

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 2024 / 092117

(1) Reportable No
(2) Of interest to other Judges: No
(3) Revised: Yes

Signature
<u>23/03/2026.</u>
Date

In the matter between:

DIAMOND PANEBEATERS AND TOWING CC

Applicant

and

K CARRIM COMMERCIAL PROPERTIES (PTY) LTD

Respondent

Heard: 19 November 2025

Delivered: 23 March 2026

JUDGMENT

PILLAY, AJ

Introduction

- [1] The applicant seeks an order, rescinding and setting aside the judgment and order granted against it by Wentzel AJ on 4 December 2024 ("the order") with respect to arrear rental and expenses payable by the applicant to the respondent in terms of an agreement of lease concluded between the parties. The said judgment and order were granted against the applicant by default because the applicant did not enter an appearance to defend the action instituted by the respondent against it.
- [2] The application for the rescission and setting aside of the order is brought pursuant to the provisions of rule 31(2)(b) of the Uniform Rules of Court. The latter rule provides as follows:

"A defendant may within 20 days after acquiring knowledge of such judgment apply to court on notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms it deems fit".

- [3] The primary issue to be determined is whether the applicant demonstrated good cause for the order to be rescinded and set aside.

Background

- [4] On 5 February 2024, the applicant and the respondent concluded an agreement of lease in respect of a property situated in the central business district of Pretoria. The lease would endure for a period of five years, and the applicant leased the premises for the purpose of conducting a panel beating business.

- [5] The agreement of lease was signed and concluded on behalf of the applicant by Ms Selinah Maiphephi Mtilene, who at the time was the sole member of the applicant.
- [6] The applicant took occupation of the leased premises in March 2024.
- [7] On 15 August 2024, the respondent caused a summons commencing action to be issued out of this court. The respondent claimed payment of the arrear rental and expenses, owing to it in terms of the agreement of lease. The summons commencing action was served upon the applicant at the leased premises on 21 August 2024. The summons commencing action was served personally upon Ms Mtilene.
- [8] Having failed to enter an appearance to defend the action, the respondent applied for default judgment, which was granted on 4 December 2024.
- [9] On 11 November 2024, the applicant, through its attorneys of record, addressed a letter to the respondent in which the applicant alleged that the respondent had breached the agreement of lease and called upon the respondent to rectify the breach. Thereafter, the applicant, on 20 November 2024, informed the respondent that it had elected to cancel the agreement of lease and had vacated the leased premises. In reply, the respondent denied being in breach of the agreement and advised the applicant that it had taken default judgment against the applicant for the arrear rental and expenses.

The applicant's submissions

Wilful default

- [10] The applicant admits that the summons commencing action was served upon Ms Mtilene. Ms Mtilene is described by the applicant as an employee, who was previously the sole member of the applicant and who had resigned her position on 28 May 2024. Ms Mtilene, the applicant submits, was replaced by the husband, Mr Mtilene, as the sole member of the applicant. In the replying affidavit, the applicant provided this court with a copy of the WinDeed report by

the Companies and Intellectual Property Commission, which confirmed the aforesaid.

- [11] The applicant proceeds on to submit that Mr Mtilene and Ms Mtilene's relationship, at the time of the service of the summons commencing action, was strained and Ms Mtilene did not immediately bring the summons commencing action to the attention of Mr Mtilene and the applicant. Instead, Ms Mtilene placed a copy of the summons commencing action in her laptop bag. The applicant states that Ms Mtilene intended bringing the summons commencing action to the attention of Mr Mtilene, but forgot to do so.
- [12] Further, the applicant submits that the parties had exchanged correspondence after the service of the summons commencing action and before default judgment was granted against the applicant. In this exchange of correspondence, the respondent failed to inform the applicant of the pending legal proceedings.
- [13] The thrust of the applicant's argument is that it was not in wilful default of defending the action because the summons commenting action was not brought to its attention by Ms Mtilene and the respondent did not inform the applicant of the pending legal proceedings after the service of the summons commencing action.

Bona fide defence

- [14] The applicant submits that it has a bona fide defence to the respondent's claim because:
- [14.1] The respondent was aware that the premises was to be utilised for the conducting of a panel beating business, which required 100 AMPS 3 phase power to be connected to the DB board. In terms of the agreement of lease, the lessor had undertaken to ensure the connection of the 100 AMPS 3 phase power to the DB board. Even though there was no time period stipulated in the agreement of lease, by the time that the applicant

had vacated the premises, the respondent had not completed the undertaking. The respondent failed to settle an existing municipal account that the City of Tshwane, resulting in the electricity to the premises being terminated on different occasions. The cumulative result was that the applicant was unable to conduct its business effectively.

[14.2] The respondent failed to give the applicant free beneficial occupation of the premises for the month of February 2024, as stipulated in the agreement.

[14.3] The respondent failed to repair a leaking water pipe, which resulted in the applicant being overcharged respect of the water usage. The applicant had disputed the charges and denied liability respect of charges for water usage.

[15] The applicant submits that as a result of the aforesaid, it cancelled the agreement and was entitled to a refund of the deposit.

The respondent's submissions

Wilful default

[16] The respondent submits that the summons commencing action was properly served in terms of rule 4 of the Uniform Rules of Court. This is not denied that the applicant.

[17] The respondent contends that the applicant improperly attempts to diminish the position and the authority of Ms Mtilene by stating that she is only an employee who is not involved in the decision-making regarding litigious matters involving the applicant. In support of this contention, the respondent refers to a newspaper article (published after Ms Mtilene had resigned as a member of the applicant) in which Ms Mtilene is described as the managing director of the applicant. Also, the respondent refers to emails exchanged between the parties before and after the service of the summons commencing action, and before and after the resignation of Ms Mtilene as a member of the applicant. These

emails deal specifically with the issues that arise from the agreement of lease concluded between the parties. Further, the emails from the applicant are sent by Ms Mtilene as the author of the emails and representative of the applicant. The emails addressed by the respondent to the applicant are addressed specifically to Ms Mtilene.

- [18] Finally, the respondent argues that the applicant's version as to why it was unaware of action instituted by the respondent is improbable because the applicant states that Ms Mtilene did not bring the summons commencing action to the attention of Mr Mtilene because of the acrimony, which existed between them at the time and at the same time the applicant states that Ms Mtilene did the to bring the summons commencing action to the attention of Mr Mtilene, but had forgotten to do so.

Bona fide defence

- [19] The respondent submits that after it had purchased the premises in 2022, the premises was vandalised and stripped of all the electrical infrastructure. As a result, there was no electricity usage at the premises. Notwithstanding, the City of Tshwane Metropolitan Municipality incorrectly levied charges upon the respondent for electricity usage from August 2023. The respondent disputed the charges. Nevertheless, the respondent submits, the applicant was made aware of the aforesaid situation during the negotiations, which preceded in the conclusion of the agreement of lease.
- [20] The respondent submits that after the conclusion agreement of lease and prior to the applicant taking occupation premises, the respondent ensured that the premises was fully rewired and fit for the purpose of conducting a panel beating business. The respondent also appointed UMFA utility management to ensure that the electricity metering and billing at the premises was correctly done. Further, Mr Steven Anderson of UMFA confirmed in May 2024 that there was a 400 AMP 3 phase power supply to the premises and as a result the respondent had complied with its undertaking in terms of the agreement of lease.

- [21] With regard to the charges in respect of the water usage, the respondent submits that the water leak was only determined to be an internal leak by City of Tshwane Metropolitan Municipality on 7 June 2024. The respondent argues that in terms of the agreement of lease the applicant was obliged to repair an internal water leak and the respondent cannot be held liable for the expenses incurred as a result of the water leak because of the applicant's failure to comply with the agreement of lease. The respondent states that notwithstanding the terms of the agreement of lease, it fixed the leak at its own expense and also initiated a process of attempting to resolve the charges levied by the City of Tshwane Metropolitan Municipality together with the applicant. The applicant did not respond to the applicant's proposals to meet the City of Tshwane Metropolitan Municipality to resolve these issues. Instead, the respondent argues, the applicant elected to cancel the agreement and vacate the premises.
- [22] The respondent argues that the applicant's version that the respondent was in breach of the contract from the outset is improbable because the respondent did not issue any letter of demand for a period of nine months, after which the applicant resorted to place the respondent in mora and thereafter cancel the agreement.
- [23] In addition, the respondent submits that the applicant does not have a bona fide defence because the applicant's complaints are rendered invalid by the terms of agreement of lease. In particular, the respondent refers to the following clauses in the agreement of lease:
- [23.1] Clause 4.1, which provides that the applicant shall be liable for the payment of rent without deduction, retention, remission or set off on any grounds.
- [23.2] Clause 17.1, which states that the applicant is liable for all municipal charges, including electricity and water.
- [23.3] Clause 22.1, which states that the lessee shall be deemed to have acknowledged that the water pipes and electrical fittings et cetera are in

a good state of repair and undertakes to care for and maintain and repair this infrastructure, at the applicant's expense, during the duration of the lease.

[23.4] Clause 27.3, which states that the applicant may not withhold any payments to the respondent by reason of the premises being any defective condition or state of disrepair.

[23.5] Clause 28, which states that the applicant shall not have a claim for damages or be entitled to cancel the agreement of lease or receive a reduction or omission of the rental payable by reason of the fact that the services have been interrupted or have failed.

Point in limine

[24] The applicant took issue with the fact that the answering affidavit was improperly commissioned and attested to because, the applicant submitted, the commissioner of oaths had an interest in the respondent's business.

[25] The respondent thereafter filed the answering affidavit, which was commissioned by a member of the South African Police Services together with an application for the conditional condonation of the late filing of the answering affidavit. The content of the answering was exactly the same. In the latter application, the respondent explained that previous commissioner of oaths did not have interest in the respondent's business and therefore he was entitled to act as a commissioner of oaths in commissioning the affidavit. The applicant did not oppose the application, or persist with the point in limine.

The applicable law

[26] The applicant brings this application for rescission pursuant to the provisions of rule 31(2)(b). The rule requires the applicant to demonstrate "good cause" to succeed in its application. The court has a wide discretion in evaluating "good cause".

[27] In *Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)* page 476-477, Brink J, in evaluating the meaning of "sufficient cause" states that an applicant should comply with the following requirements to establish sufficient cause:

- "(a) He must give a reasonable explanation for his default. If it appears that his default was woeful or that it was due to gross negligence the Court should not come to his assistance.
- (b) His application must be *bona fide* and not made with the intention of merely delaying the plaintiff's claim.
- (c) He must show that he has a *bona fide* defence to the plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."

[28] In *Chetty v Law Society, Transvaal 1985 (2) SA 756 (A)* page 765A, the Court expressed the view that "sufficient cause" or "good cause" defied precise or comprehensive definition. Miller JA stated:

"But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of the judgment by default are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success."

[29] Miller JA, in *Chetty* page 765 C-E, stated that both requirements must be met. Miller JA stated:

"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

- [30] The Constitutional Court in *Zuma v Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* 2021 JDR 2069 (CC); 2021 BCLR 1263 (CC) accepted the aforementioned principles espoused in *Chetty*.
- [31] Further, the Constitutional Court quoted, with acceptance, the following passage from *Chetty* page 762C:

"even if the [applicant's] case was that he was ignorant of the proceedings which had been instituted against him, he would have been obliged to show a supremely just cause of ignorance, free from all blame whatsoever"

- [32] Finally, in determining whether "good cause" has been established, Miller JA in *Chetty* p 767 I – 768 C, stated that "the circumstance that there may be a reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remain so, whatever the prospect of success on the merits. In the light of the finding that the appellant's explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success." The Constitutional Court accepted and applied the latter principle in *Zuma*.

Has the applicant made out a case for rescission?

- [33] The propriety of the service of the summons commencing action upon Ms Mtilene and consequently the applicant is not in issue between the parties.
- [34] The applicant contends that it is not in wilful default because Ms Mtilene elected not to bring the summons commencing action to the attention of Mr Mtilene (the sole member of the applicant at the relevant time) because of the acrimony (arising from the divorce proceedings between them), which existed between Mr and Ms Mtilene. In reply to the answering affidavit, the Mr Mtilene states that

he and Ms Mtilene, "subsequent to the service of the summons, decided to pursue other alternatives in an attempt to rescue our marriage". Mr Mtilene, on behalf of the applicant, does not present any evidence as to when the relationship between the parties improved and what was the nature of the relationship after the Mr and Ms Mtilene had decided to "rescue" their marriage that would have prevented Ms Mtilene from continuing to withhold the summons commencing action from him.

[35] Further, Ms Mtilene was previously the sole member of the applicant. She concluded the agreement of lease on behalf of the applicant. She represented the applicant in discussions with the respondent about the agreement of lease prior to and after she was replaced as the sole member of the applicant by Mr Mtilene. She described herself as the managing director of the applicant. It is patent that Mr and Ms Mtilene had a personal relationship and business relationship relating to the applicant. There is no explanation offered by the applicant as to why Ms Mtilene did not bring the summons commencing action to the attention of Mr Mtilene or why the applicant did not defend the matter for a period of four months after the relationship between Mr and Ms Mtilene had improved.

[36] Moreover, after the service of the summons commencing action upon Ms Mtilene, she constantly communicated to the respondent, on behalf of the applicant, about the matters which eventuated in the applicant cancelling the agreement of lease and also the matters, which form the basis of the judgment obtained by the respondent against the applicant. The applicant offers no explanation, why during this period and with the issues in dispute being in the forefront of the relationship between the applicant and the respondent, Ms Mtilene did not bring the summons commencing action to the attention of Mr Mtilene and why the applicant remained in default. This lack of explanation is exacerbated by the fact that approximately one month prior to judgment being granted against the applicant, the applicant consulted its attorneys of record about the very issues, which form the basis of the action between the respondent and the applicant. These consultations eventuated in the applicant cancelling the agreement of lease. I find it improbable, that in these circumstances, Ms Mtilene would not have brought the summons commencing

action to the attention of Mr Mtilene. I also find it improbable that Mr or Ms Mtilene would not have brought the summons commencing action to the attention of the applicant's attorneys of record. It is more probable that they had made an election not to bring it to the attention of the applicant's attorneys of record.

- [37] In parallel to the previous explanation, the applicant contends that it was not in wilful default because Ms Mtilene placed the summons commencing action in her laptop bag and had forgotten to bring it to the attention of Mr Mtilene. I am of the view that this explanation is irreconcilable with the previous explanation as the previous explanation suggests that Ms Mtilene had no intention of bringing the summons commencing action to the attention of Mr Mtilene because of the acrimony, which existed between them at the time.
- [38] Also, the correspondence attached to the application evinces that Ms Mtilene constantly communicated with the respondent via email after the service of the summons commencing action. It is probable that these emails or some of these emails would have been sent from her laptop. It is also probable that during the period of four months before judgment was granted against the applicant, Ms Mtilene would have seen the summons commencing action in her laptop bag, particularly when accessing her laptop to the send and receive emails. At the very least, corresponding with the respondent on the issues arising from the agreement of lease would have triggered a memory in respect of the summons commencing action.
- [39] Finally, the applicant contends that Ms Mtilene is merely an employee and the applicant cannot be held in wilful default by her failure to bring the summons commencing action to the attention of Mr Mtilene and the applicant. Once again, this argument is irreconcilable with the argument that Ms Mtilene would have brought the summons commencing action to the attention of Mr Mtilene and the applicant, but for the acrimony which existed between Mr and Ms Mtilene, alternatively the fact that she had forgotten to do so. Moreover the summons commencing action was properly served upon the applicant.

- [40] The applicant's suggestion that Ms Mtilene is a mere employee does not hold muster. Ms Mtilene was the previous sole member of the applicant and had concluded the agreement of lease with the respondent on behalf of the applicant. At the same time, Ms Mtilene described herself as the managing director of the applicant and represented the applicant in all the communication with the respondent relating to the matters arising from the agreement of lease.
- [41] In the circumstances, I find that the applicant has failed to provide a plausible or acceptable explanation for its default. In the light of this finding, as stated in *Chetty* and confirmed in *Zuma* - "it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success"¹.
- [42] Notwithstanding the aforesaid, in the interests of fairness I will briefly consider the merits of the defence raised by the applicant.
- [43] In argument, the applicant posited that it would raise the defence of exceptio non adimpleti contractus, should it be granted the chance to file a plea. The applicant did not provide any rely upon the defence in the application, nor did the applicant provide any factual basis for this defence.
- [44] The applicant argues that the respondent did not comply with the agreement of lease because the premises did not have a 100 AMP 3 phase connection to the DB board, which the respondent undertook to install. This electrical connection, the applicant argues, was crucial to the conducting of the panel beating business. In answer, the respondent provided a report by Mr Anderson, reported that as at May 2024, the premises was fitted with a 400 AMP 3 phase power supply, which exceeded the power supply that the respondent had undertaken to install at the premises. The applicant rejected the report of Mr Anderson because he is not a qualified electrician. The applicant conceded that the agreement of lease did not provide any time period within which the respondent was obliged to complete this installation. Notwithstanding the applicant's protestations, the applicant did not raise this issue from the date of

¹ *Chetty* supra 768C.

its occupation in March 2024 until November 2024. Throughout this entire period the applicant conducted its panel beating business. It is highly unlikely, on the applicant's own version, that the applicant would have been able to conduct the panel beating business had the electricity supply not been as required by the applicant. On the contrary, in the newspaper reports in August 2024 and October 2024, Ms Mtilene is celebrated for conducting a panel beating business.

- [45] The applicant argues that as a result of a water leak, the applicant was overcharged in respect of the water usage. The respondent argued that the leak was repaired in June 2024. Notwithstanding, agreement of lease enjoins the applicant to provide the respondent, within seven days of occupation, with a list of defects, failing which the applicant is deemed to have acknowledged that the water pipes are in good state of repair. There is no indication that the applicant provided the respondent with a list of defects. Moreover, the agreement of lease provides that the applicant would not be entitled to withhold any payment because of the premises being in a defective condition or state of disrepair. The lease also provides that the applicant is liable for municipal charges including charges relating to the usage of water and electricity.
- [46] Finally, the applicant argues that it was not given the three beneficial occupation of the premises for the month of February 2024. The applicant states that it was only allowed to take occupational premises in March 2024. There is no indication that the applicant complained about not having occupation for the month of February 2024 prior to the application for rescission. There is also no indication as to what damages or losses the applicant suffered as a result of not being allowed to take occupation of the premises during the month of February 2024. Consequently, the applicant does not make a case as to why it would have a defence to the respondent's claim.

Conclusion

[47] In the final analysis, I am of the view that the applicant has not discharged the onus of persuading this court that it was not in wilful default or that it has a bona fide defence, which prima facie carries some prospect of success to the respondent's claim.

[48] In the circumstances I make the following order:

1. The application is dismissed.
2. The applicant is ordered to pay the respondent's costs on a party and party scale, which costs shall include the costs of counsel on Scale B.

T. Pillay
Acting Judge of the High Court of South Africa
Gauteng Division, Pretoria

Appearances:

For the applicant	:	N S Nxumalo
Instructed by	:	Tshabalala Attorneys
For the respondent	:	JBW Mouton
Instructed by	:	Sharief & Associates Inc