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

CASE NO: 2019/21032

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

DATE
SIGNATURE

In the application by

AFEESS IMPORT AND EXPORT (PTY) LTD	FIRST APPLICANT
KHUMALO, ALFRED	SECOND APPLICANT
AND	
ABSA BANK LTD	RESPONDENT

In re the matter between

ABSA BANK LTD	PLAINTIFF
and	
AFEESS IMPORT AND EXPORT (PTY) LTD	FIRST DEFENDANT
KHUMALO, ALFRED	SECOND DEFENDANT

JUDGMENT

MOORCROFT AJ:

Summary

Rescission of judgment – Rule 42(1)(a) – order to which a party was procedurally entitled cannot be said to have been granted erroneously

Order

[1] In this matter I make the following order:

1. *The application for rescission is dismissed;*
2. *The applicants are ordered to pay the costs of the application, jointly and severally the one paying the other to be absolved, on the scale as between attorney and client.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for the rescission of a default judgment granted by the Court against the applicants (then the defendants) on 25 May 2021. The application is brought in terms of Rule 42(1)(a) of the Uniform Rules of Court. It is alleged therefore that the judgment was granted erroneously or was sought erroneously by the respondent.

[4] The claim against the two applicants was based on a loan agreement entered into by the respondent (the plaintiff) and the first applicant, and a deed of suretyship signed by the second applicant. The second applicant is the sole director of the first applicant.

Rule 42(1)(a)

[5] The summons in the action proceedings that preceded the application for default judgment was served at the first applicant's registered address and at the second applicant's chose *domicilium citandi et executandi*. The applicants say that the Court papers never came to their attention as the first applicant does not carry on business at its registered address and the second applicant does not reside at his chosen *domicilium citandi et executandi*.

[6] Service at a registered address of a company is good service.[1] Service at a chosen *domicilium citandi et executandi* is likewise good service.[2]

[7] An order is not granted erroneously or sought erroneously when the plaintiff or applicant was entitled procedurally to the order. See *Freedom Stationary (Pty) Ltd & Others v Hassam & Others*[3].

[8] It follows that the Court order was not granted in error or sought in error, and the applicants' reliance on Rule 42 must fail.

Rule 31(2)(b) and the common law

[9] The applicants do not rely on Rule 31(2)(b) or the common law but I would be inclined to grant an order for rescission if a proper case for rescission under the rule or the common law could be identified on the papers. This would require good cause to be shown. Good cause encompasses a reasonable explanation for the default as well as a *bona fide* defence.[4]

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1 See Rule 4(1)(a)(v), s 23(3) of the Companies Act,71 of 2008, *Federated Insurance Co Ltd v Malawana* 1986 (1) SA 751 (A) 759E–G, *Chris Mulder Genote Ing v Louis Meintjies Konstruksie (Edms) Bpk* 1988 (2) SA 433 (T), and *Arendnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) para [30].

2 See Rule 4(1)(a)(iv) and *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) 5J–6B.

3 2019 (4) SA 459 (SCA) para [18].

4 See the cases referred to by Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* 2022, Vol 2, D1-564 to 565, footnotes 33 and 49.

[10] In *Grant v Plumbers (Pty) Ltd*[5] Brink J was dealing with an older Rule of Court[6] that also required good or sufficient cause in the Free State Division of the High Court. He said:

> *"Having regard to the decisions above referred to,*[7] *I am of opinion that an applicant who claims relief under Rule 43 should comply with the following requirements:*
>
> *(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.*
>
> *(b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.*
>
> *(c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. (Brown v Chapman (1938 TPD 320 at p. 325)."* [emphasis added]

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5 *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) 476–7.

6 Rule 43 (O.F.S.).

7 The Judge referred to *Joosub v Natal Bank* 1908 TS 375, *Cairns' Executors v Gaarn* 1912 AD 181, *Abdool Latieb & Co v Jones* 1918 TPD 215, *Thlobelo v Kehiloe* (2) 1932 OPD 24, *Scott v Trustee, Insolvent Estate Comerma* 1938 WLD 129, and *Schabort v Pocock* 1946 CPD 363.

[11] One of the cases referred to by Brink J is *Cairns' Executors v Gaarn*[8] where Innes JA (as he then was) said:

> *"It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive and which it is highly desirable not to abridge. All that can be said is that the applicant must show, in the words of COTTON, L.J. (In re Manchester Economic Building Society (24 Ch. D. at p. 491)) 'something which entitles him to ask for the indulgence of the Court'. What that something is must be decided upon the circumstances of each particular application."* [emphasis added]

[12] Good cause includes, but is not limited to the existence of a substantial defence.[9] It is therefore necessary to determine whether there is a satisfactory explanation of the delay, and whether the appellant raised a *bona fide* and substantial defence.

[13] In the application papers the applicants rely on a cession of life policies to the respondent and it was argued that the cession amounted to a suspensive condition that precluded the respondent from instituting the action. There is simply no basis in contract or authority for this proposition.

[14] Reference is also made to an acknowledgment of debt but it is acknowledged[10] in the applicants' heads of argument that the settlement did not constitute a novation of the original debt.

[15] The applicants fail on both grounds. Neither a reasonable explanation nor a bona fide defence are discernible on the papers.

[16] For the reasons set out above I make the order in paragraph 1.

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8 *Cairns' Executors v Gaarn* 1912 AD 181 at 186.
9 *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) 352G.
10 Quite correctly. See *Rodel Financial Service (Pty) Ltd v Naidoo and another* 2013 (3) SA 151 (KZD) para [12]

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J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting 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 of the judgment is deemed to be **27 JULY 2023**.

COUNSEL FOR THE APPLICANTS:	R BALOYI
INSTRUCTED BY:	TSHABALALA ATTORNEYS
COUNSEL FOR THE RESPONDENT:	MS K MITCHELL (heads of argument by B VAN DER MERWE)
INSTRUCTED BY:	TIM DU TOIT & CO INC
DATE OF ARGUMENT:	24 JULY 2023
DATE OF JUDGMENT:	27 JULY 2023