REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2019/12579

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

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K.E. MATOJANE **22 SEPTEMBER 2021**

In the matter between:-

TSHOSA JOPA MORAKA	First Applicant
ISF STRATEGIC INVESTMENT (PTY) LTD	Second Applicant
and	
INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA	First Respondent
SHERIFF HALFWAY HOUSE	Second Respondent
NAME PLATE CENTER SIGNS (PTY) LTD	Third Respondent
HANS CHRISTIAN TILEMAN	Fourth Respondent
GERHARDUS ALBERTUS GEEL	Fifth Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties or their legal representatives via email and by uploading the same onto CaseLines. The handing down of this judgment is deemed to be 22 September 2021.

MATOJANE J

Introduction

[1] This is an application for rescission of default judgment in favor of the first respondent obtained on 14 July 2020 in terms of "Rules 42(1)(a)(b)" and various other declaratory relief sought which are not relevant to a rescission application.

Background

[2] The first respondent, as plaintiff, sued the first and second applicants as well as three other persons arising out of loan agreements concluded by Name Plate Center Signs (Pty) Ltd ("Name Plate") with the first respondent. The applicants together with three others had signed as guarantors on behalf of Name Plate for its indebtedness to the first respondent, and when Name Plate defaulted and the guarantors failed to make good its default, the parties were all held jointly and severally liable for the indebtedness of Name Plate in the combined amount of R5 566 298.00

[3] Only the first and second applicants defended the action and filed a plea. The parties agreed to exchange pleadings and notices in this matter by electronic means.

[4] The first respondent launched an application under rule 35(7) to compel applicants to make a discovery. On 12 December 2019, Mogagabe AJ granted an order compelling applicants to serve and file their discovery affidavit within five days of service of the order. In the event of non-compliance, they struck out their defence to the application.

[5] The order was served on the applicant's attorneys by email on 12 December 2019, and the applicants have failed to file and serve the discovery affidavit as ordered.

[6] In paragraph 16 of the replying affidavit, the applicant states:

> "The applicants admit that they did not make a discovery but denies that they were compelled in anyway by the first respondent to made discovery. The applicants further submit they were not served with any application compelling them to discover hence the applicants were surprised to be informed that there was an order granted by the Honourable Acting Judge Mogagabe."

[7] On 14 July 2020, Mia J granted judgment in the amount of R4 500 000.00 against the first and second applicants together with interest at the rate specified in the written agreements and costs on attorneys and client scale.

[8] Despite the plea being struck out for failure to comply with Mogagabe AJ's order, the first applicant served a notice of bar in terms of rule 26 to the first respondent to "file its reply to the Defendants Plea and Special Plea" within five days. The first respondent brought an application under rule 30(1) for the notice to be set aside.

[9] It is on the provisions of rule 42 that the applicants have chosen to base their application for rescission on the provisions of rule 42.

[10] Rule 42(1) of the Uniform Rules reads as follows:

> "(1) The Court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary –
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> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

> (b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
> (c) An order or judgment granted as a result of a mistake common to the parties."

[11] The purpose of the rule is to correct expeditiously an obviously wrong judgment or order[1]. The merits of the matter, including whether or not the applicant has a bona fide defence to the main claim, is irrelevant[2].

[12] A judgment would have been erroneously granted if there existed at the time of its issue a fact the court was unaware of, which would have induced the court not to grant the judgment[3]. There are no allegations of irregularity in the proceedings or that it was not competent for the court to have granted the default judgment.

[13] Rule 42(1)(b) refers to the Court's discretionary power to correct errors in its own judgments where the judgment does not reflect the intention of the judge pronouncing it. There are no allegations as to the ambiguity, patent error or omission that the applicants rely upon in contending that the order of Mia J falls to be rescinded under this rule.

[14] Rule 42(1)(c) finds application where there has been a mistake common to the parties linked to the grant of the order and the judgment[4]. This subrule does not assist the applicants.

[15] At common law, in order to succeed with an application for rescission, two requirements must be satisfied. First, the applicant must provide the Court with a reasonable explanation for why the judgment was allowed to

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[1] Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466.
[2] Kgomo v Standard Bank 2016(2) SA 184 (GP) par 11.
[3] Nyingwa v Moolman N.O 1993(2) SA 508 at 510 D_G.
[4] Tshivase Royal Council v Tshivase 1992 4 SA 852 A para 863A.

be issued by default. Secondly, on the merits, show a bona fide defence, which *prima facie* carries some prospects of success.

[16] In **Chetty v Law Society, Transvaal**[5], the court held that:

> "for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of the default judgment against him, no matter how reasonable and convincing the explanation for 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."

[17] The applicants proffer no explanation for why they say they were not in wilful default or have a *bona fide* defence to the application. They admit that they have not made a discovery as requested and ordered to do so. Thus, even under common law, the applicants have not made a case for the relief they are seeking.

[18] The applicants question the order of the 12 December 2019 Mogagabe AJ's order despite being provided with a formal stamped and signed order in the answering affidavit. This order was not erroneously sought nor erroneously granted. In any event, the applicant in its notice of motion never sought the rescission of this order.

[19] The applicants dispute the service of the court order of its attorneys. The applicants have failed to raise a genuine dispute of facts; the first respondent's version stands in accordance with the rule in *Plascon-Evans*.

[20] The applicants contend that there were restrictions placed on access to the court precinct for the duration of the lockdown and that the matter

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[5] 1985 2 SA 756D-E.

could not be proceeded with until the lifting of the lockdown restrictions. There is no merit in this contention as since the coming into effect of the amended consolidated practice directive of 11 May 2020, litigants were not prevented from serving any documents such as a notice of opposition or an answering affidavit. In any event, the parties had agreed to accept service by email correspondence.

[21] In the result, I find that the applicants have not met the requirements in terms of rule 42(1)(a), 42(1)(b) or at common law for having a judgment granted against them rescinded and set aside.

In the result I make the following order.

1. The application is dismissed;
2. The applicant is to pay costs on attorney-and-client scale.

K. E. Matojane
Judge of The High Court
Gauteng Local Division, Johannesburg

Hearing:	03 August 2021
Judgment:	22 September 2021
Applicant's Counsel:	K.D. Magabane
Applicant's Attorneys:	KD Magabane & Associates Inc.
First Respondent's Counsel:	Adv. S. Frees
First Respondent's Attorneys:	Mngadi Attorneys Inc.