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

CASE NO: 2022-053070

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED.

DATE: 20/11/2025

SIGNATURE:

In the matter between:

FERDINAND DIPPENAAR

Applicant

And

ZTE CORPORATION SOUTH AFRICA (PTY) LTD

Respondent

In Re:

ZTE CORPORATION SOUTH AFRICA (PTY) LTD

Plaintiff

And

BROAD SPECTRUM MINING (PTY) LTD

First Defendant

FERDINAND DIPPENAAR

Second Defendant

FIRSTRAND BANK LTD

Third Defendant

T/A FIRST NATIONAL BANK

JUDGMENT

TD SENEKE, AJ

INTRODUCTION

1. The applicant brought an application to seek the following orders:

“1. That the default judgment granted against the applicant on 30 July 2024 under the above Case Number 2022-053070 in favour of the respondent be and is hereby set aside.

2. That the applicant be given leave to file and serve a notice of intention to defend the main action within ten (10) days from date of the order referred to in paragraph 1 above.

3. That the respondent be ordered to pay the costs of the application in the event of same being opposed.”¹

ISSUES TO BE DETERMINED

2. Was the service proper? The applicant denies receiving the summons; the respondent alleges that the summons was served at a place where the defendant was employed as a director and had an office.²

3. Is there a *bona fide* defence?

3.1. the respondent’s position is that the applicant is responsible for the misappropriation of funds belonging to the respondent.

3.2. the applicant states that the money was not paid to him but to a company he worked for and the money was used to pay third parties for expenses.³

¹ Caseline 009-2 to 009-3

² Caseline 014-16

³ Caseline 014-16

4. When did BSM first discover that the money paid to it belonged to the respondent? When did the respondent first discover that the bank account it paid into belonged to BSM?⁴

5. Had the alleged claim against the applicant prescribed when summons was served?⁵

6. Was the money paid to the applicant? Did the applicant appropriate the money?⁶

7. Did BSM trade recklessly and if so did this cause the applicant to be responsible for the loss suffered by the respondent?⁷

BACKGROUND

8. The respondent issued summons against the applicant. The particulars of claim stated:

9. On or about 15 September 2016, the respondent placed a purchase order with a company known as Radio Network Solutions (Pty) Ltd (RNS) for the supply of equipment.⁸ RNS duly accepted the above purchase order from the respondent.

10. On or about 20 September 2018, and pursuant to the above purchase order the respondent paid the sum of R1 688 686.29 to the bank account listed in the purchase order held at First National Bank, namely the account held under account number 6[...], which the respondent believed was the bank account of RNS. This account shall be referred to herein as the “FNB account”.⁹

⁴ Caseline 014-16

⁵ Caseline 014-16 to 014-17

⁶ Caseline 014-17

⁷ Caseline 014-17

⁸ Caseline 002-6

⁹ Caseline 002-6

11. Unbeknown to the respondent, the FNB account was no longer held under the name of RNS, but had been transferred to, and was at that stage held under the name of Broad Spectrum Mining (Pty) Ltd (BSM).¹⁰

12. As a result, the payment made by the respondent that was intended to be made to RNS instead reached BSM, which was not the intended recipient.¹¹

13. The amount was not owing to BSM, which nevertheless appropriated the erroneous payment.¹²

14. In the alternative to the above, the applicant appropriated the erroneous payment, alternatively caused the erroneous payment to be appropriated.¹³

15. On or about 15 January 2020, at a meeting held between, among others, the respondent and BSM, duly represented by its director, Mr Nathan Mohammed, and its legal representative, Mr Premjith Supersad, admitted that:

15.1. BSM received the payment from the respondent which was intended for RNS.

15.2. BSM appropriated the sum erroneously received.

15.3. The respondent was entitled to have the incorrect payment returned to it by BSM.

15.4. BSM would refund the full amount to the respondent.¹⁴

16. Notwithstanding demand, BSM, alternatively the applicant, has failed to refund the sum due and payable to the respondent in accordance with the agreement reached on 15 January 2020 among the parties.¹⁵

17. On 13 June 2023, the respondent obtained default judgment against the applicant.

¹⁰ Caseline 002-6

¹¹ Caseline 002-6

¹² Caseline 002-6

¹³ Caseline 002-6

¹⁴ Caseline 002-7

¹⁵ Caseline 002-7

18. On 10 September 2024, the applicant initiated the current application for rescission.

CASE FOR THE APPLICANT

The applicant states that:

19. This application for rescission is brought in terms of Rule 42 of the Uniform Rules alternatively the common law. The criteria are that the applicant shows lack of wilful default when he failed to defend the summons and that he has a *bona fide* defence against the action brought by the respondent, ultimately that the judgment was erroneously sought or erroneously granted.¹⁶

Basis of Rescission

Reasonable explanation for the default

20. During July 2024, the applicant was contacted telephonically by a Captain Monaiwa of the South African Police Services (SAPS) and informed the applicant that together with his brother Benno Dippenaar were to attend the Sandton police station as they were required to provide SAPS with information regarding a charge against them.¹⁷

21. On or about 30 July 2024, the applicant together with his brother and attorney Mr Andre Kruger of Fluxmans Inc (Fluxmans), attended the Sandton police station.¹⁸

22. Captain Monaiwa of the SAPS showed the applicant and his brother a copy of the judgment that was in the docket.¹⁹

23. This was the first time that the applicant became aware of the judgment.²⁰

¹⁶ Caseline 009-7

¹⁷ Caseline 009-7

¹⁸ Caseline 009-7

¹⁹ Caseline 009-7

24. The applicant immediately requested Fluxmans to obtain a copy of the court file in respect of the judgment as the applicant did not have any other documentation with regards to the judgment. Fluxmans despite numerous attempts to communicate with the respondent's attorneys of record telephonically were unable to reach them. Fluxmans was only able to obtain access to the court's digital platform in which the judgment was granted on 30 July 2024.²¹

25. On 16 August 2024, after having obtained copies of all the process which led to the judgment from the CaseLines portal for the above matter, the applicant consulted with his attorney, Mr Alex Peral from Fluxmans (Mr Peral), for purposes of instructing him to bring this application.²²

Service

26. The applicant states that:²³

26.1. He has never received a summons under the above case number and only became aware that the judgment was granted on 30 July 2024;

26.2. Based on the purported return of service on the applicant, it seems that the respondent attempted to serve the summons on the applicant at 4[...] A[...] Road, Bedfordview c/o Protax Group on 2 December 2022.

26.3. At the time of service, the applicant had no involvement in Protax Group and it was not the applicant's place of employment nor was he carrying on business at that address or as part of Protax Group;

26.4. At that time of the purported service of the summons in the above matter, the applicant was (and remain until today) a director of Protax Business Advisory Service (Pty) Ltd, with its trading address being the applicant's residential address referred to above.

26.5. Albeit that Protax Business Advisory Service (Pty) Ltd's registered address as at 2 December 2022 was 4[...] A[...] Road, Bedfordview, being the

²⁰ Caseline 009-7

²¹ Caseline 009-7

²² Caseline 009-7 to 009-8

²³ Caseline 009-8 to 009-9

address of Protax Business Advisory Services (Pty) Ltd's auditors, the applicant was never provided with a copy of the summons by the Protax Group, being Protax Business Advisory Services (Pty) Ltd's auditors.

26.6. The applicant's company Protax Business Advisory Service (Pty) Ltd is a different company and separate legal entity from Protax Group. Protax Group was Protax Business Advisory Service (Pty) Ltd's auditors, and the applicant can only surmise that the respondent perhaps believed that the Protax Group and Protax Business Advisory Service's (Pty) Ltd were one and the same which is incorrect.

26.7. Protax Group had no authority to accept service on the applicant's behalf and in any event could not accept service of a summons on his behalf when he was cited in his personal capacity. Protax Group did not provide the applicant with a copy of the summons received by it on 2 December 2022, as it was not obligated to as it was only the auditors of Protax Business Advisory Service (Pty) Ltd and not an address where service could be effected on his personal capacity. The applicant was completely unaware of any such summons against him.

26.8. In the circumstances, the applicant would not have been aware of any summons being served as alleged in the return of service as the applicant was not employed by Protax Group and for reasons unbeknown to him, Protax Group failed to inform him of the summons served on its offices on 2 December 2022.

26.9. In the circumstances the application for default judgment was erroneously sought and granted as the court was not aware that the address for service on the applicant was not a valid address.

Bona Fide Defence

27. The applicant is not indebted to the respondent in the amount claimed or at all, he did not receive the monies erroneously paid by the respondent and the respondent has no cause of action against the applicant either in delict or in contract. The applicant was simply a director of Broad Spectrum Mining (Pty) Ltd at the time.²⁴

²⁴ Caseline 009-9

28. In any event, it seems that at the time of the purported service of the summons on the applicant, which was not valid for the reasons set out above, that any claim the respondent alleged to have as against him had prescribed.²⁵

29. In this regard, with reference to the respondent's particulars of claim, on or about 15 September 2018, the respondent alleges to have made an erroneous payment of R1,688,686.29 to Broad Spectrum Mining (Pty) Ltd (BSM) thinking that it was paying Radio Network Solutions (Pty) Ltd.²⁶

30. During September 2018, being the month in which the respondent effected the so called erroneous payment of R1,688,686.28 to BSM, the applicant was a director of BSM. The applicant, however, resigned as a director and employee of BSM in September 2019.²⁷

31. The respondent alleges to have had a meeting between itself and BSM on or about 15 January 2020 (the year after the applicant's resignation as director).²⁸

32. Based on what is recorded in the minutes of the meeting between the respondent and BSM, and relied on by the respondent, BSM acknowledged its liability towards the respondent for the repayment of the amount of R1,688,686.28. BSM was, based on the minutes, represented by its director Mr Nathan Mohammed and its legal representative Advocate Premjith Supersad.²⁹

33. It seems to have been an opportunistic approach adopted by the respondent as it has no basis to claim anything from the applicant in his personal capacity. The respondent did not even cite any of the other directors of BSM and chose to only target the applicant for unknown reasons.³⁰

²⁵ Caseline 009-9

²⁶ Caseline 009-9

²⁷ Caseline 009-10

²⁸ Caseline 009-10

²⁹ Caseline 009-10

³⁰ Caseline 009-11

34. The respondent clearly attempted to introduce a new, non-pleaded cause of action, against the applicant in his personal capacity on the basis that the applicant purportedly contravened the Companies Act alternatively, he together with BSM purportedly appropriated the funds. This cannot be further than the truth. The respondent's supplementary affidavit in support of default judgment states that minutes of a meeting record that the applicant informed the respondent that the monies were received by BSM and that he had said that he appropriated the erroneous payment and used it for business expenses. The respondent states that the meeting minutes are annexed to that supplementary affidavit as AP2. The meeting minutes show that the meeting was held in January 2020 after the applicant had resigned and also that he was not present at the meeting. The minutes also record that BSM had thought that the payment was from a shareholder as they were expecting monies from a shareholder to be invested and that is why they appropriated the monies for BSM expenses. Obviously the respondent (plaintiff) confused the applicant with someone else who was at the meeting.

CASE FOR THE RESPONDENT

35. The respondent respectfully submits that summons were properly served on the applicant for the purposes of Rule 4 of the Uniform Rules of Court, and that the applicant was personally aware of the summons filed for the reasons set out below.³¹

36. On or about 28 November 2022, Mr Dali Ngalo of the respondent's attorneys telephoned the offices of Protax Group (Pty) Ltd, and spoke with the applicant's secretary, who confirmed that the applicant was employed at 4[...] A[...] Road, Bedfordview, and indicated that he would be present in his office the following day.³²

37. It bears mention that both Protax Business Advisory Service (Pty) Ltd, of which the applicant is a director, and Protax Group (Pty) Ltd and Protax Business Advisory Service (Pty) Ltd, have their registered address situated at 4[...] A[...] Road, Bedfordview. It may be that, when Mr Ngalo was advised that the applicant was

³¹ Caseline 010-4

³² Caseline 010-4

employed at that address, reference was made to his employment under Protax Business Advisory Service and not Protax Group.³³

38. Regardless of the name of the applicant's employer, it would appear that, insofar as the summons were served on the address at 4[...] A[...] Road, Bedfordview, they would be served at the place where the applicant was normally employed and where he held offices. Service would therefore be effective at this address as per Rule 4(1)(a)(ili) of the Uniform Rules of Court.³⁴

39. Had the sheriff been informed that the applicant no longer worked at 4[...] A[...] Road, then the sheriff would not be able to serve the summons in terms of Rule 4(1)(a)(iii) and would not have attempted to do so. The sheriff's return of service would then show that service could not be effected at that address.³⁵

40. There is nothing to suggest that the summons did not come to the attention of the applicant. The respondent respectfully submit that the applicant deliberately ignored the summons that were received to frustrate the proceedings brought against him, and that he was in wilful default of the summons.³⁶

41. The high watermark of the applicant's case is that the applicant allegedly "had no involvement in Protax Group" and that he was not carrying on business at the address of 4[...] A[...] Road, Bedfordview.³⁷

42. Given that the applicant is a director of Protax Business Advisory Services, he may be said to be an employee of that company. Service on the registered address of that company should ordinarily come to his attention.³⁸

No Bona Fide Defence

³³ Caseline 010-4 to 010-5

³⁴ Caseline 010-5

³⁵ Caseline 010-6

³⁶ Caseline 010-6

³⁷ Caseline 010-7

³⁸ Caseline 010-7

43. The respondent's claim against the applicant is set out in paragraph 10 of the particulars of claim in this matter. It was that the applicant, who was a director of BSM, had personally appropriated the sum that was erroneously paid by the respondent into the bank account of BSM.³⁹

44. Over the course of September 2018 to December 2018, a number of payments were made from BSM's account to Protax Business Advisory Services, of which the applicant was a director (and still is a director). This is clear from the bank statements of BSM. These payments were made as follows:

- 44.1. 28 September 2018: R150 000.00.
- 44.2. 30 October 2018: R120 000.00.
- 44.3. 19 November 2018: R13 330.80.
- 44.4. 30 November 2018: R137 000.00.
- 44.5. 20 December 2018: R120 000.00.⁴⁰

45. A sum of R540 330.80 was therefore paid out of BSM to a company controlled by the applicant, for no ostensible purpose. Even more importantly, before the erroneous payment was made by the respondent to BSM, BSM only had approximately R4 000 in its account. This demonstrates that the monies that were paid out were monies that belonged to the respondent, and which the respondent could recover by way of a quasi-vindictory claim.⁴¹

46. At worst for the respondent, the applicant was liable for trading recklessly under section 22 of the Companies Act 71 of 2008, or was guilty of breaching his duties as a director and enriching himself at the expense of the company, under section 77 of the Companies Act. He is liable under section 424 of the Companies Act 61 of 1973.⁴²

47. It is evident that the applicant transferred, or caused the transfer of, or received, directly or indirectly, the funds belonging to the respondent. Because the

³⁹ Caseline 010-8

⁴⁰ Caseline 010-8 to 010-9

⁴¹ Caseline 010-9

⁴² Caseline 010-9

respondent's claim is quasi-vindictory, the claim has not prescribed, and the respondent had (and still has) a strong claim against the applicant, and the applicant has no bona fide defence to the claim.⁴³

LEGAL FRAMEWORK

Reasonable explanation for default

48. In *Harris v ABSA Bank Ltd Volkskas*,⁴⁴ the court stated that:

"[8] Before an applicant in a rescission of judgment application can be said to be in "wilful default" he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions.

*[9] A decision freely taken to refrain from filing a notice to defend or a plea or from appearing, ordinarily will weigh heavily against an applicant required to establish sufficient cause. However, I do not agree that once wilful default is shown the applicant is barred; that he or she is then never entitled to relief by way of rescission as he or she has acquiesced. The Court's discretion in deciding whether sufficient cause has been established must not be unduly restricted. In my view, the mental element of the default, whatever description it bears, should be one of the several elements which the court must weigh in determining whether sufficient or good cause has been shown to exist. In the words of Jones J in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 708G,*

' . . . the wilful or negligent or blameless nature of the defendant's default now becomes one of the various considerations which the courts will take into account in the exercise of their discretion to determine whether or not good cause is shown'."

⁴³ Caseline 010-9

⁴⁴ 2006 (4) SA 527 (T).

49. In *casu*, the applicant has explained that the summons was served on Protax Group and not at his residential address as he was being sued in his personal capacity. Protax Business Advisory Services of which applicant is a director's registered address is the same as that of Protax Group who are the auditors of Protax Business Advisory Services.

50. The applicant is neither an employee of Protax Group nor Protax Advisory Services. The respondent had a duty to ascertain that service was properly effected in terms of Rule 4(1)(a)(iii) of the Uniform Rules of Court.

51. It is apparent in this matter that the respondent made assumptions that are not supported by facts. The respondent assumed that the applicant was the employee of Protax Business Advisory Services on the basis that he is a director. The respondent assumed that the person that their attorney, Mr Ngalo spoke to was the applicant's secretary and not his brother's secretary. That the Dippenaar that was being referred to was the applicant. These assumptions unfortunately resulted in defective service. The confirmatory affidavits of Benno Dippenaar, Kristelle van der Berg and Kerishe Chetty⁴⁵ support the version of the applicant that he was not the employee of Protax Business Advisory Services and that Kristelle van der Berg was not his secretary but was Benno Dippenaar's secretary. This is a typical case of miscommunication and failure to ascertain proper facts.

52. 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 and Others*⁴⁶ when dealing with the absence of an applicant in rescission applications under Rule 42(1)(a), the Constitutional Court clarified that:

"[56] ...However, the words "granted in the absence of any party affected thereby", as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent.

⁴⁵ Caseline 011-65 to 011-67 and 011-76 to 011-77 and 011-69 to 011-70

⁴⁶ 2021 (11) BCLR 1263 (CC) (17 September 2021)

[57] At the outset, when dealing with the “absence ground”, the nuanced but important distinction between the two requirements of rule 42(1)(a) must be understood. A party must be absent, and an error must have been committed by the court. At times the party’s absence may be what leads to the error being committed. Naturally, this might occur because the absent party will not be able to provide certain relevant information which would have an essential bearing on the court’s decision and, without which, a court may reach a conclusion that it would not have made but for the absence of the information. This, however, is not to conflate the two grounds which must be understood as two separate requirements, even though one may give rise to the other in certain circumstances. The case law considered below will demonstrate this possibility.

...

[60] ... Whilst that matter correctly emphasises the importance of a party’s presence, the extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by that same act), plead the “absent victim”. If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence).” (own emphasis)

53. In this matter, I reach a conclusion that the applicant’s presence was precluded due to defective service that was incorrectly effected on him which did not conform to the Uniform Rules.

Bona fide defence

54. In the Harris v ABSA Bank,⁴⁷ Moseneke J stated as follows:

“[10] A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation.

“Instead, the explanation, be it good, bad or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole”.”

55. The applicant stated that he is not indebted to the respondent in the amount claimed or at all, he did not receive the monies erroneously paid by the respondent and the respondent has no cause of action against the applicant either in delict or in contract. The applicant was simply a director of Broad Spectrum Mining (Pty) Ltd at the time.

56. In any event, it seems that at the time of the purported service of the summons on the applicant, which was not valid for the reasons set out above, that any claim the respondent alleged to have as against him had prescribed.

57. In this regard, with reference to the respondent's particulars of claim, on or about 15 September 2018, the respondent alleges to have made an erroneous payment of R1,688,686.29 to Broad Spectrum Mining (Pty) Ltd (BSM) thinking that it was paying Radio Network Solutions (Pty) Ltd.⁴⁸

58. It seems to have been an opportunistic approach adopted by the respondent as it has no basis to claim anything from the applicant in his personal capacity. The respondent did not even cite any of the other directors of BSM and chose to only target the applicant for unknown reasons.⁴⁹

Respondent's dispute of *bona fide* defence

⁴⁷ 2006 (4) SA 527 (T).

⁴⁸ Caseline 009-9

⁴⁹ Caseline 009-11

59. The respondent relies on paragraph 10 of its particulars of claim that the applicant has misappropriate the funds.

60. The respondent has also sought to introduce a new cause of action in attempting to hold the applicant liable on the basis of some funds having been transferred from BSM to Protax Business Advisory Services.

61. In his replying affidavit, the applicant dealt with this issue as follows, at paragraph 37:

“Again we see the twisting of evidence by plaintiff’s deponent Avinash Pather when he claims in the answering affidavit to this application that it “is clear from the bank statements of BSM” that “a number of payments were made by from BSM’s bank account to Protax Business Advisory Services” and then he cites the list of payments being R150 000, R120 000, R13 330, R137 000 and R120 000 and concludes that “A sum of R540 330.80 was therefore paid out of BSM to a company controlled by the applicant, for no ostensible purpose”. This is not true. The bank statements show that the list of payments that Pather cites were made to “Protax”, meaning BSM’s accountants Protax Financial Administrators (Pty) Ltd, a member of the Protax Group and a company of which I am not and have never been a shareholder, director or employee of and of which I have never been in control.”⁵⁰

62. The respondent has also sought to introduce a new cause of action relating to reckless conduct in the part of the applicant in terms of section 22 of the Companies Act 71 of 2008.

63. The version of the respondent falls within the realm of speculation which lacks factual basis. The respondent did not bother to verify the details of the account to which the amounts were transferred from BSM to Protax Financial Administrator (Pty) Ltd, a member of the Protax Group of which the applicant is not a director or has no

⁵⁰ Caseline 011-11

interest therein. This speculation is contrary to the version of the applicant that the funds were used for payroll and not for the benefit of the applicant. There are no facts to support the speculative assertion that the applicant appropriated the funds.

64. The respondent has sought to rely on *actio rei vindicatio* to counter the defence of prescription which has been raised by the applicant.

65. The cases such as *Roestof v Cliffe Dekker Hofmeyer Inc*⁵¹ have dealt with this aspect decisively. There is no claim for *actio rei vindicatio* in respect of money. The court held the following:

*“Money paid into a bank account becomes the property of the bank. The account holder usually becomes the creditor of the bank for the amount so deposited into his account. Stolen money that is paid into the bank account of a bona fide third party and which has become mixed with the money of the third party cannot be claimed from the third party using the rei vindicatio. Where the money is held in a dedicated fund and is still identifiable as the money that was deposited into the account, the original owner can obtain an interdict to prevent the account holder from using the money until it can be established who is entitled to it.”*⁵²

66. In the matter of *Keet*⁵³ and *Smit*,⁵⁴ both of which are Supreme Court of Appeal cases, *actio rei vindicatio* has been invoked in the instance of claiming a moveable like a motor vehicle or a tractor.

67. In the matter of *Keet*,⁵⁵ the SCA held that:

⁵¹ (34306/2010) [2010] ZAGPPHC 219; 2013 (1) SA 12 (GNP) (15 December 2011)

⁵² English translation of the judgment which is in Afrikaans. The Law Reports: January 2013 (1) The South African Law Reports (pp 1 – 322); [2012] 4 The All South African Law Reports December no 1 (pp 485 – 605) and no 2 (pp 607 – 689) Heinrich Schulze BLC LLB (UP) LLD (Unisa) is a professor of law at Unisa.

⁵³ Absa Bank Limited v Keet (817/2013) [2015] ZASCA 81; 2015 (4) SA 474 (SCA); [2015] 4 All SA 1 (SCA) (28 May 2015)

⁵⁴ Ronel Noleen Smit v Calvin Kleinhans (case no 917/2020) [2021] ZASCA 147 (18 October 2021)

⁵⁵ Absa Bank Limited v Keet (817/2013) [2015] ZASCA 81; 2015 (4) SA 474 (SCA); [2015] 4 All SA 1 (SCA) (28 May 2015)

“[20] In my view, there is merit in the argument that a vindicatory claim, because it is a claim based on ownership of a thing, cannot be described as a debt as envisaged by the Prescription Act. The high court in Staegemann (para 16) was correct to say that the solution to the problem of the prescription is to be found in the basic distinction in our law between a real right (jus in re) and a personal right (jus in personam). Real rights are primarily concerned with the relationship between a person and a thing and personal rights are concerned with a relationship between two persons. The person who is entitled to a real right over a thing can, by way of vindicatory action, claim that thing from any individual who interferes with his right. Such a right is the right of ownership. If, however, the right is not an absolute, but a relative right to a thing, so that it can only be enforced against a determined individual or a class of individuals, then it is a personal right.”

68. In the matter of *Smit*,⁵⁶ the SCA held that:

“[8] The objective of the rei vindicatio is to restore physical control of the property to the owner, with ownership forming the basis for such a claim. Three requirements must be met for the rei vindicatio to be successfully invoked In this case it is common cause that the vehicle existed and that it was in the possession of Mr Kleinhans, thus leaving Ms Smit to prove ownership. In addition, it is incumbent upon her to prove that Mr Kleinhans’ right to be in possession of the vehicle was lawfully terminated.”

69. In the case in *casu*, I have no hesitation in coming to the conclusion that the applicant has raised bona fide defence.

CONCLUSION

70. I make a finding that the applicant has made a case for rescission in terms of Rule 42(1)(a) and accordingly, the order of 13 June 2023 is rescinded and the applicant is afforded an opportunity to defend the summons.

⁵⁶ Ronel Noleen Smit v Calvin Kleinhans (case no 917/2020) [2021] ZASCA 147 (18 October 2021)

The order:

I make the order in terms of the draft order which is uploaded on Caseline 013-4.

TD SENEKE AJ

Acting Judge of the High Court
Gauteng Division, Pretoria

Appearances

For applicant : Advocate Rosalind Stevenson

Instructed by : Fluxmans Inc

For respondent: Advocate O Ben-Zeev

Instructed by : Teng (Hung-Han) Inc T/A Simplex Law