

SOUTH AFRICA / JUDGMENT

Buthelezi Emergency Medical Services (Pty) Limited and Another v Zeda Car Leasing (Pty) Ltd t/a Avis Fleet Services and Another (78303/19) [2020] ZAGPPHC 623 (22 October 2020)

[2020] ZAGPPHC 623

COURT

North Gauteng High Court, Pretoria

BEFORE

B Ceylon

CASE / FILE NUMBER

78303/19

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

DIVISION,

PRETORIA

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE

NO: 78303/19

IN

THE MATTER BETWEEN

BUTHELEZI

EMERGENCY MEDICAL

1st APPLICANT

SERVICES

(PTY)

LIMITED

(REGISTRATION

No. 2013/0645417/07

THAPELO

SAMUEL BUTHELEZI

2nd

APPLICANT

(ID

No: [...])

AND

ZEDA

CAR LEASING (PTY) LTD

1ST RESPONDENT

T/A

AVIS FLEET SERVICES

ROTHMANN

PHAHLAMOHLAKA INC

2nd

RESPONDENT

IN

RE:

ZEDA

CAR LEASING (PTY) LTD

PLAINTIFF

BUTHELEZI

EMERGENCY MEDICAL

1st

DEFENDANT

THAPELO

SAMUEL BUTHELEZI

2nd

DEFENDANT

JUDGMENT

Ceylon AJ

The Applications:

(A) the rescission application:

- [1] This is an application for rescission of the default judgment entered against the respondents on or about 18 November 2019, and directing the 2nd respondent to pay the costs of this application de bonis propriis on an attorney and own client scale, alternatively directing the 1st respondent to pay the costs of this application but only in the event of opposition, and granting the 1st and 2nd applicants further and/or alternative relief.

Background:

[2]

2.1 The 1st respondent (plaintiff in the main action) instituted action in this court for payment of the amount of R 9 589 340.96, interest and costs against the applicants (the defendants in the main action).

2.2 The summons was duly served on the defendants on or about 25 October 2019.

2.3 The defendants (applicants herein) caused a notice of intention to defend to be served on the respondents on 14 November 2019.

2.4 The default judgment was granted by the Registrar against the applicants on 18 November 2019.

2.5 Following the granting of the default judgment the applicants launched this recession application and an application in terms of Rule 45A.

(B) the rule 45A application:

- [3] In this application the applicants seek an order that the execution of the default judgment granted against them on 18 November 2019 be suspended pending the final determination of the rescission application, costs against the respondent in the event of opposition and for further and/or alternative relief.
- [4] Both applications are opposed and will be adjudicated simultaneously. It is common cause that the fate of the rule 45A application to stay execution is dependent on the outcome of the rescission application. It is therefore apposite to deal with the rescission application first.

The applicants' case – rescission application:

- [5] The applicant avers that the default judgment was erroneously sought and/or granted in their absence against them. In light hereof, they rely on rule 42(1)(a) for their rescission application.
- [6] According to the applicants, the respondents were not procedurally entitled to the judgment, therefore the judgment was erroneously granted as envisaged in said rule 42 (1)(a). In the opinion of the applicants, they are not required to show, over and above the above error, that there is good cause for the rescission, as contemplated in rule 31(2)(b). The applicants rely on rule 42(1)(a) itself and *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 SCA at paras 25-27, *Colyn v Tiger Foods Industries Ltd*

t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at pars 6 and 9, Kgomo v Standard Bank of SA Ltd 2016(2) SA 184 (GP) at para 11.7 and Tshabalala v Peer 1979 (4) SA 27(T).

- [7] The applicant raised the question as to whether, in view of the above, the 1st respondent was procedurally entitled to the default judgment. They argue that rule 19(5) of the uniform court rules provides that a defendant may legitimately serve an intention to defend outside the prescribed period allowed for same so long as the default

judgment

has not been granted. If the plaintiff applied for default judgment before the defendant so entered an appearance to defend, the plaintiff will be entitled to costs.

- [8] The applicants continue to argue that rule 31(5) set out the instances where the Registrar may grant default judgment against a defendant who is in default of entering an appearance to defend: in this instance, the applicants entered their appearance to defend after the judgment by default was applied for under rule 31(5)(a), but before the judgment was granted, in which case the jurisdictional facts empowering the Registrar to grant the default judgement and those

entitling the 1st respondent to proceed with the application for default judgment were lacking - relying on Erasmus: Superior Court Practice (2nd edition) Vol 2, Service 12 of 2020 D1 - 364 and Moraitis Inv (Pty) Ltd v Montic Dairy (Pty) Ltd 2017

- (5) SA 508 (Wahaya SCA).

- [9] In their Heads of argument, the applicants indicated that they do not persist with their claim for costs de bonis propriis against the 2nd respondent [para 17 thereof].

- [10] The applicant argues that it is only because the 1st respondent continued with its application for judgment when the applicants were no longer in default, that the judgment was granted. Accordingly, the applicants have brought Themselves within the requirements of rule 42(1) (a) and as such, entitled to the rescission sought.

- [11] The applicant then continues to assert that the respondents, on the other hand, were well aware of the inherent risk associated with their opposition to both applications herein. The 1st respondent should accordingly be mulcted with an appropriate cost order.

- [12] The applicant then concludes that they have met the requirements of rule 42(1) (a) and the default judgment falls to be rescinded and the 1st respondent ought to pay the costs for the application.

The respondents' case – rescission application:

- [13] The respondents contend that service of the summons was effected on 25 October 2019 and the period in which the notice of intention to defend should have been filed expired on 08 November 2019.

- [14] The respondent applied for default judgment in terms of rule 31(5)(a) and was under no obligation to notify the applicants of its application for default judgment.
- [15] The applicants, with explanation for same, served their notice of intention to defend on 14 November 2019. The default

judgement

was granted by the Registrar on 18 November 2019.

- [16] The respondent aver that on 22 November 2019, the respondent's attorneys advised the applicants' attorneys that the default judgment was already applied for. At this stage, the respondents' attorneys did not have any notion that the Registrar already granted judgment on 18 November 2019. No response was received for this notification.
- [17] The respondent's attorney again on 16 January 2020 advised the applicants' attorneys that default judgment had been granted and that the applicants had until 13 February 2020 to bring their rescission application in terms of rule 31 (2) (b) and, the applicants did not respond to this correspondence, and the applicants failed to satisfy the debts.
- [18] The respondent caused a writ of execution to be issued around 20 February 2020. The sheriff then commenced execution. The applicants then proceeded to issue applications for rescission and to stay execution of judgment on 12 March 2020, served on 13 March 2020.
- [19] The respondent argues that the common law does not avail the applicants for rescission of judgment due to the fact that "sufficient cause" must be shown relying on *Chetty v Law Society, Transvaal* 1985 (2) SA 76 (AD) at 764I -765E.
- [20] The respondent asserts that a rescission in terms of rule 31(2) (b) also does not avail the applicants. They contend that the requirement in terms of the latter rule is the existence of a substantial defence, in which it will be sufficient for the applicant to show a prima facie case or the existence of an issue which is fit for trial. The applicant need not deal with the merits of the case fully, but only

set out their grounds for defence in sufficient detail to enable the court to conclude there is a bona fide defence and that the application is not made merely for the purpose of harassing the respondent. For the aforementioned, the respondent

rely on, inter alia, *Silber v Ozen Wholesalers (Pty)Ltd* 1954 (2) SA 345 (A) at 352 G-H , *PLG van Rensburg en Vennote v Den Dulk* 1971 (1) SA 112(W) , *Brown v Chapman* 1928 TPD 320 and *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476.

- [21] With regards to rule 42, the respondent opines that its purpose is to correct expeditiously an obviously wrong judgment or order- relying on *Bakoven Ltd v GH Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 47/E-F, and *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411(C) at 417 B-I .

- [22] According to the respondents, for the applicant to succeed with a rescission application under rule 42(1)(a) the applicants must show that the prior order was “erroneously sought or granted in the absence of any party effected thereby. Once the court find that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order, and it is not necessary for a party to show good cause for the sub- rule to apply [citing *Duma v ABSA Bank Ltd* 2018 (4) SA 463 (GP)]. Accordingly, the applicants are not entitled to proceed under rule 31(2)(b).
- [23] The respondent contends that generally, a judgment is erroneously granted if there existed at the time of its issue, a fact of which the court was unaware, which would have precluded the granting thereof and which would have induced the court, if aware of it, not to grant the judgment – citing, inter alia, *Ngingwa v Moolman* NO 1993 (2) SA 508 (TK) at 510 D-G and *Thomani v Seboka* NO 2017 (1) SA 51 GP at para 58 C-E.
- [24] The respondent explains further when an effected party invokes rules 42(1)(a) the question is whether the party that obtained the order was procedurally entitled to it, and if so, the order could not be said to have been erroneously granted in the absence of the affected party. An applicant or plaintiff would be procedurally entitled to an order when all affected parties were adequately notified of the relief that may be granted in their absence. The relief need not necessarily be expressly stated. The respondent concludes to state that it suffices that the relief granted can be anticipated in view of the nature of the proceedings, the relevant disputed issues and the facts of the matter. A judgment to which a party is procedurally entitled is therefore not granted erroneously within the meaning of this sub-rule by reason of facts of which the court was unaware at the time at which the judgment was granted. Accordingly, in view of the aforementioned, the applicants cannot succeed with this rescission application under rule 42(1)(a).The applicants therefore prays that the application should be dismissed with costs on an attorney and client scale.

Legal principles:

- [25] There are various options available to a litigant to rescind a judgment obtained in their absence, to wit, in terms of the common law, under rule 31(2)(b) and rule 42(1)(a) [*Freedom Stationery (Pty) Ltd and Others v Hassam and Others* (2019) (4) SA 459 (SCA) at 465 E-F].
- [26] To rescind a judgment under common law, “ sufficient cause” must be shown [*Chetty v Law Society* , supra] and in terms of rule 31(2)(b) “good cause” is required [*Siber v Ozen Wholesalers and Colyn v Tiger Food Industries*, supra, and *Vilvanathan and Another v Louw* 2020(5) SA 17 (WCC)].
- [27] Rule 42(1)(a) provides that:
- ‘(i) the court may, in addition to any other powers it may have, mero mutuo or upon 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.”

[28] The prerequisites that the applicants needs to satisfy under this sub-rule are the following:

- (a) the default judgment must have been erroneously sought or granted;
- (b) Such judgment must have been granted in the absence of the applicants; and
- (c) The applicants’ rights or interest must be affected by the judgment [Muthebwa v Mulebwa and Another 2001 (2) SA at pg 199F].

[29] The latter two requirements are obvious and does not need further consideration, and can be taken as having been established by the applicant. However, in order to succeed for rescission under this sub-rule, the applicants bear the onus of establishing that the judgment was erroneously granted (Bakoven Ltd v GJ Howes (Pty) Ltd 1990 (2) SA 446 at pg 469B).

[30] The meaning of the words “erroneously granted” was explained in Bakoven, *supra*, where the court held:

“An order or judgment is “erroneously granted” when the court commits an error in the sense of a mistake in a matter of law appearing on the proceedings of a record’ (The Shorter Oxford Dictionary). It follows that a court in deciding whether a judgment was ‘erroneously granted’ is, like a Court of Appeal, confined to the record of proceedings. In contradiction to relief in terms of rule 31(2) (b) or under common law, the applicant need not show ‘good cause’ in the sense of an explanation for his default and a bona fide defence (Hardroad (Pty)Ltd v Oribi Motors (Pty) Ltd (supra) at 578 F-G; De Wet (2) at 777 F-G. Tshabalala and Another v Pierre 1979 (4) SA 27 (T) at 30 C-D. Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission”.

[31] Accordingly, the words “erroneously granted” means that the court (or Registrar) must have committed a mistake in law, which appears from the record of proceedings itself. The question then arises as to whether the applicants is correct in their contention that the court made a mistake in law in granting the default judgment in this matter [HA Smit v A Olivier 18322/2008 (ZAWCHC) at paras 11-13].

[32] In Dlamini Construction (Pty) Ltd v Future Logistical Solutions CC (21429/2006) TPD at para 31, it was held that “it is worth mentioning at this stage that in terms of rule 42(1) the applicant

does not have to show good cause. Once the court holds that an order or judgment was erroneously granted it should without further enquiry rescind same [referring to Hardroad v Oribi Motors and Tshabalala v Peer, *supra*]. This is not to say the court has lost its discretion to refuse a rescission in the latter circumstances. It was held that the court retains its discretion to refuse a rescission of judgment nonetheless. [Schutte v Nedbank, *supra*, at paras 60-61; Van der Merwe v Bonaero Park (Edms) Bpk 1998 (1) SA 697 (T) at 703-704].

- [33] Default judgment by the Registrar is regulated by rule 31(2) of the uniform rules of court. It applies when the defendant is in default of delivery of their notice of intention to defend or of their plea. Whenever a defendant is in default of delivery of same, the plaintiff who wishes to obtain default judgement shall, where each claim is for a debt or liquidated demand, file with the Registrar a written application for judgment [rule 31(2)(a) and 31(5)(a); *Schutte v Nedbank Ltd* (73759/17)[2019] ZAGPPHC 950 (13 December 2019) at para 33].
- [34] Rule 19 of the uniform court rules deal with notice of intention to defend. Rule 19(5) states that , “notwithstanding the provisions of subrules (1) and (2) a notice of intention to defend may be delivered even after the expiration of the period specified in the summons or the period in subrule (2), before default judgment has been granted: Provided that the plaintiff shall be entitled to costs if the notice of intention to defend was delivered after the plaintiff had lodged the application for default judgment.

Evaluation:

- [35] It seems to this court that the parties are *ad idem* that the applicants are not entitled to apply for rescission of default judgment under Rule 31 (2) (b) or the common law and as envisaged in *Chetty v Law Society, Transvaal* 1985(2) SA 756 (AD) at 764i-765E (common law) and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003 (6) SA, (SCA) at para 1 [Rule 31(2)(b)]. The applicants' application is in terms of subrule 42(1) (a) which was fully outlined herein-above. The purpose, nature and extent of this subrule was analysed in detail by the respondents in paras 16-22 of their HOA relying on, inter alia, the *Bakoven* and *Promedia Drukkers* decisions, *supra*, *Duma v Absa Bank Ltd*, *Nyingwa V Moolman NO* and *Freedom Stationary (Pty) Ltd v Hassam* ,*supra*, at paras 465 H and 467 G-H. In essence, the respondents submit that the applicants are not entitled to rescission of judgment. The applicants, relying on, inter alia, the said *Freedom Stationary*, *Lodhi 2 Properties Investments CC*, *Colyn v Tiger Food Industries*, *Kgomo v Standard Bank SA Ltd*, decisions, *supra*, contend that they are entitled to bring the application under subrule 42(1)(a).
- [36] Having had regard to the above arguments of the parties, the case law and court rules submitted, and the facts of this matter, this court is of the view that the applicant seeks to have the judgment rescinded on the basis of being sought and/or granted erroneously and therefore under subrule 42(1)(a).
- [37] The applicants indicated that they bring this application in terms of subrule 42(1)(a) and as such, obliged only to bring themselves within the jurisdictional facts of the said sub- rule, which they argue, they have done. Accordingly, they are not obligated to traverse the merits of the 1st respondent's claim in the main action against them.
- [38] The respondents aver that the applicants are not entitled to the relief sought, either on the grounds set out in the founding affidavit or otherwise. They continue to argue that in any application for rescission for default judgement, the applicants must show cause why the remedy should be granted, which entails giving a reasonable explanation for the default, showing that the application is made *bona fide* and that there is a *bona fide* defence to the

plaintiff's claim which prima facie has some prospects of success. In addition, the application must be brought within 20 days after the defendant has obtained knowledge of the judgement. The respondents submit that the applicants failed to comply with the above requirements.

- [39] In their founding affidavit [paragraphs 18-20] the applicants argue that the default judgement was erroneously sought and/or granted in their absence and therefore falls to be rescinded under the said subrule 42(1)(a). In these circumstances, they submit, they brought themselves within the jurisdictional requirements of said subrule, and therefore they are not obligated to set out their defence on the merits. This is also the position the applicants take in their replying affidavit [eg. paras 10-11]. Relying on *Kgomo v Standard Bank of SA Ltd* (2016) (2) SA 184 GP at para 11.7 and *Tshabalala v Peer* 1979 (4) SA 27 (T), the applicants argue that for a rescission under the said subrule, it is not required to show, over and above the error, that there is good cause for the rescission, as contemplated in rule 31(2)(b).
- [40] It appears that the respondents, in paras 18-19 of their HOA, concede that the applicants is correct in their above contentions that it is not necessary to show cause and set out their defence on the merits under subrule 42(1)(a).
- [41] This court agrees that the applicants brought the application correctly under rule 42(1)(a) and with the contentions of the applicants in the latter regard, and find that it is not necessary for the applicants to traverse the merits of the respondents' claim under this subrule. The onus is herefore on the applicants to only show that the default judgment was erroneously sought and/or granted in their absence as required inter alia in the *Bakoven* and *AH Smit v A Olivier* decisions, supra.
- [42] The applicants, in paras 9-20 of their founding affidavit, asserts that the default judgment was erroneously sought and/or granted. They also deal with same in paras 4-7 and 10-17 of their replying papers, as well as paras 12-16 of their HOA.
- [43] The applicants, in answering the question as to whether the 1st respondent was procedurally entitled to proceed with the default judgment, argues that in terms of rule 19 (5) of the Uniform

Court Rules, a defendant may lawfully serve a notice of intention to defend outside the prescribed dies allowed for same. This is the position for as long as the default judgment is not granted. Where the plaintiff applied for default

judgment before the defendant filed their notice of intention to defend, the plaintiff will be entitled to the costs of the default

judgment in terms of this rule.

- [44] The applicants then submits that rule 31(5) sets out the instances where the Registrar may grant default judgment against defendants in default of filing their notices of intention to defend: in this instance, the notice of intention to defend was entered after default judgment

was applied for under rule 31(5)(a) , but, however, before the Registrar granted it. As such, the jurisdictional facts empowered the Registrar to grant the judgment and entitling the 1st respondent to proceed with the application for default judgment were lacking, so the applicants submitted [relying on Erasmus: Superior Court Practice (2020) and Moraitis Inv (Pty) Ltd, supra].

- [45] The applicants argued further that it is only because the 1st respondent proceeded with its application for default judgment when the applicants were no longer in default of entering this appearance

to defend, that the judgment was granted. Accordingly, the applicant have brought themselves within the requirements of subrule 42(1)(a) and therefore entitled to the rescission sought.

- [46] In the founding affidavit [paras 9-20] the applicants explain that after the summons was served on them, their attorneys served their notice of intention to defend on the 2nd respondent (who is the attorney of the 1st respondent) on 14 November 2019. Hereafter, on 22 November 2019 addressed a letter to the applicants, wherein the 2nd respondent (attorney) pertinently referred to the applicant's notice of intention to defend, indicated that it had been served on 14 November 2019 and that the dies inducia for the appearance to defend has lapsed on 08 November 2020 [this letter was annexed as annexure "FA2" to the founding affidavit]. The letter further stated that the 1st respondent already applied for default judgment in terms of rule 31(5)(a) [annexure "FA4" is a copy of the default judgment].

- [47] The above documents revealed that the judgment was granted on 18 November 2019, after the notice on intention to defend was served, and that the 2nd respondent conceded that the notice was served before the judgment was granted.

- [48] The respondents then invited the attention of the applicants to the provisions of rule 31(2) (b) to apply for the rescission of the judgment granted within 20 days, failing which the 1st respondent would proceed with execution steps

- [49] It is the applicants' argument that the 1st respondent was entitled to apply for default judgment for as long as the applicants were in default of entering an appearance to defend. The 1st respondent was, however, not entitled to do so once the applicants entered such an appearance to defend. The applicants argue that the 1st respondent, through the 2nd respondent, should have halted immediately its application for such judgment as the applicants were no longer in default. The respondents, with full knowledge of the notice to defend having been entered wrongly and erroneously, continued with the application for such judgment notwithstanding the fact that the applicants were no longer in

default, so the applicants argued.

- [50] The applicants are adamant that had the Registrar, who granted the judgment, been made aware of the fact that the appearance to defend had been entered, the Registrar would have declined to grant the judgment. As best, the 1st respondent would only have been entitled to the cost of such judgment, and not the judgment itself. The 2nd respondent ought to have informed the Registrar, but it did not. It rather continued with the application for default judgment. Accordingly, and in the above circumstances, the default judgment was erroneously sought and/or granted in this absence, and the applicants therefore aver that it falls to be rescinded under subrule 42(1)(a) and as such, the applicants are not obliged to deal with the merits of their defence on the merits.
- [51] The respondents took issue with the above mentioned arguments of the applicants. They denied that summons was served on 12 November 2019 and contend that service was affected on 25 October 2019. According to the respondents, the applicants had until 08 November 2019 to serve and file their notice of intention to defend, which they failed to do, and on 13 November 2019 the 1st respondent applied for default judgment under rule 35(5) (a) of the Court Rules. The respondents admit that the applicants served their notice of intention to defend on 14 November 2019, but this was after the 1st respondents applied for default judgment. However, the respondent admits that this was also before judgment was granted on 18 November 2019.
- [52] The respondents indicates that the letter of 22 November 2019 speaks for itself and requires no interpretation: it merely pointed out that the applicants have to utilised the mechanism of rule 31(2)(b) in order to have the default judgment set aside and even advised when the dies would expire.
- [53] According to the respondents, the applicants conceded that the 1st respondents were entitled to apply for default judgment whilst the applicants remained in default, but denied that there was a duty on the 2nd respondent to halt the application for default judgment once the applicants defended the matter. Accordingly, to the respondents, there was no such duty, particularly in view thereof that the notice of intention to defend was well out of time, was not accompanied by any letter explaining the reasons for the delay and seeking condonation or some other form of succor. The respondents submits that the applicant's attorneys did not respond to their correspondence of 22 November 2019 (wherein which it was advised that default judgment was already applied for) nor of 16 January 2020 (wherein it was indicated that judgment was already granted).
- [54] The respondents denied that the 2nd respondent wrongly and erroneously continued with the application for default judgment. The respondents concede that the applicant, by delivering their notice of intention to defend on 14 November 2019, was no longer in default, but argues that the notice was served out of time without an explanation and without a request to condone the late delivery.

- [55] The respondents argue that the applicants seeks to rely on rule 42(1)(a) because they were out of time for an application in terms of rule 31(2)(b) and contend that rule 42(1)(a) finds no application in this instance. They contend further that it is always incumbent on an applicant to set out their defence on the merits in rescission applications. They contend that the applicants have no defence to the merits, and If they had, they should have raised it. The applicants' failure to do so is an indication that they were merely attempting to delay the inevitable, namely the execution for the payment of approximately R10 Million together with interest and costs. The respondents are of the opinion that the applicants did not make out a proper case for the relief sought and the application should be dismissed with costs.
- [56] In the view of this court, the respondents correctly points out that the correct date of service of the summons (main action) is 25 October 2019, and not 12 November 2019. The applicants conceded this point. This is clearly evidenced by the return of service in respect of the summons. This issue is therefore not in dispute.
- [57] It is common cause that the dies (in respect of the service of the notice of intention to defend) lapsed on 08 November 2019, that default judgment was applied for on 13 November 2019, the notice of intention to defend was served on 14 November 2019 and that default judgment was granted on 18 November 2019.
- [58] With regards to the reference by the respondents that they applied for default judgment in terms of rule 35(5) (a), the applicants took issue with same, advising that this rule applies to discovery and not judgment applications. Rule 35 concerns the discovery, inspection and production of documents. The applicants are correct in their contention. This court is, however, of the view that
- the respondents refer to rule 31(5)(a) rather than to rule 35(5)(a), and this appears to be a bona fide typing error on the part of the respondents.
- [59] It is also common cause between the parties that the 1st respondent was entitled to apply for default judgment as long as the applicants did not enter their appearance to defend. This follows after the applicants conceded this in their papers. There is therefore no dispute on this point anymore.
- [60] With regards to the issues raised in respect of the late delivery of the notice of intention to defend by the respondents, advising that the applicants should have provided an explanation for the lateness and seek condonation in respect thereof. The respondents did not refer this court to any case law, court rules or other sources to substantiate their argument. The applicants relies on rule 19(5) read with rule 31(5)(a) in relation to this issue.
- [61] In *Rainbow Farms (Pty) Ltd V D Fransman (5684/99) [LCC64R/99]* it was held that a defective notice of intention to defend cannot just be ignored. Until it is set aside by court, it stands and the case will have to proceed as a defended matter [paras 9-12 thereof]. This court sees no reason why the same principle cannot be extended to valid notices of intention to defend, even served out of time. In addition, in terms of rule 19(5), service of a notice of intention to

defend can lawfully be affected after the expiry of the dies in which it should have been so filed. This court is therefore not in agreement with the respondents' contention mentioned above in respect of same.

- [62] This court is of the opinion that it is not a legal requirement in terms of rule 19(5) that a defendant (applicants in casu) explain their late filing of such notice or to seek condonation for same.
- [63] Returning to the argument as to whether or not the respondents was procedurally entitled to the judgment, it was already established that the respondents were entitled to apply for the default judgment. However, the applicants only conceded that to be correct for as long as the applicants did not enter their appearance to defend, that is, only when they remain in default of entering such appearance to defend. As indicated previously, the applicants concede this and it is therefore not in dispute, and the subsequent question is therefore if the 2nd respondent had a duty to inform the Registrar that the applicants did, in the meantime, file their notice of intention to defend. According to the applicants, the answer to this question is affirmative, whilst the respondents the

answer is in the negative.

- [64] This court is not persuaded by the respondents argument on the latter point. In the view of this court, all litigants are duty bound to inform the court (which include the Registrar) of all facts and furnish all relevant information pertaining to their case. This is more so in the case of an officer of the court. The respondents' decision not to inform the Registrar of such crucial information and/or document (notice of intention to defend) is not proper as this information would definitely influence the decision of the Registrar. This court is of the view that the Registrar, had he known of the existence of the notice of intention to defend, would not have granted the default judgment. It is this court's opinion that the Registrar should have been informed immediately after the 2nd respondent received service of the said notices.
- [65] The respondent's entitlement to seek the default judgment, in view of this court, lapsed when the applicant was no longer in default in entering its appearance to defend, and, at that point, the respondents were not entitled to default judgment. In other words, the respondents were at that point not procedurally entitled to the judgment anymore. Accordingly, the judgment was

erroneously sought and granted, as envisaged in rule 42(1)(a), and the Bakoven, Smith v Olivier and Lodhi 2 Properties decisions, *supra*.

- [66] The respondents contended that it is always necessary for an applicant to set out their defence on the merits in their application for rescission of judgment. As indicated previously, the applicants dispute this contention. The applicants argue that this is not necessary for an application under subrule 42(1)(a). This court shares the applicants' views on this point. In Bakoven *supra* (where the court relied on Hardroad (Pty) Ltd v Oribi Motors,

De Wet and Tshabalala and Another v Pierre, supra) and held that the applicant need not show “good cause” in the sense of an explanation for his default judgment and a bona fide defence.

[67] In light of the above circumstances, it is the court’s view that the judgment was erroneously sought and/or granted in the absence of the applicants and therefore falls to be rescinded – in the words of the Bakoven decision supra, “Once the applicant can point at an error in the proceedings, he is without further ado entitled to rescission”.

[68] It was indicated earlier that the rescission and rule 45A applications were to be adjudicated simultaneously. This court then first dealt with the rescission applications and held that the applicants succeeded in making out a proper case for the relief sought. Accordingly, the basis for the rule 45A application has fallen away and there is therefore no need to adjudicate the rule 45 application in the circumstances [Enoch Mgijima Local Municipality v Milowo Trading Enterprise (528/2018) ZAECGHC [Para 12]].

Costs:

[69] The general principle is that costs follows the result except where there are good grounds to deviate from this principle [Myers v Abrahmson 1951

(3) SA 348 (C) at 455].This court finds no reason to deviate from this principle in the circumstances of this case.

[70] The applicants effectively abandoned their application for costs de bonis propriis against the 2nd respondent [refer to paragraph [9] of this judgment]. It is therefore not necessary for this court to deal with same. However, the applicants persist to seek costs against the respondents in respect of both applications mentioned herein-above, in the event that the applications are opposed, which it was.

[71] This court agrees with the applicants’ contention that the conduct of the respondents [in dealing with the default judgment after the applicants were no longer in default, including their persistence to hold on to the judgment and to proceed with execution steps] should be met with a punitive cost order. Accordingly, a punitive cost order will be awarded.

Order:

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

- (1) the application for rescission of judgment is granted;
- (2) the default judgment granted against the applicants on 18 November 2019 is hereby rescinded and set aside;
- (3) the applicants shall deliver their plea within twenty (20) days of date of this order;
- (4) the respondents are ordered to pay the costs of the rescission and rule 45A applications on an attorney and client scale, jointly and severally, the one to pay the other be absolved for.

B CEYLON

ACTING JUDGE OF THE HIGH COURT

Appearances:

Date of hearing

: 05 August 2020

Date of Judgment : 22 October 2020

For the Applicant : Adv AL Williamson

Instructed by

: B K Msimeki Attorneys

For first Respondent : Adv T P Kruger, SC

Instructed by

: Rothmann Phahlamoklaka Inc

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