




**IN THE HIGH COURT OF SOUTH AFRICA,  
MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)**

**APPEAL CASE NUMBER: A2025-232833  
CASE NUMBER: 2849/2021**

<b>DELETE WHICHEVER IS NOT APPLICABLE</b>	
(1)	REPORTABLE: <b>NO</b>
(2)	OF INTEREST TO OTHER JUDGES: <b>NO</b>
(3)	REVISED <b>YES</b>
4/6/2026 DATE	 <u>H.F. FOURIE</u> SIGNATURE

In the application between:

**SHAYA PHANSI PROJECTS PTY LTD**

**APPELLANT**

**and**

**MONTGOMERY PLANT HIRE AND CONSTRUCTION CC    FIRST RESPONDENT**

**MONTGOMERY GROUP (PTY) LTD**

**SECOND RESPONDENT**

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**JUDGMENT**

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## **FOURIE AJ (PHAHLAMOHLAKA J, LESO AJ CONCURRING)**

### **INTRODUCTION:**

- [1] This is an Appeal against the judgment and order of the court a quo per Langa J dated 25 July 2025. The court a quo dismissed the appellant's application for rescission of judgment granted against it on 29 April 2024. The appeal is with leave of the court a quo.
- [2] The Appeal is unopposed, with the Respondents having filed a Notice to abide by the Court's decision.
- [3] At the heart of the appeal lies the question of whether the Court a quo correctly dismissed the Appellant's rescission application, wherein they sought rescission of the Default Judgment granted against them, dated 29 April 2024, and, in so dismissing the application, also ordered costs to be paid by the Appellants.

### **BACKGROUND:**

- [4] The Appellant, a private company with limited liability, was previously incorporated as a close corporation until its conversion to a private company on 20 December 2016.
- [5] Despite being so converted and for reasons which the Appellant has not seriously been able to display to this Court, the Appellant continued utilising some of the details of the previous closed corporation, such as their name, registration number, and place of business, in their engagements with clients such as the Respondent.

- [6] It is largely common cause that during July 2020, the Appellant and the Respondents concluded an agreement for the demolition of certain coal silos at the Anglo Goedehoop Mine, Vlaklaagte Shaft.
- [7] It is the performance under this agreement that forms the ultimate and underlying *causa* between the respective parties. The Respondents contend that they have fully performed under the agreement and claim payment for their contractual performance from the Appellants. The Appellants, seemingly under the premise of the *exceptio non adimpleti contractus*, performance in terms of the contract, alternatively, no proper performance in terms of the contract was forthcoming on the part of the Respondents, and as such, the Appellants ought to be exempt from making payment to the Respondents.
- [8] The application was brought and persisted with by the Appellant on the two-fold approach under Rule 42(1)(a) as well as Rule 31(5)(d) of the Uniform Rules of Court, and the Common Law.
- [9] It is evident that the Appellants wish the Court to pronounce finally on the validity of the service of the Summons, which the Appellants openly admit would revive a Special Plea in the main action, if they are granted leave to do so, in respect of prescription of the Respondents' claim against the Appellants.
- [10] The Court *a quo* in respect of service found the following:

*“26. The Applicant seems to argue that since it has not been established that there was an employee of the Applicant not willing to accept service, the service by affixing was therefore bad. This contention in my view, amounts to elevating form over substance and is inconsistent with the decision in Brangus Ranching (Pty) Ltd v Plaaksen (Pty) Ltd 2011 (3) SA 477 (KZB), which is quoted with approval in Arendsnes Sweefspoor CC v Botha [2013] JOL 30596 (SCA). The SCA in Arendse agreed with the proposition that the effectiveness of service of a Court process or substantial compliance should trump form. Consequently, event though*

*there was no employee present not willing to accept the service, the service of the Summons by affixing it at the registered address constitutes substantial compliance with the rule. A proper procedure was therefor followed in order to allow the Applicant an opportunity to participate in the process. Any confusion or prejudice which may have resulted in steps on the Applicant's own conduct in representing itself, as a CC, and/or failing to ensure that the CIPC records are properly updated. This service, in my view, was adequate and in conformity with the Law."*

[11] Uniform Rule 42(1)(a) provides for circumstances wherein Judgment was erroneously sought or erroneously granted.

[12] The actions of the Appellant themselves in dealing with the Respondents leading to the information that was available to the Respondents when they issued the Summons, and the information available to Court on whether the Summons was served at an address indicated by the Appellants to be their main place of business would, in this Court's view, move the matter past the contention as made by the Appellant on these grounds.

[13] This Court cannot find that the Court *a quo* was misguided in not dealing with the matter under the principles of Rule 42(1), and I align myself with the views that the matter is to be adjudicated under the auspices of Rule 31(5)(d).

[14] When evaluating the matter under the aforesaid Rule, the Appellant ultimately needed to show good cause. In the matter of *Colyn v Tiger Food Industries* [1] the Supreme Court of Appeal held that an Applicant needed to establish:

[14.1] A reasonable and acceptable explanation for their default;

[14.2] The application must be *bona fide*; and

[14.3] A *bona fide* defence which *prima facie* carries some prospects of success needs to be shown.

[15] In respect of the reasonable explanation for default, the Appellant states that they had moved premises and registered addresses by the time the Summons was ultimately served on them.

[16] The Appellant further states that, prior to the service of the Summons, on at least two occasions, they informed the legal representatives acting on the part of the Respondents that they sought any further legal process to be served at the office of their legal representatives.

[17] Although the actions of the Appellants in dealing with third parties, such as the Respondents, and the possibility that their actions might have invoked a certain perception, the Court cannot find that a reasonable explanation for the default was not provided.

[18] The Courts have found that:

*“More specifically, in the context of a default judgement, wilful connotes deliberateness in the sense of knowledge of the action and of its consequences, i.e. its legal consequences and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be” [2]*

[19] Nothing before me indicates that the Appellants knew of the Summons issued against them, and nothing indicates that they took some sort of wilful decision not to participate in the initial proceedings.

[20] The Constitutional Court confirmed, however, that an explanation for the default is not the only leg on which an application stands. In **Government of the Republic of Zimbabwe v Fick**[3], it is said:

*“The requirements for rescission of judgment are twofold. First, the Applicant must furnish a reasonable and satisfactory explanation for its default. Second,*

*it must show that on the merits it has a bona fide defence which prima facie carries some prospects of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them will result in refusal of the request to rescind.“*

- [21] If the Court has regard to the *bona fide* defences raised by the Appellant, the question as raised by the Appellant in respect of the Respondents' non-performance seems to reflect a defence under the *exceptio non adimpleti contractus*.
- [22] Accordingly, the principle is that neither party should be entitled to enforce the contract unless they have performed or are ready to perform their own obligations. [4]
- [23] As expressed by the Court in *Thompson v Scholtz* [5], the defence is a stalemate defence to a claim *ex contractu* and not a remedy for breach of contract.
- [24] Simply put, the question this Court needs to answer is whether the Respondents, *prima facie*, had any contractual obligation towards the Appellant which was not complied with, which would afford the Appellant the right to invoke the *exceptio* and withhold payment to the Respondents.
- [25] The Appellant submits that severe defects existed in the Respondent's contractual performance. The question will accordingly ultimately be, *ex contractu*, in what way the Respondents failed to perform.
- [26] Simply put, the Appellant avers that the Respondent has not complied with their contractual obligations towards the Appellant, and as such should be precluded from claiming any monies from them.

- [27] In a Rescission of Judgment application, the Court is not to pronounce on the ultimate success of the defence as raised by the party bringing the Rescission of Judgment application. The Appellant ought to have in the Court *a quo* only established a *prima facie* position, which, if established at trial, constitutes a good defence. [6]
- [28] No doubt the underlying issues between the parties will be properly canvassed when the matter is ultimately heard, but on the evidence presented to the Court *a quo*, it can neither be said that the defence was raised *mala fide* nor that, if it was ultimately proven, it would not be a valid defence as raised to the Respondents' claim.
- [29] In respect of the Appellant's claim of prescription, this Court is mindful not to make a ruling on issues which would later need to be determined after the leading of evidence by the respective parties. A proposed defence of prescription is, however, one that is available to be raised by the Appellant, and one which, under the circumstances, cannot be regarded as being raised *mala fide*, and if this defence is ultimately proven, it would constitute a valid defence against the Respondents' claim.
- [30] Premised on the aforesaid, I am satisfied that the Appellant made out a proper case for the rescission of the Judgment granted against them in their absence and the court *a quo* ought to have found as such.

**COSTS:**

- [31] The appeal has not been opposed by the Respondent, nor could the Respondent be faulted for initially opposing the Rescission of Judgment application. It is, however, evident that the Appellant ultimately reached success in respect of the Rescission of Judgment application for which a cost order is warranted.

[32] Had it also not been for the opposition to the Rescission of Judgment application, the ultimate appeal would also not have been necessary. No reason exists, however, for a deviation from the normal party and party costs order.

**ORDER:**

[33] As such and for all the aforesaid reasons, I propose the following order:

[33.1] The appeal is upheld.

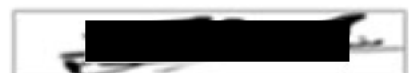
[33.2] The Order of the Court *a quo* is set aside and replaced with the following Order:

[33.2.1] The Default Judgment dated 29 April 2024 is rescinded and set aside.

[33.2.2] No order as to costs.

[33.3] The Respondents, jointly and severally, the one to pay the other to be absolved, shall pay the Appellant's reserved costs for leave to appeal on a party and party Scale.

[33.4] The Respondents, jointly and severally, the one to pay the other to be absolved, shall pay the Appellant's costs of appeal on a party and party Scale.



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**H F FOURIE AJ  
ACTING JUDGE OF HIGH COURT, MIDDELBURG**

I agree

  
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**J T LESO**  
**ACTING JUDGE OF HIGH COURT, MIDDELBURG**

I agree, and it is so ordered:



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**K F PHAHLAMOHLAKA**  
**JUDGE OF HIGH COURT, MIDDELBURG**

Judgment reserved on:  
Date of delivery:

15 May 2026  
04 June 2026

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- [1] Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)
- [2] Maujean t/a Audio Video Agencies v Standard Bank of SA Limited 1994 (3) SA 801 (C)
- [3] Government of the Republic of Zimbabwe v Fick 2013 (5) SA 325 (CC) at 85
- [4] Euhar Truck & Bus (SA) Pta Ltd v Dorbyl Limited t/a Dorbyl Transport Products & Busaf Case 38/03 (25 March 2004) at paragraph 12
- [5] Thompson v Scholtz 1999 (1) SA 232 (SACA)
- [6] Standard Bank of South Africa Ltd v El-Naddaf 1999 (4) SA 779 (W) at 784