



THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: YES/NO

Case No: 1719/2015

In the matter between:

RAMALEPHATSO INDUSTRIES CC
SIZAMPILO PROJECTS CC

First Applicant
Second Applicant¹

and

NYUMBA MOBILE HOMES & OFFICES (PTY) LTD

Respondent

In re

NYUMBA MOBILE HOMES & OFFICES (PTY) LTD

Plaintiff

and

MEC FOR THE FREE STATE DEPARTMENT OF HEALTH

First

Defendant²

FEZILE DABI DISTRICT MUNICIPALITY

Second Defendant

MAZIBUKO WESSELS ARCHITECTS

Third Defendant

RAMALEPHATSO INDUSTRIES CC

Fourth Defendant

SIZAMPILO PROJECTS CC

Fifth Defendant

¹ The applicants operated as a joint venture in this case.

² It was ordered by Van Zyl, J on 6 May 2016 that all references in the combine summons to the first defendant as a party to the action to be struck out on the basis of a misjoinder of the first defendant as a party to the action.

GRAHAM TAKATSO LEHETLA

Sixth

Defendant

CARLTON PULE SHAKWANE

Seventh Defendant

Coram: Opperman, J

Heard: 3 August 2023

Delivered: 15 September 2023. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and released to SAFLII on 15 September 2023. The date and time of hand-down is deemed to be 15h00 on 15 September 2023

Judgment: Opperman, J

Summary: Application for rescission

JUDGMENT

INTRODUCTION

[1] Litigants may not be allowed to turn their backs on the justice system and the court and walk away as, and when, and how it suits them. Access to courts in terms of section 34 of the Constitution of the Republic of South Africa, 1996 is a basic human right. The Constitutional Court³ was clear and unyielding when it was ruled that:

[2] In this matter, this Court is being asked to rescind the judgment and order that it handed down in respect of contempt of court proceedings launched against former President Jacob Gedleyihlekisa Zuma for his failure to comply with an order of this Court. Ironically, the judgment now impugned, contains a thorough exposition of the rule of law and its fundamental importance to South Africa's constitutional democracy. Indeed, it says, "[n]o one familiar with our history can be unaware of the very special need to preserve the integrity of the rule of law" in South Africa. Yet, with the finality of its decision questioned, this Court, once again, finds itself tasked with defending the integrity of the rule of law.

³ *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* [2021] ZACC 28.

[103] ...If our law, through the doctrine of peremption, expressly prohibits litigants from acquiescing in a court's decision and then later challenging that same decision, *it would fly in the face of the interests of justice for a party to be allowed to willfully refuse to participate in litigation and then expect the opportunity to re-open the case when it suits them. It is simply not in the interests of justice to tolerate this manner of litigious vacillation.* (Accentuation added)

[2] The order⁴ hereunder, and the warrant of execution that was issued consequent thereto, is the subject of the application for rescission.

IT IS ORDERED THAT:

1. The fourth and fifth defendants jointly and severally to pay the amount of R 313.268.09 (three hundred and thirteen thousand, two hundred and sixty-eight rand, and nine cents) to the plaintiff.
2. The fourth and fifth defendants jointly and severally pay interest on the amount in paragraph 1 calculated at a rate of 10,5% per annum from 27 June 2013 to date of final payment, both days inclusive.
3. The trial against the sixth and seventh defendants is removed from the roll.
4. The fourth and fifth defendants jointly and severally pay the costs of the action on a scale as between attorney-and-client.

[3] The order was granted on 7 March 2023 because the fourth, fifth, sixth and seventh defendants were absent from the trial set down for three days, being the 7th, 8th and 10th of March 2023.

[4] The fourth and fifth defendants conducted their business as a *joint venture* in the cause that brought the matter to litigation. They have as their sole members the sixth defendant, Graham Takatso Lehetla ("Mr Lehetla" or "TK") and the seventh defendant, Carlton Pule Shakwane ("Mr Shakwane") respectively.

[5] The application, filed on 31 March 2023 that serves for adjudication before court, wants the following orders:

1. Rescinding and setting aside the default judgment granted on 7 March 2023 against the first and second applicants;
2. Rescinding and setting aside the warrant of execution issued in pursuance of the said default judgment;

⁴ The "7 March 2023 – order".

3. The Applicants tender the costs for this application, if not opposed.

THE ARGUMENTS

[6] The application for the rescission of the 7 March 2023 – order is according to the applicants’ heads of argument, based on two legal grounds.

1.3 The rescission is sought on two fronts. The first being that the judgment was erroneously sought or erroneously granted in the absence of the applicants,⁵ and secondly that the applicants were not in willful default and that they have a bona fide defence to the respondents claim.

[7] Further, on page 8 of their heads of argument counsel for the applicants states that:

4.2 It is likewise common cause that van Vuuren withdrew as an attorney of record for the applicants, and for Lehetla and Shakwane, in the main action. The reasons for such withdrawal, and whether the applicants were in willful default, are not relevant for the determination of the question whether the judgment was erroneously sought or granted and will be dealt with when the provisions of the common law or rule 31 are discussed hereunder.

4.3 It is trite that judgment in the absence of a party at trial stage,⁶ may only be granted if the trial court is satisfied that the party who is in default *was aware of the proceedings*, and most importantly, in *casu*, that the notice of withdrawal as attorney of record, was delivered on all the parties in compliance with rule 16 of the Uniform Rules of Court. (Accentuation added)

[8] The respondent is of the view in their heads of argument that:

32. The judgment was granted due to the willful, reckless, and admitted negligence of the applicants. It is submitted that our courts will generally not entertain a rescission application when the litigant had an opportunity to defend himself, but willfully and recklessly failed to do so. Such litigants must accept the consequences of their own conduct.

[9] From the reading of the case for the applicants it is not clear; but it seems as if they rely on rescission in terms of the common law, rule 31(2)(b) and rule 42(1) of the Uniform Rules of Court.

[10] I take a step back to depict the facts of the case for perspective; this is the default and the merits of the claim itself.

⁵ In terms of rule 42(1)(a) of the Uniform Rules of Court.

⁶ The applicants refer to rule 39(1) here.

THE PRELUDE TO THE DEFAULT AND THE DEFAULT

[11] On 13 November 2022 Mr Lehetla, according to him, was advised that the matter was on the roll for March 2023.

[12] The notice of set down for the trial was served on the applicants' attorney on 30 November 2022.

[13] On the same day the attorney addressed an email to Mr Lehetla to inform him of the trial. *The attorney confirmed that he attached the notice of set down to the email. Mr Lehetla had to have full knowledge and understanding of the dates.*

[14] Although Mr Shakwane alleges that he never received the notice of withdrawal the respondent's attorney made enquiries with the erstwhile attorneys of the applicants and was informed that the joint venture was at all times represented by Mr Lehetla. Mr Lehetla informed the erstwhile attorney that he is the responsible person, and all contact and communication should be with him. The erstwhile attorney's invoices were always sent to Mr Lehetla but paid by both applicants. This information was confirmed under oath by said attorney in annexure "AA23" on pages 270 to 271 (paragraph 3) of the bundle indexed on 14 June 2023.⁷

... I specifically confirm that although I legally represented the 4th to 7th defendants in the matter, my only communications were with the sixth respondent, known to me as TK. TK informed me that he was authorised to instruct me on behalf of all the mentioned defendants, and I had no reason to doubt his assurance.

[15] At paragraph 8.5 of his statement⁸ Mr Shakwane admitted that: "There was however little communication between my attorney's and myself as the sixth defendant occasionally informed me what the progress of the matter was." It is trite that a litigant must take responsibility for the management of his case; he may not sit back and wait for news. He

⁷ "The Bundle"

⁸ Page 151 of the Bundle.

paid the invoices submitted by the attorneys and must have had some inquiries as to the detail of the services rendered.

[16] Mr Shakwane states his address in his confirmatory affidavit to be at 32 Mostert Street, Nelspruit, Mpumalanga Province. The address that his attorney had of him according to the notice of withdrawal is Stand 30, Kabokweni and Sizampilo Projects CC at 119 Nkhohlakalo Trust, Kabokweni.

[17] It is vital to realize that Ramalephatso Industries CC and Sizampilo Projects CC entered into the contracts that caused the action as a joint venture. The one's business was the business of the other. "GTL03" at page 42 of the bundle shows the letterhead of "Sizampilo Projects & Ramalephatso Industries" as one entity with email takatsolehetla@yahoo.com. It is also undisputed that Mr Lehetla took the lead in the communications with the attorneys. The notice of withdrawal as per page 269 of the bundle "AA22" was served on this address. Perusal of the papers before the court shows that communication was to this address.

[18] In addition, "GTL03" shows that the joint venture has only one physical address, one landline number, one fax number, one cell phone number and one email address: takatsolehetla@yahoo.com. The joint venture operates under one registration number namely: 1998/026599/23. The address is "Suit No: 140 CALTEX BUILDING, 32 BELL STREET, NELSPRUIT". If the applicants wanted service and communication at any other address, they had to indicate this to their attorney and in the contract.

[19] In an email of 30 November 2022, the legal representative requested Mr Lehetla that counsel be appointed, and consultations be finalized.

[20] Mr Lehetla responded immediately and as follows:

Your email is noted.

But as I explained to you earlier via our telephone conversation, I suggest I should get my Own Affordable Advocate to work with you on this matter, I can pay your Fees directly.

[21] On 19 January 2023 the attorney had not received any further instructions from Mr Lehetla and addressed another email to him wherein he enquired about the appointment of an advocate and in addition, requested him to make payment of the deposit in respect of the attorney's fees as was agreed.

[22] Later in the day on 19 January 2023 Mr Lehetla responded that he will visit Bloemfontein "sometime next month to understand the attorney's account". No mention was made of the appointment of an advocate. "Next month" was February 2023; the trial was to commence on 7 March 2023.

[23] The legal representative send a second email on the same day to Mr Lehetla and explained the account. The legal representative emphasized the following:

You did not yet get an advocate as promised. May I remind you that we are in Court in March. Advocates are running a busy schedule and I truly hope you find an advocate in time. I wanted to book an advocate during November 2022, but you said the deposit is extravagant.

You must very URGENTLY give me instructions if you want to proceed with the matter.

The bottom line is that I will Withdraw as attorney of record timeously, in order for you to get a new attorney on this case ASAP.

[24] Mr Lehetla responded on 20 January 2023:

Your mail was noted but I took the Decision to *terminate your mandate* because of your exorbitant costs which small companies like us can't afford.

I will be in Bloemfontein second week of February to search someone who can take over from you with reasonable fees as you're aware that this is a shit case with no MERITS. Furthermore if there is any justified funds I still owe you it can be arranged how it can be sorted out but to my little knowledge I paid all your invoices you provided *to us* unless there's extra work you done *for us* which I am not aware of.

If there is any clarity my line is open.

G.T. Lehetla (Accentuation added)

[25] *The services of the attorneys were summarily terminated by the applicants. The attorneys did not withdraw on their own volition. The applicants were now aware, and very well so, that they are without legal representation and cannot hide behind any notice of*

withdrawal that was allegedly not issued in accordance with rule 16 of the Uniform Rules of Court.

[26] Their attorney of record withdrew after the termination of their mandate, and they did not appoint new legal representatives. They did not attend the trial.

[27] It is not known to this court on what basis the court granted the default judgment on 7 March 2023. It is not known whether the court had information that is not available to this court and how the plaintiff convinced the court of proper service. It is therefore impossible to infer that the court made a mistake. The parties elected not to put the information forth in this application. In applying the provisions of rule 42 it should always be borne in mind that the court cannot sit as a court of appeal and that it cannot review the order.⁹

[28] Mr Lehetla confessed that:

8.15 I do however acknowledge that there was an obligation on the fourth defendant to appoint a different attorney when it could not afford the services of Mr. Van Vuuren and that is (sic) should have enquired about the exact trial date. What really mattered was the court date and the appointment of an attorney. I therefore admit that the fourth defendant was negligent in this regard.

THE FACTS THAT CAUSED THE CLAIM IN THE MAIN ACTION¹⁰

[29] In 2011 Fezile Dabi District Municipality awarded a contract for the construction of temporary wards and a new forensic mortuary at the Metsimaholo District Hospital, in Sasolburg, Free State Province, to the Sizampilo/Ramalephatso Joint Venture as the main contractor.

⁹ Rule 42 does not affect the substantive law; it goes to procedure. In Civil Procedure, *Civil Procedure in the Superior Courts*, Part B High Court, UNIFORM RULE 42 VARIATION AND RESCISSION OF ORDERS, Grounds, Last Updated: August 2023 - SI 77, <https://www.mylexisnexis.co.za/Index.aspx>, Harms pointed out in footnote 2 at B42.2: “There are a number of dicta that give the impression that this basic principle does not apply, forgetting that the rule is merely procedural and does not affect the substantive law: *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E); *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk GD); *Suleman v Minister of Interior* [1996] 1 All SA 553 (Tk) and *Njomane v Lobi* [1996] 2 All SA 252 (Tk); *Mutebwa v Mutebwa* [2001] 1 All SA 83 (Tk), 2001 (2) SA 193 (Tk). But see *Stander v Absa Bank* 1997 (4) SA 873 (E) 884; *Dawson & Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd* 1993 (3) SA 397 (B GD); *Naidoo v Somai and Others* 2011 (1) SA 219 (KZP)”

¹⁰ See the heads of argument for the applicants from page 2 paragraph 2 to page 7 paragraph 3.6.

- [30] The respondent was appointed by the joint venture as subcontractor on 22 November 2011 for the construction of prefabricated general wards and a temporary mortuary at the hospital. The contract price is R 5 107 547.00. The contract apparently specified a specific term of the appointment and payment would be made to the respondent within 30 days after receipt of an invoice approved by the site engineer.
- [31] The appointment was accepted by the respondent on 13 December 2011 and subject to specified amendments to the initial quotation and specified payment terms. These payment terms were reflected in the acceptance letter as a percentage that the joint venture had to pay upon the completion of the building and during different stages of the contract.
- [32] Construction of the temporary structures commenced during January 2012. As is evident from the affidavits, counter allegations are made by the applicants and the respondent about the delays and the workmanship that resulted from the performance of the works.
- [33] What however remains common cause is that payment in the sum of R 4 920 615.12 of the initial contract price of R 5 107 547.00 was paid. The balance was kept as retention for certain specified snags compiled by Mazibuko Wessels Architects, to be corrected.
- [34] A dispute arose between the joint venture and the respondent regarding the liability to correct the snags and the respondent, as subcontractor, requested the principal agent to have the Municipality make direct payments to it as it did not trust the joint venture. This then culminated in the conclusion of a cession agreement on 26 June 2013.
- [35] The applicants, in terms of the cession agreement, jointly ceded the rights title and interest they had against the Municipality, to the respondent in the amount of R 624 965.53 together with interest thereon.

- [36] The cession in addition provided that the respondent, as cessionary, undertook to repair any material latent structural defects attributable to it, arising within three months of the date of such cession, without any further costs to the applicants.
- [37] The applicants, as cedents, in turn undertook to ensure that any defects, whether latent or not, which is not exclusively attributable to the cessionary, be repaired within seven days after receipt of notification of the said defects and take all such necessary steps as to not further delay and/ or prevent any payment to the cessionary.
- [38] Apart from the retention in relation to the temporary mobile units, there were certain monies that the Municipality owed to the joint venture based on the main contract. On 12 September 2013 two snag lists were issued by the architects, one for the joint venture and the other for the respondent.
- [39] The joint venture allegedly attended to its snag list and completed the works which were accordingly approved. The joint venture was subsequently paid its retention monies and left the site.
- [40] The Municipality alleges that it was required to utilize a third-party contractor to finalize the project and that it has fully discharged its payment obligations to the joint venture.
- [41] In April 2015 the plaintiff issued summons against the first to seventh defendants as cited in the main action. In terms of the particulars of claim as they then stood, the plaintiff/respondent pleaded that the applicants breached the terms of the cession agreement in that apart from paying an amount of R 271 835.68 the applicants neglected to pay the balance.
- [42] The respondent, in addition, alleged that the Municipality, despite having knowledge of the cession agreement, breached its obligations by failing and or refusing to make payment of the amounts reflected in the cession agreement.

- [43] In their plea, the applicants denied that payment was to be made by the applicants and pleaded that the Municipality had to make payment after all the obligations were met in terms of the cession agreement.
- [44] During November 2021, almost six years later, the respondent amended its particulars of claim, now relying on the applicants alleged breach of the terms of the 'main agreement', in that the latter failed and/or refused to make payment to the respondent in the amount of R313 268 09.
- [45] According to counsel for the joint venture in *casu* the applicants' erstwhile attorney failed to seek instructions from the applicants to make consequential adjustments to the initial plea consequent upon the respondent's amendment. This therefore had the effect of the plea filed by the applicants, as it currently stands, being based on the cession as the cause of action and not on the initial appointment as sub-contract. Notwithstanding the averment that blames the attorneys for the oversight, the prelude to the default above shows that the applicants did not co-operate fully with their attorneys.
- [46] The lackadaisical handling of the applicants of their case and their defense is of concern; if they had a *prima facie* defence on the facts, they could have addressed the matter expeditiously and avoided any delay.
- [47] Application of the Plascon Evans – dictum¹¹ on the affidavit of one Pieter Le Roux for the respondent and the facts that are common cause convinces the court that the applicants have not proven, on the merits of the case, that a *bona fide* defence which *prima facie* carries a prospect of success, exists.

THE LAW APPLICABLE IN THE APPLICATION FOR RESCISSION

¹¹ *Plascon-Evans Paints LTD v Van Riebeeck Paints (PTY) LTD* 1984 (3) SA 623 (A). The Plascon-Evans rule allows courts to make determinations on disputes of fact in application proceedings without hearing oral evidence. The rule states that in motion proceedings, a final order may be granted if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order. There are exceptions to the rule, such as when allegations or denials are far-fetched or clearly untenable. The Plascon-Evans rule applies only to final relief and not interlocutory matters.

[48] Constitutional principles have come to play a pivotal role in matters of this kind. In *RGS Properties (Pty) Ltd v Ethekweni Municipality* 2010 (6) SA 572 (KZD) a mindful and balanced approach by courts adjudicating these cases was the resolve to the constitutional challenge. The test as summarised in the Headnote is:

1. A court should not, in an application for the rescission of a default judgment, scrutinise too closely whether the defence is well founded, as long as, *prima facie*, there appears to the court sufficient reasons for allowing the defendant to lay before court the facts he thinks necessary to meet the plaintiff's claim.
2. Where a defendant has never clearly acquiesced in the plaintiff's claim, but persisted in disputing it, the court should be slow to refuse him entirely an opportunity to have his defence heard.
3. Judgment by default is inherently contrary to the provisions of section 34 of the Constitution. That section provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum.
4. Therefore, in weighing up facts in an application for the rescission of a default judgment, the court must balance the need of an individual who is entitled to have access to court and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default judgment being granted in the first instance.
5. In its deliberation, the court will no doubt be mindful, especially when assessing the requirement of reasonable cause being shown, that, while, among others, this requirement incorporates showing the existence of a *bona fide* defence, the court is not seized with the duty to evaluate the merits of such defence.
6. The fact that the court may be in doubt about the prospects of the defence to be advanced, is not a good reason why the application should not be granted.

7. That said, however, the nature of the defence advanced must not be such that it *prima facie* amounts to nothing more than a delaying tactic on the part of the applicant.

[49] An absolute constitutional rejection of default judgments will not suffice because there is a persistent tension between commercial certainty and prompt remedies in law for non-compliance with contracts and court orders, on the one hand; and the right to access to courts on the other hand.

[50] Commercial certainty is the unfettered right of the respondent to claim compliance with contracts and court orders and be aided with access to swift justice in assertion thereof. The sustenance of a democratic economy is crucial. In *Sasson v Chilwan and Others* 1993 (3) SA 742 (A) at 762H Eksteen, JA referred to: “The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible ...”.

[51] Justice Ackermann in *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at paragraph 26 described it as: “a central consideration in a constitutional state”. These statements aim for reasonable certainty, so that parties can go about their business knowing the rules of the game; constitutional economic integrity is vital.

[52] The constitutional right of the applicants lies in the use of courts to settle disputes; the right to access to courts in terms section 34 of the Constitution of the Republic of South Africa, 1996. Furthermore, to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. The respondent has the same right and it may not be obstructed by the unexplained or wilful absence of the other party at a trial.

[53] The above sets the atmosphere in which the norm of “good cause” must be applied on the facts of this case. The criteria includes at least both a reasonable and acceptable explanation for the default and a *bona fide* defence on the merits which *prima facie* carries some prospect of success.

[54] Each case must be adjudicated on its own merits and there is no *numerus clausus* of factors. The law is that the court has a wide discretion in evaluating good cause to ensure that justice is done. The explanation for default must be stated and be reasonable. The default may not be wilful and an attempt to delay justice.

[55] Rule 31(2):

- (a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in sub-rule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.
- (b) A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.

[Sub-r. (2) substituted by GNR.417 of 1997 and by GNR.61 of 25 January 2019.]

[56] Rule 42(1):

The court may, in addition to any other powers it may have *mero motu* or upon the application of any party affected,

- (a) rescind or vary: an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) an order or judgment granted as the result of a mistake common to the parties.

[57] Harms¹² is correct when he pointed out with reference to case law that at common law the court is entitled to rescind a judgment obtained in default of appearance provided sufficient cause is shown. This includes a reasonable and acceptable explanation for the

¹² Civil Procedure, *Civil Procedure in the Superior Courts*, Part B High Court, UNIFORM RULE 42 VARIATION AND RESCISSION OF ORDERS, Grounds, Last Updated: August 2023 - SI 77, <https://www.mylexisnexis.co.za/Index.aspx>. “A judgment by default can be set aside under rule 31(2)(b) and an order given in an urgent application against a party in the absence of that party may be “reconsidered” (which reconsideration may include rescission). In addition, a court may set aside its own final judgment in terms of the provisions of this rule or under the common law. Both issues are discussed. The rule cannot and did not amend the common law and is in many respects merely a restatement of it. The court otherwise does not have the inherent power to set aside its judgments. There are, however, some statutes that provide for the setting aside of orders made under them.”

default and that on the merits the party has a *bona fide* defence. The application of this principle is limited to those few cases where the application does not fall strictly within the limits of rule 31 or 42.

[58] The judgment in *De Wet and others v Western Bank LTD* 1979 (2) SA 1031 (A) at 1038 is relevant. The service of the notice of withdrawal is irrelevant if the notice of set down had already been served. The applicants terminated the services of their attorneys and indicated that they will seek alternative legal representation.

The appellants cannot avail themselves of the fact that their attorney had not complied with all the requirements of Rule 16 (4). There is no question of any irregularity on the part of the respondent. At the stage when Lebos withdrew as the appellants' attorney, the case had already been set down for hearing on 16 August 1976 in accordance with the Rules of Court, and there was no need for the respondent to serve any further notices or documents on the appellants in connection with the resumed hearing. As far as the trial Court was concerned the Rules of Court had been fully complied with and the notice of trial had been duly given. When the case was called before VAN REENEN J neither the appellants nor their legal representative were present in Court, and, in the circumstances, the respondent's counsel was fully entitled to apply for an order of absolution from the instance with costs in terms of Rule 39 (3) in respect of the appellants' claims and to move for judgment against the appellants under Rule 39 (1) on the counterclaim. *The fact that the appellants had not been advised timeously of the withdrawal of their attorney is, of course, a factor to be taken into account in considering whether good cause has been shown for the rescission of the judgments under the common law, but it is not a circumstance on which the appellants can effectively rely for the purpose of an application under the provisions of Rule 42 (1) (a).* (Accentuation added)

[59] Counsel for the applicants refers to rule 39(1) in footnote 14 of his heads of argument: "..., and most importantly, in *casu* that the notice of withdrawal as attorney of record, was not delivered on all parties in compliance with rule 16 of the Uniform Rules of Court." Rule 39(1) makes no mention of rule 16.

Rule 39(1) to (4)

- (1) *If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden: Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders.*
- (2) When a defendant has by his default been barred from pleading, and the case has been set down for hearing, and the default duly proved, the defendant shall not, save where the court in the

interests of justice may otherwise order, be permitted, either personally or by an advocate, to appear at the hearing.

- (3) If, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs but may lead evidence with a view to satisfying the court that final judgment should be granted in his favour and the court, if so satisfied, may grant such judgment.
- (4) The provisions of sub-rules (1) and (2) shall apply to any person making any claim (whether by way of claim in reconvention or third-party notice or by any other means) as if he were a plaintiff, and the provisions of sub-rule (3) shall apply to any person against whom such a claim is made as if he were a defendant. (Accentuation added)

[60] Rule 16 deals with the representation of parties by attorneys. Its objective is to provide the parties with a definite and convenient address at which they are entitled to serve the further processes in the case.

[61] On the undisputed facts the notice of set-down that depicted the dates for trial was already served and procedurally correct. The dates for trial did come to the notice of the applicants; they had proper knowledge thereof. The notice of withdrawal is also peripheral due to the further fact that the applicants ended the mandate of the attorneys, and the attorneys did not withdraw on their own volition.

[62] The words of Kriek, J in *Bristow v Hill* 1975 (2) SA 505 (N) at 506 to 507 direct the outcome:

This seems to be exactly the type of situation envisaged in Voet, 2.4.14:

"a summons will be good, if served in the prescribed manner, even if it does not reach the defendant, for it is his fault that he left no agent at home, or that his servants negligently failed to inform him of the service of the document; but restitutio in integrum should be granted if the defendant can show a *supremely just cause of ignorance, free from all blame whatsoever*".

Voet did not envisage relief being granted for "sufficient cause" or "good cause" in the sense in which those phrases are explained in, e. g., *Kajee and Others v G. & G. Investment & A Finance Corporation (Pty.) Ltd.*, 1962 (1) SA 575 (D) at p. 577. It seems to me that, subject to the exceptions mentioned in *Childerley Estate Stores v Standard Bank of S. A., Ltd.*, supra, a Court can only rescind a judgment either under the provisions of Rule 31 or 42 or where the litigant makes out a case for restitutio in integrum at common law, the latter being the only relief to which the applicant could be entitled in the present case.

CONSIDERATION OF THE ISSUES

[63] The applicants had adequate and legally appropriate knowledge of the dates of trial. The service in terms of rule 16 of the withdrawal of the attorneys is irrelevant to their knowledge of the dates of trial. The order was not erroneously granted. As counsel for the applicants correctly pointed out in their heads of argument; it is about knowledge of the dates. The notice of set down was properly served on the applicants by the email forwarded by their own attorneys to them.

[64] Their default was blatantly disrespectful to the rule of law and the interest of the other litigants. The default has caused a delay in the case that is to the prejudice of the respondent and the administration of justice; it is a delay of months if not a year and unacceptable. The default closed the doors of access to justice in terms of rule 34 of the Constitution to the respondent.

[65] The application must be dismissed on the first leg already in that there is not a reasonable explanation before this court for the default; the lack of prospects of a *prima facie* defence bolsters the dismissal of the application and with costs. Litigation started in 2015 and the interest of justice demands finality to be reached.¹³

[66] ORDER

The application to rescind and set aside the default judgment granted on 7 March 2023 against the first and second applicants and rescinding and setting aside the warrant of execution issued in pursuance of the said default judgment; is dismissed with costs.

M OPPERMAN, J

APPEARANCES

On behalf of the first & second applicants

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¹³ Zuma -case *supra* footnote 3 at paragraph [104] of the case.

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On behalf of the respondent

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