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

CASE NO: 005025/2023

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED: YES 06/02/2025 DATE	SIGNATURE
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**CANON SOUTH AFRICA
(PROPRIETARY) LIMITED**

Plaintiff/ Respondent

And

**EDUCOR HOLDINGS
(PROPRIETARY) LIMITED**

Defendant/ Applicant

Neutral Citation:

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.

JUDGMNET

SENYATSI J

Introduction

[1] This matter demonstrates challenges that litigants face where they are, for any reasons, unable to access the Case Line portal created to upload the pleadings. The matter relates to an application for rescission under section 23A (1) the Superior Courts Act, 2013 as amended to rescind the default judgment granted in terms of Rule 31(5) on 11 May 2023. This much is apparent from the Notice of Motion filed on behalf of the defendant. The defendant also seeks that a punitive costs order be imposed on the plaintiff. The applicant is the defendant in the main action and the respondent is the plaintiff in the main claim. For convenience's sake, the parties will be referred to Educor and Canon.

Background

[2] The action was instituted by Canon on 23 January 2023. On 14 February 2023, Educor delivered a notice of intention to defend. On 01 March 2023 Canon delivered a declaration. Educor failed to deliver a plea by due date and Canon subsequently, delivered a notice of bar on 03 April 2023. Educor served a plea on Canon on 12 April 2023.⁵ It is common cause that the plea was not uploaded to Court Online. Canon brought an application for default judgment under Rule 31(5) on the basis that Educor was in default of delivery of a valid notice to defend and a plea. This was served on Educor on 20 April 2023. On 08 May 2023, Educor served a notice to oppose the application for default judgment. On 11 May 2023, default judgment was granted by the Registrar and this, as already stated, is the reason for this application.

Issues for Determination

[3] The issue for determination is whether a case has been made in terms of section 23A (1) which is illuminated as the basis of the application in the notice of motion. This is critical because although the action is brought in terms of that section, in its heads of arguments, Educor contends that the basis its application is Rule 42(1)(a).

The legal principles and reasons

[4] Section 23A (1) of the Superior Court Act, 2013 as amended states as follows:

“(1) If a plaintiff in whose favour a default judgment has been granted has agreed in writing that the judgment be rescinded or varied, a court may rescind or vary such judgment on application by any person affected by it.

(2) Except where a judgment was obtained erroneously or fraudulently, the rescission of a judgment referred to in subsection (1) does not affect the rights of third parties or the parties to the case.

(3) Nothing precludes a court from proceeding with the rescission or variation of a judgment if there is proof that the judgment debt has been settled by the judgment debtor, where an agreement in writing that the judgment be rescinded or varied cannot be obtained from the judgment creditor.” This section envisages an instance where a written consent is sought and obtained that the judgment may be rescinded.

[5] Rule 42(1)(a) of the Uniform Rules provides that:

“The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind, or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.”

[6] Rule 19(1) of the Uniform Rules provides as follows:

“Subject to the provisions of section 24 of the Act, the defendant in every civil action shall be allowed 10 days, after service of summons on such defendant, within which to deliver a notice of intention to defend, either personally or through an attorney: Provided that the days between 16 December and 15 January, both inclusive, shall not be counted in the time allowed within which to deliver a notice of intention to defend.”

[7] The interpretation of Rule 19(1) has been considered in various judgments. For instance, in *Volkskas Motor Bank Ltd v Loe Mining Raise Bone CC*¹ Mahomed J (as he then was) considered whether a notice of intention to defend signed on behalf of a juristic person was valid. After considering the various authorities, the Court concluded that only natural persons can sign notice of intention to defend and in fact represent themselves in court but that the notice of intention defend the juristic person is invalid if an advocate or attorney does not sign it.

[8] In *Yates Investments (Pty)Ltd v Commissioner for Inland Revenue*² where a sole shareholder sought to appear and argue the appeal on behalf of the company, Centlivres C. J said:

“Mr. Prior and the appellant are different personae. A litigant is entitled to appear in person in any Division of the Supreme Court. The appellant, being an artificial person, cannot appear in person and must be represented by a duly admitted advocate. Apart from certain statutory provisions which allow attorneys in very exceptional circumstances to appear in the Superior Court on behalf of a litigant, only a duly admitted advocate can represent a litigant in a Superior Court. As far as the Appellate Division is concerned there is no statutory provisions which allow anybody who is not a duly admitted advocate to appear on behalf of a litigant.”

[9] In *Arma Carpet House (Johannesburg) (Pty) Ltd v Domestic & Commercial Carpet Fittings (Pty) Ltd and Another*³, Margo J said⁴:

“In the case of notice of intention to defend, Supreme Court Rule (1) limits the defendant to acting in person or through an attorney and, as before, the right to act in person cannot extend to an artificial person. If it had been intended to permit any person to represent a defendant in giving notice of intention to defend, then it would not have been necessary in Supreme Court Rule 19(1) to refer to ‘the defendant personally or through an attorney’. The Rule would then have referred simply to ‘the defendant or his agent.’ The concept of the defendant acting ‘personally’ in Supreme Court Rule 19(1) seems to me to be

¹ 1992(2) SA 50 at 54D

² 1956(1) SA 364(A) at 365C

³ 1977(3) SA 448 (W) at

⁴ At 451A-C

the same as under Supreme Court Rule 18(1) in respect of a party who sues or defends 'personally'.

It follows that the first defendant could not validly give notice of intention to defend in person, but only through an attorney. The notice in this case is therefore bad in law and must be set aside."

[10] The Notice of Intention to Defend filed by Educor reads as follows:

"SIRS,

KINDLY TAKE NOTICE that the Defendant in the above matter hereby defends the matter and appoints the address set out hereunder as the address where it will accept service of all documents in the matter.

BE PLEASED TO TAKE FURTHER NOTICE that the service address for the Defendants is:

DAMELIN RANDBURG, CNR MALIBONGWE DRIVE AND REPUBLIC ROAD, RANDBURG

DATED AT PINETOWN ON THIS 14th DAY OF FEBRUARY 2023

DEFENDANT

EDUCOR HOLDINGS

5[...] U[...] Road

PINETOWN "

[11] Based on what appears on the face of the Notice of Intention to Defend, is the contention on behalf of Educor that the notice was signed by an admitted attorney defensible? Educor contends that because the notice was signed by its group legal adviser and a group company secretary who is an admitted attorney of the High Court, this Court should find that the notice complied with Rule 19(1). The contention is bad in law because it is not supported by the notice itself. Nowhere in the notice are the facts evident which support this proposition. To the contrary, there is no identity of the person who signed on behalf of Educor and of course, I have not been referred to any authority in support of the proposition by Educor that I must accept that the signatory of the notice is an admitted attorney of the High Court absent any indication to that effect from the notice itself. It must therefore follow that the Plea and Counterclaim which was signed someone at Educor without the necessary

details required by the Rule, must suffer the same fate as the Notice of Intention to Defend and is invalid because Educor cannot represent itself.

[12] The contention that Canon's attorneys acted in bad faith in proceeding with the application for default judgment in the face of a Plea cannot be sustained because the purported Plea was filed out of time. More importantly, both invalid Notice of Intention to Defend and the Plea had not been uploaded in the Case line portal as required by the Practice Directive of this Court.

[13] The fact that someone at Educor communicated with Canon's attorneys for assistance to upload the ill-fated Notice of Intention to Defend and the Plea would not render those documents valid, and this is based on the quoted authorities set out in this judgment. Furthermore, the Rule 30 Notice, which was filed and uploaded on Case line portal on 6 June 2023 by the Educor's attorneys of record well after the judgment had been obtained and was filed out of the timelines and of course also signed by someone at Educor and not by an attorney. The judgment in default was therefore, in my opinion, not granted by error as claimed by Educor because of the invalidity of the pleadings that had not been uploaded on the Case line portal as required by the Practice Directive. This view finds support of the many decisions quoted in this judgment.

[14] I turn to deal with Rule 42(1)(a) of the Uniform Rules which has been referred to above. The words "granted in the absence of any party affected thereby" has little to do with actual, or physical, presence but refers to whether the affected party was afforded a genuine opportunity to participate.⁵

[15] In *Zuma*⁶, Khampepe J, said the following regarding the requirements to be met in Rule 42(1)(a) application:

"It should be pointed out that once an applicant has met the requirements for rescission, court is merely endowed with a discretion to rescind its order. The

⁵ See *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* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC)

⁶ Above, footnote 5 at para 53

precise wording of rule 42, after all, postulates that a court ‘may’, not ‘must’, rescind or vary its order – the rule is merely an ‘empowering section and does not compel the court’ to set aside or rescind anything.⁷ This discretion must be exercised judicially.⁸”

[16] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape*⁹, in dealing with the common law principles behind Rule 42(1)(a), Jones AJA stated as follows:

“[4] As I shall try to explain in due course, the common law before the introduction of rules to regulate the practice of superior courts in South Africa is the proper context for the interpretation of the rule. The guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the judge who delivered it. He becomes *functus officio* and may not ordinarily vary or rescind his own judgment (*Firestone SA (Pty) Ltd v Gentiruco A.G.*)¹⁰. That is the function of a court of appeal. There are exceptions. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, *justus error*.¹¹ Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause. There are also, thirdly, exceptions which do not relate to rescission but to the correction, alteration and supplementation of a judgment or order. These are

⁷ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) (De Wet) at 1034F and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* [2003] ZASCA 36; 2003 (6) SA 1 (SCA) at para 5 where the Supreme Court of - Appeal held that rule 42, understood in the context of the common law of rescission, caters for a mistake, but “rescission or variation does not follow automatically upon proof of a mistake. The rule gives the courts a discretion to order it, which must be exercised judicially.” See also *Theron N.O. v United Democratic Front (Western Cape Region)* 1984 (2) SA 532 (C) and *Chetty* above n 12 at 760F-G.

⁸ *Chetty* id at 761D where the Court held as follows: “broadly speaking, the exercise of a court’s discretion [is] influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case”. One of the most important factors to be taken into account in the exercise of discretion, so the Court in *Chetty* found at 760H and 761E, was whether the applicant has demonstrated “a determined effort to lay his case before the court and not an intention to abandon it” for “if it appears that [an applicant’s] default was wilful or due to gross negligence, the court should not come to his assistance”. And, as stated in *Naidoo v Matlala N.O.* 2012 (1) SA 143 (GNP) at para [4], a court will not exercise its discretion in favour of a rescission application if undesirable consequences would follow.

⁹ ZASCA 36; [2003] 2 All SA 113 (SCA); 2003 (6) SA 1 (SCA) at paras 4 and 5.

¹⁰ 1977 (4) SA 298 (A) 306 F- G.

¹¹ *Childerly Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163, *De Wet and others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1040. And see Harms, *Civil Procedure in the Supreme Court*, B42-10 and the authorities collected in footnotes 7, 8 and 9.

for the most part conveniently summarised in the headnote of *Firestone SA (Pty) Ltd v Gentiruco A.G. supra*¹² as follows:

- ‘1. The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, that the court overlooked or inadvertently omitted to grant.
2. The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order.
3. The court may correct a clerical, arithmetical, or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance.
4. Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.’

In the *Gentiruco A.G.* case Trollip JA left open whether or not this list is exhaustive.¹³ The authorities also refer to an exceptional procedure under the common law in terms of which a court may recall its order immediately after having given it, or within a reasonable time thereof, either *meru motu* or on the application of a party, which need not be a formal application (*De Wet and others v Western Bank Ltd supra*¹⁴; *First national Bank of SA Ltd v Jurgens*¹⁵; *Tom v Minister of Safety and Security*.¹⁶ This procedure has no bearing on this case.

5. It is against this common law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. The rule

¹² The headnote is an accurate summary of the passage in the judgment appearing at pages 306H-308A.

¹³ At 308 A – 309 B. That is how matters presently stand, despite the reservation in *Seattle v Protea Assurance*

Co Ltd 1984 (2) SA 537 (C) 542 at H- 543 A

¹⁴ Footnote 11 at 1044 E – 1045G.

¹⁵ 1993 (1) SA 245 (W) 246I.

¹⁶ [1998] 1 All SA 629 (E) 637A – 638A.

caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The rule gives the courts a discretion to order it, which must be exercised judicially (*Theron NO v United Democratic Front (Western Cape Region) and others*)¹⁷ and *Tshivhase Royal Council and another v Tshivhase and another; Tshivhase and another v Tshivhase and another*.¹⁸

6. Not every mistake or irregularity may be corrected in terms of the rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law¹⁹. That is why the common law is the proper context for its interpretation. Because it is a rule of court its ambit is entirely procedural.”

[17] The trend of the courts over the years is not to give a more extended application to the rule to include all kinds of mistakes or irregularities.²⁰ In *Bakoven Ltd v GJ Howes (Pty) Ltd*²¹, the Court said the following on the interpretation of Rule 42(1)(a): “An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of a mistake in a matter of law appearing on the proceedings of a Court of record' (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence... Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission.”

[18] In the instant matter, Educor contended that there was an error by the registrar to grant the default judgment because it had entered notice of intention to defend which could not be uploaded due to technical reasons. This contention is without merit because at the time the default judgment was granted, no notice of intention to defend had been uploaded in the court file. Educor contended furthermore that it had been refused the right to file the notice of intention to defend manually and by implication furthermore argued that somehow, the registrar should

¹⁷ 1984 (2) SA 532 (C) at 536G.

¹⁸ [1992] ZASCA 185; 1992 (4) SA 852 (A) 862J – 863A.

¹⁹ Harms, *Civil Procedure in the Supreme Court*, B42-1. But see the reservation in *Tshivase Royal Council v Tshivase supra* (footnote 18) at 862 I.

²⁰ Colyn v Tiger Foods Industries Ltd above footnote 9 at para 8.

²¹ 1990(2) SA 446 at page 471E to H

have that there was always an intention to defend the action. This contention loses sight of the fact that the office of the registrar of this court consists of support staff and not a single individual.

[19] Consequently, given the application for default judgment for consideration, Mr. Maponya, the registrar of this court could not have known that indeed there was a notice of intention to defend the action which had been turned down by Mr. Makofane one of his staff members when the alleged attempt to file it manually was made. Accordingly, I am of the view that the judgment was not granted in error. I am, furthermore, fortified by the fact that in any event, what is said to be the notice of appearance to defend is not compliant with the Rules because Educor indicated that it is representing itself instead of been represented by an attorney. This renders the so-called notice of intention to defend invalid which is in line with the many courts.

[20] I now consider whether Educor had demonstrated that it has a bone fide defence to the claim. Educor does state in its affidavit what its defence is. It refers to a "Plea and Counterclaim" which it attaches to its founding affidavit which was not signed by an attorney or advocate. The so-called "Plea and Counterclaim" refers to the alleged point in limine challenge Canon's alleged failure to prove that the person who concluded the agreement with Canon on behalf of Educor had the authority to do so. The "Plea" also challenges the correctness of the amount claimed and avers that Canon failed to fulfil its obligations by not maintaining the equipment. For the reasons stated above regarding the invalidity of the notice of intention to defend, the so-called "Plea and Counterclaim" must suffer the same fate. Accordingly, Educor has not made out a case that it has a bona fide defence.

Order

[21] The application for rescission of judgment is dismissed with costs on the scale A.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

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DATE APPLICATION HEARD:

03 September 2024

DATE JUDGMENT HANDED DOWN:

06 February 2025