



**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

07/04/2026



In the matter between:

KEVIN JOHN DEAN

APPLICANT

and

NEDBANK LTD

RESPONDENT

In re:

NEDBANK LTD

PLAINTIFF

and

KEVIN JOHN DEAN

DEFENDANT

JUDGMENT

BHoola AJ,

Introduction

[1] This is an application for leave to appeal against the judgment granted by this Court on 20 February 2026, refusing the applicant's rescission of a default judgment obtained by the respondent against him.

[2] The notice of appeal was filed on 13 March 2026, within the prescribed 15 court days after judgment, in terms of Rule 49(1)(b) of the Uniform Rules of Court and is therefore timeous.

[3] The applicant's heads of argument and notice of appeal raise various grounds of appeal, which may be encapsulated as follows:

- (i) The court erred in finding that service at the applicant's *domicilium citandi et executandi* was valid.
- (ii) The Court erred in finding that the applicant failed to establish good cause for rescission.
- (iii) The Court erred in finding that the applicant did not have a substantial defence, in particular in relation to the defence of rectification having been pleaded inadequately.
- (iv) The Court erred in finding that the default was self- created.
- (v) The Court misapplied the law relating to rectification and the effect of non- variation and the entire agreement clauses.

[4] Before considering and addressing the merits, I set out the legal framework for leave to appeal.

The test for leave to Appeal

[5] Section 17(1)(a)(i) of the Superior Court Act¹ provides that leave to appeal may only be granted if the appeal “would” have a reasonable prospect of success. The test is now more stringent as was confirmed in *S v Smith*.²

[6] Section 17(1)(a)(ii) requires further consideration of whether there is some other compelling reason why the appeal should be heard, such as conflicting judgments or issues of public importance.³

[7] The applicant conceded in oral argument that the test under section 17(1)(a)(i) is relevant, and although he acknowledged and conceded that section 17(1)(a)(ii) also forms part of the test, he made no submissions in that regard. The proper approach requires consideration of both provisions.⁴

Procedural Observation

[8] It is prudent to mention the absence of a replying affidavit at the outset.

(i) The applicant did not file a replying affidavit in the rescission proceedings.

(ii) In oral argument, he conceded that he denied all allegations but failed to place any evidence before the Court to contradict the respondent’s version.

(iii) In terms of the *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁵ rule, a bare denial in the absence of a replying affidavit does not create a genuine dispute of fact, and the respondent’s version must be accepted.

¹ Superior Court Act 10 of 2013

² *S v Smit* 2012 (1) SACR 567 (SCA)

³ *Fair Trade Independent Tobacco Association v President of the Republic of South Africa* [2020] JOL 47858 (GP) para 6; *Caratco v Independent Advisory* 2020 ZASCA 17, 2020 (5) SA 35 (SCA), para 2

⁴ *S v Smit* 2012 (1) SACR 567 (SCA) para 7

⁵ *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A)

(iv) This procedural aspect is highlighted for the attention of the Appellate Court. Importantly, it does not materially affect the outcome of this application, which turns on the applicant's failure to establish good cause for rescission, and the absence of a *bona fide* defence with prospects of success.

Evaluation of the Grounds of Application for leave to Appeal

Service at domicilium citandi et executandi

[9] Service was effected at the applicant's chosen *domicilium* in accordance with rule 4(1)(a)(iv) of the Uniform Rules of Court. The applicant acknowledged during oral argument that he failed to notify the respondent of a change of his address. The Court confirmed that there was valid service at the *domicilium* despite applicant's argument that Ubuntu's address on the offer of banking facilities letter, should have been used. This could not be accepted as the letter of offer was addressed to the company and not the surety. The applicant's failure to notify respondent of his changed address rendered the default self-created.⁶

[10] Service at the chosen *domicilium citandi et executandi* remains valid until formally changed, and the debtor bears the risk of failing to notify the creditor of a new address.⁷ Negligence or inattention does not constitute good cause.⁸ Moreover, rescission requires more than mere promptness; the explanation must be reasonable and not self-created.⁹ The authorities in this paragraph reinforce the correctness of the finding that the applicant's default was self-created and that *no bona fide* defence with prospects of success has been shown.

Default Judgment and Failure to show Good Cause

⁶ *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA); *Qubeka v FirstRand Bank Ltd t/a WesBank* (GJ, Case No. 2019/23591) [2021] ZAGPJHC 658

⁷ (*Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at paras [24]–[27])

⁸ (*Colyn v Tiger Food Industries Ltd* 2003 (6) SA 1 (SCA) at paras [9]–[11])

⁹ (*Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) at paras [13]–[15])

[11] The applicant explained that he acted promptly upon learning of the judgment, however, his default arose from his failure to update his *domicilium* address.

[12] In terms of rules 31(2)(b), 32 and of the Uniform Rules of Court, as well as the common law principles regulating rescission, the applicant was required to show:

- (i) a reasonable explanation for the default.
- (ii) the existence of a *bona fide* defence with prospects of success.
- (iii) that he acted within a reasonable time.¹⁰

[13] Rule 42(1)(a) of the Uniform Rules which permits rescission where a judgment erroneously sought or granted in the absence of a party. This ground was not relied upon in the present case.

[14] Although the applicant acted promptly, his explanation does not overcome the fact that the default was self – created.¹¹

Substantial Defence and Rectification inadequately pleaded

[15] The applicant contends that the 2022 suretyship was intended to secure only a temporary overdraft facility and not the full obligations of the company. He relies on rectification and cites *Leyland SA (Pty) Ltd v Rex Evans Notice (Pty) Ltd*¹² (*Leyland*).

[16] The respondent points out that the suretyship is clear and unambiguous, the non – variation (clause 13) and the “whole agreement” clauses preclude the reliance

¹⁰ Chetty v Law Society Transvaal 1985(2) SA 756(A), Colyn v Tiger Food Industries Ltd 2003 (6) SA 1 (SCA)

¹¹ Colyn v Tiger Food Industries Ltd 2003 (6) SA 1 (SCA), Ferris v FirstRand Ltd 2014(3) SA 39 (CC), Rossouw v FirstRand Ltd 2010 (6) SA 439(SCA)

¹² Leyland SA (Pty) Ltd v Rex Evans Notice (Pty) Ltd 1980 (4) SA 2071(W)

on extrinsic evidence which has the effect of contradicting, altering or varying such agreement is inadmissible and therefore this defence would not succeed.

[17] There was no contemporaneous documents, emails, or correspondence supporting the applicant's contention. In fact, the offer of banking facilities letter does not contradict the suretyship agreement but substantiates the suretyship agreement.

[18] For a rectification claim to succeed:

- (i) the contract must be reduced to writing.
- (ii) there must be a common intention of the parties at the time of the signing.
- (iii) the written document must not reflect that intention due to mutual mistake.¹³

[19] In this matter, there is no evidence of a mutual mistake. The applicant has not exhibited a *bona fide* defence that would succeed at trial. The authorities such as *Saphula v Nedcor*,¹⁴ and *Lodhi 2 Properties Investment ZASCA*,¹⁵ and the principles on non – variation clauses support this conclusion.

[20] The applicant submitted that the Court erred in not ruling on *Leyland*. While *Leyland*, confirms that rectification is not precluded merely because the written agreement contains a non – variation or whole agreement clause, the applicant has not pleaded or established a *prima facie* case for rectification. Therefore, while *Leyland* remains good law, it was unnecessary to make a specific ruling on it, as the applicant's pleadings and supporting evidence are insufficient to establish a *prima facie* case for rectification.

¹³ *Brisley v Drotsky* 2002 (4) SA1 (SCA)

¹⁴ *Saphula v Nedcor* 1999(2) SA 76.

¹⁵ *Lodhi 2 Properties Investment ZASCA* 2097 (6).

Conclusion

[21] On a consideration of the grounds of appeal and the requirements under the Uniform Rules as well as at Common law:

- (i) The service was validly effected at the chosen domicilium et executandi, and the default was consequently self – created.
- (ii) The default judgment was regularly obtained by way of motion proceedings and cannot be characterised as erroneously granted.¹⁶
- (iii) The suretyship defence discloses no prospects of success, and the rectification claim is not supported by evidence.
- (iv) The applicant has not satisfied the requirements for leave to appeal under section 17(1)(a)(i) and (ii) of the Superior Courts Act.

[22] The applicant has not established a defence that would have a reasonable prospect of success and has also not established a compelling reason for this court to grant leave to appeal.

Costs

[23] Although the suretyship provides for costs on an attorney and client scale and the parties agree on such costs, I am not persuaded that a punitive costs order is warranted in the present application. In the exercise of my discretion, costs will follow the result on the ordinary scale.

Order

[24] In the result, I make the following order:

- (i) Leave to appeal is refused.

¹⁶ *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA), para 27.

- (ii) The applicant is to pay the costs of the application.



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 7 April 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 7 April 2026.

APPEARANCES

Date of hearing: 24 March 2026

Date of judgment: 07 April 2026

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