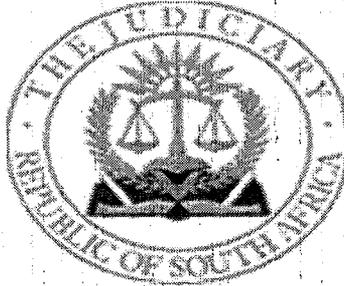


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 24028/2014

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

13/12/18

Date

ML Twala

ML TWALA

In the matter between:

**KAIDE INVESTMENTS (PROPRIETARY)
LIMITED**

FIRST APPLICANT

MILOSEVICH, STEVAN

SECOND APPLICANT

MILOSEVICH, CAROLINE

THIRD APPLICANT

AND

FIRSTRAND BANK LIMITED

FIRST RESPONDENT

REGISTRAR OF DEEDS

SECOND RESPONDENT

**SHERIFF OF THE HIGH COURT:
SANDTON SOUTH**

THIRD RESPONDENT

JUDGMENT

TWALA J

- [1] In this opposed application the applicants seek the following orders:
- I. Condonation for the late filing of the rescission application;
 - II. That the writ of execution issued under case number 24028/2014 be stayed pending the outcome of prayer 3;
 - III. That the judgment granted under case number 24028/2014 on the 23rd May 2017 be rescinded and set aside;
 - IV. That leave be granted to the applicants to defend the matter;
 - V. Order as to costs, if opposed.
- [2] No costs order is sought against the second and third respondents unless they oppose this application. Both the second and third respondents are cited as they are responsible to execute the court order in as far as the transfer of the property and the execution of the warrant is concerned respectively.
- [3] Counsel for the first respondent indicated at the commencement of this case that the first respondent is not opposed to the application for condonation for the late filing of the application for rescission. Having perused the papers and noting that the delay in filing the rescission application was not inordinate, I therefore granted the application for condonation .

- [4] It is common cause that the first respondent issued summons against the applicants. The applicant defended the matter and successfully opposed an application for summary judgment. It is further not in dispute that the first respondent obtained judgment by default against the applicants on the 23rd of May 2017.
- [5] At the commencement of the hearing, counsel for the applicants raised a point in limine which is not contained in the papers that the first respondent's answering affidavit is not properly commissioned. The deponent is described as an adult male but the commissioner's certificate state that it is a "she". The commissioner did not give his name as the signatory of the certificate as required by the Act and therefore the answering affidavit is not properly before the Court and should be discarded.
- [6] It is contended on behalf of the applicants that the parties agreed to service of all documents by way of e-mail but the first respondent decided to serve the notice of set for the 23rd May 2017 on the applicants' correspondent attorney. The correspondent attorney denies having received the notice of set down – hence there was no service, so goes the argument, of the notice of set down on the applicants and therefore they are not in wilful default in not attending court on the 23rd May 2017.
- [7] Counsel for the applicants contended further that the applicants are on record that they were defending this case and have successfully opposed a summary judgment application. In opposing the summary judgment application their defence was clearly disclosed. The applicants insist on their defences as contained in the pleadings and their opposition to the summary judgment application. On the 10th of May 2017 the first respondent served its amended declaration and the applicants were entitled to object to the amendment or

file a consequential amendment within the time frames prescribed by the rules of court. However default judgment was granted before the expiration of the time frames prescribed by the rules of court. The default judgment was therefore granted prematurely and that prejudiced the applicants from exercising their rights in terms of the rules of court.

- [8] Counsel for the first respondent contended that the point in limine raised by the applicants is an ambush on the first respondent as it does not appear anywhere in the applicants' founding papers. Counsel for the applicants did not even have the courtesy to inform him about the point in limine nor does it appear on the applicants' heads of argument. As such the court should dismiss the point in limine.
- [9] It is further submitted by counsel for the first respondent that service of the notice of set down on the correspondent attorney for the applicants is proper service as prescribed by the rules. That the parties agreed on service by e-mail, so the argument goes, was merely for convenience and does not invalidate service on the correspondent attorney. In terms of the rules of court, it is submitted for the first respondent, a party is entitled to amend its pleadings any time before judgment and the applicants were entitled to state their consequential defence due to the amended pleading in their founding affidavit. The applicants instead chose to stick to the defences contained in the pleadings which are not bona fide defences as required in rescission applications. Therefore, so it is contended, the amendment did not prejudice the applicants in anyway and the application for the rescission of judgment should be dismissed.
- [10] It is trite that, for an applicant to succeed in an application for the rescission of judgment, it must establish to the satisfaction of the Court that it was not

in wilful default and that it has a bona fide defence to the claim of the respondent which is good in law.

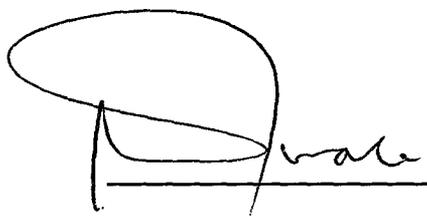
- [11] It is trite that in motion proceedings the parties must stand and fall by their papers. I agree with counsel for the respondent that the point in limine raised by the applicants does not appear anywhere in the papers including in their heads of argument. It is undesirable for a party to take the other party by surprise and this point in limine appears to be an after-thought by the applicants. It is my respectful view therefore that, in the interest of justice, the point in limine falls to be dismissed.
- [12] Service of the pleadings on the other party is an important element of the litigation process. It is intended to inform the other party of what steps are being taken and not to take it by surprise or ambush. The rules of court prescribe the forms service should take. But where the parties agree to a particular form of service of the pleadings, it is expected of the parties to continue serving the processes on each other in that fashion. Should one party decide not to adhere to the agreed form of service, then it should clearly inform the other party that it is no longer continuing with the agreed form of service.
- [13] I find myself in agreement with the applicants that they were not in wilful default in not attending the hearing of this matter on the 23rd May 2017. Although the first respondent served the notice of set down on the correspondent attorney for the applicants, it was bound by the agreement to serve the notice of set down electronically on the attorneys for the applicants but it failed to do so. It is my considered view therefore that on this ground alone the application for rescission of judgment should succeed.

[14] It is on record that it has been the intention of the applicants to defend this case from the beginning. The applicants successfully resisted summary judgment and filed their plea and counter-claim in the process. The defence for the applicants was found to be good in law by the court when summary judgment was successfully resisted and the applicants testified that they still stand by the defence enunciated in the pleadings. This defence has not been tested in the ensuing trial for the applicants did not attend the trial.

[15] It is my respectful view therefore that the applicants have met the requirements for the judgment by default entered against them to be rescinded.

[16] In the circumstances, I make the following order:

- I. The late filing of the application for rescission of judgment is condoned;
- II. The judgment granted on the 23rd May 2017 under case number 24028/2014 is rescinded and the normal dies for the filing of pleadings are resumed;
- III. The warrant of execution issued under case number 24028/2014 is suspended pending finalisation of this case;
- IV. Costs to be costs in the course.

A handwritten signature in black ink, appearing to read 'Twala M L', written over a horizontal line.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 3 December 2018

Date of Judgment: 13 December 2018

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