REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-059973

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

18 May 2026 [redacted]
DATE SIGNATURE

In the matter between:

PIETER MÖLLER N.O.	Applicant
and	
NICOLAAS HOFFMAN	First Respondent
GIDEON PIERRE JOUBERT	Second Respondent
SUPREME HEAT TREATMENT (PTY) LTD	Third Respondent
SCOTOPS PROPERTY (PTY) LTD	Fourth Respondent
SHT PRODUCTION (PTY) LTD	Fifth Respondent

JUDGMENT

DJ Smit, AJ

Introduction

[1] The applicant (*Mr Möller*) is the executor of the estate of the late Mr Derick Hutchison, who passed away on 30 June 2023. Mr Möller applies in his official capacity for rescission of an order made on 18 September 2024 (*the order*) in default of his appearance.

[2] The order compelled him to deliver to the first and second respondents (*Mr Hoffman* and *Mr Joubert*, respectively) the original share certificates in respect of shares the deceased held in three private companies: the third respondent (*Supreme Heat*), the fourth respondent (*Scotops*) and the fifth respondent (*SHT*). The certificates were to be delivered against a tender of payment for the shares. Mr Möller was also ordered to sign share transfer forms. If he disobeyed the order, the sheriff was directed to enforce compliance. Mr Möller was also ordered to pay costs on a punitive scale.

[3] This case was argued on the basis that compliance with the order made Mr Hoffman and Mr Joubert the owners of the shares. I express no view on that topic, which is irrelevant to this judgment. This judgment concerns whether there is "*sufficient cause*" to set aside the order (which is the test at common law).[1]

[4] The existence of "*sufficient cause*" depends on whether: (a) the applicant has presented a reasonable and acceptable explanation of his default; <u>and</u> (b) the applicant has shown the existence of a *bona fide* defence, i.e. one that has some prospect or probability of success. These requirements are conjunctive.[2]

[5] I find below that Mr Möller's reasons for failing to appear were relatively weak but that, even if they were stronger, I would not have granted a rescission of the order because of the weakness of the defence envisaged on the papers.

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[1] *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) para 4. Mr Möller expressly brought the application under the common law.

[2] *Harris (supra)* paras 4-5

Background

[6] Messrs Hutchison, Hoffman and Joubert were, at least in ordinary parlance, business partners. They were co-owners of Supreme Heat, Scotops and SHT although Mr Hutchison held the lion's share (63%) of the shares in Supreme Heat and Scotops. They co-owned SHT in equal shares. A Mr Nobrega held a 7% share in in Supreme Heat and Scotops, but his position is not relevant to this application.

[7] Messrs Hutchison, Hoffman and Joubert were the only directors of Supreme Heat, Scotops and SHT until the death of the deceased.

[8] Supreme Heat was, at first, a close corporation but it was converted in 1989 to a private company. Messrs Hutchison, Hoffman and Joubert were directors of Supreme Heat from when it was a private company, i.e. for more than three decades. Supreme Heat carries on business in Germiston. It provides heat treatment and hardening of steel and related materials.

[9] Scotops was incorporated in 2004. It owns the premises from which Supreme Heat carries on its business.

[10] SHT was incorporated in 2017. It employs persons who provide labour to Supreme Heat.

[11] The heart of the dispute between Mr Möller (as executor), on the one hand, and Messrs Hoffman and Joubert on the other, is whether Messrs Hoffman and Joubert are entitled under a contract (which, like the parties, I refer to as the "second agreement") to a deemed sale of the shares in the three companies concerned to them on the death of Mr Hutchison.

[12] Messrs Hoffman and Joubert's evidence – not meaningfully contested by Mr Möller – is that they concluded an association agreement with Mr Hutchison while Supreme Heat was still a close corporation. This agreement provided, similarly to the second agreement, for the disposal of the members' interest in Supreme Heat upon the death or disability of a member. After conversion of Supreme Heat to a private company, it was discussed and orally agreed between the parties

that a shareholders' agreement would provide for the surviving shareholders to acquire the shares of a deceased shareholder, funded through life assurance. The parties took out a life insurance policy which eventually would fund such a purchase.

[13] Sometime in 2006, after registration of Scotops, the parties agreed to formalise an agreement in that regard. A draft "Purchase and Sale" agreement was prepared but apparently not signed. During or about early April 2011, however, <u>two</u> agreements were signed using the template prepared in 2006:

a. An agreement styled "*Purchase and Sale Agreement (Partnership – three or more partners) Supreme Heat Treatment (Pty) Ltd and Scotops (Pty) Ltd (automatic sale of partnership interest and claim at the death, withdrawal or disablement of a partner*". The last party to this agreement signed it on 4 April 2011. This is why it's called the "first agreement" by the parties.

b. An identical agreement save that no reference is made to Supreme Heat and Scotops and that the last party in time to sign, signed it on 5 April (and not on 4 April) 2011. This is why it's called the "second agreement" by the parties.

[14] In later years, the business partnership appears to have been unhappy, and allegations are made of untoward or at least unwise business practices. Nothing turns on them, for present purposes; since neither the first nor the second agreement seems to have been expressly amended or revoked. There are indications that Mr Hutchison sought advice in that regard from Mr Möller, who is also an attorney, but Mr Möller – perhaps understandably – did not disclose the tenor of these discussions with Mr Hutchison.

[15] After Mr Hutchison passed away, disputes erupted including regarding the ownership of the shares. The disputes led to several urgent and other applications, some of which are still ongoing, as well as the application for what is described as transfer of the shares (*transfer application*).

[16] In the transfer application, Messrs Hoffman and Joubert tendered 63% of the value of the shares in Supreme Heat and Scotops, as valued by their auditor (at

R5.6 million). They contend that the shares in SHT have no value, because SHT has no assets.

[17] The parties seem to have initially envisaged that the court should, at this hearing, determine the costs of various interlocutory applications ancillary to the rescission application, but at the hearing they were agreed that I could ignore them and that either of the parties could set them (or some of them) down for determination as and when so advised. This was appropriate, given what could only be described as the chaotic state of the CaseLines folder and the parties' lack of diligence in agreeing to a joint practice note which delineates the issues.[3]

A reasonable and acceptable explanation for the default

[18] Messrs Hoffman and Joubert brought the transfer application in May 2024 (*transfer application*), during but not as part of ongoing separate litigation with Mr Möller, as executor. Although Mr Möller is also an attorney, he instructed his current attorney in those other matters. There is no dispute that Mr Möller received personal service of the transfer application.

[19] Mr Möller's explanation for his failure to enter an appearance to oppose is that, on receipt of the transfer application, he assumed that Messrs Hoffman and Joubert would serve the application on his attorney too or would at least alert his attorney to the application. The basis for this assumption is that the attorney acting for Messrs Hoffman and Joubert knew of the identity and involvement of Mr Möller's attorney and in the other legal matters copied "*each of the role-players ... on correspondence exchanged between the parties, as well as the service of legal notices and documents concerning pending litigation*".

[20] Mr Möller states that when the transfer application was served on him, he "*took it for granted that [his attorney] had also been appraised thereof, one way or another, and that he would attend thereto*".

[21] It goes almost without saying that these were dangerous and unwarranted assumptions. There was no agreement that Mr Möller's attorney would always

[3] Each party filed multiple separate practice notes and the applicant, without explanation for the failure to file a true joint practice note, filed a unilateral practice note styled "joint practice note".

be served with documents, including new litigation. There was also no obligation in terms of the Rules of Court for the transfer application to be served on his attorney, although it would have been courteous to do so.

[22] Further, it was unreasonable for Mr Möller not to have, at least, followed up with his attorney regarding receipt of the application. Mr Möller, as an attorney, knew that an appearance to oppose had to be entered; and that an answering affidavit was due within a relatively short period after that. Axiomatically, his attorney did not contact him for instructions in this regard. This should have struck him as strange and alarming long before the order was taken in September 2024 (more than three months after the transfer application was served on Mr Möller) and he should have made enquiries in that regard.

[23] It follows that Mr Möller was at least negligent in not entering an appearance to oppose. Messrs Joubert and Hoffman contend that he was in wilful default or at least grossly negligent.

[24] Although nothing turns on this, I do not consider Mr Möller to have been in wilful default. The case law makes it clear that for a party to be in wilful default, he or she must have – with full knowledge of the risks attendant on default – taken a decision not to appear.[4] Mr Möller did not to take a decision not to appear. He (unreasonably) assumed his attorney would appear on his behalf without him prompting the attorney to do so.

[25] This does not mean Mr Möller's relatively weak explanation is irrelevant. A court seized with a rescission application <u>may</u> excuse even wilful default if it is accompanied by a strong defence.[5] Concomitantly, if Mr Möller's reason for his default had been innocent, a court could have overlooked even a relatively weak defence (even though it must, of course, have some prospects of success).

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[4] *Harris (supra)* paras 7-8 and the cases quoted there.
[5] *Harris (supra)* para 10.

Mr Möller's defence on the merits of the transfer application

[26] In this case, both Mr Möller explanation for his default as well as the defence proffered on the merits, are weak. This means that the application for rescission should be dismissed.

[27] It is not easy to encapsulate Mr Möller's defence, as set out in his founding affidavit in the rescission application. It appears to be that the second agreement (but, importantly, <u>not</u> the first agreement) is invalid and unenforceable. The reasons for the unenforceability are said to be the following:

a. The second agreement is void for vagueness because it does not reflect the names of Supreme Heat or Scotops or any other company.

b. The second agreement (like the first) refers to "*a former partner's*" "*interest*" in and "*claims*" against a partnership; not to shares in a company or companies. (Although the first agreement refers, of course, explicitly to Supreme Heat and Scotops.)

c. Messrs Joubert and Hoffman initially relied in preceding urgent proceedings on the first agreement. They contended initially that the first agreement applied, which did not refer to the shares in SHT.

d. Both agreements are, on Messrs Joubert and Hoffman's own version, spliced versions consisting of a mix of original pages and photocopied pages without any explanation how or why this was done.

e. Messrs Joubert and Hoffman do not explain, adequately, or at all, why the parties signed two agreements a day apart. The explanation appears to be that someone has attempted to "*splice*" together an agreement to acquire the deceased's shareholding in all three companies and did a bad job in doing so.

[28] Thus, Mr Möller's counsel submitted that it cannot be said on a plain reading of the second agreement that the parties thereto were *ad idem* that the second agreement was intended to refer to Supreme Heat, Scotops and SHT, which was

not in existence at the time, and to the parties' respective shareholding in such companies.

[29] Messrs Hoffman and Joubert contend, on the other hand:

a. It is obvious that the second agreement was intended to refer to and deal with their shareholding, together with the deceased's shareholding, in Supreme Heat and Scotops, as well as SHT, which was not registered at the time when the second agreement was concluded. The reason why the second agreement did not in terms refer to Supreme Heat and Scotops is precisely that it was contemplated that the parties may, after 2011, register further businesses.

b. Mr Möller has no personal knowledge of how the first or second agreement came into being. He relies simply on suspicion and baseless conjecture, as opposed to the actual knowledge of Messrs Hoffman and Joubert.

c. The reason why, at first, they relied on the first agreement was because they only found the second agreement in February 2024. Nothing turns on this, in any event, because the first agreement would in substance have the same effect as the second agreement. Although the first agreement does not refer to SHT, the shares in SHT have no value.

d. It would thus have been more beneficial for Messrs Hoffman and Joubert to continue to rely on the first agreement, but they did not do so because they found the second agreement. They relied on it simply because it exists.

e. Mr Möller acknowledged in correspondence before litigation that an agreement exists in terms of which the shareholding of (at least) Supreme Heat would be deemed to be sold upon the death of Mr Hutchison. He also stated that he knew Mr Hutchison's "*intent*" in that regard, but he failed to say what the intent was.

[30] It seems that Mr Möller's case proceeded on the assumption that the second agreement revoked the first agreement. It is common cause that both agreements provide in clause 13 that "*[t]he provisions of this agreement have*

precedence over any provisions to the contrary contained in any other agreement that the parties have entered into with each other."

[31] A major difficulty facing Mr Möller is that, if the second agreement is invalid and unenforceable, as he contends, or even if it refers to something other than the shares in Supreme Heat and Scotops, it did not revoke the first agreement. In that case, he would have no defence against the transfer application save insofar in respect of the SHT shares (which are apparently valueless). Thus, if I understood Mr Möller's case correctly and he attacks only the validity of the second agreement, the application should fail save perhaps regarding the transfer of the SHT shares.

[32] In case, however, I misunderstood Mr Möller's case, I consider his remaining bases of attack.

[33] In my view, the second agreement is not void for vagueness because it does not reflect the names of Supreme Heat or Scotops or of any other company or because it refers to "*partners' interests*" rather than shares.

[34] A contract has to be interpreted in light of the circumstances attendant upon its coming into existence, the apparent purpose to which it is directed and the material known to those responsible for its production (among other factors). A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the contract.[6]

[35] When the second agreement was signed – and I should make it clear that Mr Möller at no stage disputed Mr Hutchinson's signature – the parties knew that:

a. They had been for decades engaged in what in ordinary parlance would be described as a business partnership. (Concomitantly, in law one often describes a closely-held company such as Supreme Heat as "*an incorporated partnership*".)

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[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 endorsed by the Constitutional Court in *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society* 2020 (2) SA 325 (CC) para 41.

b. The parties had incorporated another company, Scotops, and it was possible that they would incorporate further companies in future.

c. They had been desirous from the time when Supreme Heat was a close corporation to arrange for the situation whether a partner should pass away through a transfer of his ownership interests to the other parties, financed by life insurance.

[36] Against this backdrop – and without even taking account of the directly preceding first agreement – it seems obvious that the partnership referred to in the second agreement refers to the parties' joint business ventures carried on through Supreme Heat and Scotops, and which may in future be carried on through other entities. The interpretation of the second agreement is therefore straightforward.

[37] In addition, Messrs Jobert and Hoffman gave direct evidence on affidavit identifying the "*partnership*" and the "*interests*" with which the second agreement deals. Even before the paradigm shift in contractual interpretation brought about by the Supreme Court of Appeal's judgment in *Endumeni*[7], as continued and expanded by the Constitutional Court in *University of Johannesburg*[8], such evidence was admissible to identify the persons, things, or factual setting to which a document refers, or to apply a contract to the relevant facts.[9]

[38] The other issues raised by Mr Möller's defence are rightly described as attempts to cast suspicion devoid of facts to back it up. It is as well to be reminded of the following *dicta* of the Supreme Court of Appeal:

> "*Whatever place mere suspicion of malfeasance or moral turpitude might have in other discourse, it has no place in the courts – neither in the evidence nor in the atmosphere in which cases are conducted. It is unfair, if not improper, to impute malfeasance or moral turpitude by innuendo and suggestion. A litigant who alleges such conduct must do so openly and forthrightly so as to allow the person accused a fair opportunity to respond. It is also prejudicial to the judicial process if*

[7] *Supra*
[8] *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC).
[9] *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454F-H.

cases are adjudicated with innuendo and suggestion hovering in the air without the allegations being clearly articulated. Confidence in the process is built on transparency and that calls for the grounds upon which cases are argued and decided to be openly ventilated."[10]

[39] If Mr Möller meant to say that Messrs Joubert or Hoffman forged the second agreement to achieve transfer of the shares in SHT (in addition to those in Supreme Heat and Scotops), he should have said so and should have proffered evidence of forgery, if necessary of an expert nature. He did not. And there appears to be no obvious reason why they would do so, in light of their uncontested evidence that the SHT shares have no value.

[40] The same holds true for the issues regarding the late discovery of the second agreement and the so-called "*splicing*" of the agreements:

a. It is not uncommon for parties to litigation to scour their records for documents that may bear on a case. The discovery of the second agreement also did not fundamentally alter the position between the parties. There seems to be no reason why Messrs Joubert or Hoffman would lie about the discovery.

b. As for the "*splicing*", neither Messrs Joubert and Hoffman, nor Mr Möller explain why it appears as if some pages from the one agreement found their way into the other. Messrs Joubert and Hoffman deal with this openly in their founding affidavit in the transfer application. There could be any number of innocent explanations for it but, perhaps appropriately, they did not speculate. Mr Möller did not accuse them directly of wrongdoing, thereby perhaps recognising that the splicing may have come about in an innocent way.

[41] In the circumstances, Mr Möller's allegations in his founding affidavit do not cast significant doubt on Messrs Joubert and Hoffman's entitlement to transfer of the shares, as recognised in the order sought to be rescinded. Together with Mr

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[10] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2013 (4) SA 557 (SCA) para 4.

Möller's weak explanation for his default in appearing, this means that his application for rescission should be dismissed.

Costs

[42] Messrs Joubert and Hoffman sought punitive costs against Mr Möller (in his representative capacity as the executor, meaning that such costs would be paid by the estate of Mr Hutchison). It seems to me that punitive costs are justified because Mr Möller's default was caused by, at the very least, negligence and that his defence is speculative.

[43] Counsel also sought to motivate that the costs should be taxed on scale C. Counsel was unable to assist with authority on whether it is appropriate to make an order for both punitive costs and for counsel's costs to be taxed on scale C. It seems to me that Rules 67A and 69, which created and regulate scales A to C, only applies to party-and-party costs. Therefore, if attorney-and-client costs are awarded, counsel's fees are not subject to the scales set out in Rule 69; the only question is whether they have been reasonably incurred.[11]

Order

[44] I therefore make the following order:

a. The application for rescission is dismissed.

b. The applicant shall pay the costs of the application for rescission, such costs to be taxed as between attorney and client.

[redacted]

DJ SMIT
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 3 March 2026

Date of judgment: 18 May 2026

[11] See also the cases cited in *Erasmus: Superior Court Practice* RS 28, 2025, D1 Rule 67A-1 footnote 22.

For the Applicant:	HP West instructed by Chris Liebenberg Attorneys
For the Respondents:	S Symon SC with RG Cohen instructed by Glynnis Cohen Attorney