

IN THE HIGH COURT OF SOUTH AFRICAGAUTENG DIVISION, JOHANNESBURGCASE NO: 092448/2023DATE: 26.08.2026

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES : NO

(3) REVISED



SIGNATURE

DATE: 26 August 2026

In the matter between

10 ASHLEY ZWART

Applicant

and

INDUSTRIAL DEVELOPMENT CORPORATION

Respondent

J U D G M E N T E X T E M P O R E

WILSON J: The applicant, Mr Zwart, seeks to rescind an order granted by my sister, Siwendu J, on 27 February 2024, requiring him to pay certain monies to the respondent, the Industrial Development Corporation, in

20 terms of an agreement he signed, guaranteeing the repayment of a loan by a company known as Ubergruvi CC, which I understand from the papers was run by his brother in Cape Town until his brother died.

After Mr Zwarts' brother died, he took over the company and found that it was not profitable. As a result of

the state of the company, Mr Zwart decided to place it under voluntary liquidation in 2017. The liquidation of Ubergruvi was, under the terms of its loan agreement with the Industrial Development Corporation, an act of default which entitled the Industrial Development Corporation to cancel the agreement and sue for the full outstanding balance of the loan. For whatever reason, the Industrial Development Corporation did not do that for at least three years.

Some six years later, it sought to enforce the
10 guarantee against Mr Zwart, and its application to do so gave rise to the default order granted by Siwendu J. Mr Zwart now asks me to rescind Siwendu J's order. He relies on the well-known common law requirements for rescission. In respect of his default, Mr Zwart tells me that he has always resided primarily in KwaZulu-Natal. He has a company in Pietermaritzburg and lives in Howick. Under the guarantee he signed, he nominated his domicilium at Ubergruvi's address in Cape Town, and that is where the application to enforce the guarantee was served.

20 Mr Zwart says that six years after Ubergruvi's liquidation, he had no reason to suppose that he would be still pursued on the guarantee, and accordingly no reason to keep his domicilium updated. He tells me that the first he knew of Siwendu J's order was when a writ of execution was served at his business premises in Pietermaritzburg.

On those facts, which are not seriously disputed by the Industrial Development Corporation, I can readily understand Mr Zwart's complaint. I cannot realistically conclude that he was in wilful default of appearance, given the lapse of time between the liquidation of Ubergruvi and the service of the application to enforce the guarantee. Mr Zwart might reasonably have believed that after all that time, the enforcement of the guarantee was not a realistic prospect, and the domicilium he nominated in terms of the
10 guarantee agreement would not be used for the purposes of service.

Conversely, I think it was unrealistic to the point of unreasonable for the Industrial Development Corporation to blithely rely upon a domicilium nominated in an agreement at least six years old in seeking to enforce the guarantee. The Industrial Development Corporation might reasonably have been expected to consider whether that domicilium was still good and to make enquiries as to Mr Zwart's actual location, to ensure that service was effective. There was, in
20 my view, no wilful default.

The only remaining question is whether Mr Zwart has a *bona fide* defence. Here, counsel for Mr Zwart relied upon terms of the guarantee. I was taken to Clauses 2 and 3 of the guarantee agreement, which, read together with the definition section of the agreement, defines guaranteed

liabilities as all present and future monies and liabilities which are now or which may hereafter become, owing by the borrower, that is, Ubergruvi, to the Industrial Development Corporation in terms of the finance documents and which the Industrial Development Corporation is entitled to recover from the borrower in terms of the finance documents.

Counsel for Mr Zwart posited that this entails a two-pronged test. First, the question is whether or not there is
10 a liability. Second, the question is whether it is a liability that the Industrial Development Corporation is entitled to recover from Ubergruvi. Mr Zwart argues that because the Industrial Development Corporation took no action to recover the debt from Ubergruvi for three years after the liquidation, the debt owing by Ubergruvi to the Industrial Development Corporation became prescribed and, as a result, the Industrial Development Corporation became disentitled to recover it. For that reason, the guarantee cannot be enforced.

20 There were two arguments to the contrary advanced on behalf of the Industrial Development Corporation. The first was that, because Mr Zwart was a co-principal debtor under the terms of the guarantee for Ubergruvi's debts to the Industrial Development Corporation and that the guarantee lasted until Mr Zwart was released from it, it did

not matter that Ubergruvi's debts under the loan agreement had prescribed. Whether or not Mr Zwart can appropriately be described as a co-principal debtor under the guarantee, it seems to me that the terms of the guarantee themselves, particularly the definition of guaranteed liabilities relied upon by counsel for Mr Zwart, suggest that it does matter whether or not, at the time the guarantee is sought to be activated, the Industrial Development Corporation is entitled to recover the amounts guaranteed from the borrower, 10 Ubergruvi. I need not reach a final view on this point, but I need only conclude that on the text of the guarantee, as constructed on Mr Zwart's behalf, there is a *bona fide* defence that stands some prospects of success.

On the face of things, the defence posited on Mr Zwart's behalf is such a defence. It was also suggested during argument that because the Industrial Development Corporation is an organ of State, debts to it prescribe after 30 years rather than 3. That point was not pleaded in opposing the rescission application and may be the subject 20 of some argument once the application to enforce the guarantee comes to be reargued.

It is not immediately clear to me that a parastatal, whose sole purpose is to enter into commercial agreements and make investments on the State's behalf, is to be treated as an organ of State for the purpose of the Prescription Act.

It may well be that it is to be so treated, but given the failure to raise the point in the rescission application, I am content to leave that argument to the court that hears the ultimate application to enforce the guarantee.

On the papers before me, Mr Zwart has clearly established the absence of wilful default and a *bona fide* defence that stands some prospects of success. For all those reasons, I make the following order.

1. The default judgement granted by Siwendu J under
10 this case number on 27 February 2024 is rescinded
and set aside.
2. The costs of this application will be costs in the
cause.


WILSON, J
JUDGE OF THE HIGH COURT
26 August 2026

