

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE REGIONAL COURT FOR THE REGIONAL DIVISION
OF KWAZULU-NATAL
HELD AT DURBAN**

Case no:KZN/DBN/RC

3171/2021

In the matter between:

DENVER CHETTY N.O.

(Identity Number: [...])

First Applicant

BRENTON GANESH NAIR N.O.

(Identity Number: [...])

Second Applicant

JOSE ALBERTO DELGADO N.O.

(Identity Number: [...])

Third Applicant

and

**THE KINGSMEAD OFFICE APRK OWNERS
ASSOCIATION NPC (RF)**

Respondent

Judgment

[1] This is an opposed rescission of judgment application in terms of which the Applicants in their representative capacities as trustees of The Regal Property Trust

seek to rescind a default judgment granted in the Respondent's favour on 10 May 2022.

Factual Background

[2] The Applicants are trustees for the time being of the Regal Property Trust ("the Trust").¹ The Respondent administers, controls and manages the Kingsmead Office Park ("the site") in accordance with the provisions of its Memorandum of Incorporation ("MOI") and rules made by the Board of the Plaintiff.² The trust owns portion 6 of Erf 12486 which is located at the site.³

[3] According to the Plaintiff's Particulars of Claim it is alleged that a resolution was taken at the Respondent's Annual General Meeting in 2020 that monthly levies would be imposed on the Trust for the 2020/2021 financial year in the amount of R13 257.76 per month excluding VAT. It is further alleged that during the period 1 December 2020 to 15 December 2021, the Trust failed to pay:

'12.1 levies in full;

12.2 amounts paid by the Plaintiff to EThekweni Municipality in respect of electricity water and sewerage services supplied to the Trust by the Municipality.

12.3 interest on the outstanding amounts⁴,

[4] The Plaintiff furthermore averred that the Trust is indebted to it in the amount of R243 633.11.⁵

Onus of Proof

¹ Particulars of Claim, para 5.

² Particulars of Claim, para 7.

³ Particulars of Claim, para 8.

⁴ Particulars of Claim, paras 11 and 12.

⁵ Particulars of Claim, para 14.

[5] It is trite that an Applicant is to give a reasonable and acceptable explanation for his or her default; that that application is made in good faith and that on the merits Applicant has a *bona fide* defence which *prima facie* carries some prospect of success.⁶

Issues for determination

[6] The crisp issues for determination are whether:

- (a) the Applicants have provided a reasonable and satisfactory explanation for its absence or default to defend the action; and
- (b) The Applicants have shown that they have a *bona fide* defence to the Plaintiff's claim on the merits, which carry some prospect of success.

Legal Principles

[7] It is trite that an order of a court of law stands until set aside by a court of competent jurisdiction⁷. Until that is done, the court order must be obeyed even if it may be wrong.⁸ There is a presumption that the judgment is correct. At common law a court's order becomes final and unalterable by that court at the moment of its pronouncement by the Judicial Officer, who thereafter becomes *functus officio*. Save in exceptional circumstances it cannot thereafter be varied or rescinded. Section 36 is an exception and it is submitted that a Magistrate's Court may correct or vary its judgment only in those cases that are covered by the section."⁹

⁶ *Scholtz and Another v Merryweather and Others* 2014 (6) SA 90 (WCC) at 93D-96C.

⁷ *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B-C; *MEC for Economic Affairs, Environment and Tourism v Kruissenga* 2008 (6) SA 264 (CKHC) at 277C; *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA) at 439G-H.

⁸ *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W) at 473C; *Culverwell v Beira* 1992 (4) SA 494A-C.

⁹ Jones and Buckle 'The Civil Practice of the Magistrates' Courts in South Africa' Juta Law [service 25, 2010]

[8] Furthermore, there is no exhaustive definition of the meaning of “good cause” and “sufficient cause” giving a court a wide discretion in this regard. **Silber v Ozen Wholesalers**¹⁰ is instructive on the requirements of good cause and the giving of a full explanation by a party in default. In this regard, Schreiner JA stated that:

‘The meaning of “good cause” in the present sub-rule, like that of the practically synonymous expression “sufficient cause” which was considered by this Court in Cairn’s Executors V. Gaarn, 1912 A.D. 181, should not lightly be made the subject of further definition...There are many decisions which have the same or similar expressions have been applied in the grant or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.’

[9] The idiosyncratic test for a *bona fide* defence has been described in **Saphula v Nedcor Bank Ltd**¹¹ as:

‘...the hallmark of what lawyers call a bona fide defence (which has to be established before rescission is granted), that defendant honestly intends to pursue before a Court a set of facts which, if true, will constitute a defence.’

[10] A *pro pos* to the *bona fide* defence requirement, Blieden J in **Mnandi Property Development CC v Beimore Development CC**¹², refers to a substantial defence to underpin the requirement of good cause and states that:

‘...good cause cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence but in addition of a bona fide presently held desire on the part of the applicant for relief actually to defend the case in the event of the judgment being rescinded.’

Failure to effect proper service

¹⁰ 1954 (2) SA 345 (A) at 352H-353A.

¹¹ 1999 (2) SA 76 (W) at 79C-D.

¹² 1999 (4) SA 462 (W) at 464H-I.

[11] It is undisputed that the Sheriff served the Summons Commencing Action on the First, Second and Third Defendants (“The Applicants), on the 22nd of December 2021:

‘By LEAVING a copy thereof of the SUMMONS COMMENCING ACTION in a 4 DRAW CABINET of the chosen domicilium address, as the premises was found locked, No other service was possible as no responsible person could be found after diligent search and enquiries’¹³

[12] It is the Applicants contention that they did not receive the summons. The Applicants aver that they only had knowledge of the Default Judgment on 28 June 2022, consequent upon the Sheriff of the Court executing a warrant at the Kingsmead Office Park, when a member of staff had been on site and alerted the Applicants.

[13] Rule 9 (5) states that:

‘Where the person to be served keeps his or her residence or place of business closed and thus prevents the sheriff from serving the process, it shall be sufficient service to affix a copy thereof to the outer or principal door or security gate of such residence or place of business or to place such copy in the post box at such residence or place of business.’

[14] The Applicants argued that it was possible for the Sheriff to affix the summons to the front door of the premises. According the Applicants, they did not choose a *domicilium citandi et executandi* and as such, alternative service should have been attempted, more especially as the premises was vacant at the time of service. Reliance by the Applicants was placed on ***Magricor (Pty) Ltd v Border Seed Distribuions CC***¹⁴ where it was stated:

¹³ Index to Application for Rescission of Judgement, pages 28 -30.

¹⁴ (1072/2020) [2021] ZAECGHC, para 19.

'In my view, the absence of employees of a company from the registered office or principal place of business does not permit the sheriff to effect service by affixing the process to the company's main door at its registered office or principal place of business. For that kind of service to be effected the employees of the company must be unwilling to accept service.'

[15] In this case, the Sheriff of the High Court attended at **Magricor's** registered address which was also the principal place of business and affixed the summons to the main door at 13h25, having "*found the Defendant to be absent*". The employees of **Magricor** were on their lunch break at the time. **Magricor** contended that the Sheriff of the High Court could not effect proper service by affixing whilst **Magricor's** employees were on their lunch break, and as such, the service of the summons on **Magricor** was defective.

[16] The matter *in casu* is however distinguishable as the High Court considered the issue of service in reference to Rule of 4(1)(a)(v) which deals with service of due process by the Sheriff of the High Court on a Close Corporation or a company which essentially makes provision that service may be affected '*in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction; or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law*'. This matter essentially dealt with service on a juristic person. The court found that an important requirement prior to affixing is that the Sheriff must have personal interaction with the employees of the juristic person.

[17] *In casu*, the ultimate question to be answered is whether there was proper service. The Applicants are all sued in their capacity as Trustees of the Trust. The Respondent argued that The Trust's address was reflected on its letterhead in correspondence dated 5 March 2021, in which it put forward its payment plan to settle the arrears.¹⁵ It does however bear mentioning that the offer in the letter, which is marked "without prejudice" appears to relate to an offer of settlement of the summonses issued under case numbers 6637/2020 and 20475/2020.¹⁶ In further amplification, the Respondent contended that the top drawer of the cabinet was specifically labelled "DROP OFF HERE" at the entrance to the service premises, which is indicative that the Trust required documents to be served as designated by the facility provided for service when nobody was at the address to receive service of the documents.

[18] The Respondent, in its Answering Affidavit specifically stated that *'[i]t is not denied that the summons could, as an alternative, have been affixed at the premises.'*¹⁷ The Respondent furthermore argued that the preferred way of service as indicated cannot be criticized. It is noteworthy that the version of the Applicants that they did not receive the summons was not refuted. It is the Respondent's contention that the Trust failed to take the Court into its confidence with *bona fide* reasons as to why the summons would not have come to the Trust's attention prior to the granting of default judgment on 10 May 2022 when service was affected at the address provided by the Trust.

¹⁵ Respondent's Heads of Argument, para 10, page 6.

¹⁶ Index to Application for Rescission of Judgement, Annexure AA7, page 88.

¹⁷ Index to Application for Rescission of Judgement, Respondent's Answering Affidavit, para 71, page 53.

[19] The Respondent, in the absence of the Trust having entered an intention to defence, was permitted to seek Judgment by Default against the Applicants without further notice to the Trust, however, it cannot be assumed that the Applicants willfully defaulted if regard is to be had to ***Harris v ABSA Bank Ltd Volkskas***¹⁸ where the court held:

'Before an applicant in a rescission of judgment application can be said to be in "willful default" he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequence of his or her actions. A decision freely taken to reform from filing a notice to defence or a plea or from appearing would ordinarily weigh heavily against an Applicant required to establish sufficient cause.'

[20] On a conspectus of the evidence, I am not persuaded that service was effected at the domicilium address as envisaged in terms of Rule 9(3)(d)¹⁹. Consequently, I am satisfied that the Applicants have provided a reasonable and acceptable explanation for their default. This in and of itself does not automatically entitle the Applicants to the relief they seek as the court is enjoined to consider whether the application is made in good faith and that on the merits Applicants have a *bona fide* defence which *prima facie* carries some prospect of success as previously stated.

Bona Fide Defence

[21] The Applicants relies of the following defences in amplification this application:

¹⁸ 2006 (4) SA 527 (T), para 8.

¹⁹ ' if the person so to be served has chosen a *domicilium citandi*, by delivering a copy thereof at the *domicilium* so chosen: Provided that the sheriff shall set out in the return of service the details of the manner and circumstances under which such service was effected'

- (a) The non-joinder of the EThekwini Municipality;
- (b) The excipiability of the Particulars of Claim on the basis that:
 - (i) The Plaintiff had failed to annex the complete MOI to its papers;
 - (ii) The Plaintiff's failure to plead the necessary and essential averments that shows the Trust's liability to be bound by the MOI and failure to annex proof that the Trust was accepted as a member of the Respondent's Association;
 - (iii) The Plaintiff's failure to disclose a cause of action;
 - (iv) The Trust's dispute on the amount claimed and the disputes surrounding drainage and maintenance of the common area;
 - (v) The Plaintiff's non-compliance with Section 129, read with Section 130 of the National Credit Act.

[22] I do not deem it necessary to deal with each of these grounds *ad seriatim*, in light of the conclusion to which I have come.

Non-Joinder of the EThekwini Municipality

[23] It is the Applicants contention that the EThekwini Municipality had a direct and substantial interest in this matter and as such, should have been joined as a party to the proceedings. The Respondent's contention in this regard is that the Trust has historically paid invoices inclusive of amounts levied upon the Plaintiff by the municipality. It was furthermore argued that the MOI provides for the Trust to make payment to the Plaintiff of amounts the municipality seeks from the Plaintiff:

'28.1 It is envisaged that where an Erf does not front into a public road that certain consumption charges such as electricity and water due by the owner of such Erf will be levied by the service provider on the Association. The

*Association will arrange for separate metering of such services and will be entitled to recover the charges therefor from the member/s of the Association receiving the benefits of such services.*²⁰

[24] The question to be answered is whether this is a triable issue to be ventilated in the trial. It is my view that this consideration ties in with whether the Particulars of Claim is excipiable on the basis that the Plaintiff failed to plead a cause of action for unjustified enrichment. Regard is also to be had as to whether the Particulars of Claim lacks the necessary averments to sustain a cause of action. In this regard, it was illuminated by the Applicants that the Respondent attempted to cure the deficiencies in its papers, by annexing excerpts from the MOI, to its Answering Affidavit, which did not form part of the Particulars of Claim. Furthermore, the Applicants have indicated that they have a genuine and *bona fide* dispute pertaining to the Trust's liability and whether or not it is in fact bound by the unsigned MOI and lack of resolution. I make no findings on the merits and these points of contention which have essentially been highlighted to provide a perspective of the challenges that would require possible ventilation at the trial.

[25] Of seminal importance however, is that there appears to be a dispute of fact on the amount claimed. In this regard, the Respondent pleaded in the Answering Affidavit that '*a dispute arose between the Trust and the Respondent regarding the charging of levies on additional bulk.*'²¹ The Applicants on behalf of the Trust deny the amounts owing. It was argued that the amounts claimed differ if regard is to be had to the Customer Transactions Report and the concerns raised in respect of the Chairman's Report.²²

²⁰ Index, Annexure POC, para 28.

²¹ Respondent's Answering Affidavit, para 19, page 42.

²² Index to Application, FA3, page 27 and pages 91 - 94

Conclusion

[26] The court is mindful that in applications for rescission, the Applicant is required in terms of the rule to set out a defence with sufficient particularity so as to enable the court to decide whether or not there is a valid and *bona fide* defence. It is for this reason that I have considered the application holistically and not in a vacuum.

[27] On a conspectus of the evidence before me, and without pronouncing on any of the issues, whether factual and/ or legal, ought to be, in my view, ventilated at the trial, I am persuaded that Applicants have met the threshold requirements and placed a set of facts before me that if true, may constitute a defence insofar as it disputes the amount claimed by the Respondent. It is trite that the existence of a substantial defence does not mean that Applicant must show a probability of success, it is sufficient for Applicant to show a *prima facie* case or the existence of an issue that is fit for trial. Consequently, I am of the view that the Applicants should be allowed to defend the action and have these defences ventilated in the trial.

[28] As earlier stated, I am satisfied that the Applicants have given a reasonable and acceptable explanation for the default. In the circumstances, I find that the Applicants are not in willful default of delivery of a notice of intention to defend the action brought against them by the Respondent.

[29] I am furthermore satisfied that the Applicants have launched this application in good faith and that on the merits the Applicant have a *bona fide*

defence which *prima facie* carries some prospect of success. In the circumstance, I am satisfied that the Applicant demonstrated the necessary *bona fides*; have set out the grounds of its defence with sufficient details so as to enable the court to conclude that it does have a *bona fide* defence to the Respondent's claim and that Applicant has succeeded to show good cause for the rescission of the judgment.

Costs

[30] Turning now to the issue of costs. The Applicants seeks that the Respondents pay costs on an attorney and client scale including the cost of Counsel's reasonable fee on brief.

[31] It is an accepted legal principle that costs ordinarily follow the result and a successful party is therefore entitled to his or her costs. It is fundamental legal principal that the issue of costs is in the unfettered discretion of the court.²³ In view of the fact that there are issues that should be fully ventilated in the trial, it is my view that a costs order at this stage will in any event be premature. The trial court will be in a better position to make a final pronouncement in this regard after having heard the evidence in relation to the issues in dispute. Therefore, in the exercise of my judicial discretion, I am of the view that the issue of costs should stand over for later determination.

Order:

²³ *Fusion Hotel and Entertainment Centre CC v eThekweni Municipality and Another* [2015] JOL 32690 (KZD) '[12] It is common cause that in this matter the issues at hand remained undecided and the merits were not considered. When the issues are left undecided, the court has a discretion whether to direct each part to pay its own costs or make a specific order as to costs. A decision on costs can on its own, in my view, be made irrespective of the non-consideration of the merits. I am stating this on the basis that an award for costs is to indemnify the successful litigant for the expense to which he was put through to challenge or defend the case, as the case may be...'

[32] In the result, after considering the submissions made by Counsel on behalf of both the parties and having considered the documents filed on record, the following orders are made:

- (a) The Default Judgment granted on 10 May 2022 under case number: **KZN/DBN/RC 317/21**, is hereby rescinded and set aside;
- (b) The Applicants (Defendants) are granted leave to defend the action which was instituted by the Respondent and file their plea and counter-claim (if any);
- (c) Costs are to stand over for later determination.

P ANDREWS
Regional Magistrate: Durban

APPEARANCES:

FOR THE APPLICANTS:
Instructed by:

Advocate L. Moodley
Strauss Daly Incorporated

FORTHE RESPONDENT:
Instructed by:

Advocate S P Anderton
Chelin & Associates

DATES OF HEARING:

26 January 2023

DATE OF JUDGEMENT:

09 February 2023