

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

Case No: 2017/20038

| | |
|--|-------------------------------------|
| <u>DELETE WHICHEVER IS NOT APPLICABLE</u> | |
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |
| DATE | SIGNATURE |

In the matter between:

NYAMA & CHIPS CC

(REGISTRATION NUMBER: 2009/223228/23)

First applicant

MARIO ANDREOU

(IDENTITY NUMBER:)

applicant

Second

and

NAHEEL INVESTMENTS (PTY) LTD

(REGISTRATION NUMBER: 2009/023064/07)

Respondent

In Re:

and

NYAMA & CHIPS CC

First defendant

MARIO ANDREOU

Second defendant

JUDGMENT

TLHOTLHALEMAJE, AJ:

Introduction and background:

- [1] The first and second applicants, who are the defendants in the main action, seek an order rescinding a default judgment granted by Van Vuuren AJ on 18 September 2017¹ in favour of the respondent.
- [2] In its combined summons resulting in the default order being sought and granted, the respondent as the plaintiff in the main, based its cause of action on an alleged breach of a written agreement of lease entered into with the first applicant on 2 October 2015. The first applicant is a fast food franchise, and the premises leased to it are situated in a mall where it was to operate its restaurant. The lease agreement was due to expire on 30 September 2020.
- [3] In accordance with the particulars provided in the lease agreement, the first applicant's *domicilium citandi et executandi* for all purposes is recorded as *173 Kelvin Drive Sandton 2146 (P, O. Box 652212 Benmore 2010)*, or any such other address as it may from time to time appoint in writing.

¹ The Order provided:

'The cancellation of the lease agreement between the Plaintiff and the First Defendant dated 2 October 2015 more particularly in respect of Shop 17, Larnbton Court, Corner Doak, Webber 8 Beacon Roads, situate on Erf 178, Klippoortjie Agricultural Lots, Germiston, in extent approximately 124 square metres, is confirmed.

AS AGAINST THE FIRST DEFENDANT AND SECOND DEFENDANT JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE ABSOLVED FOR,'

1. Payment of the sum of R261 623.34.
2. Payment of interest on the sum of R261 623.34 at the rate of 10.5% per annum from 1 June 2017 to date of payment.
3. The Plaintiff is granted leave to re-enrol this matter at a later stage for judgment in respect of the Plaintiffs damages once quantified.
4. Payment of costs of suit on the attorney and client scale.'

- [4] The second applicant, (Mr Andreou) Andreou, had represented the first applicant when the lease agreement was signed. He had also signed a deed of suretyship on 15 September 2015, binding himself as co-principal debtor to that agreement. He chose *Unit 121 The Algarve, Mountfletcher Lane Paulshof, Ext 46, 2161* as the *domicillum et executandi* for all purposes under the Deed of Suretyship.
- [5] The applicants' case is that the first applicant was due to open for business on 15 October 2015. It was discovered that the respondent had not made provision for the installation of gas in the premises to enable it to conduct its fast food business. It appeared that there was a dispute between the service providers in the mall as to which entity was to operate the gas installation, which the respondent ought to have attended to. This dispute went unresolved between 15 October 2015 to 30 March 2017. During that period, the first applicant was forced to purchase its own gas in 19 kg cylinders at a costs of about R113,438.29, in order to carry on its business. The applicants therefore held the view that the respondent did not perform in accordance with its obligations which required it to provide the first applicant with a gas supply sufficient for it to operate its twelve-burner grill and ancillary gas appliances. It was alleged that the respondent was in breach of the lease agreement, and therefore not entitled to enforce the agreement.
- [6] The respondent's case was that it had no obligation under the agreement to supply the first applicant with gas, and that the latter failed to comply with the terms of the lease by failing to pay rental and other amounts for which it was liable. It was submitted that the first applicant had instead repudiated its obligations in terms of the agreement by prematurely vacating the premises in April 2017. It was further contended that as at 1 June 2017, the applicants were jointly and severally indebted to the respondent in the sum of R261 623.34, which represented total arrear rentals and other amounts with interest thereon, from 1 June 2017 to date of final payment. The respondent further claimed damages sustained as a result of first applicant's unlawful repudiation of the lease, and other costs incurred to restore the premises to the same condition that it was at the commencement of the lease.
- [7] On 13 and 14 June 2017, the respondent served the combined summons and particulars of claim commencing action on the first applicant and on Andreou.

The service of summons in accordance with the Sheriff's return of service occurred by way of affixing to the principal doors of both premises. Andreou, who had deposed to the founding affidavit, contends that none of the applicants were aware of the service or the default judgment until on 16 October 2017, when the sheriff served a warrant of execution.

The delay:

- [8] In opposing the application, the respondent had submitted that the applicants had not provided a reasonable explanation for their delay in bringing this application. This was due to the common cause facts that the applicants became aware of the judgment on 16 October 2017, and had only launched this application on 8 April 2021, some three years and five months later.
- [9] The applicants' contention was that as could be gleaned from paragraph 13 of the founding affidavit, the application was brought in accordance with the provisions of the common law, and 'insofar applicable' in accordance with rule 31(2)(b)². Notwithstanding this contention, it is recorded in the parties' joint practice note that *the application is brought in accordance with the provisions of the rule 31(5)(b) of the Uniform Rules of Court³, insofar applicable, and in accordance with the provisions of the common law.* Furthermore, it is

²Paragraph 13 of the Founding Affidavit reads:

'This application for rescission is brought in accordance with the provisions of rule 31(2)(b) of the Uniform Rules of Court, insofar applicable, and in accordance with the provisions of the common law.'

Rule 31(2) provides that;

(a)...

(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.

³Rule 31 (5) provides;

(a)Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, who wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than five days' notice of the intention to apply for default judgment.

(b) The registrar may—

- (i) grant judgment as requested;
- (ii) grant judgment for part of the claim only or on amended terms;
- (iii) refuse judgment wholly or in part;
- (iv) postpone the application for judgment on such terms as may be considered just;
- (v) request or receive oral or written submissions;
- (vi) require that the matter be set down for hearing in open court:

Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court.

(c) The registrar shall record any judgment granted or direction given.

(d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.

recorded that; *“Only insofar that the provisions of rule 31(5), or any other provision of rule 31(5) of the Uniform Rules of Court, may be of application, an order is sought condoning applicant’s non-compliance and extending the time period for the filing of this application.”*

[10] Rule 31(2)(b)⁴ makes provision for time frames within which rescissions ought to be launched, and the Court may upon good cause being shown, grant the rescission. Equally so, rule 31(5)(d) makes provision for similar time frames. Be that as it may, and to the extent that the applicants insisted that reliance was placed on rule 31(2)(b) ‘insofar as applicable’, it is apparent that there are excessive delays between the applicants’ knowledge of the default order, and the timing of the rescission application. The latter provisions imply that the applicants ought to have brought the application within 20 days of having knowledge of the judgment, or at the very least, explained the delay in not doing so timeously.

[11] The delay amounts to some three and half years, which is excessive in the extreme. Notwithstanding the fact that reliance was placed on Rule 31(2)(b) ‘insofar as applicable’, or the fact that the application was brought in terms of the common law, it has long been stated that the requirement for good cause under Rule 31(2)(b) and for sufficient cause under the common law is the same⁵. It was brought to the applicants’ attention by the respondent in the answering affidavit that no condonation was sought. The applicants however insists that no such application was required, which on the facts is an incorrect posture. Indeed such an application was required.

[12] In the founding affidavit, the applicants in an attempt to explain the excessive delay in bringing this application merely attributed blame on at least no less than six set of attorneys that were instructed since 18 October 2017 to launch the application, but had failed to do so. Andreou averred that at various

⁴ Rule **31. Judgment on confession and by default and rescission of judgments**

(2) provides:

(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 subrule (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.

⁵ *Chetty v Law Society, Transvaal 1985(2) 756 (A)* at para 765A

stages since knowledge of the default order, the applicants had instructed, Goodes & Seedat Incorporated, on 18 October 2017; Harris Incorporated, during September 2018; Edward Nathan Sonnenberg Attorneys, on 26 April 2019; Thomson Wilks, on 24 January 2020; June Marks Attorneys, on 29 April 2020; and Pagel Schulenburg Incorporated on 11 February 2021, who only launched the rescission application some two months after their appointment, and withdrew as attorneys of record on 22 January 2022 some few days prior to the hearing of this matter. In these proceedings, the applicants were represented by Fairbridges Wertheim Becker attorneys, who came on board on 24 January 2022.

[13] It should be accepted that ordinarily, when a litigant appoints attorneys to handle matters, it is expected of the latter to execute their mandate with the necessary diligence, skill and care required. It is therefore not sufficient for an applicant to solely blame its appointed attorneys for over a period of three years of inactivity and/or lack of diligence. This is so in that it has long been said that there is a limit beyond which a litigant cannot escape the results of lack of diligence on the part of his/her chosen representative⁶. It is in the light of this approach that it is inexplicable as to how five sets of attorneys could have been instructed to launch the rescission application, and yet none of them had done so over a period of four years.

[14] Even if it may be accepted that the facts in *Saloojee* are distinguishable from those in *casu*, and that from the continuous change of attorneys it cannot be said that the applicants were supine, this does not at all demonstrate a satisfactory example particularly since Andreou sought to advance other unsatisfactory explanations such as disagreements between him and various attorneys over a variety of issues including fees, his own lack of knowledge of the time frames, or his busy schedule. In the end, in the light of the clearly

⁶ *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at page 140H-141B-E, where it was held;

'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'

excessive delay in bringing this application, the explanation proffered in that regard, is not satisfactory. Even though from these conclusions this ought to bring this matter to an end, I will for the sake of completeness deal with the merits.

The legal approach to rescissions and evaluation:

[15] It is trite under the common law that this Court is empowered to rescind its judgments and orders obtained in default, provided that the applicant has demonstrated sufficient or good cause. This entails that the applicant must provide a reasonable and satisfactory explanation for its default; demonstrate that the application is made *bona fide*, and that it has a *bona fide* defence which *prima facie* carries some prospect of success⁷.

[16] It is further trite that a failure to demonstrate prospects of success on the merits will not assist an applicant, irrespective of how reasonable and convincing the explanation for the default may be⁸. Equally so, in *Zuma*⁹, it was reiterated that under the common law, “*an unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits*”, and that in the absence of a reasonable explanation for a default, there was no obligation to assess the applicant’s prospects. The onus being on an applicant for rescission¹⁰, the Court nonetheless enjoys a wide discretion when determining whether sufficient or good cause exists by taking account of all the relevant facts and circumstances of the case.

The explanation for default:

[17] The main explanation proffered by Andreou for the applicants’ default was that they were not aware of the summons or the default judgment until on 16 October 2017 when the Sheriff served a warrant of execution. As can be

⁷See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 6 SA 1 (SCA) at 9 C – F; *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* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para 72; *Chetty* at 764J, where it was held;

‘It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. 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...

⁸ At para 71

⁹ At para 76

¹⁰ *De Wet v Western Bank Ltd* 1979(2) SA 1031 (A) at 1042H

gleaned from the Sheriff's return of service, the combined summons were served by affixing on the principal doors at *45 Morningside Villas, Murray Avenue, Sandton, Unit 121* (the first applicant) and *Unit 121 The Algarve, Mount Fletcher Lane, Paulshof* (Andreou) on 14 June 2007. Andreou's contention was that at the time of service of the summons, the property was leased to and occupied by a Ms Zimezonke Angela Hardy. Since the sheriff had simply served the summons by affixing on the main entrance of the property of the garage door, the said Hardy is said to have not found them.

[18] It was further Andreou's contention that in accordance with clause 10 of the lease agreement, his *domicilium* was recorded as *173 Kelvin Drive, Sandton*. The summons were however served on him at *Unit 121 The Algarve, Mount Fletcher Lane, Paulshof*. He contended that he never resided at the property in question as it was leased to a Mr Xolo Mkhize. Andreou averred that Mkhize also informed him that he did not receive the summons.

[19] In disputing that the summons was not properly served, the respondent relied on the provisions of rule 4(1) (a) (v) of the Uniform Rules¹¹ to demonstrate that proper service was effected and contended that the applicants have not proffered a reasonable and satisfactory explanation for their default.

[20] It needs to be said from the onset that I have difficulties in appreciating the essence of Andreou's explanation for the default, when the summons were served on applicants' chosen addresses. It is accepted that either party to legal proceedings must ensure that service should strictly be in accordance with the provisions of "*domicilium* clauses" as agreed to between the parties, and that this was correctly reflected in the Sheriff's return of service. Once this is demonstrated, it is accepted that the service is valid and good¹².

¹¹ Which provides;

'4. Service
(1)

(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners-

...
...
...

(v) in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law;

- [21] In this case, the Court accepts that service on both the first applicant and Andreou was good. Andreou's contention that service on him at *Unit 121 The Algarve, Mount Fletcher Lane, Paulshof*, when he resided at *173 Kelvin Drive Sandton* is disingenuous. This is so in that the latter address is as reflected in the deed of suretyship. The explanation that the properties were at the time occupied by tenants who had merely denied receipt of the summons to Andreou is hardly satisfactory nor acceptable. This is particularly so since neither Mkhize nor Hardy had filed any confirmatory affidavits that accompanied the founding affidavit, or copies of their purported lease agreements at the time, to support their denials that the summons came to their attention.
- [22] It was only in the replying affidavit that Andreou had attached unsigned copies of the purported lease agreements entered with Hardy and Mkhize. It is trite that an applicant must make out its case for the relief it seeks in its founding affidavit and cannot make out its case for the relief it seeks in a replying affidavit. Even then, copies of unsigned leases are meaningless, and worst still, even at that belated stage, nothing came by way of confirmatory affidavits from these individuals who had purportedly occupied the premises.
- [23] A mere submission of unsigned lease agreements is clearly not sufficient to demonstrate any *bona fides* on the part of the applicants. On the other hand, this makes their explanation even more unsatisfactory and suspect. It therefore ought to be concluded that the manner of service in the light of the provisions of Rule 4(1)(a)(v) was indeed good, and the reasons advanced for

¹² See *Amcoal Colliers Ltd v Truter* (128/88) [1989] ZASCA 99; [1990] 1 All SA 248 (A) (7 September 1989), where it was held from para 14 that;

'...It is a matter of frequent occurrence that a domicilium citandi et executandi is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution. (If a man chooses domicilium citandi the domicilium he chooses is taken to be his place of abode: see Pretoria Hypotheek Maatschappij v Groenewald 1915 TPD 170). It is a well-established practice (which is recognized by rule 4(1)(a)(iv) of the Uniform Rules of Court) that if a defendant has chosen a domicilium citandi, service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found (Herbstein & Van Winsen, The Civil Practice of the Superior Courts of South Africa 3rd ed., p 210. See Muller v Mulbarton Gardens (Pty) Ltd 1972(1) SA 328 (W) at 331 H-333 A, Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd 1984 (3)SA 834 (W) at 847 D-F.) It is generally accepted in our practice that the choice without more of a domicilium citandi is applicable only to the service of process in legal proceedings. (Ficksburg Transport (Edms) Bpk v Rautenbach & h Ander (supra) 333 C-D). Parties to a contract may, however, choose an address for the service of notices under the contract. The consequences of such a choice must in principle be the same as the choice of a domicilium citandi et executandi (Cf the Ficksburg Transport case ubi cit.), namely that service at the address chosen is good service, whether or not the addressee is present at the time...'

the applicants' default are neither reasonable nor satisfactory. Ordinarily therefore, the court is not obliged to consider the applicants' prospects of success, but will nonetheless do so for the sake of completeness.

A bona fide defence on the merits?

- [24] At the core of the applicants' defence is that the respondent breached a tacit term of the lease agreement to provide the first applicant with gas sufficient for it to operate a twelve-burner grill, together with other ancillary gas appliances at the premises. It was submitted that there were overwhelming surrounding circumstances from which the tacit term could be inferred, and that the non-variation clause contained in the lease agreement did not prohibit the operation of that term.
- [25] Andreou contended that inferences ought to be drawn from the nature of the business to be conducted by the first applicant which specifically needed the installation and supply of gas. Reliance was further placed on the discussions held between Mr Van der Linde, the centre manager representing the respondent, and a Mr Blessmore Moyo, the operations manager representing the first applicant regarding the provision of gas and 'agreements' reached in that regard between the two, upon which Andreou had signed the lease agreement.
- [26] Although it was conceded that the lease agreement made no mention of the supply or provision of gas to the first applicant, Andreou's contention was that he was aware that certain terms of a contract were evident and did not need to be specified in such agreements, particularly since they were material.
- [27] The respondent's submissions in regards to the alleged tacit term were that such a defence was not valid given the circumstances of the case, and that it was merely raised as a smokescreen. This was so since the lease agreement was framed in such a manner that it prohibited any oral or tacit variation of its clauses unless reduced to writing and signed by the parties. The respondent further pointed out that the applicants were bound by the *caveat subscriptor* principle, and that the factual position and surrounding circumstances were contrary to any such tacit term being raised or having been discussed between the parties. It was submitted that if indeed there was such a term, Andreou in particular would have raised it as repudiation of the agreement or

raised a compliant at the very least. To this end, it was submitted that since the applicants had breached the agreement resulting in it being cancelled, by operation of the law, the respondent was therefore entitled to its judgment.

[28] A tacit term is an unexpressed provision in a contract deriving from the common intention of the parties that can be inferred from the express terms and conditions of the contract, the subsequent conduct of the parties and the surrounding circumstances thereof¹³. The test in determining the existence of a tacit term or condition was recently reiterated by the Supreme Court of Appeal in *City of Tshwane Metropolitan Municipality v Brooklyn Edge (Pty) Ltd and Another*¹⁴ as follows;

‘A tacit term is an unexpressed provision of a contract. It is inferred primarily from the express terms and the admissible context of the contract. A court will not readily infer a tacit term, because it may not make a contract for the parties. The inference must be a necessary one, namely that the parties necessarily must have or would have agreed to the suggested term. A relevant factor in this regard is whether the contract is efficacious and complete or whether, on the other hand, the proposed tacit term is essential to lend business efficacy to the contract. The ‘celebrated’ bystander test constitutes a practical tool for the determination of a tacit term. To satisfy the test the inference must be that each of the parties would inevitably have provided the same unequivocal answer to the bystander’s hypothetical question. Even if the inference is that one of the parties might have required time to consider the matter, the tacit term would not be established...’¹⁵

[29] Applying the above principles to the facts of this case, it is indeed correct that under clause 49 of the lease agreement, provision is made for non-variation and no relaxation or indulgence clauses. At clause 13.1, it is provided that the property was leased ‘voetstoets’. The respondent further relied on the provisions of clause 21 of the ‘Offer to Lease’, which was signed by Andreou on 17 August 2015, at which it is provided as part of the ‘Special Conditions’, that the shop or premises will be handed over to the lessee as a white painted shell. The agreement as correctly conceded by the applicants does not make any mention of any obligations to provide gas to the first applicant.

¹³ *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A).

¹⁴ (928/2020) [2022] ZASCA 23; [2022] 2 All SA 334 (SCA)

¹⁵ At para 16

- [30] A non-variation clause in contracts is in principle valid and binding, and courts are not at liberty to ignore such clauses in favour of other factors not initially agreed to in the contract. This principle is nonetheless not immutable since the general principles of the law of contract will still apply, which may release a party from the strict wording of the terms of an agreement¹⁶.
- [31] The common cause facts as correctly pointed out on behalf of the respondent were that the first applicant was in breach of the lease agreement as it failed to pay rental, and had absconded from the premises. It has been the respondent's contention throughout the institution of this application that it had no obligation to supply gas to the first applicant since this was the responsibility of the tenant. It was contended that the first applicant occupied the premises for a period of 18 months during which the issue was not raised, whilst other tenants operating restaurants such as Mike's Kitchen had installed their own gas supply, since the centre did not provide such services to all the tenants.
- [32] It is significant to note that the applicants further relied on a variety of emails exchanged between Van der Linde and gas suppliers dating between 4 November 2015 and 15 February 2016, that demonstrates the respondent's obligations and endeavours to supply gas to the first respondent, and from which further inferences could be drawn in support of a tacit term. From February 2016 when Van der Linde allegedly 'withdrew from the scene' and until March 2017, the applicants alleged that during that period, they had made use of their own gas supply at their expense. It was on this basis that it was alleged that the respondent was in breach of the agreement.
- [33] There are clear hurdles faced by the applicants in relation to a claim of a tacit term, even if the respondent could not solely rely on the non-variation clause or any other clauses relied upon by the respondent. The first is that the first applicant had occupied the premises between October 2015 until April 2017, and had during that period, incurred costs by sourcing its own gas. Other than relying on an exchange of emails between Van der Linde and a host of other individuals in regards to the provision of gas, after occupation, there appears

¹⁶ *Telcordia Technologies Inc v Telkom SA Ltd* (26/05) [2006] ZASCA 112; [2006] 139 SCA (RSA) ; 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) at para 12; *Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Limited* (288/2017) [2018] ZASCA 9; 2018 (3) SA 405 (SCA)

nothing further of substance that the applicants had done, to assert the alleged tacit term.

[34] As correctly pointed out on behalf of the respondent, various options were available to Andreou and Moyo who are supposed to be astute business people and well-experienced in such commercial matters. The options available included instituting a claim for specific performance, a claim for damages in respect of costs incurred for the gas, or even placing the respondent on terms prior to simply not complying with the terms of the lease agreement by not paying rental and vacating the premises. Aligned to these factors is that as correctly pointed out on behalf of the respondent, the terms of the order granted in default are not disputed. This was despite the applicants having claimed a breach of the agreement on the basis of the alleged tacit term, which was the only defence raised in this rescission application.

[35] It is significant to note that despite it being impermissible, some two days prior to the hearing of this matter, the applicants had filed supplementary heads of argument, in which they sought to dispute the amounts claimed and granted in paragraphs 1 and 2 of the default order. The court need not say more on this issue since new issues cannot be raised in heads of arguments. This dispute was never raised in the founding affidavit. Equally so, and to the extent that the applicants sought to raise disputes in regards to paragraph 4 of that order, it was common cause that such a dispute is still pending before this Court. I will not say more on these new disputes raised.

[36] In summary therefore, the applicants failed to provide a reasonable and acceptable explanation for the excessive delay in bringing this application, and their default. They also did not show that this application is *bona fide* and not merely a ruse aimed at frustrating the default judgment and its consequences, particularly through their inexcusable delays. Furthermore, they did not establish the existence of a *bona fide* defence on the merits of the matter. This is so in that on the contrary, the express terms of the agreement, the conduct of the parties before and after occupation of the leased premises, and the evidence relied on by the applicants as a whole, do not demonstrate a basis upon which any inference can be drawn that would permit the importation of the alleged tacit term.

[37] In the end, from the material before the Court, there were no circumstances that prevented the applicants from complying with their obligations in terms of the lease agreement¹⁷, and thereafter invoke the remedies at their disposal. The only inference to be drawn from the facts is that the applicants simply neglected to comply with the terms of the agreement. It follows that whether this application was considered in accordance with the common law or the Uniform Rules, it did not disclose any basis to justify interference with the default judgment. The rescission application therefore ought to fail with costs.

Order:

1. The first and second applicants' rescission application is dismissed.
2. The first and second applicants are ordered to pay the costs of this application, jointly and severally the one paying the other to be absolved.

Edwin Tlhotlhemaje

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 21 October 2022.

Appearances:

For the Applicants:

Adv. C. Acker with Adv L. Acker,
instructed by Fairbridges Wertheim
Becker attorneys

¹⁷See *Tudor Hotel Brasserie & Bar Pt Ltd v Hencetrade 15 Pt Ltd* (793/2016) [2017] ZASCA 111 (20 September 2017)

For the Respondent:

Adv. K Gouden, instructed by
Venns Attorneys

Date of Judgement: 21 October 2022

Date of hearing: 07 February 2022