

REPUBLIC OF SOUTH AFRICA



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

Case no: 2018-19141

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
26.09.24	
DATE	SIGNATURE

In the matter between:

SOLOMON SIPHO MAHLANGU

First applicant

THABISENG MAHLANGU

Second applicant

KATLEGO MAHLANGU

Third applicant

GOD'S WAY EVANGELISTIC MINISTRIES

Fourth applicant

UMLONDOLOZI (PTY) LTD

Fifth applicant

and

TSHIKULULU SOCIAL INVESTMENT NPC

Respondent

This judgment was delivered by uploading it to the court online digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties on 26 September 2024.

JUDGMENT

VAN DER WALT AJ

Introduction

- [1] This is a judgment in respect of an application for the rescission of an order granted by default against the first applicant (Mr Mahlangu), on 15 November 2021. The applicants ask also that the warrant of execution issued consequent upon the default judgment be reviewed and set aside.

Factual background

- [2] Tshikululu Social Investments NPC is a non-profit company. As far as it is relevant to this application, it receives contributions from donors, and administers funds intended to be spent on the building and improvement of infrastructure for schools. In June 2015, Tshikululu and Mr Mahlangu concluded an employment agreement. According to the agreement, Mr Mahlangu would be a manager in Tshikululu's operations department. He would not be permitted to engage in any other form of employment without Tshikululu's prior consent. One of his duties was to authorise payments to service providers used by Tshikululu.
- [3] On 1 June 2018 Tshikululu issued summons, instituting claims against Mr Mahlangu, God's Way Evangelistic Ministries and three others. The fundamental basis of the claims against Mr Mahlangu was simply that funds meant for Tshikululu's projects and beneficiaries were, in breach of contract and fraudulently, directed to other projects and beneficiaries. Tshikululu led

damages as it had to refund those donors whose donations didn't reach their intended beneficiaries.

- [4] Mr Mahlangu gave notice of his intention to defend the action on 20 June 2018. Neither he nor any of the other defendants have, to date, pleaded to the claims against them. That notwithstanding, an application for summary judgment was filed on 5 July 2018. The defendants elected to give notice of their intention to oppose the application and to file an affidavit resisting it. In that affidavit, it was said that God's Way, alleged by Tshikululu to have benefited from Mr Mahlangu's fraudulent scheme and breach of contract, is a shelf company that had no offices, premises or bank accounts. Mr Mahlangu, in addition to making bold denials, also asserted that Tshikululu had not attached proof to substantiate some of the claims made in the particulars of claim, and that the particulars of claim were vague and embarrassing. The summary judgment application was set down for hearing on 12 February 2018. On the day, it was, among other things, ordered that the application be postponed sine die. On 7 May 2019, 25 May 2020 and 15 June 2020 the defendants filed Rule 30(2)(b) notices, all with the same content. They also included the arguments made in the affidavit resisting summary judgment.

- [5] Default judgment was granted against Mr Mahlangu on 15 November 2021.

Postponement

- [6] The notice of set down of the hearing of the rescission application was filed and served on the applicants on 19 March 2024. On 23 April 2024, the attorney for the applicants wrote to Tshikululu informing it that he had a hearing in Bloemfontein on 25 April 2024, the day the rescission application was to be heard. He asked that Tshikululu agree to a postponement of the hearing. Tshikululu declined the request. No formal application for a postponement was

made. Instead, the attorney for the applicants sent counsel to court to ask for a postponement from the Bar.

- [7] An application for postponement must be made in accordance with the Rules that regulate applications.¹ To dispense with that requirement, the court must be told of “exceptional circumstances” from the Bar.² I was not told of any relevant exceptional circumstances. The mere fact that the attorney for the applicants had to be in Bloemfontein on the day of the hearing does not amount to exceptional circumstances. No explanation was given why an email could be sent to Tshikululu days before the hearing, but the giving of proper notice and the making of a short affidavit were impossible. I find that there was in fact no application for postponement before me and proceed to the merits of the matter.

Rescission

- [8] The applicants ask for rescission on the bases of Rule 31(2)(b), Rule 42(1)(a) and the common law. All three bases for rescission includes time limits and substantive requirements.

Was the application for rescission brought in time?

- [9] Rule 31(2)(b), Rule 42(1)(a) and the common law place time limits on applications for rescission. Rule 31(2)(b) requires that the application be brought by a defendant “within 20 days after acquiring knowledge of such judgment.” Applications for the rescission in terms of Rule 42(1)(a) and the common law must be brought within a reasonable time of the court making the

¹ *Hanson, Tomkin and Finkelstein v DBN Investments (Pty) Ltd* 1951 (3) SA 769 (N) 775H.

² *Hanson, Tomkin and Finkelstein v DBN Investments (Pty) Ltd* 1951 (3) SA 769 (N) 776F and *Joshua v Joshua* 1961 (1) SA 455 (GW) 457B.

order sought to be rescinded.³ The rescission application is a rehashing of the points taken in the proceedings leading up to the default judgment and the case sought to be made for the purposes of Rule 31(2)(b) is the same as the case sought to be made for the purposes of common law rescission. In these circumstances, the 20-day requirement in Rule 31(2)(b) was also a reasonable time within which the rescission application could be brought.

[10] The factual issue to be determined is when Mr Mahlangu knew of the order against him. Mr Mahlangu, in the founding affidavit in support of the rescission application, says under oath that he learned of the order against him only when the sheriff of the court arrived at his residence on 15 January 2022. This is difficult to believe. This court uses a digital filing system. Documents filed by litigants or which issues out of court, are uploaded to the system near immediately. Litigants are notified via email of new documents, including judgments, also more or less immediately after they are uploaded to the system. Mr Van Deventer, in the answering affidavit for Tshikululu, says that the applicants “had, at all relevant times, access to Caselines [the digital system then in use] and would have received notice [by email to their attorney’s email address] of any movement on the matter”.

[11] Mr Mahlangu’s reply is perhaps as striking for what it says, as for what it does not say. To the facts that, through his attorney, he throughout had access to the court’s digital filing system and would have received immediate notice of documents filed in the matter, he says merely that Mr Van Deventer fails to annexe copies of the emails sent to his attorney, that filing on the court’s digital system is not service as required by the Rules of Court and that he was “never served with any process in the default judgment application” (my emphasis). Clever as this may be, it does not address Mr Mahlangu’s knowledge or lack thereof in light the digital filing system. Mr Mahlangu, in his failure to engage with this issue, also does not show that his attorney in fact (somehow) did not

³ *First National Bank of Southern Africa Ltd v Van Rensburg NO: in re First National Bank of Southern Africa Ltd v Jurgens* 1994 (1) SA 677 (T) 681B–G and *Money Box Investments 268 (Pty) Ltd v Easy Greens Farming and Farm Produce CC* 2021 JDR 2405 (GP) par. 7.

receive the system's notification about the default judgment or that his attorney had knowledge of the judgment, while he (somehow) didn't.

- [12] Ultimately, I do not to dismiss the application on this basis because Tshikululu did not make the allegation that Mr Mahlangu actually learned of the order on the day it was made, but merely said that he "would have" had knowledge of the order. I would imagine that, had Mr Van Deventer for Tshikululu forthrightly said that Mr Mahlangu "had known", it would certainly not have been so far-fetched, so clearly untenable or so palpably implausible as to warrant its rejection on the papers. To the contrary, it would have been perfectly reconcilable with the practice in this court and its digital filing system. I imagine in future, where it has been shown that an applicant's attorney received documents via the court's digital system, an applicant would have to provide a detailed explanation as to how it came about that he did not have knowledge of an order on the day that it issued.

The merits

- [13] Rule 31(2)(b), 42(1) and the common law on rescission treat the requirement that an applicant for rescission must put up a defence, that could be pursued subsequent to rescission, differently. Rule 31(2)(a) empowers the court to rescind a default judgment "upon good cause shown". There is no exhaustive definition of what might amount to "good cause". An applicant for rescission could satisfy the requirement through, among other things, providing an explanation for the default and showing that he has a bona fide defence.⁴ A bona fide defence could, therefore, form part of an applicant's case to satisfy the prerequisites to the court's power to order rescission. The court's common law powers to rescind default judgments are similar. As is the case with Rule 31(2)(b), what constitutes "good cause" is not exhaustively and precisely

⁴ *Wahl v Prinswall Beleggings (Edms) Bpk* 1984 (1) SA 457 (T) 461H.

defined,⁵ but it is beyond doubt that one of the relevant considerations is whether an applicant has shown that he has a bona fide defence that carries some prospects of success.⁶ Rule 42 is different in this regard. Applicants do not have to show “good cause” or a bona fide defence to obtain relief in terms of it. They do, however, have to satisfy the requirements contained in its subrules. The first three words of the Rule are “The court may”. The phrase applies to all the subrules of Rule 42. The word “may” entails that the Rule gives the court a discretion.⁷ I.e., even in cases where the requirements of each subrule are satisfied, the court retains a discretion as to whether to grant rescission. The absence of factors which go to showing good cause for a rescission, including the absence of a bona fide defence, might move a court not to grant rescission notwithstanding the fact that the prerequisites to the exercise of its power have been satisfied.⁸

- [14] Mr Mahlangu has failed to show a bona fide defence. His assertion that God’s Way has never traded, had no offices, no premises and no bank accounts, does not establish one. The claims against Mr Mahlangu are for damages led as a result of breach of contract and fraud. As to breach, the contract does not prohibit dealings with a specific entity. It prohibits dealings with entities other than Tshikululu. I.e., it is no less a breach of the contract by Mr Mahlangu if a third party other than God’s Way was involved in the breach. It is also entirely irrelevant to the allegation that Tshikululu led damages because of the breach. As to the claim for damages because of fraud, one might say that the involvement of a dormant company in a fraudulent scheme is not entirely unheard of. But more pertinently, this attempt at a defence goes only to what exactly happened to Tshikululu’s funds after Mr Mahlangu is alleged to have

⁵ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) 1042G and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) 9B–D.

⁶ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) 1042F–1043A; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) 764J–765D; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) 9D–F; and *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) 152H–153A.

⁷ *Tshivhase Royal Council and Another v Tshivhase and another; Tshivhase and another v Tshivhase and another* 1992 (4) SA 582 (A) 862J – 863A; and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA).

⁸ Cf *Williams v Shackleton Credit Management (Pty) Ltd* 2024 (3) SA 234 (WCC).

defrauded it. It does not address the fraud itself or the damages led because of it.

[15] Mr Mahlangu further argues that the Rule 30 notices somehow amount to or disclose a defence. The argument is bad. Firstly, the points taken in the notices were never prosecuted to completion (or given effect to) in accordance with Rule 30. For the purposes of this application (and perhaps for all others), the notices are therefore irrelevant. Secondly, and in any event, nothing contained in the notices begins to establish defences to the claims against Mr Mahlangu. Thirdly, the points taken in the notices are without merit. The complaint about an agreement that was not attached to the particulars of claim is factually incorrect. Rule 18, furthermore, does not require a claimant to plead or attach evidence in or to the particulars of claim. Mr Mahlangu made no other attempt to satisfy the requirement of good cause for the purposes of Rule 31(2)(b) and the common law and has, therefore, failed to do so.

[16] What remains is whether Mr Mahlangu has made out a case that the order against him had been erroneously sought or granted for purposes of Rule 42(1)(a). In this regard, Mr Mahlangu asserts that the applicants were not notified of the hearing of the application for default judgement. The assertion is, however, incorrect. The applicants' attorney received the application for default judgment and even filed a notice to oppose it. No suggestion is made that he did so without instructions. The applicants were, furthermore, in fact notified of the date of the hearing of the application by way of a notice of set down sent via email to their attorney. In fact, the applicants' attorney had access to the case on the court's online digital filing system 7 days prior to the hearing of the application for default judgment.

[17] In the event, the application is dismissed with costs on scale A.



Nico van der Walt

Acting Judge, Gauteng Division,
Johannesburg.

Heard: 25 April 2024

Judgment: 26 September 2024

Appearances:

For the applicants

Heads of argument by Mr M.V. Gwala

M.V. Gwala Inc

For the respondent:

Adv S. McTurk

Instructed by Uys Matyeka Schwartz Attorneys