

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



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- | | |
|-----|-------------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES |
| (4) | Signature: _____ Date: 8 April 2024 |

CASE NO : 23459/2022

In the matter between:

DMB TRUCK HIRE (Pty) Ltd

Applicant

(Registration Number: 2019/317180/07)

and

LWAMALAJI LOGISTICS (Pty) Ltd

Respondent

(Registration Number: 2018/532894/07)

In Re

LWAMALAJI LOGISTICS (Pty) Ltd

Plaintiff

(Registration Number: 2018/532894/07)

And

DMB TRUCK HIRE (Pty) Ltd

Defendant

(Registration Number: 2019/317180/07)

JUDGMENT

ERASMUS AJ

INTRODUCTION AND RELIEF SOUGHT BY THE PARTIES

1. This matter concerns a dispute that has been brewing between the parties since 2021. The centre to this dispute is a contract that was signed between the parties during June 2021. The Respondent obtained default judgment during September 2022. This default judgment order is the subject matter of the current application.

2. DMB TRUCK HIRE (Pty) Ltd, being the Applicant in the application before the Court, approach the Court in what can only be described as a shotgun approach for an order setting aside an order that was granted by the Honourable Judge Phooko AJ on 12 September 2022. In addition to the rescission of the order dated 12 September 2022, the applicant also seek an order for costs only in the event that the application is opposed.

3. The Respondent strenuously opposed the application by the Applicant, and are seeking an order that the application be dismissed on an attorney and client scale.

ISSUES TO BE DETERMined

4. This Court is now called upon to determine: -

- 4.1 Should the order dated 12 September 2022 be rescinded and set aside and the Applicant be afforded the opportunity to oppose the action;
- 4.2 Who should pay the costs of the application, and the scale of the cost.

BACKGROUND FACTS

5. On or about 22 June 2021 and at Centurion, the Applicant and the Respondent entered into a written Service Level Agreement (“the Service Level Agreement”). In terms of the Service Level Agreement, the Applicant was to lease a truck and trailer to the Respondent.
6. The material and express *alternative* implied terms of the Service Level Agreement can be summarised as follows:
 - 6.1 The Service Level Agreement commenced on 15 June 2021 despite the date of signature of the agreement (clause 4);
 - 6.2 The Service Level Agreement will endure for a month to month basis and such period may be extended by agreement between the parties (clause 4);

- 6.3 Should either party wish to terminate the agreement, the party wishing to cancel must provide a month written notice of termination to the other party (clause 4);

- 6.4 The Respondent would pay an amount of R110 000.00 for a truck and trailer every month on the 15th of each month (clause 7);

- 6.5 The Respondent was to inform the Applicant of the place where the services was to be rendered (clause 5);

- 6.6 The Respondent was to ensure that the Applicant had unimpeded access to the property where the services was to be rendered (clause 5);

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- 6.7 If either party to the Service Level Agreement commits any act of insolvency or endeavours to compromise generally with its creditors the other party shall be entitled to recover all costs incurred by it on an attorney and client scale (clause 10).
7. At the time of the conclusion of the Service Level Agreement, the Applicant informed the Respondent that it had no trucks available but will outsource trucks from another person. This agreement would be between the Applicant and a third party. The Respondent had no dealings with this third party.
8. The Respondent concluded a 12-month agreement with Xwena Logistics. The truck and trailer that forms the subject matter of the Service Level Agreement was rented for the purposes of complying with the terms of the agreement between the Respondent and Xwena Logistics. For the purposes of this judgment, the further terms of this agreement is not relevant.
9. In compliance with the terms of clause 5 of the Service Level Agreement, the Respondent informed the Applicant that the services will be rendered at the premises of Xwena Logistics.

10. On collection of the truck and the trailer, the Respondent informed the Applicant that the routes that was initially indicated, changed and the Respondent informed the Applicant of the new routes where the truck and trailer will be used. This is consistent with clause 5 of the Service Level Agreement.
11. The Respondent complied with the terms of the Service Level Agreement and on 22 June 2021 the Respondent paid to the Applicant the first month's rental in the amount of R110 000.00 as per the agreement.
12. Upon the indication that the routes that will be used, the owner of the truck and trailer withdrew its truck and trailer. I pause to mention that the Applicant is not the owner of the truck and trailer. The Respondent never concluded any agreement with the owner of the truck and trailer.
13. The obligation in terms of the Service Level Agreement to deliver the truck and trailer always rested on the Applicant. This obligation was not conditional on any provisions.
14. Despite the payment of the first monthly rental and the compliance by the Respondent to inform the Applicant about the site the truck and trailer will be used, the Applicant failed to deliver the truck and trailer as per the Service Level Agreement.

15. As a direct result of the failure to deliver the truck and trailer, the Respondent could not deliver the truck it needed in order to comply with the terms of the agreement concluded between itself and Xwena Logistics. The Respondent was also, due to time constraints, not able to secure another truck and trailer in order to comply with its obligations in terms of the agreement with Xwena Logistics.

16. As a result of this breach, which stems directly from the breach of the agreement by the Applicant of the Service Level Agreement, Xwena Logistics cancelled the contract with the Respondent. As a result of this cancellation, the Respondent lost the income that it would have made from the agreement between itself and Xwena Logistics.

17. The damages suffered by the Respondent is computed as follows:
 - 17.1 The general contractual damages in the amount of R110 000.00;

 - 17.2 Special damages in the form of loss of income in the amount of R541 500.00.

18. On 28 September 2021 the Applicant sought an extension to pay the Respondent back the amount of R110 000.00.

19. The contract between the Applicant and the Respondent therefore was cancelled. The Respondent contents that the reason for the cancellation of the agreement was as a result of the fact that the Applicant failed to deliver a truck and trailer and the Applicant contents that the reason for the cancellation of the agreement is found in the fact that the premises where the truck and trailer will be used, changed.

THE ROUTE THE LITIGATION FOLLOWED

20. On or about 26 April 2022 the Respondent instituted an action against the Applicant for the damages it suffered as a result of the breach of the agreement by the Applicant. The claim was for the following relief:

“1. That the Defendant is ordered to pay the amount of R651 500 to the Plaintiff.

2. Interest on the abovementioned amount calculated at 7.50% from 22 June 2021 to the date of final payment.

3. Costs of suit against the Defendant on an attorney and client scale.

4. Further/alternative relief.”

21. The Combined Summons and the Particulars of Claim was served on the Applicant on 6 May 2022 by way of affixing it to the main gate of the chosen physical address for services of notices. The Return of Service by the Sheriff specifically indicates that *“The defendant moved to Monavoni confirmed by Mr Simon.”*

22. The *dies induciae* expired on 20 May 2022. The Applicant did not file any Notice of Intention to Defend the action against it.
23. During June 2022 the Respondent applied for default judgment.
24. On 30 June 2022, and via e-mail, the Respondent's attorneys of record served the Final Notice of Set Down on the Applicant's. The Notice of Set Down was sent to the following email addresses: info@dmbprojects.co.za ; info@dmbtruckhire.co.za; ssigenu@dmbtruckhire.co.za ; athavhana@dmbtruckhire.co.za; mnefale@dmbprojects.co.za.
25. The Default Judgment was initially set down for hearing on 13 July 2022. The Honourable Judge De Vos J postponed the application to 12 September 2022. The reason for the postponement is not reflected in the evidence before me.
26. On 18 July 2022 the Combined Summons and Particulars of Claim was served on the registered address of the Applicant.
27. On 29 August 2022 the Respondent's legal representative and via e-mail to the aforementioned addresses, provided the Applicant with both the Summons and the Set Down for the hearing on 12 September 2022. The one email address is the email address elected in clause 12.8.1 of the Service Level Agreement.

28. The Applicant did not respond to any of the emails.
29. The matter proceeded and on 12 September 2022 the Honourable Judge Phooko AJ granted an order by default (“the default judgment” or “the 12 September 2022 order”). The order was granted in the following terms:
- “1. That the Defendant is ordered to pay the amount of R651 500 to the Plaintiff.
2. Interest on the abovementioned amount calculated at 7.50% from 22 June 2021 to the date of final payment.
3. Costs of suit against the Defendant on an attorney and client scale.”
30. The order was then emailed to the Applicant on or about 26 September 2022. Despite the evidence that the Court Order was served on 26 September 2022, the Notice of Motion is dated 13 September 2022. The affidavit was signed on 13 October 2022.

LEGAL PRINCIPLES & CONCLUSION ON THE BASIS IN TERMS OF WHICH THE APPLICANT APPROACHES THE COURT

31. There are three avenues through which rescission of a judgment can be obtained:

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- 31.1 The setting aside of a default judgment in terms of Rule 31 (2) (b); or
- 31.2 Rescission of the judgment in terms of Rule 42; or
- 31.3 Rescission under the common law.
32. In the Founding Affidavit, the Applicant does not state under which of these they bring their application to set aside the order by the Honourable Judge Phooko AJ on 12 September 2022. Despite the fact that this aspect has not been dealt with in the Founding Affidavit, the Applicant states in paragraph 1 of the Heads of Argument filed by it that its basis for the rescission is *“in terms of Rule 42 (1) (a), alternatively 32 (1) (b), and further alternatively Common law,”*. As I have already indicated above, this can only be described as a shotgun approach. This approach creates the distinctive impression that the Applicant itself knows that it is not entitled to the order sought by it and try to achieve this goal to shoot and hope it hits the target.
33. In light of the strategy followed by the Applicant, I consider it prudent to briefly deal with the three different avenues and the requirements the Applicant have to meet under any of these avenues. I state this, bearing in mind, of course, that even if the Applicant meets the requirements, the Court retains a discretion as to whether rescission ought to be granted.

34. I will now turn to briefly deal with the requirements and reach the conclusion on the process in terms of which the Applicant approaches the Court for the relief sought by it.

Setting aside a default judgment under Rule 31 (2) (b)

35. Rule 31 concerns default judgments granted in action proceedings where a defendant has failed to file a Notice of Intention to Defend or a Plea after being barred. A Defendant may, within 20 days of acquiring knowledge of the judgment, apply for the Court to set it aside, which the Court may do, on good cause shown.
36. Rule 31 finds application in this matter, as the order which the Applicant wishes to have set aside is an order that was granted by default after its failure to file a Notice of Intention to Defend.

Rescission under Rule 42

37. Rule 42 (1) of the Uniform Rules of Court empowers a Court to rescind an order or judgment erroneously sought or granted in certain circumstances.
38. Rule 42 (1) reads as follows:

“Variation and Rescission of Orders

(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:*

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) An order or q in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) An order or judgment granted as the result of a mistake common to the parties.”

39. A litigant must establish the jurisdictional facts in subrule (1) of Rule 42 before a Court may exercise its discretion to set aside the order. ⁱ

40. The Applicant failed to place any of the jurisdictional factors before the Court in order to place it within the ambit of Rule 42. This Rule therefore clearly does not find application in the current application.

Rescission Under the Common Law

41. Under the common law, the Court is empowered to rescind a judgment obtained on default of appearance, provided sufficient cause for the default

has been shown. ⁱⁱ The Appellate Division in **Chetty** held that the term “*sufficient cause*” (or “*good cause*”) has two elements for rescission of a judgment by default. These are

41.1 that the party seeking relief must present a reasonable and acceptable explanation for his default; and

41.2 that on the merits such party has a *bona fide* defence which, *prima facie* carries some prospect of success. ⁱⁱⁱ

42. For there to be good cause, both of these elements must be met. A failure to meet one of them may result in refusal of the request to rescind. ^{iv}

43. On the consideration of the evidence before me, it is clear that the Common Law also finds application. I will therefore also consider these requirements.

44. In addition: It is possible to rescind a final judgment at common law or other, but very limited grounds, namely fraud and *iustus error*. ^v Neither of these were pleaded by the Applicant and, on the facts before me, neither is present in the current matter.

45. I will now turn and deal with the evidence that was placed before me.

APPLICANT'S EXPLANATION FOR ITS DEFAULT

46. The first hurdle the Applicant needs to cross is the explanation why it never defended the action against it. The Applicant offers the following explanation:
"The summons was served at my old residential area, of which I no longer reside at, even the Applicant area of my business was changed due to unforeseen circumstances that occurred between the property owner and myself. The above-mentioned address in paragraph 2 is the current address of the Applicant and the process of notifying all the clients is underway."
47. It concludes by stating that the Summons never came to its knowledge.

THE DEFENCES RAISED BY THE APPLICANT WITH REFERENCE TO THE MERITS OF THE CLAIM AGAINST IT

48. In an attempt to cross the second hurdle to succeed with its quest to have the Judgment set aside, the Applicant raises the following :-
- 48.1 This Court does not have the necessary jurisdiction as the parties agreed in the Service Level Agreement to the jurisdiction of the Magistrate's Court (clause 10.3 of the agreement);

48.2 The termination of the Service Level Agreement was as a result of the change of routes by the Respondent;

- 48.3 There was no dispute about the refund of the R110 000.00 and the Respondent simply could have completed the refund forms and gets his refund.
49. During argument I allowed the Applicant's counsel to explore further grounds on which there may be a *bona fide* defence to the claim of the Respondent and the basis on which the order was granted.
50. At the outset I need to emphasize that not even this attempt was successful in assisting the Applicant to prove that it has a *bona fide* defence against the claim against it. I hasten to state that despite the fact that these arguments were allowed, I am of the view that if any fruitful argument was raised, it will be a misdirection of this Court to adjudicate this application on aspects that was not canvassed by the Applicant in its papers – neither in the founding papers nor on reply. Parties cannot substantially extend their case during arguments. The other party is entitled to know what case they must meet on the papers. ^{vi} That being said, and as I have stated above, not even an extended argument assisted the Applicant in its quest to have the default judgment order set aside.

APPLICATION OF THE PRINCIPLES TO THE FACTS

51. I have already indicated that the applicant approached the Court in the widest possible sense. I have dealt with the requirements and already concluded that the Applicant is before the Court either in terms of the provisions of Rule 31 or the provisions of the Common Law. Rule 42 of the Uniform Rules of Court does not find application for the reasons already mentioned.
52. I will turn to deal with the requirements separately.

Explanation for Default

53. The first hurdle the Applicant needs to cross is to provide the Court with a proper explanation for its default.
54. I have already indicated that the version of the Applicant is that he left the chosen address and that he is in the process of informing his clients of his new address. No further information is provided. This explanation by the Applicant as to the reason for its default is nothing other than vague and sketchy.
55. In terms of clause 12.8 of the Service Level Agreement, the parties agreed as follows:

“All notices and any other communications whatsoever (including, without limitation, any approval, consent, demand, query or request) by either party in terms of this Agreement or relating to it shall be given in writing, and shall be sent by registered post, or by delivery by hand to the Parties at their relevant addresses as set out below.

12.8.1 If to Owner

Telefax:

079 271 3721

E-mail Address:

mnefale@dmbtruckhire.co.za”

56. Clause 12.11 goes further and determines as follows:

“The parties choose as their physical address in clause 12.8 as their respective domicilia citandi et executandi at which all documents relations to any legal proceedings to which they are a party may be served. If those addresses are change to other addresses which are not physical address in the Republic of South Africa, then the original addresses shall remain the domicilium citandi et executandi until they nominate a new physical address within the Republic of South Africa in writing, to be its new domicilium citandi et executandi.”

57. The Applicant did not select a physical address.

58. In paragraph 1.1, however, the registered office of the Applicant is indicated as *“Corner Lombardi, Wierda road, Sunderland.”*

59. The Summons was initially served in terms of the provisions of Rule 4(1) (a) (iv). The address where the service occurred is in line with the address indicated in paragraph 1.1 of the Service Level Agreement.

60. In a further attempt to bring the proceedings to the Applicant's attention, the proceedings were also served on the registered business address. This is evident from the Return of Service dated 18 July 2022.
61. I have already dealt with the explanation provided by the Applicant. The explanation by the Applicant goes weak on detail. It does not take me into its confidence advising me as to when it left the chosen address. It merely states it left the address. One would expect that an applicant will advise the Court in its Founding Affidavit as to when the move happened.
62. There is also no indication by the Applicant what steps it took to provide a forwarding address or its new address. It merely states that it is in the process of advising its clients of the new address. The reason why the Applicant is so secretive about this information, is unclear. The Applicant is clearly aware of the fact that it needs to provide written notice of the change of address. This especially in light of the fact that it is clear from the contents of the affidavit that the Applicant is blissfully aware of the fact that it needs to inform clients of the change of address.
63. This view is further supported by the contents of clause 12.9 of the Service Level Agreement where the parties agreed as follows:
- “Either party may, by written notice to the other party, change any of the addresses at which the designated person for whose attention those notices, or other communications are to be given.”*

64. Without taking the Court into its confidence as to the time frames when it left the address and the steps it took to inform its clients (including the Respondent), I cannot but to come to the conclusion that this is a hollow explanation as to the default of the Applicant.
65. Merely to state that the Summons did not come to its attention because it left the address and think the Court will come to its assistance is simply not sufficient.
66. At this point I then need to pause and state that the Applicant left the it to the Respondent to place the relevant facts before the Court. The Respondent states that the Applicant on 29 November 2021 informed the clients of the intended relocation to a new business address, but that the numbers and the email address remains the same. The relocation notice reads as follows:

“The purpose of this letter is to notify you that DMB TRUCK HIRE will be moving to a new location on 1 December 2021. As of that date, we will be in operation at new location, which is located just 7km away from the current location. Our phone numbers and email addresses will remain the same, as well as our website address and social media accounts kindly contact our office WhatsApp number (0615367693) to request a pin location. We looking forward to continuing to serve your needs and fulfil our commitments towards your business at our new location.”

67. This in itself is non-complaint with the terms of the Service Level Agreement.
68. What further adds insult to the injury of the Applicant's lack of a proper explanation as to its default, is that it states that the order of 12 September 2022 came to its knowledge as it was sent to it via email. What is, however, left unaddressed in the affidavits by the Applicant is the fact that the Summons and the Set Down of the Default Judgment application for 12 September 2022 was emailed to the very same address to which the Court Order was send. There is absolutely no explanation how the order came to the attention of the Applicant but not the Summons and the Notice of Set Down.
69. I cannot turn a blind eye for the lack of an explanation of this.
70. The Applicant dismally failed to give a proper explanation for its failure to enter an appearance to defendant the action. The first leg in order to succeed with the application is therefore not met.

Bona fide defence against the claim against it

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71. The second leg that needs to be proved is that there is a *bona fide* defence which, *prima facie* carries some prospect of success.
72. I have already summarised the three grounds raised by the Applicant illustrating that it has a *bona fide* defence herein above. I will deal with each and every ground separately.
73. The first ground raised by the Applicant is the ground of jurisdiction. In this regard the Applicant presumably relies on clauses 10.3 and 13 of the Service Level Agreement. It states that this Court does not have the necessary jurisdiction to adjudicate the matter as the parties agreed to the jurisdiction of the Magistrate's Court. In this regard the following:

73.1 At the outset, the issue of jurisdiction does not go to the heart of the defence against the merits of the matter. This aspect does not deal with the merits of the matter. If a court finds in favour of the Applicant on this argument, it will not mean it is the end of the road for the Respondent. The matter will then only proceed in a different forum. This therefore cannot be a *bona fide* defence to the merits of the claim the Respondent has against the Applicant.

73.2 That being said, the terms of clause 10.3 of the Service Level Agreement is clear. It reads as follows:

“In the event that one party institutes legal action against the other party as a result of this agreement, the party instituting the legal action shall have the right, but shall not be obliged, to institute legal action in any Magistrates court having jurisdiction irrespective of the quantum of such claim and/or action.”

[own emphasis added]

73.3 It is clear in the wording of the clause, that the decision as to which court to approach is vested in the person who approaches the Court. There is nothing compelling the Respondent to approach the Magistrates Court.

- 73.4 I do take a very dim view of the fact that the Respondent is attempting to use this as clause in order to create a *bona fide* defence where the wording of clause 10.3 is clear. Especially where this aspect is not raised in the Founding Affidavit or the Replying Affidavit explaining why this part of the agreement giving either party the decision which court to approach should not find application. This failure will have a direct impact when I exercise my discretion when it comes to the costs order.
- 73.5 In light of the fact that the answer to this alleged defence is found in the wording of the agreement, it is not necessary for me to deal with the legal principles of jurisdiction and the provisions of contract where the parties agreed to the jurisdiction of the Magistrates Court.
74. The second ground raised by the Applicant is that the agreement was cancelled as a result of the change of the routes by the Respondent. In this regard, the following:
- 74.1 Without saying it in so many words, this aspect raised by the Applicant speaks to the claim for Special Damages as is claimed by the Respondent. This amounts to R541 500.00;
- 74.2 It is common cause between the parties that at the time of the signature of the Service Level Agreement, the Applicant had no trucks

available to satisfy the terms of the agreement but it undertook to source the necessary truck and trailer from a third party;

74.3 It is further common cause that the Applicant then indeed did source the relevant truck and trailer from a third party, and that the Respondent was not part of the agreement with the third party who rented the truck and trailer to the Applicant.

74.4 The Respondent cannot be bound by the terms of that agreement. The only provisions that are binding between the Applicant and the Respondent is those found in the Service Level Agreement.

74.5 It is common cause that the Respondent informed the Applicant of the premises where the truck and trailer will be used. There is no dispute about the fact that the route where the truck and trailer was to be used changed when the Respondent attempted to take delivery of the truck and trailer;

74.6 The Service Level Agreement, with specific reference to the place where the truck and trailer will be used, provides as follows:

“Lessee undertakes:

...

5.2 *To ensure that the owner has unimpeded access to the property where the Services are to be rendered.*

...

5.5 *To grant the owner full authority to access the Premises for the purposes of carrying out the Services and protecting renter's business, property and persons.*

...

OPERATIONAL OBLIGATIONS

...

- *The Truck and Trailer must only operate within the borders of South Africa"*

74.7 There is no provision in the Service Level Agreement stipulating what the Applicant wishes the case to be. There is no provision in the Service Level Agreement stating that the truck and trailer was to be used only on a specific premises. I was during argument also not directed to such a provision in the Service Level Agreement.

- 74.8 The only requirement is that the Respondent should inform the Applicant of the premises and ensure the necessary access to the premises. It is common cause that this was done by the Respondent.
- 74.9 It seems that the Applicant is attempting to enforce the terms of the agreement it has with the third party onto the Respondent. This can never be, especially in light of the common cause fact that the Respondent is not part of that agreement.
- 74.10 There can be no doubt that the Respondent failed to adhere to the terms of the agreement. As a result (which fact is not denied) the Respondent lost a contract as it could not provide the truck and trailer. There is no evidence that this was as a result of the actions by the Respondent.
- 74.11 In a further attempt to substantiate the rescission, the Applicant expresses the view that the Respondent will be undue enriched as the Respondent is the sole cause of the termination of the Service Level Agreement. Enrichment is unjustified where there is no sufficient legal ground for the transfer of value from one state to the other or the retention of such benefit.
- 74.12 This ground is without any merits, and the Applicant failed to place sufficient facts before the Court to illustrate this argument. I have

already deal with the allegations that the Respondent is the cause of the cancellation of the Service Level Agreement. This can never be.

74.13 This is without any merits.

75. The third ground raised by the Applicant in order to establish a *bona fide* defence is that there is no dispute for the refund of the R110 000.00. In this regard, the following:

75.1 This in itself is an admission of at least a portion of the order / indebtedness. There is no defence to this amount raised. To state that the Respondent should have completed forms for the refund is not a defence.

75.2 This does not create a ground for the rescission of the judgment. The Applicant, in fact, admits to the entitlement of the payment of R110 000.00 in paragraph 7.2 of the Founding Affidavit.

75.3 That being said, this does not raise a defence for the special damages claimed by the Respondent. I have already herein above dealt with the special damages.

75.4 It also needs to be mentioned that the Respondent sketches a different picture. It proves that the refund forms were indeed submitted to the Applicant for the refund. The Applicant asked the Respondent to complete the forms on 16 August 2021. On the forms it is indicated that the refund will be made within 14 days. On 26 September 2021 the Applicant acknowledged that the Respondent completed the forms. The Applicant pleaded to the Respondent for more time to make the refund.

75.5 The undisputed facts are that the Applicant admits the indebtedness to the Respondent in this regard and despite the Respondent taking the required steps, the repayment by the Applicant was simply not forthcoming.

CONCLUSION ON THE MERITS OF THE APPLICATION

76. For the reasons mentioned I find the following on the purported defences:

76.1 The argument that this Court does not have jurisdiction is ill-founded. This does not create a *bona fide* defence to the merits of the claim by the Respondent. No trial Court can come to a different conclusion on this question and it will be pointless to test this question on trial. This does not raise a *bona fide* defence;

76.2 There can be no doubt that there is no provision in the Service Level Agreement that the truck and trailer should be used at only one specific premises. The only requirement was that the Respondent should inform the Applicant and provide access and that the truck and trailer should be used within the borders of South Africa. If this is tested on trial, no other outcome will be reached. This is therefore not a *bona fide* defence as is required in terms of either the rules or the common law;

76.3 The Applicant admits that it is indebted to the Respondent in at least the amount of R110 000.00. The Applicant then attempts to put a rider on this payment and states that the necessary refund forms ought to be completed. The Respondent illustrate that this was done, but that the payment simply was not forthcoming. This does not create a basis for a *bona fide* defence. This confirms the indebtedness for at least that portion of the judgment.

77. For the reasons mentioned, I cannot but to find that the Applicant failed to meet the requirements to rescind the order dated 12 September 2022.

REQUEST FOR PUNATIVE COSTS BY THE RESPONDENT

78. The Respondent seeks and order that the application be dismissed, and that the costs should be paid by the Applicant on an attorney and client scale.

79. The terms of the Service Level Agreement are clear. The party approaching the Court is entitled to the costs on an attorney and client scale. There are no facts before me why I should deviate from this. In fact, the actions and the fashion in terms of which the Applicant approached the Court confirms that a order should be made on an attorney and client scale.

CONCLUSION

80. “Like all things in life, like the best of times and the worst of times, litigation must, at some point, come to an end.”^{vii}

81. For the reasons mentioned herein above, the Applicant failed to place sufficient evidence before the Court to have the order that was granted by the Honourable Judge Phooko AJ on 12 September 2022 rescinded. Any order for rescission will unnecessarily drag out the inevitable. Hopefully this order will bring an end to the litigation between the parties.

ORDER

82. The following order is therefore made:

82.1 The application is dismissed;

82.2 The Applicant is to pay the costs on an attorney and client scale.

Erasmus AJ

Acting Judge of the High Court of South

Africa

Gauteng Division, Pretoria

Appearances:

For the Applicant: Adv L Makgopa

Cell: [...]

For the Respondent: Adv A C Diamond

Cell: [...]

Date of delivery: 8 April 2024

- ⁱ **Minister for Correctional Services v Van Vuren; In Re Van Vuren v Minister for Correctional Services** [2011] ZACC 9; 2011 (10) BCLR 1051 (CC) at para 7
- ⁱⁱ **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A) at 764
- ⁱⁱⁱ **Chetty** at 765
- ^{iv} **Government of the Republic of Zimbabwe v Fick** [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at para 85
- ^v **Kr Sibanyoni Transport Services CC v Sheriff, Transvaal High Court** 2006 (4) SA 429 (T) at para 6. See, too, Harms in LAWSA, Volume 4, Third Edition Replacement, at 601
- ^{vi} The Constitutional Court, albeit in the context of raising new arguments on appeal, noted the following basic principle in **Prince v President of the Law Society of the Cape of Good Hope** [2000] ZACC 28; 2001 (2) SA 388; 2001 (2) BCLR 133 at para 22 : “It is not sufficient for a party to raise ... only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought.”
- ^{vii} **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** [2021] ZACC 28 at para 1