

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

LOCAL SEAT, JOHANNESBURG

CASE NO: 2020/10763

DATE: 24 May 2021

Reportable: No
Of Interest To Other Judges: No
Revised

In the matter between:

LLR PROPERTIES (PTY) LTD
RAMATSHILA-MUGERI:LUFUNO, LESLIE

First Applicant
Second Applicant

and

SASFIN BANK LTD
SUNLIN (PTY) LTD

First Respondent
Second Respondent

JUDGMENT

Johann Gautschi AJ

1. This is an application for rescission of the judgment which was granted by default on 19 August 2020 against the first and second applicants jointly and severally in favour of the first respondent (the judgment). Rescission is sought in terms of Uniform Rule 31 (2) (b), alternatively Rule 42 (1) (a), further alternatively in terms of the common law.

2. It is common cause that the judgment was granted by default in the absence of the applicants.

3. The case for the applicants is that the summons was served at the wrong addresses and consequently they only became aware of the order that had been granted when the sheriff telephonically contacted the second applicant to advise him that he had to serve a warrant of execution and needed an address to do so.

4. The causes of action upon which the judgment was granted were three rental agreements concluded between Thusano Group (PTY) Ltd (Thusano) and the first applicant, which were ceded to the second respondent and thereupon ceded by the second respondent to the first respondent.

5. The joint and several liability of the second applicant arises from three signed guarantees in which he bound himself jointly and severally as co-principal debtor in respect of each of the three rental agreements to Thusano and its cessionaries.

Default judgment void *ab origine* due to defective service of summons

6. The applicants also submit that the Court was not in law entitled to grant the default judgment and that it was void *ab origine* by reason of defective service of the summons.

7. The applicants submitted in their founding affidavit that service of the summons was “*improper and ineffective*” as it took place in contravention of the Regulations 20 and 21 issued in terms of the Disaster Management Act, 2002 at Cedar Lodge which

provides luxury and leisure accommodation services to the public and was closed during the national Lockdown.

8. The respondents' answering affidavit made it clear why this submission was misconceived and without merit. The relevant portion of regulation 20 reads: "*Service of process and execution of writs and warrants by sheriffs must be limited to cases which are urgent or permitted services – – –*". The applicants failed to have regard to the definition of "*permitted services*". In terms of item 8 of section B (Civil Law Proceedings) of Annexure 1 to the regulations, "*Permitted services in terms of Alert level 4*" include: "*Issue of all court processes and proceedings and filing of papers relevant to pending proceedings*".

9. Not surprisingly, therefore this submission was not pursued in the applicants' heads of argument.

10. Instead, the applicants pursued their contention that the summons was not served on any valid address for the applicants. In the case of the first applicant, it was contended in the replying affidavit that service should have taken place at its registered office. In the case of the second applicant, it was contended in the founding affidavit that the Combined Summons was served at an address in Louis Trichardt, whereas the second applicant says that does not reside there, but resides in Midrand.

11. The respondent contends that service was valid as it took place at the *domicilia citandi et executandi* as selected in the rental agreements and the guarantees. Consequently, in the case of the first applicant there was no need to serve it at the registered office.

12. In the applicants' replying affidavit the second applicants stated that the respondents were not entitled to rely on chosen *domicilia citandi et executandi* as the applicants had not entered into any of the agreements.

13. The validity of service issue is impacted on by the issue of whether the agreements and guarantees were signed by the second applicant. That involves the main dispute between the parties, namely, whether the applicants have shown that they have a bona fide defence. I shall revert to the significance of service validity after I have dealt with the issue of whether the applicants have shown that they have a bona fide defence.

14. I should add that it is, in any event, not clear to me that *domicilia citandi et executandi* had been inserted in each of the guarantees. The manuscript details of the address on the first guarantee annexed to the combined summons as annexure **SAS1c** are illegible. In the case of the second guarantee dated 30 July 2018 (annexure **SAS3c**) the manuscript details are so illegible that it is not clear whether any address has been inserted. In the case of the third guarantee (annexure **SAS5c**) dated 29 August 2018, as far as I can see, no address has been inserted.

Bona fide defence

15. In the applicants' founding affidavit deposed to by the second applicant, he states that he is the sole director of the first applicant and contends that he has shown sufficient cause and that the applicants have a bona fide defence to the respondent's claims, *inter alia*, because the three rental agreements are fraudulent based on the following averments (the fraud point):

"23. Secondly, the Applicants have no knowledge of the rental agreement said to be concluded with the Respondents. A close inspection of such rental agreements attached in the Particulars of Claim, reveals that such a contract was entered into between us, the Applicants and an entity known as Thusano Group (PTY) Ltd.

24. The rental agreement was allegedly concluded with a certain Mr Jade Christopher on behalf of the Respondents. This person is unknown to the Applicants. Furthermore, Thusano Group (PTY) Ltd is also unknown to the

Applicants. The Applicants are therefore not party to the said contractual agreement with the Respondent.

25. The Respondents in their defective summons and particulars of claim again, describe the Second Defendant in the main action as “the duly authorised representative of the First Defendant” and further as “an adult female”. Again, I am not female, and most importantly, I have never entered into any agreement with the Respondent.

26. I am the sole director of the First Applicant. I would be the only one to act as representation of the First Applicant. I did not act in such capacity, and I certainly did not authorise anyone to enter into any agreements with the Respondent.

27. The agreements relied upon by the Respondents for their cause of action are fraudulent. They were not concluded by me or any representative of the First Applicant. As I keep reiterating this point, I did not authorise the conclusion thereof.

28. Moreover, the only explanation I can offer the court with regards to what appears to be my signature on the alleged agreements is that it is an obvious and pure falsification of my signature and subsequently rendering all three alleged agreements fraudulent. I submit that the Respondents have a pure and clear intention to mislead the court.”

16. The first respondent's answering affidavit disputed the fraud point and, in support of its contentions, provided considerable detail surrounding the signing of the rental agreements. The heads of argument of respondent's counsel, adv JG Botha criticised the inadequate manner in which the applicants responded in reply which compounded the skimpy detail in its founding affidavit. The respondent contends that the applicants' version is so deficient that the applicants had not shown the requisite *bona fide* defence.

17. For a proper understanding of the validity of those contentions I shall quote extensively from those portions of the answering affidavit dealing with the fraud point before setting out the respondent's criticism thereof.

18. In relation to the circumstances leading up to and surrounding signing of the rental agreements and guarantees, the first respondent stated the following which was confirmed in a confirmatory affidavit by Mr Bunting who is said to have represented to Thusano in concluding the rental agreements:

14. Bunting is startled by the allegations of fraud, and that the deponent allegedly "has no knowledge" of the agreements, and that his "signature" is an "obvious falsification".

15. Apart from the fact that three (3) separate rental agreements were concluded with Thusano, one of which was concluded a month after the first two, each agreement requires multiple signatures by the first Applicant's representative, not one.

16. The deponent was required to sign each agreement on at least seven (7) places, apart from signing the Guarantee. (On each agreement the first pages signed twice by the signatory, at the "Agreed Costs and Rental Period" In three (3) places, and the acknowledgement of receipt once, and finally at the debit order authorisation once.)

17. Moreover, the signing of the agreements occurred within the context of the following events:

17.1 during or about June 2018, Thusano was referred by the previous owner of Cedar Lodge to the 1st Applicant. Thusano subsequently furnished a quotation to the first Applicant on a new PABX system (essentially a switchboard);

17.2 Bunting attended at Cedar Lodge to furnish a quote and ascertain the particular needs of Cedar Lodge, and for purposes of establishing the technical specifications that would be required of the PABX;

17.3 upon arrival at Cedar Lodge, Bunting was met by, and he dealt with the manager in charge, Mrs Moloko Ramathella-Mugeru ("Moloko");

17.4 during the course of Bunting's dealings with Moloko it emerged that she was married to a "lawyer" (the deponent) and that:

17.4.1 Moloko's husband (the deponent) was at the time the director of Cedar Lodge, and consequently he would have to sign the relevant documents. This is confirmed by an extract of the records of the CIPC, annexed hereto as "AA1". "AA1" confirms that the deponent only resigned as a sole director of Cedar Lodge on 22 October 2018 and that Moloko was then appointed as sole director on the same day;

17.4.2 upon acceptance of the Thusano's quote, which Moloko asked to include the Toshiba multi-functional printer, Bunting was informed that the rental agreement would be concluded with LLR Propertys (Pty) Ltd (the 1st Applicant), whose sole director was also the deponent. This is confirmed by an extract of the records of the CIPC, a true copy of which is enclosed as "AA 2". As a consequence, the deponent would also have to sign the relevant agreements;

17.5 Bunting explained to Moloko that the installation of the PABX would necessitate that "Cedar Lodge" also conclude a separate services agreement in respect of telephony services and the porting of Cedar Lodge's telephone numbers, without which the PABX would not be operational. Telephony services were required to enable "Cedar Lodge"

to use the PABX. Bunting suggested that Huge Telecom (Pty) Ltd (a company related to Thusano) concludes a telephony services agreement with the first Applicant. Arrangements could then be made for the installation of the PABX and the porting of Cedar Lodge's phone number;

17.6 the first Applicant subsequently concluded a services agreement with Huge Telecom, on 17 July 2018. A true copy of the services agreement is annexed hereto as "AA 3" ("the services agreement");

17.7 the services agreement included a debit order authorisation in respect of the payment of the amounts due under the services agreement, by the first Applicant;

17.8 the deponent, in his capacity as the 1st Applicant's sole director, signed the services agreement and authorised the debiting of Huge Telecom of the first Applicant's account at FNB, cheque account number [...], held at Randburg branch ("the Randburg FNB account");

17.9 Bunting made arrangements with Moloko for the installation of the PABX. The installation commenced on 19 July 2018. Thusano's job card in respect thereof is annexed hereto as "AA4.1". Thusano's technicians attended at Cedar Lodge on numerous subsequent occasions, thereafter, as is evidenced by its job cards, annexed hereto as "AA 4.2" to "AA 4.8";

17.10 during the installation of the PABX, and when Bunting attended at Cedar Lodge to obtain the signed agreements for the PABX and the multi-functional printer from Moloko, the deponent was present. He remarked to Bunting that he was impressed with the work being performed by Thusano's technicians who, as Bunting, were wearing corporate branded "Thusano" shirts;

17.11 a month later, the third rental agreement, in respect of the Wi-Fi equipment, was concluded on 29 August 2018. As before, it was signed by first Applicant, represented by the deponent;

17.12 as part of Thusano's business arrangement with the Sunlyn, to which all rental agreements concluded by Thusano was (sic) ceded on 16 March 2017, Thusano required written and signed confirmation from its customers that the equipment forming the subject matter of the agreements were properly installed. Such confirmation was obtained from the first Applicant, represented by the deponent. Such notifications are annexed to the Respondent's particulars of claim as "SAS1d"; "SAS 3d" and "SAS 5d". Internally, the Respondents referred to the latter documents as "ATP's" (Authority to pay) as Sunlyn would not pay Thusano without the existence of an ATP in respect of particular agreement ceded to it;

17.13 Bunting consequently disputes the deponent's allegations that the Applicants have "no knowledge" of the agreements and that the deponent's signatures thereon are fabrications. Apart from meeting Bunting, wearing a corporate branded "Thusano" shirt, at Cedar Lodge the deponent:

17.13.1 was required to and in fact concluded the required services agreement with the Huge Telecom, in terms of which payment was made against the 1st Applicant's Randburg FNB account;

17.13.2 signed the agreements, in multiple places, which similarly included debit order authorisations against the 1st Applicant's Randburg FNB account;

17.13.3 *witnessed installation of at least the PABX, with which he was "impressed";*

17.13.4 *signed the "ATP's" in respect of the PABX, the Toshiba and the Wi-Fi equipment."*

19. In the light of the foregoing details provided in the respondent's answering affidavit and the manner in which they were responded to by the applicants in their replying affidavit, respondent's counsel made the following submissions in his heads of argument:

"16. The Respondent disputes that allegation of fraud:-

16.1 three (3) separate rental agreements were concluded. Each agreement requires at least seven (7) signatures on behalf of the 1st Applicant, apart from the 2nd Applicant's signature as guarantor;

16.2 the Applicants terse denial of signing "the rental agreement plainly glosses over this abovementioned material feature of the agreements. The denial also fails to address the conclusion of the agreements (and the guarantees) on three (3) separate days;

16.3 Thusano's representative, Mr. Grant Bunting, furnishes as (sic) affidavit regarding the circumstances surrounding the conclusion of the agreements:-

16.3.1 the previous owner of Cedar Lodge referred Thusano to the 1st Applicant in June 2018;

16.3.2 Thusano attended at Cedar Lodge to furnish a quote;

16.3.3 Bunting was met by and dealt with the 2nd Applicant's wife, "Moloko";

16.3.4 the 1st Applicant also concluded a separate telephony services agreement with Huge Telecom to port the lodge's phone numbers failing which the PABX would not be operational;

16.3.5 the payments under the latter agreement were made via direct debit against the Randburg FNB cheque account;

16.3.6 the rental is due under the three (3) rental agreements were also paid by direct debit against the same Randburg FNB cheque account;

16.3.7 Bunting (who wore a corporate branded "Thusano" shirt) was present at the installation of the PABX. The 2nd Applicant spoke to him remarking how "impressed" he was with Thusano's work;

16.3.8 Thusano's technicians attended Cedar Lodge on numerous occasions to perform the installation and delivery as evidenced by Thusano's job cards;

16.3.9 apart from the three (3) rental agreements, . the Applicants signed three (3) "ATP's" (authority to pay) failing which Thusano would not receive payment;

16.4 the rentals payable under the three (3) agreements were subsequently paid by way of direct debit against the 1st Applicant's Randburg FNB account for approximately nine (9) months;

16.5 Significantly, Cedar Lodge's manager sent an email (copying the 2nd Applicant's wife) on 13 May 2020, wishing to cancel the agreements "because of the current excruciating pressure our industry is having with the current Covid-19 pandemic".

17. In summary, the fraud-point is contradicted:

17.1 by the number of the agreements and their form, requiring multiple signatures on three separate occasions, apart from the three (3) guarantees;

17.2 the separate signing by the 1st Applicant of three (3) ATP's on finalisation and delivery of the equipment;

17.3 the circumstances surrounding the signing of the agreements, and the separate agreement concluded with Huge Telecom;

17.4 the subsequent payment, for approximately nine (9) months, by way of direct debit against the 1st Applicant's Randburg FNB account, of the rentals and the services payments;

17.5 the written request to cancel the agreements on 13 May 2020 due to the pandemic.

20. In reinforcement of the submission contained in paragraph 17.1 of the respondent's heads quoted above, the following point was made in a footnote:

The 2nd Applicant did not deny signing the guarantees in the Founding Affidavit, when this is pointed out in the Answering Affidavit (paragraph 27 at [012-15], the 2nd Applicant in the Replying Affidavit states "I deny having signed the Guarantee to each agreement and I deny that I have bound myself jointly and severally as co-principal debtor to Thusano, or its cessionaries."

21. In further support of his aforementioned submissions, respondent's counsel also referred to the following extracts from judgments in point:

"18.1 In Kassim Brothers (Pvt) Ltd v Kassim and Another¹ by Hathorn ACJ:

"As in so many instances in the affidavits filed by' or on behalf of the defendants, it is not so much what is said in them: it is what is not said in them." (Emphasis added);

18.2 in Standard Bank of SA Ltd v El-Naddaf and Another² by Marais J:

" The authority of the judgment of Colman J (and common sense) indicate that bona fides cannot be demonstrated by merely making a bald averment lacking in any detail. To hold that such bald averment is sufficient to demonstrate bona fides is a classic oxymoron. It effectively negates the requirement that the Court be satisfied that the applicant has a bona fide defence. It could with equal validity be held that a mere statement by an applicant that his defence is bona fide would be sufficient which is manifestly absurd.

The requirement that detail adequate in the circumstances be provided applies with particular force in a case like the present one where a clear and unambiguous document has been signed by a literate person who relies (apparently) on having been in some way misled by the plaintiff. Without requiring the defendant to prove her case or to show a balance of probabilities in her favour or to provide copious evidence, I would nevertheless firmly say that it must be inadequate for a defendant, required to demonstrate a bona fide defence, to make bald averments without giving them some of the flesh and colour provided by a degree of detail. The degree of detail must depend on the

¹ 1964 (1) SA 651 (SR)

² 1999 (4) SA 779 (W) at 785J to 786E

circumstances, but I reiterate that in circumstances like the present for a defendant merely to make the averment 'I was misled by the plaintiff' is inadequate to demonstrate bona fides and insofar as the Grant case may suggest otherwise I am in respectful disagreement." (Emphasis added)

22. Adv Botha's heads of argument then concluded with the following submissions:

19. *The following aspects of the Applicants' application expose the absence of a bona fide defence:*

19.1 *both the founding and replying affidavits are silent about the delivery and installation of the rented equipment. The Applicants respond with a bald denial that installation and delivery was accompanied by three (3) signed "ATP"s from the 1st Applicant;*

19.2 *the Applicants merely "note":-*

19.2.1 *the allegations and references to numerous job cards in relation to the installation and delivery of the equipment, on numerous consecutive days;*

19.2.2 *similarly, Mr. Grant Bunting's affidavit, confirming that he in fact met the 2nd Applicant whilst wearing a "Thusano" branded shirt, is "noted";*³

19.2.3 *the dispatch of the letter requesting cancellation of the agreements during May 2020.*

³ This submission is not correct. Paragraph 62 which is referenced in the heads of argument contains a denial. It is in response to paragraph 18 of the answering affidavit referring to buntings confirmatory affidavit being annexed that the replying affidavit stated "noted".

20. These latter aspects plainly negate the notion that the Applicants "had no knowledge" of the agreements.

21. Tellingly, it is stated in the replying affidavit that the cedent had dealt with Moloko "...from the get-go and it ought not be presumed that I automatically am privy of all her arrangements with other people ...".

22. Curiously, no affidavit is tendered by Moloko, to provide "...some of the flesh and colour provided by a degree of detail...", apart from the vague and ambiguous manner in which the Applicants' defence is presented.

23. The continued payment of the rentals until the breach, and the subsequent request for cancellation in May 2020, contradicts the notion that the Applicants had "no knowledge" of the agreements.

24. Moreover, the monthly rentals were not insignificant. The rental in respect of the PABX was R5,520 per month. The monthly rental in respect of the Toshiba E-studio was R2,185.00. The monthly rental in respect of the Ubiquity wi-fi equipment was R3,450.00.

25. The 2nd Applicant's response to the aforementioned debits (totalling R11,155.00 per month) is:-

'[57] I have a lot of debit orders which run against LLR's bank account as it is a business account. [58] I was unaware of this debit order running against LLR for quite some time. As soon as it came to my attention that this specific debit order, (which I learn now that the respondents are the creditors under this action), I cancelled and reversed the debit orders.'

26. *It has a hollow ring to it."*

23. Applicants' counsel, adv Peter, emphasised in his heads of argument the applicable principles as they appear from the following dictum in Sanderson Techitool v Intermenua:⁴

"In Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476 BRINK J summarised the effect of South African decisions. An applicant who claims relief under this Rule, should comply with, inter alia, the following requirements. His application must be bona fide and not made with the intention of merely delaying plaintiff's claim and he must show that he has a bona fide defence to plaintiff's claim. 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 or produce evidence that the probabilities are actually in his favour."

24. He also drew attention to the following passage from the judgment in RGS Properties (Pty) Ltd v eThekwin Municipality⁵ relevant to whether a *bona fide* defence has been shown by an applicant for rescission of a default judgment:

"[12] I may add to this principle that judgment by default is inherently contrary to the provisions of s 34 of the Constitution. The section provides that everyone has a right to have any dispute that 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 of an individual who is entitled to have access to court, and to 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. In its deliberation the court will no doubt be mindful, especially when assessing the requirement of reasonable cause being shown, that while among others this requirement incorporates showing the existence of a bona fide defence, the court is not seized with the

⁴ 1980 (4) SA 573 (W)

⁵ 2010 (6) SA 572 (KZD) at 57H-576D

duty to evaluate the merits of such defence. The fact that the court may be in doubt about the prospects of the defence to be advanced, is not a good reason why the application should not be granted. That said however, 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.”

25. During the hearing, having considered the affidavits and heads of argument, I raised with Adv Peter my *prima facie* concerns about the absence of detail and explanations in the applicant's affidavits.

26. At the outset Adv Peter in oral argument drew attention to contradictions between the particulars of claim and the respondents' answering affidavit. In the particulars of claim the person representing Thusano is alleged to be Jade Christopher, whereas in the respondents' answering affidavit it is alleged that *“In concluding the agreements, Thusano was represented by Mr Grant Bunting”*.

27. Adv Peter then emphasised that what is required at the rescission stage is to set out a *prima facie* case which, if proved at the trial, would be a defence. He submitted that in evaluating what the claimant says I should not place myself in the position of the trial court hearing the case. The court considering rescission, he submitted, merely has to consider whether fraud would constitute a defence to the claim, that fraud is a defence; whether or not the applicant could prove and succeed on it at the trial, is a different consideration. He stressed that the only prejudice to the respondent would be a delay of some months in the execution of its order, whereas it would be final for the applicants. Consequently, the court should not shut the door to the applicants so that they are given an opportunity of proving the defence in a trial. He submitted that in considering an application for rescission, I should apply the same standard as would be applicable in considering an exception, namely, that where a pleading can be substantiated by the leading of evidence it would not be excipiable and that, similarly, in the case of rescission, the difficulties which I had raised should be fully ventilated at trial where evidence would be led.

28. In the light thereof and being conscious of the implications for the second applicant as an attorney, I carefully re-assessed the respective cases of the parties to ensure that in evaluating the respective cases and in exercising my discretion, I would correctly apply the applicable legal principles.

29. The exception approach contended for is not apposite. In the present case the issue is not merely whether the applicants have shown that they have a defence. If the second applicant did not sign the rental agreements and the guarantees, that would be a defence. The issue here is separate from the requirement to show a defence. The applicants must satisfy the Court that the defence raised is *bona fide*.

30. The distinction between merely showing a defence and what is additionally required in order to satisfy the Court that the defence raised is bona fide, was well articulated by Colman J in Breytenbach v Fiat SA (Edm) Bpk as explained by Marais J in Standard Bank of SA Ltd v El-Naddaf and Another (supra) at pages 784-785 in the passages preceding those quoted in the respondent's heads.

"I wish to add something in regard to the sketchiness of the second defendant's affidavit. It is true that in Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) Brink J at 476-7 said that:

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

I am aware that this was approved by Zulman AJ (as he then was) in Federated Timbers Ltd v Bosman NO and Others 1990 (3) SA 149 (W) at 155 et seq. I also accept the statement by Zulman AJ that it is not necessary for the defendant to actually prove his case. Clearly not.

But I find a degree of contradiction in the statement by Brink J that on the one hand the applicant must show that he has a bona fide defence and his statement that it is sufficient if the applicant sets out 'averments which, if established at the trial, would entitle him to the relief asked for'. It seems to me that the question of whether the applicant has shown that he has a bona fide defence must be decided against the background of the full context of the case. In a case such as this, where the applicant for rescission admits having signed a clear suretyship, I feel that it cannot be sufficient to establish bona fides if she baldly states 'the plaintiff misled me as to the contents of the document I was signing' without saying how the plaintiff misled her. I am at a loss to understand how, if so bald and sketchy an averment is made, a court can be satisfied as to the bona fides of an applicant who is in a position to set out much more clearly (without requiring massive detail) how she was misled and by whom on behalf of the plaintiff.

It seems to me that the situation is analogous to that under Rule 32(3)(b) of the Uniform Rules of Court, which requires that the Court must be satisfied that the defendant has a bona fide defence. This subrule was considered in Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T). The relevant portion of the subrule requires the defendant to 'satisfy the Court by affidavit . . . that he has a bona fide defence to the action; such affidavit . . . shall disclose fully the nature and ground of the defence and the material facts relied upon therefor'. It will immediately be seen that the second portion of the sentence contains requirements different to those specifically required in an application for rescission. However, Colman J deals with the requirement that the defendant must satisfy that his defence is bona fide as

- (a) separate from the requirement that he must satisfy the Court that he has a defence and*

(b) separate from the requirement that he 'shall I disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

At 227 in fine - 228A Colman J says:

'If, therefore, the averments in a defendant's affidavit disclose a defence, the question whether the defence is bona fide or not, in the ordinary sense of that expression, will depend upon his belief as the truth or falsity of his factual statements. . . .'

That paragraph is preceded at 227G-H by the statement that the rule requires that the defendant

'set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If he does not do that, he can hardly satisfy the Court that he has a defence. . . . On the face of it, bona fides is a separate element relating to the state of defendant's mind.'

This makes it quite clear that Colman J regarded the requirement that bona fides be demonstrated as separate and distinct from the requirement that the affidavit 'shall disclose fully the nature and grounds of the defence' etc, even though there would appear to be some inevitable overlapping between the two requirements. That Colman J regarded bona fides as a separate requirement, and was dealing with that only in the last sentence of the following passage, appears from the full passage itself. At 228B-E the relevant passage occurs and it reads:

'Another provision of the subrule which causes difficulty, is the requirement that in the defendant's affidavit the nature and the grounds of his defence, and the material facts relied upon therefor, are to be disclosed "fully". A literal reading of that requirement would impose upon a defendant the duty of setting out in his

affidavit the full details of all the evidence which he proposes to rely upon in resisting the plaintiff's claim at the trial. It is inconceivable, however, that the draftsman of the Rule intended to place that burden upon a defendant. I respectfully agree, subject to one addition, with the suggestion by Miller J in Shepstone v Shepstone 1974 (2) SA 462 (N) at 366-467, that the word "fully" should not be given its literal meaning in Rule 32(3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I should add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides.'

The last two sentences make it clear that Colman J separates the requirement to show bona fides and the requirement to 'disclose fully the nature and grounds of the defence and the material facts relied upon therefor'.

I stress the distinction drawn by Colman J because, since he does not rely upon the other arguments of the Rule when he lays down what is required to demonstrate bona fides, I am satisfied that his remarks regarding what is required to demonstrate that a defence is bona fide are of equal application to applications for rescission where the applicant is also required to demonstrate that he has a defence which is bona fide.

In my view the concluding sentence in the passage that I have quoted is of full application to applications for rescission. In my view, where it is required that bona fides be demonstrated, this cannot be done by making a bald averment lacking in any detail.

Insofar as Grant's case may suggest that a mere bald averment 'which appears in all the circumstances to be needlessly bald, vague or sketchy' is sufficient to

demonstrate bona fides, I am of the view that it is clearly wrong and I decline to follow it.”

31. In the present case the denials and averments in the applicant’s founding affidavit are unacceptably bald seen in the light of the undisputed facts as they emerged from the applicants’ replying affidavit.

32. The founding affidavit deposed to by the second applicant contains no more than a general denial of knowledge “*of the rental agreement said to be concluded with the Respondents*”, a general averment that the “*agreements relied upon by the Respondents for their cause of action are fraudulent*”, a denial that those agreements were “*concluded by me or any representative of the First Applicant*” and a general denial of knowledge of Thusano. In effect this also amounts to an implicit denial of any awareness that a PABX and Wi-Fi system had been installed in Cedar Lodge. He concludes by stating “*Moreover, the only explanation I can offer the court with regards to what appears to be my signature on the alleged agreements is that it is an obvious and pure falsification my signature and subsequently rendering all three alleged agreements fraudulent. I submit that the Respondent have a pure and clear intention to mislead the court*”.

33. In considering what one would expect the applicants to have set out in the founding affidavit it is necessary to bear in mind the second applicant’s state of knowledge at that time based on what turned out to be not disputed by the applicants in their replying affidavit.

34. It is not in dispute that the second applicant was the sole director of Cedar Lodge until 22 October 2018 and that from 22 October 2018 his wife became a director of Cedar Lodge.

35. It is also not denied, but merely noted, that at the relevant times the second applicant’s wife was the manager of Cedar Lodge.

36. It is not disputed that every month for some 9 months three debit orders totalling R11,155 were debited to the second applicant's FNB account as well as the debit orders for Huge Telecom and that the last payments on the three rental agreements were made, respectively, on three consecutive months in January, February and March 2019 and that, according to the second claimant, as soon as these debit orders came to his attention, he "*cancelled and reversed*" them.

37. Also not denied by the second applicant, but merely noted, is that on 13 May 2020 an email was sent to Thusano by Deon Langa as "*Management Cedar Country Lodge*" and which email was CCed to Moloko, the second applicant's wife who is described as "owner" and who was at that time the sole director of Cedar Lodge according to the CIPC record. The relevant portion of the letter attached to the email reads as follows:

"Effective (15 May 2020), I would like to cancel my contract for all Thusano telecommunication services which include Wi-Fi and telephony. I am cancelling the service because of the current excruciating pressure our industry is having with the current Covid-19 pandemic. It is with great regret that as Fidelity industry is only deemed to resume operation at Level 1 as per the Government laws and regulations.

It is impossible for us to keep up with the previously arranged monthly instalment as we are currently not making any revenue whatsoever.

For your reference, my contract number is [...]/[...]

Owner: Moloko Ramatshila-Muger-0817197137"

38. In the circumstances, and where each of the three rental agreements attached to the particulars of claim included the signed debit order authorisations to debit the first applicant's FNB account, I would have expected at least some explanations in the founding affidavit to flesh out the general denials in order to demonstrate the bona fides

of the baldly alleged defence that the second applicant's signature had been falsified and the baldly alleged lack of knowledge and awareness of the debit orders paid from first applicant's FNB account and of the installation of a new PABX and Wi-Fi system in Cedar Lodge of which he was then the sole director.

39. Even more problematic for the applicants is that, once the circumstances surrounding signing of the documents by the second applicant and the installation of the PABX and Wi-Fi systems were set out in detail in the respondents' answering affidavit, I would most certainly have expected proper explanations in the replying affidavit. However, there were none.

40. It beggars belief in such circumstances that the second applicant, being the sole director of Cedar Lodge and his wife being the manager, would not have been aware of the installation of the new PABX and Wi-Fi system and that he was not aware of the debit orders coming off his FNB account.

41. The undisputed statement "*It is impossible for us to keep up with the previously arranged monthly instalment* – –" does not sit comfortably with the second applicant's exculpatory explanation of lack of awareness of the debit orders when he states: '[57] I have a lot of debit orders which run against LLR's bank account as it is a business account. [58] I was unaware of this debit order running against LLR for quite some time. As soon as it came to my attention that this specific debit order, (which I learn now that the respondents are the creditors under this action), I cancelled and reversed the debit orders.'" Yet, no explanations were volunteered in the founding affidavit.

42. It is to be expected that there must have been some discussions between the second applicant and his wife about what had been debited to the first applicant's FNB account to have caused him to stop payment on each of the three debit orders after the last payments were made, respectively, in January, February and March 2019 followed about a year later by Cedar Lodge's "management" emailing Thusano on 13 May 2020 (about a week after summons was issued on 8 May 2020) stating that "*It is impossible for us to keep up with the previously arranged monthly instalment* – –", an email which

was copied to the second applicant's wife who was then sole director of Cedar Lodge. Yet, the second applicant provides no explanation whatsoever about any discussions or to explain the circumstances surrounding the cancellation of the debit orders.

43. I also would have expected him to have filed a supporting affidavit from his wife to explain what had happened and to explain how it could possibly have happened that the second applicant had no knowledge or awareness of the installation or of the amounts being debited from first applicant's FNB account, contrary to the 13 May 2020 email complaining that *"It is impossible for us to keep up with the previously arranged monthly instalment – –"*.

44. I would add that, given the large amount which had been incorrectly (on the second applicant's version) debited to the first applicant's account, I would have expected steps to have been taken to reclaim the amount. However, the applicants' founding and replying affidavits are silent thereon from which I infer that no such steps were taken.

45. Moreover, the views expressed by Marais J in the above quoted extract from the judgment in El-Naddaf (supra) in respect of a "literate person", must apply with even greater force where, as in the present case, the second applicant is an attorney. Adv Peter submitted that all legal practitioners should not be judged by the same standard as this would be applying too strict an approach. He submitted that the applicants should be given an indulgence to have a further opportunity of proving their defence in a trial court.

46. No doubt there would be instances where different standards might be applicable in judging the conduct of an attorney depending on his or her particular experience or diligence. However, in the present case a reading the answering affidavit where the detailed circumstances were so clearly and glaringly spelt out, it would, in my view, have been plainly obvious to any legal practitioner that proper explanations should be provided. Moreover, in the present case there is no evidence to suggest that the second applicant should be judged by some lesser standard. On the contrary, his ID number on

the CIPC search document shows that he is in his mid-40s as he was born in 1975. I would also have thought that he has some business experience given the sole directorship which he had in Cedar Lodge.

47. In the absence of proper explanations, the second applicant's bald denials and averments in the founding and replying affidavits are not plausible.

48. As against the foregoing, I considered the significance and import of the contradictions which were highlighted in argument by adv Peter, between the particulars of claim and the answering affidavit as to the identity of the person who represented Thusano in concluding the rental agreements. In my view nothing turns on this terminology. It seems to me to be apparent from the context in which the answering affidavit referred to Mr Bunting as representing Thusano in "*concluding*" the agreements, that it must be read in the context of the further details provided. Those details show that he was the person who came to the premises and had all the agreements signed by the second applicant, clearly for purposes of concluding the rental agreements. Confirmation of this can be seen in the documents themselves where his name appears as the witness to the second applicant signatures. In addition it can be seen that the name of Jade Christopher appears as the director who signed acceptance of the rental agreements, thereby formally concluding those agreements.

49. In conclusion therefore, the unacceptably bald denials and averments in the applicants' founding affidavit, particularly when combined with the total absence of proper explanations in the replying affidavit, fall so far short of what is required to show a *bona fide* defence, that, in my view, the applicants had not shown that the defence raised is *bona fide*.

50. In so far as I have a discretion nevertheless to grant rescission notwithstanding my conclusion that the applicants had not shown that their defence is *bona fide*, I decline to exercise that discretion in favour of the applicants. The second applicant, an attorney, had the opportunity to provide the necessary fleshed out explanations in reply and to submit a supporting affidavit from his wife. The fact that he provided neither and

persisted with no more than generalised denials and averments, in my view, do not justify the exercise of a discretion in favour of the applicants.

51. During the hearing I invited submissions from adv Peter about my prima facie view that, if I were to refuse rescission on the grounds that no bona fide defence had been proved, this would in effect mean a finding that the second applicant, an attorney and an officer of the Court, has given false evidence in legal proceedings and that in such circumstances I should refer this judgment to the Legal Practice Council to consider disciplinary proceedings against the second applicant.

52. Adv Peter again emphasised his concern about the drastic and dire consequences for the second applicant, given that such a finding would have been made on paper without his defence of fraud having been fully ventilated.

53. However, I pointed out that the findings in this judgment would be *res inter alios acta* in any disciplinary proceedings where findings would have to be made on the evidence before the disciplinary tribunal.

Default judgment void *ab origine*

54. I revert now to the issue of whether the default judgment is void aborigine by reason of the applicants' claim in the replying affidavit that the respondents were not entitled to rely on chosen *domicilia citandi et executandi* as the applicants had not entered into any of the agreements.

55. Given that I have found that the applicants have not shown that the defence raised is bona fide, it follows that respondents were entitled to serve the combined summons on the first applicant at the chosen *domicilia citandi et executandi*. Consequently, the default judgment granted is not void ab origine as contended by the applicants.

56. Furthermore, with regard to service of the summons on the second applicant, insofar as there may have been service at an incorrect address, this is, in my view, no reason for me to exercise any discretion in favour of the applicants given my finding that a bona fide defence has not been shown.

ORDER:

1. The application is dismissed.
2. The Applicants are ordered jointly and severally to pay the costs of this application including the costs of counsel.
3. This judgment is to be referred to the Legal Practice Council to consider disciplinary proceedings against the second applicant.

Johann Gautschi AJ
24 May 2021

Date of judgment: 24 May 2021

Date of hearing: 3 May 2021

Counsel for applicants: Adv L Peter

Attorneys for applicants: Ramatshila-Mugeri Attorneys Inc

Counsel for respondents: Adv JG Botha

Attorneys for respondents: ODBB Attorneys