20/9/17

IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
(4)	SIGNATURE DATE 20/09/2017

CASE NO: 69531/2012

DAWID JACQUES RICHTER	**APPLICANT**
and	
BLOEMPRO CC	**1ST RESPONDENT**
LUKE BERNARD SAFFY N.O.	**2ND RESPONDENT**
TSIU VINCENT MASEPE N.O.	**3RD RESPONDENT**
ABSA BANK	**4TH RESPONDENT**

JUDGMENT

KHUMALO J

Introduction

[1] The Applicant, Mr Dawid Jacques Richter, is with leave of the Supreme Court of Appeal proceeding with an Application for Rescission of a Judgment that was granted in his

was granted in his absence by Louw J on 6 May 2013, dismissing the Application he brought in terms of s 131 (1) (a) (ii) of the Companies Act 71 of 2008 ("the Companies Act") for an order placing Bloempro CC, the 1st Respondent ("Bloempro") under supervision and commencing business rescue proceedings ("business rescue Application"), with costs.

[2] Bam J dismissed or refused the Rescission Application on 14 March 2014 on the basis that the order in terms of s 131 (1) (a) (ii) sought by Richter had no prospects of success seeing that Bloempro was already under final sequestration and the Companies Act does not provide for the sequestration proceedings to be converted into business rescue proceedings. On appeal to the SCA, the legal issue was decided in Richter's favour on 1 June 2015. The SCA granted him leave to proceed with the Rescission Application and remitted the matter to this court for the determination of the Application.

[3] Richter is an employee manager of Bloempro, a close corporation whose woes started on 17 September 2012 when it was placed under final sequestration on application by Absa Bank ("Absa"), the 4th Respondent, its major creditor. The order was obtained in the Bloemfontein High Court since Bloempro previously had its principal address in Bloemfontein that subsequently changed to erf 24, Rossyln in Pretoria.

[4] The 2nd and 3rd Respondent, Mr IB Saffy and TV Masepe are Bloempro's liquidators and cited in that capacity. They are not opposing the rescission or the business rescue application.

[5] Bloempro has lodged an application at the SCA for leave to appeal the final sequestration order after being denied leave by the Bloemfontein High Court. The Application was pending when the matter came before me.

Historical Background

[6] Richter's business rescue application was launched in this court on February 2013 seemingly as a sequel to the refusal of the leave to appeal by the High Court in Bloemfontein. On 18 March 2013, Absa brought an application for leave to intervene, its application serving also as opposition to the business rescue application in which it sought the application's dismissal. On 27 March 2013 Richter filed a notice to oppose the bank's application which was later withdrawn. Richter's attorneys then communicated telephonically with Absa's attorneys regarding Absa's entitlement to leave to intervene and the withdrawal of opposition thereto. Afterwards Richter's attorneys sent a letter to Absa attorneys in which the telephone conversation was referred to and confirmation of the withdrawal of its opposition made. The letter went further and also confirmed that the matter was to be removed from the unopposed motion roll and Richter to file a replying affidavit. Each party has a different version of what the implication of the communication/correspondence and the withdrawal notice was.

[7] The long and short of it is that on the date the matter was to be heard, neither Richter nor his attorney was at court. The Absa representative proceeded to seek an order for both prayers set out in its notice of motion, reliant on the notice of withdrawal of opposition. The court therefore granted it leave to intervene in Richter's business rescue Application, and then continued to dismiss the then opposed application.

Application

[8] Richter is seeking to rescind only the part of the order that dismisses his application. The gist of his contention being that the withdrawal of opposition was only in respect of Absa's leave to intervene upon which his business rescue application became opposed and there was an understanding that the application was to be removed to the opposed roll.

[9] In his founding affidavit he submitted that his intention was at all relevant times not to proceed with opposition to Absa's application to intervene, since Absa's entitlement to do so as a creditor of Bloempro was made apparent to him following his notice to oppose, hence its withdrawal thereafter, intending to proceed with his business rescue application.

[10] He alleged to have instructed his attorneys to withdraw the opposition so that the business rescue application can proceed in the opposed motion with him serving a replying affidavit to address Absa's contentions to his application. Consequently his attorney, Mr P M Jacobs ("Jacobs") telephoned Mr Van den Burg ("Van den Burg"), the attorney acting on behalf of Absa confirming Absa's entitlement to intervene and oppose his application. Jacobs subsequently sent a letter to Van den Burg in which he confirmed the withdrawal of the notice to oppose and undertook to serve a replying affidavit shortly to deal with Absa's contention to the business rescue Application. Jacobs also thanked Van den Burg's co-operation and confirmed that Absa's Application will be removed from the unopposed roll.

[11] Jacobs has confirmed what is said to have transpired between him and Van den Burg.

[12] Richter alleged further that on 6 May 2014, instead of removing their application for it to be placed on the opposed motion roll in accordance with their communication, Absa attorneys proceeded to obtain an order for leave to intervene and dismissal of the business rescue application. He submits that he intended to only grant Absa an opportunity to intervene and oppose his application.

[13] On the other hand Absa contended that the Notice served on its attorneys indicated the withdrawal of Richter's notice to oppose, clearly demonstrating an unequivocal intention by Richter to withdraw his opposition to its Application. Its argued that there were no further affidavits filed by the date of hearing of the matter, and as Absa was in that instance entitled in terms of the notice of withdrawal to seek an order as set out in its notice of motion, it set the intervention application down to be heard as an unopposed application.

[14] Absa denies that the notice was intended to withdraw opposition to prayer 1 only. Its submitted that the notice is not susceptible to such an interpretation if reference is made to the correspondence. According to it, the only reference that could be drawn was that the opposition to its application was duly withdrawn. Consequent upon such withdrawal its Application was set down and granted on 6 May 2013.

[15] In contrast however, regarding the telephone communication between Van den Burg and Jacobs, Van den Burg confirms that during the telephone conversation Jacobs conceded to Absa's real and substantial interest to intervene in the Application and especially **that Absa is consequently entitled to the relief in terms of prayer 1 of its notice of motion**, which is leave to intervene. He however denies that he undertook to remove the

Application from the unopposed roll, or that there was such an agreement as implied by the letter. At the same time he states that Richter failed to file his affidavit.

Issues to be determined

[16] The issues to be determined are:

[16.1] Whether Absa's obtaining of the order to dismiss Richter's application on the basis of Richter's withdrawal of his opposition to his intervention application was erroneous?

[16.2] Whether the court's granting of an order dismissing Richter's application for business rescue after granting Absa leave to intervene was erroneous?

Legal framework

[17] An order that has been obtained or granted erroneously in the absence of the affected party may be set aside either in terms of rule 42 (1) (a) of the Uniform Rules of Court or in terms of Rule 32 (2) (b) or at common law. An order is erroneously granted where there was no procedural entitlement to it. In terms of Rule 42(1)(a), where this has been proven the Applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as is the case in Rule 32 (2) (b). The purpose of the rule being to correct expeditiously an obviously wrong order or judgment. In *Topol v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650 D-J the court referred to the case of *Tshabalala and Another v Peer* 1979 (4) SA 27, a judgment of a full bench of the Transvaal Provincial Division, citing a statement by Eloff J's (as he then was) at 30D-E dealing with the Rule, that:

> "The Rule accordingly means-so it was contended-that, if the Court holds that an order or judgment was erroneously granted in the absence of any party affected thereby, it should without further enquiry rescind or vary the order. I agree that is so, and I think that strength is lent to this view if one considers the Afrikaans text which simply says that: "Die hof het benewens ander magte wat hy mag he, die reg om ...."'

which the court found very persuasive and arrived at a conclusion that it is indeed not a requirement for rescission under Rule 42 (1) (a) that an applicant need, in addition, establish good cause for such rescission; *Naidoo v Somai* 2011 (1) SA 219 (KZD at 220F-G; *Rossiter v Nedbank* (unreported, SCA case no 96 /2014 dated 1 December 2015 [16].

[18] The order or judgment is also erroneously granted if there was an irregularity in the proceedings; *De Wet v Westren Bank Ltd* 1979 (2) SA 1031 (A) at 1038D or if it was legally incompetent for the court to have made such an order; see *Athmaran v Singh* 1989 (3) SA 953 (D) at 9561. The subrule does not cover orders wrongly granted *Seale v Van Rooyen NO; Provincial Govt North West v Van Rooyen N O* 2008 (4) SA 43 (SCA) at 52B-C; *De Beer v Absa Bank* unreported GP Case no: A882/2014 dated 6 May 2016.

[19] In common law, the general principle applicable is that the Applicant as the party that seeks relief, bears the *onus* of establishing a "*sufficient cause*" for the order or judgment to be rescinded. Whether or not sufficient cause has been shown to exist:

(a) Applicant has got to prove that he was not in wilful default when the order was granted in his absence or erroneously by presenting a reasonable and acceptable explanation of his default.

(b) the Applicant has got to show the existence of a bona fide defence, one that has some prospects or probability of success.

See *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E); *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd)* 1980 (4) SA 794 (A).

Analysis

[20] The examination of the circumstances surrounding the purported withdrawal of notice of opposition is relevant for purposes of determining whether there was willful default and if judgment erroneously obtained. The assessment has to take place within the context of the communication and correspondence that took place between the parties.

[21] It is Richter's contention that the order dismissing his application was obtained willfully by Absa after Van den Burg was made aware that the withdrawal of his notice to oppose pertained to the prayer for leave to intervene, not Absa's opposition of his application which was, to be removed to the opposed motion roll.

[22] It is not in contention that Jacobs and Van den Burg telephonically discussed Absa's application whereupon Richter conceded explicitly and exclusively to Absa's entitlement to intervene, that is to prayer 1 of Absa's notice of motion.

[23] The letter sent subsequent to the withdrawal and the telephone conversation not only confirmed the withdrawal of opposition, which according to the telephone conversation confirmed by both parties was, to Prayer 1, the only prayer that was to be heard unopposed on the date of hearing, but also that the application will then be removed. It was to be placed in the opposed roll. The letter also indicated that a replying affidavit was to be served shortly. If the intention was that Absa obtain an order for dismissal of Richter's application (which clearly is far-fetched), Jacobs reference to the replying affidavit that was to follow shortly would not make sense since there would be no proceedings to respond to. The communication was clearly of an understanding that Richter's application was now opposed, which procedurally was the position, and therefore not appropriate for the matter to be heard in the unopposed motion. Furthermore in the last paragraph of the letter Jacobs confirmed the removal of Absa's application (opposition papers) for enrolment in the opposed motion, which is logical.

[24] Van den Burg on the other hand does not deny that after the telephone conversation he received the letter and confirms that in the letter Jacobs refers to the withdrawal of Richter's opposition to their notice, which is clearly in line or pursuant to their telephone conversation. He also confirms that Jacobs went further and indicated that a replying affidavit was being prepared for service on him, and that Absa's application was to be removed from the opposed roll. He however denies that there was an agreement or understanding as suggested in the last paragraph, alternatively disagrees with it.

[25] Van den Burg admits that he was aware of the connotation in the letter of an understanding between the parties that Absa was entitled to intervene and that its opposition was to be removed from the unopposed roll. It is however very significant that even though he says he disagreed with that connotation, he did not respond to challenge, dispute or contradict the contents of the letter, orally or in writing to Jacobs, a conduct that does not accord with his alleged disputation of the contents of the letter.

[26] Silence in the face of an event that calls for a reaction of some sort or on an occasion where there was a duty to speak or act, implies agreement or waiver of rights or can be regarded as a representation to that effect. Jacobs expectation that Van den Burg will carry forward their understanding and act accordingly on the date of the hearing of the matter was therefore logical. Van den Burg was supposed then, if he was not in agreement, to warn his opponent that he was going to proceed and obtain an order for dismissal. His conduct was not only discourteous but unprofessional. Consequently Jacobs and Richter's absence on the date of the hearing was not willful. They were also justified to expect the matter to be removed to the opposed roll.

[27] In addition when the order for leave to intervene was granted the main application became opposed. It could not be heard in the unopposed motion court. It was therefore procedurally undue as the parties were agreed that Absa was entitled to be granted leave to intervene, so the only remaining prayer was Absa's opposition to the granting of the order in the main application for business rescue.

[28] Furthermore, Absa's argument that Richter has failed to file his Replying affidavit by the date of the hearing of the matter is inconsistent with its allegation that Richter was understood to have withdrawn his opposition. Nevertheless whether or not Richter's Replying affidavit was filed or not is of no consequence. It was not a necessity for him to do so, as it will be shown hereafter. In view of the fact that Richter has established that there was an agreement or understanding that Absa's Application was to be removed for enrolment in the opposed motion which Absa could not refute, the order was erroneously granted.

[29] Moreover the procedural nature of the application for leave to intervene does not involve the court's consideration of the merits of the dispute which is to be argued fully in the main proceedings. The court only considers whether if the allegations relied upon by the Intervening Applicant are proven in the main application, will entitle him to succeed (if he has a prima facie case). It actually only deals with the prospects of success in his opposition of the main application; see *Exparte Moosa*: In re *Hassim v Harrop- Allin* 1974 (4) SA 412 (T); *Minister of Local Government and Land Tenure v Sizwe Development* 1991 (1) SA 677 (Tk) at 678 J-679A; *Ex parte Sudurhavid (Pty) Ltd*; In re *Namibia Marine Resources (Pty)* Ltd v Ferina (Pty) Ltd 1993 (2) SA 737 (Nm).

[30] Therefore as soon as leave to intervene was granted, the main Application became opposed and was to be enrolled in the Opposed Motion roll. The court, may then allow and give direction as to the filing of further Affidavits that would have been necessitated by the intervention. In Moosa at 417B-D it was stated that:

> "It is sufficient for the party seeking leave to intervene to rely on allegations which, if they can be proved in the main action, would entitle him to succeed. This is in my opinion the criterion which should be applied at this stage and it is the same criterion which constitutes a bona fide defence as required by defendant who wishes to stave off an application for a summary judgement."

[31] It is also a discretion of the Applicant whether or not to seek to file a Replying Affidavit. The matter may be heard on its Founding Affidavit. Failure therefore to file a Replying Affidavit does not amount to non-compliance with the rules that should lead to a dismissal of Applicant's case.

[32] Therefore the procedural defect that was so infused in this matter when Richter's application was dismissed are very clear. Absa 's argument that the court that adjudicated the matter had considered the merits is of no assistance, since on granting of leave to intervene to Absa the main application became opposed. The error was committed by the unopposed motion court when it proceeded to consider the then opposed application and granted the order in the believe that notice of withdrawal also applies to its application. The court was also not aware of the correspondence between the parties that confirmed the removal of the matter from the unopposed roll; see *Rossiter v Nedbank* Ltd (Unreported (SCA) Case no96/2014 dated 1 December 2015 [16].

[33] The error was clearly twofold. It arose in the process of seeking the judgment on the part of Absa and also in the process of granting default judgment by the court. Since the court has come to a conclusion that the order or judgment was erroneously sought by Absa and also granted erroneously by the court, the order should without any further enquiry be rescinded or varied; see *Tshabalala v Peer* 1979 SA (4) 27 (T) at 30; *Rossiter v Nedbank* Ltd (Unreported (SCA) Case no96/2014 dated 1 December 2015. It is not necessary for the Applicant to show that there is good cause for the rescission as contemplated under common law, for the Rule 42 (1) to apply .

[34] The court has taken into consideration what has been highlighted on behalf of Absa that when the Application came before the court after being remitted back to the court by the SCA, it was already 3 and a half years after the Application was lodged and therefore there is a possibility that Bloempro's circumstances might have changed. It might not be in a position where business rescue proceedings would be viable due to its insolvency. It was held in *Trye Corporation Cape Town (Pty) Ltd and Others v G T Logistics (Pty) Ltd (Esterhuizen and Another Intervening)* 2017 (3) SA 74 (WCC) that commercial or factual insolvency is no bar to business rescue and constitute 'financial distress' for purposes of the Act. I have all the same, in the interest of justice considered that an appropriate order that will facilitate a proper hearing of the matter.

[35] Under the circumstances I make the following order:

1. The Applicant's application for rescission is upheld. The order made by Louw J on 16 May 2013 dismissing the Applicant's Application for the 1st Respondent to be placed under business rescue is set aside.

2. The business rescue application will proceed on an opposed basis;

3. The Applicant is granted leave to supplement its papers in the business rescue application upon which the Respondent will be afforded an opportunity to respond, If they find it necessary, subject to the normal time limits applicable.

4. The 4th Respondent to pay the costs.

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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[17] In *HDS Construction (Pt) Ltd v Wait* 1979 (2) A 298 (E) at 300G-301E the court held that:

> "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**."

[18] In *Harris* on par [5], Moseneke J (as he was then) in a full bench appeal explained that a reasonable and an acceptable explanation of the default must co-exist with the evidence of reasonable prospects of success on the merits. He made a reference to Muller JA's explanation of the rule in *Chetty v Law Society* (At 765D-E) that:

> "It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. **An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain for the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."** (*my emphasis*)

[10] Muller JA's explanation however creates a conundrum as weighing prospects of success might show that the Plaintiff, taking into consideration the facts as established or proven by the Defendant, was not entitled to Default Judgment. If the Defendant has however displayed utter disregard of the rules and acting with total indifference failed to oppose the Application, will refusal of rescission be appropriate under the circumstances.

[11] Appreciating the danger of following the dicta of Moseneke J in Harris verbatim, he amplifies the preferred approach by quoting in par [11] the statement by Jones J in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 711F-I that:

> "An application for rescission is never simply an enquiry whether or not to penalise a party for failure to follow the rules and procedures laid down for civil proceedings in our courts. **The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the Application for rescission is not bona fide. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties.... He should also do his best to advance the good administration of justice.** In the present context this involves weighing the need, on the one hand, to uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised and heard.

[12] The *dicta* indicates that in determining whether or not a rescission of judgment would be appropriate, the court in some instances when exercising its discretion has got to look at various other factors beyond the finding of wilful default and prospects of success.

The interests of the parties have to be balanced looking at the prejudice that might be caused to each party, its decision ensuring that good administration of justice is advanced, that judgments of the courts which are properly taken in accordance with procedures are upheld at the same time preventing an injustice that might arise from allowing the execution of judgment which should not have been taken. This answers to the *bona fide* of the Application, that is, whether or not the Application is made with good intentions. Which is the principle that is applicable in this matter. *De Wetts* confirms the approach, in accepting that:

> " the wilful or negligent or blameless nature of the Defendant's default now becomes one of the **various considerations which the courts will take into account** in the exercise of their discretion to determine whether or not good cause shown."

[20] It would certainly be contrary to the advancement of the administration of justice and an ordered judicial process, if the order for rescission of a default judgment would be set aside for the purpose of giving a litigant, who had due legal representation and both him and his legal representative being aware of the proceedings had, owing to a believe that the Application would not succeed, deliberately not opposed the application, a chance to attempt to reverse the outcome so that he can then oppose the Application. The Applicants have failed to establish the absence of wilful default by giving a reasonable and a credible explanation for their default.

[21] It is also common cause that the Applicants were delayed in bringing the Rescission Application and have applied for condonation. The rescission Application was finally filed only in 2015, 1st Respondent did not oppose their Application indicating that they did not wish for the matter to be delayed any longer. The condonation would then be granted. The 1st Respondent was in turn also delayed in filing the answering affidavit and the Applicants had elected not to oppose the application for condonation but to abide by the court's decision. I had therefore considered granting condonation to both parties' applications.

Applicant's bona fide and the prospects or probability of success.

[22] The Applicants have outlined their case against the 1st Respondent which is largely not disputed by the 1st Respondent. It is common cause that the Applicants and 1st Respondent entered into a sale agreement on 13 April 2013 with the 1st Respondent purchasing the Applicants' business for a R1 000 000.00. The parties agreed that 1st Respondent was to pay a deposit of R500 000.00 on date of signature and thereafter to transfer ownership of its truck to the Applicants with the agreed value of R150 000.00 and the difference of R350 000.00 to be paid in monthly instalments of R20 000 until the full purchase price is paid.

[23] It is also common cause that 1st Respondent paid an amount of R207 200.00 on 13 April 2012, transferred ownership of the man horse with the value as agreed in their agreement, of R150 000.00 to the Applicants. He also arranged for an amount of R292 800 that was payable to him by Sparax Trading 145 (Pty) Ltd("Sparax") to be paid to the Applicants by having Sparax draw a cheque in their favour to make up for the shortfall in the deposit, which cheque was accepted by the Applicants. He therefore *de facto* ceded his claim of R292 000. Thereafter 1st Respondent took over the business on 16 April 2012 and

transferred a trailer to the Applicants followed by two payments totalling R30 0000. all these facts are not denied by the Applicants.

[24] However there is an argument about the value of the trailer and the total monthly payments made. 1st Respondent alleges that the trailer is worth R55 000.00 whilst the Applicants allege that it is R50 000.00. The monthly payments are said to be only R30 000 by the Applicant whilst 1st respondent alleges to have paid R67 000.00.

[25] The Applicants have alleged in their Founding Affidavit and claimed in their summons that resulting from 1st Respondent's default an amount of R612 800.00 was due and owing to it. In their summons no mention is made of the trailer or the amount of R292 000.00. The Applicants only acknowledged in their particulars of claim receipt of the R207 200, the handing over of the heavy duty man horse of R150 000 and instalment payments of R30 000 which equals R387 200.00 leaving a balance of R612.800.00, the amount of the Default Judgment. Nothing further is said about the debt.

[26] On their Application to set aside the Default Judgment, the 1st Respondent referred to the fact that the Applicants have omitted to mention a trailer in the value of R55 000.00 that was also transferred to the Applicants and a claim for R292 800.00 owed to it by Sparax which they ceded to the Applicants. He alleged that Applicants had accepted the cession and thereafter collected the cheque from Sparax as part of the deposit. They proceeded to sue and obtain judgment against Sparax in their favour for the payment of the amount, when the cheque was dishonoured. The judgment was obtained on 12 October 2012 before they applied for default judgment against him. 1st Respondent argued that the amount that was as a result paid to the Applicants was therefore not R387 000.00 as claimed by the Applicants. Therefore the Registrar was misled by not being informed of the other arrangements between the parties. He alleges the amount of R200 000.00 to have been paid on 31 March 2012 before the signing of the agreement with Applicants accepting the different form of payment. As a defence to the remaining amount he alleged that the Applicants had in breach of their agreement removed certain items from the business and that made it difficult for him to operate the business profitably, as a result the business did not generate the monthly income that was expected from which he was supposed to pay monthly instalment. There is also a contention raised regarding the amount paid by electronic transfer.

[27] In their Founding Affidavit, Applicants now allege, contrary to what is in their particulars of claim, that the man horse was not in a running condition and needed substantial repair work of approximately R100 000.00. The tyres and the battery were missing. They also claim for the first time that the parties as a result agreed to amend the agreement and agreed on a value of R100 000.00 for the man horse. They for the first time also mention the trailer being transferred to them albeit for the value of R50 000 and together with the horseman to have made up the amount of R150 000.00 that was initially agreed upon for the man horse. Applicants at the same time deny that the agreement was ever amended and therefore that the 1st Respondent ceded Sparax's debt of R292 800.00 to them. They argue that no payment was received from Sparax which implies that the R292 800.00 remains owing. However they do not mention that they did not only bank the cheque but also proceeded to enforce the claim by suing Sparax when the cheque was

dishonoured. They subsequently obtained a default judgment against Sparax, an indication not only of having accepted the cession but of Applicants enforcing the ceded claim.

[28] The aforementioned facts were not revealed in the summons upon which the Applicants had obtained judgment against the 1st Respondent. The Registrar in that case did not consider these facts when the Default Judgment was granted. Therefore on the facts as established by the 1st Respondent, he had shown good cause for the default judgement to be set aside. Kollapen J therefore exercised his discretion properly when he at the time granted the 1st Respondent the order setting aside the Default Judgment that was granted in the absence of the 1st Respondent. I have left the consideration of 1st Respondent's allegation on the immovable property for proper consideration by the court that will be hearing the application on the 2 prayers postponed sine die.

[29] Kollapen J further properly exercised his discretion when he, even though the 1st Respondent had alleged to have sent a letter to the 2nd Respondent notifying him of the Rescission Application and made him aware of the documents that were filed, took into consideration the interest of the parties and postponed the two prayers that refers to the cancellation of the sale *sine die* with the order that 1st Respondent serve the Application personally on the 2nd Respondent. For that reason there is no justification for the order of Kollapen J to be set aside. By making such an order he had made sure that the prejudice that 2nd Respondent could have suffered as a result of the Applicants failure to oppose the matter is prevented.

[30] The Applicants have failed to show the *bona fides* of their Application that would justify the prevention of the matter being sent to trial. On their papers the disputes on the facts are apparent since they have now in their Founding affidavit made new allegations upon which their claim is allegedly founded. Interestingly even then they do not dispute what the 1st Respondent is alleging, the transfer of the trailer albeit the R5 000.00 difference on the value, the receipt of the cheque R292 800 and not divulging that they obtained judgment on the cheque. Their claim clearly lacks the *bona fides* inherent in the application. They have failed to make a case for the reversal or setting aside of the order by Kollapen J.

[31] The purpose of rescinding a judgment is 'to restore a chance to air a real dispute, as correctly pointed out by "Mr Leballo, 1st Respondent's counsel. The parties will get a proper opportunity to deal with the apparent disputes and finally deal with the matter in the trial, since there is no advantage or disadvantage that can flow from a rescinded default judgment.

[32] Under the circumstances taking into account the nature of the Applicants claim whose cause of action was not fully pleaded when default judgment was granted, Kollapen J's order was correct and would not be in the interest of justice to set it aside.

I therefore make the following order:

1. The Applicants Application for rescission of Kollapen J's order of the 26 August 2013 is dismissed with costs.

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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