IN THE KWAZULU-NATAL HIGH COURT, DURBAN **REPORTABLE**

REPUBLIC OF SOUTH AFRICA

CASE NO: 8591/2008

In the matter between:

STELMED CC Applicant

and

UNION DRUG (PTY) LIMITED Respondent

JUDGMENT

MSIMANG, J:

[1] This is an application for rescission of a default judgment in the sum of R166 706.29 granted by the Registrar of this Court against the applicant on 15 August 2008. The application is brought under Rule 42 and under Rule 31 of the Uniform Rules of Court or, alternatively, under the Common Law.

[2] Before dealing with the legal issues raised by this application and to enable this Court to do so, I set out the circumstances underlying the same.

[3] The respondent (the plaintiff in the action) is an incorporated company apparently carrying on business as a supplier of medical disposables

having its principal place of business at 24 Duiker Road, Canelands, Verulam and the applicant (the defendant in the action) is a distributor of those disposables and has its place of business at 8 Hoep-Hoep Street, Onderpapegaaiberg, Stellenbosch.

[4] It would appear that, during the years 2006, 2007 and 2008, the applicant would, from time to time, purchase certain goods from the respondent on account and that the respondent's accounting system had a facility that would block and close an account that exceeded its credit limit.

[5] During the year 2006 applicant's account was not properly serviced and a number of payments became overdue without any payments being forthcoming. Not even letters of reminder from the respondent would yield the desired results but they would elicit further promises from the applicant which were never kept. One such response dated 18 February 2008 vaguely declared that "To my knowledge everything is being paid, contact Shayma".

[6] By 1 July 2008 the respondent had reached the end of its tether. It was now time to put the applicant on terms. A minute was addressed to the applicant admonishing that, should payment not be made by 15h00 of that date, the account would be handed over to the respondent's attorneys for collection. The deadline came and went with no payment forthcoming.

The matter was accordingly referred to the respondent's attorneys who, on or about 9 July 2008, issued summons against the applicant for the recovery of the amount owing.

[7] It is common cause between the parties that the summons was served upon the applicant on 21 July 2008 at its registered address by affixing a copy thereof to the principal door of that address. In its founding affidavit filed in support of the present application, the applicant denies having received the summons and avers that the first time it saw the summons and learnt that judgment had been taken by default was on 5 September 2008 when the information was divulged by the Sheriff who had come to applicant's place of business for the purpose of executing a warrant that had been issued pursuant to the said default judgment. These allegations have not been denied by the respondent.

[8] It is history that when the applicant did not enter appearance within the prescribed period, the matter was placed before the Registrar who, on 15 August 2008, granted a default judgment for the amount of R166 706.79 plus interest and costs, a rescission of which judgment now forms a subject of the present application.

[9] In its founding affidavit filed in support of the present application the applicant refers to a statement which apparently had been received from

the respondent on 30 September 2007 and which the applicant annexes to the said affidavit as "K". In that statement it is recorded that the amount owing by the applicant, as at that date, was R16 724.64. It is for that reason that the applicant contends that it is that amount that it owes to the respondent and payment of which it tenders. The applicant further contends that, had the respondent demanded the same or had it become aware of the summons, the amount would have been paid. It accordingly denies being indebted to the respondent in the sum for which the default judgment was granted.

[10] One of the factors which is therefore relevant to the issues to be determined in this application concerns the circumstances surrounding the issue by the respondent of the said statement.

[11] In its answering affidavit the respondent explained those circumstances as follows. By November 2006 the applicant had exceeded the credit limit allowed for its account, presumably due to non-payment of the amounts which were due. Respondent's accounting system, alluded to earlier on in this judgment, accordingly kicked in and the account was closed. However, notwithstanding such closure, the applicant continued to purchase goods from the respondent on credit and, in error, the latter's employee opened a new account in the name of the applicant. The balance reflected in annexure "K" was in respect of this new account and

the same did not take into account the balance outstanding in the old account which had been closed during November 2006. It should be added that annexure "K" clearly shows the numbers as well as the dates of invoices to which the amount of R16 724.64 related, one date being 3 August 2007 and the other 27 September 2007.

[12] In any event, it would appear that by the time the respondent issued summons against the applicant, it had furnished the latter with a total of approximately eighteen (18) copies of invoices and corresponding delivery notes in respect of the old account as well as a statement of account revealing that the amount owing, in terms of those invoices and delivery notes, was R165 682.78 and showing how that figure had been arrived at.

[13] The provisions of Rule 42 run as follows :-

> "42(1) 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 :
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> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
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> (b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
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> (c) An order or judgment granted as the result of a mistake common to the parties.
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> 42(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought……..."

[14] Two provisions of Rule 31 may be relevant to the present application, namely, the provisions of Rule 31(2)(b) and those of Rule 31(5)(d). Those provisions provide that :-

> "31(2)(b) 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, upon good cause shown, set aside the default judgment on such terms as to it seems meet. "

> "31(5)(d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after he has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court."

Rule 31 Ground

[15] For the sake of convenience, I deal first with that portion of the application based on the provisions of Rule 31.

[16] When I initially listened to argument on 25 August 2009, applicant's Counsel purported to rely and therefore addressed me upon the provisions of Rule 31(2)(b); Also, that is the basis upon which respondent's Counsel responded to applicant's submissions.

[17] Upon reflection, it occurred to me that, as the judgment by default *in casu* had been granted by the Registrar, the applicable rule is Rule 31(5)(d) and that applicant's reliance upon the provisions of Rule 31(2)(b) was

therefore misplaced. I accordingly dispatched a notice to respective Counsel requesting them to address me on the issue.

[18] Indeed, the Court reconvened on 11 September 2009 and, on this occasion, Mr. **Collins,** who appeared for the applicant, had changed tack. The applicant was no longer relying on the provisions of Rule 31 and was only limiting its assault upon the default judgment on the grounds provided for under Common Law and on those provided for in the provisions of Rule 42.

Common Law Ground.

[19] At Common Law a judgment by default may be rescinded provided sufficient cause for such rescission has been shown. Dealing with this requirement Miller JA had the following to say in **Chetty v Law Society, Transvaal** [1]

> "But it is clear that in principle and in the long-standing practice of our Courts two essential elements of 'sufficient cause' for rescission of a judgment by default are:
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> (i) that the party seeking relief must present a reasonable and acceptable explanation for his default: and
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> (ii) that on the merits such party has a *bona fide* defence which, *prima facie,* carries some prospect of success. (*de Wet's* case *supra* at 1042; *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980(4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954(3) SA 352 (O) at 357-8.)
>
> It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the

[1] 1985(2) SA 756 (A) at 765 A-F;

> merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits. The reason for my saying that the appellant's application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, or elsewhere in the papers, any reasonable or satisfactory explanation of his default and total failure to offer any opposition whatever to the confirmation on 16 September 1980 of the rule *nisi* issued on 22 April 1980."

[20] It is not disputed that the summons was never received by the applicant and that it only learnt of the same after the default judgment had been taken. Clearly therefore the applicant has presented an acceptable explanation for its default.

[21] Regarding the requirement of a *bona fide* defence, in its answering affidavit, the respondent declares that a sum of R165 682,78 is due to it by the applicant and attaches to that affidavit eighteen (18) copies of invoices, corresponding delivery notes as well as a statement of account in support of the said indebtedness and revealing how the amount had been arrived at. In its replying affidavit the applicant had an opportunity of responding to these specific allegations but chose not to do so, preferring, instead, to allege that the statement was fraught with discrepancies. The applicant also refers to the subject of annexure "K" and alleges that the discrepancy regarding the same had not been explained, which allegation is not borne out by the facts.

[22] I am accordingly not able to find that the applicant has shown any defence to respondent's claim, let alone the one carrying a prospect of success.

[23] Furthermore, interpreting the decision of Colman J in **Breitenbach v Fiat SA (Edms) BPK,** [2] Marais J pronounced himself as follows in **Standard Bank of SA Ltd v El-Naddaf and Another** [3] :-

> "However, Colman J deals with the requirement that the defendant must satisfy that his defence is *bona fide* as
>
> (a) separate from the requirement that he must satisfy the Court that he has a defence ……. " [4]

Indeed, at 227 – 228A in **Breitenbach (supra)** Colman J remarks as follows :-

> "If, therefore, the averments in a defendant's affidavit disclose a defence, the question whether the defence is *bona fide* or not, in the ordinary sense of that expression, will depend upon his belief as to the truth or falsity of his factual statements …."

and again at 228 D-E he adds :-

> "What I should add, however, is that if the defence is averred in a manner which appears in all circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of *bona fides*".

Marais J accordingly concludes that :

> "The authority of the judgment of Colman J (and common sense) indicate that *bona fides* cannot be demonstrated by merely making a bald averment lacking in any detail. To hold that such bald averment is sufficient to demonstrate *bona fides* is a classic

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2 1976(2) SA 226 (J);

3 1999(4) SA 779(WLD);

4 Ibid. at 784 H; It is true that the courts in Breitenbach and Standard Bank were interpreting the words *bona fide* defence in a context different from that of the facts of the present case - clearly, though, the words are susceptible to the same interpretation in the context of the present case.

> oxymoron. It effectively negates the requirement that the Court be satisfied that the applicant has a *bona fide* defence". [5]

[24] Returning to the facts of the present case, in its answering affidavit the respondent sets out to explain that Annexure "K" did not constitute the basis upon which the summons was issued, explains the circumstances surrounding the issue of the document and provides documentary evidence of the indebtedness constituting the basis upon which the summons was issued and upon which default judgment was subsequently sought and granted. The applicant had an opportunity of directly dealing with those specific allegations in its replying affidavit and yet it chose not to do so. As a matter of fact, upon perusing the applicant's response to those allegations, a plausible inference would appear to be that it avoided dealing directly with them.

[25] Like in the case where a defendant makes a bald statement, lacking in detail, it cannot be said that applicant's conduct herein, in avoiding to deal directly with specific allegations of respondent's claim, displays *bona fides.* I am accordingly not satisfied that applicant's defence is *bona fide.*

[26] It is, however, evident that, even on the respondent's version, the default judgment herein ought to have been granted for the amount of R165682.78 and not for the sum R166 706.29, for which sum the judgment was granted. This fact is conceded by the respondent who

[5] Standard Bank (supra) at 785J – 786A.

consents to a rescission of the judgment in respect of the difference between the two amounts, namely, an amount of R1 023.51.

[27] Mr. **Collins,** however, submitted that such a route is not permissible in law. Relying on a number of decisions, [6] he argued that, as the applicant has established a *bona fide* defence in respect of the said amount of R1023.51, it is entitled to have the whole of the judgment set aside.

[28] It would appear that this interpretation of Rule 31(2)(b) originated in **Kavasis (supra)** and was followed in a subsequent decision in **Zealand (supra).** Both these cases dealt with applications for rescission based on the provisions of that section. The *ratio* behind the **Kavasis** ruling was set out as follows by James JP :-

> "Unlike the provisions of Rule 32 dealing with summary judgment, Rule 31(2) does not give the Judge power to allow the applicant to defend only a portion of the claim ……." [7]

[29] However, in **Terrace Auto Services (supra)** the Court was concerned with the Court's power to set aside a default judgment under the Common Law and Rubens AJ remarked as follows :-

> "I might add however that if the matter had concerned an application of the Rule I would have followed the **Kavasis** line of cases". [8]

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[6] Kavasis v South African Bank of Athens Ltd 1980(3) SA 394 (A); Grunder v Grunder en Andere 1990(4) SA 680 (C); Zealand v Milborough 1991(4) SA 836 (E); Terrace Auto Services Centre (Pty) Ltd and others v First National Bank of South Africa Ltd 1996(3) SA 209 (W);

[7] Kavasis (supra) at 396A;

[8] Terrace Auto Services (supra) at 214 F-G;

[30] However, lower down the same page the Honourable Acting Judge continued to hold that :-

> "Once a defendant in an application for rescission presents a reasonable and acceptable explanation for his default, his default is purged. He is then entitled, provided that he can show in addition that he has a *bona fide* defence to the plaintiff's claim, to be put back in the position that he would have occupied but for his default. I can see no reason why a defendant should not in those circumstances be revested with all of the procedural advantages which the Rules of Court afford a defendant in the ordinary course. This reasoning it would seem, is implicit in the abovequoted passages in the *Kavasis* and *Zealand* cases. There is no inequity involved as far as the plaintiff is concerned. He is in fact in a better position than he would have been in had the defendant not been in default. He has the obvious advantage which flows from the fact that the defendant has been obliged to set out his defence in an affidavit. He may in addition, as was pointed out by the learned Judge in the *Kavasis* case, apply for summary judgment." [9]

[31] **Grunder (supra)** is the only other decision I have come across which invoked the **Kavasis** ruling **(supra),** though it would appear that the application for the setting aside of a taxing master's allocatur in that case was based on the Common Law. [10]

[32] The issue came up pointedly for decision in the two Namibian High Court decisions (one being a full bench of that Court) and both disagreed with and accordingly departed from the **Kavasis** ruling. [11]

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[9] Ibid. at 214 G-J;

[10] At 685 B-C Conradie J remarks thus: 'Na my mening is die beginsels van die gemenereg wat by die tersydestelling van vonisse by verstek geld ook van toepassing op die tersydestelling van die allocator van 'n takseermeester";

[11] Maia v Total Namibia (Pty) Ltd 1991(2) SA 188 (Nm); SOS Kinderdorf International v Effie Lentin Architects 1993(2) SA 481 (NmHC);

[33] The issue was again revisited in the decision in **Silky Touch International (Pty) Ltd v Small Business Development Corporation Limited.** [12] In a philosophy-laden judgment, Flemming DJP placed a stamp of approval on the Namibian High Courts' decisions, while delivering a scathing criticism at **Terrace Auto Services (supra), Zealand (supra) and at Kavasis (supra),** holding that those three decisions were based on an erroneous interpretation and application of the rules of construction and declaring that they could not be justified on the basis of the rules of Common Law or legal philosophy. The Honourable Deputy Judge President's motivations appear to be sound and which I would have preferred had the determination of the issue before me depended on the applicability of the **Kavasis** ruling.

[34] I have, however, concluded that the facts of the present case are distinguishable from the facts in **Kavasis** line of cases and therefore that, in this matter, I am not called upon to decide the applicability or otherwise of the **Kavasis** ruling.

[35] In **Kavasis (supra)** the defendant claimed that it had a *bona fide* defence to plaintiff's claim, contending that, in terms of the surety agreement, his liability was reducible by every instalment of R250.00 per month from 15 July 1977. It was common cause between the parties that, during

[12] [1997] 3 All SA 439 (W);

August of 1977, the principal debtors had paid an instalment of R250.00 and yet judgment by default had been taken for the full amount of the loan.

[36] In **Zealand (supra)** it would appear that defendant's defence was that the calculation of damages had been based upon incorrect quantities, namely, 150 bags of cement instead of 15 bags and that there was also an arithmetical mistake in the calculation of the quantum of damages which had not been noticed until after judgment had been taken.

[37] In **Terrace Auto Services (supra),** in its defence, the third defendant had raised a number of factual disputes relating to the rate at which the plaintiff had been entitled to charge interest in respect of first defendant's overdrawn banking account, the fact that certain deposits made to the first defendant's banking account were credited late as a result of which the first defendant was entitled to have certain interest charges which had been debited reversed, the fact that there were unexplained debits to the account which aggregated R293.38 and the fact that the plaintiff had continued to operate a debit order on the account for some months after it had agreed to stop the debit order. Though the Court concluded that there was insufficient evidence that, were all those disputes to be resolved in favour of the third defendant, the result would be that it would not be indebted to the plaintiff in any amount. As a matter of fact, the Court continued to find, indications were that, even in that event, the third

defendant would remain indebted to the plaintiff in a not insubstantial amount. It is against the background of these facts that Ruben AJ made the statement referred to in paragraph 35 hereof.

[38] The golden thread running through the above facts of the **Kavasis** line of cases is that, in all those cases, the defendant had dealt directly with (and had not avoided) the specific allegations upon which plaintiffs' claims were based and that, from the said dealings, the Courts had concluded that the defendants had shown *bona fide* defences.

[39] In the present matter the applicant avoided dealing with those allegations resulting in the finding that it has not shown a *bona fide* defence to respondent's claim. In my judgment this factor distinguishes the facts of the present case from those of the **Kavasis** line of cases.

[40] I have accordingly been driven to the conclusion that, though the applicant has presented an acceptable explanation for its default, it has failed to show a *bona fide* defence to respondent's claim. The assault on the default judgment based on the Common Law must therefore fail.

Rule 42 Ground

[41] The documents filed by the respondent clearly show that the amount for which judgment by default ought to have been granted in this matter was

R165 682.78 and not R166 706.29. It therefore follows that the default judgment for the latter amount was erroneously sought and erroneously granted.

[42] It is for that reason that the applicant submitted that, once those jurisdictional facts had been established, there is only one course open to the Court, namely, to rescind the judgment concerned without the necessity of establishing good cause.

[43] This submission by the applicant tells half of the story. The Court may also *mero motu* vary such a default judgment or a judgment in which there is a patent error. It would appear that the proper course would be for the Court to grant an order in terms of the provisions of this portion of the rule.

The order I therefore make is as follows :-

(a) The application for rescission is hereby dismissed with costs;

(b) **In terms of the provisions of Rule 42, the order of the Registrar of this Court dated 15 August 2008 is amended by deleting the figure R166 706,24 appearing therein and by replacing the same with the figure R165 682,78.**

For the Applicant:	Adv. M W Collins (instructed by Johard Roux Attorneys c/o Carl van der Merwe & Associates)
For the Respondent:	Adv. D W Finnigan (instructed by Garlicke & Bousfield Inc.)
Matter argued:	25 August 2009 and 11 September 2009
Judgment delivered:	23 September 2009