

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 41757/2020

DATE: 2022-08-23

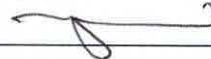
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(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED. ✓

DATE 29/08/2022

SIGNATURE 

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In the matter between

OMANG TRADING AND LOGISTICS (PTY) LTD 1st Applicant

BUNGANE MAWELISI WILFRED KAKANA 2nd Applicant

SIPHO WISEMAN MOFOKENG 3rd Applicant

NONTUTHUKO DENGA KWINDA 3rd Applicant

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and

TOYOTA FINANCIAL SERVICES (SA) LTD Respondent

J U D G M E N T

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Summary: Rescission of judgment – order granted in circumstances where officer lacks jurisdiction. Order a nullity – rescission application need not set out usual requirements for rescission application in terms of the common law of Rule 42.

WEPENER J: The applicant seeks a rescission of default judgment given by the Registrar of this Court on 9 February

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2021. The respondent resists the application.

The chronology of events follows upon an agreement entered into between the respondent and the 1ST applicant. The 2ND, 3RD, or 4TH applicants entered into separate surety agreements in terms of which they bound themselves jointly and severally as sureties and coprincipal debtors for certain amounts due by the 1ST applicant to the respondent.

On 4 December 2020 the 1ST respondent issued a summons against the applicants which was served upon the
10 applicants on 17 December 2020.

It is common cause that the period for delivering a notice of intention to defend expired on 22 January 2021.

On 2 February the respondent applied for default judgment with the Registrar of this Court. However, on the same day on 2 February 2021 the applicant gave its notice of intention to defend the action. Despite this, and on 9 February 2021 the Registrar granted a judgment by default against the applicants.

The applicants then launched the present application
20 for rescission of the judgment given by the Registrar. The applicants submit that by virtue of the provisions of Rule 19(5) the judgment granted by the Registrar is irregular. Rule 19(5) provides as follows:

“Notwithstanding the provisions of subrules (1)

and (2) a notice of intention to defend may be delivered even after expiration of the period specified in the summons or the period specified 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 judgment by default.”

The notice of intention to defend was filed before the
10 granting of the judgment by default, and the powers of the Registrar from the time that it was filed and prior to the granting of the judgment were only to consider the question of costs as set out in the proviso. The Registrar no longer had the power to grant the judgment. The consequence thereof is that the judgment was irregularly granted and is thus a nullity.

The consequence of the irregular judgment remains the issue in the matter argued before me. The respondent argued that the requirements for a rescission of judgment are
20 applicable. Counsel for the respondent submitted that one of these requirements, which is that the person seeking rescission of judgment must show good cause, also applies. Such good cause would be a disclosure of a *bona fide* defence.

On the assumption that the applicants failed to disclose a good cause or a *bona fide* defence, which I make no finding on, the determination to be made is whether the judgment falls to be rescinded due to it being irregular for want of jurisdiction to grant it.

Schoeman JA said in *Travelex Limited v Maloney and Another* (823/2015) [2016] ZASCA 128 27 September 2016, that such a judgment is a nullity. In paragraph 16 the Supreme Court of Appeal held:

10 “I incline to the view that if a judgment or order has been granted by a court that lacks jurisdiction, such order or judgment is a nullity, and it is not required to be set aside. However, I agree with the view expressed in *Erasmus Superior Court Practice*, that if the parties do not agree as to the status of the impugned judgment or order, it should be rescinded. That is the position in the instant matter where the appellant applied to have the order set aside on the

20 premise that the court did not have jurisdiction. Therefore, the usual requirements for a rescission application in terms of the common law or Rule 42 do not apply.”

In my view it will be no different whether a court, a

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magistrate, a judge, or a registrar gives the order outside of its powers.

The rescission application based on the lack of jurisdiction where the judgment was granted is consequently in my view *sui generis* and does not fall under the requirements of the rules regarding rescission generally. Or, as Mabuse J said *Seleka v Fast Issuer SPV (RF) Limited* [2021] ZAGPPHC 128 at para 15:

10 “The power of the Registrar of the Court to grant default judgment is circumscribed. He does not have power to grant all the applications for default judgment. He can only do so where the law expressly authorises him to do so. The Registrar may therefore not grant default judgments where it is so prohibited by statute, such as s 130 of NCA. If he oversteps his powers or where contrary to the statutes, he arrogates to himself the power to grant a default judgment, such a default judgment is null and
20 void.”

The same applies in this matter. The moment that a notice of intention to defend was filed, the Registrar's power to grant default judgment ceased, and he overstepped his powers when granting the judgment which

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is then null and void.

In the circumstances of this matter the applicants are entitled to an order to rescind the Registrar's judgment by virtue of the reasons set out hereinbefore.

ORDER

I issue the following order:

- 1) The default judgment and order granted by the Registrar on 9 February 2021 under this case number is rescinded and set aside.
- 2) The 1ST defendant or applicant to the 4TH defendant or applicant are ordered to pay the wasted costs of the plaintiff/respondent in launching the application for default judgment.
- 3) The plaintiff/respondent is ordered to pay the costs of this application for rescission of the default judgment granted by the Registrar.

That is my order.

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WEPENER J

JUDGE OF THE HIGH COURT

DATE:

Counsel for Applicants: H.S. Goosen

Attorneys for Applicants: Arthur Channon Attorneys

Counsel for Respondent: J. Govender

Attorneys for Respondent: Smith Van der Watt Inc.