THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO. 2023 – 132715

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: ~~YES~~/NO (2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO (3) REVISED 20/02/2026 [redacted] ………………………… ………………………………………

In the matter between:

KEVIN JOHN DEAN **APPLICANT**

and

NEDBANK LIMITED **RESPONDENT**

In re:

NEDBANK LIMITED **PLAINTIFF**

and

KEVIN JOHN DEAN **DEFENDANT**

JUDGMENT

BHOOLA AJ,

Introduction

[1] This is an application for the rescission of a default judgment which was granted on 12 March 2024 against the applicant, wherein he was ordered to pay the respondent's R1, 700 000.00 together with the interests and costs.

[2] The judgment arose arising from a suretyship which was concluded on 17 August 2022, in favour of the respondent for the debts and obligations of the principal debtor Ubuntu Plastics (Pty) Ltd (in liquidation) ("Ubuntu Plastics"), who was placed under voluntary liquidation on 9 February 2023.

[3] The applicant seeks a rescission of the said judgment, contending that his default was not wilful, that he has demonstrated a good cause for the rescission by providing a *bona fide* defence of rectification of the suretyship agreement.

[4] The respondent opposes the application, asserting that service was properly effected at the applicant's chosen *domicilium* address, that the applicant has not shown good cause for his default, and that his defence is misguided and without prospects of success.

Factual Background

[5] The applicant concluded a suretyship in favour of the respondent on 17 August 2022 in respect of the debts of the principle debtor Ubuntu Plastics to the respondent.

[6] The respondent instituted proceedings against the applicant to recover monies owed to it by Ubuntu Plastics which the applicant had bound himself as surety and co-principal debtor for.

[7] In terms of the surety agreement, the applicant bound himself "jointly and severally" with the principal debtor for all amounts which the principal may now or at any time thereafter owe, whether arising directly or indirectly, including monies lent and advanced or to be lent and advanced, subject to a maximum liability of R1 700, 000.00.

[8] The suretyship contained a non- variation clause stating that the suretyship agreement is the entire agreement and may not be varied except reduced to writing and signed by both the parties.

[9] The applicant also alleges that the other agreements entered into between the parties, namely, the invoice discount agreement, the existing commercial loan facility, and a new commercial loan facility as well as the suretyship was meant to secure only the temporary overdraft associated the new facility in the amount of R1, 700, 000.00.

[10] The notice of motion application was served at the applicant's contractually chosen *domicilium* address on 13 February 2024 by affixing to the door, after a diligent search. The applicant did not oppose this application.

[11] Due to there being no opposition by the applicant, the respondent obtained an order against the applicant for payment in the sum of R1 700 000.00 together with interest and costs thereon.

Issues

[12] The issues for determination are whether the applicant has met all the requirements either in terms of the Common Law, Rule 31(2)(b) or in terms of Rule 42(1)(a) of the Uniform Rules of Court.

Legislative Framework

[13] It is trite law that the requirements for rescission under common law and Rule 31(2)(b) are the applicant must show good cause for the default and a *bona fide* defence with prospects of success.[1]

[14] Rule 42(1)(a) of the Uniform rules permits rescission where a judgment was erroneously sought or granted in the absence of a party.

[15] Where a party has chosen a *domicilium citandi et executandi* in a contract, service at that address is valid and binding unless formally changed in writing,[2] even if the party is no longer physically there. Written notice is required to change a chosen *domicilium*. It is settled law that service at a contractual domicilium is valid and binding, even if the party does not actually receive the papers[3]. Failure by the applicant to update such address in writing renders service competent.[4]

[16] A judgment is not erroneously granted merely because a defence is later disclosed.[5] Consequently, the judgment cannot be said to have been erroneously granted, therefore rescission under Rule 42(1)(a) is inapplicable. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* e.[6] the Supreme Court of Appeal cautioned that whilst rule 42(1)(a) caters for 'mistake,' rescission or variation does not follow automatically upon proof of a mistake. The rule gives the courts a discretion to order it, which must be exercised judicially. Therefore, the applicant is obliged to rely on rescission under Rule 31(2)(b) or the common law.

[1] Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) , Silber v Ozen Wholesalers (Pty) Ltd 1954 2 SA 345 (W), Grant v Plumbers (Pty) Ltd 1949 (1) SA 107 (W).
[2] Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA)
[3] Muller v Mulbarton Gardens (Pty) Ltd 1992 (4) SA 733 (W).
[4] Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA)
[5] Colyn v Tiger Food Industries Ltd 2003 (6) SA 1 (SCA)
[6] Colyn v Tiger Food Industries Ltd 2003 (6) SA 1 (SCA)

Applicants version

[17] The applicant's explanation rests on the fact that he did not receive factual knowledge of the proceedings, and he vacated the domicilium address in 2013.

[18] He admits that the service address was a private residential address where he resided prior to the signature of the Suretyship in 2022 and denies having provided this address to the applicant and that he did not note that was the address referred to on the suretyship upon signature.

[19] The applicant contends service was by affixing and the occupier of the address at the time did not bring it to his attention.

[20] He contends that he became aware of the judgment only when the sheriff attended with a warrant of execution on 26 August 2024. He thereafter consulted his attorney on 11 September 2024, and instituted rescission application proceedings which was served on 6 November 2024.

[21] The applicant argues that the suretyship was intended only to secure a temporary overdraft facility of R1,700,000, which was settled, and not the Invoicing Discounting Agreement.

[22] He contends the suretyship agreement should not have referred to as it does ...." All amounts which the principal debtor may now or at any time hereafter owe Nedbank Limited ...... provided that the total amount to be recovered from me hereunder shall not exceed an aggregate sum of R1,700,000.00 ......"

[23] The applicant avers that the suretyship does not correctly record the agreement between the parties and is a common error of the parties in the suretyship agreement

that was signed in 2022. As a result, thereof the applicant raises the defence of rectification of the Suretyship agreement between the parties.

Respondent's version

[24] The respondent contends that in as much as the applicant contends that he does not reside at the contractual address, there was no allegation by the applicant that he ever notified the respondent of a change in address.

[25] The respondent disputes the applicant's version, relying on the written terms of the offer of banking facilities letter and the suretyship itself, which record continuing security for all Ubuntu's obligations, capped or limited only by amount of R1,700, 000.

[26] The respondent contends that clause 13 of the suretyship agreement contains a non-variation clause. It is trite that where parties have reduced their agreement to writing, extrinsic evidence contradicting or varying the written terms is inadmissible. The applicant's defence of rectification is therefore not *bona fide* and has no prospects of success.

[27] The respondent contends that even if the defence of rectification had been before the court that granted the default judgment, as no common error existed between the parties when the suretyship was granted.

Analysis

Good cause shown

[28] It is common cause that the respondent's application was served at the applicant's chosen domicilium in the suretyship agreement on 13 February 2024 by way of affixing.

[29] The applicant contends that he did not oppose the main application because he had no factual knowledge of it, as he vacated the *domicilium* address in 2013.

[30] He acted forthwith upon becoming aware of the judgment being obtained against him. He consulted with his attorney and filed the rescission application within the prescribed time period.

[31] The applicant sought in oral argument to challenge the validity of service, by alluding to the fact that the law has changed in respect of service at a domicilium, This issue was not raised in the founding affidavit, nor was the sheriff's return of service disputed on oath.

[32] It is trite that an applicant must stand and fall by its founding papers. A sheriff's return of service constitutes *prima facie* proof of proper service and may only be displaced by clear evidence. No evidence was placed before the court that the applicant is not the owner of the service address. Service at the chosen domicilium in terms of Rule (1)(a)(iv) was accordingly valid and did not fall short of the principles of service by affixing in the case of *Nedbank Ltd v Conco*[7].

[33] In the said case, the court went on to confirm that where a party chooses a *domicilium*, service at that address is valid. In such instances actual knowledge is not required. The risk of non-receipt lies with the party who chose the *domicilium.* The court reaffirmed long- standing authority that a *domicilium* clause is a risk allocation mechanism

[34] The suretyship has the address of the respondent typed into the agreement, which agreement was subsequently signed by the applicant and is binding. No allegation was made that the applicant notified the respondent of any change in

[7] Nedbank v Conco (2006) ZAWCHC) 38

address. Consequently, the applicant's failure to oppose the main application cannot be excused. The duty was on the applicant to inform his creditors of his changed *domicilium* address.

[35] The applicant's explanation that he did not receive the application because he vacated the domicilium, was self- created and cannot be accepted as a legally sound argument. The court must balance procedural regularity against substantive fairness. Therefore, the judgment cannot be said to be erroneously granted.

Bona Fide Defence

[36] The applicant raises a defence of rectification of the 2022 suretyship agreement. He contends that the suretyship was intended to secure only a temporary overdraft facility of R1,700,000.00, which was settled once the new commercial loan facility was finalised.

[37] He asserts that the suretyship cannot be relied upon to claim indebtedness under the Invoice Discounting Facility.

[38] On perusal of the suretyship agreement, the terms and conditions clearly creates a "Continuing Covering Guarantee", binding the applicant for all amounts owed by the principal debtor Ubuntu, capped at R1, 700,000.00.

[39] Where a suretyship is expressed to cover all present and future obligations of the principal debtor, the payment of a particular debt does not terminate the suretyship unless otherwise agreed in writing.[8]

[8] Tesven CC v South African Bank of Athens 2000 (1) SA 268 (SCA).

[40] The repayment of the temporary overdraft facility, therefore, does not extinguish liability under the 2022 suretyship. The cap of R1, 700,000 merely limits maximum exposure and does not extinguish the liability for other existing agreements.

[41] It is undisputed that other credit facilities exist, the invoice discount agreement, an existing commercial loan, and a new commercial loan. The suretyship agreement is not tied to any specific facility. The wording of the suretyship expressly covers all debts of the principal debtor subjected to the cap of R1,700, 000.00.

[42] The applicants argument that the suretyship was intended solely for the temporary overdraft therefore cannot be supported factually and legally. The existence of multiple facilities does not alter the continuing covering nature of the suretyship.

Rectification

[43] The applicant contends that the suretyship should be rectified to reflect the "true intention" of the parties, namely that it secured only the temporary overdraft facility.

[44] The requirements to prove rectification are[9]

(i) a prior common intention of the parties inconsistent with the written document;

(ii) a mistake in reducing that intention to writing; and

(iii) specific wording that should have been included.

[45] The applicant has failed to allege that the parties agreed to:

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[9] Tesven CC v South African Bank of Athens 2000 (1) SA 268 (SCA), Intercontinental Exports (Pty) Ltd v Fowles 1992 (2) SA 1045 (SCA)

(i) any prior common intention limiting the suretyship to the temporary overdraft.

(ii) any drafting error in the written agreement.

(iii) any conduct by the respondent demonstrating a facility- specific limitation.

[46] Quite the contrary, the respondent contends that the signed suretyship agreement reflects the intentions of the respondent. It is a signed binding agreement between the parties.

[47] The respondent contends that applicant's defence is not *bona fide*, has no prospects of success, and is intended merely to frustrate the respondent's claim.

[48] The offer of the banking facilities letter expressly records that the applicant's liability was continuing security for all Ubuntu's obligations, limited only to the amount of R1,700,000.00.

[49] Clause 13 of the suretyship is a non-variation clause, barring extrinsic evidence that contradicts or varies the written agreement. The suretyship contains the words "entire agreement" as well as non-variation clauses precluding reliance on extrinsic evidence or tacit intention.

Conclusion

[50] The applicant has failed to show good cause for his default.

[51] The applicant has not demonstrated that the order was erroneously sought or granted. The fact that the application did not come to his attention does not constitute

good cause for his failure to oppose as the applicant does not have a defence and his explanation is unsatisfactory to warrant a rescission.

[52] The applicant alleged defence is not *bona fide* and has no prospects of success. Consequently, the rectification defence is inadequately pleaded and lacks prospects of success.

[53] The requirements for rescission under common law, Rule 31(2)(b) and Rule 42(1)(a) have not been satisfied by the applicant on a balance of probabilities.

Order

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

(i) The application for rescission of the default judgment is dismissed.

(ii) The applicant is ordered to pay the costs of this application on a party and party scale.

CB. BHOOLA

Acting Judge of the High Court

Gauteng Division of the High Court, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 20 February 2026 and is handed down electronically by circulation to the parties/their legal representatives by e mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 20 February 2026.

APPEARANCES

Date of hearing: 24 November 2025

Date of judgment: 20 February 2026

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