REPUBLIC OF SOUTH AFRICA

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

APPEAL CASE NO: A5045/2019

COURT A QUO CASE NO: 16479/2018

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

Date: …… .....

In the matter between:

ROLKO CC t/a WORLD TIME MACHINE
(Registration No. 1993/029309/23) First Appellant

ROLAND MARTIN KOPEL
(ID No. […]) Second Appellant

and

LUXCO IMPORTERS (PTY) LTD Respondent

JUDGMENT

STRYDOM J (BAQWA J AND BHOOLA AJ CONCURRING):

Introduction

[1] This is a full court appeal against the refusal by the court *a quo* to rescind a default judgment obtained by the respondent against the first and second appellants arising from the appellants' failure to file a notice to defend.

[2] The appeal came before this court pursuant to leave to appeal being granted by the Supreme Court of Appeal on 16 August 2019.

[3] Default judgment was obtained in respect of a claim (the main claim) by the respondent for goods, namely luxury watches, sold and delivered in terms of a written credit agreement entered into between the first appellant and the respondent.

[4] The second appellant signed a deed of suretyship, incorporated in the written agreement, in terms of which he rendered himself liable on demand for all moneys due by the first appellant to the respondent.

[5] Before this full court there was only appearance on behalf of the second appellant as the first appellant has gone into liquidation subsequent to the court *a quo's* order being granted. The court was informed that the first appellant will abide by the decision of this court.

[6] The appellants applied for condonation for the late serving and filing of the appellant's heads of argument and practice note. This application was not opposed and at the hearing of this matter such condonation was granted.

Factual matrix and chronology

[7] On or about 30 May 2018, the respondent (as plaintiff) served a summons on the appellant wherein it claimed the amount of R91,027.49 plus interest and

costs pursuant to watches being sold and delivered to the appellant. In the summons it is alleged that:

7.1 On 25 February 2005, the first appellant and the respondent concluded a written agreement in terms of which the second appellant, representing the first appellant, signed and accepted the respondent's credit application which incorporated its trading terms and conditions and a suretyship by second respondent in favour of respondent. (hereinafter referred to as the "written agreement")

7.2 In terms of the deed of suretyship, the second appellant bound himself as surety and co-principal debtor, in solidum, for the due and punctual payment of all moneys which may now or in the future become due and payable by the first appellant to the respondent.

7.3 The first appellant fell into arrears with its payment obligations to the respondent in terms of the written agreement as a result of which the respondent claimed the amount of R91,027.49 plus interest and costs.

[8] On or about 31 May 2018, the appellant's attorney drafted a notice to defend on behalf of the appellants. This notice, in terms of the Rules of this Court, ("the Rules") should have been filed on or before 13 June 2018. The notice was not filed within the time limit.

[9] On 15 June 2018, the respondent obtained a default judgment against the appellants for payment of the amount of R91,027.49 together with interest and costs.

[10] On 18 June 2018, 3 court days after the due date, the appellants filed their notice of intention to defend. Only thereafter, on 22 June 2018, the appellants became aware of the default judgment that had already been obtained against them.

[11] Considering that the default judgment was already granted, the appellants had to apply for a rescission of this judgment within the time period of 20 days

prescribed in Rule 31(2)(b) of the Rules. The cut-off date for filing of the rescission application would have been 23 July 2018.

[12] The application for rescission of the default judgment was filed on 31 July 2018 also after the date required.

[13] The condonation application and the rescission application were dismissed on 27 November 2018 by the court *a quo*. The written reasons as well as the judgment on the application for leave to appeal delivered by the court *a quo* stated that the court delivered an oral judgment which was read into the record. This judgment did not form part of the record before us. After a notice of appeal was filed against the judgment and order, a request was made for reasons for judgment which was delivered on 13 February 2019. These were the written reasons for judgment before this full court.

Judgment of the court *a quo*

[14] The court *a quo* found that the appellants did not show good cause to obtain an order to rescind the default judgment. It was found that the appellants did not establish a *bona fide* defence against the respondent's claim and failed to provide satisfactory explanations for the late filing of the notice of intention to defend as well as for the late filing of the application for rescission of judgment. The court *a quo* further made an adverse costs order against appellants pertaining to an irregular step taken by them which will be dealt with later in this judgment.

[15] The appellants appeal was aimed at each one of these findings.

Legal requirements for rescission of a judgment

[16] The requirements for an application for rescission of a default judgment under Rule 31(2)(b) has been stated by our courts[1] to be as follows:

[1] See for instance *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1(SCA) at 9E-F

16.1 The applicant must give a reasonable explanation for his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance.

16.2 His application must be *bona fide* and not made with the intention of delaying the plaintiff's claim.

16.3 He must show that he has a *bona fide* defence to the plaintiff's claim.

[17] It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

[18] The wilful or negligent nature of the defendant's default is one of the considerations which the court takes into account in the exercise of its discretion to determine whether or not good cause is shown.[2]

[19] The reasons for the applicant's absence or default must be set out because it is relevant to the question whether or not his default was wilful. The explanation for the default must be sufficiently full to enable the court to understand how it really came about, and to assess the applicant's conduct and motives.[3]

[20] In *Silber* supra, the Appellate Division held that *"good cause"* includes but is not limited to, the existence of a substantial defence. It has been held that the requirement of "*good cause"* cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence, but in addition, of the *bona fide* presently held desire on the part of the applicant for relief to actually raise the defence concerned in the event of the judgment being rescinded.[4]

[21] Before I deal with the explanation provided by the appellants for the late filing of their notice of intention to defend and the lateness of the application for

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2 *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 530B – 531B; *Scholtz v Merryweather* 2014 (6) SA 90 (WCC) at 94F- 96C.
3 See *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A.
4 *RGS Properties (Pty) Ltd v Ethekwini Municipality* 2010 (6) SA 572 (KZD) at 575 D-G.

rescission, I am of the view that it is convenient to deal with the question whether the appellants have shown a *bona fide* defence to the respondent's (plaintiff's) claim.

***Bona fide* defence**

[22] The golden thread that runs through the appellants' grounds of appeal is premised on the proposition that an oral agreement, entered some 25 years ago, existed as a separate and distinct agreement from the written agreement.

[23] The appellant asserted that whilst it is not disputed that second appellant signed the written agreement the parties "*never acted in accordance with the terms and conditions thereof, especially in circumstances of consignment."* The second appellant, who deposed to the founding affidavit on behalf of the appellants, then continued to explain how certain watches were delivered to first appellant by respondent on consignment. This entailed that the respondent, from time to time, provided the appellant with watches to display in its shops and to offer them for sale. The purpose of this arrangement was to assist in the marketing of certain watch brands. The appellants mentioned the following brands of watches which were supplied by the respondent to the first appellant on consignment: Ball; TW Steele; Titan; Michel Herbelin; and Wenger. It was asserted that the watches that formed the subject matter of the dispute in this matter are TW Steele and Titan watches supplied on consignment and not in accordance with the written agreement. The appellants further asserted that the respondent was willing to collect some of the watches supplied on consignment but refused to take back the TW Steele and Titan watches despite the return being tendered. The appellants then concluded that the respondent is obliged to take back its consignment stock and that the default judgment was "*wrongly"* obtained.

[24] On behalf of the respondent it was argued that the appellant failed to establish a *bona fide* defence on the merits. The first line of attack was aimed at the existence of the oral agreement. The court *a quo* found that the appellant has not provided a convincing explanation on the existence of this agreement. Details pertaining to the oral agreement is in fact lacking in that the terms of

the oral agreement was not stated. It was merely stated that the watches would be provided to the appellant on a consignment basis. What exactly this entailed has not been stated.

[25] It was further argued that the oral agreement, which allegedly pre-dated the conclusion of the written agreement, determined that watches would not be sold on a consignment basis or return basis. It was argued that the written agreement expressly excluded the consignment basis.

[26] It was further argued that even if it could be accepted that the appellant would be able to establish at trial that an oral agreement was concluded many years ago, there would still not be a *bona fide* defence to the respondent's claim as the oral agreement cannot exist independently and simultaneously with the written agreement. Reliance for this proposition was placed on the *parol evidence rule.* According to the argument, the alleged oral agreement and any evidence in relation to the oral agreement will contradict, add to and modify the meaning of the written agreement. Moreover, so the argument went, the written agreement precludes variation unless reduced to writing and signed by both parties and contained in a clause confirming that this was the whole agreement between the parties. This clause therefore prevents the existence of other agreements simultaneously with the written agreement. It was argued that if the appellant seeks to carve out of the written agreement specific conditions attaching to the sale of particular watches, then the remedy lies in rectification of the written agreement to reflect its application only to certain goods. The written agreement did not distinguish between different watches and only referred to "*goods".* As the appellant did not seek rectification of the written agreement, there is no evidence to support the appellant's claim that there exists any agreement between the parties on the terms asserted by the appellant.

[27] Finally, the respondent found some support for its argument in an alleged non-variation clause contained in the written agreement. It was argued that the parties specifically and deliberately bound themselves to a clause that precludes the departure from the terms of the written agreement, including the term that the respondent does not supply watches to the first appellant on

consignment. The appellants are therefore precluded by the non-variation clause from arguing that another arrangement exists. The respondent's argument was concluded by submission that the appellants had failed to establish a bona fide defence on the merits of the main claim. For this reason alone, the court *a quo* was correct in dismissing the rescission application.

[28] The argument advanced by the respondent was in line with the decision of the court *a quo* and should be considered further by this court.

[29] The first question to consider is whether the alleged oral agreement could exist simultaneously and independently of the written agreement.

[30] On a perusal of the terms of the written agreement it becomes clear that the written agreement also incorporated a deed of suretyship. In terms of this deed of suretyship the second appellant bound himself as surety for and co-principal debtor in solidum with the first appellant. Clauses 1 to 10 deal exclusively with the terms of the deed of suretyship. Clause 3, for instance, reads as follows:

> "No variation of this suretyship or any of the terms hereof shall be of any force or effect unless reduced to writing and signed by me/us and confirmed by the Creditor in writing. It is agreed that this suretyship constitutes the whole of the agreement between the parties hereto and that no conditions precedent suspending its operation and no warranties, promises, representations or inducements of whatsoever nature have been made or given by the Creditor or any other person to me to sign the suretyship and bind myself to the terms thereof."

[31] When this clause is interpreted it is my view that the reference to *"no variation"* and "*the whole of the agreement"* pertain exclusively to the suretyship and not to the credit agreement part of the written agreement. This clause would accordingly not be a bar from asserting a further agreement. Moreover, as far as the "*no variation"* restriction is concerned it was never the defence of the appellants that the written agreement was varied. Their case was that the oral agreement preceded the written agreement by many years.

[32] On behalf of appellants it was argued that the written agreement only regulates the goods sold to first appellant and not the supply of goods on consignment. This was countered by an argument that clause 13 excludes the sale of watches on consignment.

[33] Clause 13 reads as follows:

> "Goods are not sold on a consignment basis or sale or return basis."

[34] This clause is not clear in its terms. Does it mean that goods are not sold by the respondent to the first appellant on a consignment basis or does it mean goods are not supplied by respondent to be sold by first appellant on a consignment basis?

[35] The appellant has not provided any detail to explain the terms of the oral agreement pertaining to consignment. According to the Oxford English Dictionary,[5] "*consign*" means "*deliver to someone's custody*"; or "*put someone or something in [a place] in order to be rid of them"* and "*consignment*" means *"a batch of goods consigned*". This meaning provided does not refer to the selling of goods by someone whom has taken delivery of goods. Even when this clause is interpreted in context of the entire written agreement the clause remains unclear as it determines that *"goods are not sold on consignment*" or sold on a "*return basis*". The latter is an indication that "*sold*" refers to the transaction between the respondent and the first applicant and not between the first appellant and the ultimate buyer. The reference to "*sale*" in this clause further renders this clause ambiguous. Accordingly, in my view, it is not clear that the reference to "*sold on a consignment basis*" is a reference to the selling of the goods by the person who received the goods.

[36] I do not intend to decide this issue considering my findings later in this judgment.

[37] The question remains however whether goods could have been supplied by the respondent for sale by the first appellant after it has been consigned to it, without being bought, in terms of a prior agreement. In my view a separate

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[5] 10th Ed completely revised.

oral agreement could co-exist with the written agreement. The written agreement does not contain a whole agreement clause preventing a supply of goods between the parties only in terms of the written agreement. As indicated hereinabove, the "whole agreement" clause only pertains to the suretyship.

[38] For purposes of the rescission application and the establishment of a *bona fide* defence, an applicant does not have to show a probability of success in his defence. The defence only needs be established on a *prima facie* basis. This matter can be decided on the version of the appellants that a prior oral agreement existed separate from the written agreement. Having said that, I am nevertheless of the view that the appellants have failed to establish a *bona fide* defence even on a *prima facie* basis. There are two reasons for my finding.

[39] First, the appellants in the founding affidavit, in my view, failed to make it clear what impact the oral agreement had on the claim of the respondent premised on the terms of the written agreement. The details pertaining to this alleged oral agreement have not been fully stated or ventilated in the founding affidavit. The whole concept of the supply of watches on consignment has not been properly explained in relation to how it was implemented. No documents were referred to and nothing was said about the terms of the oral agreement pertaining to any *quid pro quo* should watches on display be sold. The court was left to speculate and to assume that watches supplied on a consignment basis were supplied without monies being paid. What would have happened when these watches were sold to third parties and how would it have affected the outstanding credit balances?

[40] Second, and even more damaging for appellants, the second appellant on or about 13 March 2018, after the respondent demanded payment for watches sold to the first appellant, wrote as follows in an email sent to respondent:

> "Please be advised you may advise your client they can collect their stock to off-set the debt owed to them just as they have removed their stock previously from Cresta Jewellers and World Time Machine Sandton."
>
> VTM Cresta

TWL Steel R89,859.54

Titan R48,783,62

WTM East Rand Mall

Michelle Herbelin R29,680.66

Total Debt according to you letters R169466.53 stock returned, R168 283.82 amount to be paid R1182,71.

Regards

Roland Kopel"

[41] When this letter is considered there is no doubt that the appellants acknowledged the debt in the amount of R169,466.53 as it is now stated that after the set-off R1182,71 remains due. The contents of the letter were not disputed and speak for itself. To off-set this debt the appellants tendered the return of these watches at a certain specific stated value. How can the return of goods be tender at value if these goods were not previously bought either for cash or against an account? If it is considered that the appellants defence is based on the supply of these watches on consignment, which would ordinarily entail that it was not sold, coupled with the fact that there is no allegation that these consignment items were wrongly invoiced for by respondents, the only reasonable inference to be drawn is that these watches were in fact sold by the respondent to the first appellant. Otherwise as stated hereinabove, how can the value of these watches be set off against the existing debt? If bought, they could only have been sold by the respondent in terms of the written agreement and not the oral consignment

[42] During the hearing of this appeal I specifically took up this issue with Mr Novitz acting for the second appellant. He merely contended that this is an issue that should be further ventilated at a trial hearing. The problem with this response is that it was expected of the appellants to provide a *bona fide* defence against the R91,027.49 claim of the respondent. It was for the appellants to place evidence before the court to set out their defence. It is also telling that this email was not attached to the appellants' founding affidavit. Only a letter which in vague terms referred to an oral agreement was attached.

[43] In the replying affidavit the appellants raised a further defence not referred to in the founding papers. It is now asserted that the watches listed in annexes "JS6" and "JS7" were never delivered. No prior correspondence refers to this and this allegation cannot be brought in line with what appellants asserted in the email dated 13 March 2013 quoted hereinabove. Moreover, it was expected of the appellants to state their case and defence in the founding papers. In my view this further "defence" is an afterthought and not raised *bona fide.* Consequently, I am of the view, for somewhat different reasons, that the court *a quo* correctly concluded that the appellants failed to show that they have *bona fide* defences to the claim which *prima facie* have some prospect of success.

[44] In light of my finding that the appellants have failed to establish a *bona fide* defence, it is not strictly necessary to consider the explanations for the lateness of the filing of the notice of intention to defend and for the late filing of the rescission application. I will nevertheless express my views in this regard.

[45] Pertaining to the explanation as to why the notice of intention to defend was filed three days late, I am prepared to accept that this was caused due to the negligence of the appellants' attorney. The notice of intention to defend was prepared one day after the summons was served on 30 May 2018. There is nothing placed before the court to dispute this.

[46] The court *a quo* was of the view that the explanation was lacking in any detail. There is nothing to suggest that delivery was delayed deliberately. When the error was discovered, it was served three court days later. This is not an undue delay. The appellants' attorneys accepted that they and not the appellants were at fault. The responsibility for the delivery of a notice of intention to defend rested upon the appellant' attorney whose confirmatory affidavit was annexed. His confirmation that it was not served as a result of a fault on his office is in my mind a sufficient explanation. Factually, he signed the notice of intention to defend on 31 May 2018 with the intention that it be delivered. However, it was not, and the appellants cannot be held responsible for this oversight. The delay in the service of the notice of intention to defend was too short to have expected of the appellants to follow whether this

document was filed. They had authorised their attorney to accept service and to enter an appearance to defend on their behalf. As such, there was nothing further for them to do at that stage.[6]

[47] The explanation for the late filing of the rescission application after there was already a late filing of the notice to defend is on a different footing and is unconvincing and lacks particularity. On 22 June 2018 the appellants became aware that a default judgment was entered against them. This would mean that by 23 July 2018 the rescission application should have been launched. Part of the explanation for the delay is that second appellant went to Russia to watch the Soccer World Cup. The second appellant does not state when he went to Russia but he said that he returned on 18 July 2018. Five further days remained before 23 July when the rescission application had to be served. To cover this period he merely stated that he travelled internally and made reference to a funeral which he had to attend on 27 July 2018. No explanation has been provided what transpired between 18 July 2018 and 23 July 2018. Eventually the rescission application was filed on 31 July 2018.

[48] I am in agreement with the court *a quo* that the reasons advanced by the appellants are not satisfactory and opaque. No date has been provided as to when the second appellant left the country. There is also no account for the days between 18 July to 27 July, except to state that the second appellant had travelled internally and had to attend a funeral service in Cape Town. In my view condonation should not have been granted for the late filing of the application for rescission of the judgment.

[49] Accordingly, it is my view that the appellants have not shown good cause for a rescission and the application was correctly dismissed with costs by the court *a quo.*

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[6] The test applied in *Salojee and Another, NNO v Minister of Community Development 1965* (2) SA 135 (A) at p 141B – H does not apply to the appellant. This is not a case of an inordinate delay where it could have been expected from the client to enquire from its attorneys how the matter was progressing.

The irregular step costs order

[50] What remains is to consider is whether the costs order pertaining to the alleged irregular step was correctly made by the court *a quo* in its judgment refusing leave to appeal. To consider this cost order it should be considered whether the filing of the appellants' notice for application for leave to appeal dated 7 December 2018 constituted an irregular step.

[51] Apart from the cost order the court *a quo* never made an order that the filing of the first notice of application for leave to appeal constituted an irregular step. The court *a quo* only came to this conclusion in his written leave to appeal judgment.

[52] What transpired is the following: On 27 November 2017 the court *a quo* made its order dismissing the rescission application with costs. It is unclear from the record to what extent reasons for the order were read into the record when the order was made. In the respondent's irregular step application it was asserted that the judgment was handed down. In the judgment it was stated that the "reasons for my order were read into the record." A similar statement was made in the judgment for leave to appeal. On 7 December 2018 appellants filed its first notice for application for leave to appeal. On 14 December 2018 the court *a quo* was requested to provide reasons for judgment. On the same date the respondent filed a notice of irregular step aimed at the notice for application for leave to appeal. On 6 February 2019 the respondent's application to set aside the irregular step was delivered. On 13 February 2019 the court *a quo* provided reasons for judgment and on 15 February 2019 the appellants filed a second and more comprehensive notice of application for appeal.

[53] What has not been explained before us is why there was need for reasons for judgment if same were read into the record when the order was made on 27 November 2017? What seems to be common cause is that the learned judge provided some reasons for his order when same was made. It was not a case, as contemplated in Rule 49(1)(c), where the court *a quo,* when the order was made, indicated that reasons for the order would be furnished on application.

One can only conclude that the reasons read into the record were not the full reasons.

[54] The appellants were entitled, pursuant to the reasons for judgment which were provided when the order was made, to file a notice of appeal within the time frame stipulated in Rule 49(1)(b). The appellants were entitled to ask for further reasons as Rule 49(1)(b) refer to *full reasons* apart from *reasons*.[7]

[55] The first notice of appeal expressly stated that the appellants reserved the right to amend the grounds set out therein, upon receipt of written reasons. Such reasons were requested timeously. Thereby the appellants made it clear that they would consider whether to supplement the notice of appeal once the further reasons were received.

[56] On behalf of the respondent it was argued that it was not aware of the request for the provision of further reasons. The request, according to the judgment, was emailed to the acting judge on 14 December 2018. Whether this email was also sent to the respondent is not known to this court. Even if it was not it is unlikely that it would have made a difference as on the same day the notice of an irregular step was emailed to the appellants.

[57] The first notice of application for leave to appeal, in my view, encapsulated the main points of appeal clearly and succinctly enough for the respondents not to be prejudiced. The first notice for leave to appeal was not an irregular step and the adverse cost order made by the court *a quo* should be set aside. The appellants filed no papers in this application and no cost order should be made. Moreover, this part of the appeal was only incidental to the main appeal and limited court time was spent on this issue.

[58] The following order is made:

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[7] Rule 49(1)(b) reads: "When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days."

58.1 The appeal is dismissed with costs, including the cost of the application for leave to appeal.

58.2 The order in terms of which the appellants were ordered to pay the costs of the Rule 30 notice, on the High Court scale, is upheld. No further order as to costs.

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R. STRYDOM

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

I agree,

_____

U. BHOOLA

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

It is so ordered,

_____

S. BAQWA

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

Date Heard:	07 September 2020
Judgment Delivered:	18 September 2020

Appearances:

For the Appellant:	Adv. M Nowitz
Instructed by:	Nowitz Attorneys
For the Respondent:	Adv. A. Vorster
Instructed by:	Mervyn J Smith Attorneys