

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>06/10/2025</u> DATE  SIGNATURE	

Type text here

Case Number: 2022-031620

In the matter between:

LUANDHRAN KISTNASAMY MOODLEY

Applicant

and

WOA FUELS AND OILS CC

Respondent

In re:

WOA FUELS AND OILS CC

Plaintiff

and

HILTON LOGISTICS & DISTRIBUTION CC

First Defendant

LUANDHRAN KISTNASAMY MOODLEY

Second Defendant

In the matter between:

LUANDHRAN KISTNASAMY MOODLEY Applicant

and

WOA FUELS AND OILS CC Respondent

In re:

WOA FUELS AND OILS CC Plaintiff

and

HILTON LOGISTICS & DISTRIBUTION CC First Defendant

LUANDHRAN KISTNASAMY MOODLEY Second Defendant

JUDGMENT

KRÜGER AJ:

Summary

Practice- Judgment and orders- Rescission of unopposed summary judgment- Rescission of judgment by default- condonation sought for late rescission application in respect of rescission application for default judgment- rescission in terms of common law- good cause requires defence showing some prospect of success- Courts having judicial discretion-surety alleged not to have been signed yet bearing initials of surety

Introduction

[1] The applicant seeks a rescission of judgments granted against him in two matters, one following upon summary judgment and the other following default

judgment. The Deputy Judge President allowed for both matters to be heard simultaneously by this court.

- [2] During August 2020 the respondent and Hilton Logistics & Distribution CC (“Hilton”) concluded a written contract for the sale and delivery of goods on credit by the respondent to Hilton. The contract incorporated a deed of surety in terms of which the applicant bound himself jointly and severally as surety and co-principal debtor *in solidum* to the respondent for payment on demand of all sums of money which Hilton may then and from time to time owe or be indebted to the respondent.
- [3] According to the respondent, Hilton failed to make payment of two of the respondents invoices, the first being ‘HDL001’ in the amount of R 1 900 854,14 and the second being ‘HLD002’ for R 1 339 934,73. Letters of demand sent to Hilton and the applicant did not have the desired effect.
- [4] In case number 2022-031620 the respondent served a combined summons during November 2022 upon Hilton as first defendant and the applicant herein, who is the second defendant in the action, for payment in the sum of R 1 900 854,14. The applicant filed notice of intention to defend on 5 December 2022 and his plea on 15 February 2023. Hilton did not file notice of intention to defend.
- [5] In case number 2022-045734 the respondent served a combined summons during November 2022 upon Hilton as first defendant and the applicant as second defendant for payment in the sum of R 1 339 934,73 in respect of invoice ‘HLD002’. Neither Hilton nor the applicant filed notice of intention to defend.
- [6] For the sake of convenience, I shall refer to the matter with number 2022-031620 as the “*first matter*” and the matter with number 2022-045734 as “*the second matter*”
- [7] Hilton was placed under final winding up on 16 May 2023.

- [8] In the first matter, application for summary judgment was brought. It was not opposed. Summary judgment was granted against the applicant on 24 May 2023 for payment in the amount of R 1 900 854,14. In the second matter, on 19 July 2023, judgment by default was granted against the applicant and Hilton in the amount of R 1 339 934,43, the one paying the other to be absolved.
- [9] Around 22 December 2023, the applicant delivered to the respondent an application seeking an order rescinding and setting aside the summary judgment granted in the first matter. In the second matter, on the same date, the applicant delivered an application for the reconsideration for an order condoning the applicant's non-compliance with the time period prescribed in rule 31(5)(d) and for the default judgment against the applicant to be reconsidered. After the respondent indicated in its answering affidavit that rule 31(5)(d) was not applicable and does not confer jurisdiction on this court to grant the relief sought, the notice of motion was amended to seek an order for rescission of the default judgment in terms of rule 31(2)(b) and condonation for non-compliance with the time limits prescribed in that rule for bringing a rescission application.

The application in the first matter

- [10] The applicant alleges he was unaware of the application for summary judgement. He was not informed by his erstwhile attorneys of record in the action that application for summary judgment was brought. The applicant was informed by the erstwhile attorney responsible for the matter that his correspondent attorney may not have sent a copy to him. Curiously, so it is alleged, the attorney also informed him that he was under the impression the summary judgment only pertained to Hilton. The attorney informed him that the attorney's secretary did not distinguish between Hilton and the applicant and with a view towards minimising costs and Hilton being in the process of liquidation, he had not bothered to bring the summary judgment application to the attention of the applicant.
- [11] The plea filed is three pages long consisting of four paragraphs. Many of the allegations in the particulars of claim are met with a plea of having no

knowledge. In respect of paragraphs 6 to 15 of the particulars of claim, which relates, amongst others, to the conclusion of the contract and its material terms and conditions pursuant to a credit application by Hilton to the respondent, the applicant pleaded it has no knowledge thereof, cannot admit or deny same and puts the respondent to the proof thereof. However, he denies that he acted on behalf of Hilton in concluding the contract. He baldly denies the suretyship attached to the particulars of claim and that he had bound himself as surety and co-principal debtor. He also denied that he is liable for payment of the amount claimed. No material facts are pleaded as to the grounds upon which the suretyship is denied. The applicant's allegations regarding letters of demand having being addressed to Hilton and the applicant, compliance by the respondent with the *National Credit Act* 34 of 2005 and the like, are again met with a plea of having no knowledge, not being able to admit or deny same and putting the respondent to the proof thereof.

- [12] The applicant in his founding affidavit alleges that the deed of surety in terms of which summary judgment was granted against him was initialled by him, but not signed. He alleges the respondent and its representatives perpetrated a fraud in proceeding to obtain summary judgment knowing the deed of suretyship was unsigned.
- [13] According to the applicant, he first became aware of the summary judgment by default when the respondent's attorney, in response to a request by the applicant to provide him with a copy of the suretyship, sent him a copy of the court order together with a copy of the alleged unsigned deed of suretyship.
- [14] The applicant alleges that when completing the application for credit, it was a requirement for Hilton to state if it offered any security. Hilton answered "no". It is also alleged that the handwriting on the deed of suretyship is not his handwriting and that he does not know whose handwriting it is. He confirms it is his initials which appear at the bottom of the suretyship's pages, but "*...it is probably because the surety agreement was part of the bundle of documents which were signed by me as part of the application for credit.*" As the application for credit was not signed by the applicant, it is alleged to fall foul of the requirements for a surety to be in writing and signed by the surety.

[15] In addition, it is alleged that the respondent and/or its attorneys “...made itself party to the fraud by pleading that a suretyship agreement existed and when summary judgment was sought.” The respondent and its attorneys are alleged to have known the suretyship was not signed by the applicant and had made a fraudulent misrepresentation with the intent to mislead the court in order to obtain summary judgment. If the court had known the alleged true facts, it would have given a judgment other than summary judgment.

The application in the second matter

[16] Following upon the amendment to the notice of motion, the applicant did not adapt the founding affidavit accordingly. In consequence, allegations in the founding affidavit still refer to section 31(5)(d) as if it were an application for reconsideration.

[17] The applicant alleges that his opposition to the first matter is indicative of him always intending to defend his rights. He was unaware of the second matter “...due to confusion caused by the close proximity within which both summonses in the two actions were served...” Both his erstwhile attorney and he were under an allegedly reasonable impression that only one action existed and that it had been defended and pleaded to. His current attorneys only discovered on 12 December 2023 that there were two actions.

[18] As in the application for rescission in the first matter, the grounds and allegations set out in the applicant’s founding affidavit accords with that of the application in respect of the first matter, as referred to above.

Condonation

[19] The applicant seeks condonation for the late launching of the application to set aside default judgment granted in the second matter. His affidavit refers to non-compliance of the 20 days limit in terms of rule 31(5). Be that as it may, the same period applies in respect of rule 31(2)(b). I will assume for purposes of this judgment that condonation is sought in terms of the latter rule.

[20] It is contended by the applicant that he only became aware of the default

judgment on 16 November 2023 which would require him to have filed the application by 20 December 2023. He contends the application was approximately 4-5 days late. It is a result of it having taken time, having regard to the time of year, to obtain and secure the services his legal representative after instructing his previous attorneys to withdraw.

- [21] For condonation to be granted, it needs to be shown there is sufficient cause for a court to exercise its discretion to do so upon consideration of all the facts placed before it, bearing in mind fairness to both sides. The degree of lateness, and the explanation therefor, as well as the prospects of success in the matter and its importance needs to be considered. If there are no prospects for success, no condonation ought to be granted.¹ The nature of the relief sought and the interest of the other parties for a dispute to be brought to finality, the avoidance of unnecessary delay in the administration of justice and the degree of negligence causing the delay are also factors to be taken into account.²
- [22] Though the Court is endowed with a wide discretion, condonation is not there for the asking. An application for condonation must be brought within a reasonable time depending on the circumstances of the matter, and an inordinate delay may in itself be good reason for refusing relief.³ Where the delay is inordinate, a reasonable belief is induced that the order had become unassailable.⁴ The interests of justice also need to be considered.⁵
- [23] Having regard to the facts and circumstances placed before me, it appears, if the applicant's version is to be believed, that the delay in bringing the application for rescission was not inordinate. As regards the merits of the matter, as set out herein below, I am not persuaded there are prospects for success. However, the second matter is closely linked to the application in the first matter, though in the former summary judgment was obtained and in the

¹ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-E

² See *Civil Procedure in the Superior Courts Harms September 2024 Part B* at B27.7 and the authorities there cited.

³ *Occupiers, Berea v De Wet* NO 2017 (5) SA 346 (CC) at 366E to 367A; *Promedia Drkkers & Ultgewers (Edms) Bpk v Kaimowitz & others* 1996 (4) SA 411 © at 421f-H

⁴ *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC) at par [16]; *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) at [31]

⁵ *Brummer v Gorfil Bros Investments (Pty) Ltd 7 others* 2000 (2) SA 837 (CC) at [3]

latter judgment by default. Both matters involve the same contract and the applicant's liability is based on the same deed of suretyship. The defences raised by the applicant as to why he should not be liable on the deed of surety correspond. It seems to me that it would in the circumstances be incongruous not to grant condonation.

Consideration

- [24] It is trite that section 6 of the *General Law Amendment Act*⁶ stipulates no suretyship contract shall be valid unless its terms are embodied in a written document signed by or on behalf of the surety.
- [25] Respondent's counsel, Ms Blumenthal, referred me to Caney's *Law of Suretyship*⁷ where it states a signature should be interpreted as meaning the placing of a mark on a document identifying or representing the person signing. A signature is "...any mark-whether it be a person's full name and surname, or his initials and surname, or only his initials, or a mere mark-placed on the contract with the intention of identifying the signatory." It need not be written in a specific manner or place.
- [26] Ms Blumenthal also referred me to the judgment of Moshidi J in *Beaux Lane (SA) Properties (Pty) Ltd v Marais*⁸ where the surety had appended his initials to a lease agreement consisting of 59 pages. At clause 54 of the agreement, at page 23, appeared a deed of suretyship. It was not disputed the surety had there initialled the deed of suretyship.⁹ It was denied that the initials were appended with the intention of being bound as surety. The defence was that the clause containing the surety was one of many clauses that required to be signed. In upholding the deed of suretyship the court did not disapprove of the view expressed in Caney pertaining to what may constitute a signature.¹⁰
- [27] Mr Naidoo, on behalf of the applicant, did not take issue with the exposition set out in Caney, nor with any of the authorities relied upon in substantiating same.

⁶ 50 of 1956

⁷ 6th Edition C F Forsyth and J T Pretorius 69

⁸ [2015] JOL 32961 (GJ)

⁹ *Beaux* [17].

¹⁰ *Beaux* [21]

He argued that no signature appeared on the suretyship agreement where it was indicated for the surety to append its signature and that the applicant never intended to sign the deed of surety by appending his initials to it. This, so it is contended, is substantiated by the fact that section D to Hilton's credit application enquired whether any security was being offered. The enquiry takes the form of three columns. The first describes the nature of security offered, seven possibilities in number, one of which is "*Personal Security*". The second column against each of the seven possibilities contains an empty circle indicating 'yes' which may be ticked against each of the seven possibilities. The third column contains a circle against each of the possibilities indicating 'no'. Each of the circles in the third column has been filled in. In his replying affidavit in the second matter, the applicant stated that when completing the application for credit, he "...specifically and expressly answered "no" to the questions whether any security against the credit facility was being offered..." The applicant's case is that this signifies Hilton offered no security.

- [28] In its answering affidavits the respondent sets out in detail the manner in which credit applications are dealt with in concluding a contract. According to the respondent, this discloses, amongst others, that the applicant's versions of events are not correct. The application for credit was done online, which the applicant did on Hilton's behalf. An online electronic application form is completed by an applicant or on behalf of an applicant. Once completed it is uploaded online together with various documents required as per the application form. The form consists of various sections which must be completed and populated. In this instance, it was done accordingly and the form duly signed. On the face of the form it is stated in bold capital letters:

**"APPLICATION FOR CREDIT INCORPORATING THE
ACCEPTANCE OF TRADING TERMS AND CONDITIONS AND THE
OFFERING OF SURETYSHIP"**

- [29] Section D states "*Print the personal surety document and ensure that the document is signed by at least one Director of the Company...Then scan back into your documents and attach to this application under "Section G".* In the applicant's replying affidavit, these allegations is baldly denied, save for stating

that the respondent's usual procedure is irrelevant and that it had accepted the application for credit in the form "...I submitted it...". No explanation is proffered of the requirement of a signed suretyship to be uploaded.

[30] Incorporated into the answering affidavits is a copy of Section G. It clearly records the applicant confirms, warrants and consents that certain documents had been uploaded including a personal surety, the corresponding tick box having been completed accordingly. It was verified that the suretyship had been printed, signed and uploaded as required. In reply, the applicant admits that the suretyship was uploaded, but persists in denying it was signed by him.

[31] The respondent explains that the upload of a personal surety is mandatory on its system in the absence of which the application is not allowed to be submitted back to the respondent. There is a personal surety tab which provided for the download of the surety. The fact that it had been submitted to the respondent means it had been so downloaded by the applicant. The deed of surety uploaded by the applicant was completed by hand, in pen and witnessed. Again, in reply, these allegations are met with a bald denial and reiteration of the applicant's version that he did not sign the suretyship.

[32] The respondent alleges particulars of an audit trail generated by its electronic system recording the occurrence of certain actions and the time it took place in respect of the application for credit. It includes, amongst others, the e-mail address to which the electronic credit application was sent, the date and time the credit application was first opened by the applicant and the date and time the respondent's terms and conditions were accepted in the application for credit. It recorded the full name of the signatory as being the applicant as well as his identity number. The respondent alleges this accord with Section C of the application for credit form, the surety document as well as the CIPC search for Hilton which was attached to the summonses. The audit trail further recorded the date and time the signatory's signature was confirmed and made valid as being 12 August 2020 at 4:13pm. The respondent explains this is the time an applicant hit the "Submit" button to return the completed credit application to the respondent together with all the attached mandatory documents. In reply, the applicant did not dispute the audit trail and the

correctness thereof. He stated he is unable to do so and avers the audit trial shows nothing more than that the documents were submitted.

[33] The applicant does not dispute that the signed special resolution uploaded by the applicant for credit is also mandatory. Indeed, it is annexed to the applicant's founding affidavit. Nor does he dispute the resolution lists the signatures of 5 members or directors of Hilton who attended the meeting authorising the applicant to sign all documents with regard to the credit application.

[34] The respondent alleges that the signature of one of the signatories to the special resolution, Mr Govindsami's, is the same signature as that of the second signatory to the deed of suretyship. Mr Govindsami is further alleged to be the other signatory to the credit application, where he is cited as the accountant. The signature at number 3 of the special resolution is alleged to be that of the first witness to the deed of suretyship. The deed of suretyship was witnessed by two signatories in Hilton's employ, who bore witness to the applicant's signing of the suretyship. In reply, the applicant merely notes the contents of the paragraphs in which these allegations are made. He states he never alleged that the witness signatures were forged or that no witnesses appended their signatures to the surety agreement. He again reiterates he did not sign the surety and that no signature appeared thereon, save for the witnesses and his initials at the bottom of the page. It is averred that none of this was brought to the attention of the court when the judgments were obtained. The remaining allegations are denied.

Conclusions

[35] A final judgment may be set aside in terms of common law principles or in terms of the provisions of rule 42. Once a judgment is granted, it is final and the judge becomes *functus officio*. At common law, a judgment cannot be rescinded or altered except where it was obtained by fraud or, on rare exception, *iustus error*.¹¹ In certain circumstances a judgment might be altered, supplemented or corrected, which is not relied upon by the applicant and does

¹¹ *Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough and Others* [2020] JOL 47818 (SCA) at [20]

not apply to the matters before me. Rule 42 for the most part has been held to be a restatement of the common law principles which in its ambit is procedural.¹²

[36] Where judgment by default was granted, it may be set aside in accordance with the provisions of rule 31(2)(b) upon good cause shown. Good cause usually will be satisfied if there is evidence of the existence of a substantial defence which the defendant intends to prosecute conscientiously once the rescission is granted, amongst others. The primary requirement is not for the applicant to convince the court of probabilities favouring its defence, though it must be shown to have some prospect of success.¹³ It is enough if an issue is revealed which is deserving of being tried.¹⁴ The burden of proving the existence of good cause by providing evidence of the existence of a substantial defence as well as a *bona fide* held desire to prosecute such defence and not with a view towards merely delaying a plaintiff's claim, lies squarely upon an applicant seeking rescission.¹⁵

[37] The court is clothed with a wide discretion to grant or refuse rescission which must be judicially exercised, having due regard to do justice between the parties.¹⁶

[38] In my view, having due regard to the applicant's purported defences and the facts and circumstances I have set out, the applicant has not met the requirements entitling him to a rescission of either the summary judgment granted in the first matter, nor the default judgment in the second matter. The prospects of success of the defences raised are remote to the extent that it cannot be said to show the existence of a *bona fide* defence.

[39] In *Childerley Estate Stores v Standard Bank of SA Ltd*¹⁷ it was held that a judgment induced by fraud cannot stand. The requirements for succeeding in

¹² *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at [11]

¹³ *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764J-765D confirmed in *Ingosstrakh v Global Aviation Investments (Pty)Ltd and Others* 2021 (6) SA 352 (SCA) at [21] where 'good cause' is considered in the context of rule 27(3)

¹⁴ *Riddles v Standard Bank SA* 2009 2 All SA 407 (T) at [9]

¹⁵ *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352Gff

¹⁶ Full bench in *City of Tshwane Metropolitan Municipality v Brooklyn Edge (Pty) Ltd* 2017 1 All SA 116 (GP) at [42]ff. In applications for rescission of a default judgment where Rule 31(2)(b) does not apply, the application may be governed by the provisions of Rule 42(1)(a) or the common law or both.

impugning a judgment fraudulently obtained are for the applicant to prove the respondent fraudulently, with the intent to mislead the court, gave incorrect evidence diverging from the true facts to the extent that the court, had it been aware thereof, would have given a different judgment. These principles were confirmed by the Supreme Court of Appeal in *Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough and Others*¹⁸

[40] The allegations that a fraud had been perpetrated in that the court had been misled into believing the surety had not been signed, beggars belief. The plea proffered by the applicant in the first matter did not contain any allegations of fact upon which the respondent might have assumed a denial of having intended to be bound as surety or that he would allege the surety offends against the *General Law Amendment* for lack of bearing his signature. In the absence of a disclosure by the applicant of the factual basis of a defence against the surety, it cannot be said the respondent was or could have been aware of what the applicant now alleges after the judgments had been granted. After all, the suretyship contains the applicant's initials, is signed by witnesses and was duly uploaded on the respondent's electronic system. It is not disputed that initials may signify signature by a surety.

[41] What is more, it is not disputed the applicant was authorised by special resolution to sign all documents on behalf of Hilton. Nor is it disputed some of the signatories to the special resolution signed the suretyship as witnesses to the applicant's signature of the suretyship. In my view, any contention the applicant had not appended his initials to the suretyship with the intention to be bound as surety is implausible, regard being had to the prevailing circumstances and the context in which he put his initials to the suretyship. It would require the court to believe that the respondent would have been expected to advance substantial credit to Hilton in the absence of security. I find such a proposition unlikely.

¹⁷ 1924 OPD 163

¹⁸ [2020] JOL 47818 (SCA) at [16] with particular reference to *Schierhout v Union Government* 1927 AD 94 at 98. *Rowe v Rowe* 1997 (4) SA 160 (SCA); [1997] 3 All SA 503 (A) at 504. *Makings v Makings* 1958 (1) SA 338; [1958] 1 All SA 510 (A) at 342H-345A.

[42] These are some of the facts and circumstances I alluded to which is strongly indicative of the respondent not having misled the court in the summary judgment proceedings, nor when taking default judgment. I can find no indication of the respondent having had the intention to mislead the court as alleged by the applicant or at all. I am not persuaded that a court, even had it been specifically informed of the indication in Section D of the application form that Hilton offered security, be it personal security or otherwise, judgment would not have been granted, the more so in the context of the facts and circumstances I have referred to.

[43] As regards the '*justa causa*' ground, Mr Naidoo argued on behalf of the applicant that if no fraud is found to exist, it is contended that no deed of suretyship was signed by the applicant and, as there is no valid suretyship between the parties which supports the orders granted, it follows there is no just cause or lawful ground upon which the orders were granted. During argument, Mr Naidoo made it clear that the applicant's reference to just cause was not *iustus error* in the sense of seeking to avoid the contract and repudiating his apparent consent to it. It is simply that firstly, no suretyship had been offered at all because he did not intend to do so and secondly it was not signed as a result of which no suretyship came into being.

[44] In *Childerley* it was held that a non-fraudulent misrepresentation is not a ground for setting aside a judgment. *Iustus error* can be a ground only in rare and exceptional circumstances. The court held:¹⁹

"We arrive at this position then that so far as *justus error* is concerned default judgments may in some cases be set aside under the Roman-Dutch Law on the ground of *justus error*, and that judgments, whether by default or not, may be set aside in the seven exceptional cases above-mentioned on the ground of *instrumentum noviter repertum*, though evidently some of those cases are nowadays obsolete and inapplicable. . . . There may be other exceptional circumstances. But I must say that I know of no such further general application of the doctrine of *justus error* to judgments as would entitle the vanquished party to bring an action to set aside a judgment only on the ground that the Court gave the judgment in *error*, even

¹⁹ At 168.

if such error was just and induced by a non-fraudulent misrepresentation made by the other party to the case.”

This was broadly confirmed in *Moraitis Investments (Pty) Ltd and Others v Montic Diary (Pty) Ltd and Others*.²⁰

[45] In *Vilvanathan and Another v Louw N O*²¹ a full bench of the Western Cape High Court confirmed the guiding common law principle of the demand for certainty and finality of judgments.²² The court noted the apparent distinction drawn in the Courts of Holland between rescission of default judgments granted without going to the merits of the dispute between the parties and rescission of final and definitive judgments. In the former, a court enjoyed wide powers of rescission. In the latter, the court being *functus officio*, judgments could only be set aside on the limited grounds mentioned in *Childerley*, namely fraud and exceptional cases of *iustus error*.²³ Having due regard to *De Wet and Others v Western Bank Ltd*²⁴ the following propositions are distilled by the judges:²⁵

“(1) *This court's common-law power to rescind its own judgments and orders, at least in cases where the merits of the dispute between the parties have not been gone into, is not confined to cases of fraud or the exceptional cases of justus error which are referred to in the Childerley case, supra, but may be exercised on wider grounds than those;*

(2) *Generally speaking, this court, like the Courts of Holland, is empowered to rescind its judgments and orders given in default of appearance 'on sufficient case shown'...: the word 'case' may be a misprint here for 'cause'; this is a discretionary power, the exercise of which is influenced by 'considerations of justice and fairness, having regard to all the facts and circumstances of the particular case'...;*

(3) *The applicant for rescission, who bears the onus in this regard, has to satisfy the court, inter alia, that 'there was some reasonably satisfactory*

²⁰ [2017] 3 All SA 485 (SCA); 2017 (5) SA 508 (SCA) at [13]

²¹ 2010 (5) SA 17 (WCC)

²² *Vilvanathan* at p.22H with reference to *Colyn*

²³ *Vilvanathan* at p 20Fff

²⁴ 1979 (2) SA 1031 (A) at 1042F- 1043A

²⁵ *Vilvanathan* at 21E-I

explanation why the judgment was allowed to go by default”

[46] Having regard to the facts and circumstances prevailing in respect of the suretyship and the signing of it, albeit by appending only his initials thereto, I find the applicant has failed to show good or sufficient cause for the rescission of the judgment in both matters. There simply is no *bona fide* defence indicated. I find that a valid suretyship came into being under the circumstances the applicant appended his initials to it. It follows that no *iusta causa* exists for the rescission of the judgments. I also can find no reason why the interests of justice between the parties demands the setting aside of either of the judgments granted against the applicant.

Striking out

[47] The respondent applied for the striking out of objectionable content in the founding affidavits to both matters in terms of rule 6(15). These pertain to allegations of fraud made against the respondent’s attorneys of record.

[48] Rule 6(15) allows for the striking out of any matter which is scandalous, vexatious or irrelevant. The court may not grant the application unless satisfied the applicant is prejudiced should it not be granted.²⁶

[49] The allegations complained of appears not to be irrelevant having regard to the fact that fraud is the basis upon which the applicant sought to have the judgments set aside. To my mind, it cannot be said the matter is vexatious in the sense of it being worded with the intention to harass or annoy.²⁷ It may well be construed to be scandalous in that, if not abusive, it quite possibly is defamatory of the respondent’s attorneys.²⁸

[50] I am not persuaded that the respondent is prejudiced by the offending allegations against its attorneys however egregious it may be. I and am not inclined to grant the applications for striking out. During argument I was informed that a claim for defamation had been instituted by the respondent’s

²⁶ *Van Zyl v Government of RSA* [2005] 4 All SA 96 (T) at [122]

²⁷ *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) at [28]

²⁸ *ibid*

attorneys in respect of the offending allegations. It has progressed beyond discovery. I am loathe to make any finding in striking out allegations which may be perceived as constraining any decision to be made by the court adjudicating upon the defamation claim.

Costs

[51] Ms Blumenthal submitted that an order be made *de bonis propriis* against the applicant's attorneys. She argued the applicant's case was hopeless and brought with the assistance of the applicant's attorneys, not caring whether the allegations made were true or false, in which case they acted recklessly or with gross negligence.

[52] In *Public Protector v South African Reserve Bank*²⁹ the constitutional court by majority held that a court is bound to secure a fair and equitable outcome in deciding awarding costs with reference to the circumstances of the case. It confirmed that a costs award falls within a court's discretion and may be awarded when a court wishes to mark its disapproval of the conduct of a litigant. Where the conduct of a litigant has prejudiced another party the award of a punitive costs order may be justified.³⁰

[53] Having regard to the facts in these matters, the allegations regarding fraud was ill advised and ill conceived. In my view, it deviated from the standard required to a disturbing degree, though not to the extent of warranting an order for costs *de bonis propriis*.

[54] Having regard to all of the above, I find that the applicant should pay the costs of the rescission applications on the scale as between attorney and client.

Order

[55] In case number 2022-031620, I order as follows:

²⁹ 2019 (6) SA 253 (CC) at [222]ff

³⁰ *Limpopo Legal Solutions v Eskom Holdings SOC Ltd* d [2017] JOL 38860 (CC) at [38]

1. The application for the rescission and setting aside of summary judgment against the applicant dated 24 May 2023 is refused and dismissed;
2. Costs of the application for rescission and setting aside of summary judgment to be paid by the applicant on the scale as between attorney and client;
3. The application to strike out is refused.

[56] In case number 2022-045734, it is ordered that:

- 1 The application for the rescission of judgment against the applicant dated 19 July 2023 is refused and dismissed;
2. Costs of the application for the rescission of judgment against the applicant to be paid by the applicant on the scale as between attorney and client;
3. The application to strike out is refused.


N. S. KRÜGER
NAME OF JUDGE

**ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

Electronically submitted

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **6 October 2025**.

For the applicant in both
matters :

Adv K Naidoo instructed by Maharaj Attorneys

For the respondent in both matters: Adv R Blumenthal instructed by NVDB Attorneys

Date of hearing and argument: 10 June 2025

Date of judgment: 6 October 2025

