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

CASE NO: 2019/9612

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

DATE
SIGNATURE

In the application by

TBS MANAGEMENT CONSULTANT AND PROJECTS CC	FIRST APPLICANT
SIBEKO, THEMBA MUZI	SECOND APPLICANT
and	
THE SPAR GROUP LTD	RESPONDENT

In re the matter between

THE SPAR GROUP LTD	PLAINTIFF
and	
TBS MANAGEMENT CONSULTANT AND PROJECTS CC	FIRST DEFENDANT
SIBEKO, THEMBA MUZI	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

Rescission - Rule 32(2)(b) – common law – Good cause – reasonable explanation and a bona fide defence

In a modern State it is expected of people who involves themselves in a particular sphere, that they should keep themselves informed of applicable legal provisions

Order

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

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

[2] The reasons for the order follow below.

Introduction

[3] This is an application for the rescission of a default judgment granted on 9 June 2022. The application is based on Rule 42, alternatively Rule 31(2)(b), and further alternatively the common law.

[4] The respondent entered into a credit agreement with the first applicant, represented by the second applicant, on 27 November 2014. The second applicant is the sole member of the first applicant and represented the first applicant in its dealings with the respondent.

[5] The second applicant signed a suretyship in favour of the respondent in 2016.

The application in terms of Rule 42(1)(a)

[6] The applicant must show that the order sought to be rescinded was granted in his absence *and* that it was sought or granted erroneously. Once these requirements are met, the Court has a discretion to rescind the order and this discretion must be exercised judicially. [1] In the *Zuma* matter, Khampepe J, writing for the majority, said[2] in this context that:

> *"… these sorts of proceedings have little to do with an applicant's right to seek a rescission and everything to do with whether that applicant can discharge the onus of proving that the requirements for rescission are met. Litigants are to appreciate that proving this is no straightforward task. It is trite that an applicant who invokes this rule must show that the order sought to be rescinded was granted in his or her absence and that*

---

1 *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 (Council for the Advancement of the South African Constitution and Democracy in Action Amicus Curiae)* 2021 JDR 2069 (CC), [2021] JOL 51107 (CC) paras [53] to [56]

2 *Ibid* paras [54] and [56].

> *it was erroneously granted or sought. Both grounds must be shown to exist."*
>
> *and*
>
> *"…the words "granted in the absence of any party affected thereby", as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent."*
>
> *.*

[7] The summons was served at the chosen *domicilium citandi et executandi* whereupon the applicants instructed attorneys to represent them. Notice of intention to defend was given and was received by the respondent's attorneys of record on 1 April 2019. A summary judgment application was heard and was dismissed on 14 February 2020.

[8] The applicants brought an application to compel discovery in terms of Rule 35(12) and (14) and the application was dismissed on 16 April 2021.

[9] The applicants did not file a plea. A notice of bar was delivered on 1 April 2020 and the applicants did not file a plea within five days as required, and were *ipso facto* barred[3] by 9 April 2020. The applicants however knew of the bar and they delivered an abortive notice in terms of Rule 30(2)(b) on 13 May 2020, alleging that the notice of bar constituted an irregular step.

[10] It is common cause that the first applicant was furnished with a copy of the set down in the default judgment application by his attorneys of record on 26 May 2022. The applicants say that they assumed that the action have been resolved or finalised by their attorneys and for this reason they did not react to the notice of set down. The attorneys had however advised the applicants that the attorneys required a further deposit from the applicants in order to proceed to oppose the application for default judgment. The first applicant then advised the attorneys that he was not able to make

---

[3] Rule 26.

payment of a further deposit on such short notice. The assumption that the attorneys would proceed to defend the matter without being placed in funds therefore had no basis in fact.

[11] The applicants therefore knew that the application for default judgment was on the Court roll and would proceed, and that nothing had been done to resolve or finalise the action as alleged. There is therefore no reasonable explanation for their inaction.

[12] There is also no basis for finding that the order was granted in error. An order is not granted erroneously or sought erroneously when the plaintiff or applicant was entitled procedurally to the order.[4]

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

[13] Turning to Rule 31(2)(b) and the common law, an applicant for rescission is required to show good cause.

[14] Good cause encompasses a reasonable explanation for the default as well as a *bona fide* defence.[5] In *Grant v Plumbers (Pty) Ltd*[6] Brink J was dealing with an older Rule of Court[7] 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,*[8] *I am of opinion that an applicant who claims relief under Rule 43 should comply with the following requirements:*

---

4 *Freedom Stationary (Pty) Ltd & Others v Hassam & Others* 2019 (4) SA 459 (SCA) para [18].

5 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.

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

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

8 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.

> *(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]

[15] One of the cases referred to by Brink J is *Cairns' Executors v Gaarn*[9] 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]

[16] Good cause therefore includes, but is not limited to the existence of a substantial defence.[10] It is therefore necessary to determine whether there is a satisfactory explanation of the default, and whether the appellant raised a *bona fide* and substantial defence.

[17] The applicants contend that they paid an amount of R1 million towards the indebtedness and that this amount must be subtracted from the judgment debt. A

---

9 *Cairns' Executors v Gaarn* 1912 AD 181 at 186.

10 *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) 352G.

litigant who raises a defence of payment is required to prove payment[11] and the applicants do not go beyond bald averments. One would expect a party who made a payment to be able to produce a receipt in respect of a cash payment, especially for a large amount, and to be able to state the date of the payment and to furnish a cheque, an electronic fund transfer (eft) document, a bank statement or other document in support of the allegation. The applicants instead rely on a letter emanating from the respondent and written in September 2016 that refers to a deposit but does not state whether or not the amount had actually been received by the respondent.

[18] The allegation that R1 million was paid in or about September 2016 is also at odds with an acknowledgement by the applicants on 13 July 2017 where they declared that they were indebted to the respondent in the amount of R1 980 000.

[19] Faced with the denial in the answering affidavit, the applicants take the matter no further in the replying affidavit, save to say that they were *'struggling to obtain proof of payment from'* a *'financial institution.'*

The suretyship

[20] The suretyship document is a five-page document. It is headed in large print "DEED OF SURETYSHIP INCORPORATING CESSION AND PLEDGE". The document cannot be mistaken for anything else and it was signed twice on the last page by the second applicant as surety and also as the representative of the first applicant, then trading as Themba Brick and Steel Structure CC. He also initialled every page of the document.

[21] The document is in plain and simple language that can be understood by the ordinary person and particularly the ordinary person who ventures into business.

[22] It is presumed that a party entering into a contract has the necessary will or

---

[11] *Pillay v Krishna* 1946 AD 946 at 958, *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA).

animus to do so. The second applicant has the onus[12] to prove that the suretyship is not binding as he was unaware and could be excused for not knowing of the suretyship..

[23] The second applicant alleges that the suretyship relied upon by the respondent was presented to him for signature and that he was not given the opportunity of reading the document nor was he advised of the legal consequences of the document. He admits that he signed the suretyship document.

[24] The second applicant is a member of close corporation carrying on business. No person is expected to know all of the law but as a businessman he is expected to acquaint himself with areas of the law into which he ventures in the course of his business activities. He is therefore expected to know or to find out what a suretyship is.

[25] His bald averment that he did not know what he was signing stands to be rejected.

[26] In *S v De Blom*[13] Rumpff CJ dealt with the maxim *ignorantia iuris non excusat.*[14] I quote from the headnote, summarising the text of the judgment:

> *"At this stage of our legal development it must be accepted that the cliché that "every person is presumed to know the law" has no ground for its existence and that the view that "ignorance of the law is no excuse" is not legally applicable in the light of the present day concept of mens rea in our law. But the approach that it can be expected of a person who, in a modern State, wherein many facets of the acts and omissions of the legal subject are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere, can be approved."*

---

12 *Langeveld v Union Finance Holdings (Pty) Ltd* 2007 (4) SA 572 (W) paras [12] – [13]. See also *HNR Properties CC and Another v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) paras [22] – [23].

13 *S v De Blom* 1977 (3) SA 513 (A).

14 Ignorance of the law is no excuse.

[27] In *George v Fairmead (Pty) Ltd*,[15] Fagan JA said:

> *"When can an error be said to be justus for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? (vide Logan v Beit, 7 S.C. 197; I. C Pieters & Company v Salomon, 1911 AD 121 esp. at pp. 130, 137; van Ryn Wine and Spirit Company v Chandos Bar. 1928 T.P.D. 417, esp. at pp. 422, 423, 424; Hodgson Bros v South African Railways, 1928 CPD 257 at p. 261). If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."*

[28] A mistake is not justifiable merely because it was induced by the other party to the contract. The Court must also ask whether the reasonable man would have been misled.[16]

[29] A defence of *iustus error* succeeded in *Brink v Humphries & Jewell (Pty) Ltd*.[17] In that case a majority of the Supreme Court of Appeal held on the facts that the surety document itself constituted a misrepresentation that induced a mistake by the defendant. The document itself was[18] a *"trap for the unwary."* In the present matter the suretyship boldly proclaims itself to be a suretyship. The surety was not trapped.

[30] By entering into a contract parties signal their intention to exercise the rights granted by and to undertake the obligations imposed by the contract. Other parties are entitled to rely on the external manifestation of will and then arrange their affairs on the understanding that the undertakings are seriously given. In *Ridon v Van der Spuy and*

---

15 *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) 471B. See also *Absa Bank Ltd v Trzebiatowsky and Others* 2012 (5) SA 134 (ECP) and *Burger v Central South African Railways* 1903 T.S. 571.

16 *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para [8].

17 *Ibid.*

18 *Ibid* para [11].

Partners (Wes-Kaap) Inc,[19] Van Heerden J said:

> *"South African law, as a general rule, concerns itself with the external manifestations, and not the workings of the minds of parties to a contract (see South African Railways & Harbours v National Bank of South Africa Ltd 1924 AD 704 at 715 - 16, per Wessels JA).*[20] *In a case such as this one, where there is no subjective consensus (meeting of the minds) between the plaintiff and the defendant, resort must be had to the so-called 'reliance theory' in order to determine whether a binding contract has come into being between the parties (see further below). However, in order to apply the reliance theory, it is necessary to determine what the defendant's 'expressed intention' ('declared intention') was by reference to and interpretation of 'the words which he has used or to which he appears to have assented' (see Irvin & Johnson (SA) Ltd v Kaplan 1940 CPD 647 at 651)."*

[31] The so- called reliance theory was considered by the Appeal Court in *Steyn v LSA Motors Ltd*.[21] Applying the test formulated by Scott JA in that case to the present matter, and accepting for the sake of the argument that the second applicant's true intention (not to be bound by a suretyship) differed from what was expressed in the document signed by him (namely that he was so bound), the question is whether the reasonable man in the position of the respondent would have entered into the contract of suretyship in the belief that it represented the second applicant's true intention. The answer to this question must be "yes."

[32] The applicants applied for condonation for the late filing of the rescission application insofar as it was necessary to do so and the application was not opposed. Condonation is therefore granted insofar as it may have been necessary.

[33] The agreement provides for cost on the attorney and client scale and the order I make above therefore provides for costs on the attorney and client scale.

---

19 *Ridon v Van der Spuy and Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (C) 135C.

20 See the discussion of the *SAR&H* case by Kerr *The Principles of the Law of Contract* 5th ed. 1998, p 20 – 25.

21 *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A) 61C – E. See also *Kgopana v Matlala* 2019 JDR 2365 (SCA) para [10] and *SONAP Petroleum (SA) (Pty) Ltd (formerly known as SONAREP (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (AD) 238G – 240B.

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

_____

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:	M RODRIGUES
INSTRUCTED BY:	PAUL T LEISHER & ASSOCIATES
COUNSEL FOR THE RESPONDENT:	D VAN NIEKERK
INSTRUCTED BY:	CLIFFE DEKKER HOFMEYR
DATE OF ARGUMENT:	24 JULY 2023
DATE OF JUDGMENT:	27 JULY 2023