Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**
Circulate to Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case Number: 2115/2021
Heard: 29 February 2024
Delivered: 26 April 2024

In the matter between:

CHRISTO BRIEDENHANN **APPLICANT**

and

YUMNAH NORDIEN N.O. **RESPONDENT**

Coram: Tyuthuza AJ

JUDGMENT

Tyuthuza AJ

INTRODUCTION

1. The applicant herein applied for leave to appeal to the Full Bench of the Northern Cape High Court, *alternatively* the Supreme Court of Appeal

against my judgment delivered on 04 August 2023 in which I made the following order:

a) The application for rescission of the default judgment granted on 10 May 2022 is dismissed with costs.

2. The respondent opposed the application for leave to appeal.

3. It is the applicant's contention that reasonable grounds for the success of the appeal exist, in that I had erred in the following respects:

3.1 By finding that the rule of practice in this Division of the High Court is that once a summons is stale, i.e., service thereof has taken place more than six months prior to the institution of the action before proceeding with any further application (i.e. application for default judgment), the applicant must serve the notice of set down on the Respondent;

3.2 By finding that the applicant's alleged defence of partial payment was not a *bona fide* defence to the claim;

3.3. By not finding that the submissions of the respondent's attorney regarding the probabilities of the applicant's alleged defence of partial payment was inadmissible as evidence and therefore ought to have been struck from the record;

3.4. By not finding that the respondent's version regarding the alleged settlement negotiations between the parties were inadmissible as the very nature thereof would have been without prejudice.

4. On 28 February 2024 the applicant filed a notice of his intention to amend his its notice of application for leave to appeal, by seeking to include a further ground to *wit*:-

"[5] THE APPLICANT'S EXPLANATION FOR HIS DEFAULT

5.1. That the honourable Tyuthuza AJ erred in finding that the Applicant had not given a reasonable and satisfactory explanation for his default."

5. Despite the objection from the respondent to the amendment, I ruled that the addition of the further ground would not be prejudicial to the respondent and allowed the amendment.

6. The matter proceeded in terms of the amended notice of application for leave to appeal, on grounds 1, 2 and 5 thereof.

7. The test to be applied in an application for leave to appeal is set out in section 17(1)(a) of the Superior Courts Act 10 of 2013 which provides that:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(b) (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"

8. The applicant brought this application on the ground that the appeal has the reasonable prospect of success in that another court may come to a different conclusion.

9. In the matter *MEC for Health, Eastern Cape v Mkhita*[1] the Supreme Court of Appeal emphasised the application for the test for leave to appeal and remarked as follows:

"*[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.*

[1]2016 JDR 2214 (SCA)

> *[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough.There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.*

GROUNDS OF APPEAL:

NORTHERN CAPE HIGH COURT RULE OF PRACTICE *RE* APPLICATIONS FOR DEFAULT JUDGMENT AFTER 6 MONTHS OF SERVICE OF SUMMONS

10. It is common cause that it is a practice in this Division that a plaintiff who has issued summons against a defendant *must* serve a notice of set down on the defendant before proceeding further with the litigation if a period of six months has elapsed since the service of the summons.

11. Mr Eillert submitted that the six months' period from the date of service of the summons expired in April 2022, and that the default judgment was granted in May 2022, outside of the six months' period. Thus, the respondent ought to have served the applicant with the notice of set down and that the failure to do so resulted in the default judgment being erroneously sought and granted in the absence of the applicant. He submitted that the phrase *"application for default judgment"* means the date on which the application serves before the presiding judge and not the date upon which the application is launched.

12. It is common cause that:

    12.1. The respondent issued its summons out of this court on 13 October 2021.
    12.2. The Sheriff served the summons on 20 October 2021.
    12.3. The applicant did not file a notice of intention to defend.
    12.4. On 19 April 2022, the respondent applied to the Registrar of this court for default judgment against the applicant.
    12.5. Default judgment was granted against the applicant on 10 May 2022.

13. On the applicant's interpretation a notice of set down was to have been served on the applicant, because the matter was only to be adjudicated on 10 May 2022.

14. Mr Olivier submitted that the date for the calculation of the six month period should be the date of the application for default judgment and not the date upon which the judgment is granted and that if the applicant's interpretation was to be applied it would produce absurd results.

15. I am in agreement with the respondent's submission that the correct interpretation of the practice is the date of the application being made and not the date upon which the judgment is granted. Thus the respondent need not have served a notice of set down as the application was launched within six months from the service of the summons on the applicant.

16. In the circumstances I find that there is no merit to this ground of appeal.

EXPLANATION OF DEFAULT

17. Mr Eillert submitted in his heads of argument that the applicant's default in entering an appearance to defend was not wilful or due to gross negligence. He referred to *Grant v Plumbers (Pty) Ltd*[2] wherein the Court stated: *"He must give a reasonable explanation for his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance*."[3]

18. It is common cause that when applying for the relief as sought by the applicant (*rescission of default judgment*), the applicant must set out the reasons for the default and this explanation must be set out with sufficient particularity to enable the Court to understand how it really came about that the applicant was in default and to assess the applicant's conduct and motives.[4]

[2]1949 (2) SA 470 (O) at 476–7.
[3] See also *Coetzee & Another v Nedbank Ltd* [2010] JOL 26260 (KZD) at para 1.
[4]*Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A.

19. Despite the applicant's explanation regarding what had happened between October 2021 when he was served with the summons to December 2021, there is no explanation for the applicant's lack of action from December 2021 to the time that the default judgment was granted.

20. In *Harris v ABSA Bank Ltd t/a Volkskas*[5] the Court held as follows:

> *"Before an applicant in a rescission of judgment application can be said to be in 'wilful default' he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions. A decision freely taken to refrain from filing a notice to defend or a plea or from appearing, ordinarily will weigh heavily against an Applicant required to establish sufficient cause. . ."*

21. I have dealt extensively with the applicant's explanation for his default in the judgment. It is clear therefrom that the applicant had been aware of the summons since October 2021. From October 2021 to December 2021, there were attempts to resolve the matter through discussions, but it seems none of those envisaged discussions actually materialised. From January 2022, the applicant did nothing, he explains that he forgot about the meeting on 7 January 2022, and that he had missed many calls due to being busy and that he doesn't listen to voicemails. It is clear that the applicant had, from at least December 2021, done nothing to try and resolve this matter and remains mum on the actions he had taken between January 2022 and September 2022 when he was served with the writ of execution.

22. I remain of the view that despite the applicant being aware of the action instituted against him, he had failed to take an active interest in his case and I am therefore not persuaded that the applicant has given a reasonable and satisfactory explanation for his default.

23. In the circumstances I find no merit in this ground.

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[5] 2006 (4) SA 527 (T) at 530A-B.

BONA FIDE DEFENCE TO CLAIM

24. The Constitutional Court in the matter of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*[6] emphasised that two requirements for the granting of an application for rescission of a default judgment need to be satisfied under the common law; first, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that it has a bona fide defence which *prima facie* carries some prospect of success on the merits. 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 may result in the refusal of the request to rescind the default judgment.

25. Mr Elliert submitted that by making the findings, I assessed the merits of the matter and the balance of probabilities to the extent that a trial court would have, and required the applicant to produce evidence to show that the probabilities were in his favour. He further submitted that I failed to apply the correct test regarding the requirement of a *bona fide* defence in respect of an application for rescission of judgment. The applicant submits that there exists a reasonable possibility that another Court will arrive at the conclusion that *prima facie,* the applicant had established a bona fide defence.

26. In the matter of *Minister of Police v Lulwane*[7]*,* the Court observed thus:

> "It should be borne in mind that the discretion to rescind the judgment must always be exercised judicially and is primarily designed to enable courts to do justice between the parties. 'Good cause' means that:
>
> *'(a) the defendant has a reasonable explanation for the default. Wilful default is normally fatal but gross negligence may be condoned. "Wilful" default in this context connotes*

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6 (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at para 71.

[7]429/20200 [2023] ZAECMHC; [2023] JOL 59222 (ECM); 2023 JDR 1492 (ECM) at para 46 (footnote omitted).

knowledge of the action and its legal consequences and a conscious decision, freely taken to refrain from entering an appearance, irrespective of the motivation.

(b) The application is bona fide and not made with the mere intention to delay the plaintiff's claim.

(c) The defendant can show that he has a bona fide defence to the plaintiff's claim and that he has a bona fide intention to raise the defence if the application is granted.'

The court may also take into account the prejudice to the parties. The bona fide defence needs to be established prima facie only and it is not necessary to deal fully with the merits of the case or to prove the case. It is sufficient to set out the facts, which if established at the trial, would constitute a good defence. The defence must have existed at the time of the judgment. The court has a wide discretion in evaluating "good cause" in order to ensure that justice is done between the parties. A good defence can compensate for a poor explanation and vice versa." See: Zealand v Milborough 1991 (4) SA 836 (SE) at 838 C-E; Carolus and Another v Saambou Bank Ltd 2002 (6) SA 346 SE at 349B-E.

27. In deciding whether 'good cause' exists, the court will exercise its discretion based on the merits of each individual case and cannot consider the explanation for the Applicant's default in isolation.[8] In the matter of *De Witts Auto body Repairs (Pty) Limited v Fedgen Insurance CO Limited*[9] the Court stated as follows:

"The correct approach is not to look at the adequacy or otherwise of the reasons for the failure to file a plea in isolation. Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which is an all-important consideration, and in the light of all the facts and circumstances of the case as a whole. In this way the magistrate places himself in a position to make a proper evaluation of the Defendant's bona fides, and thereby to decide whether or not, in all the circumstances, it is appropriate to make the client bear the consequences of the fault of its attorneys as in Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A). An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the Rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence, and hence

[8] Mothabeng v Mothabeng [2022] JOL 53925 (FB) at para 16.
[9] 1994 (4) SA 705 (E).

that the application for rescission is not bona fide. The magistrate's discretion to rescind the judgment of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties, bearing in mind the considerations referred to in Grant v Plumbers (Pty) Ltd (supra) and HDS Construction (Pty) Ltd v Wait (supra) and also any prejudice which might be occasioned by the outcome of the application. He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised and heard."

28. The applicant and the deceased entered into a written agreement, wherein the applicant agreed to pay the deceased an interest-free amount of R861 555.72 to the deceased over a period of five years. In the main application, the applicant contended that the agreement entered into in 2015 was merely an addendum to the initial agreement entered into in June 2012, further that the addendum is an unlawful agreement in terms of section 89 of the National Credit Act.[10] The applicant contends that he entered into an oral agreement with the deceased in October 2018, and in terms of the agreement, payments would be made in cash and part in kind. The applicant alleges to have made partial payment on three occasions wherein an amount of R632 000.00 was paid in total. The applicant has also sought to undertake payment of the balance should the court declare the addendum to be lawful. The respondent disputes that partial payment was done based on the fact that the alleged proof of payment does not bear a signature of the deceased, the applicant failed to provide any substantiation for the allegation that he and the deceased orally agreed that the payments be made in cash and further that the deceased sold the farm by October 2018. Having considered the facts, I view these to constitute triable issues

[10]34 of 2005

29. It is trite law that an applicant for rescission of judgment is not required to illustrate a probability of success, but rather the existence of an issue fit for trial.

30. Despite not being satisfied that the applicant has proffered a reasonable and acceptable explanation for the default, having considered the application as a whole and the applicant's defence, I am of the considered view that the applicant's case may constitute a defence insofar as the applicant disputes the amount owed to the deceased. It is sufficient that in his evidence he shows a *prima facie* case which raises triable issues.[11]

31. I therefore make the following order:

1. Leave to appeal is granted to the full court of this Division against the judgment and order of 4 August 2023.

2. Costs of the application for leave to appeal are costs in the appeal.

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T TYUTHUZA
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

APPEARANCES:

On behalf of the Applicant:	Adv A Eilliert
On the instruction of:	Louw & Da Silva Attorneys c/o Duncan & Rothman Attorneys

[11] Olisa trading as African Vibes v Tupa 2012 (Pty) Ltd [2023] JOL 57260 (GJ) at para 10-12.

On behalf of the Respondent:	Adv JL Olivier
On the instruction of:	Oosthuizen, Sweetnam, Rietz & Fourie Attorneys c/o Elliot Maris Attorneys