REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 47/2021
APPEAL NUMBER: A3150/2021

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

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B.C. WANLESS **11 January 2023**

In the matter between:

SHERNEIGH FIONA OLISA t/a AFRICAN VIBES Appellant

and

TUPA 2012 (PTY) LTD Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 11 January 2023.

JUDGMENT

WANLESS AJ (DOSIO J concurring)

Introduction

[1] This is an appeal by **SHERNEIGH FIONA OLISA t/a AFRICAN VIBES** *("the Appellant")* arising from a judgment granted (by default) in the Magistrates' Court for the District of Johannesburg Central (Held at Booysens) against the Appellant in favour of **TUPA 2012 (PTY) LTD** *("the Respondent")*.

[2] The said judgment was granted in the court *a quo* by default in light of the failure of the Appellant to enter an appearance to defend the action pursuant to service of the summons at the Appellant's chosen *domicilium citandi et executandi* in terms of the lease agreement *("the lease agreement")* entered into between the Appellant and the Respondent whereby the Appellant leased certain business premises from the Respondent. The judgment granted on the 17th of March 2021 was as follows:

> *"1. Payment of R20 295,89;*
>
> *2. Interest thereon at the rate of 7% per annum from date of judgment until date of final payment;*
>
> *3. Damages for the unlawful holding over of the leased premises at R436.08 per day from 1 February 2021 limited to an amount of R200 000.00;*
>
> *4. Confirmation of the rent interdict;*
>
> *5. Eviction of the defendant from the leased premises;*
>
> *6. Costs in the amount of R136.00."*

[3] Pursuant to the granting of the judgment as aforesaid the Appellant instituted an application in the court *a quo* in terms of rule 49 of the Rules Regulating the Conduct of the Proceedings of The Magistrates' Courts of South Africa *("the Rules")* for the rescission of the judgment. At the same time, as is clear from the transcript of proceedings which took place on the 11th of November 2021 in the court *a quo* before Magistrate R LERM *("the Magistrate")* and events which transpired thereafter, the Appellant sought condonation in terms of subrule 60(9)[1] of the Rules as a result of the failure of the Appellant to comply with the time provisions of subrule 49(1) of the Rules.

[4] The Magistrate dismissed the Appellant's application for condonation, with costs. In light thereof the Appellant's application for rescission was not heard. Thereafter, the Appellant requested written reasons for the decision of the Magistrate which were provided by the Magistrate, in terms of subrule 51(1), on the 20th of December 2021. It is against this decision that the Appellant appeals to this Court.

[5] From a technical perspective, it appeared to this Court that the appeal should be restricted to the decision of the Magistrate in refusing condonation and not dealing with the Appellant's application for the rescission of the judgment. In that event, if the appeal was successful the matter could well be remitted back to the court *a quo* to decide the Appellant's application for rescission. In addition to the aforegoing, there

[1] *"60(9) The court may, on good cause shown, condone non-compliance with these rules."*

was great confusion as to how this matter had even been enrolled as an appeal before this Court and whether or not the Appellant had properly complied with the Uniform Rules of Court applicable to appeals from the Magistrates' Courts to the High Courts. The Respondent had dealt extensively with this latter difficulty in the Respondent's Heads of Argument and was of the view that the appeal should be struck from the roll as a result of the Appellant's failure to comply with the rules of this Court.

[6] When the matter was called a considerable amount of time was spent (and wasted) by this Court attempting to resolve these difficulties with the Appellant's Attorney and the Respondent's Counsel. At the end of the day, the difficulty pertaining to whether or not the Appellant had properly complied with the Uniform Rules of Court (which can only be described, at best, as a veritable "shambles") and thus whether or not the appeal was properly before this Court, was graciously resolved by, *inter alia*, the Respondent abandoning its point that the appeal should be struck from the roll due to non-compliance with the rules. Thereafter, this Court decided, in the interests of justice, that the matter should proceed before it.

[7] With regard to the true nature of the appeal, this Court held that it would also be in the interests of justice, particularly in respect of finality, if this Court decided the appeal on the basis of whether or not the Appellant should have been successful in the court *a quo* in respect of the application for rescission of the judgment in terms of subrule 49(1). This decision was based on the factors as already stated, together with the important consideration that the requirements for condonation and rescission are remarkably similar (if not identical) focussing as they both do on whether an applicant can show good cause. In the premises, since this Court would, in any event, be called upon to consider and determine these issues, it was expedient that this Court, sitting as a court of appeal, reach a final decision and bring the matter to a conclusion. Both parties were in agreement thereto. Certainly, neither party objected to the appeal proceeding.

The grounds of appeal

[8] In terms of the Appellant's *"Notice of Application for Leave to Appeal"* dated the 18th of May 2022, it is stated that the Appellant's grounds of appeal are the following:

> *1. The learned Magistrate erred in that:*
>
> *1.1 The Plaintiff did not have locus standi standing on its own and that the owner of the property was not joined in the main action, there was a non-joinder to the action.*
>
> *1.2 The Defendant was not in wilful default.*

1.3 There was (sic) supervening impossibilities preventing the Defendant from honouring her obligations against the lease agreements, Covid-19 pandemic, closure of alcohol establishment a contributing factor;

1.4 The Defendant at time of Judgment by default only owed a month's rental which was current.

2. That the court erred in not finding that the amount owed is disputed, the Badenhorst rule."

The law

[9] Rule 49 deals with rescission and variation of judgments. The relevant subrules for the purposes of this appeal are subrules (1) and (3) which read as follows:

"(1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 days' period shall not be applicable to a request for rescission or variation of judgment brought in terms of sub-rule (5) or (5A).

(2) ……

(3) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim."[2]

[10] From the aforegoing (and this is fairly trite) it can be accepted that for an application for the rescission of a default judgment to be successful in terms of rule 49 the court must be satisfied that an applicant has proven that there is good cause for the court to rescind the judgment and that the applicant has a substantial defence to the action.[3] The requirement that the applicant for rescission must show the existence of

[2] *Emphasis added.*

[3] Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa ("Jones and Buckle"); Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352G; *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) at

a substantial defence does not mean that he must show a probability of success. It will suffice if he or she shows a *prima facie* case, or the existence of an issue which is fit for trial.[4]

[11] The onus of setting out reasons for the failure to enter an appearance to defend the action falls upon the Appellant.[5] While wilful default on the part of an applicant in an application for the rescission of a default judgment is no longer a substantive or compulsory ground for refusal of an application for rescission under subrule 49(3) since the amendment of rule 49 in 1992[6] the reasons for an applicant's default remain an essential ingredient of the good cause to be shown and the onus of proof to be discharged by an applicant in an application of this nature.[7] The wilful or negligent nature of the applicant's default is one of the various considerations a court will take into account when exercising its discretion in deciding whether good cause has been shown.[8]

[12] It is trite that the ground's of the defence to the action must be contained in the founding affidavit of the application.[9] The applicant need not show a probability of success on the merits. It will suffice if he or she shows a *prima facie* case in the sense of setting out averments which, if established at the trial, would entitle the applicant to the relief sought.[10] He or she need not deal fully with the merits of the

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1180F–1181F; *Harris v ABSA Bank Ltd t/a Volkskas* [2002] 3 All SA 215 (T) at 217*f*–218*c*; *Gangat v Akoon* (unreported, GJ case no A5044/2019; 3751/2007 dated 21 December 2021- a decision of the Full Court) at paragraphs [27]–[34];*Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at 350D and *Scholtz v Merryweather* 2014 (6) SA 90 (WCC) at 93F–94E; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A; *Mnandi Property Development CC v Beimore Development CC* 1999 (4) SA 462 (W) at 464G; *Jwacu v Jwacu* (unreported, ECM case no 3223/20 dated 1 February2022) at paragraph [20];*Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 477E–G; *Santa Fe Sectional Title Scheme No 61/1994 Body Corporate v Bassonia Four Zero Seven CC* 2018 (3) SA 451 (GJ) at454G–H; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352G–H; *De Vos v Cooper & Ferreira* 1999 (4) SA 1290 (SCA) at 1304H; *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd* 2011 (3) SA 477 (KZP) at 485A–C.

[4] *Jones and Buckle at footnote 45.*

[5] *Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A; Cavalinias v Claude Neon Lights SA Ltd 1965 (2)SA 649 (T) at 651C–D. The learned authors in Jones and Buckle note that both of these decisions were decided under a version of the subrule which required that the affidavit set forth 'shortly' the reasons for the applicant's absence or default.*

[6] *By GN R1510 of 1992.*

[7] *Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at 529E-F; Nale Trading CC v Freyssinet Posten (Pty) Ltd In re: Freyssinet Posten (Pty) Ltd v Nale Trading (Pty) Ltd (unreported, GJ case no 26992/2019 dated 22 September2021) at paragraph [14]; Thondlana v Absa Bank Limited (unreported, GJ case no 29241/2017 dated 3 March 2022) at paragraph [26].*

[8] *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) SA 705 (E) at 708G; Nale Trading CC v Freyssinet Posten (Pty) Ltd In re: Freyssinet Posten (Pty) Ltd v Nale Trading (Pty) Ltd (unreported, GJ case no 26992/2019 dated 22 September 2021) at paragraph [13]; Thondlana v Absa Bank Limited (unreported, GJ case no 29241/2017 dated 3 March 2022) at paragraph [26].*

[9] *F&J Car Sales v Damane 2003 (3) SA 262 (W) at 266E–G; Securiforce CC v Ruiters 2012 (4) SA 252 (NCK) at 261G.See also Taylor v Additional Magistrate, Vereeniging 1984 (4) SA 1 (T) at 4D.*

[10] *Brown v Chapman 1928 TPD 320 at 328; Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476–7; Kritzinger v Northern Natal Implement Co (Pty) Ltd 1973 (4) SA 542 (N); Greenberg v Meds Veterinary Laboratories (Pty)Ltd 1977 (2) SA 277 (T) at 279; Kavasis v South African Bank of Athens Ltd 1980 (3) SA 394 (D) at 395; SandersonTechnitool (Pty) Ltd v Intermenua (Pty) Ltd 1980 (4) SA 573 (W) at 575; Kouligas & Spanoudis Properties (Pty) Ltd v Boland Bank Bpk 1987 (2) SA 414 (O) at 417C–D; Federated Timbers Ltd v Bosman NO 1990 (3) SA 149 (W) at155G–I; Morkel v Absa Bank Bpk 1996 (1) SA 899 (C) at 903D–E; Saphula v Nedcor Bank Ltd 1999 (2) SA 76 (W) at79C; Santam Ltd v Bamber [2006] 1 All SA 311 (W) at 315b–c; Pienaar v Bean (unreported, WCC case no A277/2019 dated 21 October 2020) at paragraphs [19] and [20].*

case[11] but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that there is a *bona fide* defence and that the application is not made merely for the purpose of harassing the respondent.[12]

The reasons for the Appellant's default and the grounds of the Appellant's defence to the Respondent's action

[13] The relevant averments (taken verbatim) made by the Appellant in her Founding Affidavit are the following:

(a) she did not enter an appearance to defend as she was unaware of the action;

(b) she only had knowledge of the action and the subsequent judgment by default when the Sherriff called her;

(c) she has a *bona fide* defence as she has been a tenant of the Respondent since 2014 and has been a good payer over that time. The type of business that she operates from the Respondent's property *"is largely depend (sic) on alcohol sales and the court will be aware the South African government due to Covid-19 locked-down South Africa from 27 March 2020 and alcohol sales was (sic) banned many times throughout this lockdown"*:; and

(d) she further avers that her business was practically non-existent during this time as *"even gathering of large crowds was also banned"* and *"we were not operational and our doors were closed to business, which the Respondent was aware of."*.

The Appellant's first ground of appeal: The Plaintiff did not have *locus standi* standing on its own and that the owner of the property was not joined in the main action, there was a non-joinder to the action.

[14] It is clear from even a cursory perusal of this first ground of appeal that the Appellant would appear to have confused and conjoined two (2) separate and distinct issues, namely *locus standi* and non-joinder. In the premises, this Court will deal with these two (2) concepts separately in this judgment.

Locus standi

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[11] *Brown v Chapman 1928 TPD 320 at 328; Greenberg v Meds Veterinary Laboratories (Pty) Ltd 1977 (2) SA 277 (T) at 279; Kavasis v South African Bank of Athens Ltd 1980 (3) SA 394 (D) at 395; Securiforce CC v Ruiters 2012 (4) SA 252 (NCK) at 261H–I.*

[12] *Ngcezulla v Stead 1912 EDL 110; Schneider v Abel 1916 CPD 346; Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)at 476; Kouligas & Spanoudis Properties (Pty) Ltd v Boland Bank Bpk 1987 (2) SA 414 (O) at 417C–D; Federated Timbers Ltd v Bosman NO 1990 (3) SA 149 (W) at 155G–I; Morkel v Absa Bank Bpk 1996 (1) SA 899 (C) at 903D; Standard Bank of SA Ltd v El-Naddaf 1999 (4) SA 779 (W) at 784D–785A; De Vos v Cooper & Ferreira 1999 (4) SA1290 (SCA) at 1303A–C and 1304B–G; Securiforce CC v Ruiters 2012 (4) SA 252 (NCK) at 261H–I.*

[15] In the founding affidavit the Appellant describes the Respondent as an estate agent who is the authorized mandated managing agent of the owner of the property who has consented to "their representation on its behalf". Arising therefrom, it is difficult to understand how this issue can be one of the Appellant's grounds of appeal. Most importantly, the issue of the Respondent's alleged lack of *locus standi* is not dealt with, at all, by the Appellant in the founding affidavit.

[16] In addition to the aforegoing, it is clear from the transcript of the hearing of the application in the court *a quo* that this issue (if it indeed was still an issue) was resolved by the handing in at the hearing of the application in the court *a quo* by the Respondent of the requisite resolutions whereby the Respondent was authorized to act on behalf of the owner of the leased premises (the property).

Non-joinder

[17] Firstly, it is important to note that no mention is made whatsoever in respect of the issue of non-joinder in the Appellant's founding affidavit. In argument, it was contended by the Appellant's Attorney that the owner of the premises should have been joined in the action as this entity had a substantial and material interest in the outcome of the litigation.

[18] It is obvious that the owner has such an interest. However, the aforegoing is only part of the test in deciding the necessity or otherwise in our law as to whether the joinder of a party to an action is strictly necessary. As correctly pointed out by Counsel for the Respondent, it is settled in our law that a party must only be joined in proceedings as a matter of necessity and not as a matter of convenience. The rights of the owner of the premises are not affected by the fact that the owner of the premises is not joined as a party to the action. In light of the fact that the Respondent is lawfully authorised to act on behalf of the owner (as above) the owner's rights in respect of the outcome of the litigation are not prejudiced in any manner whatsoever.

The Appellant's second ground of appeal: The Defendant was not in wilful default

[19] As already dealt with in this judgment, it is not incumbent upon the Appellant to show that she was not in *wilful* default when she failed to enter an appearance to defend the action instituted by the Respondent which resulted in the court *a quo* granting default judgment against her. She is nevertheless called upon to provide reasons as to why she did not enter the necessary appearance to defend which will be taken into account when the court considers whether there is good cause for the default judgment to be rescinded.

[20] It is not difficult to see, taking into account the relevant principles as dealt with earlier in this judgment, together with the "facts" as set out by the Appellant in the founding affidavit, that the Appellant has failed miserably in this regard. In fact, the Appellant

has provided no reasons whatsoever in the founding affidavit as to why she failed to enter an appearance to defend the action. It is common cause that there was proper service of the Summons at the leased premises which are the Appellant's chosen *domicilium citandi et executandi* in terms of the lease agreement. When this is pointed out by the Respondent in the answering affidavit the response thereto by the Appellant in the replying affidavit is simply that she *"was not present on the property due to the strike Covid-19 lockdown, which prohibited the operation of any business operating with alcohol.".* This bald averment does little, if anything, to amplify the failure of the Appellant to set out any real reasons as to why she did not enter an appearance to defend the action.

The Appellant's third ground of appeal: There was (sic) supervening impossibilities preventing the Defendant from honouring her obligations against the lease agreements, Covid-19 pandemic, closure of alcohol establishment a contributing factor

[21] From the application papers before the court *a quo* the Appellant's defence to the Respondent's action is based solely on the inability to trade as a direct result of the Covid-19 and the governmental trade restrictions arising therefrom, particularly with regard to the sale of alcohol upon which the success of her business depends. There is no dispute on the application papers pertaining to the indebtedness of the Appellant in respect of arrear rentals or in respect of any of the other claims as set out in the particulars of claim and in the judgment granted by the court *a quo*. Further, the Appellant relies on no term in the lease agreement, material or implied, that would entitle the Appellant to withhold payments in respect of rental under the circumstances as set out by the Appellant in her answering and replying affidavits.

[22] In light of the aforegoing the Appellant would have the court *a quo* rescind the judgment on the basis that the Respondent should not enforce its contractual rights to receive rental payments during lockdowns enforced by the South African Government during a pandemic on moral grounds. There is no basis in law upon which the court *a quo* could or should have done so. None was provided to this Court by the Appellant or the Appellant's Attorney during the hearing of the appeal. This Court is unaware of any authority for such a proposition.

The Appellant's fourth ground of appeal: The Defendant at time of Judgment by default only owed a month's rental which was current.

[23] This Court understands this ground of appeal to relate to the inequity (on the Appellant's version) attached to the amount claimed by the Respondent in respect of arrear rentals (as dealt with above) rather than any suggestion that the Appellant was not in fact indebted in the amount claimed. Once again, it is not disputed by the Appellant in the application papers that the Appellant is indebted in the amounts as claimed in the particulars of claim.

The Appellant's fifth ground of appeal: That the court erred in not finding that the amount owed is disputed, the Badenhorst rule.

[24] Once again, this Court can find no reference in either the Appellant's founding affidavit or replying affidavit that the actual amounts claimed in the action are disputed by the Appellant and the grounds therefor. If the Appellant *does* seek to dispute the computation of the Respondent's claim (as appears *may* be the case from the Appellant's Heads of Argument) she is clearly not entitled to do so when nothing appears in the application papers in that regard. This is trite. On that basis, the only possible reference to a dispute that the amount is owing, can only be, at best, a reference to the defence as raised in the Appellant's third (and possibly fourth) ground of appeal. This ground of appeal has been dealt with above.

[25] Miss Crisp, who appears for the Appellant, sought to rely on the decision in the matter of *Badenhorst v Northern Construction Enterprises (Pty) Ltd*[13] in support of the Appellant's contention that the judgment should be rescinded in light of the fact that the amount claimed was disputed by the Appellant. With regard to the matter of *Badenhorst* this Court has no hesitation whatsoever in accepting the correctness of the principle enunciated therein, namely that winding-up is not an appropriate procedure to be availed of by a creditor whose claim against a respondent is *bona fide* disputed on reasonable grounds. However, this Court is unable to comprehend how this principle applies, in any manner whatsoever, to the present matter. Not only (as already dealt with above) were the amounts claimed not disputed in the affidavits filed by the Appellant but even if this Court is somehow incorrect in this regard, facts were never placed before the court *a quo* to show a substantial and *bona fide* defence as required in terms of rule 49.

Conclusion

[26] It is clear from the aforegoing that none of the Appellant's grounds of appeal can be upheld by this Court. The court *a quo* did not err in dismissing the Appellant's application for condonation for instituting the application for the rescission of the default judgment outside of the time limits as provided for in rule 49. As set out at the beginning of this judgment, this Court, sitting as a court of appeal, has elected to decide the appeal on the basis that the court *a quo* dismissed the application for rescission itself.

[27] The appeal must fail since the Appellant's application for rescission in the court *a quo* could never have been successful. In this regard, as set out above, the Appellant failed to show good cause within the meaning thereof and as provided for in subrule 49(1). Moreover, the Appellant failed miserably to provide reasons for her failure to defend the action (reasons for her default) and the grounds for her defence

[13] *1956 (2) SA 346 (TPD) at 347-348.*

in terms of subrule 49(3).Put another way, the Appellant has failed to show a substantial defence. In that regard, she has failed to show even a *prima facie* case or the existence of an issue which is fit for trial. At the end of the day the Appellant has failed to discharge the onus incumbent upon her to prove, on a balance of probabilities, that she has a *bona fide* defence to the Respondent's action and the details thereof. There is no such defence as there never existed a defence at all.

[28] In the premises, the appeal must be dismissed, with costs. To be clear and to remove any possible doubt (as remote as that may be) the appeal which is dismissed is an appeal by the Appellant against the refusal by the court *a quo* of the application for the rescission of the default judgment granted in favour of the Respondent against the Appellant (and is *not* restricted to the refusal of the Appellant's application for condonation to institute that application).

[29] As to the scale of those costs the Respondent has requested that the Appellant be ordered to pay the costs of the appeal on the scale of attorney and client. It is trite that not only costs but the scale thereof fall within the discretion of the court. It is not the intention of this Court to burden this judgment unnecessarily by dealing with the various principles applicable thereto. However, it is fairly trite that costs on the punitive scale are generally awarded where the litigation has been unnecessary; devoid of merit and has also put the other party to unnecessary expenses and costs. Costs on the scale of attorney and client may also be awarded to show the displeasure of the court in the manner in which a party has conducted the litigation and taken up the court's time.

[30] This Court has already made mention of the chaos that preceded the hearing of this appeal earlier in this judgment. Indeed, the Appellant can count herself fortunate indeed that in light thereof the appeal was in fact heard by this Court and judgment delivered in respect thereof. Insofar as the merits of the matter are concerned, it is the opinion of this Court that all of the factors as set out above and which are, to one extent or another, relevant when a court orders costs to be paid on a punitive scale, are present in this matter.

[31] Before dealing therewith, an important point needs to be made. In the replying affidavit the Appellant makes the following bald averments (with no proof) in the last subparagraph thereof:

> *"I have paid up the judgment amount and thus the order has been extinguished in that aspect and I humbly plead with the court to make an order that finds that the condonation application be confirmed and that the rescission application be granted and the order for my eviction from the property be set aside."*

Apart from the fact that the averments set out therein, according to the transcript of the application in the court *a quo*, appear to be in direct contradiction with what the Appellant's Attorney advised the Magistrate at the hearing of the application, namely that the Appellant had not paid the debt, the Appellant continues to exhibit herein a clear intention, despite not having a defence to the action at all, to seek relief from the court *a quo* in the form of a rescission of the default judgment. If the Appellant was genuine in her intentions to clear her indebtedness in respect of the lease agreement, one would have expected, rather than her seeking a rescission of the default judgment and then, when unsuccessful, appealing to this Court, to properly extinguish her indebtedness and thereafter seek relief in terms of subrule 49(4). This subrule reads as follows:

> *"Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who does not wish to defend the proceedings, the applicant must satisfy the court that he or she was not in wilful default and that the judgment was satisfied, or arrangements were made to satisfy the judgment, within a reasonable time after it came to his or her knowledge."*[14]

[32] Taking all of the aforegoing into account, it is the opinion of this Court that the Appellant's application for condonation and the rescission of the default judgment in the court *a quo* was unnecessary; devoid of merit and mulcted the Respondent in costs. These factors were only aggravated when the Appellant instituted an appeal to this Court. The appeal, apart from the aforegoing factors, not only dramatically increased the costs of the Respondent but has also taken up a considerable amount of this Court's valuable time both in the hearing thereof and the delivery of this judgment. In the premises, it would be just and equitable if the Appellant paid the costs of the appeal on the attorney and client scale.

Order

[33] This Court makes the following order:

1. The appeal is dismissed.

2. The Appellant is to pay the costs of the appeal on the attorney and client scale.

[14] *Emphasis added.*

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B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

I agree:

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D. DOSIO
Judge of the High Court
Gauteng Division, Johannesburg

Heard:	13 October 2022
Judgment:	11 January 2023

Appearances:

For Appellant:	Ms R Crisp
Instructed by:	R Crisp Attorneys
For Respondent:	Adv M Amojee
Instructed by:	Nadeem Moolla Attorneys