

Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates	NO



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

CASE NUMBER: 2023/011342

In the matter between:-

PETER NTINO JUSTINOS DIKHUBA Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

In re

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

PETER NTINO JUSTINOS DIKHUBA Defendant

*This judgment is handed down via electronic communication (e-mail) to the parties' legal representatives as indicated in their practice note. The date that the judgment is deemed to be handed down is **15 September 2025**.*

JUDGMENT

REID J

Introduction

- [1] This is an application for rescission of a default judgment that was granted against the applicant in favour of the respondent, Standard Bank ("the Bank"). The default judgment related to monies lent to a company known as Mendi Trading Investments ("the company").
- [2] The applicant was one of 3 directors of the company.
- [3] The default judgment was granted on 13 April 2023 and a writ of execution was issued on 24 April 2023. This application seeks to have the default judgment and the writ set aside.

Condonation

- [4] The applicant seeks condonation for the late filing of this application and for filing the replying affidavit out of time.
- [5] The respondent does not oppose either application for condonation.
- [6] As grounds for condonation, the applicant states that the property on which service was effected is a property that he owns but was not living in since 2017. He became aware of the summons when he received a call from the Sheriff on 17 May 2023 informing him that there is a writ of attachment against his property. The applicant had difficulty in obtaining sufficient funds to afford an attorney and counsel. The rescission application was instituted as soon as affordable legal counsel could be obtained.
- [7] The applicable amount is R 3,096,975.66 (Three Million and Ninety Six Thousand Nine Hundred and Seventy Five Rand and Sixty Six Cents).
- [8] Having regards to the substantive amount as well as the fact that the

application for condonation is not opposed, I view it to be in the interest of justice to grant condonation for the late filing of the application and the late filing of the replying affidavit.

- [9] Condonation for the late institution of the application, as well as the late filing of the replying affidavit, is consequently granted.

Background

- [10] The two other directors of the company are married in community of property.
- [11] The company entered into two separate trade loan agreements with the Bank on 12 April 2021 and 21 April 2021 ("the agreements").
- [12] The applicant and one other director, Mrs Ramodibedi, signed as sureties/guarantors of the monies owed by the company in relation to the agreements.
- [13] The company fell into financial troubles. The parties dispute what the cause of the financial troubles were. For purposes of this judgment, the cause of the financial troubles is irrelevant.
- [14] The applicant made a proposal to the company to amicably part ways, which did not realise. On 4 February 2022 the applicant was suspended from the operations of the company. The applicant was removed as a director of the company on 6 October 2022. No disciplinary or criminal charges were instituted against the applicant.
- [15] Subsequent to the suspension from the operations of the company and removal of the applicant as a director, the company seized payments to the Bank in terms of the loan agreements.
- [16] The Bank then served letters of demand in October 2022 (to the

applicant's @gmail address) and August 2023 (to the companies physical and e-mail address).

- [17] The applicant states that he requested meetings with the Bank to deal with the issues of non-payment to the Bank during his directorship. He states that he was unaware that the company was not paying the loan agreements, after his removal as a director and removal from the operations of the company.
- [18] The meeting with the Bank was held on 8 November 2022 after which the Bank followed up with an email on 5 December 2022. The applicant responded to the email and informed the Bank's attorneys that his attorney, Mr Selomo whose contact details were attached will deal with the matter. The respondent's attorney again followed up on instructions from Mr Selomo on 10 January 2023.
- [19] Summons was issued on 9 February 2023 and served on 13 March 2023 by affixing on the *domicilium citandi et executandi* of the applicant. Effective service of the summons is disputed. The return of service shows that service was attempted on 8 and 9 March 2023 but that the property was locked and the address was vacant. The return of service further indicates that *"The Combined Summons and Plaintiff's Notice to Oppose mediation in terms of uniform Rule 41(A) was served by affixing to the principal door. After a diligent search and enquiry at the given address no other manner of service was possible. Rule 4(1)(a)(iv)."*
- [20] The applicant states that it was not correct that there was no other manner of service, since the Bank's attorneys were aware thereof that the applicant was represented by Mr Selomo. The Bank also knew that even though he was suspended from the company, he had a personal email address.

[21] In terms of clause 6.1.1 of the guarantee, the guarantors (including the applicant) renounced the benefits of all otherwise applicable legal immunities, defences and exceptions to the extent that they would be applicable in the absence of such renunciation, including the defences and exceptions of "cession of actions", "excussion", "division", "*de duobus vel pluribus rebus debendi*" (i.e. that all guarantors must be joined in any action, each for his/her proportionate share of the debt) and "revision of accounts", the meaning and effect of which they declared themselves to be fully acquainted with.

[22] Default judgment was granted against the applicant on 13 April 2023 and a writ issued on 24 April 2023.

Issues to determine

[23] To my mind, the determination of this application for rescission will turn on the following scores:

- 23.1. Whether there was sufficient service of the summons; and
- 23.2. Whether the applicant has a *bona fide* defence.

Legal principles

[24] Rule 31 allows a party to apply for default judgment where the other party is in default for filing a notice to defend or plea. A party against whom such default judgment has been granted, may, 20 days after acquiring knowledge, bring an application to set aside the default judgment.

[25] The law on the rescission of default judgments is trite. The applicant must, in order to succeed with the application, deal with the reasons for the default and show good cause for the default judgment to be rescinded.

[26] To succeed in a rescission on common law grounds or in terms of Rule 31, an applicant must show good or sufficient cause. In **Chetty v Law Society** 1985 (2) SA 756 (A) the Appellate Division held that the essential elements of sufficient cause for rescission of a judgment by default are:

- 26.1. that the party seeking relief must present a reasonable and acceptable explanation for his default;
- 26.2. that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success; and
- 26.3. an application for rescission must be made *bona fide*.

Service

[27] The provisions of Rule 4(vi) provides that service may be effected as follows:

"(iv) if the person to be served has chosen a domicilium citandi, by delivering a copy thereof to a person apparently not less than sixteen years of age at the domicilium so chosen: Provided that if no person is present at the domicilium, the sheriff may leave a copy at the aforesaid domicilium".

[28] In **Absa Bank v Mare and Others**, 2021 (2) SA 151 the Full Court found that delivery of a summons in terms of Rule 4((1)(a)(iv) still had to be in a manner that the process would have come to the attention of the recipient. That:

"[26] The manner in which a process may be delivered or left at a domicilium in terms of rule 4(1)(a)(iv) is not prescribed and depends on the prevailing circumstances. The relevant provisions of the loan agreement in question

*(clause 37) also do not prescribe the manner of delivery or of acceptance at Ms Mare's chosen domicilium address. The duty upon a sheriff is to serve a notice or process of court at a domicilium citandi by delivering or leaving the notice or process in a manner by which in the ordinary course the notice or process would come to the attention and be received by the intended recipient, and to report to the court how the process was served and why it was served in that manner. The delivery requirement at a domicilium citandi, as was said by Margo J in **Loryan (Pty) Ltd v Solarsh Tea-Box Coffee (Pty) Ltd** 1984 (3) SA 834 (W) at 849A - B –*

'presupposes delivery in any manner by which in the ordinary course the notice would come to the attention of and be received by the lessor. The obvious method would be by handing the notice to a responsible employee, or by pushing it under the front door, or by placing it in the mailbox.'

*[27] Leaving the summons on the grass where it can be blown away, taken away or be invisible, was not an appropriate place for delivery in the particular circumstances. Where delivery of a notice or process is to be effected at a residence chosen as a domicilium citandi, it would equally not have been enough merely to drop the process over a perimeter fence or to put it into a hedge (see **Loryan** at 847H - I). Ms Mare's chosen domicilium citandi is not a vacant piece of land, but a smallholding with a dwelling on it, which is her private residence. The obvious method of delivery by which in the ordinary course the summons would have come to her attention and received by her, and which the sheriff in casu was required to do in order to comply with the method of service prescribed in terms of R4(1)(a)(iv), was to hand a copy of the summons to Ms Mare personally (I accept her evidence that she was present at the time of service of the summons), to a responsible employee, if there was someone present, by slipping it under or affixing it to the front door of her home, or even by placing it in a post box, if there was one."*

- [29] Further, in **Hamze Trading (Pty) Ltd v Alf's Tippers CC** [2024] 3 All SA 248 (GJ) (6 May 2024) at para 65, the court found that the mere

fact that a *domicilium citandi et executandi* has been chosen does not preclude effective service through one of the other methods prescribed in Rule 4 of the Uniform Rules of Court.

[30] In **Hamze Trading (Pty) Ltd** it was held that:

"[68] The general tenor of the language is peremptory. The sheriff must use one or other of the methods set out in rule 4(1)(a). But that is hardly determinative of this question. As I observe above, rule 4(1)(a)(iv) provides that service at a chosen domicilium address is one of "the following manners". The drafters of the rules constructed rule 4(1)(a) "to facilitate effective service on a defendant or respondent. The various alternative modes of service, some applicable only to specific cases, were set in place so that the likelihood of effective service a defendant was increased."

[31] *In casu*, the Bank's attorneys were aware thereof that the applicant was represented by attorney, Mr Selomo and in fact had addressed communication to him. Rule 4(1)(aA) provides that:

"(aA) Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings."

[32] The applicant claims that even though the summons was served on his nominated *domicillium* address, he did not receive the application as he vacated the property in 2017.

[33] The respondent states that the applicant fails to provide any acceptable explanation defending the action, for a number of reasons, namely:

33.1. The applicant was made aware of the fact that legal action was imminent yet showed a complete lack of interest in resolving the

matter. In this regard, the applicant has not been truthful by denying receipt of the letter of demand dated 17 August 2022, to which letter he in fact responded to on 26 August 2022.

33.2. Now that a lawful judgment has been granted against the applicant, he attempts to pass the buck to his former attorney of record, Mr Selomo. The Court is entitled to refuse an application for rescission even if the default is that of the applicant's attorney (which is not admitted).

33.3. The combined summons was served on the applicant's chosen *domicilium citandi et executandi*, which the applicant admits is a property that is owned by him.

33.4. The relevant service address was nominated in terms of the applicant's written guarantee which was signed by him on 21 April 2021.

33.5. The applicant fails to explain why he would have elected the relevant address as his nominated service address in 2021 if he had allegedly already vacated the property as far back as 2017.

33.6. Service at the relevant address constituted valid service of the combined summons at the time of service, irrespective of whether or not the applicant still resided there.

[34] The respondent relies on the matter of **Amcoal Collieries Ltd v Truter** 1990 (1) SA 1 (A) in which the Appellate Division held that:

“service on the domicilium address would be proper even if the person to be served was nowhere to be found” and “It is a matter of frequent occurrence that a domicilium it executandii 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, he chooses is taken to be his place of abode.”

[35] In application of the above legal principles, the purpose of effective service in terms of the Rules of Court is that the institution of legal proceedings should come to the attention of the person being served.

[36] *In casu*, service was done by affixing the summons to the chosen *domicilium* address in terms of Rule 4(1)(a)(iv).

[37] Further, on the basis that the applicant has elected the address as his *domicilium* in 2021, despite the fact that he vacated the property in 2017 (on his own version), I find that service was duly effected.

[38] I am satisfied that service of the summons was duly effected and came to the attention of the applicant, *alternatively* ought to have reasonably come to the attention of the applicant.

Bona fide defence

[39] The applicant states that he intends to plea that the clause in the agreement that allows the bank to pursue him even when the company is profitable and trading, is contrary to public policy. This plea is underscored specifically when the Bank has an agreement with the remaining directors for the settlement of the outstanding amounts. Alternatively the applicant intends to plea that the Bank must first

approach the company for payment.

[40] It has been held in **RGS Properties (Pty) Ltd v Ethekwini Municipality** 2010 (6) SA 572 (KZD) at para 10 to 12 that the Court is not seized with the duty to evaluate the merits of the defence raised as a *bona fide* defence.

[41] At the time that the default judgment was granted in September 2023, the amount was no longer R3,096,975.66 but R704 095.48 as Mr and Mrs Ramodibedi (the other 2 directors) paid the difference.

[42] However, the Bank pursued the applicant alone at the time [the application against Mr and Mrs Ramodibedi was only brought on 28 March 2024 after they defaulted on the settlement agreement]. This is even though the applicant was at pains to show to the Bank that the company was profitable and still trading. The Bank holds the view that the second agreement is a guarantee as opposed to a surety and as such it is entitled to do so.

[43] With regards to a defence on public policy, the following from the Constitutional Court's judgment in **Beadica 231 CC and Others v Trustees, Oregon Trust and Others** 2020 (5) SA 247 (CC) requires mentioning.

[44] The Constitutional Court referred to its earlier judgment in **Barkhuizen**

v Napier 2007 (5) SA 323 (CC) and confirmed that:

"[35] The majority judgment further explained that public policy, as informed by the Constitution, imports 'notions of fairness, justice and reasonableness', takes account of the need to do 'simple justice between individuals' and is informed by the concept of ubuntu. The majority recognised that public policy, in general, requires parties to honour contractual obligations that have been freely and voluntarily undertaken. This is because the principle of pacta sunt servanda is a 'profoundly moral principle, on which the coherence of any society relies'. The majority further stated that this principle - 'gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs. even to one's own detriment, is the very essence of freedom and a vital part of dignity."

[36] The majority judgment held that determining fairness in this context involves a two-stage enquiry ...

[37] The first stage involves a consideration of the clause itself. The question is whether the clause is so unreasonable, on its face, as to be contrary to public policy. If the answer is in the affirmative, the court will strike down the clause. If, on the other hand, the clause is found to be reasonable, then the second stage of the enquiry will be embarked upon. The second stage involves an inquiry whether, in all the circumstances of the particular case, it would be contrary to public policy to enforce the clause. The onus is on the party seeking to avoid the enforcement of the clause to 'demonstrate why its enforcement would be unfair and unreasonable in the given circumstances'. The majority emphasised that particular regard must be had to the reason for non-compliance with the clause."

[45] The Constitutional Court in **Beadica** went on and added the following:

"5.1. Equity (encompassing the notions of good faith, fairness and reasonableness) is a factor in assessing the terms and the enforcement of contracts. Nevertheless: (a) A court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh; and (b) The enforcement of contractual terms does not depend on an individual judge's

sense of what fairness, reasonableness and justice require. To hold otherwise would: (i) Amount to making the enforcement of contractual terms dependent on the "idiosyncratic inferences of a few judicial minds"; and
(ii) Introduce an unacceptable degree of uncertainty into our law of contract. The resultant uncertainty would be inimical to the rule of law;.."

[46] The legal principle of *pacta sunt servanda* should not be privileged over other constitutional rights and values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances.

[47] It is argued on behalf of the respondent that the documentary evidence shows that:

- 47.1. The company remains in debt and fails to pay the respondent.
- 47.2. The applicant was placed on suspension from the company.
- 47.3. The applicant intends pursuing Mendi Trading in a separate action for his "*illegal removal as member and director*".

[48] The respondent argues that public policy, inclusive of the principles of equity and *pacta sunt servanda*, requires that the guarantee must be honoured by the applicant.

Analysis

[49] The applicant cannot rely on a defence that was not available to him at

the time that the default judgment against him was granted. It was found by the Supreme Court of Appeal in **Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd** 2007 (6) SA 87 (SCA) that:

*“[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of **a defence on the merits** is an irrelevant consideration and, **if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.**”*

(own emphasis)

[50] The fact that the other two directors paid a substantial amount of the debt when the default judgment was granted, does not establish a *bona fide* defence to the applicant.

[51] When the applicant signed as guarantor, he was well aware of the implications should the principal debtor fail to honour the payments. In this regard the principal *pacta sunt servanda* (scriptor beware) is applicable.

[52] In my view, the applicant did not show a *bona fide* defence against the

Bank. It is not for this Court to evaluate the merits of a possible *bona fide* defence, only to determine whether a *bona fide* defence existed or not.

Findings

[53] I have found, for the reasons set out above, that the applicant did become aware of the summons and that service of the summons was duly effected.

[54] I have also found that the applicant did not have a *bona fide* defence at the time that the action was instituted and proceeded against him.

[55] As such, it follows that the application for rescission must fail.

Costs

[56] The general principle is that the successful party is entitled to its costs.

[57] I find no reason to deviate from the principle.

[58] The applicant should pay the cost of the respondent.

Order

The following order is made:

- i) The application is dismissed.

- ii) The applicant is to pay the costs of the respondent.



**FMM REID
JUDGE OF THE HIGH COURT
GAUTENG DIVISION JOHANNESBURG**

DATE ARGUED: 4 JUNE 2025

DATE OF JUDGMENT: 15 SEPTEMBER 2025

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