



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: 703/2020

In the matter between:

ESDA PROPERTIES (PTY) LTD

**Applicant
(Defendant a quo)**

and

SCARTERFIELD GAME RANCH CC

**Respondent
(Plaintiff a quo)**

JUDGMENT: APPLICANT'S RESCISSION APPLICATION

LOWE J

INTRODUCTION

1. This is a rescission application in which applicant (defendant *a quo*) seeks to rescind the judgment and order of this court given on 22 November 2021, that judgment having been given in default of applicant's appearance, and in favour of respondent in this matter (plaintiff *a quo*).
2. The papers in the rescission application are lengthy, some 255 pages, and the matter was vigorously argued for both to say the least.
3. Whilst the notice of motion did not indicate whether this rescission was sought in terms of the Rules or the common law, in argument it was urged upon me that the application was brought either in terms of the common law and/or

Uniform Rule 42(1)(a), the reliance on the Rule was said to be superfluous however.

4. I will nevertheless deal with both bases for the application insofar as may be necessary.
5. It should be set out that the action by respondent against applicant has its origin in a written agreement of sale in terms of which the property, Fairfax Farm no 340, was sold by respondent to applicant for a purchase price of R12 million, the deed of sale dated in October 2019.
6. The property was sold inclusive of game as listed in Annexure A1 as follows:

“6.3 The purchaser acknowledges that the property, including all game as listed in Annexure A1, all buildings and erections thereon is sold as it stands at date of the sale”.
7. Annexure A1 referred to various species of game either as to specific numbers or in instances estimated numbers.
8. It was alleged that respondent had complied with all its obligations in terms of the agreement, had tendered to effect transfer of the property to applicant against payment of purchase price therefor but that notwithstanding demand applicant had failed or refused to make provision for payment of the purchase price, respondent seeking payment by applicant (as defendant) of the sum of R12 million as and for the agreed purchase price.

9. In due course applicant filed a plea denying that respondent had complied with its obligations in terms of the agreement setting out (in summary) that respondent would not be able to give possession of the property to applicant or carry out all its obligations, there being specifically no adequate enclosure of the property to enable the applicant to keep the game listed in Annexure A1 thereon with no approved bio diversity management plan as contemplated in section 43 of the National Environmental Management Bio Diversity Act 10 of 2004 *inter alia*, and further that respondent had failed to deliver a material portion of the game listed in Annexure A1, the value of the game listed in Annexure A1 amounting to R4 201 500,00 whereas the physical game present on the property was to the value of R3 940 000,00, a difference of R1 107 500,00. It was thus alleged that respondent was in material breach of its obligations, and in the alternative that prior to the conclusion of the agreement respondent had represented to applicant that all permits to possess the game in question were valid and in existence; that adequate fencing as required by law was in place; that the number of the game was that as set out in Annexure A1, these being fraudulent misrepresentations entitling applicant to avoid the agreement.
10. Respondent filed a rejoinder, whilst applicant requested various trial particulars which were answered and respondent requested its own particulars of trial which was also answered. On 17 July 2020 a short combined minute in terms of Rule 37 was filed joining issue on the various matters raised in the pleadings.

11. Respondent filed a notice of a certain Mr. Hurter in terms of Rule 36(9) dealing with animal population issues relevant to the property.
12. Attorneys Wheeldon Rushmere and Cole who had up until then been applicant's attorneys withdrew as attorneys of record on 11 November 2020, this in terms of Rule 16(4)(b). At this time respondent's attorneys in Makhanda were McCallum attorneys.
13. Respondent's attorneys set the matter down for hearing by notice dated 19 April 2021 (filed of record on 20 April 2021) which, having regard to the withdrawal of applicant's attorneys, was addressed by email to applicant.
14. The matter came before me by way of case flow management on 20 May 2021, at which time I directed that the applicant, as defendant, attend a case flow management conference within fourteen days of the date of the order, the matter postponed to 3 June 2021.
15. Again on 9 June 2021 I issued a case flow management directive certifying the matter trial ready and ordering that:

"Notice of certification to be brought to the attention of defendant who is unrepresented at this stage via email, sms (if contact details available) and registered mail per chosen address".
16. The applicant did not attend any case flow management conferences as it had been directed to do.

17. Again, on 22 October 2021 the matter came before me at the trial roll call in open court, Mr. Cole SC appearing for respondent, no appearance for applicant. It was confirmed that the matter was trial ready and I ordered that “this roll call directive must be served by the Sheriff at the registered office of the defendant.”
18. In 26 October 2021 the roll call directive was indeed served at the registered office of the applicant in East London, the Sheriff explaining the nature of the process.
19. Again, as a matter of sheer coincidence and on 22 November 2021, the matter failed to be called on the trial roll, there being no appearance for applicant, respondent seeking judgment by default.
20. On 20 April 2021 a notice of set down was filed seeking a trial date, this sent by email to applicant.
21. A notice of set down of a civil trial clearly referring to this action, was issued by the Registrar informing that the matter had been placed on the roll for hearing at Makhanda on 22 November 2021 addressed to defendant by way of the usual email addresses utilised, defendant not having replaced its attorneys of record and not being represented by attorneys either in Makhanda or elsewhere. There is no suggestion that this notice of set down was not received.
22. Mr. Cole SC referred to the roll call directives and that there could be no doubt from the correspondence attached in the trial bundle that many letters

were sent by respondent's attorneys to applicant by email keeping applicant fully informed as to what was happening.

23. Despite the fact that this was a claim for a liquidated amount in money, and that the Rules did not require, unless the court ordered otherwise, that evidence be led at the stage of default judgment, when the matter was called respondent took me through the claim and the sequence of events, this appearing from the typed record, respondent chose of itself to give evidence, which decision I accepted, the evidence of Mr. Scarterfield being led in some detail as to the origin of its claim, the basis thereof and dealing with certain of the issues raised in defence this appearing in the typed record from page 14 to 33 thereof.
24. The evidence having been heard, I was satisfied that a proper case had been made out for judgment by default and judgment was given in appropriate terms for respondent against applicant.
25. In this regard, put shortly, the thrust of the rescission application is that applicant's relationship with his erstwhile legal representatives had broken down their mandate being terminated in November 2021 at a time when he was experiencing personal trauma in his life from the events referred to in paragraph 18 of the founding affidavit, respondent finding out late in November 2021 by word from the farm's manager that judgment had been granted by default, applicant then approaching its current legal representatives.

26. In addition, it is alleged that respondent presented incorrect (false) evidence at the hearing that it had complied with the statutory requirements; that respondent was unable to tender possession and/or transfer of the game listed and that in the circumstances this warranted the judgment being rescinded.

THE LEGAL ISSUES RELEVANT TO RESCISSION OF JUDGMENT

27. Rescission applications may be brought in a number of ways arising from Rule 31(2)(b) of the Uniform Rules of Court, in certain circumstances Uniform Rule 42(1)(a) and more importantly for the purposes of this matter, the common law.
28. Under the common law the applicant seeking rescission bears the onus of establishing "*sufficient cause*". Whether or not sufficient cause has been shown depends upon whether:
- 28.1 The applicant has presented a reasonable and acceptable explanation for the default of appearance; and
 - 28.2 The applicant has shown the existence of a *bona fide* defence, that is one that has some prospect or probability of success.¹
29. I should make it clear that the two aspects that go to sufficient cause are conjunctive, an acceptable explanation of default must be present with evidence of reasonable prospects of success on the merits.²

¹ *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T); *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764J and 765A - D; *Zuma v Secretary of the Judicial Commissioner of Enquiry* [2021] JOL51107 (CC).

² *Chetty (supra)* 765D - E.

30. A party showing no prospect of success on the merits for example will fail no matter how reasonable and convincing the explanation for default. Further, and as set out in **Chetty** (*supra*):

“And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits”.

31. Both the common law and Rule 31(2)(b) are similar in this regard sufficient cause to be shown under the common law and “*good cause*” in terms of the Rule. These terms it has been held are synonymous and interchangeable.³

32. In **Harris** (*supra*) it was pointed out that:

“The absence of ‘wilful default’ does not appear to be an express requirement under Rule 31(2)(b) or under the common law. It is, however, clear law that an enquiry whether sufficient cause has been shown is inextricably linked to or dependent upon whether the applicant acted in wilful disregard of the Court Rules, processes and time limits. While wilful default may not be an absolute or independent ground for a refusal of a rescission application, a display of wilful neglect or deliberate default in preventing judgment being entered would sorely co-exist with sufficient cause.”⁴

33. In **Harris** it was pointed out that wilful default is characterised by an indifference as to what the consequences would be rather than of wilfulness to accept them.

³ **Silber v Ozen Wholesalers (Pty) Ltd** 1954 (2) SA 345 (A) at 352H – 353A.

⁴ **Harris** [6]

34. In **Neuman (Pvt) Ltd v Marks**⁵ it was pointed out that a defendant may be most unwilling to suffer a judgment to be entered against him and the consequences may be such that he or it cannot be indifferent to them particularly where he has placed the plea and counterclaim on record. The court went on to say:

“The true test, to my mind, is whether the default is a deliberate one – i.e. when a defendant with full knowledge of the set down and of the risks attendant on his default, freely takes a decision to refrain from appearing”.

35. In **Maeujean t/a Audio Video Agencies v Standard Bank of SA Ltd**⁶ King J, following the above, said that:

“More specifically in the context of a default judgment ‘*wilful*’ connotes deliberateness in the sense of knowledge of the action and of the consequences, i.e. its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be.”⁷

36. Importantly the court in **Harris** set out that:

“[8] 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/or 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.”

⁵ 1960 (2) SA 170 (SR). This aspect of full knowledge of the risks attendant on default is of crucial importance in this matter having regard to applicant’s affidavit in which in summary this very issue is raised.

⁶ 1994 (3) SA 801 (C).

⁷ See also **Harris** (*supra*) paragraphs [5] – [10].

37. **Harris** makes it clear that even wilful default once demonstrated does not necessarily mean that an applicant is barred from claiming rescission stating that:

“The Court’s discretion in deciding whether sufficient cause has been established must not be unduly restricted. In my view, the mental element of the default, whatever description it bears, should be one of the several elements which the court must weigh in determining whether sufficient or good cause has been shown to exist. In the words of Jones J in **De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd**⁸, ‘... the wilful or negligent or blameless nature of the defendant’s default now becomes one of the various considerations which the Courts will take into account in the exercise of their discretion to determine whether or not good cause is shown.’”⁹

38. As was further pointed out in **Harris**¹⁰ the Court seized with an application for rescission, should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation. Put otherwise, the explanation good, bad or indifferent must be considered in the light of the nature of the defence which is an important consideration and in the light of all the facts and circumstances of the case as a whole. **Harris** (*supra*) [10]

39. The **Harris** judgment referred again to **De Witts Auto Body Repairs** (*supra*) with approval with respect to the following quotation:

[11] In amplifying the nature of the preferable approach in an application for rescission of judgment, I can do no better than quote Jones J with whose *dicta* I am in respectful agreement:

⁸ 1994 (4) SA 705 (E) at 708G.

⁹ **Harris** para [9]

¹⁰ Paragraph [10].

'An application for rescission is never simply an enquiry whether or not to penalise a party for 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 willful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence and hence that the application for rescission is not *bona fide*. The magistrate's discretion to rescind the judgments 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. . . . 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.'¹¹

40. All the above remains good law when regard is had to **Zuma** (*supra*) where the Constitutional Court carefully referred to the principles relevant to rescission in terms of the common law.¹²
41. The Constitutional Court pointed out that the common law requirements for rescission had already been dealt with in **Government of the Republic of Zimbabwe v Fick and Others**¹³. It was also pointed out that once an applicant has met the requirements for rescission, the Court is merely endowed with the discretion to rescind its order (this in respect of Rule 42 in the context of mistake). In respect of common law rescission reference was

¹¹ At 711 F - I.

¹² Zuma *supra* paragraph [71] to [85]. See footnote 1 above.

¹³ 2013 (5) SA 325 (CC).

made to **Chetty** (*supra*)¹⁴ which held that the exercise of a court's discretion is influenced by considerations of fairness and justice having regard to all the facts and circumstances of the particular case and that one of the most important factors to be taken into account in the exercise of a discretion to rescind was whether the applicant had demonstrated a determined effort to lay his case before the Court and not an intention to abandon it.

42. The Constitutional Court pointed out that it is well established that the grounds upon which a judgment can be set aside are extremely narrow and the law of rescission intends to exclude any other grounds for setting aside judgment after an action has been brought to a finish. The Constitutional Court held that it was not generally open to courts to expand grounds for rescission, in fact to the contrary.
43. Applicant in argument emphasised that the requirements are to be balanced and that the circumstances that a proposed defence carries reasonably good prospects of success on the merits might tip the scale in applicant's favour in an application for rescission. In **Zuma** (*supra*), applicant emphasised, that the court approved the principles set out in **Chetty** as follows:

“broadly speaking, the exercise of a court's discretion [is] influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case.’ One of the most important factors to be taken into account in the exercise of discretion, so the court in **Chetty** found at 760H and 761E was whether the applicant has demonstrated ‘a determined effort to lay his case before the court and not an intention to abandon it’ for ‘if it appears that [an applicant's] default was wilful or due to gross negligence, the court should not come to his assistance.’ And, as stated in **Naidoo and another v Matlala NO and others** 2012 (1) SA 143

¹⁴ See footnote 1 above.

(GNP) [also reported at [2011] JOL 27795 (GNP) – Ed] at para [4], a court will not exercise its discretion in favour of a rescission application, if undesirable consequences would follow.¹⁵

44. Not surprisingly applicant's counsel laid considerable emphasis on paragraphs [8] and [9] of **Harris** (*supra*), as I have already referred to above, in particular that before an applicant can be found to be in wilful default, such 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.
45. This latter issue is one upon which applicant relies heavily, it being argued that in this particular matter, on the facts, applicant did not appreciate the legal consequences of its actions in this case assuming (albeit wrongly) that the court would not grant a judgment having regard to the defences raised in the plea. It was argued, along the lines of Harris, that the explanation given for being in default must be considered in the light of the nature of the defences raised which was an important consideration and in the light of all the facts and circumstances of the case as a whole.
46. It was also emphasised that the question is whether the explanation for the default and accompanying conduct gives rise to the probable inference that there is no *bona fide* defence and that the application for rescission is not *bona fide*.

APPLICANT'S ALLEGATIONS AS TO RESCISSION

¹⁵ Paragraph [53] read with footnote 20.

47. In essence the allegation by applicant's representative and sole director was that subsequent to his attorneys withdrawing, as their relationship had broken down, he was experiencing personal trauma in his life and that the litigation played a secondary role as it is put. He described the events which contributed to the trauma he relies on having been involved in a motorcycle accident, having a daughter on the brink of suicide and a grandson taken away from him who had been raised as his own child to all intents and purposes, and also having to move home. He says that he believed that he (the company) had good defences and trusted that a court would recognise this and not grant judgment in his absence, he not failing wilfully to appear but *"... did so out of ignorance which was not helped by the personal trauma I was experiencing at the time."* It is argued that this view was *bona fide* a comprehensive plea having been delivered, applicant assuming, albeit wrongly, that a court would not in the circumstances grant judgment and that the court would play a *"more inquisitorial role"*. It is argued that the correspondence and papers relevant do not in any way indicate a subjective mind set to acquiesce in the claim against it.
48. It may be said immediately that there can be no doubt that on the pleadings applicant at no time simply acquiesced, and having regard to the defences raised the failure to appear to contest judgment was out of step.
49. Whilst it may be accepted that applicant's sole director had personal issues which distracted him from the trial, there is a complete absence of reference to nor are the case flow management issues of which applicant must have been aware, dealt with in any way at all.

50. Put otherwise, it must be accepted that applicant and its sole director were more than fully aware of all issues relevant, and took a deliberate decision not to attend the proceedings as it is at no time set out that applicant was in fact unaware thereof. Respondent relies heavily hereon in its opposition.
51. At the end of the day then the main thrust on the first leg, to be considered in the light of all the relevant facts and circumstances, is that applicant believed albeit wrongly that respondent would not be able to prove its case, that this would be recognised at the default judgment stage even in the absence of applicant and the court would refuse relief. It is argued that this falls in line (taken overall) with the submission that whilst there was a deliberate intention not to attend, in essence applicant did not appreciate the legal consequences of its failure and did not in any way acquiesce in the judgment genuinely believing it would and could not be given in the circumstances albeit conceding at this stage that it was a naive and incorrect belief.
52. In respect of the existence of a *bona fide* defence, I emphasise that I am fully aware of the fact that, as I have fully set out above, this means simply that a defence must be put up on affidavit that *prima facie* has some prospect or probability of success.
53. The concept of a defence is simply a defence such as to *prima facie* carry some prospect of success as set out in **Chetty** (*supra*).¹⁶

¹⁶ Page 765 A - D.

54. The bar is then is set relatively low being a “*a bona fide defence which ‘prima facie, carries some prospect of success.’*”
55. In this regard what is put up on the affidavits for applicant is that firstly incorrect evidence was led at the default judgment stage that it did comply with the statutory requirements raised in defence. It is alleged that the witness Scarterfield had relied on a “*single document*” to contend that it had complied with the relevant statutory requirements, that this was misleading and incorrect as the certificate of adequate enclosure was not sufficient in respect of the so-called TOPS game (being threatened and protected species in terms of the National Environment Biodiversity Act 10 of 2004 and its regulations). It is alleged that this was to all intents and purposes conceded in respondent’s reply to the request for particulars, paragraph 2.1 to 2.6 thereof. A considerable number of allegations are made in this regard in the affidavit and it goes so far as to say that Scarterfield’s evidence was “*unfortunately untrue*”. This relates to the existence of electric fencing on the farm which it is contended was required. Scarterfield is criticized for not having presented the biodiversity management plan at the hearing, this seeming to overlook that no evidence at all was required to have been put up, it being a liquid claim. It is alleged effectively that respondent misrepresented the facts in the evidence, this said to be the basis for an argument in terms of Rule 42(1)(a); that the judgment was erroneously sought alternatively falling under one of common law grounds. It is alleged, and strongly at that, that respondent had presented incorrect evidence with the knowledge that it was incorrect, alleging that it mislead the court.

56. Secondly, the thrust of the application, as to a defence, is that respondent is unable to tender possession and/or transfer of the game listed in Annexure A1. Issue is joined with the Hurter game count referred to briefly above, it being alleged that Hurter simply made an estimate of the game dependent upon the information provided by Scarterfield which never has been accurate by any stretch of the imagination. Reference is made to the fact that the count was inaccurate was contested by Rodney Bradfield (the farm manager) who did not agree therewith, that estimate showing that there were far fewer game numbers on the farm than referred to in the annexure.
57. It is then said that respondent's suggestion at the hearing that all the game was present as listed is "inaccurate" and that if rescission were granted applicant would be in a position to present definitive evidence as to this issue in due course.

RESPONDENT'S SUBMISSIONS

58. In essence respondent contends that applicant was in wilful and deliberate default in full knowledge of what was about to occur joining issue with the fact that he genuinely believed that judgment would not be granted. It is also, in any event, alleged that the applicant has no prospect of success in defending the matter and that its complaints are in effect mischievous, misleading and incorrect.
59. As to the allegations that applicant's absence was wilful and "*contemptuous*" respondent argues that its submission that applicant deliberately chose to be absent from the trial is supported by a letter written by applicant's sole director

to respondent's attorneys on 29 June 2021 in which amongst other things the following appears:

"The trustees of the De Villiers Family Trust will not be forced by any court or Judge to allow ESDA Property to purchase your client's "farm" or pay for game stock, that don't exist. It is what it is. We will not be wasting money by employing Grahamstown advocates to misrepresent the facts to a Judge. So go ahead and have your day in Court."¹⁷

60. This is indeed strong stuff but it must be read in context, and it must be remembered that this communication is written some time before the hearing, (29 June 2021), after applicant's attorneys had withdrawn.
61. It is correctly pointed out that the non-appearance was deliberate. The point, however, is rather whether in the light of that deliberate non-appearance, it can be said that applicant overall did not appreciate the legal consequences of what it had chosen to do believing that a court would, in the light of the pleadings, refuse judgment *mero moto*, albeit an incorrect belief but one which a layman might perhaps reasonably hold, in the absence of legal advice.
62. As to the bona fide defence issue respondent contends strongly that no *bona fide* defence has been put up.
63. As to the first defence, (the statutory requirements), it is pointed out that there was no warranty that the seller had the necessary permits, it being argued that this is not provided for in the agreement and that the only reference in the

¹⁷ The entire letter is one contesting respondent's trial case and defending applicant's position and persisting in its defences.

agreement relates to the inclusion of the game in Annexure A1 in the sale as already quoted above, and that clause 5.2 provides that all costs of transferring and obtaining any necessary game permits are to be born by the seller.

64. Perhaps more importantly, it is alleged to be common cause that the game fence was not electrified and that the seller was for good reason not bound by the recommendations of the Biodiversity management plan, this flowing from, and only if voluntary steps were taken in terms of section 43 and 46 of Act 10 of 2002 which was not the case in this matter.
65. It is carefully explained for respondent and argued that the policy provides for an exemption for white rhino as to electrified fences if there is a non-electrified 2.4m high fence which was in fact the case in this particular matter. It was argued that the Scarterfield evidence at the trial was that a TOPS permit and a CAE were obtained and an inspector checked the fences supported by the documentation handed in.
66. As to the game numbers argument, it is submitted for applicant that the sale was “voetstoots”. It is argued that the game list A1 constituted in certain instances an estimate which was not queried at the time. It is argued that the precise number of game was unimportant to the purchaser and the difference not material in breach of the agreement. It is argued that clause 6 of the agreement headed “*Sale Voetstoots*” is relevant including paragraph 6.3 as follows¹⁸:

¹⁸ It is highly debatable whether this clause although under the heading “voetstoots” could ever be found to be a voetstoots clause on a proper interpretation thereof.

“The Purchaser acknowledges that the property, including all game as listed in Annexure A1, all buildings and erections thereon, is sold as it stands at date of sale.”

67. It is alleged that the purchaser was then subject to this clause bound to be entitled only to all game whatever the number, whether more or less than those stated in the game list, happened to be present at the date of sale.
68. It is argued that in any case applicant has not prima facie “*proven*” that there was materially fewer game.
69. In short, the argument is that the allegations made for applicant in this regard and summarised above, are disposed of by the following.
70. It is argued that the game offered were those on the property at the date of the sale in October 2019 and that the game count after January 2022 will not assist. Secondly that Mr. Hurter had in fact been nominated by applicant and that the game estimation by Bradfield is in fact lower than that in Annexure A1 to the agreement. Ultimately respondent alleges that there is simply no prospect of success relevant to game numbers, there being no “*complete evidence by ESDA*” to establish that its defence has a prima facie prospect of success. It is argued that having regard to proof on a balance of probabilities it would be required of ESDA to establish that its defence had such a prospect and that it would not be possible on the evidence for it to do so. It is argued that Bradfield’s evidence will not be preferred simply because he is the farm manager and that this misunderstands the application of the probabilities.

CONCLUSION

71. I have carefully considered the papers and allegations made therein, as also the arguments advanced against the legal requirements.

72. Proceeding as per my summary of the legal situation as set out above, and considering all the aspects of the matter in the manner set out in the authorities, it seems to me, that it must be accepted that although deliberately deciding not to attend the trial, it cannot be accepted without more, in the context of the affidavits in this application, and the pleadings in the main action, that applicant reconciled itself to the fact that if it did not appear judgment would be given against it. It seems to me that it has been sufficiently established on the affidavits that however short sighted, unwise and misinformed, in the absence of legal advice at the time, applicant has sufficiently shown that it subjectively had a genuine belief that in the context of its defences (which it at no time abandoned) judgment would not be given against it even if in its absence. Although applicant admits its attitude was ill informed and misguided, it has for the purposes of these proceedings to be accepted on the papers that this is sufficient in the context of the defences put up to constitute an acceptable explanation for the default, in the context of the approach and tests set out above, showing that applicant did not subjectively appreciate the legal consequences of its default.

73. Insofar as the defences are concerned against the stated prima facie requirement which carries a defence with some prospect of success, I agree

with respondent that this on the papers before me is not demonstrated in respect of the fencing and certification issue.

74. However, it seems to me otherwise in respect of the issues relevant to the game count and those referred to in Annexure A1 in the context of the agreement.
75. Whilst I am not saying for a moment that this is a defence which will necessarily succeed, that is not the test, and it seems to me that respondent has overstated the extent to which applicant was required to go in this regard, and certainly not such as to deal with the probabilities on what might be found on the evidence once it has been presented.
76. In my view, in that event, there is in respect of the defence relating to the animal count issue and Annexure A1 sufficient to establish prima facie that this carries some prospect of success and that that is sufficient to establish the necessary on the second leg of the enquiry.
77. In the circumstances, I find that at common law, the applicant has established sufficient cause in the sense fully described in this judgment above, both the necessary existence of a reasonable and acceptable explanation for the default being established with, on the second defence issue raised, a bona fide defence which prima facie carries some prospect of success in the sense and to the extent required.
78. In the circumstances the application must succeed and rescission must follow.

79. As to costs, applicant sought an order that in the event of the application being opposed respondent must pay the costs thereof.
80. This, entirely, overlooks the fact that in the circumstances of the matter it was more than reasonable for respondent as a successful plaintiff in the default judgment proceedings, and having regard to the circumstances and exigencies, to have not only opposed the application but to have argued same having regard to the specific instances and arguments applicable in this matter and not only applicant's attitude to the possibility of the finding being made against it. In pursuing its opposition to the rescission respondent acted reasonably and should have his costs thereof.
81. Further, it was more than reasonable for respondent to test the water as to the defences that were to be put up and then in fact argued. There was also the question relevant to the allegation of the fact that the court was deliberately misled by the evidence of Scarterfield in respect of the game fencing, which respondent was more than entitled to meet and argue.
82. In the circumstances, in my view, although successful applicant, which seeks a substantial indulgence, cannot have its costs and further must in the circumstances bear the costs of respondent in this application, including those wasted in the default judgment proceedings.

ORDER

83. In the circumstances, the following order issues:

1. The judgment and court order granted by Lowe J on 22 November 2021 under case number 703/2020 is rescinded and set aside.
2. The applicant is to pay the respondent's costs in respect of the rescission application and those wasted in respect of the default judgment proceedings.
3. The matter is to be set down for trial in due course and is to be referred for case flow management and the allocation of a suitable trial date accordingly.

M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicant:	Adv. Steenkamp, instructed by Netteltons Attorneys, Ms. Pienaar.
Appearing on behalf of the Respondent:	Adv. S. Cole SC, instructed by McCallum Attorneys, Mr. McCallum.
Date heard:	18 October 2022.
Date delivered:	8 November 2022.