



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

Case No:28841/2020

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

DATE

SIGNATURE

In the matter between:

DANIEL WELLINGTON SOUTH AFRICA (PTY) LTD

T/a DANIEL WELLINGTON

(REG. No 2018/262456/07)

Applicant

And

AZRAPART (PTY) LTD

(REG No 2011/002042/07)

Respondent

IN RE:

AZRAPART (PTY) LTD

Plaintiff

And

DANIEL WELLINGTON SOUTH AFRICA (PTY) LTD

T/A DANIEL WELLINGTON

Defendant

JUDGMENT

MAHOMED AJ

INTRODUCTION

This is an application for a rescission of a judgment which was granted by default on 25 January 2021 in terms of which the applicant was ordered to pay an amount of R178 829.31, ejectment, interest, and costs.¹ The applicant failed to file a notice to defend the action.

The respondent opposed the application and submitted that the applicant was properly served at the address it indicated as its domicilium address and that the applicant was wilful when it failed to file a notice to defend, in that it was advised that the respondent decided to take legal action. It contends that application must fail.

By agreement between the parties, the applicant's late filing of this application is condoned, the applicant was late by six days beyond the usual time periods observed, which cannot be considered undue delay.

The claim is for arrear rentals, cancellation of lease and damages. The damages claim was postponed sine die. The parties concluded a lease agreement of business premises at a shopping mall in the greater Johannesburg area.

¹ Caselines 006-172

THE LAW

1. When a final judgment has been granted, the court itself has no authority to set it aside or correct, alter or supplement it. The court is said to have become *functus officio*, as its authority over that matter ceases. It is also important that litigation is brought to finality, it is in the public interest to do so.
2. However, a judgment can be rescinded or amended in terms of the Rules of Court, that is, Rule 42(1)(a), 31(2) (b) and in terms of the common law. A judgment or order may also be set aside in terms of s23 A of the Superior Courts Act.
3. Rule 32(1) (b) provides for a rescission of a judgment granted by default.
4. In **GRANT v PLUMBERS (PTY) LTD**², the court set out the requirements for a rescission of judgment sought under Rule 31(2) (b),
 - 4.1 The applicant must give a reasonable explanation for his/her default. If the default is found to be wilful or due to gross negligence, the court should not come to the assistance of the applicant.
 - 4.2 The applicant must demonstrate that it is bona fide in making the application and does not do so to frustrate the plaintiff/respondent's claim.
 - 4.3 The applicant must show that he it has a bona fide defence to the claim. It is sufficient if the applicant sets out a prima facie defence, that is, it can set out averments which if established at the trial, would entitle it to the relief sought. The applicant is not required to deal fully with the merits of the matter and can furnish evidence which demonstrates the probabilities are in its favour.
5. A court has a wide discretion in the granting of a rescission and must have regard to all the relevant circumstances.

² 1949 (2) S 470 (O) at 467-7,

6. In **COLYN v TIGER FOOD INDUSTRIES LTD t/a MEADOW FEED MILLS (Cape)** ³, it was stated that, where a rescission is sought against judgment taken by default, the applicant must show good /sufficient cause. No precise or definite definition is given to the terms because many and various factors must be considered.

The Applicant's submissions

7. The parties initially concluded an agreement to occupy premises in November 2018, but could not do so because the mall in which they leased a store, was still under construction. They were to enjoy beneficial occupation as of 26 March 2019 and rentals were payable after a period.
8. The mall still being incomplete, the parties entered into second agreement which was concluded in June 2019 in terms of which they were to enjoy beneficial occupation on 23 July 2019, rentals would be payable as of 1 September 2019 and the lease would terminate on 31 August 2022.
9. The applicant complained that its trading continued to be hampered by the incomplete construction.
10. Advocate N Mahlangu appeared for the applicant, submitted that in issue in this matter, is whether the use and enjoyment of the store had ever passed to the applicant.
11. Counsel proffered that the negotiations on the rentals were ongoing as of November 2019 despite the conclusion of the second agreement in June 2019. The problems regarding the incomplete construction which hampered trade, continued into 2020.⁴
12. In February 2020 the parties agreed to the basic rentals and 8% on the applicant's turnover.

³ 2003 (6) SA 1 (SCA) at 9C

⁴ Caselines 006-148 to 150

13. Counsel submitted that the court must consider the nature of the agreement concluded, that is, the rental was set on a basic amount and a percentage of the profits generated per month, thus the payment of a rental amount was inextricably linked to the generation of revenue.
14. It was further argued that the customers were not attracted to the mall which was still under construction, and this impacted on the applicant's revenue. The applicant again approached the respondents regarding its challenges and parties agreed to review rentals in six months. However, the applicants challenges were exacerbated when the Covid pandemic struck and the hard lockdown rules permitted trading to only traders of essential services.
15. On a month's notice the applicants terminated the lease agreement, as of 1 June 2020. having paid in two months as a rental deposit.⁵ It could no longer trade profitably.
16. On 27 July 2020 the applicants by email correspondences sought to remove its shopfitting and return the store as was required in the lease, as a "shell".⁶
17. Only on 7 October 2020, the respondent in its reply informed that the Board had decided to institute legal action for the breach of the agreement.⁷
- 18.1 Counsel emphasised that at no stage did the respondent's representative inform the applicants that action had already been taken on the 2 October 2020.
- 18.2 The applicant was of the understanding that it was to await a summons.
- 18.3 The applicant continued to approach the respondents to resolve the impasse between them and did in January and March 2021.

⁵ Caselines 006-154

⁶ Caselines 006-157-158

⁷ Caselines 006-157

18.4 Only in June 2021 on inquiring about the removal of their shopfitting, the respondent informed that the matter was with the attorneys and furnished their contact details.

18.5 The applicants for the first time heard from respondent's attorneys that a judgment was granted on 25 January 2021.

18. Mr Mahlangu submitted that the applicants had at all material times engaged with the respondents to resolve their dispute and to return their property, several of its correspondences were unanswered.

19. Counsel submitted that the applicant has several defences which it must be permitted to argue before a trial court.

Wilful Default

20. It is common cause that after the second lease was concluded the applicant submitted documents for the FICA and CIPC⁸ registrations, to the respondent at its request, which reflects the applicant's domicilium. Counsel submitted the applicant is entitled to accept that it has fully complied with respondent's requirements as to where it could locate the applicant.

21. Counsel argued that the respondent knew of its addresses it chose to serve on the old address and is therefore mala fides when it served on the old address.

22. It was submitted that the applicant was not in wilful default, the facts demonstrate that at all material times the applicants engaged with the respondent.

23. It was proffered that the respondent could have provided them with details of attorneys when they handed the matter over.

24. Mr Mahlangu submitted that applicant has provided a reasonable explanation for the default, it did not know that a summons was served at its old address.

Bona Fide Defence.

⁸ 006-164 to 171

25. Mr Mahlangu referred the court to the judgment in **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**⁹, where the court restated the two requirements to succeed in an application for rescission, being good/sufficient cause and a bona fide defence, which prima facie has some prospects of success, must be demonstrated. An applicant cannot succeed if it failed to demonstrate both requirements.
26. Counsel reminded the Court on the steps the applicant had taken upon becoming aware of the judgment and its delay of six days is not inordinate delay.
27. It was submitted that the applicant has a bona fide defence¹⁰ as the respondent was in material breach of the lease agreement, in that:
- 27.1 the incomplete construction of the mall and parking bays, hampered the flow of customers to the mall,
- 27.2 the marketing was insufficient
- 27.3 the general appeal of the mall as a shopping destination because of the extensive construction impacted on trade¹¹
28. Counsel submitted that the fact that the respondents engaged with it on more workable terms demonstrates that it appreciated the applicant's predicament and knew that the revenue generation was very dependent on the customer traffic in the mall. It is a point that must be argued before a trial court, regarding the applicant's liability for payment of rentals as the applicant is desirous of filing a counterclaim in that regard.

Supervening Impossibility

29. Counsel referred the court to the judgment of **HENNOPS SPORT (PTY) LTD v LUHAN AUTO (PTY) LTD**¹² in relation to the use and enjoyment of premises and

⁹ 2021 (11) BCLR 1263 (CC)

¹⁰ Caselines 006-14 para 20

¹¹

¹² 2022 JDR 3763

submitted that the court must look at the foundation of the agreement to decide if the vis major defence is competent. It was submitted that this inquiry is crucial to understanding the nature and extent of the parties' reciprocal obligations as embodied in the lease agreement.

30. In the Hennops Sports case, the court held the defence was not competent in that the premises could have been used in other ways to generate income in casu the applicant was limited to the use for retail of its watches and accessories only.

31. Counsel referred to the clause in the lease agreement which requires the applicant to provide expert evidence if it relied on the defence of vis major and argued that this itself raises a triable issue for a trial court to have regard to and demonstrates sufficient cause in this application for rescission.

RESPONDENTS VERSION

39. Advocate Dobie represented the respondent and submitted that it served the summons at the chosen domicilium as it was obliged to do. There was proper service by affixing, the sheriff's return stated

*"no other manner of service was possible after diligent search. NB company unknown by ... (receptionist)"*¹³

40. The respondent had no reason to believe that the applicant was no longer operating on the premises, the applicant is obliged to inform of a change in domicilium as confirmed in **Van der Merwe v Boniero Park (Edms)**.¹⁴ The documents which the applicant submitted were merely a verification of where the directors of the applicant could be found. It was not a notice of a change of domicilium. The applicant's domicilium changed in 2018, before it concluded the lease agreement. It chose the domicilium on the lease agreement and the respondent served at its chosen domicilium.

¹³ Caselines 006-183

¹⁴ 1998 (1) SA 697 T

43. Mr Dobi submitted that the applicant conceded it was told in October 2020 that the respondent was “going to institute action” and it did nothing about this until only in January 2021 when it inquired when it was too late as judgment had been granted. He submitted that the applicant was wilful.
44. Counsel submitted that the applicant fails to allege a breach of any specific clause of the agreement and what facts it relies on for its defence.
45. Counsel referred the court to clauses 3.3 and 3.5 of the lease agreement which excludes warranties and clause 24.5 which addresses the challenges arising from incomplete construction, when the tenant must suffer some inconvenience from, certain interruptions.
46. Mr Dobie submitted no claim for damages lie in this instance and clause 24.2 deals specifically with the applicant's main complaint that it could not operate its business due to incomplete construction.
48. Counsel denied that the parties concluded any agreement after the lease for reduced rentals or any review of rentals. The agreement concluded were merely indulgences. The respondent made an offer which was met by counteroffers as the correspondence confirms. The lease includes a non-variation clause, which requires any variation to be in writing between parties. No such variation is recorded.
49. Mr Dobie submitted the applicant repudiated the lease,¹⁵ it simply cancelled the lease, the respondent was not placed in mora. The respondent has not accepted the repudiation.
50. It was submitted that nothing in lease obliges the respondent to guarantee that applicant makes a profit the applicant must show that it became impossible to use the premises.

¹⁵ Caselines 006-155

51. Mr Dobie submitted that the applicant has failed to demonstrate prospects of success at a trial and asked that the application be dismissed.
52. Counsel submitted further that even if the court grants the rescission, it must order the applicant to pay the costs, as it was necessary for the respondent to oppose this application.

JUDGMENT

53. In this application the applicant seeks a right to be heard. It seeks the opportunity to present its defence and argue against its liability to pay the rentals claimed. It did not know that a summons was served on its previous domicilium address. Had it known of the action, it would have defended it. It is noteworthy that the applicants acted almost immediately on realising that a judgment had been granted.
54. In **INFINTUM HOLDINGS (PTY) LTD AND ANOTHER v JUDGO LERM AND OTHERS**¹⁶, Molahlehi J, stated,
- “.... the court retains a discretion to grant or refuse the rescission to rescind an order having regard to fairness and justice.”*
55. In **HARRIS v ABSA BANK LTD**¹⁷ the court held that,
- “Before an applicant in a rescission of judgment application can be said to be in wilful default, he or she must bear knowledge of the action brought against him or her of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions.”*

¹⁶ Case No, 26799/2017 [18 May 2022]

¹⁷ 2006 (4) SAS 527 (T) AT 530A

56. Mr Dobie argued that the applicant was aware that the respondent's Board had taken a decision to "*proceed with legal action.*"¹⁸, however the evidence is that nothing more was conveyed to the applicants in that regard, even after the summons was served.
57. It is clear from the judgment in Harris above, that a "*mere knowledge is not sufficient*" and that more is required. The defaulting party is also required to know of the steps that must be taken to avoid default judgment being granted against it.
58. The applicant could not have known of the steps it should have taken to avoid default judgment; it did not know that a summons was served at its old address.
59. The evidence is that the applicant understood it had properly informed the respondent of its address and where its directors may be found. Had it known of the action, it would have defended it.
60. Furthermore, the court in Harris states that there must have been a "*deliberate failure*" to take steps to avoid default judgment being granted. The applicant did not know of the service of the summons and cannot be said to have acted deliberately, or even be said to have "*appreciated the legal consequences of its failure*" to file a notice to defend if it did not know of the claim.
61. I am not persuaded that the applicant was wilful in failing to file an appearance to defend or in failing to inquire after it was advised of the Board's decision to proceed with legal action.
62. The evidence is that even after it learnt of the Board's decision, it contacted the respondents to further negotiate to resolve the dispute, still unaware that a summons was served.
63. In my view the applicant provided a reasonable and acceptable explanation for its default.

¹⁸ Caselines 006-161

64. In **HARRIS**, supra, Moseneke J, stated that:

“A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default of failure in isolation.

“instead, the explanation, be it good, bad or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole.”

65. Mr Mahlangu submitted that a trial court must determine whether the applicants were ever afforded use and enjoyment of the premises leased.

66. When the respondents engaged in further discussions and offered “indulgences” as suggested by Mr Dobie, it is reasonable to conclude that it did so because it knew that the incomplete construction was posing a problem to its tenants.

67. The evidence is that the rental payable was inextricably linked to the generation of revenue, and this is a factor that the trial court must apply its mind to, with the assistance of expert evidence, as is set out in the lease agreement.

68. In **SCOTT v TRUSTEE INSOLVENT ESTATE COMERMA**¹⁹, was stated that the court should not scrutinise too closely whether the defence raised is valid, but rather that prima facie there are sufficient reasons that present a bona fide defence for the applicant to defend itself and to be heard.

69. In **RGS PROPERTIES (PTY) LTD v ETHEKWINI MUNICIPALITY**²⁰, it was confirmed that *“the court is not seized with the duty to evaluate the merits of the defence. The fact that the court is in doubt about the prospects of the defence to be advanced, is not a good reason why the application should not be granted. That*

¹⁹ 1938 WLD 129

²⁰ 2010 (6) SA 572 (KZD) para 12

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."

70. Having regard to the conspectus of the evidence before me, I am of the view that the applicants were not in wilful default and present a defence that prima facie has prospects of success. There is no evidence that the applicants attempt to delay the matter or frustrate the respondent's claim in the action.
71. Accordingly, the application for rescission must succeed they must be allowed to present their defence to the respondent's claim.

COSTS

72. Mr Dobie submitted that even if application were to succeed, the court must order that the applicant pay the costs of this application, as it was necessary for the respondent to oppose the application.
73. A court has a discretion in the award of costs which is to be exercised judicially and must be in fairness to both sides.
74. On the facts the respondent was entitled to rely on the address provided in the lease agreement. The evidence is that the address was incorrect, albeit that the correct address was available to the applicant on the date of signature.
75. It is fair in the circumstances that the applicant, who in effect seeks an indulgence, pay the costs of the application.

Accordingly, I make the following order:

1. The application for rescission is granted.
2. The applicant is to pay the costs of the application on a party party scale.

MAHOMED AJ

**JUDGE OF THE HIGH COURT
JOHANNESBURG**

Date of Hearing: 2 November 2023

Date of Judgment: 15 November 2023

Appearances:

For applicant: Advocate N Mahlangu

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For Respondent: Advocate Dobie

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