IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 6810/2021

In the matter between:

PETER GEOFFREY SMITH	**First Applicant**
IRENE SUSAN SMITH	**Second Applicant**

and

SHERIFF CAPE TOWN NORTH	**First Respondent**
GIULIO DI GIANNATALE	**Second Respondent**
ZELDA DI GIANNATALE	**Third Respondent**

Heard: **9 November 2023**
Delivered: **29 November 2023 (Electronically)**

JUDGMENT

PILLAY, AJ

INTRODUCTION

1. This is an application for an Order in the following terms:

    1.1. That the default judgment granted against the applicants on 17 August 2022 under case number 6810/2021 be rescinded and set aside.

    1.2. That the applicants be granted leave within 15 days of the granting of this Order to deliver a Plea (with or without a Claim in Reconvention), an Exception or an Application to Strike Out.

    1.3. Costs of the urgent proceedings heard on 6 December 2022 under the above-mentioned case number against the second and third respondents on a scale as between attorney and own client, alternatively costs to be taxable and payable immediately.

    1.4. Costs of this application only in the event that it is opposed, by such parties opposing the same jointly and severally as the case may be, on a scale as between attorney and own client, alternatively costs to be taxable and payable immediately.

2. This application has a long history, the relevant aspects of which may be summarised as follows:

2.1. On 20 April 2021 the second respondent instituted an action against the applicants for damages. The claim is for damages that the second and third respondents ("**the respondents**") allege that they have suffered as a result of the applicants' failure to disclose certain defects in an immovable property sold to the respondents.

2.2. On 19 May 2021 the applicants filed a notice of intention to defend.

2.3. On 17 June 2021 the applicants filed an Exception to the Particulars of Claim.

2.4. In response, the second respondent brought an application for the joinder of the third respondent.

2.5. The application for joinder was unopposed but according to the applicants, its outcome was never communicated to them. An Order for the joinder of the third respondent (as the second applicant in the main proceedings) was granted on 15 December 2021.

2.6. The respondents allege that they delivered a Notice of Bar on 18 February 2022 on the applicants' attorneys.

2.7. On 17 August 2022 the respondents made application for default judgment.

2.8. On 19 November 2022 a Deputy Sheriff of the first respondent arrived at the applicants' home to execute a court order that had been granted.

2.9. On 6 December 2022 the applicants proceeded by way of an urgent application to interdict the first respondent (Part A), pending a rescission application to be brought by the applicants (Part B).

3. In terms of the Court Order of 6 December 2022:

3.1. Pending the final determination of the application for the relief sought in Part B thereof, to be instituted within 30 days of the date of the Order, the first respondent was interdicted and restrained from removing and executing on the applicants' assets that were judicially attached on 19 November 2022 in terms of an inventory that was attached to the Order.

3.2. The parties were granted leave to supplement their papers as may be necessary for the purposes of Part B.

3.3. Should the applicants fail to institute an application for the relief sought in Part B within 30 days of the date of the Order, the respondents were granted leave to set the matter down accordingly, including the issue of costs.

3.4. The costs of the application shall stand over for determination under Part B.

4. The applicants seek rescission of the default judgment on the basis that:

4.1. The Notice of Bar was not served on the applicants.

4.2. The default judgment was made without notice having been given in terms of Rule 31(4).

5. The application for rescission is founded on:

5.1. Rule 42 (1) (a) of the Uniform Rules of Court, which allows for a Court to vary an order or judgment that was erroneously sought or erroneously granted in the absence of any party affected thereby.

5.2. Rule 31 (2)(b) which provides that a defendant may, within 20 days after acquiring 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 it deems fit.

6. This application is opposed by the respondents primarily on two grounds:

6.1. That there was proper service of the Notice of Bar on the applicants' correspondent attorneys.

6.2. That although notice was not given for default judgment as required by Rule 31 (4), such non-compliance had been condoned and default judgment had, as a result, been properly granted.

7. In what follows, I shall first address the applicable legal principles, after which I shall address the evidence in the matter. I conclude with my findings.

THE LAW

8. It is trite that, as a general rule, a Court has no power to set aside or alter a final Order.[1] The instances in which it is permitted to do so are narrowly circumscribed under the Rules or in terms of the common law. This is to preserve the doctrine of finality and legal certainty.

9. The SCA has repeatedly held that the failure to give notice of proceedings where such notice was required constitutes an irregularity which justifies rescission of the Order granted.[2]

10. In **Theron NO v UDM (WC Region)** 1984 (2) SA 532 (C) at 536E, this Court held:

> "Rule 42 (1) entitles any party affected by a judgment or order erroneously sought or granted in his absence, to apply to have it rescinded. It is a procedural step designed to correct an irregularity and to restore the parties to the position they were in before the order was granted. The Court's concern at this stage is with the existence of an order or judgment granted in error in the applicant's absence and, in my view, it certainly cannot be said that the question whether such an order should be allowed to stand is of academic interest only. In any event, it is "very doubtful" whether it is necessary to establish that a reversal would confer a benefit upon applicant. See Featherstonehaugh v Suttie 1913 TPD 171 at 178.
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> The Court has a discretion whether or not to grant an application for rescission under Rule 42 (1). In my view the Court will normally exercise

[1] **Colyn v Tiger Foods Industries Ltd t/a Meadow Feeds Mills (Cape)** 2003 (6) SA 1 (SCA) ("*Colyn*") at par 4.

[2] **Top Trailers (Pty) Ltd and another v Kotze** [2019] JOL 45953 (SCA); **Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd** 2007 (6) SA 87 (SCA); **Rossitter and others v Nedbank Limited** [2015] JOL 34894 (SCA).

that discretion in favour of an applicant where, as in the present case, he was, through no fault of his own, not afforded an opportunity to oppose the order granted against him, and when, on ascertaining that an order has been granted in his absence, he takes expeditious steps to have the position rectified."

11. It is well established that a judgment may be said to have been "*erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment.*"[3]

12. In **Rossitter and Others v Nedbank Limited** (96/2014) [2015] ZASCA 196 (1 December 2015) the SCA held at par 15 and 16:

12.1. The notice of intention to apply for default judgment did not comply with the prescripts of Rule 31(5)(a) read in conjunction with paragraph 2.3 of the Practice Manual in that the notice did not provide a time and date on which default judgment would be sought (in circumstances where the Summons had been served more than six months before the application for default judgment). The Respondent's notice was therefore lacking and procedurally defective.

12.2. If it is shown in an application for rescission under Uniform Rule 42(1)(a) that the default judgment was erroneously sought or granted, a Court

[3] **Nyingwa v Moolman NO** 1993 (2) SA 508 (Tk) at 510. Confirmed by the Constitutional Court in **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 and Others** (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at par 62.

should, without more, grant the order for rescission. It is not necessary for a party to show good cause under the subrule.

12.3. Generally a judgment is erroneously granted if there existed at the time of its issue a fact which the Court was unaware of, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment.

12.4. There can be no doubt that if the Registrar had been made aware of the procedural defect in the Rule 31(5)(a) notice, default judgment would not have been granted.

13. In **Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd** 2007 (6) SA 87 (SCA) at par 24, the SCA held that if notice of proceedings to a party was required but was lacking and judgment was given against that party, such judgment would have been erroneously granted. According to the SCA, this is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given . . ."

14. During the course of argument, the respondents placed much emphasis on the judgment of **Obiang v Van Rensburg and Others** (A119 / 2022) [2023] ZAWCHC 17; [2023] 2 All SA 211 (WCC) (3 February 2023). That matter concerned an appeal against the dismissal of an application for rescission of judgment. The

appellant was the Vice President of the Republic of Equatorial Guinea. The first respondent instituted action proceedings and obtained a judgment against the appellant for damages for his unlawful incarceration, torture and assault in prison. One of the issues in that matter concerned the rescission of an Order that granted the striking out the appellant's defences. According to the majority judgment of this Court, there were no facts to show that the service of the application to strike out and the notice of set down should be declared not to be good service. The majority judgment found that the appellant tried to cast doubt on whether he received the first striking out application by alleging that he may or may not have received it. It held that there needs to be more and that there was nothing advanced to doubt the first respondent's evidence. It was in the context of these facts, that this Court held as follows:

14.1. Service is a matter within the discretion of the Court in deciding whether or not to issue a rescission.

14.2. Defective service could be condoned. Even if service was defective, it was not invalid. According to the majority judgment, it should be condoned given the circumstances of the appellant's non-compliance with the Court Rules.

14.3. No formal condonation application is required to condone any defects in service. Service is at the Court's discretion and the Court has the inherent jurisdiction to regulate its process.

THE EVIDENCE

15. According to the founding affidavit:

15.1. On 19 November 2022, a Deputy of the first respondent executed an Order by attaching the applicants' property, including a collection of 35 vintage and other guitars.

15.2. On enquiry with the Sheriff, the first applicant was handed a Warrant of Execution: Immovable Property dated 2 November 2022 whereby the applicants were execution debtors.

15.3. The first applicant immediately telephoned his attorney, Mr Roberts who arrived while the Deputy Sheriff was carrying out his attachment. Mr Roberts asked to see a copy of the Writ and permitted the Deputy Sheriff to carry out his duties so that Mr Roberts could soon contact the respondent's attorneys to determine how the circumstances came to pass.

15.4. An exchange of correspondence between the attorneys for the parties culminated in a letter written by the respondents' attorneys of record on 28 November 2022 giving the applicants until 30 November 2022 by which to pay R 307 657. 47, failing which the respondents would uplift the attached property without further notice.

15.5. In the meantime, Mr Roberts contacted the applicants' correspondent attorney to confirm whether a Notice of Bar had in fact been served on them. According to an affidavit deposed to by the correspondent attorney, it is confirmed that no Notice of Bar had been served on the applicants' correspondent attorneys. It is explained that the correspondent attorneys do not have any record of such service on its offices and that it is not their practice to simply sign and date a document in that they would always stamp the document with the stamp of the firm in the event that it was physically delivered.

15.6. The Notice of Bar is signed for by an unknown person.

15.7. Pursuant to the answering affidavit that was filed in the urgent application (determined on 6 December 2022), the applicants came to understand for the first time that judgment by default had been granted on 17 August 2022 and that a Notice of Bar had purportedly been served on the applicants' correspondent attorneys.

15.8. Nowhere in the application for default judgment is there a notice of set down as is required by Uniform Rule 31 (4).

15.9. The applicants further allege the existence of a bona fide defence to the plaintiffs' claim and contend further that they have not been in wilful default.

16. According to the answering affidavit (which the second respondent has deposed to):

16.1. The respondents served a Notice of Bar on the applicants' correspondent attorneys at the specifically appointed and elected address. The following is stated by way of elucidation on this point:

> "13. On or about 18 February 2022, the messenger of the respondents' correspondent attorneys, Van Der Spuy & Partners, physically served a Notice of Bar on the applicants correspondent attorneys. A copy of the served Notice of Bar with the acknowledgement of receipt dated 18 February 2022 is attached hereto and marked as Annexure GDG4.
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> 14. The above-mentioned signature is exactly the same as the signature and handwriting as is seen on the notice of motion for the joinder application and index received on 26 November 2021 by the applicants' correspondent attorneys."

16.2. The Notice of Bar was served personally on the applicants' correspondent attorneys and the affidavit filed on behalf of the respondents do not confirm that the Notice of Bar was not received by their office in that he does not state that he acted as correspondent at the time when the Notice of Bar was served or was in charge of the file at the time, only that he is currently in charge.

16.3. There is no explanation from the correspondent attorney as to what procedure is followed at the offices to receive documents and which person accepts documents on behalf of the firm.

16.4. Despite the fact that the Notice of Bar reflects “served by email”, physical service remains valid service of the Notice of Bar. It is alleged in this regard that it was never put forward by the respondents that the Notice of Bar was served by email. According to the respondents, it has always been their case, that the Notice of Bar was served personally on the applicants’ correspondent attorneys as is evidenced by the signature and date acknowledging same.

16.5. While it is correct that the stamp of the attorneys does not appear on the Notice of Bar, it is alleged that this was nothing more than an omission on their end as no alternative explanation is offered.

16.6. It is accepted that the Notice of Set Down did not comply with Rule 31 (4). The following is stated in this regard:

> “64. The Notice of Bar, properly served on the applicants, informed them that should they fail to deliver their Plea within the time stated, the matter shall be set down for Default Judgment.
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> 65. I am also advised that any non-compliance of Rule 31 (4) alleged can be condoned by the Court hearing the Default Judgment. I am advised that Judge Slingers granted condonation and granted the Default Judgment. The granting of the Default Judgment is in the Court’s discretion.
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> …
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> 68. The Default Judgment was granted after due process was followed by the respondents.

69. Any non-compliance with the Rules, which is denied, was condoned by the above Honourable Court hearing the application for Default Judgment.

70. The Default Judgment was therefore properly obtained and there was no irregularity in the proceedings."

16.7. The respondents further allege the absence of a bona fide defence.

THE ALLEGED NON-COMPLIANCE WITH RULE 31(4)

17. Rule 31(4) provides as follows:

"(4) The proceedings referred to in subrules (2) and (3) shall be set down for hearing upon not less than five days' notice to the party in default: Provided that no notice of set down shall be given to any party in default of delivery of notice of intention to defend."

18. According to Western Cape Practice Directive 18, in all matters to be heard in the Third Division a Notice of Set Down must be filed with the registrar by no later than noon (12 p.m.) on the court day but one prior to the date of the hearing.

19. It is common cause that there was non-compliance with Rule 31(4). In my view, this is fatal for the following reasons:

19.1. First, it is clear that Rule 31(4) is peremptory in its terms. It follows that non- compliance gives rise to a procedurally defective application for default judgment unless condonation has been granted.

19.2. Second, it is clear that no condonation is sought in the application for default judgment and nor is there any reference to non-compliance with

Rule 31(4). The chronology provided in the application ends with a Notice of Bar having been served and filed on 18 February 2022. The Draft Order that is attached to the application makes no reference to non-compliance with Rule 31(4), and condonation being granted as a result thereof.

19.3. Third, the Deponent to the answering affidavit (who is the Second Plaintiff in the matter) avers that he was "advised" that the Judge granted condonation and granted default judgment. No explanation is given as to how this knowledge came to the attention of the Deponent; it is also not confirmed by anyone with first-hand knowledge of this. The allegation of condonation having been granted is founded hearsay by the Deponent, which is not, save in exceptional circumstances, allowed in affidavits. Even then, the Deponent must state the source of his information, and affirm under oath that he believes the statement to be true and give reasons for such belief.[4] Although there was no application for the striking out of these hearsay allegations, in light of the allegations being denied, they have no probative value whatsoever and can be ignored.[5]

19.4. Fourth, I do not accept that the findings in **Obiang** are of application in the present matter. In **Obiang**, service had occurred but it had been alleged to be defective. In assessing whether the service was deficient or not, the

[4] See **Batista v Commanding Officer, Sanab, SA Police, Port Elizabeth** 1995 (4) SA 717 (SE) at 722B and the authorities cited therein: **Geanotes v Geanotes** 1947 (2) SA 512 (C); **Dennis v Garment Workers' Union, Cape Peninsula** 1955 (3) SA 232 (C); **Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd** 1991 (3) SA 276 (SE) at 285.
[5] **Batista v Commanding Officer, Sanab, SA Police, Port Elizabeth** 1995 (4) SA 717 (SE) at 722B.

Court had regard to the equivocation on the part of the appellant and whether on the facts of that matter, in the exercise of its discretion, service had occurred. By contrast, in this matter, it is common cause that there was no service of the Notice of Set Down. This, in circumstances where such service is a peremptory requirement and there is no evidence of condonation having been sought or granted. The difficulties are heightened by the fact that the answering affidavit is founded on hearsay evidence on this score.

19.5. Finally, the result of the aforegoing, is that default judgment was taken in circumstances where the applicants had no knowledge that default judgment would be sought and as a result, were deprived of the opportunity to place their case before Court.

20. For all of these reasons, I am of the view that the failure to have served a Notice of Set Down in accordance with Rule 31 (4) constitutes a ground for reliance on Rule 42 (1)(a). This, in my view, is dispositive of the matter. I shall however proceed to consider the further ground, namely, that the Notice of Bar was not served on the applicants.

THE NOTICE OF BAR

21. The following aspects of the evidence are of relevance:

21.1. As stated, the answering affidavit alleges that the Notice of Bar was served by the messenger of the respondents' correspondent attorneys, on the applicants' correspondent attorneys. There is no confirmatory affidavit by the messenger of the respondents' correspondent attorneys and nor is this person identified. It is also not explained how the Deponent to the answering affidavit came to acquire this knowledge.

21.2. A Notice of Bar is attached to the founding affidavit. It bears a date stamp of the office of the Chief Registrar at the Western Cape High Court, reflecting a date of 21 February 2022. The handwritten date which appears from the Notice is that of 18 February 2022. The Notice of Bar is addressed to the Clerk of the Court and to the correspondent attorneys for the applicants. It reflects the words "service by email" and bears a signature against a handwritten date reflecting that of 18 February 2022. There is a dispute of fact on the papers as to whose signature is reflected on the Notice of Bar as having received it on behalf of the applicants correspondent.

21.3. Also attached to the founding affidavit is an email chain from Charmaine Meyer at SVN Attorneys (Steenkamp Van Niekerk Inc) to Natasha Du Preez at Van Der Spuy Attorneys. This email reads: "*Good day Natasha, Kindly find attached hereto Notice of Bar to be served on the opponents. Please provide me with a copy of the served notice for our records. Thank you kindly.*" In response, Ms Du Preez states: "*Dear Charmaine, we*

confirm receipt of your instructions and shall let you have proof in the usual way."

21.4. An email dated 22 February 2022 from Natasha Du Preez to Charmaine Meyer reflecting an attachment of a Notice of Bar states: "*Included, is proof of delivery of the notice of bar.*"

21.5. A diary entry, taking the form of a handwritten note, states that the Notice of Bar was served.

22. Notwithstanding the above evidence that was included in the application, it is not without significance that the respondents do not identify exactly who served the Notice of Bar, the time at which it was served or any other relevant details pertaining to service. There is also no confirmatory affidavit in this regard, which is of particular significance given that it is apparent from the answering affidavit that the Deponent himself had no personal knowledge of the alleged service.

23. The allegations in the answering affidavit pertaining to service by the messenger of the correspondent attorneys constitute hearsay evidence. As stated, save in exceptional circumstances, such evidence is not allowed in affidavits. No case has been made out for the admission of such evidence, which is in any event, disputed by the applicants.

24. For this reason too, the requirements for the granting of default judgment have not been met. In the circumstances, I am of the view that the default judgment

granted on 17 August 2022 falls to be rescinded and set aside and that the applicants ought to be given a reasonable opportunity to plead to the Particulars of Claim (with or without a Claim in Reconvention).

THE TIMING ISSUE

25. The respondents further take issue with the timing of this application and argue that in light of the order of 6 December 2022, the applicants had 30 days in which to launch this application. On this timeline, the respondents contend that the application for rescission should have been brought by 5 January 2023.

26. The respondents did not address oral argument on this point but made clear that they were not abandoning the point.

27. I am of the view that there is no merit to this argument. On an application of the definition of “court day” in Uniform Rule 2, the application was timeously brought.

28. In any event, the Order of 6 December 2022 expressly made provision that should the applicants fail to institute an application for the relief sought in Part B within 30 days of the date of this Order, the respondents are granted leave to set the matter down accordingly, including the issue of costs. The respondents have taken no steps to have the matter set down.

29. In the circumstances, I am of the view that there is no merit to the argument in respect of timing.

COSTS

30. What remains to be determined is the issue of costs. There is, in my view, no reason to depart from the ordinary rule that costs should follow the event and that the successful party is awarded costs as between party and party.

31. I am not satisfied that a case for costs on an attorney and own client scale has been made out.

32. I am of the view that the second and third respondents, jointly and severally, the one paying the other to be absolved, should bear the costs of this application (inclusive of the urgent proceedings heard on 6 December 2022 under the above-mentioned case number) as taxed or agreed on a party and party scale.

ORDER

33. In the circumstances, I make the following Order:

    33.1. The default judgement granted against the applicants on 17 August 2022 under case number 6810/2021 is rescinded and set aside.

    33.2. The applicants be granted leave within 15 days of the granting of this Order to deliver a Plea (with or without a Claim in Reconvention), an Exception or an Application to Strike Out.

33.3. The second and third respondents, jointly and severally, the one paying the other to be absolved, shall bear the costs of this application (inclusive of the costs in the urgent proceedings heard on 6 December 2022 under the above-mentioned case number) as taxed or agreed on a party and party scale.

_____

K Pillay

Acting Judge of the High Court

Appearances :

For the Applicants:	Advocate A Brouwer
Instructed by:	Roberts Inc (ref: D Roberts)
For the 2nd & 3rd Respondents:	Advocate H Lerm
Instructed by:	Steenkamp Van Niekerk Attorneys (ref: C van Niekerk)