

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-050639

(1)	REPORTABLE: <i>no</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>no</i>
(3)	REVISED:
<i>13/8/2024</i>	
DATE	SIGNATURE

In the matter between:

First Applicant

THULANI MAKHOSI MAJOLA

LESEDI TECHNICAL ENGINEERING (PTY) LTD

Second Applicant

and

INVESTAGE 183 (PTY) LIMITED

First Respondent

SHERIFF, SANDTON NORTH

Second Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines/Court online and by release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 13 August 2024.

JUDGMENT

TODD, AJ:

- [1] This is an application for rescission of judgment brought by the First Applicant.
- [2] The judgment concerned was granted by Wright J on 31 August 2022. The judgment included an order for the payment of an amount in respect of arrear rental and for damages claimed as being the outstanding rental due for the remaining duration of a lease.
- [3] The background to the claim giving rise to the judgment was a lease initially entered into during March 2018 between the Second Applicant as tenant and the Vunani Property Investment Trust ("Vunani"), which then owned the property. The Second Applicant leased the property and the First Applicant bound himself as surety and co-principal debtor together with the Second Applicant for all amounts due and payable under the lease.
- [4] In January 2020, the First Respondent acquired the property from Vunani and stepped into Vunani's shoes in relation to the lease with the Second Applicant and the suretyship concluded with the First Applicant.
- [5] In October 2020 the Second Applicant entered into a written addendum to the agreement of lease with the First Respondent, which extended its term for a further period of five years and seven months.
- [6] The Second Applicant then fell into arrears.
- [7] The First Respondent served a summons in action proceedings brought against both First and Second Applicants in which it cancelled the lease and claimed arrear rental and damages for the remaining period of the lease.

- [8] Summons was served on 1 February 2022. On 16 February 2022 the Applicants, as Defendants in the action proceedings, entered appearance to defend. They did not, however, subsequently deliver a plea.
- [9] On 17 March 2022 the First Respondent delivered a notice of bar.
- [10] In the interim, on 24 February 2022, the Second Applicant had been placed under final liquidation.
- [11] On 14 July 2022, the First Applicant launched an application in terms of section 354 of the Companies Act to rescind the liquidation of the Second Applicant.
- [12] On 17 August 2022, with the First Applicant barred from pleading, the First Respondent served a notice of set down in respect of an application for default judgment. The matter was set down for hearing on 31 August 2022.
- [13] There was no appearance for the First Applicant on that date, and judgment was duly granted by default.
- [14] In the founding papers the First Applicant relied on broader grounds for rescission, including the so-called common law grounds. When the matter was argued, however, Mr Pye, who appeared for the First Applicant, made it clear that the First Applicant limited his application to grounds contemplated in the provisions of Rule 42 of the Uniform Rules of this Court.
- [15] Specifically, Mr Pye submitted that the judgment had been granted on the strength of one or more errors in the proceedings.
- [16] The errors contended for by the First Applicant comprised, first, the allegation that the summons did not disclose a cause of action and was consequently excipiable; and second the contention that the court committed a procedural error by granting judgment for contractual damages without requiring that evidence be lead regarding quantum.
- [17] The thrust of Mr Pye's submissions was that the matter fell within the ambit of the provisions of rule 42(1)(a) and that the procedural errors to which he referred

had the consequence that judgment was erroneously granted in the absence of the First Applicant.

- [18] Regarding his absence from the proceedings when judgment was granted by default, the First Applicant accepts that the summons was indeed served and brought to his attention, and confirms that his attorneys entered appearance to defend the action on his behalf.
- [19] As indicated earlier, the First Applicant did not deliver a plea and in due course the First Respondent, Plaintiff in the action, served a notice of bar.
- [20] At that stage, according to the First Applicant, his attorneys advised him that they would not be able to file a plea on his behalf unless they were placed in funds to do so.
- [21] The First Applicant states that at the time he could only restore himself to a financial position in which he could place his attorneys in funds to deliver a plea on his behalf if he could set aside the liquidation of the Second Applicant. He therefore concentrated his efforts on achieving that end.
- [22] Thereafter the First Respondent, Plaintiff in the action proceedings, served the notice of set down of the application for default judgment. The First Applicant confirms that he received the notice of set down but did not react to it. He gives the following explanation for this in his affidavit:

“Unfortunately given that my attention was focussed entirely on taking LTE out of liquidation I did not give my attorneys the instructions to deal with the matter. I only did not understand the gravity of the situation and laboured under the belief that if I could take LTE out of liquidation all would fall into place, including the need to deal with the application for default judgment. I did not understand that my position as surety and co-principal debtor was divorced from the liquidation of LTE. This I now understand to be incorrect. LTE was taken out of liquidation on 12 October 2022.”

[23] As to whether the First Applicant was in fact absent in the sense contemplated in Rule 42 when judgment was granted, the Constitutional Court has made it clear¹ that this requirement exists to protect litigants whose presence has been precluded and not those who have been afforded procedurally regular process but have opted to be absent:

"[60] ...the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed."

And further:

"[61] ...our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a)."

[24] In my view, the First Applicant's explanation for not participating in the proceedings does not bring him within the ambit of the provisions of rule 42(1)(a). The judgment was not granted in his absence in the sense contemplated by the Rule.

[25] In any event, even if this were not correct, it seems to me that the First Applicant has failed to establish that the order was erroneously sought or granted.

[26] The first ground on which the First Applicant contends that the order was erroneously sought or granted is that the particulars of claim did not disclose a cause of action for the relief sought. In short, the First Applicant contends that although he was a surety in respect of the lease over the property and remained so after the property was acquired by the First Respondent, his obligations as a

¹ 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* 2021 (11) BCLR 1263 (CC)

surety ceased when the lease was subsequently extended under the addendum concluded between the Second Applicant and the First Respondent.

- [27] Under the deed of suretyship itself, however, the First Applicant specifically bound himself to Vunani as landlord of the property at the time and its successors in title or assignees. The First Applicant bound himself as surety and co-principal debtor for the due performance by the Second Applicant of its obligations under the lease including any amendment, continuation, extension, renewal or reinstatement of the lease. Although the landlord under the lease at the time was Vunani, the First Respondent's predecessor in title from whom it acquired the property in question, the First Applicant accepts that the First Respondent stepped into the shoes of Vunani both in relation to the lease and the deed of suretyship.
- [28] The addendum to the lease agreement subsequently concluded between the First Respondent and Second Applicant served to extend the period of the existing lease for a further period of five years and seven months commencing 1 October 2020.
- [29] In those circumstances, it seems to me, there are no good grounds on which to contend that the summons and particulars of claim were excipiable on the basis contended for by the First Applicant.
- [30] Mr Pye pointed out that in its particulars of claim the First Applicant incorrectly stated that the initial lease had been concluded with it rather than with Vunani. When, however, this allegation is read with the pleading as a whole including the documents attached to it, it seems to me that the cause of action is clear.
- [31] The second error contended for by the First Applicant was that the Court committed a procedural error by failing to hear evidence on the quantum of damages before granting judgment.
- [32] Mr McTurk, who appeared for the First Respondent, submitted on the strength of the decision in *Hyprop Investments Ltd and another v NCS Carriers and Forwarding CC and another*² that in a claim for damages arising from cancellation

² 2013 (4) SA 607 (GSJ) at para [35]

of a lease due to a tenant's breach, the measure of damages is the rent for the unexpired portion of the lease post cancellation less any amount actually received on subsequently reletting the premises to a new tenant or which ought to have been received had the landlord taken reasonable steps to mitigate its damages.

[33] Mr McTurk submitted that the questions of what steps were taken to mitigate damages and whether any discount should be applied for the remaining period of the lease, although related to quantum, concern a defence that may properly have been raised by the First Applicant had he chosen to participate in the proceedings. I agree.

[34] In my view the Court was not precluded procedurally from granting the judgment that it did in the circumstances.

[35] I make the following order: the application for rescission is dismissed with costs.



C TODD
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 30 May 2024

Date of Judgment: 13 August 2024

APPEARANCES

Counsel for the First Applicant: WB Pye SC
S Kunene

Instructed by: Yakopi Attorneys Inc

Counsel for the First Respondent: S McTurk

Instructed by: Uys Matyeka Schwartz Attorneys