

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 45/2023

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

DATE..... SIGNATURE.....

In the matter between:

BARTHOLD DRICUS OERLEMANS

APPELLANT

And

PIETER HENDRIK STRYDOM N.O.

FIRST RESPONDENT

HARRON ABDOL SATAR MOOSA N.O.

SECOND RESPONDENT

DEON MARIUS BOTHA N.O.

THIRD RESPONDENT

JUDGMENT

DEANE AJ

Introduction

1. This is an Appeal against the judgment and order delivered by the Magistrates Court, Polokwane, on 30 May 2023, wherein default judgement was granted in favour of the First, Second and Third Respondents (the Respondents).
2. The Appeal is unopposed.
3. Together with this application, the Appellant filed a condonation application for the late filing of the Appellant's Notice of Appeal and the late furnishing of security in terms of the stipulations of Rule 51(4) of the *Uniform Rules of Court*.
4. Having considered the application for condonation and the applicable principles, this court granted condonation as applied for.
5. The Appeal application is premised on the various grounds as listed in the Notice of Appeal.¹
6. To summarise, it is an Appeal against the finding that the Appellants application for rescission of judgment did not reveal a *bona fide* defence against the claim in that the Magistrate erred by making the following rulings of fact and law:²

¹ Document Court Stamped 2023-10-02 and Appeal Record: pp 80-86.

² Appeal Record: pp 81-84.

6.1 “By finding in paragraph 5 of the written reasons provided in terms of Rule 51(1) of the Magistrates Court Act, that the Appellant approached Becker attorneys, to ask Becker attorneys to allow him to contact their instructing attorneys, to inform them that the payments he received was without value” and that the Magistrate “should have found that the Appellant intended to communicate to the instructing attorneys that he received the payments for value”.³

6.2 The court erred in dismissing the application for rescission of judgement, “by ruling, in effect, that the Appellant did not have a bona fide defence against the claim of the Respondents, since the Appellant failed to attach the documents that would prove that he did indeed make payments in excess of the amounts received”.⁴

6.3 The Appellant submits that the Magistrate should have found:⁵

6.3.1 The Appellant had a conversation with Mr Pieters Walters on the 16th of March 2022, in which he clearly indicated that he paid an amount of R380 000.00 to Choice, while still in business whereas he received only payments of R106 400.00 back from them as payments resulting in a loss of R273 600.00”.

6.3.2 Accordingly, “the court should have found that the payments that were received by the Appellant where for value, and thus

³ Appeal Record: p 81, para 1.

⁴ Appeal Record: p 81, para 2.

⁵ Appeal Record: pp 81-83.

place the amount received outside the ambit of section 26 of the Insolvency Act”.

6.3.3 It is further submitted that the court “*should have further found that the Appellant did in fact hand over “all the documents”, that means inclusive payments documents evidencing the R380 000.00 initial payment, relevant to the investment, to Becker attorneys, who in turn forwarded the documents to their instructing attorneys.*

6.3.4 The Appellant further submits that “*the court should have also found that the instructing attorneys did in fact receive all the above-mentioned documentation”.*

6.3.5 Furthermore, that the “*court should have also found that there was consequently an admission of receipt of proof of the payment of the R 380 000.00, to Choice”.*

6.3.6 Based on these submissions, the Appellant states that the court should have found that the Appellant has placed a *bona fide* defence before the court and that the court should have consequently rescinded the judgement.

6.4 The Appellant further submits that the court erred by requiring that the Appellant should have attached proof of the payment made to Choice, despite finding that it was not necessary for the Appellant to prove, on a balance of probabilities, the defence to which the Appellant would be entitled. The Appellant avers that all

that is required in terms of the authority in *Grant v Plumbers (Pty) (Ltd) 1949 (2) SA 470 (O)*, and which was cited by the magistrate, was for the Appellant to make out a case that, should it be raised at the trial, could *prima facie* succeed.⁶

7. The Appellants main contention herein is that whilst the Magistrate had the correct appreciation of the legal principles applicable that was necessary to adjudicate the application, she, however, erred in the application of the legal principles to the application before her.

Material Background Facts

8. The Respondents are all liquidators practising as such.
9. The Respondents were duly appointed by the Master of the High Court as the joint liquidators of Free Agape Enterprises Pty (Ltd) (Free Agape).⁷
10. On 22 March 2018 an application was brought before the Western Cape Division, Cape Town for an order *inter alia* to wind up Free Agape.
11. Free Agape was placed under final liquidation on 12 June 2018.⁸
12. On 13 August 2019, the High Court of South Africa, Western Cape Division declared:⁹

12.1 *The investment scheme conducted under the name and style of Free Agape and various other trading names, including Choice Lifestyle Change, to be illegal, unlawful and void; and*

⁶ Appeal Record: p 83.

⁷ Appeal Record: Annexure POC1, p 47.

⁸ Appeal Record: Annexure POC2, pp 48-51.

⁹ Appeal Record: Annexure POC3, p 52-53.

12.2 *All investment and related agreements entered into between Free Agape and third parties as investors, to be null and void.*

13. The Respondents issued summons in the action on 17 February 2022.¹⁰

14. The summons was served on the Appellant's sister on 22nd February 2022.¹¹

15. The Appellant failed to deliver his notice of intention to defend. This resulted in the default judgement, in terms of Rule 12(a) of the *Magistrates Court Rules*, being granted against the Appellant on 19 September 2022.

16. Default judgment in the amount of R106 400.00 plus interest and legal costs was granted against the Appellant.¹²

17. The Respondents issued a Warrant of Execution on 6 October 2022,¹³ but the Sheriff was unable to serve the Warrant of Execution on the Appellant.¹⁴

18. The Appellant applied for the rescission of the default judgment, on 1 November 2022.

19. The Respondents opposed the application and filed the necessary opposing affidavit.

20. The Magistrate dismissed the application on 30th May 2023 and the Appellant subsequently filed a Notice of Appeal on 11 August 2023.

Analysis

¹⁰ Appeal Record: Annexure AA2, p 33.

¹¹ Appeal Record: Return of Service, p 54.

¹² Appeal Record: Annexure AA4, p 55.

¹³ Appeal Record: Annexure AA5, p 58.

¹⁴ Appeal Record: Annexure AA6, p 61.

21. It is correct that in an application for rescission of default judgment a court must determine if ‘good cause’ exists to set aside the default judgment. This would include the court establishing whether an Applicant (Defendant) has a *bona fide* defence to the Plaintiff’s claim. However, the existence of a *bona fide* defence is merely one of several factors that a court must consider when it adjudicates a rescission application; it is not the primary focus of the enquiry.

22. In *Grant v Plumbers*, Brink J held that the following requirements should be complied with in order to show “good cause”;

“(a) An 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, (b) The application must be bona fide and not made with the intention of merely delaying Plaintiff’s claim, and (c) The Applicant must show that he has a bona fide defence to the Plaintiff’s claim. It is sufficient if he makes out a prime facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.”

23. The question is what then is a *bona fide* defence. It means that the facts that are provided must be such that if proven at trial, they will constitute an answer to the Plaintiff’s claim. The court must determine whether the Defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded, and whether on the facts so disclosed the Defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. Additionally, while the Defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least

disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable to the court to decide whether the affidavit discloses a *bona fide* defence.¹⁵

24. If the court has any doubt as to whether the Plaintiff's case is unanswerable at trial, such doubt should be exercised in favour of the party seeking an order for default judgment.¹⁶

25. The Magistrate *in casu* explains what must be considered in order to show that there is a *bona fide* defence:¹⁷

“As regards the bona fide defence raised by the applicant.....it is not necessary to decide whether the applicant had shown on a balance of probabilities that he has a bona fide defence.....”

What must be considered, however, is whether the averments in the founding affidavit regarding what applicant stated about his defences would satisfy the standard required for the purpose of rescission of a default judgement. Whether applicant made out a case for a defence that would prima facie have succeeded to defeat the respondents claim at the time when default judgement was granted.”

26. The Magistrate went on to find that the “Applicant in this case had failed to satisfy the Court that his defences are *bona fide* to the Respondents claim.”¹⁸

27. In analysing whether or not the Appellant had a *bona fide* defence the Magistrate had stated that:

¹⁵ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425G-426E.

¹⁶ See *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 347H.

¹⁷ Record: p 76-77, paras 28-29.

¹⁸ Record: p 77, para 25, lines 6-7.

“.....as far as the bona fide defence is concerned, it is the Applicant’s version that he was advised by his attorneys of record that the court order dated 12 June 2018, granted by the Western Cape High Court, implies that a final order for final liquidation had still to be granted as agreed between the parties, and as such, no final order for liquidation of Free Agape was granted, as the agreement between the parties could not give rise to a liquidation of a company.”¹⁹

28. The Magistrate further states that it is the Applicant’s version that:

“.....it is only a court that can grant an order for the final liquidation of a company. Therefore, it is submitted that Plaintiff’s summon was issued prematurely, as the final order for liquidation of First Respondent had not yet been granted by the Court. Secondly, it is the Applicants version that section 21 of the Insolvency Act is not applicable, as he invested in good faith an amount of R380 000.00 and he received payment in an amount of R 106 400.00, which is less than the amount invested with Free Agape, and the latter amount is not the payment that exceeded the payments made by himself to Free Agape, as claimed by the Respondent, and Free Agape received value.”²⁰

29. In response thereto, the Magistrate finds that:

“.....as regards the bona fide defence raised by the Applicant, in order to show good cause for rescission of the default judgement, all Applicant had to do in this regard was to make out a case that he had a defence which he could raise at the trial, and which could prima facie succeed.....”

¹⁹ Judgment: p 165, lines 4-12.

²⁰ Judgment: p 165, lines 18-25.

30. The Magistrate in the judgment then went on to state that:

“...as regards his first defence, this Court has no powers to review or set aside an order granted by another court, especially the High Court. However, if one looks at the Annexure POC2 annexed to the Respondents’ particulars of claim it states:

“By agreement between the parties, it is ordered that...”

Thereafter the court recorded what the parties had agreed from paragraph 1 up to 14, and at the end, it states:

“by order of court....”

And thereafter, the signature of the registrar and the date stamp of the date wherein such order was made.....

In my view, one interprets it as a competent court order, whether it was correct or incorrect..... Mr Meyer also submitted in his argument that they were intending to review the High Court order for it to be set aside, and this also shows that indeed, the court order made by the Western Cape High Court is a competent court order.”²¹

31. It is evident from the Western Cape Court Order of 12 June 2018,²² that Free Agape was in Business Rescue.

32. In terms of Section 141(2)(a)(ii), of the *Companies Act 71 of 2008 (Companies Act)*, the Business Rescue Practitioner must apply to the court for an order discontinuing the Business

²¹ Judgment: pp 173-174, lines 23-26 & 1-14.

²² Appeal Record: Annexure POC2, pp 52-53.

Rescue proceedings and placing the company into Liquidation, should there be no reasonable prospect of the company being rescued.

33. Upon the Court granting that the Business Rescue proceedings be discontinued Free Agape would be placed in liquidation.

34. Therefore, in terms of paragraph 2 of the Court Order, the Final Order of Liquidation was granted on 12 June 2018.

35. Upon proper consideration of the Court Order, it would be noted that the Order does not refer to a “Provisional Liquidation” and accordingly a Final Liquidation was granted. This is generally the practise applied by courts in the case where Business Rescue proceedings are converted to liquidation proceedings.

36. Furthermore, it is the Appellant’s version that section 26(1) of the *Insolvency Act*, is not applicable, as he invested in good faith an amount of R380 000.00 and received payment of R106 400.00 which is less than the amount invested with Free Agape. Moreover, the latter amount is not the payment that exceeded the payments made by himself to Free Agape as claimed by the Respondents and Free Agape received value, and therefore the Respondents claim should be dismissed.

37. In response, the Magistrate in his judgment stated the following:

“As regards the interpretation of Section 26, defence raised by Applicant, I agree with the Respondent’s admission that Applicant should have placed his confidence before this Court by attaching documents which he submitted to the Respondent to show that indeed, he received a lesser amount of R106 400.00 because he invested an amount of R380 000.00 with Free Agape. There is no explanation why same was not

done by the Applicant and the Respondent had set out in their particulars of claim regarding how they comply with Section 26, and most of these requirements are not challenged or disputed by the Applicant in his founding affidavit, except to say that the payment received by himself from Free Agape was of less value, as he invested an amount of R380 000.00 with Free Agape, and that the disposition were made by Free Agape in the ordinary course of business, not intended to prefer him over other creditors.”²³

38. The court went on to state that *“the Applicant has failed to make a prima facie case that he has a bona fide defence to support his version that the payment of R106 400.00 was made in the ordinary course of business, and as I have already stated above, that he is also failed to attach the documentation to show that indeed, he has a prima facie case or he invested more than what he received, or gained from Free Agape.”²⁴*

39. Looking at the documents before me, the Respondents set out in detail in paragraphs 7 to 11 of the Particulars of Claim²⁵ of how they complied with section 26 of the *Insolvency Act*.

During or about the period 2017/10/18 to 2017/12/01, Free Agape effected payments to the Defendant in a total amount of R106 400.00, being the total amount of the following payments:

2017/10/18	R28 000.00
2017/11/02	R25 200.00
2017/11/15	R28 000.00
2017/12/01	R25 200.00
Total	R106 400.00

²³ Judgment: p 175, lines 7-23.

²⁴ Judgment: p 176, lines 6-12.

²⁵ Appeal Record: pp 42-43.

40. It is clear that the payments were made by Free Agape to the Appellant less than two years before the effective date of liquidation.

41. During this period the Applicant paid R0.00 to Free Agape.

42. It is also clear that the payments set out in these paragraphs (7 to 11 of the Particulars of Claim) constituted dispositions as intended in section 26(1), read with section 2 of the *Insolvency Act*.

43. Additionally, the Magistrate correctly found that:

“.....based on what I stated regarding Section 26 defence, and the fact that there was a final liquidation order granted by the Western Cape High Court, there is no need for me to decide whether the alternative claim should stand, as the default judgement was granted in terms of section 26 of the Insolvency Act and already found that the Applicant has failed to show good cause that he has a bona fide defence in terms of Section 26.”²⁶

44. I am in agreement. Faced with the details as provided by the Respondents herein regarding the payment, the Appellant had to show good cause why its version should be believed and not merely aver that he was paid lesser. The Appellant should have indicated with sufficient particularity what his defence is without necessarily getting into the details or merits of the case. This is to avoid a situation where a rescission application is only made for the purpose of harassing the Respondent or frustrating him in the execution of an order. At the very least the material facts upon which the defence is based must be pleaded with sufficient particularity and completeness to enable the court to decide whether the submissions made

²⁶ Judgment: p 176, lines 19-25 and p 177, line 1.

disclose a *bona fide* defence. In this case the Magistrate required something more than a mere averment that the Appellant was paid a lesser amount.

45. Regarding the explanation for the Appellant's failure to defend the Respondents claim, the Appellant submits that the Respondent's attorneys of record did not revert to him after he submitted all the documentation to them to show them that he never gained any profit from Free Agape.

46. The Respondents admit that they received the said documentation but deny having told the Applicant that they will revert to him after receiving the documents. The Respondents aver that "*the Applicant only provided documentation and did not make any attempt to approach the Respondents' attorneys to settle or defend the matter*".²⁷

47. In response the Appellants submit that if the Respondents received the documentation, and the documentation did not substantiate the allegations that he indeed lost money, one would have expected the Respondents to deny the fact that the documentation substantiated the allegations of the Appellant.²⁸

48. Looking at the record, the Respondents version that they deny telling the Appellant that they will revert to him after being given the said documentation, was corroborated by Pieter Walters, the person with whom the Appellant communicated with regarding the documentation.²⁹ It is not disputed that Pieter Walters filed a confirmatory affidavit to confirm the Respondent's version.

²⁷ Appeal Record: p 25, para 5.2.5.

²⁸ Appellants Heads of Argument: p 15, para 4.8.2.

²⁹ Appeal Record: p 76, para 22.

49. Accordingly, the onus is upon the Appellant to satisfy the court that indeed the Respondent's attorneys of record told him that they will revert to him after he provided them with those documents.

50. The Appellant, after providing the documentation, did nothing for six months. There were no follow-ups even when there was no response by the Respondent's attorneys.

51. The Respondents proceeded with default judgment against the Appellant, as is their right. The law is clear, in that after receiving summons the Appellant had an option to consent to the judgment or defend the matter.

52. There are indeed two competing versions in terms of whether or not the Appellant was told that he would be contacted after providing the requested documentation to the Respondent's attorneys. However, the Respondents filed a confirmatory affidavit of Pieter Walters confirming their version. The Magistrate consequently and correctly found that faced with this evidence, it is the Respondent's version that must be accepted.³⁰ The conclusion of the Magistrate cannot be faulted herein.

53. Furthermore, it was the Appellants version that the parties were engaged in settlement negotiations but provided no basis for this submission.

54. The court *a quo* concluded that the Appellant failed to satisfy the Court that he has shown good cause that he gave a reasonable explanation for his default to defend the Respondents claim.³¹

³⁰ Appeal Record: p 76, para 22, lines 18-19.

³¹ Appeal Record: p 76, para 23, lines 24-25.

55. The onus rests on an Applicant for rescission to show good cause.³² A Court has a wide discretion when determining whether good cause exists which must be exercised after a proper consideration of all the relevant circumstances.

56. Having carefully considered the guidelines relevant to the rescission of judgments it is my view that the court *a quo* was correct in finding that the Appellant failed to satisfactorily establish the requirements for a rescission order.

57. It is on the basis of all the foregoing reasons that I find that the Appeal cannot stand. Consequently, the following order is made:

ORDER:

1. The Appeal is dismissed.

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**ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION**

I AGREE

KGANYAGO J

³² *De Wet v Western Bank Ltd* 1979(2) SA 1031 (A) at 1042H.

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION, POLOKWANE**

APPEARANCES

FOR THE APPELLANT : Adv GJ Diamond
INSTRUCTED BY : Diamond Inc. Attorneys
FOR THE RESPONDENTS : No Appearance
INSTRUCTED BY :
DATE OF HEARING : 17 May 2024
DATE OF JUDGEMENT : 22nd July 2024