

SOUTH AFRICA / JUDGMENT

Elia and Others v Absa Bank Ltd (A5083/2021 ; 19617/2017) [2023] ZAGPJHC 649 (6 June 2023)

[2023] ZAGPJHC 649

COURT

South Gauteng High Court, Johannesburg

BEFORE

Wepener, Adams, Mahalelo

CASE / FILE NUMBER

A5083/2021 ; 19617/2017

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

GAUTENG DIVISION,
JOHANNESBURG

APPEAL

CASE NO: A5083/2021

COURT

A QUO

CASE NO: 19617/2017

DATE:

6th
JUNE 2023
NOT REPORTABLE
NOT OF INTEREST TO OTHER
JUDGES

In the matter between:	ELIA, ANDREAS DEMETRIOU First Appellant KYRIACOU, KYRIACOS Second Appellant KYRIACOU, IRENE Third Appellant and ABSA BANK LIMITED First Respondent
Neutral Citation:	Elia Andreas Demetriou and others vs Absa Bank Ltd (A5083/2021) [2023] ZAGPJHC 649 (06 June 2023)
Coram:	Wepener, Adams et Mahalelo JJ Heard: 8 March 2023 Delivered: 06 June 2023 – This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 06 June 2023.
Summary:	Judgments and orders – rescission – rescission in terms of the Uniform Rule 42(1)(a) and/or the common law – grounds for rescission of judgment – summons and notice of application for default judgment did not come to the attention of the appellants – cause on which default judgment based had been compromised – also that claims time-barred – explanation for default and bona fide defence equate to ‘good cause’, entitling appellant to rescission of the default judgment – Appeal upheld. ORDER On appeal from: The Gauteng Division of the High Court, Johannesburg (Matojane J

sitting as Court of first instance):

- (1)
The appellants' appeal against the order of the court a quo is upheld, with costs.
- (2)
The order of the court a quo is set aside and in its place is substituted the following: -
- '(a)
The default judgment granted against the first, second and third defendants in favour of the plaintiff on 27 August 2019 under case number 19617/2017 be and is hereby rescinded;
- (b)
the first, second and third defendants shall deliver their plea within twenty days from date of the granting of this order, being 6 June 2023.
- (c)
The costs of the first, second and third defendants' application for rescission shall be in the course of the main action'.
- (3)
The respondent shall pay the appellants' costs of the appeal, including the costs of the application for leave to appeal to the court a quo and the costs of the application for leave to appeal to the Supreme Court of Appeal.

JUDGMENT

Mahalelo J (Wepener et Adams JJ concurring):

Introduction

- [1] This is an appeal against an order of the High Court dismissing an application for rescission of judgment granted by default against the appellants on 27 August 2019. The appeal is with leave from Supreme Court of Appeal.

Background

- [2] The foundation of the debt on which the respondent's judgment is based are four agreements entered into between the respondent and Lightworks Imaging (Pty) Ltd (Lightworks) between 2006 and 2008 for the purchase of various pieces of equipment. The appellants signed sureties for and on behalf of Lightworks in favour of the respondent for any debts owed by Lightworks to the respondent. On 10 July 2009 Lightworks was placed

under final winding-up. On 2 April 2014, at the first meeting of creditors, the respondent submitted claims related to the afore mentioned agreements. The respondent's claims against the estate of Lightworks were rejected.

- [3] On 26 June 2016 the respondent herein issued summons wherein it sought an order for payment of monies resulting from breach of those agreements by Lightworks against the defendants (appellants herein) as sureties.
- [4] The summons, the application for default judgment and the notice of set down were all served at the chosen domicilium address of the appellants, namely [...], Johannesburg. On 27 August 2019, the respondent took judgment against the appellants before Mtati AJ in their absence.
- [5] Being dissatisfied with the judgment by default, the appellants filed an application for rescission of the default judgment. In the said application, the appellants' case was that the order was erroneously sought and granted against them as the summons did not come to their attention but were only served with the warrant of execution issued pursuant to the default judgment. The

appellants contended that they had vacated the domicilium address and had given Mr Georgiades, an attorney acting for the respondent, their new contact information. The appellants alleged that service at the chosen domicilium address of the summons and the application for default judgment does not constitute good service under the circumstances where the respondent knew that the principal debtor no longer traded from this address and the sureties had no presence there. They submitted that because the summons and the default judgment application did not come to their knowledge they were not in wilful default for not opposing the matter. They submitted that they have a good and bona fide defence which carries with it prospects of success and that they are entitled to a rescission of the judgment in terms Rule 42(1) (a), alternatively, in terms of the Common law.

- [6] In response, the respondent's case was that it is not correct that the summons did not come to the knowledge of the appellants because the first appellant was aware of the pending action as far back as 2018, but nevertheless chose not to enter an appearance to defend. Furthermore, the respondent and his attorney did not effect service at the home address of the first appellant because the home address of the first appellant was not his chosen domicilium. The respondent submitted that clause 12 of the written suretyship agreement signed by the appellants provided that the domicilium address may only be changed by giving proper written notice thereof to the respondent and the change shall only be effective on receipt by the respondent of such written notice, and if the respondent does not object to the suitability thereof.

- [7] Having heard arguments from both sides the learned judge dismissed the rescission application. The application for leave to appeal was similarly dismissed on 28 May 2021. The appellants then petitioned the Supreme Court of Appeal on the grounds that the judgment refusing rescission misconstrued and misapplied the test for rescission and failed to consider certain material facts which have a direct bearing on the willful default leg of a rescission inquiry. The Supreme Court of Appeal granted the appellants leave to appeal.
- [8] It is against the decision dismissing the application for rescission of the default judgment that the appellants noted the present appeal. The appellants raised various grounds on which they allege rescission ought to have been granted, amongst them that:
- (a) The court a quo erred in not accepting as a fact that Mr Georgiades was in receipt of the appellants' contact details and had assured them that they would be notified should he seek to institute legal proceedings in the future. The court found that the 'summons did not come to the applicants' attention due to the changed circumstances', therefore the court ought to have found that in addition to the summons, the application for default judgment and the notice of set down did not come to the applicants' attention for the same reason and ought to have applied these facts in coming to a

determination

of the test for rescission.

- (b) The court a quo found that service at the domicilium address was effective, despite having found that the applicants had vacated that address and did not become aware of the documents served at that address. The court ought to have found that, notwithstanding the domicilium clause in the agreement, service at that address did not come to the appellants' attention; and constituted ineffective service as the respondent knew that the appellants had no presence there and would not receive any documents served there (in particular the application for default

judgment

and the notice of set down).

- (c) The court a quo found that '[a]s the summons and notice of set down were properly served on the [applicants] at their chosen domicilium, the respondent was procedurally entitled to a default judgment ...'. In making these findings, the court conflated the considerations of service in accordance with the Uniform Rules on the one hand, and the requirements of rescission on the other. The court ought to have considered the wilful default requirement of a rescission separate to the question of whether or not service was effected in accordance with the letter of the Uniform Rules.

- (d) The court quo dismissed the application, having found no ‘good cause’ for condonation in circumstances where he had already found that the application was one in terms of Uniform Rule 42 and the common law; and condonation was not required.
- (e) The court found that the appellants were under an obligation to proactively monitor the progress of threatened legal action, despite having already found that service of the proceedings and the summons had not come to the appellants’ attention; and Mr Georgiades’ undertaking to notify the appellants if the matter proceeded in the future. The court ought to have found that the proceedings had not been effectively served on the appellants, the proceedings had not come to their knowledge and as such judgment was improperly sought and granted.
- (f) The court a quo did not consider the admissibility of the respondent’s answering affidavit and also failed to consider that the appellants have a bona fide defence which prima facie has prospects of success.
- [9] Before dealing with the issues raised it is important to first set out the legal principles governing rescission of judgments.

Legal Framework

- [10] As indicated earlier, the appellants contend that they are entitled to rescission of the order in terms of either Rule 42 (1) (a) of the Uniform Rules of Court or the Common law. The test for a rescission under Common law is trite, namely that good cause must be shown. In order to establish good cause, an applicant must set forth a reasonable explanation for the default and a bona fide defence/s. Regarding the issue of ‘good cause shown’ in an application for rescission, the following dictum in the matter of *Chetty v Law Society, Transvaal*[1], is apposite:

‘The Appellant’s claim for rescission of judgment confirming the rule nisi cannot be brought under Rule 31 (2) or Rule 42 (1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefore has been shown. (See *De Wet and Others v Western Bank* 1979

- (2) SA 1031 (A) at 1042 and *Childerly Estate Stores v Standard Bank SA Ltd* 1924 OPD 163.)

The term “sufficient cause” (or “good cause”) defies precise or comprehensive definition, for many and various factors are required to be considered (See *Cairn’s Executors v Gaarn* 1912 AD 181 at 186 per Innes JA), but it is clear that in principle and in the long-standing practice of our courts two essential

elements “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 (De Wet's case supra at 1042; PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980

(4) SA 799 (A); Smith N O v Brummer N O and Another; Smith N O v Brummer 1954

(3) SA 352 (O) at 357-8.'

[11] In Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including

Organs of State and Others[2], the Constitutional Court restated the two requirements for the granting of an application for rescission that need to be satisfied under the common law as being the following:

'First, the applicant must furnish a reasonable and satisfactory explanation for its default.

Second, it must show that it has a bona fide defence which prima facie carries some prospect of success on the merits. 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 refusal of the request to rescind.'

[12] Silber v Ozen Wholesalers[3] remains authority for the proposition that an applicant's explanation must be sufficiently full to enable the court to understand how the default came about and assess the applicant's conduct.

[13] An element of the explanation for the default is that the applicant must show that he was not in wilful default. If the case the applicant makes out on wilful default is not persuasive, that is not the end of the enquiry – the applicant's case may be rescued if a bona fide defence is demonstrated.[4]

[14] The defences raised must not only be decided against the backdrop of the full context of the case but must also be bona fide and the nature of the grounds of the defence and the material facts relied upon must be fully disclosed.[5]

[15] It is also trite that the court has the power to rescind its orders or judgment in terms of rule 42 (1) (a), which provides 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)'

[16] The import of Rule 42 was explained by the Constitutional Court in the Zuma matter *supra*, in the following terms:

‘[53] It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court "may", not "must",

rescind or vary its order – the rule is merely an "empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially.’

[17] As stated in the Zuma matter, to satisfy the requirements of Rule 42(1)(a), the applicant must show the existence of both the requirements that the order or judgment was granted in his or her absence and that it was erroneously granted or sought. However, the court retains the discretion to grant or refuse the rescission of an order having regard to fairness and justice.

Explanation of Default

[18] The appellants submitted that they did not oppose the proceedings because they were not aware of it. They contended that service was never effected on them. They say that the respondent failed to effect service at a different address which was known to it because the warrant of execution was served at the address of the first appellant’s residence. They submitted that this is substantiated by the fact that Mr Georgiades knew that the appellants had vacated the domicilium address. They contended that service of the summons and the application for default judgment on the Corlett Drive address was intended to evade the appellants. In developing this argument, they relied on the case of *Steinberg v Cosmopolitan National Bank of Chicago*[6], where the court opined ‘that it is a cornerstone of our legal system that a person is entitled to notice of legal proceedings instituted against him’. They also relied on other cases amongst them *First Rand Bank v Gazu*[7] and *Sandton Square Finance (Pty) Ltd and others v Biagi, Bertola and Vasco and Another*[8] to strengthen their argument on effective service.

[19] In considering whether the appellants were in wilful default I bear in mind what was said in *Harris v ABSA Bank Ltd Volkskas*[9] that:

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

[20] It is quite apparent from the facts of this case that the appellants did not receive the summons and the application for default

judgment.

While there is nothing inherently wrong with service at a domiciliary address, it is my view that a plaintiff, and particularly one that has knowledge of alternate means of effecting proper service, should effect service in a manner that is likely to ensure that a defendant is informed of the intended action against him.[10] In the circumstances, I cannot find that the appellants were wilful in not entering an appearance to defend.

[21] In the circumstances I find that the Court a quo ought to have found that there was no wilful default by the appellants in not defending the proceedings against them.

Bona fide Defence

[22] The second stage of the inquiry is whether the appellants have raised a bona fide defence to the respondent's claim against them. In the Harris decision supra, Moseneke J stated thus:

‘[10] A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation.

“Instead, the explanation, be it good, bad or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole”.’

[23] It is the appellants' case that they have a bona fide defence with a reasonable prospect of success. The appellants raise two defences namely that the respondent's claims were

compromised and that they have prescribed. With regard to compromise the appellants alleged that they concluded a settlement agreement

with the respondent and clause 5.1 thereof provided that: ‘this Agreement shall be in full and final settlement of all or any claims that any Party may have against one or more of the other Parties to this Agreement’.

[24] In developing this argument, the appellants referred to the case of Man Financial Services SA (Pty) Ltd v Phaphoakane Transport and Another[11], where the court found as follows:

‘[T]he settlement agreement, in my view, ended the relationship between the parties as far as the rental agreements and suretyships were concerned and a new relationship commenced. The agreement reads that it is in full and final settlement of the applicant's

claims against the first and second respondents with regard to the rental agreements in question. The agreement was consequently a transaction in the legal sense. In Gollach & Gomperts (1967) (Pty) Limited vs Universal Mills & Produce Co (Pty) Limited & Others 1978

(1) SA 914 (A)

It is also settled law that a transaction can be entered extra judicially as have been held in Gollach at p 922. The general principle in our law is that such a transaction or compromise terminates the parties' original

rights and obligations and gives rise to new rights and obligations under the new agreement.'

[25] They further argued that the settlement agreement contained no reservation of the respondent's rights. It was a total compromise in full and final settlement of all or any claims which included those claims which the respondent asserts in its summons. In this regard they relied on what was held in Road Accident Fund v Ngubani[12] that:

'Unless reserved in the compromise, parties thereto are precluded from enforcing the rights and obligations arising from the compromised

claim. In Hamilton vs Van Zyl 1983

(4) SA 379 (E) the court said at 383 (E – H):

"A compromise need not necessary however follow upon a disputed contractual claim. Any kind of doubtful right can be subject of a compromise ... Delictual claims are, for example, frequently the subject of a compromise. Nor need the claim be even prima facie actionable in law. A valid compromise may be entered into to avoid even a clearly spurious claim and defendants frequently, for various reasons, settle claims which they know or believe the plaintiff will not succeed in enforcing by action.

An agreement of compromise in the absence of an express or implied reservation of the right to proceed on the original cause of action, bars the bringing of proceedings based on such original cause of action ... Not only can the original cause of action no longer be relied upon, but a defendant is not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise."

[26] The appellants contended that even if the settlement agreement did not compromise the respondents claim under the suretyships, because the principal debt had been extinguished by the settlement agreement, there is no debt enforceable against the appellants as sureties.

[27] With regard to prescription, they submitted that in terms of section 13(1)(g) of the Prescription Act 16 of 1968, the respondent ought to have instituted summons on or before 3 April 2015 which is a year after its claims were rejected at the meeting of creditors. The appellants submitted that because the respondent's summons was only instituted on 23 June 2017, this being more than three years after its claims had been rejected, the claims had prescribed. According to the appellants, the respondent's contention that the resubmission of its claims reignited the prescribed claims is flawed in law as well as in fact, prescription having occurred, the claims become unenforceable.

[28] The respondent countered that the claim that was granted by the court on default does not involve the agreements that formed part of the settlement agreement and those agreements were not compromised. With regard to prescription the respondent countered that in terms of section 13(1)(g) of the Prescription Act, prescription becomes interrupted due to any actions of filing a claim in a person's estate and that prescription runs up until one year after the finalization of the liquidation and distribution account.

Analysis

[29] It is trite that an applicant for rescission must demonstrate an existence of a substantial defence and not necessarily a probability

of success. It is sufficient that in his evidence he shows a prima facie case which raises triable issues. The appellants in this matter have fully and sufficiently explained their defences. The defences raised by the appellants in my view raise triable issues. My view is fortified by what was said in the case of *Van Deventer and Another v Nedbank Ltd*[13] regarding when the impediment ceased to exist in a respondent's claim where the court said:

'The precise event which causes a debt to become the object of a filed claim for purposes of s 13(1)(g) is yet to be determined by our highest courts.'

[30] In any event, the argument advanced by the respondent is that the impediment cease to exist one year after the Master of the High Court has confirmed the distribution and liquidation account and not when the claim is filed. I am unpersuaded by this argument. I find myself in agreement with the appellants' submission that the impediment ceases to exist one year after the rejection of the claim in accordance with what is provided for in section 13(1)(g) and that the respondent's view that the resubmission of the claims three years after they were rejected reignites them is flawed. There is therefore merit in the appellants' submissions which ought to have persuaded the Court a quo to allow the said issues to be ventilated in Court by granting the rescission of the judgment. Having adopted this view, it is not

necessary to deal with other grounds of appeal.

Conclusion

[31] In the circumstances, I find that the Court a quo erred in its dismissal of the appellants' application for rescission. The Court a quo ought to have found the existence of both the absence of wilful default and the presence of bona fide defence which has prospects of success.

Order

[32] In the result, the following order is made: -

- (1) The first, second and third appellants' appeal against the order of the court a quo is upheld, with costs.

M B MAHALELO

Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON: 8 March 2023 JUDGMENT DATE: 6 June 2023 – judgment handed down electronically
FOR THE FIRST, SECOND AND THIRD APPELLANTS: Adv Marc J Cooke INSTRUCTED BY: Ryan D
Lewis Incorporated, Rivonia, Sandton FOR THE RESPONDENT: Adv F Bezuidenhout, together
with Adv M Masemola INSTRUCTED BY: Jay Mothobi Incorporated, Rosebank, Johannesburg

- [1] Chetty v Law Society, Transvaal 1985
- (2) SA 756 (A) 1985 (2) SA 746J to 765 C;
- [2] [2021] ZACC 28;
- [3] Silber v Ozen Wholesalers 1954
- (2) SA 345 (A) at 353;
- [4] Harris v ABSA Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at [8] – [10], Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532C-F;
- [5] Standard Bank of SA Ltd v EI-Naddaf 1999 (4) SA 779 (W) at 784 D-F;
- [6] Steinberg v Cosmopolitan National Bank of Chicago 1973
- (3) SA 885 (RA);
- [7] First Rand Bank v Gazu 2011 (1) SA 45 (KZP);
- [8] Sandton Square Finance (Pty) Ltd and others v Biagi, Bertola and Vasco and Another 1997 (1) SA 258 (W);
- [9] Harris v ABSA Bank Ltd Volkskas 2006
- (4) SA 527 (T);
- [10] Supra
- [11] Man Financial Services SA (Pty) Ltd v Phaphoakane Transport and Another 2017(5) SA 526 (GJ) at para 9 and 10;
- [12] Road Accident Fund v Ngubani 2008
- (1) SA 432 (SCA) at p43;
- [13] Van Deventer and Another v Nedbank Ltd 2016 (3) SA 622 (WCC);

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