



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

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

SIGNATURE

DATE: 24/02/2025

**CASE NO: 2022/017041**

In the matter between:-

**WALTER ALEXANDER MARTENS**

Applicant

and

**SAPOR RENTALS (PTY) LIMITED**

Respondent

In re:

**SAPOR RENTALS (PTY) LIMITED**

Plaintiff

and

**WALTER ALEXANDER MARTENS**

Defendant

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**JUDGMENT**

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**ALLEN AJ**

**INTRODUCTION**

- [1] The applicant seeks the rescission and setting aside of a default judgment granted against him on 9 November 2022 under the above case number and the applicant be granted leave to file his plea to the respondent's particulars of claim within 20 days of the granting of this order.
- [2] The application for rescission was launched 12 May 2023 after applicant became aware of the default judgment on 12 April 2023. On 19 April 2023 applicant requested respondent's consent to rescind the default judgment which consent was refused on 20 April 2023. Respondent filed a notice to oppose on 12 May 2023, answering affidavit on 5 June 2023 and applicant filed a replying affidavit on 20 June 2023.

## RELEVANT BACKGROUND FACTS

- [3] Respondent issued a summons against applicant in terms of an agreement whereby applicant bound himself as guarantor for a company known as P and D Facades (Pty) Limited (P and D). The company is the principal debtor in a master rental agreement for certain goods. Applicant was a director of P and D which went into voluntary liquidation. The default judgment granted against applicant was for the amount of R1 418 798.15 plus interest at the rate of prime plus 6% plus costs on an attorney and own client scale.
- [4] The parties filed a joint practice note and it is undisputed that applicant bound himself as guarantor for P and D on 30 November 2020 in favour of the respondent, although the type of agreement is disputed. It is also undisputed that in terms of the master rental agreement the respondent purchased the goods from a supplier to rent it to P and D on a monthly basis for a period of 48 months from 5 December 2020. It is also undisputed that P and D is in arrears.
- [5] It is further undisputed that respondent issued summons in the main action on 23 August 2022, obtained default judgment on 9 November 2022 and that the applicant became aware of the default judgment on 12 April 2023.
- [6] It is also undisputed that a misunderstanding occurred between the applicant and his attorney, although the cause of the misunderstanding is disputed.

## ANALYSIS

- [7] It is disputed that the applicant showed good cause and a bona fide defence for the rescission of the default judgment granted.
- [8] The applicant's submissions are that he has a bona fide defence against the action instituted by the respondent and was not in wilful default.
- [9] The respondent's submissions are that the applicant is in wilful default as applicant had knowledge of the summons and Rule 41A on 29 August 2022 (date of service), did not defend the matter and does not provide any explanation for the delay between 3 September 2022 and 1 December 2022 when applicant corresponded with his own attorneys.
- [10] Respondent further submit that it always remains the owner of the goods and that P and D has no interest in the goods after termination. The master rental agreement also sets out the liability of P and D on breach of the agreement and that the future rentals are agreed liquidated damages. As guarantor the applicant guaranteed the payment of the monthly rentals of P and D. Should P and D fail to make the necessary payments, as such the applicant is liable for the payment of the arrears and future rentals.
- [11] Respondent further submit that applicant did not plead or prove that the Conventional Penalties Act No. 15 of 1962 (CPA) applies which is one of the grounds applicant relies on for his bona fide defence.



[12] Respondent also submit that applicant has to prove that respondent has not suffered any prejudice and that the applicant is required to prove that he will be able to satisfy the judgment at once which applicant has not done.

[13] An application for rescission of judgment can be brought under Rule 42(1) of the Uniform Rules of Court, or Rule 31, or in terms of the common law. Applicant during argument confirmed that the application is under Rule 31(2)(b) of the Uniform Rules of Court.

## DISCUSSION

### Good Cause-Wilful Default

[14] The summons was served on applicant's chosen *domicilium citandi et executandi* "by leaving a copy thereof to the outer gate". Applicant admits having received the summons. It is undisputed that he became aware on the day when service was effected.

[15] Applicant, on 2 September 2022, emailed the summons to his attorney Jordaan (first firm of attorneys). The heading of the email was "RULE 41A NOTICE – SAPOR RENTALS". In the email he requested the attorney to "please advise my course of action?". The email clearly was not an instruction to defend the matter, but to seek advice. Jordaan, correctly so, did not take any steps to defend the matter. No affidavit of Jordaan was filed.

- [16] Applicant, on 1 December 2022 at 09:39, requested an update from Jordaan "in the above matter". The heading of this email was "P&D FACADE PTY LTD – LIQUIDATION" and clearly not related to the summons received or defending the matter.
- [17] Applicant, on the same day at 09:33, emailed another attorney Van Niekerk of another firm of attorneys (second firm of attorneys) furnishing the latter with information. This email was sent 6 minutes prior to the email to Jordaan. This email was also not an instruction to defend and neither did it refer to any discussion in that regard.
- [18] Applicant in an email, dated 11 April 2023 at 10:28, to Van Niekerk thanked him after having asked him to follow up on a subpoena received by Standard Bank in prior emails disclosed and referred to a misunderstanding in the same sentence. The heading of this email was "Subpoena". No inference can be made as to Van Niekerk's alleged instructions to defend.
- [19] Applicant, once aware of the "misunderstanding" instructed a third firm of attorneys to enquire from respondent's attorneys "where you are currently in the litigation process". Attorney Fourie from applicant's attorneys of record forwarded an email to respondent on 11 April 2023 at 10:46. This all happened within 18 minutes after the email to Van Niekerk regarding the subpoena.

[20] The applicant has to show good cause meaning that wilful default has to be absent. The correspondence does not come to applicant's assistance for the delay of approximately eight months to counter wilful default.

[21] Applicant timeously on 12 May 2023 launched this application.

[22] The requirements for a rescission application in terms of Rule 31<sup>1</sup> are as stated in ***Grant v Plumbers (Pty) Ltd*** 1949 (2) SA 470 (O) at page 476-7:

[22.1] "He 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.

[22.2] His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.

[22.3] He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a *prima 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] In ***Silber vs Ozen Wholesalers (Pty) Limited*** 1954(2) SA 345 (A) Schreiner JA stated on page 353: "*It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to*

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<sup>1</sup> Uniform Rules of Court page D1-366



*enable the Court to understand how it really came about, and to assess his conduct and motives. In considering whether this minimum has been shown by the defendant I must express my disagreement with the view that this is 'a simple case of a misunderstanding between a client and his attorney'. There was no proof of misunderstanding...."*

[24] An application which fails to set out these reasons is not proper<sup>2</sup>, but where the reasons appear clearly, the fact that they are not set out in so many words, will not disentitle the applicant to the relief sought<sup>3</sup>.

[25] In **Nale Trading CC v Freyssinet Posten (Pty) Ltd In re: Freyssinet Posten (Pty) Ltd v Nale (Pty) Ltd** (unreported, GJ case no 26992/2019 dated 22 September 2021) it was stated in paragraph [15] "Before a person can be said to be in wilful default, the following elements must be shown:

- (a) *knowledge that the action is being brought against him;*
- (b) *a deliberate refraining from entering an appearance, though free to do so; and*
- (c) *a certain mental attitude towards the consequences of the default*<sup>4</sup>.

[26] All three elements must be established before the party can be said to have been in wilful default. The onus of proof rests ultimately on the respondent<sup>5</sup>. In

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<sup>2</sup> **Marais vs Mdowen** 1919 OPD 34

<sup>3</sup> **Cf Behncke vs Winter** 1925 SWA 59

<sup>4</sup> See Uniform Rules of Court page D1-367

<sup>5</sup> **Silber v Ozen** supra at 352 G-H



this matter, applicant does have knowledge of the action, did not enter an appearance to defend and has not given a satisfactory explanation for his default in entering an appearance to defend. His explanation is premised on a "misunderstanding" (with only the second firm of attorneys) which is not corroborated by the evidence proffered of what transpired over a period of approximately eight months.

#### Good Cause-Bona Fide Defence

[27] Applicant raised a defence by relying on Section 3 of the Conventional Penalties Act 15 of 1962 which reads as follows: "*Reduction of excessive penalty, if upon the hearing of a claim for a penalty, it appears to the Court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated by the Court may reduce the penalty to such extent as it may consider equitable in the circumstances: provided that in determining the extent of such prejudice the Court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.*"

[28] Applicant intends to raise it as a defence in the action and alleges that same is substantial. Applicant did not elaborate on the alleged proportions of prejudice suffered or rightful interest which may be affected other than to refer to the relevant clause of the agreement and respondent's duty to mitigate its damages.

[29] In **NATIONAL SORGHUM BREWERIES LTD (t/a VIVO AFRICAN BREWERIES) v INTERNATIONAL LIQUOR DISTRIBUTORS (PTY) LTD** 2001 (2) SA 232 (SCA) Olivier JA stated on page 241 “[8] *It follows that, although the forfeiture clause in Shembe arose, as it inevitably must, from the contract between the parties, its raison d'être and validity are to be found in the damage suffered by the creditor. To emphasise the point: in order to reduce the amount of the forfeiture, the actual prejudice suffered by the creditor must be proved by the debtor - see Smit v Bester 1977 (4) SA 937 (A) at 942H; Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) at B 906E; Chrysafis and Others v Katsapas 1988 (4) SA 818 (A) at 828I; and see A J Kerr The Principles of the Law of Contract 4th ed at 602*” and “[9] *It follows that, although a claim for forfeiture arises ex contractu, its essence and function is to compensate the creditor for prejudice (including damage) suffered by it. From this it would follow that, if a creditor relies in an action on a forfeiture clause, it cannot again in a later action claim for damages: the 'thing' claimed and the cause of action for both claims are similar and has already been finalised*”.

[30] In **Steinberg v Lazard**<sup>6</sup> the SCA followed the **National Sorghum Breweries** case.

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<sup>6</sup> 2006 (5) SA 42 (SCA) page 46, paragraph 10. See also *South Cape Corporation (Pty) Ltd v Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548.

[31] It is undisputed that P and D defaulted in terms of clause 8 of the agreement and respondent elected to exercise its rights in terms of clause 8.3 to terminate the agreement, take possession of the goods, retain all amounts already paid and claim all outstanding arrear rentals as agreed pre-estimated liquid damages the aggregate of the rentals for the initial rental period.

[32] It is applicant's case during argument that respondent's mitigation of damages entails deduction of the value of the goods sold from the amount claimed. Applicant was invited to proffer case law to substantiate, but was unable to do so. The amount claimed include arrears and future rental. Applicant admitted that the application is defective in that the proceeds should not be deducted from the arrears, but only the future rental and default judgment should be only partially rescinded in respect of the future rental which is not applicant's case. The arrears amount has substantially increased to date and remains outstanding. The agreement, if not cancelled, would have run out 4 December 2024 and to the extent no future rental remains to be considered.

[33] It is respondent's case that it is only a rental agreement and need not deal with the goods. The purchase of the goods by respondent in terms of a purchase agreement with a supplier and the renting out of the same goods in terms of a rental agreement between respondent and P and D is not related to each other and a negative inference should not be made that respondent's intention was to receive the rental *in lieu* of the goods purchased and the possibility of a "rent to buy" agreement is excluded.



- [34] On respondent's version he purchased the goods and rented it out and remains the owner of the goods. Respondent's prejudice lies in the purchase of the goods. I cannot disagree.
- [35] In the circumstances applicant has not shown good cause why the default judgment should be rescinded and set aside.
- [36] In the case of ***Pendigo Trade and Investment (Pty) Limited t/a ITEC Finance vs Suzanne Michelle Potgieter*** (9928/2022) [2023] ZAWCHC 114 (22 May 2023) it was stated as follows: "[21] *The wording of s 3 can be construed to the effect that its provisions may be applied by the court suo motu. It has been remarked in that regard that the provision not only invests the court with a power to make an equitable order but also imposes a duty upon it to do so when a penalty appears to it out of proportion in the sense contemplated. Not having had the benefit of argument on the point, I have assumed for the purposes of this judgment that the authorities that have construed s 3 of the Conventional Penalties Act to impose a duty on the court in appropriate cases to apply the provision mero motu, which appears to imply an inquisitorial approach, were correctly decided. That construction is, however, not easy to reconcile with the appeal court authority referred to later in this judgment that has held that s 3 places a true onus on a debtor seeking to mitigate the effect of a penalty stipulation to prove that the penalty is disproportionate to the prejudice suffered and to what extent, which appears to imply a strictly adversarial approach.*



[22] *In the current matter the extent of the penalty does not appear to me, on the face of it, to be out of proportion. It equates, subject to the effect of any mitigatory measures that the plaintiff might reasonably be expected to avail of, to the sum that the plaintiff, absent the penalty stipulation, would have been able to claim by way of general contractual damages, viz. the amount necessary to put the plaintiff, in monetary terms, in the position it would have been if the principal debtor had not breached the contract”.*

[37] In the matter before me the extent of the penalty does not appear to me, on the face of it, to be out of proportion either. The goods were returned to respondent by the liquidator of P and D, was of value, and was sold by respondent. In addition, respondent did not have to tender the goods to applicant as an option to mitigate its damages, since it was a rental agreement only. In other words, in my view, the penalty in this matter is not disproportionate to the prejudice suffered by respondent as he would have been in the same position had P and D not breached the agreement.

[38] In the matter of **Premier Finance Corporation (Pty) Ltd v Rotainers (Pty) Ltd and Another** 1975 (1) SA 79 (W) the court held on page 83 and 84: “Relying on the decision reported as **Claude Neon Lights (S. A.) Ltd. v Schlemmer**, 1974 (1) SA 143 (N), he argued that it would be unfair to defendants to allow plaintiff to receive in one sum an amount which, had the contract run its full length, it would have received over a period of years, without the allowance of a discount.

*I would respectfully venture to express this criticism of the decision in the Claude Neon case that it proceeds on the assumption, which on the facts as set out in the judgment does not appear to be justified, that the judgment will be satisfied as soon as it is delivered or as soon as execution is levied. If in fact the defendant is found to be unable to satisfy the judgment and the judgment creditor has to go through the time-consuming process of taking payment in instalments, then the consideration which prompted the Court to allow a discount on the plaintiff's claim falls away.*

*Similar considerations seem to me to be present in the present case. I do not know whether the judgment can or will be satisfied at once, and, in the absence of some indication that it will be, I do not find a sufficient basis to grant leave to defend so that defendant can claim a discount. As I have said, this defence has no basis in the answering affidavit. Nor was anything said in the affidavit concerning the extent to which the claim should be discounted - if it is to be discounted at all - and in this respect too I have nothing before me on the strength of which I can grant leave to defend, or by virtue of which I can decree an abatement of plaintiff's claim".*

[39] Applicant has not shown whether he will be able to satisfy the judgment, or any portion thereof, at once. Applicant's reliance on an abatement in respect of the arrears is also ill-founded.

[40] Having regard to what I have already set out above in respect of the applicant's good cause, I am satisfied that the applicant has not met the requirement of showing good cause. Applicant is in wilful default, has not set out a bona fide

defence, even on a prima facie basis, and is accordingly not entitled to rescission in terms of Rule 31(2)(b).

## ORDER

[41] In the result the following order is made:

1. The application for rescission of judgment is dismissed.
2. Applicant to pay the costs on an attorney and own client scale.



ALLEN AJ

**ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, JOHANNESBURG**

This judgment was prepared by Acting Judge Allen. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 24 February 2025.

HEARD ON: 19 February 2025

DECIDED ON: 24 February 2025

For the Applicant: Adv A Du Plessis  
Instructed by JNS Attorneys

For the Respondent: Adv JJ Durandt  
Instructed by Jay Mothobi Inc