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

CASE NUMBER: **35217/2019**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
8/03/2023

_____ _____
DATE SIGNATURE

In the matter between:

CHRISTOPHER JAMES MCLURE RENWICK
APPLICANT/DEFENDANT

and

CHRISTOFFEL GERHARDUS BOTHA
T/A TAX CONSULTING RESPONDENT/PLAINTIFF

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This is an application for the rescission of a summary judgment granted against the applicant (the defendant in the main application) by Wanless AJ on 18 May 2020. The order was granted in the absence of the applicant. The rescission application is brought in terms of Rule 42(1)(a), alternatively in terms of Rule 31(2)(b) of the rules. The application is opposed by the respondent (the plaintiff in the main application).

[2] The order granted by Wanless AJ reads as follows:

1. Payment of the sum of R500 000-00;

2. Interest on the amount referred to in paragraph 1 at a rate of 10% per annum *a tempora morae* until date of final payment;

3. Costs of suit.

[3] Furthermore, the applicant also seeks an order condoning the late filing of the application for the rescission of the judgment.

[4] The respondent is Mr Botha t/a Tax Consulting SA. The respondent also seeks condonation for the late filing of his answering affidavit.

Background of relevant facts and Chronology

[5] Mr Renwick ("the Applicant") was employed by the respondent as a senior tax attorney on 15 November 2016. The parties concluded a written Employment Agreement to regulate the employment relationship between them.

[6] On 18 July 2017 the parties amended the Employment Agreement between them by means of a further written agreement ("the Agreement") dated 18 July 2017.

[7] In terms of the agreement the parties agreed to amongst others to amend the terms relating to the payment of bonusses and in this regard paragraph 8.13 and 8.14 states:

"8.13 Bonus payments are made in accordance with the provisions stated in the bonus letter accompanying such payment,
8 14. Bonus payments are at the sole discretion of the company."

[8] I will refer to the amendment as the 2018 "Six months Bonus Incentive Policy" ("the 2018- Bonus Policy"). The policy was circulated to all employees of the respondent and it was agreed that only employees who were paid a bonus in December 2019 and who resign on or before 1 March 2019 shall have the obligation of repaying the bonus to the respondent.

[9] On 2 July 2019, a year later, an amended policy ("the 2019- Bonus Policy") for consultants regarding the "six months bonus incentive" was circulated to all employees. The applicant confirmed receipt and acceptance of the 2019- Bonus Policy on 3 July 2019. In terms of paragraph B and C of the 2019-Bonus Policy the following were agreed to;

"**B. Application**

- The bonus incentive applies to two, six month *(sic)* periods, namely, January to June and July to December. The bonus payments will be made In July and December respectively, as soon as numbers are finalised.

- Part C below applies to TCSA business units and individual consultants not allocated to a specific business unit.

- Support staff are excluded from Part C and are governed under Part D below.

C. Employment Change

- In the event that the employment of any employee is terminated for reasons other than retrenchment and/or operational requirements, that employee shall be required to fully refund the bonus paid to them, to the company.

- The manner in which the bonus shall be repaid may agreed *(sic)* upon at the date of termination. Where a payment plan is required, the employee shall sign an agreement to such effect.

- The company may choose to waive its right to receive repayment of the bonus however this will be at the sole discretion of the company, is not guaranteed and shall be on a case by case *(sic)* basis.

- The terms hereof shall only be applicable to the calendar year in which the bonus is paid i.e., a bonus paid in June shall be subject to repayment in December. A December bonus paid shall only be subject to repayment before the end of that same calendar year."

[10] The object of the 2019-Bonus Policy was to incentivise consultants, such as the applicant for "genuine performance" in that they would be entitled to a bonus. The bonus would be paid in July and/or December, respectively, subject to all financial requirements of the respondent have been achieved by the individual.

[11] The applicant satisfied the requirements, and qualified for a bonus for the period January to June 2019, and on 5 July 2019, he was accordingly paid a gross amount of R 500 000.00.

[12] On 16 July 2019 the applicant resigned from the respondent's employment. The dispute arose as to whether the applicant was paid the bonus in terms of the 2018- or the 2019- Bonus Policy implemented by the respondent.

[13] After the resignation of the applicant, the respondent caught wind of the applicant's emigration from the Republic, whereafter the respondent demanded that the repayment of the bonus amount as stipulated in the 2019-Bonus Policy. The applicant refused to repay the bonus amount.

[14] The respondent was of the view that the applicant was not entitled to the bonus in terms of the 2018- Bonus Policy, and therefore, the respondent instituted an urgent application in the Labour Court, where he sought an interim interdict for the immediate payment of the bonus into a trust account, pending the resolution of the dispute between the them. It is evident that the application in the Labour Court was launched due to the applicant's imminent emigration from the Republic.

[15] The application was heard on 13 August 2019 in the Labour Court by Van Niekerk J and was dismissed with costs. Aggrieved by the outcome of the application in the Labour Court, the respondent applied for leave to appeal, which application was also dismissed.

[16] On 16 August 2019 the applicant emigrated to the United Kingdom ("the UK").

[17] Following the applicant departure from the Republic, on 8 October 2019, the respondent issued summons against the applicant, seeking an order for the payment of R 500 000.00.

[18] The respondent was granted leave to serve the summons on the applicant by way of edictal citation in the UK in the following way:

18.1. By way of email: mclurerenwick@gmail.com and,

18.2. By way of service on the office of Harrington Johnson Wands Attorneys.

[19] The summons was served in terms of the court order on the applicant's erstwhile attorneys of record, as well as on the applicant by way of email on 12 February 2020.

[20] On 14 February 2020 the applicant's attorneys withdrew as attorney of record.

[21] On 25 February 2020 the applicant filed notice to oppose the summons, and he also filed his plea on the same date.

[22] On 16 March 2020, the respondent applied for summary judgment. The summary judgment application and set down in respect of the application was served on the applicant via email during March/April 2020.

[23] The applicant failed to deliver an affidavit resisting summary judgment and accordingly, summary judgment was granted against the him on 18 May 2020 on an unopposed basis.

[24] On 10 July 2020 this application for rescission of the summary judgment was served on the respondent, which the respondent opposed. The respondent filed his answering affidavit in the rescission application on 11 August 2020 and the applicant his replying affidavit on 19 August 2020.

[25] On 4 August 2020, the respondent's attorney addressed a letter of demand to the applicant's attorney, the purpose thereof was to demand security for the respondent's costs in respect of the rescission application as well as all future litigation. Due to applicant's refusal to furnish security for costs in the rescission application, the respondent served a security application, as well as a condonation for late filing of the said application on the applicant on 27 August 2020.

[26] The said application was opposed by the applicant. The application was heard on 11 February 2021 by De Bruyn AJ and on 13 April 2021 the security application was dismissed.

Condonation late filing of rescission application and answering affidavit

[27] The applicant seeks condonation of his failure to bring this application within the period required by Uniform Rule 31(2)(b). The respondent on the other hand seeks condonation for the late filing of his answering affidavit. The applicant admits that his filing of the rescission application was 1 (one) day out of time in terms of the rules. The respondent also admits the filing of the answering affidavit was late. This failure to file in time may be condoned on good cause shown.

[28] During the hearing both parties consented to condonation being granted. Even had such consent not being granted I would still have condoned the late filing of the parties in this application. The applicant was only 1 (one) day out of time in terms of the rules, the applicant provides a reasonable explanation of the delay (his attorney of record miscalculated the computation of the *dies*). No prejudice can be said to have arisen from it.

[29] The respondent contended that the parties have agreed to condonation of the late filling of the application and the answering affidavit.

[30] Therefore, the late filling of the rescission application by the applicant and the late filing of the answering affidavit by the respondent are condoned.

Point *in limine*

[31] Ms Bekker for the respondent raised a point *in limine* to the effect that the applicant's founding affidavit is not properly authorised. The respondent argued that the solicitor notarising the applicant's founding affidavit, failed to effect a seal as contemplated in Rule 63(3) of the Uniform Rules to the founding affidavit.

[32] Counsel for the applicant referred to the provision in Rule 63(4) of the Uniform Rules, and argued that the court has a discretion in this regard and if the court is satisfied with the authenticity of the affidavit, it can be allowed. The applicant contended that the rules pertaining to the authentication of a document are no more than directory, in the sense it merely guides a person from a regulatory point of view and is not a pre-emptive measure and that pleadings are made for the court, not the court for pleadings.

[33] Ms Moorcroft for the applicant pointed out that the respondent has not objected to the authenticity of the document, and does not dispute that it is the applicant who has deposed thereto. Clearly, the only objection by the respondent is that the founding affidavit has not been sufficiently authenticated in accordance with the rule. The authenticity of the founding affidavit is thus not in dispute.

[34] Rule 63 of the Uniform Rules provides the following:

> "63 **Authentication of documents executed outside the Republic for use within the Republic**
>
> (1) In this rule, unless inconsistent with the context —
>
> **'document'** means any deed, contract, power of attorney, affidavit or other writing, but does not include an affidavit or solemn or attested declaration purporting to have been made before

an officer prescribed by section eight of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963);

'authentication' means, when applied to a document, the verification of any signature thereon.

(2) Any document executed in any place outside the Republic shall be deemed to be sufficiently authenticated for the purpose of use in the Republic if it be duly authenticated at such foreign place by the signature and seal of office —

(a) …; or

(b) …;

(c) …; or

(d) …; or

(e) …; or

(f) …

(2A) Notwithstanding anything in this rule contained, any document authenticated in accordance with the provisions of the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents shall be deemed to be sufficiently authenticated for the purpose of use in the Republic where such document emanates from a country that is a party to the Convention.

(3) If any person authenticating a document in terms of subrule (2) has no seal of office, he shall certify thereon under his signature to that effect.

(4) Notwithstanding anything in this rule contained, any court of law or public office may accept as sufficiently authenticated any document which is shown to the satisfaction of such court or the officer in charge of such public office, to have been actually signed by the person purporting to have signed such document. [my emphasis]

(5) …"

[35] It is clear that there is no substantive enactment which lays down that a document executed in a foreign place *must* be authenticated. The provisions of the rule are not

exhaustive or imperative but merely directory.[1] The rule does not take away the power of the court to consider other evidence directed at the proof of a document executed in a foreign country, and to accept such document as being duly executed.[2]

[36] In *Blanchard, Krasner and French v Evans*[3] Malan J said:

> "The rules set out above are not exhaustive but are, as Erasmus Superior Court Practice B1 - 407B, said, merely directory. They do not take away from the power of the Court to consider other evidence directed at the proof of a document executed in a foreign place, and to accept such a document as being duly executed."

[37] In *Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd*,[4] van Reenen J articulated the position as follows;

> *"*The rules relating to the authentication of a document executed in foreign countries have been designed to ensure that such documents are genuine before use can be made thereof in the Republic of South Africa. The prescribed formalities are not mandatory, and the genuineness of such documents may be proved on a balance of probabilities by means of direct or circumstantial evidence or both (See: Chopra v Sparks Cinemas (Pty) Ltd & Another 1973(2) SA 352 D&CLD at 358B-D; see also *Ex parte* Holmes & Co (Pty) Ltd 1939 NPD 301; Friend v Friend 1962(4) SA 115 (E))."

[38] It is not in dispute that the founding affidavit of the applicant has not been authenticated in accordance with the rules, in that the solicitor, Mr Patrick Hunt, not having a seal, did not certify the fact, underneath his signature as provided in rule 63(3). On 19 August 2020, in a attempt to mitigate any prejudice which the respondent might suffer,

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[1] See *Ex parte Holmes & Co (Pty) Ltd* 1939 NPD 301; *Ex parte Melcer* 1948 (4) SA 395 (W); *Ex parte Estate Innes* 1943 CPD 257; *McLeod v Gesade Holdings (Pty) Ltd* 1958 (3) SA 672 (W) at 675A; *Friend v Friend* 1962 (4) SA 115 (E); *Chopra v Sparks Cinemas (Pty) Ltd* 1973 (2) SA 352 (D).

[2] *Blanchard, Krasner & French v Evans* 2004 (4) SA 427 (W) at 432H–I.

[3] Ibid 2.

[4] *Maschinen Frommer GMBH & co kg v Trisave Engineering & Machinery Supplies (PTY) limited* (415/02) [2002] ZAWCHC 55; [2003] 1 All SA 453 (C) (10 October 2002) at para

the applicant served a notarised copy of the founding affidavit, displaying the seal on the respondent.

[39] Therefore, I can see no reason why this court should not accept that the founding affidavit has been properly authenticated. The court is entitled to condone non-compliance with the requirement of the rule. Thus, I exercise my discretion in favour of the applicant as envisaged in rule 63(4).

[40] As a result, the point *in limine* is dismissed.

The rescission application

[41] The provisions of the rules relevant in the present matter are the following;

Rule 42(1) provides that;

> "The Court may, in addition to other powers it may have, mero motu or upon the application of any other party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby ..."

Rule 31(2)(b) provides;

> "the defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment, the court may upon good cause shown, set aside the default judgment on such terms as to it seems meet."

[42] It is important to reflect briefly on the principles entailed in rescission applications:

42.1. In terms of rule 42(1)(a) a rescission will be granted where the order or judgment was erroneously sought or granted in the absence of a party affected thereby. The judgment would be erroneously granted if there were facts which existed which the court was unaware of and which would have induced the

court not to grant the order or judgement. The applicant in this instance is not required to show good cause.

42.2. In a rule 31(2)(b) rescission, the application must be delivered within 20 (twenty) days of the applicant having knowledge of the order or judgment. In order to succeed, the applicant must show good cause; the application must be based on *bona fide* reasons and must have a *bona fide* defence; furthermore, the applicant must give a reasonable explanation for his default. If the application is brought outside of the period prescribed, the applicant is to apply for condonation. The applicant would be required to address the degree and reasons for lateness; the prospect of success on merits and the aspect prejudice.

[43] In *Kgomo v Standard Bank of South Africa*[5], Dodson J, held that the following principles govern rescission under Rule 42(1)(a):

1. The rule must be understood against its common-law background;
2. The basic principle at common law is that once a judgment has been granted, the judge becomes *functus officio*, but subject to certain exceptions of which rule 42(1)(a) is one;
3. The rule caters for a mistake in the proceedings;
4. The mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;
5. A judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;

[5] 2016 (2) SA 184 (GP).

6. The error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and

7. The applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).

[44] The court has a discretion to rescission. The application for rescission of judgment in this matter is premised on rule 42(1)(a), alternatively on rule 31(2)(b), this does not preclude me from determining the application in terms of the common law if the applicant does not succeed under rule 42 and/or rule 31.[6]

Analysis of the Evidence and Arguments by the Applicant and Respondent

[45] I now turn to consider whether the grounds proffered by the applicant in justification of the rescission of the summary judgment have merit.

[46] It is common cause that the application for summary judgment was served on the applicant during March/April 2020. However, after receipt thereof, he attempted to locate the email on a later date, but was unable to find the said email in his inbox. It is also common cause that the summary judgment was granted in the absence of the applicant.

[47] Counsel for the applicant argues that the summary judgment was granted erroneously and in the absence of the applicant. The applicant asserts that the court could not have granted the judgment, because he raised points of law, amongst others a special plea of jurisdiction.

[48] The applicant submits that if he was present, the court would have considered the matter differently as he would have had the opportunity to make submissions in his defence. This argument was based on the fact that the applicant opposed the urgent application in the Labour Court during August 2019, and furthermore, he filed an

[6] *De Wet and Others v Western Bank Ltd* 1977 (4) SA 770 (T) at D-F.

answering affidavit in the main application setting out his defence. It was further argued that the applicant also opposed the application for providing security, which was heard by De Bruyn J in April 2021.

[49] The above actions, according to counsel for the applicant clearly indicates that the applicant would have opposed the application for summary judgment, if he was aware of the date on which the application would be heard. Therefore, counsel contended that the applicant was not in *wilful* default.

[50] The applicant referred the court to the case of *Nkhathi v Absa Bank Limited*[7] where it was held that *wilful* default on the part of the applicant is not a substantive or compulsory ground for the refusal of an application for rescission, but that it is simply one of the ingredients in the basket of good cause, which the court should take into account in exercising its discretion to determine whether or not good cause is shown.

[51] Reference was also made to *OUTsurance Insurance Company Limited v Mpapama*[8] where the court dealt with a similar situation where e-mail service could not be located, and held that the applicant's failure to have entered an appearance to defend was not *wilful*, the following was said;

> "It is not far-fetched that emails can be deleted and unless the recipient bears knowledge of such deletion, its existence might never be known. Consequently, this Court finds that the defendant's default had not been wilful."

[52] Accordingly, the applicant argued that even if it is found that the applicant had an *onus* to inquire from the respondent about the status of the application for summary judgment, it cannot be said that the applicant was in "*wilful* default", nor is it sufficient to bar the applicant from defending this matter in light of the overwhelming good prospects of the applicant's *bona fide* defence.

[53] The applicant raised a number of defences against the respondent's claim on his version, if proven at trial would defeat it. The following *bona fide* defences are;

[7] 2018 JDR 0224 (GP) para [20].
[8] 2022 JDR 1505 (GP) at para [21].

53.1. The court did not have the necessary jurisdiction to grant the order for summary judgment, by virtue thereof that the applicant is a *peregrinii,* residing in the UK; and

53.2. Despite the respondent's allegation, the applicant did not breach the 2019-Bonus Policy, alternatively, the alleged breach of the 2018- Bonus Policy, on which the respondent relies, is *contra bones mores*.

[54] The applicant raised various arguments relating to the lack of jurisdiction.

[55] Furthermore, that applicant argued that the palpable differences in the two Bonus Policies, 2018 and 2019, are in dispute, and furthermore, which policy was applicable to the applicant and these have to be canvassed at a later stage. It is evident that this is a contentious issue between the parties, because the respondent alleged that the applicant circulated a deceitful policy (the 2018- Bonus Policy) to the employees of the respondent without the respondent's permission.

[56] Therefore, the applicant contended that he has shown good course in that:

56.1. He was not in *wilful* default;

56.2. He is bona fide in bringing this application for rescission, and

56.3. He has a *bona fide* defence against the respondent's claim with good prospects of success.

[57] Counsel for the respondent argued that there exist sufficient facts and evidence to confirm the jurisdiction of this Court to have adjudicated the action between the parties, as it did when it granted the summary judgment on 18 May 2020. The respondent asserts that it cannot be said that summary judgment was erroneously sought or granted on the basis that the court lacked jurisdiction over applicant.

[58] The respondent argued that service of the summary judgment application was proper and the applicant does not dispute in receiving it. The respondent contended that the allegation regarding the disappearance of the e-mail with the summary judgment application from the applicant's inbox, is highly improbable and suspect. The argument is based on the fact that the respondent previously served a number of legal proceedings on the applicant via the same e-mail address namely, the urgent application in the Labour Court, the action, the application for summary judgment, the application for security and the papers in this rescission application, therefore the explanation in this regard should not be accepted by the court.

[59] The respondent submitted that the reason why summary judgment was applied for and granted was because the applicant's defence set out in his plea constituted a bare denial. It is trite that, for the purpose of rule 32, a defence as pleaded should comply with rules 18(4) and 22(2), and a bare denial does not raise any issue for trial.

[60] Regarding the question raised by the applicant in that the court does not have the necessary jurisdiction over him as a person, the respondent argued that the applicant was a South African citizen and the cause of action arose in South Africa. Furthermore, that in accordance with the visa attached to the applicant's founding affidavit, he is permitted to work in the UK and that he has "leave to remain" there until 25 December 2024.

[61] Therefore, the respondent argued that the applicant remains a South African citizen and he is not a permanent resident nor citizen of the UK. He may very well return to South Africa before, or after 2024, if the residence permit is not renewed. The respondent further argued that the applicant has not expressed any intention on his part to renounce his South African citizenship, which means that his residence in the UK can by no means automatically be considered indefinite or permanent.

[62] Counsel for the respondent argued that the applicant has made out no case that the summary judgment should be rescinded. The summary judgment was not erroneously sought or granted, and the applicant's "absence" or failure to oppose the application for summary judgment cannot be explained away by his failure to open and consider the email service of the summary judgment application.

[63] The respondent argued that the dispute between the parties has been ongoing for a number of years and the summary judgment brings an end to the dispute, and therefore there is no valid reason for the summary judgment to be rescinded.

[64] The respondent argued that the rescission application should be dismissed, with costs.

[65] In determination of the question whether the applicant established a *bona fide* defence as to whether this court has jurisdiction, the starting point would be to look at the provisions of section 21 of the Superior Courts Act[9], which states:

> "**Persons over whom and matters in relation to which Divisions have jurisdiction**
>
> (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance…" [my emphasis]

[66] It is based on the provisions of this section that the respondent submitted that the court has the necessary jurisdiction, because the cause of action arose in this court's jurisdiction.

[67] In *Brooks v Maquassi Halls Ltd*[10] Kotzé J said:

> "According to our common law and practice under it, the Court will exercise jurisdiction upon any one of the following grounds, viz: (1) *ratione domicilii*; (2) *ratione rei sitae*; (3) *ratione contractus*; that is, where the contract has either been entered into or has to be executed within the jurisdiction."

[68] It is by now well established that the expression "causes arising" signifies all factors giving rise to jurisdiction under the common law including although not limited to a cause of action.[11]

[69] Reverting to the facts in the present matter. In this particular case, there was an employment relationship that came into existence between the applicant and the

[9] Act 10 of 2013.
[10] 1914 CPD 371 at 376-7.
[11] *Cordiant Trading v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) para [11].

respondent in this country and in this Court's area of jurisdiction. In terms of the written employment agreement concluded between the parties, the applicant was entitled to a bonus.

[70] The fact that the employment contract was concluded in this court's jurisdiction undoubtedly played an integral, if not vital part in the bonus being paid to the applicant, which constituted the basis for the respondent's cause of action. Apart from emigrating from South Africa after the applicant's resignation, there is no other link or connection that either party had with the UK. The applicant could very well have remained inside this country or inside the area of jurisdiction of this Court.

[71] The cause of action clearly arose in this court's jurisdiction which accordingly is sufficient to endow this court with jurisdiction.[12] The fact that the applicant relocated to the UK is of no moment and the defence in this regard raised by the applicant cannot be sustained.

[72] On all the information before me, I am accordingly unable to conclude that the order was erroneously granted in the sense contemplated by rule 42(1)(a)(ii). Rather, the default falls to be exonerated in terms of the rescission procedures contemplated by rule 31(2)(b) or the common law.

[73] This brings me to the question whether the applicant's application for rescission is made *bona fide* and furthermore, does the applicant has a *bona fide* defence to the respondent's claim which *prima facie* has some prospects of success.[13]

[12] *Geyser v Nedbank Ltd: In re Nedbank Ltd v Geyser* 2006 (5) SA (W) at para [11], also see Erasmus *Superior Court Practice* A2 -103

[13] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape),* 2003 (6) SA 1 SCA, the court explained the approach as follows:

> "In order to succeed an applicant for rescission of a judgment taken against him by default must show good cause. The authorities emphasise that it is unwise to give a precise meaning to term "good cause". As Smalberger J put it in *HDS Construction (Pty) Ltd v Wait*: when dealing with words such as 'good cause' and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words. The court's discretion must be exercised after a proper consideration of all the relevant circumstances."

[74] In the rescission application, the applicant is required to make out a *prima facie* defence in the sense of setting out facts, which if established at trial, would constitute a defence. He need not fully deal with the merits of the case and produce evidence that the probabilities are actually in his favour.[14]

[75] If the applicant in this matter is to establish that the employment agreement concluded fall within the ambit of the of the 2018-Bonus Policy and not under the ambit of the 2019 -Bonus Policy, it would vitiate the latter policy and constitute a complete defence to the respondent's claim.

[76] The respondent alleged that the wrong policy was circulated by the applicant to his employees and this was done with the intention to avoid the applicant being under any obligation to refund the bonus paid to him. In other words, the respondent, relied on the alleged dishonesty of the applicant.

[77] The appellant dealt meaningfully with the said averment made by the respondent in his replying affidavit, the applicant denied issuing the policy and circulating it to all employees. Be that as it may, it is not the duty of this court to fully evaluate the merits of the applicant's defence or determine the ultimate success of such defence on the probabilities. It is sufficient for the applicant to illustrate that his defence *prima facie* has some prospects of success and to illustrate the existence of a triable issue.[15]

With that as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospects, of success."

[14] *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* 2017 JDR 1655 (SCA).

[15] Ibid 14 para [13] and [17].

[78] It is apposite to refer to *RGS Properties (Pty) Ltd v eThekwini Municipality*,[16] wherein it was held:

> "Therefore, in my view, in weighing up facts for rescission, the court must on the one hand balance the need of an individual who is entitled to have access to court, and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default judgment being granted in the first instance. In its deliberation the court will no doubt be mindful, especially when assessing the requirement of reasonable cause being shown, that while amongst others this requirement incorporates showing the existence of a bona fide defence, the court is not seized with the duty to evaluate the merits of such defence. The fact that the court may be in doubt about the prospects of the defence to be advanced, is not a good reason why the application should not be granted. That said however, the nature of the defence advanced must not be such that it prima facie amounts to nothing more than a delaying tactic on the part of the applicant".

[79] The question of which policy was applicable to the employment agreement of the applicant, prima facie is not unsustainable at law and a determination of the probabilities and the ultimate prospects of success of the defence at this stage is not appropriate. It cannot in these proceedings be concluded that the applicant's averments lack *bona fides* or that no triable issue is raised with some prospects of success.

[80] For these reasons it is concluded that the application for rescission must succeed.

[81] As for the costs of this application both parties have achieved some success, the applicant in obtaining recission of the judgment and the respondent in relation to the finding that this Court has jurisdiction. The fairest order in my view would be for the costs of this application to follow the result in the action.

[82] In the result the following order is made:

1. Condonation for the late filing of the rescission application is granted.

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[16] 2010 (6) SA 572 (KZD) para [12].

2. Condonation for the late filing of the answering affidavit is granted.

3. The summary judgment granted by Wanless AJ on 18 May 2020 is rescinded and set aside.

4. The applicant is granted leave to defend the action.

5. The costs of this application will be costs in the cause.

CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 8 March 2023.

DATE OF HEARING: **27 February 2023**

DATE JUDGMENT DELIVERED: **8 March 2023**

APPEARANCES:

Counsel for the Applicant:
Mrs A Moorcroft
Contact Numbers: 078 035 8006 / 011 888 0246
Email: anna@burgerhyserattorneys.co.za

Attorneys for the Applicant:

BURGER HUYSER ATTORNEYS

Counsel for the Respondent:
Ms CJ Bekker
Cell no: 082 310 1604
Email: cbekkeer@rivoniaadvocates.co.za

Attorneys for the Respondent:
SCHRÖTER ATTORNEYS
Mr M van der Walt
Email: marco@schroterlaw.co.za
Contact numbers: 044 874 5372/081 015 7161