



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable/Not Reportable

Case no: 22984/23

In the matter between:

OVERBERG VEE BOERDERY CC

FIRST APPLICANT

SERVAAS DANIËL SMAL

SECOND APPLICANT

ABRAHAM DANIEL ROUX

THIRD APPLICANT

ROUX LEWENDE HAWÉ CC

FOURTH APPLICANT

and

OVERBERG AGRI BEDRYWE (PTY) LTD

RESPONDENT

Neutral citation: *Overberg Vee Boedery CC and 3 others v Overberg Agri Bedrywe (Pty) Ltd (Case no 22984/23) [2025] ZAWCHC (01 August 2025)*

Coram: **NJOKWENI AJ**

Heard: 8 MAY 2025

Delivered: 01 AUGUST 2025

Summary: *rescission of judgment – uniform rule 31, alternatively common law – good cause – reasonable explanation – application is bona fide –bona fide defence – opinion evidence vis-à-vis expert evidence.*

JUDGMENT

Njokweni AJ

INTRODUCTION

- [1] This is an opposed application for rescission of judgment granted against the Applicants on 15 April 2024 under the above-mentioned case number. The application is brought by the Applicants in terms of uniform rule 31¹, alternatively common law.
- [2] This action was commenced by way of combined summons (“summons”) and on 18 December 2024, the summons was served by the sheriff upon the Applicants separately. The summons required the sheriff to *inter alia* inform the Applicants that:
- (a) Respondent has instituted an action against them as set out in the particulars of claim attached to the summons.
 - (b) if they intend to defend the action, they must within ten (10) days of service upon them of the summons deliver a notice of intention to defend by service of a copy thereof on the registrar of this Court.
 - (c) after delivery of their notice of intention to defend, they must deliver their plea (a statement of defence).
 - (d) failure to deliver a notice of intention to defend within the ten (10) days stipulated thereon, judgment in default may be entered against them.

¹ In this judgment, reference to rule or rules means the uniform rules of Court, unless specified otherwise.

- [3] Summons having been duly served as aforesaid, the Applicants failed to deliver notice of intention to defend within the ten (10) days from the date of service of the summons upon them.
- [4] In the result, on 15 April 2024 the Respondent successfully applied for default judgment against the Applicants for payment of R455 110.86 together with interest and costs.
- [5] It is this default judgment that the Applicants seek to be rescinded in this application.

THE RELEVANT FACTS

- [6] The first Applicant owns a lucerne farm in Leeu-Gamka, Western Cape province ("the farm"). The Respondent is the supplier of irrigation systems. The Second, Third, and Fourth Applicants are sureties and co-principal debtors for First Applicant's liabilities and debts to Respondent. As sureties and co-principal debtors, the Second to Fourth Applicants are jointly and severally to the Respondent.
- [7] In December 2019, the Second Applicant approached the Respondent for the design and installation of an irrigation system for an 8-hectare new lucerne field on the farm. On 4 May 2020, Mr Lombard, the Respondent's then manager, conducted soil and water quality tests on the farm and provided the First Applicant with a final design and quotation for the design, supply and installation of the irrigation system.
- [8] In July 2020, the First Applicant and the Respondent concluded a written credit agreement in terms whereof the Respondent *inter alia* agreed to design, supply and install the necessary irrigation system. In terms of the credit agreement the Respondent designed, supplied and installed the irrigation system for new lucerne field at the farm at a total cost of R455 110.86.

- [9] In February 2021, the Second Applicant complained about the irrigation system's performance and refused to repay the amount of R455 110.86 to the Respondent. In the result, in March 2021 the Respondent appointed an independent expert, Netafim, to investigate the First Applicant's complaints. Netafim found no faults in the irrigation system.
- [10] In July 2021 the Second Applicant complained of a 30% loss of production on the newly irrigated lucerne field allegedly due to poor design and installation of the irrigation system by the Respondent. The Respondent conducted a further inspection of the irrigation system in March 2022 which found the system functioned but was poorly managed by the First Applicant. The First Applicant refused to pay the balance due to Respondent, claiming damages of approximately R500 000 for the alleged 30% production loss.
- [11] On 6 October 2023, the Respondent sent a letter of demand to the First Applicant for payment of the outstanding amount of R455 110.86 which was due and payable. On 14 November 2023, the Applicant's attorneys, Mr Marais ("Marais") replied to the letter of demand on behalf of the First Applicant and informed the Respondent's attorney that a counterclaim will be instituted for damages suffered by the First Applicant for 30% production loss.
- [12] Following the above, and during the latter part of November 2023, alternatively early December 2023, it was then agreed between the legal representatives of the Applicants and the Respondent that it would be best to engage in round table discussions in an attempt to resolve the dispute.
- [13] According to Marais, the Respondent's attorney later in December 2023 informed him that prescription may be an issue for the Respondent, and as a result, the Respondent would proceed to issue summons for the sole purpose of interrupting prescription pending finalization of the proposed round table discussions to be held in 2024. Indeed, on 14 December 2023 the Respondent issued summons against the Applicants for the amount owing to the Respondent in terms of the credit agreement being R455 110.86.

[14] The summons was duly served on the Applicants but none of them defended the action. In the result, the Respondent applied for default judgment against the Applicants and on 15 April 2024 default judgment was granted against the Applicants (jointly and severally one paying the other to be absolved) for the payment of R455 110.86 together with interest and costs.

[15] On 5 July 2024 the Applicants launched this rescission application, which is opposed by the Respondent *inter alia* on the basis that the Applicants were in wilful default of appearance to defend, and that the Applicants do not have a *bona fide* defence to the Respondent's claim.

ISSUES IN DISPUTE

[16] The issues in dispute in this application are whether the Applicants':

- (a) default of delivery of notice of intention to defend was wilful.
- (b) rescission application is *bona fide* and not filed with intent to delay the Respondent's claim.
- (c) have a *bona fide* defence to the Respondent's claim.
- (d) have shown good cause to rescind the default judgment.

APPLICABLE LAW

[17] Once made, an order of Court can be rescinded by the Court in which the order was made, in terms of:

- (a) Section 23A of the Superior Courts Act 10 of 2013;
- (b) Rule 31;
- (c) Rule 42; and
- (d) Common law.²

² Van Loggerenberg et al, Erasmus: Superior Court Practice, vol 2, D1-561; (*Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 468H).

[18] The present application is brought in terms of Rule 31 and/or common law. Rule 31(2)(b) reads as follows:

‘Applicant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the Respondent to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.’

[19] The grounds for rescission in terms of common law are succinctly stated in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*³ per Jones AJA (with Olivier JA and Cameron JA concurring), where the Court held:

[11] I turn now to the relief under the common law. In order to succeed an Applicant for rescission of a judgment taken against him by default must show good cause (*De Wet and others v Western Bank Ltd*⁴). The authorities emphasize that it is unwise to give a precise meaning to the term good cause. As Smalberger J put it in *HDS Construction (Pty) Ltd v Wait*:

“When dealing with words such as “good cause” and “sufficient cause” in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words... The Court’s discretion must be exercised after a proper consideration of all the relevant circumstances.”

...With that as an underlying approach the courts generally expect an Applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the Respondent’s claim which prima facie has some prospects of success (*Grant v Plumbers (Pty) Ltd, HDS Construction (Pty) Ltd v Wait supra, Chetty v Law Society, Transvaal*).’

[20] This position has also been confirmed by the Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State*

³ *Colyn v Tiger Food Industries Ltd t/a Meadow Feedmills (Cape)* 2003 (6) SA 1 (SCA) at 11.

⁴ Reference omitted.

*Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*⁵, where the majority of the Apex Court, penned by Khampepe J, held that:

[71] As an alternative to rule 42, Mr Zuma pleads rescission on the basis of the common law, in terms of which an Applicant is required to prove that there is 'sufficient' or 'good cause' to warrant rescission. 'Good cause' depends on whether the common law requirements for rescission are met, which requirements were espoused by the erstwhile Appellate Division in *Chetty*, and affirmed in numerous subsequent cases, including by this Court, in *Fick*. In that matter, this Court expressed the common law requirements thus:

"the requirements for rescission of a default judgment are twofold. First, the Applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a *bona fide* defence which *prima facie* carries some prospects of success. 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] Thus, the requirements for an application for rescission can be summarised, that:

- (a) The Applicant must give a reasonable explanation for his/her default;
- (b) The application must be *bona fide* and not made with the intention of merely delaying the Respondent's claim;
- (c) The Applicant must show a *bona fide* defence to the *claim*.

[22] Accordingly, to succeed in an application in terms of Rule 31 or common law the Applicants must explain their default and set out a *bona fide* defence to the Respondent's claim.

⁵ *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] ZACC 28, at para 71, see also *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).

[23] The onus of setting out reasons for his/her non-appearance is upon the Applicant who must: 'furnish an explanation for his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives.'⁶

[24] In respect of the alleged defence raised by the Applicants, the onus rests upon them to demonstrate that they have a *bona fide* defence to the claim which carries some prospect of success.⁷

APPLICATION OF LAW TO THE FACTS

Analysis of the Applicant's reasons for default of appearance to defend

[25] The Applicants contend that none of the Applicants were in wilful default of delivery of a notice of intention to defend the main action.

Ad service on First and Second Applicants

[26] The First and Second Applicants admit that on 18 December 2023, the Sheriff served the summons upon a Ms. Swart, a major female employee of the First Applicant, at the First Applicant's place of business. It is contended that Ms. Swart, mistakenly filed away the summons served on her and had forgotten about it, as she believed it was another letter of demand from the Respondent.

[27] It was contended that this was so because, previously the sheriff has served letters of demand from the Respondent at the First Applicant's place of business and these letters were apparently received by Ms Swart who would forward them to the Second Applicant.

[28] Ms Swart should have perused the "document" served on her by the sheriff in December 2023. She is used to receiving documents served by the sheriff (i.e.

⁶ *Silber v Ozen Wholesalers (Pty) Ltd* 1954(2) SA 345 (A) at 353A and *Cavalinias v Claude Neon Lights SA Ltd* 1965 (2) SA 649 (T) at 651C – D.

⁷ *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357-8.

previous letters of demand) relating to the Respondent's dispute with the Applicants and which on her version forwarded to the Second Defendant immediately on receipt. Had she done so, she would have clearly realised that the "document" served on her was a summons issued by the Respondent against the Applicants and would have surely alerted the Second Applicant accordingly.

[29] In worst case scenario, on return from annual leave in January 2024 Ms Swart should have given the Second Applicant the "document" served on her by the sheriff in December 2023. She did not do so because she forgot. Had she done so, the Second Applicant would have realised that the "document" was a summons not a letter of demand. There was no claim in the Applicants' papers that either Ms Swart or the Second Applicant are illiterate and could not understand the content of the "document" so served as to appreciate its purport. This has nothing to do with having never been served with summons before, it is simple neglect of the summons.

[30] I pause to mention that the Second Respondent is the sole member of both the First and Fourth Applicants, and thus their controlling mind. After receipt of the previous letters of demand, the Second Applicant forwarded same to Marais. In the result, it is contended that the Second Applicant was also under the impression that the summons (which he refers to as the 'document') that was served on Ms Swart was a letter of demand and did not realize it was a summons that required action.

[31] The Second Applicant contends that he only became aware at a much later stage that the document that was served by the sheriff on 18 December 2023 was in fact a summons when the sheriff attended at the First Applicant's place of business on 7 June 2024 in order to execute a warrant of attachment, apparently issued pursuant to the default judgment granted in favour of the Respondent.

[32] According to the Second Applicant, he immediately contacted Marais and informed him that the sheriff wanted to attach goods in satisfaction of a

judgment having been granted in favour of the Respondent, and that Marais was equally shocked by this as he advised that a summons had to be served first before judgment could be obtained. Strangely, the Second Applicant confirms that prior to the service of summons on Ms Swart, the Sheriff contacted him telephonically in December 2023 but that he was informed during that conversation that the sheriff had to serve 'a document' (not a summons) in respect of the Respondent. He was not informed about the nature of the document to be served.

- [33] He also states that he had no idea what a summons was and what it entails as he has never before been sued nor had he ever sued anyone and thus has never dealt with nor seen a summons. He was under the impression that the dispute was being handled by the legal representatives and was awaiting feedback on round table discussions.
- [34] The Second Applicant was on the same date of service of summons upon Ms Swart informed by the Third Applicant that he was served with a "letter" by the sheriff but did not recognize it as a summons. The Second Applicant advised the Third Applicant not to be concerned, believing it was another letter of demand related to the ongoing dispute with the Respondent.
- [35] First, it is apposite to state that it cannot be disputed that the summons in the main action was correctly served upon the Applicants. It is not and cannot be contended that there was any procedural irregularity which flowed from service and the subsequent granting of the default judgment.
- [36] The Second Applicant in his own version was informed by the sheriff in December 2023 that he wanted to serve a "document" on him. He (the Second Applicant) informed sheriff to serve that "document" upon Ms Swart at their offices. On his return to office in January 2024, the Second Applicant should have enquired from Ms Swart about the "document" served by the sheriff in December 2023 so that he could satisfy himself that indeed that "document" was just another letter of demand which he would, as a norm, have forwarded Marais for legal advice.

- [37] The Second Applicant simply did not do so, because he thought this was another letter of demand. Strangely, he did not ignore previous letters of demand from the Respondent, he forwarded them to Mr Marais for legal advice. The Second Applicant should not have assumed that the documents served by the Sheriff were simply letters and should have made enquiries from Mr Roux and Ms Swart or even his attorney, Mr Marais (as he did when the sheriff served the warrant of execution).
- [38] It was argued for the Applicants that Marais was not informed about the summons and was unaware that steps needed to be taken to defend the action. He only learned about the default judgment in June 2024 when contacted by the Second Applicant. Notably, in the Applicants own version, Marais was notified by the Respondent's attorney that summons was going to be issued to interrupt prescription. Marais would have been alive to the date of prescription of the Respondent's claim against the Applicants hence he agreed. That being the case, surely after that date of prescription it would be reasonable to expect Marais to have enquired (at least from the Applicants) whether summons had been served. Accordingly, Marais should clearly have informed his clients that service of a summons was imminent and should be on the lookout for same. The failure of the Applicants attorney to inform the Applicants to do so is not conduct which could or should be attributed to the Respondent but should have caused the Applicants to be more diligent about served documents.
- [39] The notification of Marais by the Respondent's attorney of their intention to issue summons to interrupt prescription, without more, is no reasonable explanation or excuse not to defend the summons. If there was a written undertaking from the Respondent's attorneys that summons was going to be issued to interrupt prescription and that no further steps would be taken in the litigation until a reasonable notice is given to the Applicants' attorney to do so, then in that event, there would clearly be reasonable excuse why the action was not defended.

[40] In *casu*, no such written undertaking was given by the Respondent's attorneys. That deals with the issue of an alleged agreement that summons was issued only to interrupt prescription.

Ad service on the Third Applicant

[41] The summons was served on the Third Applicant (Second Applicant's father in-law) on 18 December 2023 at his place of residence. The Third Applicant contacted the Second Applicant after receipt thereof and informed him that a 'letter' was served on him by the Sheriff, and that it was in respect of a debt that is allegedly due to the Respondent. The Third Applicant did not mention to the Second Applicant that it was a summons, and significantly, the Third Applicant was unsure as to why the 'letter' was served on him as he was retired and not indebted to the Respondent.

[42] As Marais was attending to the dispute, as stated above, the Second Applicant was under the impression that the 'letter' was again referring to a letter of demand and as such advised the Third Applicant not to be concerned therewith.

[43] It was also submitted, both Marais and the Second Applicant (and by implication the First Applicant and the Fourth Applicants) were unaware at the time that a summons had earlier been served which required steps to be taken in defending the action as instituted on the basis as set out above.

[44] In light of the above, it was contended that the Third Applicant was also unaware that it was indeed a summons that was served on him as surety, and as he was informed by the Second Applicant that Marais was already attending to the dispute, he was clearly unaware that he was required to take further steps in defending same.

[45] Based on the above, it was submitted that the Applicants have provided a satisfactory explanation for their default in that the explanation provided:

- (a) Constitutes a reasonable explanation with sufficient details and/or particularity in order for the Honourable Court to understand how the default came about;
- (b) Clearly evidences that none of the Applicants acted wilfully, as wilful connotes deliberateness in the sense of knowledge of the action or consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend.

[46] In this regard the Applicant's counsel referred me to *Harris v Absa Bank Ltd t/a Volkskas*⁸, where it was held that before an applicant in a 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 steps which would avoid the default and must appreciate the legal consequences of his or her actions.

[47] It was argued for the Applicants that none of the Applicants acted grossly negligent in failing to take steps to defend the action as instituted against them.

[48] It was further argued for the Applicants that the explanation given by the Applicants does not evince reprehensible or grossly negligent conduct on the part of the Applicants' legal representative as it is clear that Marais was also not aware that a summons was served on the Applicants prior to being informed thereof during June 2024.

[49] In conclusion, it was submitted for the Applicants that none of the arguments presented by the Respondent in disputing the explanation provided for the Applicants' default, as set out in its Answering Affidavit, establish gross negligent conduct on the part of the Applicants or Marais, nor does it at all show wilful default on the part of the Applicants.

⁸ *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T).

[50] The respondents argued that the explanation for the Applicants' default in defending the matter involves the failure of a number of persons to appreciate that a summons was served on them. In addition, the Second Defendant, despite knowing that documents were served upon the receptionist of the First Applicant failed to make any attempts to ascertain what was served when he returned from holiday. Furthermore, the Third Applicant, who was personally served with a summons, apparently did not appreciate the nature of the document which was served on him and did not bring it to anyone's attention. What makes matters worse is that the Applicants' attorney was aware of the fact, because he was told as much by the Respondent's attorney, that a summons would be served to interrupt prescription. The explanation which has been advanced by the Applicants stretches the bounds of what is believable. In *Rose and Another v Alpha Secretaries Ltd*⁹ the Appellate Division stated:

'It seems to be undesirable to attempt to frame a comprehensive test as to the effect of an attorney's negligence on his client's prospects of obtaining relief under sub-rule (2) or to pay down that a certain degree of negligence will debar the client, and another degree will not. It is preferable to say that the court will consider all the circumstances of the particular case in deciding whether the Applicant has shown something which justifies the court holding in the exercise of its wide discretion that sufficient cause for granting relief has been shown.'

[51] In *Athmaram v Singh*¹⁰ the court considered whether the failure of an attorney to perform certain acts constitutes an acceptable explanation for a delay. The court considered this and held that blame in that matter lay primarily with the attorney but that in any event the defence to the claim in question tipped the balance in favour of the Applicant.¹¹

[52] The Third Applicant upon whom summons was served personally, and who informed the Second Applicant of service of a "document" by the sheriff ought to have read the document and in doing so, he would have realised that the

⁹ *Rose and Another v Alpha Secretaries Ltd* 1947 (4) SA 511 (AD) at page 519.

¹⁰ *Athmaram v Singh* 1989 (3) SA 953 (D).

¹¹ At 957 E – I referring to *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).

document is a summons. He ignored it because he was under a mistaken belief that since he was no longer a member of the First Applicant, he was not liable to the Respondent.

[53] The basis for assuming that the summons that was served on all the Applicants seems to lie on failure by the sheriff when serving the summons to explain to the Applicants the nature and exigence of the “document” served. However, the sheriff was not joined in this application so as to answer such serious allegations. In the result, this court must and does accept the content of the sheriff’s return of service of summons that when summons was served on each of the Applicants, he explained the nature and exigence of the summons or “document” so served.

[54] In the result, I find that the Applicants’ explanation for failure to defend the summons is not satisfactory and is unreasonable.

[55] However, even though I have found the explanation for default to be unreasonable and unsatisfactory, this is not the end of the enquiry to decide whether to grant rescission or not. Accordingly, I proceed to determine whether the Applicants have a *bona fide* defence to the Respondent’s claim.

***Bona fide* defence and counter claim**

[56] The Applicants argued that they have a defence to the Respondent’s claim *inter alia* for the following reasons:

- (a) The suretyship agreements concluded by the Second and Third Applicants were signed in 2008 and allegedly could not be used to find a claim based on a written agreement concluded by the First Applicant (represented by Mr Smal) in July 2020. The argument is advanced that the suretyship agreements concluded in 2008 by the Second to Fourth Applicants were in respect of a particular project.

- (b) Mr Lombard was negligent in respect of advice given to the First Applicant in respect of an irrigation system for lucerne which was planted on the farm.
- (c) The First Applicant suffered 30% production loss in respect of that advice as the maximum space between the drippers was 1.2m when it should have been 0.8m.

[57] In the result, the Applicants contend that the First Applicant has a damages claim against the Respondent and that the sureties would be entitled to rely upon that claim as a defence.

[58] The Respondent's position *apropos* Applicants alleged *bona fide* defence and counter claim is, in summary, as follows:

- (a) The First Applicant's alleged damages claim is precluded by the terms of the credit facility and in particular clause 13.1.312 thereof.
 - (b) In any event, the First Applicant's damages claim has prescribed. A letter of demand was received by Mr Smal on behalf of the First Applicant on 29 July 2021 which demonstrates that he had knowledge of the facts giving rise to the alleged claim on that date, at the very latest. Thus, the First Applicant's claim in respect of damages would have prescribed on 29 July 2024.
 - (c) If such a claim is not contractually excluded and had not already prescribed, the allegations of negligence and deficient design are not based on any facts. The annexures to the founding affidavit demonstrate that the drippers in respect of the irrigation system was specified as being 0.6m apart and not 1.2m apart as alleged by the Applicants.
 - (d) There is after all these years of an intended claim by the First Applicant, still no admissible expert evidence of any nature to sustain the allegations of negligence or improper design which have been made.
-

- (e) The First Applicant's alleged damages claim remains not quantified and illiquid. It is merely a speculative estimate by Mr Smal which lacks any factual foundation.

[59] The Court may set aside a default judgment on such terms as it deems, if it is satisfied that good cause therefore has been shown. One of the requirements for good cause is that the defendant must show that he has a bona fide defence to the plaintiff's claim. Bona fide defence in this context means a prima facie defence setting out averments which if established at the trial would entitle the defendant to the relief asked for.¹³

[60] In *Grant v Plumbers (Pty) Ltd*¹⁴ it was held:

'for the proposition that in making out his case for rescission an applicant must show that his application is bona fide and not made with the intention of merely delaying the plaintiff's claim'.

In respect of the need for an applicant to show that he has a good defence on the merits, Brink J referred (at 475) to the following words of Curlews J in *Joosub v Natal Bank*¹⁵ - "I do not think the Court should scrutinise too closely whether the defence is well-founded, as long as prima facie there appears to the Court sufficient reason for allowing the defendant to lay before the Court the facts he thinks necessary to meet the plaintiff's claim."

At 476 to 477 Brink J stated further in respect of the requirement of showing that he has a bona fide defence that "(i)t 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."¹⁶ (Brink J's judgment was referred to with approval by Jones AJA in *Colyn v Tiger food Industries Limited t/a Meadow Feed Mills (CAPE)*).¹⁷

¹³ See *Silber v Ozen Wholesales (Proprietary) Limited* 1954 (2) SA 345 (A) at 352 G to H; *De Vos v Cooper and Ferreira* 1999 (4) SA 1290 (SCA) at 1304 H; *Sanderson Technitool (Proprietary) Limited v Intermenua (Proprietary) Limited* 1980 (4) SA 573 (W).

¹⁴ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O).

¹⁵ *Joosub v Natal Bank* (1908 T. S. 375).

¹⁶ *Brown v Chapman* (1938 T.P.D.320 at p.325).

¹⁷ *Colyn v Tiger food Industries Limited t/a Meadow Feed Mills*¹⁷ (CAPE) 2003 (6) SA 1 (SCA).

- [61] First, in the present application under consideration, the First Applicant's claim is based on the allegation that the drippers in the irrigation system should have been spaced 800mm apart instead of 1.2m, leading to insufficient irrigation. However, this claim is contradicted by the evidence provided in annexures to the founding affidavit. Multiple documents, including emails and letters from Mr. Lombard, specify that the drippers were spaced 600mm apart, which is less than the alleged 800mm.
- [62] The Applicants have not provided expert evidence to support their claim, and the Respondent has demonstrated that there is no factual basis for the allegations. The Applicants have failed to address this contradiction in their reply and have not established a prima facie case. Consequently, there is no admissible evidence to prove any defect in the irrigation system's design, undermining the Applicants' defence against the Respondent's claim.
- [63] The Independent expert appointed by the Respondent found that the irrigation was functioning properly but was poorly managed by the First Applicant.
- [64] Second, the sureties fall into two groups, being those who signed suretyship agreements in 2008 (being Mr Smal and Mr Roux) and the Fourth Applicant in respect of which Mr Smal signed a suretyship in 2020. An argument was advanced that the sureties who signed in 2008 should not be held liable in respect of the suretyship agreements on the basis that they were signed years prior to the agreement upon which the Respondent's claim is based. That argument can be disposed of simply by reference to the terms of the suretyship agreements which provide that the surety would be liable in respect of any debt which existed, or which may in the future exist.
- [65] There is also no indication in the suretyship agreements that they relate to any particular project and the argument that they would be limited to a single transaction or cause would of course contradict their express terms. That argument can safely be rejected as the suretyship agreements are clearly all unlimited.

[66] Section 6 of the General Law Amendment Act 50 of 1956, provides that the “suretyship agreement will only be valid if the terms thereof have been embodied in a written document signed by the surety”. It is trite that a suretyship agreement must set out the identity of the creditor, the surety, the principal debtor and that the nature and amount of the principal debt must be capable of ascertainment by reference to the provisions of the suretyship.

[67] In *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd*¹⁸, the debt in the suretyship was defined in a similar manner, to wit: “all sums of money which the debtor may have in the past owed or may presently or in the future owe”. In identifying the debt referred to in the suretyship, the court held as follows:

‘And, if such a contract of suretyship is recorded in writing, it follows that extrinsic evidence must necessarily be admissible to prove that the principal obligation has come into existence, and to establish the amount of the obligation if, as in this case, the guarantee is an unlimited continuing guarantee for payment of all sums of money which the principal debtor may in future owe to the creditors.’

[68] The provisions of section 6 of Act 50 of 1956 do not invalidate a contract of suretyship of this sort provided, of course, such contract is embodied in a written document, and it is signed by or on behalf of the surety. What section 6 requires is that the “terms” of the contract of suretyship must be embodied in the written document.

[69] This meant that the identity of the creditor, of the surety and of the principal debtor, and the nature and amount of the principal debt, must be capable of ascertainment by reference to the provisions of the written document, supplemented, if necessary, by extrinsic evidence of identification other than evidence by the parties (i.e. the creditor and the surety) as to their negotiations and consensus.

¹⁸ *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A). at p10-12

- [70] In the present application, a certificate of balance indicating the amount owing by the First Applicant in terms of the written credit agreement was attached to the summons. Thus, the nature and amount of the debt was thus identified, and the suretyship complies with section 6 of the General Law Amendment Act.
- [71] Accordingly, the provisions of section 6 of Act 50 of 1956 do not invalidate a contract of suretyship of this sort. In the result, the suretyship agreement is valid and binding against the Second, Third and Fourth Applicant.
- [72] The second issue related to the suretyship agreement is the alleged counter claim that the Applicants have against the Respondent and the amount of which it is alleged exceeds the Respondent's claim. Thus, it was argued for the Applicants that it will have an effect of extinguishing the Respondent's claim against the Applicants.
- [73] Another attack on the Applicant's alleged counterclaim is that any such claim for damages has prescribed. On 29 July 2021 the Second Applicant sent the Respondent a letter of demand in which he stated inter alia that the drippers were too far from each other and alleged that there was a 30% loss of production and set out damages allegedly suffered by the First Applicant.
- [74] It is trite that the Prescription Act provides that the time period in respect of a claim for a debt¹⁹, which would include the damages claim of the First Applicant, is three years and would commence upon the party in question having knowledge of the facts upon which a claim is based or will start to run on the date on which a party could reasonably have become aware of those facts.
- [75] At the very least, on that date, prescription would begin to run in respect of the claim. Thus, that claim would have prescribed on 29 July 2024 being three years after the First Applicant had knowledge of the facts giving rise to its alleged claim.

¹⁹ Section 11(d) Prescription Act 68 of 1969.

- [76] Notwithstanding the aforesaid, as at the date of granting of the default judgment against Applicants and on the date of hearing of this application, the First Applicant had not instituted an action against the Respondents for the alleged damages.
- [77] Accordingly, it appears to me but without deciding that any counterclaim the First Applicant might have had against the Respondent has prescribed due to effluxion of time. Even if I am wrong on the prescription issue the absence of a *prima facie* case against the Respondents arising from the facts pleaded as a basis for the alleged counterclaim remains an insurmountable hurdle for the Applicants.
- [78] However, central to the defence which has been raised is that the design of the irrigation system in question was defective and thus not fit for purpose. That is of course a conclusion of an expert nature. In this regard, the Respondents have expert opinion that the irrigation system and its installation is not defective and functioned properly, but the problem was caused by poor management thereof by the First Applicant. This expert evidence has not been countered by any contrary expert opinion of the Applicants.
- [79] It is trite that for expert opinion to be admissible the person adducing the evidence must be a qualified expert who has experience or skill and qualifications which render him/her an expert.²⁰ In *Visagie v Gerryts en 'n Ander*²¹ the Court held that in order for a court to determine the correctness of an opinion expressed by an expert, it was necessary that the reasoning which led to it, as well as the assumptions on which it was based, had to be disclosed to the court.
- [80] That the Applicants failed to produce any expert evidence in respect of the alleged defective irrigation system supplied by the Respondents deals a blow to

²⁰ *Holtzhauzen v Roodt* 1997 (4) SA 766 (WLD).

²¹ *Visagie v Gerryts en 'n Ander* 2000 (3) SA 670 (C) at 681A – C/D.

the Applicants attempt to persuade this court that they have established a prima facie case against the Respondent.

[81] In view of the foregoing, the alleged facts upon which the Applicants' counterclaim or claim presents no triable issue. In the result, I am satisfied that the Applicants have failed to demonstrate to this Court that they have a bona fide claim against the Respondent.

[82] Accordingly, I find that this rescission application is not *bona fide* and was filed for purpose of delaying finalisation of the Respondent's claim. In the circumstance, I find that the Applicants have failed to show that good cause exists to justify granting the rescission of the default judgment.

[83] Accordingly, the application for rescission falls to be dismissed.

[84] As to costs, the Respondents are successful, and I find no reason why costs should not follow the results.

Accordingly, I make the following order.

1. The application for rescission of judgment granted against the Applicants on 15 April 2024 is hereby dismissed.
2. The Applicants must pay the Respondents costs on the High Court Scale as between party and party including costs of counsel on scale C as taxed or agreed.

NJOKWENI AJ
ACTING JUDGE OF THE HIGH COURT

Appearances

For the Applicants: Advocate MW Muller
Instructed by: Schur Marais Du Plessis Attorneys

For the Respondent: Advocate D Van Reenen
Instructed by: Vanderspuy Cape Town