REPUBLIC OF SOUTH AFRICA

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

Case No: 2021/39886

DELETE WHICHEVER IS NOT APPLICABLE

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

14 April 2023 .....
DATE SIGNATURE

In the matter between:

VALDITIME (PTY) LTD **First Applicant**

RUDOLPH CORNELIUS JOHANNES VAN DER WESTHUIZEN **Second Applicant**

and

ABSA BANK LTD **Respondent**

JUDGMENT

ENGELBRECHT, AJ

INTRODUCTION

[1] This is an application for rescission of the summary judgment granted by Twala J on 8 March 2022 under case number 39886/2021. The respondent (Absa) opposes the application, but concedes that the amounts in which the judgment was granted in respect of two claims were incorrect. To this end, Absa has abandoned the judgment for the amounts in excess of the amounts due to it and, consents to rescission in respect of the amounts not due to it.

RELEVANT FACTS

[2] The indebtedness of the first applicant (Valditime) stems from loan and overdraft facilities held under account numbers 4083672258 and 4079331668, respectively. The indebtedness is secured by mortgage bonds over immovable properties owned by it. Prior to the institution of the action that led to the grant of the summary judgment, certain of the mortgaged properties were sold and the mortgage bonds cancelled. The remaining mortgaged properties were declared executable when summary judgment was granted against the applicants.

[3] The second applicant (Mr Van der Westhuizen) is liable to Absa as surety and co-principal debtor for Valditime's indebtedness to Absa.

[4] Absa instituted action against the applicants in August 2021, and the applicants filed and served a notice of intention to defend. However, they failed to file a plea within the prescribed period. A plea was delivered on 21 October 2021, pursuant to delivery of a notice of bar on 14 October 2021. In their plea, the applicants denied every substantive allegation by way of a bare denial.

[5] Absa applied for summary judgment and the matter was set down for hearing on 8 March 2022. The applicants did not oppose the application and summary judgment was granted.

[6] The applicants allege that the failure to oppose the summary judgment application was the result of the matter "*falling through the cracks"*, proverbially speaking, in circumstances where an employee of the applicants' attorney failed to attend to various matters, including the case involving the applicants. The attorney is said only to have obtained notice of the summary judgment two days after it was uploaded to CaseLines.

[7] Moreover, the applicants contend that they are not indebted to the respondent in the amount claimed, on account of alleged payments in excess of R8 million allegedly made prior to the grant of summary judgment and on the basis of an alleged dispute concerning the punitive interest rate to be applied. The applicants also rely on an alleged agreement reached with Absa, which Absa is alleged to have acted in breach of. The applicants contend that the judgment was erroneously sought or granted in the circumstances.

THE REQUIREMENTS FOR RESCISSION

Introduction

[8] Rule 42(1) of the Uniform Rules of Court provides:

[9] "The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

[10] (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby".

[11] The purpose of Rule 42(1)(a) is to "*to correct expeditiously an obviously wrong judgment or order*", and the court does not have a discretion to set aside an order in terms of the sub rule where one of the jurisdictional facts does not exist.[1]

[12] An application for rescission under 42(1)(a) must thus satisfy four requirements.

12.1. First, the applicant must be a party affected by the judgment;

12.2. Second, the judgment must have been granted in the absence of such a party;

12.3. Third, the judgment must have been erroneously sought or granted; and

12.4. Fourth, if the above three criteria are met, the applicant must also satisfy the court that it should exercise its discretion in favour of granting the rescission.

The first requirement: affected party

[13] The applicants are obviously parties affected by the judgment. As a consequence of the grant of summary judgment against them, they are

[1] *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T) at 702H.

bound to make payment in the amounts reflected in the judgment, and certain properties owned by Valditime have been declared executable.

[14] The first requirement is met.

Second requirement: absence

[15] Plainly, the applicants were absent on the day in question. They were also absent in the sense of not having indicated any intention to oppose the summary judgment application.

[16] The second requirement is met.

Third requirement: order erroneously sought and granted

[17] The meaning of a rescindable error under rule 42(1)(a) has been explained in several judgments.

17.1. In *Freedom Stationery (Pty) Ltd v Hassam*,[2] the Supreme Court of Appeal held that:

"*when an affected party invokes Rule 42(1)(a), the question is whether the party that obtained the order was procedurally entitled thereto. If so, the order could not be said to have been erroneously granted in the absence of the affected party. An applicant or plaintiff would be procedurally entitled to an order when all affected parties were adequately notified of the relief that may be granted in their*

[2] 2019 (4) SA 459 (SCA).

absence. … [T]the failure of an affected litigant to take steps to protect his interests by joining the fray ought to count against him."[3]

17.2. The Supreme Court of Appeal held in *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*[4] that:

"*… in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that he defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."*

17.3. Further, in *Van Heerden v Bronkhorst*,[5] the Supreme Court of Appeal held that the error must be unknown to the judge:

"*Generally, a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have*

[3] Ibid para 25.
[4] 2007 (6) SA 87 (SCA) at para 27.
[5] [2020] ZASCA 147 para 10.

precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment."[6]

17.4. And in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture*,[7] the Constitutional Court confirmed that an applicant seeking to demonstrate that an order was erroneously sought or granted must:

"*show that the judgment against which they seek a rescission was erroneously granted because 'there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment*".[8]

[18] In the circumstances, there are four elements to a rescindable error:

18.1. First, the error must be procedural in nature;

18.2. Second, the court must have been unaware of the procedural error at the time judgment was granted (in other words, an applicant for rescission may not rely on a fact known to the presiding officer);

18.3. Third, the error must be such that had the court been aware of the error, the court would not have the granted the judgment; and

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[6] See also *Daniel v President of the Republic of South Africa* 2013 (11) BCLR 1241 (CC) para 6: *"The applicant is required to show that, but for the error he relies on, this Court could not have granted the impugned order. In other words, the error must be something this Court was not aware of at the time the order was made and which would have precluded the granting of the order in question, had the Court been aware of it."*

[7] 2021 JDR 2069 (CC).

[8] *Zuma*, supra, para 62, citing with approval *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510D-G.

18.4. Fourth, even if there is a procedural error, the court must consider whether the applicant for rescission took adequate steps to protect its interests, notwithstanding the error.

[19] The error relied on by the applicant in the present case is not a procedural one: there is no allegation that the absence of the applicants from court or in the sense of not having noted opposition to the summary judgment application was the consequence of any procedural error on the part of Absa. At best for the applicants, it is because an employee in their attorney's office did not comply with her duties.

[20] The explanation is questionable given the fact that the responsible attorney on record, who signed the plea and who had access to the case by way of CaseLines, is not the one said to have failed in his duties. Moreover, the version relied on constitutes hearsay in circumstances where no confirmatory affidavit confirms the version presented to explain the default.

[21] Mr Horn, for Absa, placed reliance on the judgment in *Colyn v Tiger Food Industries Ltd t/a Meadow Food Mills (Cape).*[9] There, the defendant gave notice of intention to defend an action; the plaintiff applied for summary judgment, but due to a filing error in the offices of the defendant's correspondent attorney, the application did not reach the defendant's attorney of record. The Supreme Court of Appeal held that:[10]

"*I have reservations about accepting that the defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment*

[9] 2003 (6) SA 1 (SCA).
[10] At para 12.

application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a reasonable explanation. While the Courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys."

[22] The reasoning applies with equal force in the present case. Moreover, the explanation, such as it is, underscores that there is no procedural error. There is certainly no procedural error that, in my view, would have stood in the way of the grant of the order.

[23] It must be emphasized that the considerations on which the applicants rely to assert a rescindable error are more in the nature of putting up a defence, *i.e.* their reliance on an alleged agreement between Absa and the applicants and alleged payments made by the Valditime said to have diminished the liability. Even if I were to treat the allegations as a subsequently disclosed defence, that would not assist the applicants, as appears from the *Lodhi* judgment I have already referred to. On top of that, the reliance on the alleged agreement and the allegation that payments were not taken into account have been persuasively and definitively dealt with in the answering affidavit. On the application of the trite principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,*[11] I must accept the version put forward by Absa. That version (supported by documentary evidence) reflects that, after the date of the alleged agreement the applicants

[11] 1984 (3) SA 623 (A) at 634H – 635C (per Corbett JA).

rely on, there was further engagement and that, in fact, no agreement was reached in the terms relied on. the version presented by Absa, not responded to by way of a reply, also asserts that the alleged payments (insofar as they were indeed reflected as deposits into the relevant accounts) were brought into account in the calculation of the liability of the applicants at the time summary judgment was sought. This is borne out by the statements reflecting the relevant payments that were indeed made into the account.

[24] From the answering affidavit filed on behalf of Absa, we know nonetheless that there was an error in the interest calculation, and therefore the amount in respect of which judgment had been sought. This was not an error that the applicant relied on, but it is one that is before this Court. That fact activates the ability of this Court to consider whether there is a rescindable error.

[25] Absa submits that "*the present case constitutes one where summary judgment taken in the absence of the applicants, stands to be varied in the manner contended for by the respondent. This is so because the respondent's allegations concerning the applicants' indebtedness to it stand uncontested. There is nothing left for the trial court to adjudicate"*.[12]

[26] For this proposition, Absa relies on the judgment in *Mostert v Nedbank Ltd*[13] together with the factual allegations concerning interest rate calculation set out in the answering affidavit and summarized in the heads of argument:[14]

[12] Respondent's heads of argument para 44.
[13] 2014 JDR 0760 (KZP) at paras 31 and 33.
[14] Footnotes omitted.

"*37 The agreed interest rate applicable to the facility under account number 4083672258 (Claim 1) is the respondent's prime interest rate per annum applicable from time to time plus 1.5%. Should the first applicant fail to pay any amount on due date, penalty interest of 2% above the agreed rate would be charged in terms of clause 6.2 of schedule A to the facility letter.*

38. Whilst preparing the answering affidavit, it appeared that the incorrect rate of interest was charged on account number 4083672258 and that penalty interest in excess of the agreed rate was charged from time to time. This has been corrected in the recalculation attached to the answering affidavit.

39. In the result, an adjustment of R2 518 047.10 was made in respect of the amount due as at 12 May 2021. The correct outstanding amount due on that date was R8 720 425.89. The respondent has abandoned judgment for the difference between the amount in respect of which judgment was granted for Claim 1, namely R11 233 877.10 and the aforesaid amount of R8 720 425.89. The difference is R2 513 451.21. Alternatively, the respondent has consented to rescission in part of the judgment obtained in respect of Claim 1 to the extent of R2 513 451.21.

40. The agreed interest rate applicable to the facility under account number 4079331668 (Claim 2) is the respondent's prime rate interest rate applicable from time to time. The facility was already in existence when the facility letter (annexure "POC8" to the particulars of claim) was issued. The interest rate previously applicable to the facility was the

respondent's prime interest rate plus 1.5%. It is for this reason that the rate which was applied to the facility remained prime plus 1.5% instead of the newly agreed rate of prime.

41. Annexure "AA10" to the answering affidavit takes this fact into account. On the second last page of recalculation of this account, the amount due as at 7 May 2021 (being the date stated in the particulars of claim) is reflected as R1 450 663.12.

42. The respondent has abandoned judgment for the difference between the amount in respect of which judgment was granted for Claim 2, namely R1 783 745.10 and the aforesaid amount of R1 450 663.12. The difference is R333 081.98. Alternatively, the respondent has consented to rescission in part of the judgment obtained in respect of Claim 2 to the extent of R333 081.98."

[27] Plainly, if the Court had known of the fact of the wrong interest rate calculation, the orders would not have been granted in the terms that they were.

Fourth requirement: discretion to be exercised

[28] Rule 42(1)(a) postulates that a court "*may*" — i.e., not "*must*" — rescind or vary an order if the applicant meets the other requirements. The Constitutional Court has explained that Rule 42(1)(a) is merely an empowering provision that affords the court a discretion.[15] It does not

[15] *Zuma*, supra, para 53.

compel the court to grant the rescission if all the jurisdictional requirements are met.

[29] In *Chetty*,[16] it was held that the discretion is "*influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case*".[17]

[30] As discussed hereinabove, the applicants, who are affected parties, were absent when summary judgment was granted. Although the case made out in the founding papers does not provide the basis for rescinding the judgment, the version put up by Absa casts a new light. It would be unfair and unjust to let a situation prevail where a judgment reflects incorrect levels of indebtedness. The question is, what options are available to this Court in the circumstances?

[31] Mr Horn referred me to the judgment of my sister Fisher AJ (as she then was) in *Conekt Business Group (Pty) Ltd v Navigator Computer Consultants CC; In Re: Navigator Computer Consultants CC v Conekt Business Group (Pty) Ltd,*[18] which dealt with an application in terms of Rule 31(2)(b) for the rescission of a judgment taken by default. On the facts of that case, the applicant in question had made out a defence for only part of the judgment. The question arose whether the judgment could be rescinded in part.

31.1. Fisher AJ recorded the existence of a line of cases holding that Uniform Rule 31(2)(b) does not permit of setting aside a part of the default judgment.

[16] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).
[17] Ibid at 761D-E.
[18] 2015 (4) SA 103 (GJ).

31.2. However, she pointed out that Fleming DJP in *Revelas and Another v Tobias*[19] considered that Uniform Rule 31(2)(b) authorizes "*qualified or conditional orders"* because under the rule the Court is entitled to rescind a default judgment "*on such terms as to it seems meet*". He also brought into account the consideration that the Court enjoys inherent jurisdiction to govern matters in the interests of effective administration of justice.

31.3. Regard was had to the reasoning in the Namibian case of *SOS Kinderdorf International v Effie Lentin Architects,*[20] to the effect that "*The Rules of Court constitute the procedural machinery of the Court and they are intended to expedite the business of the Courts. Consequently, they will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy an inexpensive manner as possible. … There is no reason why this pattern should be deviated from where a plaintiff already obtained a default judgment in respect of more than one but separate claims, and the defendant shows a defence to some of the plaintiff's claims, or to a part of the claim, which is divisible from the whole. For example, where a plaintiff is granted default judgment in respect of the payment of a sum of money as well as delivery of certain goods, and the defendant can show a bona fide defence to one or the other, there is no reason why the plaintiff should not be entitled to judgment in respect of the claim which defendant cannot defend. The essential question is whether the claim or claims in respect of which default judgment has been*

[19] 1999 (2) SA 440 (w) at 447.
[20] 1993 (2) SA 481 (NM).

given is divisible". The learned judge came to the conclusion that a Court will not assume that its powers are curtailed in the absence of a clear statement to the contrary.

31.4. Fisher AJ observed:[21]

"The aforementioned pronouncements of Flemming DJP and Levy J, notwithstanding their wide interpretation of the rule, appear to accept that, for a partial rescission to occur, the judgment should be capable of being divided into discrete parts so that the part in respect of which there is a possible defence can be discerned. Thus, if a defence is made out which is not capable of quantification in this way or which cannot be dealt with on the basis that it can be related in some manner to a distinct part of the judgment, it would appear that a partial rescission would not be permissible. This would be the case even if it were apparent that there was no defence to the entire claim. The rationale behind this is probably the impracticability of such an approach in circumstances where there is no delineation in relation to how the partial defence would relate to the claim. What then of a situation where a defence of this nature is established to what appears to be a proportionately small part of the judgment? It is likely that, in such a case, a court would have resort to the relatively wide powers afforded by Rule 31(2)(b) to impose such "such terms as to it seem meet" so as to achieve a situation where the respective rights of the parties were, in some manner, accommodated."

[21] At para 33.

31.5. Ultimately, she considered that the judgment could be rescinded in part.

[32] It must, of course, be observed that the exposition given by Fisher AJ related to Uniform Rule 31(2)(a), and not to Uniform Rule 42. Rule 31(2)(a) does not find application in the present instance, since the applicants had indeed given notice of intention to oppose and had filed a plea. The question that arises is whether the principles can be applied to an application under Uniform Rule 42(1)(a). Uniform Rule 42(1)(a) does not employ the same words as Uniform Rule 31(2)(a), but the considerations expressed in *SOS Kinderdorf* apply with equal force in the interpretation and application Uniform Rule 42(1)(a). The error that has been identified is capable of calculation, and the amount discernable in light of the updated certificate of balance. I consider it appropriate to exercise my discretion to rescind the order in part. The rescission, coupled with the necessary variation, serves the purpose of correctly reflecting the indebtedness without the need for burdening a trial court.

[33] In adopting this approach, I take note of the reliance by the applicants on the constitutional right to access to court. Section 34 of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution) provides in the relevant part that "*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court*". In the present case, the parties have had an opportunity to present their versions before this Court. Absa put up a version that presented a clear and substantiated answer to the allegations of the applicants. The applicants elected not to file a reply and challenge the facts and evidence

put up by Absa. If parties do not make use of the opportunity presented to them through the rules of court, they cannot be heard to say that they want a future opportunity to raise their facts. In the context of this case, justice is best served by dealing with the matter once and for all, and not to burden this Court with a trial where, on the facts available, there will be no triable issue between the parties.

COSTS

[34] As I have explained, it is not the facts relied on by the applicants that give rise to the partial rescission order that I make. Nonetheless, had it not been for the applicants launching the rescission application, the re-calculation would probably never have been done. In the circumstances of the case, I consider it inappropriate to make a costs order.

ORDER

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

35.1. In respect of the order of Twala J of 8 March 2022 under case number 39886/2021 (the Order) -

35.1.1. paragraph 1 of the Order is rescinded, save to the extent of R8 720 425.89 of the amount, in respect of which amount such order remains in force and effect;

35.1.2. paragraph 2 of the order is varied by the substitution for the figure of "*R11 233 977.10*" with the figure of "*R8 720 425.89*"

35.1.3. Paragraph 3 of the Order is rescinded, save to the extent of R1 450 663.12 of the amount, in respect of which amount such order remains in force and effect.

35.1.4. Paragraph 4 of the order is varied by the substitution for the figure of "*R1 783 745.19"* with the figure of "*R1 450 663.12*".

35.2. There is no order as to costs.

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MJ Engelbrecht

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 14 April *2023.*

Heard on : 13 April 2023
Delivered: 14 April 2023

Appearances:

For the Applicant:	R Orr
For the 1st & 2nd Respondent:	N J Horn