IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 47/2021

In the matter between:

ELIZABETH VILJOEN First Applicant

[Previously **GRAAF N.O.** cited herein as

Trustee of the **J J G TRUST – IT 2349/1998**]

ELIZABETH VILJOEN Second Applicant

[Previously **GRAAF N.O.** cited herein as

Trustee of the **MOOIDAM GRAAF TRUST**

- IT 901/1998]

ELIZABETH VILJOEN Third Applicant

[Identity number: 610920 0069 00 6]

and

ABSA BANK LIMITED Respondent

[Registration number: **1986/004794/06**]

HEARD ON: 15 April 2021

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 29 April 2021

[1] This is an application for rescission of a default judgment granted by this honourable court against the applicants (defendants in the main case) on 27

November 2020. The application is based on the provisions of Rule 42 (1)(a) of the Uniform Rules of Court. The application is resisted by the respondent (plaintiff in the main case). In the opposing affidavit and oral submissions by Counsel, the respondent consented that the default judgment be rescinded against the first and second applicants. I granted an order to that effect. This judgment concerns the dispute between the third applicant and the respondent.

[2] The requirements for rescission of judgment were stated in **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)**[1] as follows:

"I turn now to the relief under the common law. In order to succeed an applicant for rescission of a judgment taken against him by default must show good cause (**De Wet and Others v Western Bank Ltd** (Supra)). The authorities emphasise that is it unwise to give a precise meaning to the term 'good cause'. As Smalberger J put it in **HDS Construction (Pty) Ltd v Wait**:

'when dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (**Cairns' Executors v Gaarn 1912 AD 181 at 186**; **Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352 – 3**). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'

With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success (**Grant v Plumbers (Pty) Ltd**, **HDS Construction (Pty) Ltd v Wait** supra, **Chetty v Law Society, Transvaal**)."

[3] Rule 42 provides that, in addition to any other powers it may have, the court may rescind or vary an order erroneously granted or sought. It stands to reason that in order to succeed, the party seeking relief must allege grounds for rescission in the founding affidavit.

[4] The third applicant does not set out, at all, the explanation for her default. It can be accepted that the third applicant has no reasonable explanation to make in this regard. In the absence of the explanation, it can be accepted that

[1] 2003 (6) SA 1 (SCA) at para 11.

the default in this matter was wilful. The third applicant must also demonstrate that she has a *bona fide* defence and the application is not made with the intention of merely delaying the claim against her. The third applicant must raise evidence of the existence of a substantial defence which she intends to pursue in the defence of the claim against her. On this aspect again, the third applicant falls short of meeting the threshold. There is none in the founding affidavit that remotely resembles the requirement as stated in decided cases and provisions of the Uniform Rules of Court.

[5] The only ground raised for rescission of a default judgment is that it was erroneously sought and granted in that not all the relevant trustees were cited and/or joined by the respondent in the application for default judgment and in the action on which it is based. Undoubtedly the judgment was granted in the absence of the other applicants but not the third applicant. This ground is only good pertaining to the first and second applicant. There is a distinction between them and each is cited in different capacities.

[6] The third applicant was cited as surety for the first applicant. Clearly the third applicant is relying on the non-joinder of all the trustees of the trust. The defence raised is a defence *in personam* which does not have any effect on the cause of action or the obligation itself. In **Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd and Another**[2] the court stated the following: -

> "The contrast between defences *in rem* and *in personam* thus is that those *in rem* attach to the claim or cause of action or the obligation itself and arise from the invalidity, extinction or discharge of the obligation itself, whoever the debtor may be; those *in personam* arise from a personal immunity of the debtor from liability for an otherwise valid and existing civil or natural obligation. In the case of a defence *in personam* the obligation and debt remain in existence – the creditor may prove his claim in the insolvency or liquidation, the creditor may await the end of the moratorium, the minor's obligation remains a natural obligation, but in each case the debtor is personally immune from a claim. In the case of a defence *in rem* the law does not recognise the obligation or debt even as a natural obligation (illegality) or no obligation in fact came into existence or it was vitiated on a ground justifying its termination (mistake, misrepresentation, duress) or the obligation has ceased because it has been discharged or otherwise extinguished (payment, compromise, novation, judgment). It is in this sense that the defences *in rem* are said to adhere to or arise upon the obligation itself, regardless of the person of the debtor."

[2] 1984 (2) SA 693 (C) at 696 C-F.

[7] In conclusion, the third applicant has not stated any defence to be granted the relief sought. This application must be dismissed with costs.

[14] I make the following order against the third applicant: -

14.1. The application is dismissed with costs.

M.A. MATHEBULA, J

On behalf of applicant(s):	Adv. C.J Hendriks
Instructed by:	Noordmans Attorneys
	Bloemfontein
On behalf of respondent:	Adv. J Els
Instructed by:	ABSA Bank Limited
	C/O EG Cooper Majiedt Incorporated
	Bloemfontein