

REPUBLIC OF SOUTH AFRICA



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

Case Number: **2022-027413**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
DATE 14 January 2026	SIGNATURE

BEFORE THE HONOURABLE JUSTICE, AUCAMP AJ

In the matter between:

ABEDAIR AVIATION LIMITED

First Applicant

ADRIAN WILCOX

Second Applicant

And

NATIONAL AIRWAYS CORPORATION (PTY) LTD

Respondent

JUDGMENT

- [1] The applicants in this application for leave to appeal, the applicants in the application seeking a declaratory order alternatively the rescission of the judgement granted by Modiba J on 26 November 2018 and which application I have subsequently dismissed, makes application for leave to appeal against the said dismissal. The application for leave to appeal is founded upon three grounds.

Ground 1: Jurisdiction in respect of the First Applicant

- [2] The applicants submit that the court erred in law and/or misdirected itself in finding that the cause of action of the respondent, is arrear rentals and ancillary charges arising from the lease agreements, yet nonetheless holding that this Court had jurisdiction over the first applicant, despite the respondent's failure to plead and prove the jurisdictional facts linking the lease-based claim to this Court.
- [3] The applicants argue that on the respondent's own papers, the domicilium elected by the first applicant in each lease is in Nairobi, Kenya, and no facts were alleged establishing where the leases were concluded, performed, or breached, nor any other connecting factor sufficient to found jurisdiction.
- [4] The court accordingly erred in dismissing the declarator of nullity and/or rescission, at least insofar as it concerned the first applicant.
- [5] Prior to considering this ground for leave to appeal, Adv Hollander for the respondent during argument of this application, insisted that the applicants are correct and that the cause of action relied upon in respect of the application for default judgement before Modiba J, indeed consisted of or was confined to the second deed of settlement (in relation to the first applicant) and the deed of suretyship (in relation to the second applicant). Put differently, the cause of action was not as I found, predicated on arrear rentals and ancillary charges, as provided for in terms of inter alia the relevant lease agreements. It therefore seems that I erred in considering the application and more specifically the issue of the court's jurisdiction with reference to the lease agreements and instead should have considered it with reference to second deed of settlement and the deed of suretyship. Entirely irrelevant to the determination of this application, the now conceded error also calls for the withdrawal of certain remarks I made regarding the preparation of the respondent's papers, which I do.
- [6] However, does this error result in me granting the application for leave to appeal? The answer must be in the negative. It is trite that an appeal lies against the judgement and/or order granted and not against its reasons.¹ Should it be established that in terms of the second deed of settlement and the deed of suretyship that Modiba J had the necessary jurisdiction to have entertained the application for default

¹ Western Johannesburg Rent Board and Another v Ursual Mansions (Pty) Ltd 1948 (3) SA 353 (A) at 355; Cape Town Empowerment Trust Ltd v Fisher Hoffman Sithole [2013] ZASCA 16; [2013] 2 All SA 629 (SCA); 2013 (5) SA 183 (SCA) at para 39

judgement, the obvious error made in this instance will not result in leave to appeal being granted.

- [7] It is common cause that both the second deed of settlement and the deed of suretyship contain the jurisdictional provisions, i.e (a) any and all disputes between the parties would be governed by the relevant and applicable South African laws, (b) any and all disputes would be adjudicated in the appropriate courts of law and (c) the parties irrevocably submitted themselves to the jurisdiction of the relevant and applicable South African courts. Furthermore, both the settlement agreement and the deed of suretyship, provide for the appointment by the applicants of a "Process Agent", in South Africa, more specifically, with an address as their chosen domicilium within the jurisdiction of this court. The parties finally on this aspect expressly agreed that the purpose of the appointment of the Process Agent is to allow for service of inter alia of all process on him / her on behalf of the first and second applicants. There is no dispute that service was effected on the Process Agent at the *domicilium* address.
- [8] With reference to inter alia *Ex Parte Hay Management Consultants (Pty) Ltd*² and *Ingosstrakh v Global Aviation Investments (Pty) Ltd*³ in considering the court's jurisdiction having entertained the application for default judgement, I remain of the view that the respondent had established the court's jurisdiction and that there exists no reasonable prospects of the ground of appeal succeeding.

Ground 2: Jurisdiction against the Second Applicant—material not before Modiba J / jurisdiction not established at commencement

- [9] The applicants further submit that the court erred in upholding Modiba J's order and dismissing the declarator/rescission where the respondent did not establish the court's jurisdiction at the commencement of the default judgement proceedings and on the papers that served before Modiba J.
- [10] The jurisdictional clause relied upon, clause 10.7 of the deed of suretyship, so the applicants argue, was not contained in the version of the deed, annexure FA28 that served before Modiba J. The relevant document/version was only introduced in the present proceedings with leave of this court. It was impermissible to sustain Modiba J's jurisdiction and order retrospectively by reference to material not before her.

² 2000 (3) SA 501 (W) at 508E – I; 511H

³ (934/2019) [2021] ZASCA 69; [2021] 3 All SA 316 (SCA); 2021 (6) SA 352 (SCA) (4 June 2021)

Accordingly, the court erred in dismissing the declarator and/or rescission, at least in respect of the second applicant.

- [11] Properly considered, the objection or ground raised in this instance, is not whether Modiba J, objectively had the required jurisdiction but rather whether the respondent had proved the court's jurisdiction. The applicants do not dispute that the page of the agreement in question containing clause 10.7 indeed existed. This much is true when the respondent presented the entire deed of suretyship at the hearing, which version contained the page initially omitted before Modiba J.
- [12] The omission of the relevant page before Modiba J, considered in isolation from the other grounds relied upon in the application, does not constitute a basis from which to grant the declaratory relief and/or the rescission of judgement in that it does not constitute a triable issue for purposes of a subsequent trial hearing. Once the declaratory relief and/or the rescission is granted, the issue becomes moot in view of the fact that, as I have already stated, it is common cause that the page is in existence and that it contains what the respondent contends. Had the applicants challenged the existence of or the legality of the page and/or the deed of suretyship, unrelated to the purported challenge in the terms of the General Law Amendment Act, Act 62 of 1955, it may have been a different story. However, the applicants have not challenged my findings with reference to the said Act. This leaves only Rule 42 of the Uniform Rules of Court.
- [13] Rule 42 caters for mistakes. In general, terms a judgement is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgement and which would have induced the judge, if aware of it, not to grant the judgement.⁴
- [14] The omission of the referred to page, given the fact that the necessary allegations pertaining to the issue of jurisdiction were contained in the founding papers of the respondent, does not trigger the jurisdictional requirements set out in Rule 42. As such, I find that there is no reasonable prospects of success as far as the second ground of appeal is concerned.

⁴ Nyingwa v Moolman NO 1993 (2) SA 508 (Tk) at 510D – G

Ground 3: Rescission—failure to adjudicate / inadequate engagement and reasons

- [15] Firstly, the applicants submit that the court erred in concluding that the application advanced legal grounds or points of law only and in consequence failed to entertain and determine the rescission application as a self-standing alternative to the declarator.
- [16] The applicants argue that they have raised substantive rescission grounds, including intended reliance on prescription, continuing dispute of the claims, and the alleged reliance on inadmissible hearsay evidence which the court did not properly adjudicate and/or rejected without adequate reasons. The court accordingly erred in dismissing the rescission application and, in doing so, denied the applicants a fair adjudication of the issues placed before it.
- [17] At the outset I find no merit to this objection. A proper consideration of my judgement reveals that I placed more emphasis on the alternative relief, i.e. the application to rescind rather than the declaratory relief. Having dismissed the application, I did so in respect of both the primary and the alternative relief.
- [18] As previously stated, the applicants briefly alluded to two additional issues: (a) prescription of the debt, and (b) the reliance on allegedly inadmissible evidence in obtaining the default judgment, specifically, a claim that certain confirmatory affidavits from the respondent's witnesses were not before the court at the time of judgment. However, and as was put to Adv Tshikila during argument in the present application for leave to appeal, these points were not seriously pursued in his heads of argument or during argument. Adv Hollander, equally confirmed this to have been the position.
- [19] However, since I have made a finding that these further points are without merit, I will briefly state the reasons for such a finding.

[i] Prescription

- [20] Firstly, the applicants were required to at the very least allege the date of inception of the period of prescription.⁵ An intention to raise prescription as a defence is wholly insufficient for purposes of an application for rescission or in support of the declaratory relief.

⁵ *Gericke v Sack* [1978] 2 All SA 111 (A), 1978 (1) SA 821 (A); *Lancelot Stellenbosch Mountain Retreat (Pty) Ltd v Gore NO and Others* ZASCA 37

[21] Secondly, the applicants suggested that some or all of the respondent's claim may have become prescribed. However, the timeline of events demonstrates that the debt was repeatedly acknowledged and restructured, which would have interrupted prescription. The second settlement agreement concluded in June 2015 expressly acknowledged the debt as at 1 June 2014, and the second applicant's suretyship was signed on the same day. A part payment in the amount of US\$40,000 was made in September 2014 and thereafter the aircraft sale agreement was concluded in November 2015 / March 2016 with a calculation of the remaining balance in 2016. The respondent's final demand was delivered in August 2016 and even later communications in 2017 showed the debt was treated as outstanding through those years. The default judgment was obtained in late 2018, well within three years of the last acknowledgment.

[ii] Procedural / "Evidence" Issue

[22] The applicants argue that Modiba J had before her inadmissible or incomplete evidence when she granted the default judgment, specifically that confirmatory affidavits of key witnesses of the respondent were not presented to the court. This appears to refer to an allegation that although the respondent's founding affidavit in the default application made reference to attached confirmatory affidavits, those may not have been uploaded or have been physically before the court on CaseLines at the hearing. The applicants posited that reliance on such missing confirmations could invalidate the judgment.

[23] An issue relevant to this point is my finding that the applicants did not place any fact, material to the application, in dispute and instead adopted the approach that even on the papers of the respondent, that there were several legal challenges or flaws to its case. The notice for application for leave to appeal as well as the submissions made by and on behalf of the applicants, seems to suggest that is incorrect. I had the opportunity to look at the papers again and I unable to agree with the contention. As such, whether the confirmatory affidavits did serve before Modiba J or not is of no consequence.

[24] The aim of an application for rescission of judgement is not about punishing a litigant for failing to comply with procedural rules. The true enquiry is whether the explanation for the default, together with the party's conduct, whether wilful, negligent, or otherwise, indicates the absence of a *bona fide defence*, and therefore that the application itself is not genuine. The discretion to grant rescission must be exercised

by balancing the interests of both parties while promoting the proper administration of justice. This requires weighing, on the one hand, the importance of upholding judgments properly obtained in accordance with procedural rules, and, on the other, the need to prevent injustice by ensuring that a judgment is not enforced where it was wrongly or prematurely granted in the absence of a party whose defence was never heard.⁶

[25] In *Mafuna v Lungwangwe*⁷ Brooks AJ summarised the court's approach to an application for a rescission of judgement as follows:

"[6] In an application of this nature, it is incumbent upon an applicant to place evidence before the court which demonstrates the following:

1. He or she must give a reasonable explanation for his/her default, if default is wilful or due to gross negligence, the court should not come to his or her assistance.
2. The application must be *bona fide* and not made with the intention of nearly delaying the plaintiff's claim.
3. The applicant must show that he or she has a *bona fide* defence. It is sufficient if he or she makes out a *prima facie* defence which does not deal fully with the merits or produce evidence that the probabilities favour the applicant. [HDS Construction (Pty) Ltd v Wait 1979 (2) SA 298 (E) 300F – 301C; Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) 476 – 477]

[7] In amplification of the first requirement of an application for rescission, it has been held that the explanation for the default must be sufficiently full to enable the court to understand how it really came about. [Silver v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A]

[8] Whilst it is for the applicant to give a reasonable explanation for his or her default, the *onus* of proof to establish wilful default rests on the respondent. [Mahomed Abdulha v Chochan 1933 (MPD) 334]

[9] The requirement that an applicant show the existence of a substantial defence does not mean that he or she must show a probability of success. It is sufficient if he or she shows a *prima facie* case, or the existence of an issue which is fit for trial. [Sanderson

⁶ Harris v Absa Bank Ltd t/a Volkskas 2003 JDR 0412 (T)

⁷ 2015 JDR 2019 (ECM) at [6] to [11]

Technitool (Pty) Ltd v Intermenua (Pty) Ltd 1980 (4) SA 573 (W)]. In this regard, the following principles are useful:

- 1.1.1. "... judgement by default is inherently contrary to the provisions of section 34 of the Constitution. The section provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. Therefore, in my view, in weighing up facts for decision, the court must, on the one hand balance the need for an individual who is entitled to have access to court, and to have his or her dispute resolved in a fair public hearing, against those facts which led to default judgement being granted in the first place. In its deliberation will no doubt to be mindful, especially when assessing the requirement of reasonable cause being shown, that while amongst others this requirement incorporated the existence of a *bona fide*, the court is not seized with a duty to evaluate the merits of such defence. The fact that the court may be endowed about the prospects of the defence to be advanced, is not a good reason why the application should not be granted. That said however the nature of defence advanced must not be such that a *prima facie* amounts to nothing more than a delaying tactic on the part of the applicant." [RGS Properties (Pty) Ltd v Ethekwini Municipality 2010 (6) SA 572 (KZD) 575G – 576C].

- [10] In considering the proper approach to be adopted in the evaluation of the evidence set out in the affidavits, it is necessary to consider the nature of the relief sought. The effect of rescission would be to render the order a nullity. Neither advantage nor disadvantage can flow there from. The applicant is entitled to claim that that status ante be restored. [Securiforce CC v Ruiters 2012 (4) SA 525 (NCK) 216D – E]. In my view, the grant of the rescission can be lightened to the grant of interim relief and a proper approach is to take the facts set out by the applicant together with any facts set out by the respondent if the applicant cannot dispute and to determine whether, on those facts, the applicant is entitled to the relief. [Spur Steak Ranches Ltd & Others v Saddles Steak Ranch, Clairmont and Another 1996 (3) SA 706 (C) 714E] 2015 JDR 2019 page 2].

- [11] In evaluating the evidence placed before the court in affidavits, it is useful to bear in mind the following two principles: firstly, the court has a wide discretion in evaluating "good cause" in order to ensure that justice is done. [Wahl v Prinswil Beleggings (EDMS) Bpk 1984 (1) SA 457 (T)]; secondly, the object of rescinding the judgement is "to restore a chance to heir a real dispute" [Lazarus v Nedcor Bank Ltd; Lazarus v Absa Bank 1999 (2) SA 782 (W)]"

- [26] Additionally, in the absence of a factual dispute, the presence or absence of confirmatory affidavits is moot, the founding affidavit itself was properly before the

court and the applicants have not raised any genuine dispute of fact which they seek to pursue at trial.

THE TEST

[27] Section 17(1) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be granted if the court is satisfied that the appeal “*would have a reasonable prospect of success*” or that there is some other compelling reason for the appeal to be heard. Section 17(1) raised the threshold for leave to appeal and it is not enough to show that another court *could* come to a different conclusion. There must be a realistic chance that the appeal *will* succeed. In other words, a mere possibility of success or an arguable case is insufficient. There must be a sound, rational basis to conclude that the appeal would likely succeed on the merits. The Supreme Court of Appeal has repeatedly emphasized that this test is “*stringent*” and should be applied rigorously. If the applicant cannot demonstrate a reasonable (not remote) prospect that another court would reach a different result, then leave to appeal must be refused. Only if such prospects are shown (or a truly compelling reason exists, e.g. an important point of law or public interest) should leave be granted.⁸

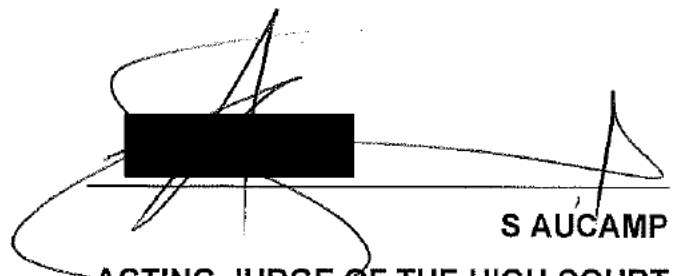
[28] For all of the reasons contained herein I am of the view that the applicants have not demonstrated that the appeal would have a reasonable prospect of success and/or that there are any other compelling reasons for the application for leave to appeal to be granted.

RELIEF

[29] In the result I make the following order:

- (a) The application for leave to appeal is dismissed.
- (b) The applicants, jointly and severally, the one paying, the other to be absolved, are ordered to pay the respondent’s costs of this application for leave to appeal, such costs to be taxed on the attorney and client scale.

⁸ MEC for Health, Eastern Cape v Mkhita 2016 JDR 2214 (SCA) at para 16 - 18



S AUCAMP
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be **10h00 on-14 January 2026***

HEARD ON: 5 August 2025
DATE OF JUDGEMENT: 14 January 2026

For the Applicants: Adv Tshikila
Fairbridges Wertheim Becker

For the Respondents: Adv Hollender
Darryl Furman and Associates