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

JUDGMENT

Reportable

Case no: A32/2025

In the matter between:

GLEN FAURE INTERNATIONAL CONSULTANCY CC

Appellant

and

MARLON MARINUS

Respondent

Coram: Saldanha J et Francis J

Heard: 4 June 2025

Delivered: 3 September 2025

ORDER

1. The appeal is dismissed.
 2. The appellant is directed to pay respondent's costs on an attorney-client scale with counsel's costs to be taxed on scale B.
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JUDGMENT

Francis, J:

Introduction

[1] This is an appeal against a judgement handed down by the Learned Magistrate in the Magistrates court for the district of the City of Cape Town, sub-division Goodwood ('the Goodwood Magistrates Court') on 12 November 2024 in which an application lodged by Appellant for the rescission of a default judgment brought in terms of Rule 49(1) of the Rules of the Magistrates' Court, was dismissed. The Rule reads as follows:

“(1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 days' period shall not be applicable to a request for rescission or variation of judgment brought in terms of sub-rule (5) or (5A).” (Emphasis added.)

[2] The term 'good cause' in the context of a rescission judgement is generally accepted to mean that the applicant must provide a reasonable explanation for its default, must show that the application is made bona fide and not with the intention of merely delaying the matter, and that there is a bona fide defense to the claim which prima facie has some prospect of success in the sense that if established at the trial, it would entitle the applicant to the relief requested (see, ***Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476-7***, and ***Colyn v Tiger Foods and Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)***).

[3] Good cause includes but is not limited to the existence of a substantial defence (***Silber v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345 (A)*** at 352G). It is therefore necessary to determine whether there is a satisfactory explanation of the delay, and whether the appellant raised a bona fide and reasonable defence.

[4] The application for rescission was brought timeously within the 20-day period prescribed in Rule 49(3). It was successfully opposed by the respondent (referred to

interchangeably as ‘Marinus’ or ‘respondent’) who also opposes this appeal.

Background facts

[5] The appellant, represented by its sole member, Glenville Lester Faure (‘Faure’), and Marinus entered into a written agreement on 22 July 2020. Although not a model of clarity, it is not disputed that the gist of the agreement was to the effect that Marinus would, on signature of the agreement, invest an amount of R150 000 and would receive a return on his investment of between 20% to 30% to be repaid on/or before a three-month period. Furthermore, as an investor and associate, Marinus would be involved in all transactions which the appellant’s group of companies was involved in at the date of signature of the agreement, including the importation and exportation of Yamaha Motors and the export of wines.

[6] Marinus paid over the sum of R150 000 to the appellant, but he did not receive payment of his initial capital contribution or the return (interest) thereon within the agreed period of three months. Instead, he received a total payment of R6000; R5000 on 28 January 2021 and R1000 on 30 December 2021.

[7] On 31 January 2022, a letter of demand was delivered to Faure via electronic e-mail at g[...] (‘the e-mail address’), in terms of which payment in the sum of R189 000 was demanded. The aforesaid amount constituted the outstanding capital investment and the promised return thereon. On that same day, Faure responded to the letter of demand via an e-mail from the e-mail address which stated that he was in Angola and that Marinus could contact appellant’s attorney who had been mandated to deal with this matter.

[8] Appellant failed to make payment in terms of the letter of demand and summons was subsequently issued in the Goodwood Magistrates Court during July 2022. After several unsuccessful attempts to effect service, Marinus applied for an order to serve the summons and particulars of claim on the appellant in Angola at the email address.

An order, as sought, for edictal citation and substituted service was subsequently granted, and the summons and particulars of claim was served on appellant at the e-mail address on 8 August 2023.

[9] No notice of intention to defend was filed and Marinus applied for default judgement which was granted on 6 December 2023.

[10] On 13 February 2024, the default judgement was served on appellant at the e-mail address. On receiving this e-mail, Faure consulted appellant's current attorney of record on 16 February 2024, and a rescission application was filed soon thereafter.

[11] In its application for rescission, appellant filed an affidavit by Faure in which he stated there was no delay in making the application for rescission once he was alerted of the default judgment. Appellant had a good reason for not entering an appearance to defend and had a bona fide defense to respondent's claim. Faure had not seen the summons and particulars of claim on the day it was served by email. Respondent had no legitimate claim against the appellant because contrary to their agreement, Marinus was not actively involved in the business of appellant as he was obliged to, and his investment was not guaranteed but was subject to everything going 'to plan'. There was 'a Force Majeure' as the company which appellant had done business with in China could not deliver due to the Covid-19 global pandemic and appellant lost its deposit.

[12] Marinus filed an answering affidavit in which he joined issue with all the submissions advanced in appellant's founding affidavit. He disputed that appellant was not in willful default in failing to enter an appearance or that it had a valid bona fide defense that raised a triable issue. He denied that repayment to him of his investment capital (and the return thereon) was contingent on the success of appellant's business operations in China and/or on Marinus's involvement in the business operations of the appellant and its group of companies. Marinus described in some detail his contribution as an investor. For example, he spent months assisting appellant to re-design its supply chain in order to acquire high quality products at lower cost, and he enhanced

appellant's business operations relating to the purchase and re-labelling of wines. He was not remunerated for his involvement in appellant's business operations. Nor was he reimbursed for any disbursements made on its behalf. According to Marinus, his involvement in the business operations of appellant was not for the purpose of growing his investment but merely to assist appellant in the latter's business transactions. Furthermore, Marinus disputed appellant's version relating to the company in China. Marinus stated that he was informed by Faure that a sale was entered into with a Japanese company and the goods were delivered to Durban but due to an error had to be transported by land. As a consequence, the profit from the sale was lost and appellant was in the process of instituting an action against the vessel responsible for the error.

[13] Appellant raised a further defense in the heads of argument filed on its behalf in the rescission application. It argued that the judgement granted was void *ab origine* (from the beginning) because the Magistrate had granted it based on a copy of the agreement. This was contrary to Rule 12 (6) of the Magistrates Court Rules ('the Rules') which required an original agreement to be filed with the request for default judgment or, failing this, and an affidavit stating why the original could not be produced.

[14] The application for rescission of default judgment was dismissed. The Magistrate found, in essence, that appellant had failed to provide a satisfactory explanation for not entering an appearance to defend, and that it had failed to establish a *bona fide* defense to respondent's claim. Appellant's argument that the default judgment was void from the beginning was also dismissed.

[15] In its notice of appeal, appellant raised 7 grounds on which it alleges that the Magistrate had erred in not granting the rescission application. The notice states as follows:

- "1. That the (Magistrate) erred in her interpretation of rule 12(6) of the Magistrates Court rules as not peremptory according to her judgment.

2. *That the (Magistrate) erred in her judgment's ruling that a non-compliance with rule 12 (6) of the Magistrates' Court rule is voidable instead of void.*
3. *That the (Magistrate) erred in her understanding and interpretation of investment principles.*
4. *That the (Magistrate) erred in her understanding about argument of void ab origine used for the first time in the Heads of Argument by the Appellant.*
5. *That the (Magistrate) erred by failing to understand that a fatality defective procedural error renders it unnecessary for the Appellant to show good cause.*
6. *That the (Magistrate) erred in her interpretation that the Appellant instructed the Honourable Court to disregard the Agreement.*
7. *That the (Magistrate) erred in her judgment that the Appellant has presented an argument that has no existence of triable issues."*

Discussion

[16] From the notice of appeal, it is apparent that some of the grounds of appeal are repetitive or vaguely formulated. Four of the 7 grounds of appeal relate to the belated argument before the Magistrate that the judgment was void from the beginning for the alleged lack of compliance with Rule 12 (6) of the Rules. The remaining 3 grounds challenge the Magistrates finding that appellant did not raise any triable issue allegedly because of her mistaken interpretation of the agreement.

[17] In the notice of appeal (and its heads of argument), appellant also seeks to impugn the reasons underpinning the Magistrate's judgment. It is trite that an appeal lies against the judgment or order of the court below and not against the reasons for judgment; an appeal court is not bound by those reasons. The principal function of an appellate court is to determine independently on the record and applicable law, whether the order itself is sustainable. The authorities make it clear that where the order is correct, it will not be set aside because the reasons advanced by the court below were unsound (see, for example, **Administrator, Transvaal and Others v Theletsane and Others 1991 (2) SA 192 (A)** – 197 B). If the order can be supported on other grounds apparent from the record, the appeal will be dismissed (cf. **S v Kubeka 1982 (1) SA 534 (W)**).

[18] An appellant is generally bound by the grounds set out in its notice of appeal as these grounds define the issues for determination by the appeal court. A notice of appeal is not a mere formality but delimits the scope of the appeal (see, **Van Rensburg v Van Rensburg 1963 (1) SA 505 (A)**). In its notice of appeal, appellant does not challenge the Magistrate's finding that it failed to provide a satisfactory explanation for not entering an appearance to defend and was in fact in willful default. Thus, the appellant's submissions in this appeal challenging the Magistrate's findings in this regard do not fall within the scope of this appeal.

[19] Accordingly, the issues that have to be decided by this Court in terms of the notice of appeal are, firstly, whether the Magistrate erred in her understanding and application of Rule 12 (6) of the Rules and, secondly, whether she erred in her conclusion that the defense raised by appellant against the merits of respondent's claim was not bona fide in the sense that it did not raise any triable issue. I now consider each issue in turn.

non-compliance with Rule 12 (6) of the Rules

[20] Appellant seeks rescission of the default judgment on the basis that it was granted contrary to Rule 12 (6) of the Rules. According to appellant, respondent did not file the original agreement or the requisite affidavit when making application for default judgment. In the circumstances, so it was argued, the application for default judgment was procedurally irregular which rendered the default judgment void from the beginning.

[21] It is indeed so that Rule 12 (6) places specific duties on a plaintiff to submit necessary documentation and evidence in support of an application for default judgment and it is incumbent on the person granting judgment to ensure compliance with this Rule before granting default judgment. In my view, the failure to comply renders the judgment defective. However, although a judgment granted in these circumstances will have been granted erroneously, it is not automatically void or a nullity. The instances when a judgment is void are circumscribed. As Grosskopf JA noted in ***Tödt v Ipser 1993 (3) SA 577 (AD)*** at 587 A-D, according to the common law authorities, judgments are void in only three types of cases – where there is no proper service, where there is no proper mandate, or where the court lacks jurisdiction. None of these circumstances are applicable in the matter before this Court.

[22] The principal difficulty which appellant faces with advancing this defense is that it was not pleaded. Appellant made no allegation in its founding or replying affidavit that the request for default judgment did not comply with Rule 12 (6). It only raised this issue for the first time in the heads of argument filed on its behalf in the rescission application. This is impermissible. As a general rule, a case must be decided on issues that arise from the pleadings, not from new arguments raised later in the heads of argument. The pleadings define the issues between the parties and what each side must meet in evidence. Heads of argument are not pleadings; they are written submissions to assist the Court. While heads of argument may expand on legal arguments or interpretations that flow from the pleadings and evidence, they cannot introduce a new case (see, ***Minister of Safety and Security v Slabbert 2010 (2) SA 552 (SCA)***).

[23] Ordinarily, a litigant may raise a new point in heads of argument if it was not made in the pleadings if it is a pure question of law that does not require new evidence or unless the other party consented (expressly or tacitly) to the issue being argued. If the issue was fully ventilated in evidence, and both parties led evidence on the point (even though it was not pleaded), a court may treat it as if it were pleaded. This is so because the courts are generally expected to apply the law correctly to the facts before them (see, **CUSA v Tau Ying Metal Industries 2009 (2) SA 204 (CC)**).

[24] In this matter, however, the basis on which appellant contends that the judgment is a nullity does not flow from the record. As counsel for the respondent correctly pointed out, it is unclear on the evidence before this Court whether or not the original agreement was, as a matter of fact, filed with the request for default judgment. Appellant was obliged to set out fully in its founding affidavit the facts on which it relied on to support its defense that the judgment was granted in error (see, **Ramodike v Mokeetsi Trading Store 1955 (2) SA 169 (T)**), and respondent ought to have been given the opportunity to answer this allegation and deal with the alleged non-compliance with Rule 12 (6).

[25] In my view, appellant's belated defense that the default judgment was procedurally defective is without merit. It was not the pleaded case of the appellant in the rescission application, and this defense is not borne out from the record before this Court.

bona fide defense

[26] From its founding affidavit, appellant's argument that it has a bona fide defense is based essentially on the submission that it was excused from paying respondent because Marinus breached the agreement by not being actively involved in its business to justify repayment of his investment (and the return thereon) and, in addition, the COVID 19 pandemic constituted a *force majeure* as the company in China could not deliver the goods that the applicant had ordered and the deposit was lost. According to

appellant, respondent's investment was not guaranteed but a promise that Marinus would be repaid if everything went according to plan.

[27] Apart from a bare denial, appellant failed in its replying affidavit to respond adequately or at all to respondent's factual submissions relating to Marinus involvement in the business operations of appellant's group of companies or his denial that appellant was excused from paying because the business in China had not gone according to plan in light of the Covid-19 pandemic.

[28] On the evidence before this Court, I am not persuaded that appellant has disclosed a bona fide defense that if established at trial would entitle it to the relief asked for. Nor am I satisfied that appellant's bare denial of respondent's factual averments give rise to a genuine dispute of fact entitling appellant to proceed to trial.

[29] The agreement was entered into between the parties in July 2020 during the COVID 19 pandemic. For appellant to succeed in the defense of *force majeure*, the happening or event relied as the excuse for non-performance must have been unforeseeable with reasonable foresight and unavoidable with reasonable care (see, ***South African Forestry Company Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA)***). Reasonable foreseeability of the event that causes impossibility of performance may have the result of ruling out *vis major* or indicating that the party tacitly accepted the risk of impossibility resulting from such event (see, ***Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG 1996 (4) SA 1190 (A)***). As counsel for respondent so cogently argued, appellant's defense of *force majeure* must fail given that the event of COVID 19 was already taking place at the time of the conclusion of the agreement and yet appellant nonetheless promised to repay the investment within three months.

[30] The onus of proving impossibility of performance rests on appellant. However, in its pleadings there are no allegations as to the foreseeability and unavoidability of performance, in what manner performance was rendered impossible, to what extent performance was rendered impossible and for how long, what the financial position of

appellant was after the pandemic, or any other factor relevant to this alleged defense. At best for appellant, the Covid-19 pandemic may have made it uneconomical or no longer commercially viable for appellant to carry out or perform its financial obligation in terms of the agreement, but this does not mean that performance has become impossible or constitutes a basis to be excused from performance (see, ***Unibank, Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd 2000 (4) SA 191 (W); Freestone Property Investment (Pty) Ltd v Remake Consultants CC and Another (2020/29927)***). In any event, the COVID 19 pandemic had long passed when respondent issued the letter of demand, and one wonders on what basis appellant could reasonably argue that performance was not then possible. Certainly, there is no averment by appellant that it is no longer trading or is unable to repay respondent.

[31] A rescission application is ordinarily aimed at setting aside a judgment granted by default in order to afford the applicant an opportunity to defend the matter. It is, therefore, not a proceeding for final relief but an interlocutory step. Because the relief sought in a rescission application is generally interlocutory in nature, a court is merely concerned with whether or not the applicant has shown a prima facie defense, not whether the defense is established on probabilities (see ***Gangat v Akoon [2021] ZAGPJHC 431 (21 December 2021)***). Thus, for ordinary rescission of default judgment applications, the applicant needs only satisfy the good cause test and establish a prima facie defense.

[32] Counsel for appellant argued that this matter should be referred to trial because of a dispute of fact relating to the interpretation of the agreement. However, any dispute of the fact that arises must be genuine. In this matter, appellant has not disputed the contents of the agreement or the validity thereof, be it the copy or the original. It did not raise any factual issue relating to the interpretation of the agreement in the founding affidavit or reply. Apart from a bare denial, respondent has offered nothing to controvert respondent's version that Marinus was involved in, and contributed to, appellant's business operations. Appellant has not disputed that the amount claimed is owing to respondent but has offered an excuse why it ought not to be paid. On the facts before

this Court, these defenses lack both factual and legal substance. In my view, there is no genuine factual dispute and, as such, it cannot be legitimately argued that the appellant has proffered a bona fide defense; a sincere, good faith belief that it does not owe the debt.

[33] In the heads of argument, appellant refers to a *novus actus interveniens*. However, no averments to support a defense of *novus actus interveniens* are pleaded by the appellant in the rescission application and this defense is not applicable nor relevant in this appeal. This legal principle is, of course, a separate and distinct from *force majeure* and usually has application in delict and in criminal liability.

[34] In summary, having regard to the record, the grounds of appeal, and the applicable law, the appeal must, in my view, fail. There was no challenge by appellant to the Magistrates order that there was no good explanation for the delay, the defense that the judgment was granted contrary to rule 12 (6) is not evident from the record and was not pleaded by appellant and, finally, appellant has not raised any legitimate triable issue that necessitates that necessitates being referred to trial.

Costs

[35] In so far as the issue of costs is concerned, respondent has urged this Court to grant an order of costs on a punitive scale given the conduct of appellant in these proceedings. The granting of a punitive cost order is unusual and is generally ordered not merely because the party loses but because their conduct justifies censure. Typical grounds would include bringing a claim or defense without any real prospect of success, misconduct in the proceedings and unreasonable or stubborn opposition by a party.

[36] In this matter, I am inclined to agree that a punitive cost order is justified. The manner in which appellant conducted this litigation right from the outset appears to me to have been designed to delay the inevitable and to frustrate the respondent from being paid. This is perhaps most starkly illustrated by the fact that appellant did not

challenge the Magistrate's finding that it was in willful default. One also got the distinct impression that the heads of argument attempted to supplement an unarguable case by introducing new causes of the action that were not pleaded. Indeed, the defense of *novus actus interveniens* appeared for the first time in the heads of argument filed on behalf of appellant in this appeal. Although referred to in the heads of argument, this defense was not pertinently argued; not surprising, since this legal principle has no application to this case.

[37] Given the nature of this matter and the various legal issues that were raised (some unnecessarily) by appellant, I am of the view that counsel's costs on scale B are justifiable.

ORDER

In the circumstances, I would propose the following order:

1. The appeal is dismissed.
2. The appellant is directed to pay respondent's costs on an attorney-client scale with counsel's costs to be taxed on scale B.

FRANCIS, J

Judge of the High Court, Cape Town

I agree, and it is so ordered

SALDANHA, J

Judge of the High Court, Cape Town

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