

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: **29635/2012**

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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SIGNATURE

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DATE

In the matter between:

GRATITUDE MZIWAMANKWALI MEMEZA

Applicant

And

NINO'S GROUP (PTY) LTD

Respondent

J U D G M E N T

MALI AJ

- [1] This is an application for rescission of default judgment granted by the Registrar of this Honourable court on 10 July 2013. The respondent obtained the default judgment on the basis that the applicant failed to enter appearance to defend.

- [2] It was argued on behalf of the applicant that the applicant was not served with summons. This is despite the sheriff's return of service indicating that the summons was served on his wife at the applicant's address. The applicant became aware of the default judgment on 4 August 2013.

- [3] The cause of action is a breach of a written lease by the applicant. The lease agreement was annexed to the affidavit filed with the Registrar. The applicant denies having entered into a lease agreement with the respondent whether written nor verbal. The applicant is a member of Sipolilo Close Corporation ("cc"), an entity that entered into a franchise agreement with the respondent and not a lease agreement.

- [4] It was further argued that respondent's claim is not liquidated as the respondent alleges that the applicant undertook to make payment of the amount of R800 000.00 on behalf of the CC. However the default judgment obtained was for the amount of R340 000.00.

- [5] Counsel for the respondent argued that summons was served on the applicant's wife Ms Zinzile Zungu. The respondent conceded that the affidavit placed before the registrar had erroneously disclosed the cause of action as a breach of a written lease agreement; accordingly that judgment was taken erroneously. Be that as it may, Mr Stylianou Counsel for the respondent persisted in opposing the application. He stated that the applicant had verbally acknowledged the arrear rental

by the cc and agreed to make payments. He further explained why the judgment was not taken on the original amount and insisted that the claim is liquidated.

- [6] The requirements for rescission of default judgment in terms of Rule 31 (2) (b) are as follows:

- (a) The applicant must give a reasonable explanation of his default;*
- (b) The application must be bona fide and not made with the intention of merely delaying the plaintiff's claim;*
- (c) The applicant must show that he has a bona fide defence to the plaintiff's claim.*

- [7] In **Harris v Absa Bank Ltd t/a** ¹ the court held that

“while wilful default on the part of the applicant is not a substantive compulsory ground for refusal of an application for rescission, the reason for the applicant's default remains an essential ingredient of the good cause to be shown”.

- [8] In **RGS Properties (Pty) Ethekwini Municipality**² (“RGS”), Acting Judge Ngwenya as he then was, citing **Naidoo v Cavendish Transport Co (Pty) Ltd** ³ held that the court should not scrutinise too closely whether the defence is well founded, as long as prima facie there appears to the court sufficient reasons for allowing the defendant to lay before court the facts he thinks necessary to meet the plaintiff's claim and that where a defendant has never clearly acquiesced in the plaintiff's claim but persisted in disputing it, the court should be slow to refuse him entirely an opportunity to his defence being heard. The

¹ 2006 (4) SA 527

² 2010 (6) SA 572

³ 1956 (3) SA 244 (D)

principles enunciated in Naidoo above have been followed in a number of cases. See for example **Galp v Tansley N.O.** ⁴

[9] The Judge in RGS above further stated

“I may add to this principle that judgment by defendant is inherently contrary to the provisions of section 34 of the Constitution. The section provides that everyone has a right to have any dispute than can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate another independent and impartial tribunal or forum. Therefore in my view in weighing up facts for rescission, the court must on the one hand balance the need for an individual who is entitled to have access to Court and have his or her dispute resolved in a fair public hearing against those facts which led to the default judgment being granted in the first instance.....the nature of the defence advanced must not be such that it “prima facie” amounts to nothing more than a delaying tactic on the part of the applicant”.

[10] In **Lazarus v Nedcor Bank Ltd** ⁵ it was held that the object of rescinding a judgment is to restore a chance to air a real dispute. It is trite law that the applicant must show that he has a bona fide defence to the plaintiff’s claim.

[11] With the above principles in mind I now consider the defence raised by the applicant against the contentions by the respondent. The applicant stated that there was no proper service of summons. Secondly the applicant denied that he entered into a lease agreement with the respondent whether written or verbal, a fact which has been conceded by the respondent. The applicant further stated that he never

⁴ 1966(4) SA 560

⁵ 1999 (2) SA 782

acquiesced to the debt of the CC towards the respondent whether liquidated or not.

[12] In my well considered view, what the applicant has stated requires to be tested by the trial court and not this court. As to the propriety or impropriety of the service the issue now becomes academic. I am satisfied that the applicant has a bona fide defence and has raised a triable issue. The application meets the requirements of Rule 31(2)(b) of the Superior Court Practice.

[13] I accordingly make the following order.

13.1. The application is granted.

13.2. The Default judgment dated 10 July 2013 is set aside.

13.3 The respondent is to pay the costs of the application.

MALI AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Counsel for the Applicant: Adv A. Mkhabela

Instructed by: Manugeni Incorporated

Counsel for the Respondent: Adv K. Ioulianos

Instructed by: Kokkoris Attorneys

Date of Hearing: 2 March 2015

Date of Judgment: 19 March 2015