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

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST OF OTHER JUDGES: ~~YES~~/NO
(3) REVISED
23 NOVEMBER 2021
DATE SIGNATURE

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

CASE NO: 27424/16

In the matter between:

ZAM ZAM LOGISTICS **First Applicant**

HASSAN IQBAL TAYOB **Second Applicant**

and

TRADEMORE (PTY) LTD **Respondent**

In re

TRADEMORE (PTY) LTD **Plaintiff**

and

ZAM ZAM LOGISTICS **First Defendant**

HASSAN IQBAL TAYOB **Second Defendant**

RESCISSION APPLICATION: JUDGMENT

FRIEDMAN AJ:

1 This is an application for the rescission of an order made by Keightley J on 19 February 2019 ("the 2019 order") in an action brought by the respondent (which I shall describe as "Trademore" below) for damages suffered as a result of the alleged unlawful destruction by the applicants (described below as "Zam Zam" and "Mr Tayob" unless it is necessary for me to refer to them collectively as "the applicants") of Trademore's 136 metric tons of cotton oil cake. *Mr Alli*, who appeared for the applicants, confirmed for me in argument that the applicants bring this application under both the common law and rule 42.

2 The 2019 order, which was granted by Keightley J after Zam Zam and Tayob failed to appear, provides as follows:

> 1. *The Second Defendant [ie, Mr Tayob] is declared to be personally liable in respect of the debt of the First Defendant [ie, Zam Zam], in terms of section 64(1) of the Close Corporation Act 69 of 1984.*
>
> 2. *Payment to the Plaintiff in the amount of R388 280.00, by the First Defendant and the Second Defendant, jointly and severally, the one paying the other to be absolved.*

3. *Interest on the above amount, at 15.5% per annum, from 13 March 2014 to date of final payment.*

4. *Costs of suit to be paid by the First Defendant and Second Defendant, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.*

3 Mr Tayob is the deponent to the founding affidavit. The grave implications of the 2019 order for Mr Tayob's personal interests are apparent from its terms. Mr Tayob explains that a few months before the trial date, his attorneys of record withdrew. He did not appoint new ones until much later. In the meantime, he suffered several personal tribulations, which led him to be unavailable on the trial date. He says that his default was not wilful and that he has a bona fide defence to Trademore's claim. He wishes to be afforded the opportunity to defend the action.

4 Trademore opposes the application. Although it seems to have some sympathy for Mr Tayob's personal circumstances, it says that his default was wilful. It also denies that Mr Tayob's founding affidavit discloses a bona fide defence to Trademore's claim and contends that the rescission application has been brought out of time.

THE BACKGROUND

5 The history of this matter goes back to 2013 and has given rise to no less than 6 orders of this Court,[1] so far (mine will be the seventh). Some of the history is

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1 As shown below, Moshidi J struck an urgent application brought by Trademore from the urgent roll in December 2013; Reyneke AJ made an order in favour of Trademore for the return of the

relevant to the merits of this rescission application and so I discuss it in some detail.

The underlying dispute

6 In October 2013, Trademore concluded a contract with Zam Zam in terms of which Zam Zam was to transport 136 metric tons of cotton oil cake ("the goods"), a perishable agricultural product, on behalf of Trademore. The goods were divided into 4 loads, and were to be transported from Zimbabwe to South Africa. In terms of the agreement, payment was to be made within 14 days of delivery. Instead of delivering the goods, Zam Zam (by the hand of Mr Tayob, the sole member of Zam Zam and the mind of the close corporation) took possession of the goods, and purported to exercise a lien over them in respect of other debts said to be owed by Trademore to Zam Zam.

7 In December 2013, Trademore launched an urgent application (under case number 45455/13) for the return of the goods. The matter was struck off the urgent roll on the basis that it was not urgent – in part, in so far as I can gather from the papers, because Mr Tayob said in his answering affidavit on behalf of the applicants that the goods could be stored safely (and without spoiling) for a period of up to one year in the conditions in which he was storing them.

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goods in May 2014; Matojane J made an order in May 2015 dismissing a contempt application brought by Trademore; Crutchfield AJ made an order on 8 February 2018 dismissing a special plea of res judicata brought by Zam Zam and Mr Tayob in respect of Trademore's claim; Meyer J made an order in May 2018 in respect of a rule 35(3) notice issued by Trademore; and, finally, Keightley J made the order which is the subject of this application. The details of these orders, to the extent relevant, are given below.

8 On 11 February 2014, Mr Tayob's attorney wrote to Trademore's attorney to say that the goods were causing a nuisance to the surrounding businesses because they were attracting rodents and insects and were emitting an offensive odour. The purpose of the letter was to say that, should Zam Zam not receive payment within 7 days, it reserved the right to dispose of the goods or, alternatively, sell them to "recoup part of the capital debt, storage costs and legal costs".

9 Mr Tayob says in his founding affidavit that, because no response was received to this letter, Zam Zam disposed of the goods "on or about 20 March 2014". In May 2014, Trademore's attorneys served a notice of set down on Zam Zam and Mr Tayob for the application initially brought as an urgent to be heard in the ordinary course. It was heard by Reyneke AJ on 26 May 2014. Shortly before the hearing, Trademore discovered, from a supplementary affidavit filed by Mr Tayob, that the goods had been destroyed.

The judgment of Reyneke AJ

10 Reyneke AJ gave a reasoned judgment and held that Zam Zam and Mr Tayob were not entitled to exercise a lien over the goods. Although the Court recognised that the goods were likely now to be incapable of return (in the light of what had been disclosed in Mr Tayob's supplementary affidavit), the Court ordered Zam Zam and Mr Tayob to return whatever of the goods remained, if any. In her order, she required Zam Zam and Mr Tayob to inform Trademore of the address at which the goods "or whatever is left and/or not destroyed" were being kept and to return the goods "or whatever is left and/or not destroyed".

The contempt application

11 When, predictably, Mr Tayob and Zam Zam were unable to return any of the goods, Trademore launched a contempt of court application under case number 12069/2012.[2] Matojane J dismissed the application on 25 May 2015. His reason for doing so was that, on a proper interpretation of Reyneke AJ's order, only those goods which were not destroyed had to be returned. In other words, Reyneke AJ's judgment and order recognised the possibility that the goods might have been totally destroyed but wished to enable Trademore to mitigate its damages by collecting what remained (if anything). In circumstances where the goods had been totally destroyed, Zam Zam and Mr Tayob could not be held in contempt for failing to return them. In the contempt application, Trademore did not argue that Zam Zam and Mr Tayob were in constructive contempt of court by destroying the goods in the face of the pending proceedings (in due course decided by Reyneke AJ). Matojane J therefore did not consider that issue.

The commencement of an action

12 In 2016, Trademore instituted an action against Zam Zam and Trademore for damages arising from the destruction of the goods. In its amended particulars of claim – ie, its pleaded case which came before Keightley J in due course – Trademore sought an order that:

12.1 Mr Tayob be declared personally liable for the debt of Zam Zam in terms of section 64(1) of the Close Corporations Act 69 of 1969.

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2 This is the case number given on Matojane J's judgment. When I asked counsel why that matter might have had a 2012 case number, the consensus was that this must have been an error.

12.2 Zam Zam and Mr Tayob were jointly and severally liable to pay an amount of R397 800.00 to Trademore.

12.3 Zam Zam and Mr Tayob were to pay interest on the above-mentioned sum from "March 2014, alternatively from date of service of summons" to date of final payment.

12.4 Zam Zam and Mr Tayob were to pay Trademore's costs on the attorney-client scale.

13 In the amended particulars of claim, Trademore pleaded three causes of action for the relief summarised above. Claim A, which was brought against both Mr Tayob and Zam Zam, was based in delict and was based on the allegation that they intentionally or negligently destroyed the goods causing Trademore loss. Claim B, brought against Zam Zam only, was a contractual claim based on an alleged breach of an agreement for the carriage of the goods, said to have been concluded between Zam Zam and Trademore on 18 October 2013. Claim C was brought against Mr Tayob only. This claim – based on section 64 of the Close Corporation Act[3] – was based on the facts that (a) Mr Tayob destroyed the goods while he knew that there was a pending application for an order that the goods had to be returned (b) Zam Zam did not pay the costs order made against it by Reyneke AJ (c) Trademore therefore tried to execute against its movable

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3 Section 64(1) of the Close Corporation Act provides that: " If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability."

property but found its premises vacant and (d) in response to a rule 35(3) request for bank statements in terms of rule 35(3), Zam Zam provided a letter from its bank saying that its account was closed in 2016. The claim, as I understand it, was based on the premise that, as the sole member of Zam Zam, Mr Tayob ran the company recklessly first by destroying the goods and then incurring debts which it was unable to meet.

The special plea

14 In response to the amended particulars of claim, Mr Tayob and Zam Zam raised a special plea of *res judicata*. They argued that Trademore, in bringing the *rei vindicatio* claim ultimately determined by Reyneke AJ, had made an election of the type of relief that it sought. According to the argument, after Trademore made that election the dispute between the parties was finally resolved by the order of Reyneke AJ. On that basis, they argued that Trademore was precluded from pursuing its damages claim. Crutchfield AJ dismissed the special plea on 8 February 2018, holding that a *rei vindicatio* claim was wholly distinguishable from the three causes of action on which Trademore's claim for damages was based. With respect, she was undoubtedly correct to do so.

The rule 35(3) order

15 Before the matter finally came before Keightley J, this Court (Meyer J) made an order compelling the applicants to deliver a reply to a rule 35(3) notice issued by Trademore in May 2017. This interlocutory application appears to have been heard by Meyer J on 13 November 2018 and the order is stamped 26 November 2018. The applicants did not comply with this order. As a result of the failure of

the applicants to comply with the order, Trademore launched an application to strike out their defence. Although this application was set down for 5 February 2019 (two weeks before the trial), it seems that Trademore decided to hold it over for determination at the trial. It became moot at the trial because of the failure of the applicants to appear and the decision of Keightley J to grant an order against them on the merits. Of course, if Keightley J's order were to be rescinded, non-compliance with Meyer J's order would come back into play.

The order granted in the applicants' absence

16 When the matter came before Keightley J on 19 February 2019, neither Mr Tayob nor Zam Zam appeared. Keightley J heard oral evidence of Ms Marie Costaz, a director of Trademore, and considered a bundle of discovered documents and argument from Trademore's counsel. This led her, on the information before her, to grant the 2019 order, which I have reproduced in paragraph 2 above.

The circumstances of the applicants' failure to appear

17 Because the circumstances of the failure of the applicants to appear is relevant to the ultimate decision to be made in this application, I consider it helpful to provide more detail about the evidence on the issue which was before me.

18 On 15 November 2018, the applicants' attorneys of record withdrew. After the applicants' attorneys of record withdrew, the applicants did not appoint new attorneys until long after Keightley J made the 2019 order (roughly a year later). So, from the time that the attorneys withdrew until 19 February 2019 when Keightley J made her order, the applicants were unrepresented. In its answering

affidavit Trademore says that, between the period November 2018 to February 2019, it made numerous attempts to contact Mr Tayob and sent him repeated reminders of the trial. In particular:

18.1 The notice of set down was served on the applicants' erstwhile attorneys on 24 July 2018. Between that time, and the ultimate withdrawal of the applicants' attorneys on 15 November 2018, there were engagements between the attorneys acting for Trademore and the applicants in respect of various matters relevant to the preparation for the trial.

18.2 The deponent to Trademore's answering affidavit says, with some justification, that it is apparent from the engagements between the attorneys between July and November 2018 that the applicants' attorneys were taking instructions from their clients regarding the upcoming trial.

18.3 When the applicants' attorneys withdrew, they provided Mr Tayob's contact details, including an email address and cell-phone number, on the notice of withdrawal. In its answering affidavit, Trademore says that the email address and cell-phone number given on the notice of withdrawal were consistent with contact details obtained for Mr Tayob in a tracer's report in 2016.

18.4 I do not wish to make this judgment any longer than necessary by recounting in detail the various attempts made by Trademore to remind Mr Tayob of the trial date and attend to housekeeping matters (such as the convening of a pre-trial conference). The papers in this matter (most

notably, the annexures to the answering affidavit) show that letters were sent to the address given in the notice of withdrawal, by registered mail and by delivery by the sheriff; emails were sent to the address given in the notice of withdrawal; the interlocutory order granted in November 2018 by Meyer J was served on Mr Tayob's residence (ie, the address given in the notice of withdrawal); a WhatsApp text message was sent on 8 February 2019 by Trademore's attorney, after Mr Tayob failed to answer his cell-phone, in order to discuss the upcoming trial; a further attempt was made to make telephone contact by Trademore's attorney on 11 February 2019.

19 Mr Tayob denies being aware of any of these communications at the time when they were sent. Mr Tayob admits that he received a WhatsApp message from Trademore's attorney in February 2019, which would have put him on notice of the imminent trial, but he denies reading it when it was sent. He says that he located it retrospectively and must have overlooked it at the time. Apart from this, he denies receiving all of the communications directed to him.

SHOULD THE RESCISSION APPLICATION BE GRANTED?

20 I now turn to consider whether the application ought to be granted in the light of the facts discussed above.

The legal position

21 The leading summary of the approach to rescission under the common law is reflected in *Chetty*.[4] I wish to quote what the Appellate Division (as it then was), said on the topic, because it is relevant to the present case:

> "The appellant's claim for rescission of the judgment confirming the rule *nisi* cannot be brought under Rule 31 (2) *(b)* or Rule 42 (1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown. (See *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042 and *Childerly Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163.) The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairn's Executors v Gaarn* 1912 AD 181 at 186 *per* INNES JA.) But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:
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> > (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
> >
> > (ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success. (*De Wet's case supra* at 1042; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357 - 8.)
>
> It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And 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 of 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."

22 The Supreme Court of Appeal ("SCA") has, relatively recently, confirmed that a court has a discretion as to whether to grant a rescission application under rule

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4 Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764-5

42(1).[5] The Constitutional Court has described the discretion to grant rescission under the common law as "fairly wide".[6]

23 The wording of rule 42 is inconsistent with the notion that the applicant bears any sort of onus. A court may rescind a judgment under rule 42 of its own accord (mero motu) – ie, even where no party has brought an application for rescission. This seems to me to be inconsistent with the notion that a rescission applicant (at least under rule 42) bears the onus of showing that rescission should be granted.

24 In *Wright*,[7] a full bench of the Cape Provincial Division (as it then was) considered the scope of the discretion of a magistrate to grant rescission under rule 49 of the Magistrates' Courts Rule, which is broadly equivalent to rule 31(2)(b) of the Uniform Rules (which applies to true default judgments, in the sense that no appearance to defend has been entered). The amended version of the rules provides that the "court may, upon good cause shown, or if it is satisfied that there is good reason to do so ...." rescind a default judgment.

25 The phrase "or if it is satisfied that there is good reason to do so" was introduced by amendment, and the Court in *Wright* considered that the purpose of this amendment (ie, the purpose of distinguishing between good cause being shown, which implies that it is demonstrated by the applicant, and the court being "satisfied" that there was good reason to rescind the judgment) was to afford:

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5 See Botha v Road Accident Fund 2017 (2) SA 50 (SCA) at para 13

6 Occupiers, Berea v De Wet NO 2017 (5) SA 346 (CC) at para 71

7 Wright v Westerlike Provinsie Kelders Bpk 2001 (4) SA 1165 (C) at paras 54 to 60

"the jurisdictional power to a court to grant an application for rescission of judgment in a case where 'good cause' has not been shown *by the applicant*. The power could be exercised in circumstances where the court considers, for reasons other those bearing on 'good cause' as defined with reference to the requirements listed in Rule 49(3), that the justice of the case merits granting the application. In other words, the court is empowered by the introduction of the phrase to grant a rescission application if the exigencies of justice require it in an exceptional case, notwithstanding the existence of what would previously have been fatal deficiencies in the applicant's founding papers. It allows the court to have regard *mero motu* to the justice of the case untrammelled by the incidence of *onus*."

26 This reasoning applies, as a perfect fit, to the wording of rule 42.

27 *Harris*[8] demonstrates that it might not be appropriate to speak in terms of a true onus even under the common law. Although in that judgment (delivered by Moseneke J, before his elevation to the Constitutional Court) the court confirmed that, under the common law, the applicant bears the onus to demonstrate sufficient cause for rescission, it also held that the Court has a very wide discretion. Moseneke J counselled for a holistic approach to the question whether there was good cause to rescind a judgment, avoiding focusing on any one factor in isolation.

28 Based on everything that I have said above, it seems to me that the correct position is the following:

28.1 Under rule 42, at least, it is not quite right to speak of the applicant having an "onus". Rather, the court has a broad discretion to decide whether to rescind a judgment granted in the absence of the rescission applicant.

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8 Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T)

28.2 Under the common law, there are suggestions that the applicant does have an onus to demonstrate good cause for rescission. Even if that is correct, the court has a wide discretion to refuse to grant rescission even if the applicant has, for instance, demonstrated that he or she was not in wilful default (or, by the same token, has a good defence to the main claim).

28.3 Even if there is no true onus on a rescission applicant, the failure of the applicant to persuade the court on the two core issues – ie, that there was no wilful default and that there is a good defence on the merits – will normally be a decisive factor militating against the granting of rescission. Put differently, if the court is in genuine doubt as to whether the rescission applicant was in wilful default, this would normally count against the granting of rescission.

28.4 When exercising its discretion in a rescission application, a court should take into account all relevant factors. These would include, at least (and this is not intended to be a closed list):

28.4.1 The length of time between the granting of the judgment and the bringing of the rescission application in respect of that judgment;

28.4.2 In cases of delay, whether there is a reasonable explanation for the delay;

28.4.3 The underlying merits of the matter and whether it is in the interests of justice for the merits to come before court again;

28.4.4 The reasons why the judgment was granted in the absence of the rescission applicant and his or her explanation for this state of affairs;

28.4.5 The balance of prejudice between the parties;

28.4.6 The balance of prejudice between the applicant and society; in particular, the balance between society's need for finality in litigation as against the rescission applicant's interest in being able to defend a claim against him or her.

Should the application be granted?

29 In my view, and in the light of the factors summarised in paragraph 28.4 summarised above, this is not a case in which I should exercise my discretion in favour of rescission. I reach this conclusion by adopting the holistic approach counselled by this Court in *Harris* (supra). This is for the following nine reasons:

29.1 First, while I accept that Mr Tayob says that he received none of the various communications alerting him to the trial, and while I accept that this is information peculiarly within his knowledge and cannot therefore be contradicted, it seems overwhelmingly likely that he received at least some of them. It would have taken immense bad luck for none of them to

have gotten through. It is true that the SCA, in *Lodhi*,[9] held that the question when considering whether a defendant has received proper notice of the proceedings must focus on the true facts and not just the formal documentation on the record. So, for instance, if a sheriff's return of service wrongly states that proper notice was given, the court should have regard to the true facts and not the return.[10] In this case, however, there is no real dispute that the notifications were all sent to the correct place and there is no meaningful explanation of how Mr Tayob managed to miss all of the communications. In reaching this conclusion, I am mindful of the stress that he was under at the time.

29.2 Secondly, Mr Tayob never expressly alleges, anywhere in the papers, that he was actually unaware of the trial date. He essentially says that he may or may not have known of it, at least at some stage before the hearing, but on the day in question he was incapacitated by his personal crises and would not have been in a position to proceed. This gives rise to a reasonable inference that one of the many mechanisms used to bring the trial to his attention indeed reached him, but he decided not to respond; possibly not out of any ill intent but simply out of distraction. Although, as explained above, there is a question as to whether Mr Tayob holds an onus in the true sense, he at least has the burden of persuading me that there is good cause for rescission. When he himself has not pleaded that he did not know of the trial date, and all the objective

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9 Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA)

10 Lodhi (supra) at para 24

evidence seems to suggest that he did, doubt as to the true facts must count against him.

29.3 Thirdly, and this links to the first and second points, Mr Tayob's personal circumstances do not, objectively, constitute a justification for not attending the trial (assuming he knew of its date, or could have established it with reasonable enquiries, which as I have explained above, I have to do). It is possible to imagine circumstances in which a person's personal difficulties are so profound as to prevent that person from acting freely. But Mr Tayob has not gone as far as to say that he faced such a situation. There are parts of his affidavit in which he appears to rely on the fact that some of the doctors treating his daughter gave him a medical certificate to book him off for the day of the trial. This might have been relevant if Mr Tayob was physically incapacitated and could not therefore have gotten to court. It cannot assist him in the circumstances of this case – in short, he has failed to explain adequately why he could not have phoned Trademore's attorney to explain his position.

29.4 Fourthly, the long period of time since Keightley J's order was given casts a long shadow over the discretion that I must exercise. I do not go so far as to find that Mr Tayob delayed unreasonably in bringing the rescission application – only because it is plausible (if unlikely) that he did not receive notice of the judgment when an attempt was made to serve it on him in April 2019. However, the public interest in the finality of litigation is a factor which weighs against granting rescission in this case.

29.5 Fifthly, whatever evidence Mr Tayob might wish to lead at trial, the common cause facts suggest that he did, construed objectively, behave very recklessly in respect of the goods. *Mr Alli* sought to make something of the fact that, on Trademore's own version, the goods would expire in only a few months. If I understood his argument, it was that Mr Tayob did not act unreasonably in destroying the goods when he did. However, in my view, the fact that the goods were perishable is against Mr Tayob, not in his favour. He was made aware, at least by December 2013 (when Trademore brought its urgent application) that the goods could not be stored indefinitely. Yet, he still refused to release them unless Trademore paid him. Through his own conduct he made it inevitable that the goods would eventually have to be destroyed, which strikes me as a reckless way to behave.

29.6 Sixthly, on the common cause facts, I cannot see any prospect of Mr Tayob succeeding on the merits at trial. This flows, in part, from what I have said above (ie, in paragraph 29.5). Given that the test to determine negligence is objective, it may already be seen, on the common cause facts, that Mr Tayob has no reasonable prospect of persuading a trial court that he was not negligent in his whole manner of handling the goods. There was some debate during the hearing about the standard that is applicable – must Mr Tayob establish a prima facie case? Must he only establish that there is a triable issue? Must he establish reasonable prospects of success? I agree with *Mr Alli* that the concept of a "triable issue" creates a somewhat lower threshold than the concept of reasonable prospects of success. And I also agree with him that there is

some suggestion in the case law that a rescission applicant need only demonstrate that he or she has a triable issue. But it seems to me that I have to give some consideration to the question whether Mr Tayob has any hope of succeeding on the merits because otherwise no purpose would be served in rescinding the judgment (see *Chetty* (supra)). In my view, his prospects of success are so remote that this weighs heavily against rescission. I should note that I am mindful that Keightley J's order was based on upholding the section 64 claim, and not the delictual claim. However, if the matter were to go back to trial, Trademore would inevitably win on at least the negligence claim, if not the section 64 claim. That is enough, in my view, to conclude that Mr Tayob has no reasonable hope of succeeding at trial.

29.7 Seventhly, had Trademore's application to strike out the applicants' defence on the basis of their non-compliance with Meyer J's order proceeded to the merits, it almost certainly would have succeeded. The failure to comply with Meyer J's order remains unexplained on the papers.

29.8 Eighthly, although Mr Tayob attempted to suggest that the quantum of damages awarded by Keightley J was inflated, there appears to be no basis to criticise the sum ultimately reflected in her order. It reflects the amount of money actually paid by Trademore for the goods, its lost profit as a result of being unable to sell them, and various small ancillary costs to do with customs fees and the like. I have no doubt that, if the trial were to be held again, Trademore would succeed in justifying those damages.

29.9 Lastly, although Mr Tayob has definitely shown a triable issue with respect to Keightley J's order on interest – the default position being that interest in an unliquidated claim should begin to run from the date of demand and Mr Tayob complaining in his founding affidavit that interest was ordered to run from March 2014 (the time of destruction of the goods) – reopening the litigation merely for a fight on interest is not in the interests of justice. Perhaps if this were the only factor, my view would be different. But in the context of all of the other considerations, I do not think that Keightley J's treatment of interest is sufficient to establish good cause for rescission. This is especially so, given that her order is entirely justified in the light of section 2A(5) of the Prescription Act. Mr Tayob knew, or ought to have known, that Trademore was seeking an order in respect of interest that differed from the default position envisaged by section 2A(2) of the Prescription Act. His failure to attend on the day of the trial made it more likely that Trademore would be granted the relief sought in its amended particulars of claim (which includes, by the way, the punitive costs order also made by Keightley J), including the order on interest which departs from the default rule created by section 2A(2).

30 I have immense sympathy for the personal travails that Mr Tayob experienced in 2018 to 2019. I would not wish them on anyone. But I cannot allow those personal challenges to misdirect me. The cumulative effect of the factors that I have listed above demonstrates, in my view, that this is not an appropriate case for rescission. The application must be dismissed.

COSTS

31 In the event of this Court dismissing the application (which, as indicated above, I intend to do), Trademore seeks a punitive costs order against the applicants. Its basis for doing so is that, in its view, Mr Tayob has been dishonest in his founding affidavit in saying that he did not receive the various documents sent to him prior to the hearing (discussed above). Trademore invites me to draw an inference from various facts (such as the fact that Mr Tayob still lives at the address where attempts were made to deliver the documents, the fact that reliable methods of delivery, such as service by the sheriff and registered post, were used, the fact that emails were sent to the address which Mr Tayob has always used and related matters) that Mr Tayob must be lying when he says that he did not receive Trademore's various attempts to notify him about the impending trial.

32 Although I take the view that there is a strong likelihood that Mr Tayob received at least some of the communications, there remains doubt about this on the papers. The doubt must count against Mr Tayob on the merits; but it counts in his favour on costs. I cannot go so far as to find that he has been dishonest. *Mr Meijers*, who appeared for Trademore, quite fairly conceded that, if I cannot make such a finding, there is no other reason to make a punitive costs order. Therefore, I decline to do so.

CONCLUSION AND ORDER

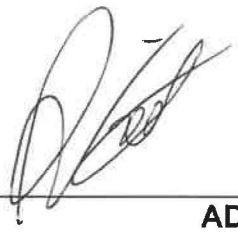
33 Before concluding, I should note that both sides intimated in their papers that they would seek to strike out certain parts of the affidavits filed by their opponents. However, in argument counsel on both sides assured me that there

was no need for any of us to be detained further by that issue. I am grateful to them and make no order in that regard.

34 In the light of everything that I have said above, I make the following order:

1. The rescission application under case number 27424/16 is dismissed.

2. The applicants are jointly and severally liable to pay the respondent's costs, the one paying the other to be absolved.



ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 23 November 2021.

APPEARANCES:

Attorney for the applicants: Hajibey-Bhyat Inc

Counsel for the applicants: Y Alli

Attorney for the respondent: Fluxmans Inc

Counsel for the respondent: G Meijers

Date of hearing: 15 November 2021

Date of judgment: 23 November 2021