

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 36497/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) NOT REVISED.

DATE: 30 July 2024

SIGNATURE

In the matter between:

JPJ MEDICAL (PTY) LTD

FIRST APPLICANT

JOHANNA MARIA OLIVIER

SECOND APPLICANT

and

ABLAND (PTY) LTD

RESPONDENT

In re:

ABLAND (PTY) LTD

PLAINTIFF

and

JPJ MEDICAL (PTY) LTD

FIRST DEFENDANT

JOHANNA MARIA OLIVIER

SECOND DEFENDANT

Heard 17 April 2024

Delivered 30 July 2024

JUDGMENT

VAN DER MERWE, AJ

INTRODUCTION

1. This is an application for the rescission of judgment to rescind an order obtained by the Respondent on 26 January 2023, in terms whereof the Applicants' defence to the Respondent's claim was struck, and their counterclaims dismissed. The aforesaid order was premised upon a striking order obtained due to the Applicants' failure to file a discovery affidavit. The parties will be referred to as in the main action.
2. The Defendants are bringing the application for rescission of judgment under the common law.

BACKGROUND FACTS

3. The Defendants entered into a lease agreement with the Plaintiff.
4. The Defendants fell in arrears with their rental whereby the Plaintiff issued summons for arrear rental and related charges. The pleadings and notices in this matter is a matter of record.
5. After close of pleadings, the Defendants were requested to file their discovery affidavits. The Plaintiff's discovery notices were served on the Defendants' attorneys of record.
6. Shortly after the filing of the discovery notices, the Defendants' attorneys of record withdrew and provided the Defendants' last known address, as follows: No. 2[...] M[...] N[...] Street, Scientia Park, Unit [...], Persequor, Pretoria.
7. Notwithstanding the request for discovery, the Applicants failed to discover, whereafter the Plaintiff obtained an order compelling the Defendants to discover, followed with an order to strike the Defendants' plea and dismissing

their counterclaims.

8. The Plaintiff applied for default judgment against the Defendants during February 2023.
9. A notice of set down of the default judgment application was served on the Defendants on 16 February 2023 and 27 February 2023.
10. Shortly after service of the notice of set down, the same attorneys that withdrew came on record for the Defendants.

THE DEFENDANTS' CASE

11. The Defendants claim that service of the proceedings was not effective, which led to the Defendants not being aware of the proceedings.
12. The Defendants' default is twofold:
 - 12.1 They failed to deliver their discovery affidavit;
 - 12.2 They failed to oppose the application for striking out.
13. Explanations given for the Defendants' default in both instances, by the Defendants are the following:
 - 13.1 The Defendants were not aware of the further steps taken in the proceedings.
 - 13.2 The Defendants were not served on the Defendant's chosen *domicilium citandi et executandi* or registered address.
 - 13.3 The Defendants first became aware when the striking out order was noted in a trash bag collected by the Second Defendant's gardener.
 - 13.4 Service of processes were affected when the First Defendant's premises (last known address and *domicilium citandi* in terms of the lease agreement) was occupied by a different entity Logistics Plus

Incorporated. The service was not proper service and did not come to the attention of the Defendants.

- 13.5 Service on the Second Defendant's gardener or domestic worker was not effective as it was not brought to the attention of the Defendants.

THE PLAINTIFF'S CASE

14. The Defendants launched this application purely as a delaying tactic, the Defendants have also shown no intent to proceed with the application.
15. The Defendants are in wilful default.
16. The application was not brought on a *bona fide* basis.
17. Service of all proceedings after the withdrawal of the Defendants' attorneys were effective and proper.
18. The Defendants' plea and counterclaims do not have good prospects of success.

LEGAL PRINCIPLES

19. The legal principles applicable to rescission of judgments, in terms of common law, was again confirmed in the unreported judgment of ***Elia and others v Absa Bank* (A5083/2021; 19617/2017 [2023] ZAGPHJC 649 (6 June 2023) (Full Bench Appeal)** at paragraph 11 thereof:

"The test for rescission under common law is trite namely that good cause must be shown. In order to establish good cause an applicant must set forth a reasonable explanation for the default and a bona fide defence that has some prospects of success. Regarding the issue of "good cause" shown in an application for rescission, the following dictum in the matter of Chetty v Law Society Transvaal 1985 (2) 756 (A) 746J-756C is apposite:¹

¹ De Wet and others v Western Bank 1979 (2) SA 1031 (A) at 1042 and Childerly Estate Stores v Standard Bank SA Ltd 1924 OPD 163.

“The appellant’s claim for rescission of judgment confirming the rule nisi cannot be brought under rule 31(2) or 42(1), but must be considered in terms of the common law, which empowers the court to rescind a judgment obtained on default of appearance, provided sufficient cause therefore has been shown”.

The term “sufficient cause” or “good cause” defines precise or comprehensive definition, for many and various factors are required to be considered,² but it is clear that in principle in longstanding practice of our courts two essential elements “sufficient cause” for rescission of judgment by default are: (1) That the party seeking relief must present a reasonable and acceptable explanation for his default; and (2) That on the merits such party has a bona fide defence, which prima facie carries some prospect of success.³

20. In ***Zuma v Secretary of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and others* 2021 (11) BCLR 1263 (CC) (17 September 2021)**, the Constitutional Court restated the two requirements for the granting of an application for rescission that needs to be satisfied under the common law as being the following:

“First, the applicant must furnish a reasonable and satisfactory explanation for its default, second, it must show that it has a bona fide defence which prima facie carries some prospects of success on the merits. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.”

21. ***Silber v Ozen Wholesalers* 1954 (2) SA 345 (A) at 353** remains authority for the proposition that an applicant’s explanation must be sufficiently full to enable the court to understand how the default came about and assess the applicant’s conduct.

22. An element of the explanation of the default is that the applicant must show

² Ken’s Executors v Gaarn 1912 AD 181 at 186 per Innes JA

³ De Wet’s case *supra* 1042; PE Bosman Transport Works Committee and others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 799 (A); Smith NO Brummer NO and another; Smith NO v Brummer 1954 (3) SA (O) at 357-8

that it was not in wilful default. If the case that the Applicant makes out in wilful default is not persuasive, that is not the end of the inquiry. The applicant's case may be rescued if a *bona fide* defence is demonstrated.⁴

23. The defence raised must not only be decided against the backdrop of the full context of the case, but must also be *bona fide* in the nature and the grounds of the defence and the material facts relied upon, must be fully disclosed.⁵

WILFUL DEFAULT

24. It is the Defendants' contention that at no point were there any staff of the First Defendant present at its last known address. The defendants averred that the First Defendant did not have any staff present at the premises and that there was no active trading from November 2019 to March 2023, since the Defendant could not obtain the relevant licences. The Defendants, as confirmation attached a pharmacy grading certificate issued by SAHPRA indicating that the certificate was only delivered at the end of March 2023. The pharmacy grading certificate reflects the First Defendant's trading address as [...] M[...] Street, Scientia Technopark, Unit [...] Persequor Park, Pretoria.
25. The proof of delivery in respect of the medical certificate, the same address appears as the delivery address and the contact person, the Second Defendant. There are also special instructions on this delivery report being: "*If responsible pharmacist is not available please deliver to store manager or owner*". This delivery notice is dated 28 March 2023.
26. The First Defendant contends that the premises has been occupied by a company by the name of Logistics Plus Incorporated. This averment is not corroborated by any evidence, as a confirmatory affidavit was not before court. It is further averred that the address is neither the First Defendant's chosen *domicilium citandi* nor the First Defendant's registered address.
27. I was referred by the Defendants' counsel to a donation in the name of Logistics Plus Incorporated. The address for Logistics Plus Incorporated is

⁴ Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at [8] – [10]; Melane v Santam Insurance Company Ltd 1962 (4) SA 531 (A) at 532C-F

⁵ Standard Bank of South Africa Ltd v El-Naddaf 1999 (4) SA 779 (W) at 784D-F

1[...] P[...] Street, Eary PA 1[...], United States.

28. It is contended by the Defendants that service on the said address is therefore not service in accordance with the Uniform Rules. The Second Defendant also denied any telephonic contact with the sheriff, but that she does recall a telephone call from a person saying that he wanted to deliver a package.
29. The Second Defendant resides at 5[...] F[...] O[...] Street, Groenkloof, Pretoria. Similarly, it is denied that any documents were received by the Second Defendant whether it be affixed in any manner, or whether it be handed to the Second Defendant's domestic worker. It is contended that none of these documents came to the attention of the Second Defendant, as her workers did not bring it to her attention.
30. It is averred by the Second Defendant that on 17 February 2023, she was talking to the gardener while he held a plastic bag of junk in his hand and that she noticed the document that did not appear to be junk mail. Upon perusal of the document, she saw that it was the court order dated 26 January 2023. It is also contended by the Second Defendant that no affidavit could be obtained by the gardener as he is no longer working for the Second Defendant, and that the domestic worker has passed away. There is no corroborating evidence in this regard either.

RETURNS OF SERVICE

31. It is trite that the sheriff's return of service is *prima facie*, but not conclusive evidence of the matter stated therein. It can only be impeached on the clearest and most satisfactory evidence.⁶ The party seeking to impeach a return of service carries the onus to show by clear evidence that the return is not a proper return.⁷
32. The court was referred to various sheriff's returns of service on the business address of the Defendants and the residential address of the Second Respondent.

⁶ Deputy Sheriff v Goldberg 1905 TS 680

⁷ See Sasfin Bank Ltd and another v Vareltsis (15432/2013) [2019] ZAGPPHC 436 (23 August 2019) at 7

33. On various of the returns, it is stated by the sheriff that the First Defendant's name still appears on the outside of the premises and that the First Defendant still traded from the address. No return of service refers to Logistics Plus as the company occupying the premises.
34. The court was further referred to a service affidavit of Carla Pienaar, in the employ of the Plaintiff's attorneys of record, who confirms that on 16 July 2021 she served a discovery affidavit on the First Defendant. On 16 August 2021 she proceeded to serve the application on the Second Defendant by way of email and also attended to the offices of the First Defendant to serve the application and the notice of set down. She indicated that the receptionist welcomed her into the premises but refused to state her name. She refused to accept service of the documents and a copy thereof was left on the receptionist's desk.
35. Plaintiff's counsel submitted that should the Defendants not elect to be served on the address as stated in the notice of withdrawal, they should have informed the Plaintiff's attorney of their last known address. I was referred to the provisions of Rule 16 (4) (a) and (b) in this regard. No such notification was done by the Defendants.
36. In terms of the case law referred to above, this court is to accept what is stated in the sheriff's return of service, unless the Defendants rebut that evidence substantiated by *"the clearest and most satisfactory evidence"*. This was not done by the Defendants.
37. In considering whether the Defendants were in wilful default, I considered what was decided in the matter of ***Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T)*** that:

"Before an applicant in the rescission of judgment application can be said to be in "wilful default" he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of her actions. A decision freely taken to reform from filing a notice to defend or a plea or from appearing would ordinarily weigh heavily against an applicant

required to establish sufficient cause.”

38. I find it highly improbable that the Defendants received no documents since the withdrawal of its attorneys. I cannot on the overwhelming evidence, find that the Defendants were not in wilful default.

BONA FIDE DEFENCE AND PROSPECTS OF SUCCESS

39. The Defendants in their founding affidavit, addresses their *bona fide* defence as follows, in paragraph 27:

“27.1 The defendants’ defence in the main action has been fully canvassed in the plea and the application for summary judgment.

27.2 In short, the simple fact is that the plaintiff’s representatives made certain misrepresentations regarding the facilities at the leased premises which were in fact false.

27.3 The defendants were induced by these misrepresentations to lease the premises from the plaintiff, despite same being unsuitable for the defendants’ use as a pharmaceutical wholesaler.

27.4 As a result of the premises being unsuitable, the defendants lost a significant income due to being unable to trade and receive no value from the leased premises.”

40. This is all that was said in terms of the Defendants’ prospect of success of their defence and various counterclaims. The court requested Defendants’ counsel to address the court on the prospects of success of the defence. Defendants’ counsel submitted that this is canvassed in the pleadings and that the pleadings raises a triable issue. Defendants’ counsel stated that the defendants wanted to pursue the counterclaims and that the Defendants’ intention could be demonstrated by the fact that the Defendants are desirous to file their discovery affidavit.

41. The Plaintiff’s counsel brought under the court’s attention that the Defendants

took two months to bring the rescission application. They had failed to file heads of argument and had to be compelled to file heads of argument. Such application to compel was opposed by the Defendants. The Defendants ostensibly did not pursue the application and the Plaintiff had to set the matter down for hearing.

42. Despite the Defendants not addressing the issue on the prospects of success of their plea and counterclaims, the court had regard thereto. The crux of the Defendants' defence is based upon an intentional, alternatively negligent misrepresentation and breach of the lease agreement due to the fact that the premises was not suitable and subsequent damages allegedly suffered by the Defendants.
43. The Defendants instituted no less than seven counterclaims, all premised on damages claims resulting out of the alleged breach of contract committed by the Plaintiff. The counterclaims are for a total amount in excess of R4,000,000.00.
44. The Plaintiff's counsel referred me to provisions in the lease agreement, precluding the Defendants to claim damages, specifically in paragraph 10.3 which states as follows:

"10.3 Notwithstanding anything to the contrary herein contained, the landlord does not warrant that:

10.3.1 The leases premises was suitable for use for any purpose whatsoever at any time;

10.3.2 The tenant will be granted any license, consents, authorities or permits or any renewal thereof for the conduct of any activity or business on the leased premises."

45. The aforesaid provision prevents any damages claim resulting from the premises not being suitable for the Defendants' intended use.
46. The Defendants deliberately chose not to address their *bona fide* defence and prospects of success of their counterclaims sufficiently.

47. In *Zuma v Secretary of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and others* 2021 (11) BCLR 1263 (CC) (17 September 2021) at 130 it was stated:

“At the heart of this matter, there is a potent need, to uphold the integrity of the administration of justice and to send a message to all litigants that rescission as an avenue of legal recourse remains open, but only to those who advance meritorious and bona fide applications, and who have not, at every turn of the page, sought to abuse judicial process.”

48. The court is not convinced that the Defendants have made out a case for rescission of judgment in terms of the common law, as the Defendants have not convincingly shown that they were not in wilful default, nor have they shown any prospect of success of their defence and/or counterclaim.

IN THE PREMISES, I MAKE THE FOLLOWING ORDER:

1. The application for rescission of judgment is dismissed.
2. The Defendants are to pay the costs of the application including cost of counsel on Scale B, jointly and severally, the one paying the other to be absolved.

J VAN DER MERWE
ACTING JUDGE IN THE HIGH COURT OF
SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

Counsel for the Plaintiff:	Adv J Vorster
Instructed by:	Maree Attorneys
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