IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE
(2) OF INTEREST TO OTHER JUDGES
(3) REVISED.

CASE NO: 18678/17

In the matter between:

MOJAHO TRADING (PTY) LTD	First Applicant/Defendant
VINCENT MOKHELE MOKHOLO	Second Applicant/Defendant
ERIC 5081 MOKHOLO	Third Applicant/Defendant
MOGMAD R NORDIEN	Fourth Applicant/Defendant

and

NATIONAL EMPOWERMENT FUND	First Respondent/Plaintiff

(Registration No IT10145/00)

JUDGMENT

COLLIS J

INTRODUCTION

[1] In the present application, applicants seek an order for the rescission of a default judgment taken against them on 11 October 2017.[1] The application is brought in terms of the provisions of Uniform Rule 32. The

application is opposed by the respondent.

BACKGROUND

[2] The plaintiff is the NATIONAL EMPOWERMENT FUND TRUST, a trust established in terms of the National Empowerment Fund Act 105 of 1998.[2]

[3] On 8 February 2013, the plaintiff issued summons against the defendants for payment of, *inter alia,* the following amounts

3.1 R22 849 606.04, emanating from a loan facility agreement entered into between the plaintiff and the first defendant on or about 23 December 2005 in terms of which the plaintiff loaned the first defendant an amount of R24 472 800.00;

3.2 R4 030 937.48, emanating from a preference share subscription agreement entered into between the plaintiff and the first defendant on or about 23 December 2005;

3.3 the loan facility agreement and the preference share subscription agreement are collectively referred to as *"the facility agreements";*

3.4 the plaintiffs claim against the second, third and fourth defendants is by virtue of a deed of suretyship entered into between them and the plaintiff in terms of which the second, third and fourth defendants bound themselves jointly and severally as sureties and co-principal debtors together with the first defendant's obligations arising out of or in connection with the loan facility agreement;[3]

3.5 the first defendant breached the facility agreements in that it failed to make payment of the requested monthly instalments of the capital and interest timeously;[4]

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[1] Founding affidavit para 5.2 p 5
[2] Founding affidavit para 5.1 p 5
[3] Particulars of claim para 7 pp 29 and 30
[4] Particulars of claim para 8 p 30

3.6 on or about 25 February 2015, the plaintiff and the first defendant entered into a settlement agreement in terms of which the first defendant agreed to pay the plaintiff an amount of R8 055 431.00 in instalments as follows:

3.6.1 R400 000.00 on 10 March 2015 or seven days after the conclusion of the settlement agreement;

3.6.2 R500 000.00 on or before 31 July 2015;

3.6.3 R500 000.00 on or before 31 December 2015;

3.6.4 R1 000 000.00 on or before 31 July 2016;

3.6.5 R1 000 000.00 on or before 31 December 2016;

3.6.6 R1 000 000.00 on or before 31 July 2017;

3.6.7 R1 000 000.00 on or before 31 December 2017;

3.6.8 R1 000 000.00 on or before 31 July 2018;

3.6.9 R1 000 000.00 on or before 31 December 2018;

3.6.10 R655 431.00 on or before 31 July 2019;[5]

3.7 the first defendant breached the settlement agreement by failing to make payment of any of the instalments due from 10 March 2015 to 31 December 2016;

3.8 as a result thereof, the plaintiff demanded payment of the amount of R7 168 021.00 from the defendants;[6]

3.9 notwithstanding demand, the defendants failed, refused and/or neglected to make payments to the plaintiff;[7]

3.10 the plaintiff therefore claimed any amount which was due, owing and payable by the defendants and any amounts which would in future, by way of future instalment(s), become due, owing and payable by the

[5] Particulars of claim para 9 p 30
[6] Particulars of claim paras 11 and 12 p 31
[7] Particulars of claim para 13 p 32

defendants to the plaintiff;[8]

[4] Uniform Rule 31(2)(b) provides as follows:

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

[5] The requirement for an application under this sub rule have been stated to be as follows:

5.1 The applicant 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.

5.2 This application must be *bona fide* and not made with the intention of merely delaying the plaintiffs claim.

5.3 He must show that he has a *bona fide* defence to plaintiffs claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at 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.[9]

WILFUL DEFAULT

[6] In the decision *Silber v Ozen Wholesalers (Pty) Ltd,*[10] it has been held that the explanation for the default must be sufficiently full to enable the court to understand how it really came about, and to assess the applicants' conduct and motives. The reasons for the applicants'

[8] Particulars of claim para 14 p 32
[9] *Colyn v Tiger Food Industries Ltd t/a Meadow Food Meals (Cape)* 2003 (6) SA 1 (SCA) at 9F
[10] 1954 (2) SA 354 (A) at 353A

absence or default must therefore be set out because it is relevant to the question whether or not their default was wilful.[11]

[7] In relation to the absence of the first applicant to have entered an appearance to defend, the deponent of the founding affidavit alleges that the first applicant, for the first time only became aware of the default judgment on 4 December 2017 when the remainder of the applicants were informed by the third applicant that the sheriff of the court visited his premises in respect of this matter.[12]

[8] The return of service on first applicant refers to service to have taken place by way of affixing at the principal place of business at the first applicant situated at 318 Rivonia Boulevard, Rivonia, in terms of rule 4(1)(a)(v).

[9] In respect of the service address, the deponent merely alleges that this address was the erstwhile address of the then auditors of the first applicant, and that the said auditors were no longer conducting their practice from the said address.

[10] In opposition, the respondent, in answer to what has been stated above, sets out that service of the summons on the auditors as the principal place of business of the first applicant was valid in law. Furthermore, the respondent contests that the auditors are the erstwhile auditors of the first applicant, as such a change in auditors has not been corrected with the CIPC.[13]

[11] In its replying affidavit, the deponent merely responds that the issue of service has become a legal issue and that legal argument will be advanced at the appropriate time.[14]

[12] In respect of service of the summons on the first applicant, counsel for the applicant advanced the argument that the respondent must have known that the first applicant did not receive the summons as attempted

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[11] *Brown v Chapman* 1928 TPD 320 at 328
[12] Founding affidavit para 7 pp 9 and 10
[13] Answering affidavit para 20 p 85

execution of the judgment took place at the respective residential addresses of the applicants.

[13] Now it is not disputed between the parties that service on the first applicant was properly effected on the principal place of business of the first applicant, as reflected in the CIPC in terms of rule 4(1)(a)(v).

[14] Furthermore, if one has regard to the founding affidavit and the replying affidavit, these affidavits are silent as to when the first applicant had vacated its registered place of business and effected its change in the CIPC as it was mandated to do in terms of the enabling legislation.

[15] Counsel for the respondent correctly, in my view had submitted that where a company changes its registered office or its principal place of business, if it has more than one office, such company will have a duty to comply with the provisions of section 23(2)(b)(ii) of the Companies Act 71 of 2008. Thus the first applicant was remiss in having complied with such requirement and failure to have done so amounted to the first applicant having been negligent.

[16] As there is no explanation given under oath by the first applicant as to when it vacated its principal place of business and further as to when it informed the CIPC as it was mandated to do, I cannot conclude that this default was not wilful due to negligence on its part.

[17] Consequently, I cannot be persuaded that the first applicant has satisfied the requirement of not having been in wilful default.

[18] In respect of the service address in respect of the second, third and fourth applicants, the deponent to the founding affidavit alleges that service of the summons was effected on No. 9 Jaspis Avenue, Mayfield Park, which address was the *chosen domicilium* address when the loan agreement and suretyship agreements were concluded.

[19] Furthermore, as no domicilium address was elected when the

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[14] Replying affidavit para 12 p 106

settlement agreement was concluded, the respondent was prohibited from effecting service on this very same address.[15]

[20] In addition to this, the deponent further alleges that the third applicant had occupied No. 9 Jaspis Avenue, Mayfield Park and that he had vacated the said address during 2009.[16]

[21] If one has regard to the relevant returns of service, they all reflect service on a *domicilium* address , being No. 9 Jaspis Avenue, Mayfield Park.

[22] In response to what has been stated above, the respondent contends that the address of service was the elected address chosen by the second, third and fourth applicants when the deed of suretyship was concluded and that the subsequent settlement agreement entered into did not novate or supersede the deed of suretyship. Furthermore, that the deed of suretyship was a continuing surety as provided for in clause 21 of the deed of suretyship.[17] As a consequence, the deed of suretyship is still valid and enforceable against the second, third and fourth applicants, notwithstanding a settlement agreement having been concluded between the first applicant and the respondent.

[23] It is not in dispute that the respondent was permitted to serve the second, third and fourth applicants on a chosen *domicilium* in terms of the Rules of Court.

[24] Rule 4(1)(a)(iv) provides as follows:

> *"If the person so to be served has chosen* a *domicilium citandi by delivering or leaving* a *copy thereof at the domicilium so chosen."*

[25] Where a person has chosen a *domicilium citandi et executandi,* the *domicilium* so chosen must be taken to be the person's place of abode

[15] Founding affidavit para 7.2 p 11
[16] Founding affidavit para 7.2.3 p 11

within the meaning of the Rules of Court, which deals with service of a summons.[18]

[26] If a *domicilium* has been chosen, service there would be good even though the defendant is known not to be living there.[19]

[27] It is significant to note that the applicants failed to give an explanation as to whether the respondent was informed that their chosen *domicilium* address had change during 2009. This duty rested on them to inform the other contracting party of their new *domicilium*[20]

[28] In the absence of an explanation proffered by the second, third and fourth applicants of them having informed the respondent of a change of their chosen *domicilium* address, service in terms of the Rules of Court was valid and proper.

[29] Consequently, the failure to have responded to service of the summons on their chosen *domicilium* address is therefore considered to be wilful in their default.

[30] Albeit, that I have found the applicants to have been in wilful default by failing to defended the summons, I still consider it prudent to consider whether a bona fide defence has been disclosed by them. This is because a good defence may compensate for a poor explanation for a default. If it is found that indeed a bona fide defence has been disclosed by them, even where the applicants have been remiss in proving that they had not been in wilful default, a court must under those circumstances come to their assistance.

BONA FIDE **DEFENCE**

[31] The applicants have articulated their *bona fide* defence to be the

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[17] Answering affidavit para 23 p 86
[18] *Muller v Mulbarton Gardens (pty) Ltd* 1972 (1) SA 328 0N) at 332 G
[19] *Pretoria Hypothec Maatskappy v Groenewald* 1915 TPD 170
[20] *Mashaba v Absa Bank Ltd* 2011 JDR 1321

following:

31.1 the settlement agreement concluded on 25 February 2015 only obliges the first applicant to make certain payments on dates reflected in the settlement agreement;

31.2 in terms of the said settlement agreement, there was no basis of liability in respect of the second, third and fourth applicants;[21]

31.3 the settlement agreement so concluded contains no acceleration clause which would have entitled the respondent to payment of the amount of R7 168 020.00 before 31 July 2019;[22]

31.4 furthermore, the applicants contend that the respondent had received a payment of R650 000.00 from the first applicant in reduction of its indebtedness, but that this amount had not been taken into account when the default judgment was granted;

31.5 as the settlement agreement was not signed by the second, third and fourth applicants, they attracted no obligation in terms of the settlement agreement.[23]

[32] In response, the respondent denied that it was only the first applicant which attracted liability to pay the respondent in terms of the settlement agreement. Furthermore, the respondent contends that the settlement agreement did not release the second, third and fourth applicants from their obligations to the respondent in terms of the deed of suretyship.[24]

[33] Furthermore, the respondent concedes that, as at date of issue of summons during May 2017, the first applicant had paid an amount of R650 000.00 in reduction of its indebtedness and that this amount had not been taken into account. In addition to this, the respondent contends that a further amount of R2 million was payable by end December 2017, which had not been paid and, as such, the respondent gave notice that it will move for a judgment in the amount of R4 750 000.00.[25]

[34] In their replying affidavit, the applicants replied that the concession

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[21] Founding affidavit paras 9.2 and 9.3 p 13
[22] Founding affidavit para 9.9 p 15
[23] Founding affidavit para 9.15 p 16
[24] Answering affidavit paras 29 and 30 p 87
[25] Answering affidavit para 31 p 88

made by the respondent that the first applicant had paid an amount of R650 000.00 which had not been taken into account is confirmation of the applicants having a *bona fide* defence to the respondent's claim.[26]

[35] In the present matter, none of the parties had annexed to their affidavits the facility loan agreement or the preference share subscription agreement. This having been the position, this court was unable to have regard to the terms of such agreements and, more importantly, whether any of such agreements contained in it any acceleration clause.

[36] If one further considers the settlement agreement, same does not contain any acceleration clause, neither is any acceleration clause referred to in the correspondence exchanged between the parties which brought into being the settlement agreement.

[37] In addition thereto, the respondent had been remiss to disclose the basis for claiming the full outstanding amount in terms of the settlement agreement in the absence of such an acceleration clause being contained in the said settlement agreement.

[38] The concession made by the respondent that the amount of R650 000.00 had been paid and should have been taken into account to reduce the judgment amount, in my opinion, sufficiently discloses a *prima facie* defence which would entitle the applicants to the relief claimed, even where they have failed to convince this court that they were not in wilful default.

[39] In the result, the following order is made:

39.1 the judgment granted by the court on 11 October 2017 is hereby rescinded;

39.2 the first, second, third and fourth applicants are hereby granted leave to defend;

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[26] Replying affidavit para 26 p 108

39.3 Cost to be in the cause.

CJ COLLIS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

Counsel for the applicant:	Mr T. Seokane
Instructed by:	Seokane Lesomo Inc
Counsel for the respondent:	Adv S Hussein-Yusuf
Instructed by:	Mothle Jooma Sabadia Inc.
Date of hearing:	30 August 2018
Date of judgment:	31 January 2019