

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



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

CASE NO: 16056/2023

REPORTABLE

In the matter between:

PRAISE CHIWARE

APPLICANT

and

TUSK CONSTRUCTION SUPPORT SERVICES PTY LTD FIRST RESPONDENT

BULDERS, A DIVISION OF MASSMART RETAIL SECOND RESPONDENT

CHIWARE CIVIL ENGINEERING CONSTRUCTION CC THIRD RESPONDENT

PAUL CHIWARE FOURTH RESPONDENT

MARY CHIWARE FIFTH RESPONDENT

Coram: MOOSA AJ

Heard: 6 AUGUST 2025

Delivered: 25 AUGUST 2025 (delivered electronically to the parties)

Summary: Rescission – common law – Uniform Rule 31(2)(b) not pleaded, but applied – forged suretyship alleged – service at domicilium discussed – Uniform Rule 6(5)(d)(iii) used – test for application.

ORDER

1. The application is dismissed with costs on the Magistrate's Court scale, including counsel's fees.
-

JUDGMENT

Moosa AJ

Introduction

[1] This judgment pertains to an application launched on 12 February 2025 under Uniform Rule 42, alternatively, the common law, for rescission of a default judgment granted under Uniform Rule 31(5)(b). The default judgment was granted on 7 February 2024 in favour of the First and Second Respondents against the Applicant, as well as the Third, Fourth and Fifth Respondents. The judgment was granted for sums falling within the jurisdiction of the Magistrate's Courts'. The default judgment was issued against the debtors jointly and severally, the one paying the others to be absolved.

[2] Mr Bester, as counsel for the Applicant, disavowed reliance on Uniform Rule 42. He, submitted, however, that Uniform Rule 31(2)(b) is also applicable. Mr Coston, being First and Second Respondents' counsel, opposed this on the grounds that there was no reference to this sub-rule in the founding papers or Notice of Motion. The application is sufficiently broad to allow for the invocation of Uniform Rule 31(2)(b). Applying the principle in *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (ECD) at 468 and *Mutebwa v Mutebwa and Another* 2001 (2) SA 193 (Tk) at 88, the rescission application falls to be adjudicated under Uniform Rule 31(2)(b) too. In my view, the outcome would be the same both under the common law and this sub-rule.

Background to the judgment by default

[3] The First and Second Respondents failed to deliver an answering affidavit. To provide context and a proper understanding of the issues distilled later, it is essential to outline the salient facts giving rise to the rescission application. I do so now.

[4] On 18 September 2023, the First and Second Respondents, in their capacity as plaintiffs, caused a summons to be issued against the Third, Fourth, and Fifth Respondents, as well as the Applicant. They are the First, Second, Third, and Fourth Defendants.

[5] The claim against the Third Respondent (i.e., Chiware Civil Engineering Construction CC) is based on the signed loan agreements concluded between it and the First Respondent, as well as between it and the Second Respondent. Conversely, the claims directed against the remaining defendants in the main action, including the Applicant, are based on signed suretyships. In terms thereof, the sureties, all of whom are clearly identified, accept liability as sureties and co-principal debtors with the Third Respondent for any indebtedness incurred by it under the loan agreements to which the suretyships relate as regards First and Second Respondents as credit providers.

[6] The service address for each defendant in the main action was pleaded to be no. 3[...] E[...] Street, Delft South, Cape Town. This is the domicilium address indicated in the loan and suretyship agreements as being chosen for service of any process arising from the loan and suretyship agreements respectively. The sheriffs' returns of service show that the summons and all its annexures were served on each of the defendants, including the Applicant, by affixing a copy to the principal door at the domicilium address. For the Applicant, this occurred on 22 September 2023.

[7] None of the defendants cited in the main action provided notice of intention to defend it. As a result, on 23 January 2024, the plaintiffs cited in the main action, being the First and Second Respondents, applied for judgment by default against the cited defendants. On 7 February 2024, judgment was granted in favour of the said

plaintiffs as against each of the defendants, including the Applicant, for amounts specified in a certificate of indebtedness enclosed with the application for judgment by default.

[8] Writs of execution were subsequently issued. An initial writ authorised the sheriff to attach goods at the domicilium address where the summonses were served. A second writ authorised the sheriff to attach goods at 1[...] L[...] Lane, Croydon Vineyard Estate, in Macassar, Cape Town. A third writ authorised the sheriff to attach goods at no. 6[...] G[...], Ndevana, King Williamstown.

[9] A return of service issued by the sheriff of the high court, dated 3 December 2024, records that on 26 November 2024, the writ was personally served on Mary Chiware at no. 1[...] L[...] Lane, Croydon Vineyard Estate in Macassar. Similarly, a return of service issued by the same sheriff on 3 December 2024 indicated that service was effected on Paul Chiware by effecting service ‘upon MRS CHIWARE, WIFE apparently a responsible person and not less than 16 years of age, and in control at the place of residence/business of PAUL CHIWARE at 1[...] L[...] LANE, CROYDON, VINEYARD ESTATE, MACASSAR, CAPE TOWN, WESTERN CAPE, the last mentioned being temporarily absent, and by handing to the first mentioned a copy after explaining the nature and exigency of the said process’.

[10] A return of service was issued by the sheriff, indicating that the writ was served on the Applicant on 26 November 2024. Service was effected ‘upon MRS M CHIWARE, 3RD DEFENDANT ... in control at the place of residence/business of PRAISE CHIWARE at 1[...] L[...] LANE, CROYDON, VINEYARD ESTATE, MACASSAR, CAPE TOWN’. In her founding affidavit (“FA”), the Applicant identifies herself as ‘an adult female nurse with address at 1[...] L[...] Lane, Croydon, olive Estate’ (FA: para 1). The Applicant also admits that she became aware of the judgment ‘when the Sheriff attended my family home on 26 November 2024 to inventory goods’ (FA: para 29). It is, therefore, common cause that the Applicant resides with her mother, Mary Chiware.

[11] In the rescission application, the Applicant cites the address for service on Chiware Civil Engineering Construction CC as no. 3[...] E[...] Street, Delft South,

Cape Town, being the corporation's averred 'principal place of business and registered address'. Accordingly, it must be taken that the Applicant is aware that, at all material times when the rescission application was prepared, the close corporation was still in business with its principal office at no. 3[...] E[...] Street, Delft South, Cape Town.

[12] In the founding affidavit, the Applicant cites her parents, Paul Chiware and Mary Chiware, as persons 'with chosen *domicilium address* at 3[...] E[...] Street, Delft South, Cape Town'. The rescission application was served on them at that address.

[13] Based on the Applicant's own residential address and the sheriff's returns of service pertaining to the writs of execution, it is unclear why the Applicant served her mother and father at an address in Delft and not at their home in Macassar. I deal with this aspect later in the context of the Applicant's bona fides.

[14] The Applicant's use of the Delft address for service on her parents citing it as their 'chosen *domicilium address*,' is pivotal for another reason relevant to the rescission application. Specifically, it suggests that the Applicant acknowledges the validity of the suretyship agreements signed by her parents, which the plaintiffs relied upon to sue and secure a default judgement against them. Therefore, the validity of those suretyships is common cause on the papers before me.

[15] As a result, it is undisputed in the rescission application that the signatures appearing on the suretyship agreements forming the basis for the liability of Paul Chiware and Mary Chiware, along with the signature of their respective witness, being the Applicant, are accepted as valid (and not forged).

[16] In the papers before me, there is no averment that either Chiware Civil Engineering Construction CC, and/or Paul Chiware, and/or Mary Chiware have challenged the validity of the default judgments issued against them respectively.

[17] The rescission application does not challenge the validity of the principal judgment against Chiware Civil Engineering Construction CC, nor does it address

the accessory liability in relation to her parents as sureties. Accordingly, the validity of the default judgments against the Third, Fourth, and Fifth Respondents is common cause.

[18] On the papers before me, the validity of the loan agreements on which the liability for the Third Respondent (i.e., the corporation) is based and judgment issued is undisputed, including the validity of the Applicant's signature thereon as a witness.

Grounds for rescission versus grounds of opposition to rescission

[19] The gravamen of the Applicant's case is that her signature was forged on the suretyships used as the basis for the granting of default judgment against her. The Applicant avers that she cannot be held liable as surety. Mr Bester contends that this is a 'complete defence'. Applicant avers that, by reason of the fraudulent suretyships, the domicilium address indicated therein for service cannot be relied on for a valid service of the summons in relation to her. For these reasons, she seeks rescission.

[20] The Applicant's founding affidavit makes the aforementioned claims as follows:

'17. I have reviewed copies of the surety agreements allegedly signed by me (being annexures to the particulars of claim), and the signatures do not appear to be mine. *I maintain that I did not sign these agreements*, and I respectfully request that the originals be made available for forensic examination to confirm that the signatures were not made by me. This will provide further clarity and support my contention that I was not involved in these agreements. ...

19. I further wish to make it clear that I was never approached, consulted, or made aware of the signing of any surety agreements. *My name was used without my consent or knowledge*, and I have reason to believe that my father orchestrated this without my involvement. *Any document bearing my name and purporting to bind me as surety is fraudulent.* ...

23. The two surety agreements form the sole basis of the judgment entered against me. *However, there is no evidence to suggest that I signed or consented to either agreement. Without my signature, the agreements are invalid as far as I am concerned, and there is no legal basis to hold me liable for the debts of the respondents. ...*
29. I respectfully submit that my failure to respond to the summons was not wilful but was due to the fact that I never received the summons. I only became aware of the judgment when the sheriff attended my family home on 26 November 2024 to inventory goods.
30. The summons was allegedly served at 3[...] E[...] Street, Delft South, Cape Town, which is not an address I resided at during the time of service. *I have not lived at this address for over ten years, and I would not have been in a position to receive any documents served there. ...*
32. The alleged service at an address I did not reside at and to which I had no connection at the time demonstrates that I had no reasonable opportunity to become aware of the proceedings. *I submit that proper service was not effected in accordance with the law, as the address relied on in the surety agreements is invalid in relation to me.*’ (my emphasis added)

[21] The First and Second Respondents oppose the rescission application by relying on Uniform Rule 6(5)(d)(iii). It reads:

‘(d) Any person opposing the grant of an order sought in the notice of motion shall —

...

(iii) if such person intends to raise any question of law only such person shall deliver notice of intention to do so, within the time stated in the preceding subparagraph, setting forth such question.’

[22] In accordance with this sub-rule, the First and Second Respondents challenged Applicant's reliance on Uniform Rule 42. The points of law raised in their notice were conceded by Mr Bester for the Applicant. His concession was, in my view, well made.

[23] The First and Second Respondents' notice sets forth their 'questions of law' relating to the common law ground for rescission (i.e., fraud) as follows:

'[6] *Ex facie* the Founding Affidavit the Applicant contends that the judgment creditors relied on 2 (two) fraudulently obtained deeds of suretyship.

[7] *She further contends that the fraud was perpetrated by her father in that he had forged her signatures on each of the 2 (two) deeds of suretyship.*

[8] *For the Applicant to succeed on the common law ground of fraud for a rescission of the judgment she must allege and prove that the judgment creditors gave incorrect evidence or misled the court or that fraud was indeed committed, that such fraud was material, that the judgment creditors were party to the fraud and that the Applicant was unaware of the fraud until after the judgment was given.*

[9] No such case is made out at all by the Applicant in her founding affidavit.

[10] In any event, the Applicant cannot make out such a case because the judgment creditors, on her own version, were not party to the fraud allegedly perpetrated by her father.

[11] *The Applicant's reliance on the common law for the rescission of an order granted by default is thus by design and does not provide a valid basis for the relief sought by the Applicant.*

[12] *For all these reasons the judgment creditors submit that on the law no case is made out and the application stands to be dismissed with costs.*’ (my emphasis)

[24] A notice under Uniform Rule 6(5)(d)(iii) does not constitute a pleading. Its contents are not evidence. See *Minister of Finance v Public Protector* 2022 (1) SA 244 (GP) paras 6 - 15. When a litigant relies exclusively on a point(s) of law (for e.g., locus standi; jurisdiction; prescription) raised under Uniform Rule 6(5)(d)(iii), then a court is required to adjudicate the law point(s) on the basis that the allegations in the founding affidavit are established facts. Put differently, when deciding the legal question(s), the facts averred by the applicant are deemed to be true. See *Boxer Superstores Mthatha and Another v Mbenya* 2007 (5) SA 450 (SCA) at 452F-G. If the question(s) of law is/are dismissed, then the application is decided on its merits using the usual rules for applications. See Erasmus *Superior Court Practice* RS 26 2025 D1 Rule 6-27.

[25] When considering a notice delivered under Uniform Rule 6(5)(d)(iii), a court must view its contents critically (i.e., with a discerning perspective). A court must determine: (i) whether the notice raises an issue which qualifies as a ‘question of law’ (not a matter of fact); and (ii) if the notice raises a question of law *stricto sensu*, then whether the question actually arises in the matter for determination. It must be borne in mind that it is not for the parties or their legal representatives to determine for a court whether a question of law arises for adjudication. Constitutionally, this is the responsibility and role of a court. No court should abdicate a pivotal dispute resolution function, namely, to properly identify the issue(s) arising for adjudication. This salutary principle was reiterated recently in *Snyman v De Kooker NO and Others* 2024 (6) SA 136 (SCA) para 24 as follows:

‘As this court cautioned in *De Wet v Khammissa*, a court plays a central role in identifying the correct basis on which a matter must be decided. Thus, a court should not decide a matter based on a wrong basis simply because the parties had relied on it. “(I)t is only after careful thought has been given to a matter that the true issue for determination can be properly identified. That

task should never be left solely to the parties or their legal representatives . . .
.” (footnotes omitted)

[26] Therefore, in casu, the pertinent question is: does the notice delivered under Uniform Rule 6(5)(d)(iii) raise any question of law within the contemplation of this sub-rule? The answer is ‘no’. A proper consideration of the contents in paras [8] and [10] of the said notice quoted above (see paragraph [23]) leads to the ineluctable conclusion that purely factual issues are raised (not legal ones). The question whether fraud in the form of forgery exists is a matter of fact (not law). The same considerations apply to the questions regarding whether the First and/or the Second Respondent misled the court, or whether they provided materially incorrect information when the default judgment was applied for under Uniform Rule 31(5). The issue whether the First and/or the Second Respondent was a party to the forgery (i.e., fraud) is patently a factual question too.

[27] Since there is no genuine question of law to address for purposes of Uniform Rule 6(5)(d)(iii), the rescission application must be determined on its merits, without invoking the principle in *Boxer Superstores* supra at 452F (see paragraph [24] above).

[28] In these circumstances, while the First and Second Respondent had the option to request a postponement to file an answering affidavit, their counsel, Mr Coston, chose to argue the application solely based on the Applicant’s papers and, rightly so, without considering the Uniform Rule 6(5)(d)(iii) notice.

Issue for adjudication

[29] The issue which now forms the subject of the remainder of this judgment below, is a crisp question: has the Applicant discharged the onus of proving that the grounds for a rescission of the impugned default judgment are met, whether at common law or under Uniform Rule 31(2)(b)? Before answering this question with reference to the facts in casu, the legal principles germane in this context requires some elucidation. Therefore, I discuss them at this juncture.

Relevant principles for rescission

[30] Complying with the requirements for rescission under the court rules or common law does not confer a right (or entitlement) to rescission. It is trite that satisfaction of the criteria merely endows a court with a discretion to grant a rescission (or not). Such discretion must be exercised judiciously (not capriciously). See *Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC) para 53. A proper exercise of judicial discretion always necessitates that due consideration be given to all relevant facts and circumstances. See *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (ECD) at 300 - 301.

[31] In some instances, the discretion to award a rescission is a wide one, while the discretion is fairly narrow in other instances. A narrow discretion would operate in cases where the *functus officio* doctrine takes centre stage. See *Zuma* supra paras 68, 80 - 81. In the application before me, a wide power of rescission operates.

[32] A wide discretion operates in this instance because the default judgment was granted without the hearing of evidence. In the main action, the merits of the plaintiffs' claims were not adjudicated before default judgment was granted pursuant to Uniform Rule 31(5). See *Zuma* supra para 68.

[33] At common law, an applicant seeking rescission must show that there is 'good cause' (or 'sufficient cause') to warrant rescission. See *Zuma* supra para 71. The good cause requirement is integral to Uniform Rule 31(2)(b) as well. This sub-rule is limited by its wording and context to the setting aside of a judgment in the following circumstance:

'A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff 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.'

[34] 'Good cause' for a rescission, whether at common law or under Uniform Rule 31(2)(b), requires the fulfilment of specific criteria: first, an applicant must provide a reasonable or satisfactory explanation for his/her default to defend the main proceeding which culminated in judgment being granted by default; and secondly, an applicant must show that, on the merits, s/he has a bona fide defence in the main proceeding which prima facie carries some prospect of success. It is essential that both requirements are fulfilled. If not, then 'good cause' has not been established. See *Zuma* supra para 71.

[35] In *Zuma* supra para 74, the apex court endorsed the following approach when evaluating an applicant's explanation for failing to defend a judicial proceeding:

'In *Chetty*, the Court dismissed the application for rescission because, it said, "I am unable to find . . . any reasonable or satisfactory explanation for his default and total failure to offer any opposition whatever to the [previous proceedings]". The Court said that "even if the [applicant's] case was that he was ignorant of the proceedings which had been instituted against him, he would have been obliged to show a supremely just cause of ignorance, free from all blame whatsoever". (footnotes omitted)

[36] In *Zuma* supra para 73, the apex court emphasised that an ordered judicial process precludes the granting of rescission if either of the twin requirements mentioned above for 'good cause' are absent. Although not mentioned in *Zuma* supra, it has been held that 'good cause' entails a third requirement too, namely, that an applicant must show that an application for rescission is made bona fide. See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11.

[37] On the basis of the legal principles discussed above, the merits of the Applicant's case for rescission at common law and under Uniform Rule 31(2)(b) are to be assessed. It is to this aspect that I now turn my attention.

Application of the principles in casu

[38] The Applicant launched the rescission application within the 20-day period envisaged by Uniform Rule 31(2)(b) and, thus, within the reasonable time requirement at common law. It is undisputed that she became aware of the default judgment on 26 November 2024, being the date when the sheriff executed the writ of execution at her home. The Applicant's founding affidavit was deposed by her on 17 December 2024, and the Notice of Motion enclosed therewith was signed on 18 December 2024. The application was served on 23 January 2025, shortly after the festive season holidays ended. Therefore, I am satisfied that there was no undue delay in the launching of the rescission application. Condonation is, therefore, not an issue.

[39] For the rest, the Applicant's rescission application faces severe head-winds. For several reasons emerging from the court papers, showing 'good cause' seems an insuperable hurdle. I discuss those reasons in the ensuing paragraphs.

[40] The Applicant contends that the summons was not served properly. She contends that service at no. 3[...] E[...] Street, Delft South in Cape Town was improper because, although she resided there previously, she was not living there when the summons was served. For this reason, she avers that 'I would not have been in a position to receive any documents there'. This ground for challenging the validity of the service and, by extension, the validity of the default judgment granted on the basis that the summons was properly served, flies in the face of the decision in *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) (applied in this Division in *Williams v Shackleton Credit Management (Pty) Ltd* 2024 (3) SA 234 (WCC) para 25).

[41] In *Amcoal Collieries* supra at 6A - D, the Appellate Division (now SCA) held as follows in relation to service of process at a domicilium address:

'It is a matter of frequent occurrence that a *domicilium citandi et executandi* is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution. If a man chooses *domicilium citandi* the *domicilium* he chooses is taken to be his place of abode. It is a well-established practice (which is

recognised by Rule 4(1)(a) (iv) of the Uniform Rules of Court) that, if a defendant has chosen a *domicilium citandi*, service of process at such place will be good, even though it be a vacant piece of ground, *or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found*. It is generally accepted in our practice that the choice without more of a *domicilium citandi* is applicable only to the service of process in legal proceedings. Parties to a contract may, however, choose an address for the service of notices under the contract. The consequences of such a choice must in principle be the same as the choice of a *domicilium citandi et executandi*, *namely that service at the address chosen is good service, whether or not the addressee is present at the time.*'
(emphasis added) (footnotes omitted)

[42] This dictum makes it plain that service at a domicilium address is proper service for court proceedings, regardless if the intended recipient is absent. Accordingly, presence at a domicilium address is not a legal pre-requisite for proper and effective service. The key requirement is that the choice of a domicilium address must have been made.

[43] For these reasons, Applicant's contention that service of the summons at her former home renders service improper, holds no water. The sheriff effected service at no. 3[...] E[...] Street, Delft South in Cape Town on the basis that this is the address chosen by the surety in writing as her domicilium for purposes of serving processes.

[44] It is in this context that Applicant's alternative ground for challenging the validity of service must be considered. She avers that the two suretyship agreements on which she was sued and held to be liable are invalid by reason that her signatures as surety on both documents were forged. Accordingly, she denies that she chose the aforestated domicilium address. This ground for establishing 'good cause' is fatally flawed.

[45] The Applicant's contention loses sight of the requirements for a valid and legally enforceable suretyship. This is regulated by legislation. Section 6 of the General Law Amendment Act 50 of 1956 is contextually relevant. It reads:

‘No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety ...’

[46] Accordingly, the prescribed statutory formalities for a valid suretyship are two-fold: (i) a written contract incorporating the ‘terms’ of the suretyship; and (ii) a signature by or on behalf of the named surety. The ‘terms’ envisaged by s 6 as essentialia for a valid suretyship are (a) the nature and amount of the principal debt; and (b) the identities of the three key parties in relation to the underlying indebtedness (namely, the surety, the principal debtor, and the creditor). See *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at 12.

[47] The SCA, in *Intercontinental Exports (Pty) Ltd v Fowles* [1999] 2 All SA 304 (A) para 9, held that a contract of suretyship which complies with the prescribed statutory formalities and contains the essential ‘terms’ is formally valid and enforceable in law.

[48] There is no dispute in casu that the suretyships on which the default judgment was granted are, ex facie the contracts, compliant with the statutory formalities and contain the essential ‘terms’. The inescapable conclusion is that both contracts are formally valid, so that judgment could be granted thereon under Uniform Rule 31(5).

[49] The onus now rests with the Applicant to prove that her signatures appearing on the suretyships are forged so that the two agreements are invalid. As a matter of law, until a court declares the suretyships concerned invalid for any reason recognised in law, the contracts remain formally valid and enforceable in law.

[50] On this basis, the plaintiffs in the main action were entitled to use the Applicant’s choice of domicilium as it appears ex facie the contracts of suretyship for purposes of serving their combined summons at no. 3[...] E[...] Street, Delft South in Cape Town.

[51] Since this procedural formality for the proper institution of the main action was duly met, it was competent for the plaintiffs, being the First and Second Respondents, to seek default judgment based on the formally valid suretyship agreements.

[52] In the premises, I am not satisfied that the Applicant proved a reasonable or satisfactory explanation for her default in the sense required for showing 'good cause'. In this context, as discussed in paragraphs [34] to [36] above, the bar is set relatively high. The Applicant must prove 'a supremely just cause of ignorance, free from all blame whatsoever' (*Zuma supra para 74*). She failed to discharge this onus.

[53] The finding expressed in the preceding paragraph is sufficient to dismiss the rescission application, both under the common law and Uniform Rule 31(2)(b). For completeness sake, I record that Applicant also failed to satisfy me that her application is made bona fide and that, prima facie, she has prospects of success in the main action should I exercise my wide discretion by granting her the opportunity to defend the claims brought against her on the basis of her defence rooted in alleged fraud.

[54] Except for her ipse dixit, the Applicant provides no basis for the assertion that her signatures on the suretyships are forged. She avers that 'the signatures do not appear to be mine'. This is not a definitive statement. To prove that a signature is forged, expert handwriting evidence is required. The Applicant provided no affidavit, report, or other statement by a handwriting expert to the effect that s/he opines, prima facie, that the Applicant's signatures on the suretyships concerned as surety appear to be forged.

[55] The Applicant avers that her father, Paul Chiware, forged her signatures on the disputed suretyships. No basis is laid for this accusation against her father. The question must also be asked: what would motivate the Applicant's father to forge the signature of his daughter and to implicate her in commercial debts of his business? There is deafening silence in the Applicant's papers on this crucial aspect. In a rescission application based on alleged fraud, this gaping hole needed to be filled.

[56] The Applicant's bald denials that she signed the suretyships are self-serving. Her say so is not proof of fraud, nor indicates prima facie prospects of success.

[57] As stated in paragraph [18] above, the Applicant's signature appears in the loan agreements forming the basis for the principal debt of Chiware Civil Engineering Construction CC. It is telling that the Applicant does not allege that the loan agreements which create the principal liability which her accessory liability secures, are invalid owing to her signature as witness thereon (including her initials on every page) being forged. This fact casts serious doubt on the veracity of the Applicant's averment that her signatures as surety on the two suretyships were forged. Why would her signatures be forged on certain commercial documents and not others, all of which formed part of the same transaction and bundle of signed documents?

[58] The Applicant's credibility and bona fides is further severely undermined by the contents of her founding affidavit. For example, while in one breath she alleges that her father 'remains unreachable' to her, she also avers that upon receiving the news that a judgment was obtained against her in this case, 'I immediately contacted my father, Paul Chiware, to seek an explanation for why I was being implicated in a matter relating to Chiware Civil Engineering Construction CC'. These pleaded versions are contradictory and mutually exclusive, even destructive of one another.

[59] Another key consideration pointing to lack of bona fides on the Applicant's part and the absence of a bona fide rescission application is the fact that she caused the rescission application to be served on her parents at their chosen domicilium address recorded in their signed suretyships, being no. 3[...] E[...] Street, Delft South in Cape Town. This is not their residential address. Despite the Applicant's strong objection to the summons in the main action being served at that same address at a time when she was no longer living there, she has no issue doing the same when effecting service at that address on her parents. This seriously undermines her case for rescission and it suggests, to my mind at least, that the Applicant took deliberate steps to ensure that neither her father nor her mother receives the papers in the rescission application papers, in so doing, neither of them would become aware of the accusations of fraud levelled by the Applicant against her father. The allegations

of fraud against the Applicant's father would, thus, proceed unchallenged (as it has on the papers before me). This has been intentionally crafted by the Applicant.

[60] The Applicant resides at no. 1[...] L[...] Lane, Croydon Vineyard Estate in Macassar. This is also the address where, according to the sheriff's return of service, he, on 26 November 2024, served the writ of execution on the Applicant's mother personally and on the Applicant's father, represented by Mary Chiware who indicated to the sheriff that Paul Chiware was 'temporarily absent' from the address concerned at the time of service. See paragraph [9] above.

[61] In my view, these considerations show that the Applicant lacks bona fides and that her rescission application is not made bona fide. I am left with a strong impression that this application is no more than a final, desperate attempt by the Applicant to avert payment of a judgment debt which was properly sought and properly granted after due legal process was followed by the First and the Second Respondent.

Costs

[62] There is no reason why costs ought not to follow the result. Counsel's fees ought to be allowed as per the applicable prescribed tariff on the lowest scale. This is so having regard to, inter alia, the nature of the application, the absence of complexity, as well as the considerations enumerated in Rule 67A(2).

[63] When default judgment was granted, the order of costs was issued as follows:

'Costs of suit on the attorney and own client scale to be taxed on the Magistrate's Court scale.'

[64] The Magistrate's Court scale was used by the Registrar of this Court presumably because the judgment creditors' claims fell within the monetary jurisdiction of the lower court and the view was taken that the action ought to have been instituted out of the lower court. I endorse the Registrar's approach in this regard. Accordingly, if the main action was instituted out of the lower court (as it

ought to have been), then logic dictates that the rescission application would likewise have been argued in the lower court. As a result, in the exercise of my wide discretion on costs, which discretion is to be exercised judiciously, I shall direct that the costs be awarded to the First and Second Respondents, including counsel's fees, but that same shall be limited to the prescribed party-and-party cost tariff on the Magistrate's court scale. This is, in my view, a just outcome in the circumstances of the matter with which I am seized.

Order

[65] In the result, the following order is made:

[65.1] The application is dismissed with costs on the Magistrate's Court scale, including counsel's fees.

F. MOOSA
ACTING JUDGE OF THE HIGH COURT

Appearances

For Applicant: J Bester
Instructed by: Bester & Lauwrens Attorneys

For Respondents: P Coston
(First & Second Respondents)
Instructed by: Larson Falconer Hassan Parsee Inc (Ms T Botha)