

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 8964/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

12 August 2025

In the matter between:

BIG ROCK CONSTRUCTION 12 CC

Applicant / Defendant

Registration Number: 2010/035324/23

and

KAAN DEVELOPMENTS 2 CC

Respondent / Plaintiff

Registration Number: 2005/035232/23

JUDGMENT

GOUWS, AJ

INTRODUCTION

[1] The respondent obtained a default judgment against the applicant on 30 November 2022 in terms whereof the applicant was ordered to pay the respondent an amount of R1 500 000.00 together with interest and costs on a scale as between attorney and client.

[2] The order was granted by the Honourable Mr Justice Vorster AJ.

- [3] The applicant applies for rescission of this default judgment. It alleges that the application is predicated upon rule 31(2)(b), alternatively rule 42(1)(a), or the common law. In prayer 3 the applicant also seeks an order that any execution process issued in lieu of the judgment be set aside (*sic*).
- [4] The applicant contends that the summons never came to its attention seeing as it was never served on the registered address of the applicant. Resultantly, so the allegation goes, the judgment was erroneously sought and granted in terms of Uniform Rule 42(1)(a).
- [5] The Sheriff's return of service is included as part of the applicant's founding affidavit. Given the relevance of the case put forward by the applicant, the salient extract from the return of service is restated:

“On this 24th day of February 2022 at 10:39 I served the combined summons in this matter upon MRS VAN ZYL, RECEPTIONIST OF SILVER CROSS SCHOOL WEAR. Apparently a responsible person and apparently not less than 16 years of age, and in control of and at the chosen domicilium citandi et executandi of BIG ROCK CONSTRUCTION 12 CC at 2[...] J[...] H[...] STREET, PRETORIA NORTH, 0182 and by handing to the PARTY SERVED a copy thereof after explaining the nature and exigency of the said process RULE 4(1)(a)(iv).

THE DEFENDANT HAD LEFT THE GIVEN ADDRESS AT PRESENT ADDRESS IS UNKNOWN. NO NAME OR SIGNBOARD COULD BE FOUND OF THE DEFENDANT”.

- [6] In support of its allegation that the summons was never served at the correct address, the deponent to the founding affidavit explains that the address of Silver Cross School Wear (which is referenced in the return of service) is not at 2[...] J[...] H[...] Street, Pretoria North, but rather at 2[...] E[...] Street, Pretoria North. It is stated that Silver Cross School Wear is a well-known school wear store in Pretoria North where the

deponent happens to purchase his children's school wear.

- [7] It appears common cause on the papers that the 2[...] J[...] H[...] Street address, which was admittedly the then chosen *domicilium citandi et executandi* address of the applicant, is one street to the West of Eeufees Weg, and is a residential property.
- [8] The applicant also records that it has never operated from 2[...] E[...] Street.
- [9] Having regard to the content of the return, and incorporating the evidence of the applicant, that 2[...] J[...] H[...] Street and Silver Cross School Wear are at separate locations, it becomes unclear where the Sheriff in fact served the summons. It may have been served at 2[...] J[...] H[...] Street, or at Silver Cross School Wear, but according to the applicant this is not the same premises.
- [10] In response, the respondent provided an explanatory affidavit by the Sheriff. The affidavit of Mr Coenie Coetzer, a male Deputy Sheriff, and who allegedly served the summons, confirms, mechanically so, that the summons was served on 24 February 2022 on a Mrs van Zyl, the receptionist of Silver Cross School Wear at 2[...] J[...] H[...] Street, Pretoria North. I remark that this response is mechanical because it does no more than confirm the exact language of the return of service.
- [11] This explanatory affidavit by the Sheriff does not address the issue. It does not, to any extent, deal with the applicant's allegation that Silver Cross School Wear is not situated at 2[...] J[...] H[...] Street, Pretoria North, as asserted by the applicant.
- [12] The failure to deal with this aspect is peculiar, particularly in light of the fact that the affidavit of the Sheriff was presumably presented for no other reason than to address the applicant's contention that Silver Cross School Wear does not operate at 2[...] J[...] H[...] Street, but rather at 2[...] E[...] Street.

DISCUSSION

- [13] On the face of the affidavits filed of record, there would appear to be a dispute as to whether the sheriff served the summons at the applicant's registered address at 2[...] J[...] H[...] Street, Pretoria North.
- [14] During argument the respondent's counsel persisted with the proposition that the applicant did in any event receive notice of the application for default judgment, because the notice of set down was allegedly served on the applicant. It was however correctly conceded by the counsel for the respondent that service of the notice of set down could not cure a failure to have served the summons for purposes of supporting a default judgment.
- [15] Reliance was also placed by the respondent on a letter dated 9 February 2024, where attorney Daan Beukes, acting for the applicant, enquires from F van Wyk Incorporated whether a judgment had been taken under case number 8964/2022 (the current matter). The basis for the enquiry is stated as being that the attorney Beukes received a mandate to act in case number 63498/2021, and that in the file received from his predecessor, he came upon the documentation "which indicated that a judgment was given / taken against Big Rock Construction 12 CC". The respondent accordingly contends that the applicant and his erstwhile attorney must have had knowledge of the pending action prior to this letter (and presumably had received the summons). Essentially the respondent's counsel argues, if I correctly surmised, that one may infer from this letter that the applicant's previous attorney was in possession of the summons, meaning it had to have been served.
- [16] I do not agree. No reference is made in this letter to what documentation was in possession of Mr. Beukes or his predecessor, and one cannot infer, as the respondent seeks to do, that the documentation referred to included a summons. This proposition is furthermore convincingly gainsaid by the fact that attorney Beukes, on

24 June 2024, in a further e-mail to F Van Wyk Incorporated, requested a copy of the summons. The letter of 9 February 2024 is accordingly not evidence that the applicant's erstwhile attorney was in possession of the summons.

- [17] The respondent's mechanical repetition of its allegation that the summons was served at the registered address at 2[...] J[...] H[...] Street, Pretoria North, without clearing up the issue raised by the applicant relating to the location of Silver Cross School Wear, amounts to nothing more than a bare denial of the applicant's allegation. This bare denial is particularly objectionable under circumstances where the allegation could easily be cleared up by way of an explanation by the Sheriff. The proffered explanation is wholly remiss, and this justifies the drawing of a negative inference against the respondent. (For an exposition on the court's power to draw a negative inference, see: **Elgin Fireclays Limited v Webb 1947 (4) SA 744 at 749-750**)
- [18] A bare denial of the applicant's allegations in his affidavit will not in general be sufficient to generate a genuine or real dispute of fact. It has been said that the court must take a "robust, common sense approach" to a dispute on motion and not hesitate to decide an issue on affidavit merely because it may be difficult to do so. (In this regard see **Roomhire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 and 1165**; also **Soffiantini v Mould 1956 (4) SA 150 (E) at 154G-H**).
- [19] In light of the above, it is the finding of this court that the respondent has provided insufficient evidence to dispel the applicant's allegation that the summons was never served on it, and to raise a genuine dispute of fact on this aspect.
- [20] In **Lodhi 2 Properties Investments CC and Another v BondevDevelopment (Pty) Ltd (2007) (6) SA 87 (SCA), the Supreme Court of Appeal, in a majority judgment handed down by Streicher JA, held that:**

“[24] ...Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff’s return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason not been service of the document. In such a case, the party in his favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously.”

[21] I also have little doubt that my brother Vorster, AJ, at time of determining the application for default judgment, would have made further inquiry had he been made aware of the allegation that Silver Cross School Wear was not located at 2[...] J[...] H[...] Street, Pretoria North. I venture to conclude that, had such an inquiry yielded the deficient explanation proffered to this court by the Sheriff and the respondent, default judgment would not have been granted.

[22] In **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 (2021) (11) BCLR 1263 (CC)**, Khampepe J. writing for the majority, held the following instructive dictum:

“[62]...he has also failed to demonstrate why the order was erroneously granted. Ultimately, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because ‘there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which

would have induced the Judge, if aware of it, not to grant the judgment.’ ”

[23] On the test for rescission of an order erroneously granted as, espoused in *Zuma supra*, and read with the dictum in *Lodhi 2 Properties Investments* to which I have adverted above, I am satisfied that the applicant has brought itself within the jurisdictional purview of rule 42(1)(a) of the Uniform Rules of Court.

[24] This leaves the aspect of inordinate delay.

[25] An application under rule 42(1)(a) must be brought within a reasonable time. The respondent contends that the applicant had not met this threshold.

[26] The explanation of the applicant for the delay from 9 February 2024 up to institution of the proceedings for rescission may be summarized thus:

[26.1] The applicant's attorney, Mr. Daan Beukes, on 9 February 2024, wrote a letter to Van Wyk Incorporated, seeking clarification on whether any judgment had been granted against the applicant under case number 8964/ 2022.

[26.2] On 15 February, Mr Daan Beukes wrote a follow-up email again requesting a reply to the enquiry.

[26.3] A further follow-up letter was written by Mr Beukes on 18 June 2024, referencing the previous correspondence, and recording that he had not received any response to this correspondence.

[26.4] It appears that, on 24 June 2024, F van Wyk Incorporated reverted in an email where Mr Beukes was requested to provide a notice of appointment as attorney of record.

[26.5] On 24 June a further email was written by Mr Beukes, again requesting a copy of the summons and particulars of claim in

order to “enable us to cite the parties correctly”.

[26.6] On 12 July 2024, in an email under hand of one Megan Janse van Rensburg, ostensibly of F Van Wyk Incorporated, Mr. Beukes was again requested to provide the notice of appointment as attorney for the applicant.

[26.7] On 15 July, Mr Beukes indicated, in a further email to F Van Wyk Incorporated that:

“The whole point of obtaining a copy of the summons is to be able to quote the correct case number on the notice of appointment.

...

Kindly provide us with the correct case number should you have any objection in providing us with a copy of the summons”.

[26.8] Ultimately, the case details were only provided on 16 July 2024.

The information provided did not indicate in what court the summons was issued out of, prompting yet a further enquiry from Mr Beukes on 17 July 2024 requesting this information.

[26.9] It appears as though the invitation to Caselines only occurred somewhere around 18 July 2024.

[26.10] The application for rescission was issued on 24 July 2024.

[27] From the above exposition I am satisfied that the applicant acted with the necessary expediency. If anything, it is the attorney for the respondent’s seemingly arbitrary, and prolonged refusal to have provided the applicant’s attorney with the requested case information, that resulted in the delay now complained of.

[28] In the result, I am satisfied that a proper case has been made out for

rescission of the default judgment under rule 42(1)(a) of the Uniform Rules of Court.

[29] The above finding obviates the need to deal with the evidence of the applicant where it relates to an entitlement to rescission of judgment under rule 31(2)(b) of the Uniform Rules of Court.

[30] Pryer 3 to which I have previously adverted, which I accept relates to execution process undertaken after default judgment, is not supported by any evidence before me. The applicant's counsel conceded this much.

COSTS

[31] There is no reason why costs ought not follow the result in this application. The respondent persisted with its opposition to the application, despite having been made aware of the difficulty raised regarding service of the summons.

[32] The respondent has not adequately dealt with this aspect, despite ample opportunity to do so, resorting to an unhelpful and mechanical regurgitation of the language of the return of service, without at all addressing the core issue raised by the applicant. The court has already drawn a negative inference against the respondent in this regard. Against the aforesaid background, I also do not consider the opposition to this application reasonable. Considering the nature of the matter, the quantum that it involves, and its relative degree of complexity, I am inclined to grant costs to the applicant on tariff scale B as contemplated in Rule 69. In the result, the court grants the following order:

[1] The default judgment of the Honourable Mr Justice Vorster, AJ, dated 30 November 2022, is hereby set aside.

[2] The applicant is granted leave to defend the matter and is hereby

afforded 20 (twenty) days from date of this order to file its plea and counterclaim (if any).

- [3] The respondent is ordered to pay the costs of this application on tariff scale B.

SG GOUWS
ACTING JUDGE OF THE HIGH COURT, PRETORIA

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