant for rescission of judgment who can show that the order was erroneously sought or erroneously granted is in principle entitled to a rescission of judgment without explaining what his/her defence is against the claim.

See: **Topal v LS Group Management Services (Pty) Ltd 1988 (1) SA 628 (W) at 6500 - J.**

In a rescission on grounds of the Common Law a defence to the claim must also be disclosed.

[53] That the order was erroneously sought on the 9<sup>th</sup> December 2011 is without doubt. The only question left in this regard is whether I have a discretion and should exercise such discretion against the rescission of judgment in the circumstances of the matter.

[54] One aspect relevant to an exercise of discretion in terms of Rule 42(1) is whether the application for rescission of judgment was brought within a reasonable time after Scholtz became aware of the 9 December 2011 order or sets forth a reasonable explanation for the failure to apply for rescission of judgment within a reasonable time.

[55] Scholtz says he became aware of the 9 December 2011 order on the 5th March 2013, that is approximately 14 months after the granting of the 9 December 2011 order. Scholtz instituted the rescission of judgment application on the 20th June 2013, that is 3 months after becoming aware of the 9 December 2011 order.

[56] Frances made no objection to the lateness of the application for rescission of judgment

and no argument was presented in that regard. In the circumstances I conclude that the rescission application was brought within a reasonable time.

[57] I have a discretion to refuse a rescission of judgment even though the 9 December 2011 order was erroneously sought as intended by Rule 42(1).

See: **Tshivhase Royal Council v Tshivhase; Tshivhase v Tshivhase 1992 (4) SA 852 (AD) at 8621 - 863A.**

In the exercise of my discretion I must take into consideration that it is not necessary for Scholtz to show good or sufficient cause in order to be successful with the rescission of judgment application in terms of Rule 42(1).

See: **Topal v LS Group Management Services supra and Mutebwa v Mutebwa [2001] (1) All SA 83 (Tk) at 89; Tshabalala and Another v Peer 1979 (4) SA 27 (T) at 300; Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (E) at 471G.**

[58] Insofar as **Topal**, **Mutebwa**, **Tshabalala** and **Bakoven** purport to find that there is no discretion to refuse an application for rescission of judgment in terms of Rule 42(1) when the judgment was erroneously sought or erroneously granted, I have to respectfully disagree with these judgments. Rule 42(1) is clear in providing a discretion. That this is so is confirmed by the **Tshivhase** judgment, which is a Supreme Court of Appeal judgment. I furthermore agree with the discussion in this regard as set forth in the matter of **Sheriff Pretoria Norlh-East v Flink and Another** [2005] (3) All SA 492 (T) at 497 - 504. See also:

**Theron v United Democratic Front (Western Cape Region) 1984 (2) SA 532 (C) 536 G.**  
**Van der Merwe v Bonaero Park (Edms) 1998 (1) SA 697 (T); Brangus Ranching (Pty) Ltd v Plaaschem (Pty) Ltd [2008] (4) All SA 542 (N); Harms Civil Procedure in the Supreme Court (the Commentary Volume) par 842.9 at pB-304.**

[59] I now consider the question whether I should exercise my discretion to refuse rescission to Scholtz.

[60] Scholtz entered a notice of intention to defend on the 2<sup>nd</sup> December 2011. Yet at no time thereafter did he file an opposing affidavit to the application. This remissness is nowhere explained by Scholtz. Accepting that he had no knowledge of the 9 December 2011 judgment, it is exceptionally strange that Scholtz, as an attorney, did not ever thereafter file an opposing affidavit, having regard thereto that the notice of motion in the contempt application indeed invites him, as it should be done, to file an opposing affidavit within 15 days after delivery of his notice of intention to defend. Scholtz is himself after all an attorney who would have known that the consequences of failure of a filing of opposing affidavit would eventually probably lead to a default judgement against him. Considering the seriousness of the application, I cannot accept that an attorney of this court would have forgotten to give attention to filing of an opposing affidavit after having taken the trouble of appointing attorneys of record and filing a notice of intention to defend.

[61] Scholtz lists his defences in paragraph 28 of his founding affidavit in the rescission application. Before turning to these defences I need to discuss a number of the submissions made by Ms Da Rocha in support of a rescission of judgment:

Firstly Ms Da Rocha submitted that on 2 September 2011 Jansens Incorporated was ordered to pay the sum of R400 524.65 and not Scholtz. Scholtz had resigned before the 2<sup>nd</sup> September 2011 order was made and up to then neither Scholtz nor Jansen were ever personally sued. As at 2 September 2011 and thereafter Scholtz was not a director (he having resigned on the 4<sup>th</sup> April 2011) and he could therefore not ensure compliance of the order. Ms Da Rocha accordingly submitted that he cannot be in contempt of court as he could not have ensured compliance with the court order of the

2nd September 2011 and as at the 2nd September 2011 he was also not personally sued; in fact there was no case for personal liability made out against him and accordingly there is no contempt of court; also on authority of **The Master v Motala 2012 (3) SA 325 (A)** the order of 9 December 2011 was void and could have been ignored; had it not been for the contempt part thereof, Scholtz need not even have approached the court to have the 9 December 2011 order set aside.

[62] The answer to these submissions are:

Scholtz and Jansen were both under the abovementioned case number personally cited by way of the 7 November 2011 contempt application. They are so cited on grounds of contempt of court of the 2 July 2010 order. I already found that the 2 July 2010 order indeed was an interim order that operated between the period 2 July 2010 to 29 July 2010. I already found that there was contempt of court during that period in that the purported answer contained in the letter of 3 July 2010 from Jansens Incorporated clearly did not comply with the terms of prayer 1.3 with its sub-paragraphs of the 2 July 2010 order. I already found that, despite the 2 July 2010 order having lapsed or having been discharged by way of the 29 July 2010 order, both Scholtz and Jansen indeed were in contempt of court.

Scholtz nowhere in the rescission application alleges that he was not aware of the provisions of the 2 July 2010 order and in any event a perusal of the papers show that he was deeply involved in the opposition to the attempts by Frances to obtain relief with regard to the R400 524.65.

His personal liability arises out of the contempt application and the 9 December 2011 order is an attempt to ensure payment of the R400 524.75 as is clear from the very prayers sought and granted against Scholtz on 9 December 2011.

The judgment of **Master v Motala 2012 (3) 325 (A)** is inapplicable. The order of 9 December 2011 was not void but is liable to be set aside (subject to the exercise of my discretion) as it was erroneously sought as intended by Rule 42(1). In this case it must be remembered that there was personal service of the contempt application on Scholtz. The order of 9 December 2011 is thus not void as envisaged by the discussion of void judgments in the **Motala**-matter.

[63] Since 2 July 2010 no proper explanation as to how the funds were utilised, has been provided to date. In this regard Scholtz is an officer of the court who understands the contents of prayer 1.3 of the order of 2 July 2010. He is an attorney and accordingly a member of an honourable profession who was ordered by the court of which he is an officer, to provide specific information.

[64] The submissions in paragraph 13.1, 13.2 and 13.3 of the Heads of Argument filed on behalf of Scholtz must be dealt with: the submission is made that Frances did not prove that Scholtz knew of the order of 9 December 2011. These submissions are made without reference to the contents of the founding affidavit of Scholtz. Nowhere is it his case that he was not aware of the existence of the order of 2 July 2010. It is Scholtz's own version in paragraph 7 of the founding affidavit that he only deals with the facts of the matter as are relevant to the rescission application. He deals in paragraph 8 and 9 with the order of 2 July 2010 and the order of 29 July 2010 and nowhere he alleges that he did not have knowledge of those orders or of the letter of 3 July 2010. Accordingly nothing turns on these submissions and they are not based on any facts. The Heads of Argument argues that the contempt arises from paragraph 1.7 of the 2 July 2010 order whereas clearly, the contempt lies with regard to non-compliance with the contents of prayer 1.3 and its sub-paragraphs of the 2 July 2010 order. Accordingly these submissions are also of no assistance to Scholtz.

[65] The defences raised in paragraph 28 of the opposing affidavit will now be discussed:

In paragraph 28.1 it is alleged that the founding affidavit of the contempt application contains allegations that were written in by hand "whilst it is clear that the affidavit is a copy, with reference to the signature thereof before a commissioner of oaths". The precise nature of the objection is not clear to me. However, in paragraph 4.1 and 4.2 of the founding affidavit the address particulars of Scholtz and Jansen were written in by hand. There is no initialling next to the handwritten addresses. The affidavit is in original and signed in original by both the deponent Kock and the commissioner of oaths. I find no irregularity and the affidavit certainly is not a copy.

Secondly in paragraph 28.2 the allegation is made that Jansens Incorporated has a substantial interest in the matter and is not a party. Insofar as the contempt of court proceedings are concerned, Jansens Incorporated is not a party with a direct and substantial interest. It is a claim directed personally at the directors of the professional company.

In paragraph 28.3 it is alleged that Scholtz and Jansen never were parties to the proceedings prior to the contempt application of 7 November 2011 resulting in the 9 December 2011 order. The implication clearly is that they are irregularly before the court. The contempt application is somewhat unconventional in the sense that one would have expected the application to be issued under a different case number or alternatively that a joinder application be brought so as to formally join Scholtz and Jansen. However, nothing turns on this apparent irregularity. Scholtz and Jansen both were properly and fully cited as parties in a separate application (although under the same case number) in terms whereof they personally are cited as parties for purposes of the contempt application. I find no defence entitling Scholtz to a rescission of

judgment in this approach of Frances. It clearly is a practical approach in the sense that all the papers relevant to the matter are then contained in one court file.

In paragraph 28.4 the defence is raised that as from 4 April 2011 Scholtz has not been a director of Jansens Incorporated and accordingly he could not give effect to the order of 2 September 2011. The contempt application is not directed against failure by Scholtz or Jansen to comply with the 2 September 2011 order. It is an application for their contempt of the 2 July 2010 order coupled with orders compelling payment of the R400 524.65. This approach appears to me to be perfectly in order.

In paragraph 28.5 the allegation is that the order of 2 July 2010 was novated (or lapsed or was discharged) as a result of the settlement agreement order of the 29th July 2010. I already dealt with these allegations.

In paragraph 28.6 the allegation made is that there is a pending application for rescission of judgment dated the 30th January 2012 to rescind the order of 2 September 2011. No allegation is made that the order of 2 September 2011 has been rescinded and nowhere in the original papers in the court file does there appear such an application or an order resulting from such an application. In any event the order that Scholtz must personally pay the R400 524.65 in order to avoid being imprisoned, can stand alone on the facts without the existence of the 2 September 2011 order. In paragraph 28.7 the discharge of the rule *nisi* of 2 July 2010 is raised. This has been dealt with and does not constitute a defence.

In paragraph 28.8 the allegation is made that the order of 2 September 2011 was not served on Scholtz save that it is an attachment to the contempt application dated the 7th November 2011. The contempt application was properly served on Scholtz personally and was not directed at contempt of the 2 September 2011 order.

In paragraph 28.9 it is alleged that Frances does not have *locus standi* insofar as the trust monies (that is the R400 524.65) is concerned. This is a rehash of a defence raised already in 2010, namely that the persons who deposited money into the Fresh Produce Agent trust account of Frances ought to be cited as parties to the proceedings. This simply is not a defence. Quite clearly the depositors are not parties for any purposes in these proceedings. The entity who is in charge of its Fresh Produce trust account is Frances and Frances alone. No defence arises from these allegations.

[66] Having regard to the abovementioned defences, they are indeed no defences and they also do not deal with the true nub of the matter, namely how the R400 524.65 were spent.

[66] Thus there is no *bona fide* defence with prospects of success.

[68] In the circumstances I exercise my discretion against Scholtz and find that the rescission of judgment application must be dismissed with costs. The conduct of Scholtz and Jansen brings this Court and its orders in disrepute and must be investigated by the Law Society. I intend to make a direction in that regard in the order.

[69] In the circumstances I make the following order:

1. The application for rescission of judgment is dismissed.
2. The Applicant for rescission of judgment (Wilhelm Pieter Scholtz) is ordered to pay the opposed costs of the application for rescission of judgment.
3. The Registrar of this Court is requested to refer the contents of the court file to the Law Society of the Northern Provinces for investigation.