

SOUTH AFRICA / JUDGMENT

Calitz v Buys N.O and Others (2696/2024)

[2025] ZAFSHC 130 (8 May 2025)

[2025] ZAFSHC 130**COURT**

Free State High Court, Bloemfontein

BEFORE

Boonzaaier AJ

CASE / FILE NUMBER

2696/2024

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Policy

IN THE HIGH COURT OF
SOUTH AFRICA,
FREE STATE DIVISION,
BLOEMFONTEIN

Not reportable**Case****number: 2696/2024****In the matter between:**

PETRUS HENDRIK
CALITZ
(Identity number:
8[...])
APPLICANT
And
STEFANUS CARL BUYS
NO
(In his capacity as
Trustee of the
Middelkraal Property
Trust, TMP[...])
RESPONDENT

In re: STEFANUS CARL BUYS
NO
PLAINTIFF
(In his capacity as
Trustee of the
Middelkraal Property
Trust, TMP[...])
And
PETRUS HENDRIK
CALITZ
DEFENDANT
(Identity number:
8[...])

Neutral Citation: Petrus Hendrik Calitz v Stefanus Carl Buys NO (2696/2024)

Coram: BOONZAAIER AJ

Heard: 17 April 2025

Delivered: 08 May 2025

ORDER

1
The application for leave to supplement the founding affidavit is granted.

2
The application for rescission of the default judgment granted on 15 August 2024 is dismissed with costs.

3
The
application for the setting aside of the writ of execution dated 8 September 2024 is dismissed.

4
The defendant is ordered to pay the costs of the application on a party and party scale which includes counsel's fee on Scale C.

JUDGMENT

.

- [1] This is an application for rescission of a Default Judgment and a related writ of execution in terms of rule 42(1)(a) and/or rule 31(2)(b) of the Uniform Rules of Court which was granted by this court on 15 August
2024. The applicant was the defendant in the main action and the respondent, the plaintiff. For the sake of convenience, I will refer to the parties as they appeared in the main action.

- [2] The defendant has also sought leave to supplement the founding affidavit by appending the summons and particulars of claim marked Annexure “SA1” and further applied for the writ of execution dated 8 September 2024 to be set aside.

Factual

background

- [3] According to the particulars of claim dated the 16 May 2024, the Trust, duly represented by both the plaintiff and the defendant, concluded a written lease agreement on 23 February 2018 (hereinafter ‘the agreement’). In terms of the agreement, it was effective for a period of five years and expired upon the effluxion of the time on 22 February 2023.
- [4] The parties also concluded an addendum rental agreement dated 16 May 2023. The rental periods provided to be from the 1 March 2023 to 31 May 2023; 1 June 2023 to 31 August 2023; and, lastly, 1 September 2023 to 30 November 2023. Both the rental agreement and the addendum also included a Shifren clause.[1]
- [5] During or about November 2023, the plaintiff and the defendant concluded a further oral agreement in terms of which the defendant would rent the farms as previously, for a period of three months commencing at the end of November 2023 until the end of February 2024. The oral agreement expired due to the effluxion of time on 29 February 2024.
- [6] The plaintiff issued the first action under case number 1172/2024, claiming arrear rental payments in terms of the first agreement, addendum rental agreement and the oral agreement. The defendant defended the claim and filed a plea and counterclaim.
- [7] Ultimately the litigation under the aforesaid case number was settled, reserving the defendant’s rights to institute action for his counterclaim under a new case number.
- [8] The defendant did not honour his obligations and the plaintiff issued a second summons with case number 2696/2024. The defendant received this documentation on 21 May 2024.
- [9] Pursuant to failure to defend, the defendant obtained default judgment and, subsequent thereto, a writ of execution against the Defendant on 17 September 2024. The sheriff issued notice of attachment on the 23rd of September 2024 in terms of which livestock had been attached.

Defendant

- [10] The defendant outlines the background leading to the judgment as follows:
- (a) The defendant received summons from the sheriff at the Caltex Garage, Wepener, scanned the documents and mistakenly believed that it forms part of the matter under case number 117/2024 and believed his attorney would attend to the same on his behalf.

- (b) This failure came to the knowledge of the defendant on 23 September 2024 when the sheriff attached the livestock. The defendant thereafter took all the necessary steps to give instructions and to appoint a new attorney on 1 October 2024 to deal with the matter. The newly appointed attorney obtained all the documents by 3 October 2024.
- (c) The sheriff held instructions to proceed with the defendant's assets on 7 October 2024. This led to an urgent application which was withdrawn after receiving the answering affidavit.
- (d) The cause of action in the main action arose from damages suffered due to the non-compliance with an agreement, as set out in an addendum, relating to payment for occupation of land from 1 March 2024 to 31 May 2024.
- (e) The defendant is relying on rule 31(2)(b) and rule 42(1)(a) of the Uniform Rules of Court.
- (f) The plaintiff's claim is for arrear rentals from the 2018 written agreement and the written 2023 Addendum agreement. The particulars of claim failed to lay a basis in terms of which the plaintiff may claim from the defendant for the period 1 March 2024 to 31 May 2024.
- (g) It is the defendant's case that it is evident, that the default judgment which was granted by this court stands to be vacated by virtue of it being erroneously sought or granted on the basis that no cause of action is disclosed in the summons and particulars of claim.
- (h) In the alternative, the defendant relied on rule 32(1).
- (i) The defendant submitted that it was evident that the defendant met both the requirements of rule 42(1)(a), namely that the judgment was granted in its absence and that the defendant provided a reasonable and satisfactory explanation for its failure to file its plea.
- (j) The defendant is of the contention that the plaintiff did not place all the terms of the oral agreement before the court. It is clear that the plaintiff has not placed all the relevant terms to its claim. This confirms the selective manner in which the plaintiff had placed the terms of the agreement before the court.
- (k) The defendant further argued that the plaintiff caused the court to issue judgment based on incomplete facts and an incorrectly pleaded agreement.
- (l) Consequently, the judgment was granted erroneously and ought to be set aside in terms of rule 42(1) alternatively rule 32(1) (b) of the Uniform rules of Court.
- [11] Counsel for defendant submitted that the shifren clause as well as the parol evidence rule find application in that the oral agreement cannot change the subsequent written orders. The agreements in writing are the sole memorial of the agreement, no further agreements or evidence can change that.

[12] Counsel for the defendant further argued that the prejudice the defendant would suffer outweighs that of the plaintiff, though they failed to elaborate on the specific circumstances constituting such prejudice.

[13] The defendant indicated that, due to the following, he has a good cause:

(a) He was not mala fide or wilfull.[2]

(b) He has good prospects of success: he has a defense against the plaintiff.

(c) He also has various counterclaims: he did not have the opportunity to institute a counterclaim, or to plead to the accusations, which was not due its own fault.

[14] It is further contended that the defendant advanced a satisfactory explanation why he needs to come onboard, notwithstanding the plaintiff's contention that good cause is absent to justify the rescission in terms of Rule 31(2)(b).[3]

Plaintiff

[15] The plaintiff, on the other hand, is adamant that the rescission was granted properly and correctly in terms of the Uniform Rules of Court.

[16] It is the defendant's main issue that an order is erroneously granted if it was legally incompetent for the court to have made such an order, if there was an irregularity in the proceedings or if the court was unaware of fact, if known to it would have precluded it from a procedural point of view from making the order or granting the judgment.[4] Also, if a party is procedurally entitled to judgment, the fact that the court was unaware of a 'defence' which the defendant could have raised not mean that the judgment is erroneously granted. [5]

[17] The defendant alleges that it has a counterclaim for damages that can stand as a valid defence against the claim of plaintiff, hence the question in this regard is whether the existence of the said counterclaim constitutes a fact which, if known to the court, precluded it from a procedural point of view from granting the default judgment.

[18] Plaintiff argued that any counterclaims were waived in the settlement agreement and must be pursued in accordance with the settlement agreement via a new action.

It was also argued that the existence of a counterclaim, valid or not, does not imply, that there was any misdirection as regards to procedure.

[19] The defendant claims that the particulars of claim lack a cause of action. The plaintiff argued that, at most, this point could be characterized as vague or embarrassing, and could have been raised but not that it lacks a cause of action.

[20] The plaintiff argued further that it is clear from the defendant's founding affidavit that, although it applied for rescission in terms of rule 42, the facts set out in the founding affidavit constitute an attempt to satisfy the requirements for rescission of judgment in terms of rule 31(2)(b) or in terms of the common law.

[21] Counsel for the plaintiff submits that, under this rule, the defendant must show good cause for the rescission of judgment. Good cause means that the defendant:

- (a) has a reasonable explanation for its default;
- (b) that the application is bona fide claim.

[22] In terms of the common law, a court is entitled to rescind a judgment obtained in default of appearance if good cause can be shown. What constitutes good cause is that the defendant can explain that it has a reasonable and acceptable explanation for the default and that on the merits, it has a bona fide defence. The defendant is unable to provide a reasonable explanation or demonstrate that he acted in good faith.

He did not provide any explanation for why he failed to discuss the summons or subsequent orders with his legal representative at the time.

[23] The Plaintiff's case is based on an oral agreement concluded after expiry of a written lease and addendum. The non-variation clause does not apply post-lapse of the original written agreements.

[24] The plaintiff further argued that the prejudice for the plaintiff lies in the fact that after the livestock was sold the third parties are in possession and received title thereof. The Plaintiff will not be able in some instances to even trace the livestock.

[25] Plaintiff concluded argued the defendant still has the option to claim damages from the plaintiff which he has yet to pursue. To recover said damages, the defendant should initiate a separate action by filing a proper claim against the plaintiff

The law

[26] In terms of rule 42(1)(a) the Court, in *Zuma v Secretary of Judicial of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*,^[6] held that the word 'absence' exists to protect litigants whose presence was precluded, not those whose absence was elected. The Court emphasized the requirements which an applicant is required to prove under to succeed with rescission under the common law. Quoting *Government of the Republic of Zimbabwe v Fick*,^[7] the Court held:

'In that matter, this Court expressed the common law requirements thus—

"The requirements for rescission of a default judgement are twofold. First, the applicant must furnish a reasonable and satisfactory

explanation for his default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in a refusal of the request to rescind.”[8]

[own emphasize]

The parol evidence rule[9]

[27] In *Traxys Africa Holdings Ltd and Another v Westbrook Resources Ltd* (509/2020) [2021] ZASCA 122 (23 September 2021) it was explained that: “[59] the parol evidence rule requires modification when an agreement is partly oral and partly written. The partial integration rule comes into play in such instances. Its operation was set out thus by this court in *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail*: [10] ‘The parol evidence rule applies only where the written agreement is or was intended to be the exclusive memorial of the agreement between the parties. Where the written agreement is intended merely to record a portion of the agreed transaction,

leaving the remainder as an oral agreement, then the rule prevents the admission only of extrinsic evidence to contradict or vary the written portion without precluding proof of the additional or supplemental oral agreement.

[27] It is trite that a court may set aside a judgment by default in the event that just cause is shown. The court at the same time retains a discretion to do so.[11]

Legal principles governing rule 42

[28] Rule 42 states:

‘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 judgement erroneously sought or erroneously granted in the absence of any party affected thereby.
 - (b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.
 - (c) An order or judgment granted as the result of a mistake common to the parties.
- (2) Any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interests may be affected by any variation sought.
- (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.’

[29] The legal principles governing the rescission of judgment under rule 42 have long been settled by the courts. In terms of rule 42(1)(b), a judgment may be rescinded on the basis that the it was erroneously sought or erroneously granted:

‘[A]n order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission. . .’

[30] The legal principles as follows:

‘[11.1] The rule must be understood against its common law background.

[11.2] The basic principle of common law is that once a judgment has been granted, the judge becomes functus officio, but subject to certain exceptions of which rule 42(1)(a) is one.

[11.3] The rule caters for mistakes in the proceedings.

[11.4] The mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgement.

[11.5] A judgment cannot be said to have been granted erroneously in light of a subsequently disclosed defence which was not known or raised at the time default

judgment.

[11.6] The error may arise in the process of seeking the judgment on the part of the Plaintiff for default judgment or in the process of granting default judgment on the part of the court.

[11.7] The applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission. . .’[12]

[31] It has been stated that the purpose of the rule is to ‘correct expeditiously and obviously wrong judgment or order’.[13] In order to succeed in an application to rescind the judgment, the applicant must meet the jurisdictional requirements contained in rule 42(1)(a)-(b).

[32] It is trite that an applicant who invokes this rule must show that the order sought to be rescinded was granted in his or her absence and it was erroneously granted or sought. Both grounds must be shown to exist,[14] and, once the applicant meets these jurisdictional requirements, the court has a discretion whether or not to rescind its own order.

Was the order erroneously sought and erroneously granted?

[33] Generally, a judgment would have been erroneously granted if there existed, at the time of its issue,

(a) a fact of which the court was not aware 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.
[15]

(b) because certain facts of which the judge who granted the judgments were unaware would have precluded him from granting the judgments had he been aware of such facts'.^[16]

[34] The Supreme Court of Appeal held that rule 42(1)(a) was essentially a restatement of the common law. The position of the courts in interpreting the rules had been to vary and expand their application as little as possible. Rule 42(1)(a) was intended to provide for rescission of an order that had been erroneously sought or erroneously granted.

[35] On whether the judgment was erroneously sought or granted, the Supreme Court of Appeal held that the rule, properly applied, depended on the nature of the error and not whether the error appeared from the record of the proceedings. The error had to be one related to the proceedings themselves.^[17]

[36] An application for rescission on common law grounds must be brought within a reasonable period. For the applicant to succeed with the application for rescission on common law grounds, the applicant must show good cause or sufficient cause by giving a reasonable explanation for delay and showing that application for rescission was bona fide and showing a bona fide defence to the claim with a prima facie prospect of success.

[37] The Appellate Division, in dealing with the concept of 'sufficient cause' or 'good cause', stated that, 'these concepts defy precise or comprehensive definition, for many and various factors require to be considered'. The learned judge stated that:

'But it is clear that in principle . . . [the] two essential elements of "sufficient cause" for rescission of a judgment by default are:

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

(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success.

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospects of success on the merits will fail in an application for rescission of a default judgement against him, no matter how reasonable and convincing the explanation of his default. An orderly judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgement against him rescinded on the ground that he had reasonable prospects of success on the merits.'^[18]

Application of the law

[38] The question now is whether the default judgment granted in this matter should be rescinded in terms of rule 42(1)(a) or 32(1). The following was stated in the case of *Mutebwa v Mutebwa and Another*:

‘Although the language used in rule 42(1) indicates that the Court has a discretion to grant relief, such discretion is narrowly circumscribed. The use of the word “may” in the opening paragraph of the Rule tends to indicate circumstances under which the Court will consider a rescission or variation of judgment, namely that it may act mero motu or upon application by an affected party.’[19]

[39] The facts in casu clearly indicates that the plaintiff did not misrepresent the facts to this court when applying for default judgment. As a result of the absence the default judgment was granted. On this point it is my view that the defendant has not succeeded in satisfying the requirements in terms of rule 42 (1)(a) that the default judgment had been erroneously sought and granted. In this regard, as stated in the Mutebwa case supra there is no reason why rescission of the default judgment should be granted neither in terms of in terms of rule 42(1)

(a) nor on rule 31(2)(1).

Findings

[40] Regarding the parol evidence rule in casu:

(a) The non- variation clause does not apply post -lapse of the original written agreements.

(b) The oral agreement in any event does not contradict or vary the written agreements but rather supplements them by allowing a monthly rental to continue on the same basis as before.

(b) the parol evidence rule is not infringed in this case by receipt of the evidence of the oral agreements.

[41] I am not convinced that the particulars of claim failed to lay a basis in terms of which the plaintiff may claim from the defendant for the period 1 March to 31 May 2024.

[42] I am persuaded that the defendant chose to be absent from the proceedings when the default judgment was granted in his absence. This ignorance of court proceedings is willful without any excuse.

Costs

[43] Both counsels argued for a punitive cost order against each other. The general rule is that costs should follow the event and this rule should be departed from only when there are good grounds to do so.

Conclusion

[44] Having considered the submissions made, I am of the view that the Defendant has failed to make a case for rescission of the default judgment. Consequently, the following order is made:

- 1 The application for leave to supplement the founding affidavit is granted.
- 2 The application for rescission of the default judgment granted on 15 August 2024 is dismissed with costs.
- 3 The application for the writ of execution dated 8 September 2024 to be set aside is dismissed.
- 4 The defendant is ordered to pay the costs of the application on a party and party scale which includes counsel's fee on Scale C.

A S BOONZAAIER AJ

Appearances For the applicant: A Sander Instructed by: Blair Attorneys, Bloemfontein For the respondent: PJ Zietsman SC Instructed by: Muller Gonsior Inc., Bloemfontein.

- [1] SA Sentrale Ko-Op Bpk v Shifren en Andere 1964(4) SA 760 (A) The Shifren -clause is a non-variation clause stating that no variation

of the said agreement shall be of any force or effect unless reduced to writing and signed by the parties to this agreement.

- [2] Ferris v First Rand Bank Ltd 2014(3) BCLR 321, 2014 (3) SA 39 (CC)[2013]ZACC 46 at par 24-25

- [3] (b) A defendant may within, 20 days after acquiring knowledge of such judgment apply to the 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.

- [4] Harms, Civil Procedure in the Superior Courts at 42.4; Athmaram v Singh 1989 (3) SA 953 (D) at 956D-E.

- [5] Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd

[2007] ZASCA 85; [2007] SCA 85 (RSA); 2007 (6) SA 87 (SCA) (Lodhi 2 Properties) para 18.

- [6] Zuma v Secretary of Judicial of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others

[2021] ZACC28; 2021 (11) BCLR 1263 (CC) (Zuma) para 56.

- [7] Government of the Republic of Zimbabwe v Fick

[2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) para 85.

- [8] Zuma para 71.

- [9] The parole evidence rule prevents parties in a lawsuit from presenting evidence of prior or contemporaneous oral agreements or negotiations that contradict or modify the terms of a written contract.

- [10] Affirmative Portfolios CC v Transnet Ltd t/a Metrorail [2008] ZASCA 127; 2009

- (1) SA 196 (SCA) para 14

- [11] Mokgatlev Allegiance Jhb South (Pty) Ltd (47615/2020)
- [12] Kgomo and Another v Standard Bank of South Africa and Others
- [2015] ZAGPPHC 1126; 2016 (2) SA 184 (GP) para 11.
- [13] Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 at 471E-F.
- [14] See Zuma v Secretary of Judicial of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others
- [2021] ZACC28; 2021 (11) BCLR 1263 (CC).
- [15] Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz 1996
- (4) SA 411 (C).
- [16] Lodhi 2 Properties para 8.
- [17] Harris v ABSA Bank Ltd t/a Volkskas 2006
- (4) SA 527 (T) at [8] – [10],
- [18] Chetty v Law Society, Transvaal 1985
- (2) SA 756(A) at 765A-E.
- [19] Mutebwa v Mutebwa and Another 2001 (2) SA 193 (TkH) at 199H-I.

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