REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE) CAPE TOWN.

CASE NO.: 1254/2003

In the matter between:

CHANDERGASIN VILVANATHAN **First Applicant**

GERMAINE OLGA VILVANATHAN **Second Applicant**

and

TOBIAS JOHN LOUW N.O.
in his capacity as Curator of
SAAMBOU BANK LIMITED **Respondent**

JUDGMENT DELIVERED THIS 19th DAY OF MARCH, 2010.

THRING, J.:

The question which arises for decision in this matter is whether a final judgment of the High Court can be set aside simply because it has been satisfied in full by the judgment debtor, and the judgment creditor consents to its rescission.

In 1996 the applicants, who are married to each other in community of property, mortgaged their immovable property to Saambou Bank, Limited by way of a continuing covering mortgage bond as security for moneys lent and advanced and to be lent and advanced by the bank to them. The applicants later fell into arrears with their monthly instalments. On the 21st February, 2003 Saambou Bank, Limited, which was by then under curatorship, represented by its curator, the respondent, issued summons against the applicants under the bond for payment of the sum of R155,405.86, an order declaring the mortgaged property executable, and costs. The summons was duly served on the applicants. However, they did not enter appearance to defend the action. On the 8th April, 2003 the Registrar of this Court duly granted the respondent judgment as prayed in the summons by default of entry of appearance to defend in terms of Rule 31(5). The judgment was, of course, final in form.

This is an application by the applicants for rescission of the judgment. It is brought under Rule 31(2)(b). There is also an application under Rule 27(3) for condonation of the applicants' failure to bring their application for rescission within the period of 20 days referred to in Rule 31(2)(b), which condonation will, in the circumstances, be granted.

The applicants were previously legally represented, but are no longer so. The respondent does not oppose this application. At the request of the Court, and as amici curiae, Ms Wharton appears for the applicants and Mr Maree for the respondent. We are indebted to both of them for the able and conscientious manner in which they have assisted the Court at short notice.

The application is founded solely on an allegation by the applicants that after the judgment had been granted against them they "liquidated the outstanding judgment debt, interest and costs" and that, consequently, they "are no longer indebted to the plaintiff in the amount claimed or at all." Annexed to their affidavits is a copy of a letter from First Rand Bank, Limited dated the 8th July, 2008 in which the following is said:

> "We will not appose (sic) the rescission of judgment.
>
> 1. We consent to the rescission of judgment.
> 2. We give condonation for late bringing of the application.
> 3. We confirm that your bond account is closed and bond cancelled in deeds office.
> 4. The cost for the above will be for your own account."

The letter purports to have been written by First Rand Bank, Limited as agent for Saambou, Limited. It can accordingly safely be accepted that the respondent consents to the judgment being rescinded.

The applicants aver that if it is not rescinded they will suffer prejudice, inasmuch as they will in future be unable to secure credit facilities from financial institutions. There is no suggestion anywhere on the papers that the applicants have or have ever had any defence to the respondent's claims against them. Nor is any express explanation proffered for their failure to enter appearance to defend the action, save for their averment that ....."(d)uring 2002/2003 the financial position of the second defendant and myself [the first applicant] grew increasingly precarious ....." The fact that they had no defence to the respondent's claims may, of course, have played a role in their decision not to defend the action: indeed, it seems not improbable that this was a material factor in that decision.

Be that as it may, when the matter came before me on the 16th October, 2008 in the Third Division I was not satisfied that I should deal with it sitting alone in view of the existence of apparently conflicting decisions on the question, and in terms of sec. 13(1)(b) of the Supreme Court Act, No. 59

of 1959 I referred the matter for hearing before a Full Court. This is that hearing.

Rule 31(2)(b) under which, as I have said, the application is brought, reads as follows:

> "A defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

Rule 31(5) (d) may also be relevant. It provides:

> "Any party dissatisfied with a judgment granted ..... by the registrar may, within 20 days after he has acquired knowledge of such judgment ....., set the matter down for reconsideration by the court."

An order or judgment may also be rescinded or varied under Rule 42(1), which reads:

> "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:
>
> (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 the result of a mistake common to the parties."

However, it is clear that Rule 42(1) has no application in the present case, inasmuch as there is no suggestion that the judgment here concerned was erroneously sought or erroneously granted, that it contains any ambiguity, patent error or omission, or that it was granted as a result of a mistake common to the parties: see Lazarus and Another v. Nedcor Bank Ltd., Lazarus and Another v. ABSA Bank Ltd., 1999(2) SA 782 (W) at 785 A. Rule 42(1) can consequently be left out of account for the purposes of this application.

Other than by means of the machinery of Rule 31(2)(b), Rule 31(5)(d) or Rule 42(1), a judgment or order of this Court may be set aside by it in the exercise of its powers under the common law: see de Wet and Others v. Western Bank Ltd., 1979(2) SA 1031 (AD) at 1042 H. I turn to this topic now, since it seems to me to be the appropriate place at which to commence a consideration of the question at issue.

It would be desirable, I think, to commence with some general observations of the common-law power, as I perceive it, of this Court to rescind its own final judgments and orders, as set out and discussed in a number of decisions of the Appellate Division and the Supreme Court of Appeal.

A convenient starting-point is perhaps the judgment of Trengove, A.J.A., as he then was, in de Wet and Others v. Western Bank Ltd., supra. The learned Judge of Appeal referred, inter alia, to the decision in Childerley Estate Stores v. Standard Bank of S.A. Ltd., 1924 OPD 163, in which it was held, in effect, that this power could be exercised only in cases of fraud or in certain very exceptional cases of justus error. Trengove, A.J.A. found, however, at 1040 D that the Court's power to grant this kind of relief under the common law was not confined to the grounds specifically mentioned in the Childerley case. At 1041 C-E he said:

> "The Courts of Holland, as I have mentioned, appear to have had a relatively wide discretion in regard to the rescission of default judgments, and a distinction seems to have been drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive

judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. (Cf *Athanassiou v Schultz* 1956(4) SA 357 (W) at 360G en *Verkouteren v Savage* 1918 AD 143 at 144). In the former instance the Court enjoyed relatively wide powers of rescission, whereas in the latter event the Court was, generally speaking, regarded as being functus officio, and judgments could only be set aside on the limited grounds mentioned in the *Childerley* case. (Cf *Voet* 2.11.9 and Loenius *Decisien en Observatien* cas 109)."

At 1042 F – 1043 A the learned Judge of Appeal continued:

"Thus, under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient case shown. This power was entrusted to the discretion of the Courts. Although no rigid limits were set as to the circumstances which constituted sufficient cause (cf examples quoted by *Kersteman* (op cit sv defaillant) the Courts nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the Court's discretionary power appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The onus of showing the existence of sufficient cause for the relief was on the applicant in each case, and he had to satisfy the Court, inter alia, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default. It follows from what I have said that the Court's discretion under the common law extended beyond, and was not limited to, the grounds provided for in Rules 31 and 42(1), and those specifically mentioned in the *Childerley* case.

> Those grounds do not, for example, cover the case of a litigant, or his legal representative, whose default is due to unforeseen circumstances beyond his control, such as sudden illness, or some other misadventure; one can envisage many situations in which both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness, be afforded relief."

From the above passages in the judgment in de Wet's case, supra, it seems to me that the following three propositions emerge, which are relevant to the present matter:

(1) This Court's common-law power to rescind its own judgments and orders, at least in cases where the merits of the dispute between the parties have not been gone into, is not confined to cases of fraud or the exceptional cases of justus error which are referred to in the Childerley case, supra, but may be exercised on wider grounds than those;

(2) Generally speaking, this Court, like the Courts of Holland, is empowered to rescind its judgments and orders given in default of appearance "on sufficient case shown" (at 1042 F-G: the word "case" may be a misprint here for "cause"); this is a discretionary power, the exercise of which is influenced by "considerations of justice and fairness, having regard to all the facts and circumstances of the particular case" (at 1042 H);

(3) The applicant for rescission, who bears the onus in this regard, has to satisfy the Court, inter alia, that "there was some reasonably satisfactory explanation why the judgment was allowed to go by default" (at 1042 in fine).

See, also, Silber v. Ozen Wholesalers (Pty.) Ltd., 1954(2) SA 345 (AD) at 352 G.

The term "sufficient cause" or "good cause" (which is practically synonymous: see Silber v. Ozen Wholesales (Pty.) Ltd., supra, at 352 in fine) was considered in this context by die Appellate Division in Chetty v. Law Society, Transvaal, 1985(2) SA 756 (AD). Miller, J.A. said at 764 I – 765 E:

> "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:

(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; *P E 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 325 (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."

The two essential elements of the "sufficient cause" or "good cause" required for the rescission of a final judgment, both of which must be present, are, with respect, set out with abundant clarity in this passage, and

I emphasize them, particularly the second, viz. that the applicant must show that on the merits of the case he has a bona fide defence which prima facie carries some prospect of success.

Most recently, in Colyn v. Tiger Food Industries Ltd. t/a Meadow Feed Mills (Cape), 2003(6) SA 1 (SCA) the Court's common-law powers were again considered and commented upon by the Supreme Court of Appeal. At 5 I – 6 B (para. [4]) Jones, A.J.A. said:

> "As I shall try to explain in due course, the common law before the introduction of Rules to regulate the practice of superior Courts in South Africa is the proper context for the interpretation of the Rule. The guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the Judge who delivered it. He becomes *functus officio* and may not ordinarily vary or rescind his own judgment (*Firestone SA (Pty) Ltd v Genticuro AG).* That is the function of a Court of appeal. There are exceptions. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, *justus error*. Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause."

At 9 C-F (para. [11]) the learned Acting Judge of Appeal continued:

"I turn now to the relief under the common law. In order to succeed an applicant for rescission of a judgment taken against him by default must show good cause (*De Wet and Others v Western Bank Ltd (supra)*).

The authorities emphasise that it is unwise to give a precise meaning to the term 'good cause'. As Smalberger J. put it in *HDS Construction (Pty) Ltd v Wait*:

> 'When dealing with words such as 'good cause' and 'sufficient cause' in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (*Cairns' Executors v Gaarn* 1912 AD 181 at 186; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352-3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'

With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success (*Grant v Plumbers (Pty) Ltd,* HDS *Construction (Pty) Ltd v Wait, supra, Chetty v Law Society, Transvaal.*"

A further requirement for rescission of a judgment under the common-law was mentioned by Trengove, A.J.A., as he then was, in Swadif (Pty.) Ltd. v. Dyke, N.O., 1978 (1) SA 928 (AD) where, at 939 E he said:

> ".....it is abundantly clear that at common law any cause of action, which is relied on as a ground for setting aside a final judgment, must have existed at the date of the final judgment. There must be some causal connection between the circumstances which give rise to the claim for rescission and the judgment....."

On the facts of that case the learned Judge of Appeal held at 939 G-H that:

> ".....when the judgment was granted, no grounds existed for setting it aside. The Court was fully entitled to grant the judgment on all the facts, and the *causa,* which existed at the date of the judgment."

Consequently, the Court found, the judgment could not properly be rescinded.

From the dicta which I have quoted above it is apparent, I think, with respect, that over a long period the Appellate Division and, more recently, the Supreme Court of Appeal, whilst being astute to emphasize the need to preserve the width and flexibility of the Court's discretion, has

unambiguously settled the ambit of the common-law powers of this Court to rescind its own judgments, the limits to those powers, and certain aspects of the manner in which the Courts should exercise their discretion in considering such applications for rescission. In particular, the requirements which must be met by an applicant for rescission at common law have been very clearly formulated and laid down. I emphasize two of them especially because they are, perhaps, the most important, and because both of them are centrally relevant in this matter, viz.

(1) The requirement that the applicant must satisfy the Court that there is some reasonably satisfactory explanation why the judgment was allowed to go by default; and

(2) The requirement that, on the merits of the action, the applicant has a bona fide defence which, prima facie, carries some prospect of success.

The principles laid down by the Appellate Division and the Supreme Court of Appeal were duly applied in numerous cases in various Provincial and Local Divisions. Examples of their application are the following: Nyingwa v. Moolman N.O., 1993(2) SA 508 (TkGD), in which White, J. refused an application for rescission of a summary judgment which had been granted by default inter alia because the applicant for rescission

had not satisfied either of the two requirements for "sufficient cause" to which I have referred above (at 513 H-I); Weare v. ABSA Bank Ltd., 1997(2) SA 212 (D), in which Meskin, J. refused to rescind a default judgment simply on the ground that it had been satisfied, that the judgment creditor did not oppose the application, and that the judgment debtor was being prejudiced in his "business activities" by its continued existence, it being found that this did not constitute sufficient cause for rescission (at 215 E-F, 216 H); Venter v. Standard Bank of South Africa, [1999] 3 All SA 278 (W), in which, in the context of an application for rescission under magistrates' court Rule 49(5), Joffe, J. applied the common-law requirement of "good cause" and found that mere satisfaction of the relevant judgment, coupled with the judgment creditor's consent to the rescission thereof, did not per se constitute such good cause (at 281 b-d, 283 f-g); Saphula v. Nedcor Bank Ltd., 1999(2) SA 76 (W), in which Flemming, D.J.P. also refused an application for rescission based on similar grounds, finding that the "hallmark" requirement of a bona fide defence to the plaintiff's claim was lacking (at 79 C-D); Lazarus and Another v. Nedcor Bank Ltd., supra, in which Cloete, J., as he then was, also refused a similar application, finding that "good cause" had not been made out simply by the satisfaction of the judgment and the judgment creditor's consent to its rescission (at 787 D-E);

and Swart v. ABSA Bank Ltd., 2009(5) SA 219 (C), in which Veldhuizen, J. also refused a similar application inter alia on the ground that the cause relied on by the applicant (satisfaction of the judgment and consent by the judgment creditor to its rescission) had not existed at the time when the judgment was handed down (at 221 H – 222 A (para. [5])), and that, in any event, it did not constitute "good cause". Yet other recent examples of the application of the principles to which I have referred are Promedia Drukkers en Uitgewers (Edms.) Bpk. v Kaimowitz and Others, 1996(4) SA 411 (C) at 417J – 418B, Marais v. Standard Credit Corporation Ltd., 2002(4) SA 892 (W) at 895 F – H and Harris v. ABSA Bank Ltd. t/a Volkskas, 2006(4) SA 527 (T) at 528I – 529F (para's [4] – [6]). There are probably many others.

However, in 2001, and in this Division, there came a new departure. This was with the decision in R.F.S. Catering Supplies v. Bernard Bigara Enterprises C.C., 2002(1) SA 896 (C). This was an appeal against a magistrate's refusal of an application to rescind a judgment under magistrate's court Rule 49(5) after the judgment debtor had satisfied the judgment and the judgment creditor had consented to its rescission. The rule provides for rescission in such circumstances. However, the magistrate considered herself bound by the decision in Venter v. Standard Bank of

South Africa, supra, in which it had been held that that rule was ultra vires inasmuch as it purported to make inroads into the substantive law requirements for rescission, which requirements included "good cause" as that term had been expounded in De Wet's case, supra, and Chetty's case, supra. In the R.F.S. Catering Supplies case, supra, Josman, J., with van Reenen,J. concurring, disagreed at 904 D with Joffe, J's conclusion in Venter's case, supra, that magistrate's court Rule 49(5) was at variance with or in conflict with a substantive rule of the common law. He held that the concept of "good cause" was sufficiently wide and flexible to embrace the circumstances of the R.F.S. Catering Supplies case, since such circumstances fell within the ambit of "justice and fairness" which lies at the root of the "good cause" requirement (at 902 E-G). He relied on various passages in the judgments in Silber v. Ozen Wholesalers (Pty.) Ltd., supra, De Wet and Others v. Western Bank Ltd., supra, and Chetty v. Law Society Transvaal, supra, in which precise or comprehensive definition of the terms "good cause" and "sufficient cause" was eschewed by the learned Judges of Appeal concerned, e.g. the statement of Schreiner, J.A. in Silber's case, supra at 352 H – 353 A that -

> "The meaning of 'good cause' in the present subrule, like that of the practically synonymous expression 'sufficient cause'

> ..... should not lightly be made the subject of further definition",

and that of Miller, J.A. in Chetty's case supra at 765 A – B that -

> "The term 'sufficient cause' (or 'good cause') defies precise or comprehensive definition, for many and various factors require to be considered ....."

If I understand his reasoning correctly, Josman, J. held that the common law should be adapted and developed according to the changing conditions of society so as to accommodate circumstances such as those existing in the R.F.S. Catering Supplies case and to enable judgments to be rescinded in those circumstances. This would of course entail, it seems to me, that such circumstances (being, in essence, the satisfaction of the judgment and the judgment creditor's consent to its rescission) could in themselves constitute "good cause" without the applicant for rescission having to comply with either of the two "essential elements" for rescission which are referred to in Chetty's case, supra, at 765 B-C, which I have set out above. However, the learned Judge said at 902 E-H:

> "If a plaintiff has consented to rescission of judgment it can be inferred that he or she no longer wishes to execute on that judgment; it no longer serves any purpose. Presumably the

> defendant has settled the debt or the plaintiff has forgiven the debt and there is no longer any need for the judgment. The procedure laid down in the Magistrates' Courts Rules also encompasses the situation where the plaintiff might incorrectly have obtained judgment by default and wishes either to initiate proceedings to rescind the judgment or to accommodate the defendant in doing so. All of this falls within the ambit of 'justice and fairness', which lies at the root of the 'good cause' requirement. The only consideration which might militate against such an interpretation is that the court must be astute to ensure that its Rules are not flouted. Since the Rules are intended to protect the plaintiff, the fact that he or she has consented to the rescission reduces the risk to such an extent that it seems unnecessary to require the courts to act as policeman in this situation."

He went on to conclude at 904 D that magistrate's court Rule 49(5) was consonant with the common law and therefore intra vires. He therefore upheld the appeal and rescinded the judgment.

The decision in the R.F.S. Catering Supplies case, supra, was followed in this Division by Binns-Ward, A.J., as he then was, in the unreported case of T.P. and C.Y. Damon v. Nedcor Bank Ltd., 30th October, 2006, case number 3970/2004. Here, again, there was an application for the rescission of a judgment which had been satisfied, and to which rescission the judgment creditor had consented. Binns-Ward, A.J., sitting

alone, considered himself bound by the two-Judge decision in the R.F.S. Catering Supplies case, and, albeit with some apparent reluctance, granted the application. However, the learned Acting Judge expressed "considerable reservation about accepting that the judgment creditor's consent should by itself be determinative of the question" (i.e. the question as to the criteria or considerations by which the fairness and justice of a given case fall to be established: see para. [9] of his judgment).

Similarly, the decision in the R.F.S. Catering Supplies case was also followed in this Division by Griesel, J., as he then was, also sitting alone, in the matter of D.S. Cassisa and R. Radomsky v. Standard Bank of S.A. Ltd., also unreported, 26th March, 2008, case number 4057/2003. The learned Judge observed at para. [5] of his judgment that:

> "The question whether or not this court is in principle competent to grant rescission of judgment in circumstances such as the present appears to have been settled - at least in this division - by the decisions in R.F.S. Catering Supplies v. Barnard Bigara Enterprises C.C. and Damon and Another v. Nedcor Bank Ltd. It is accordingly not necessary for purposes of this judgment to revisit the controversy surrounding this aspect".

In circumstances similar to those in the Damon case, supra, the learned Judge granted the application for rescission. However, he indicated that he shared the reservations which had been expressed by Binns-Ward, A.J. in that matter with regard to applications such as these, based purely on the consent of the creditor after a judgment had been settled (at para. [10] of his judgment).

For a number of reasons I am firmly of the view that the R.F.S Catering Supplies, case, supra, was wrongly decided, and that it ought not to be followed. These are the reasons.

First, as I have attempted to show above, the Appellate Division and the Supreme Court of Appeal have laid down that at common law "it is clear that in principle and the long-standing practice of our Courts", there are two "essential elements of 'sufficient cause' for rescission of a judgment by default" (Chetty's case, supra, at 765 A – B: my emphasis). These are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits (i.e. of the action) such party has a bona fide defence which, prima facie, carries some prospect of success.

Both these elements must be present. See Silber v. Ozen Wholesalers (Pty,) Ltd., supra, at 352 G, de Wet's case, supra, at 1042 H, Chetty's case, supra, at 765 A-E and Colyn's case, supra, at 9 E – F (para. [11]). A third requirement, perhaps a logical consequence of that numbered (ii) above, has also been laid down by the Appellate Division, i.e. that the circumstances which are relied on as a ground for setting aside a final judgment must have existed at the date of the judgment, and not have arisen subsequently: see the Swadif case, supra, at 939 E.

The principles expounded in these decisions were and are still, of course, binding on any Judge of a Provincial or Local Division: the territory onto which this Court ventured in the R.F.S Catering Supplies case, supra, was therefore not terra nova, and the Court was not at liberty to depart in that case from the above-mentioned principles, which had long since been settled by the Appellate Division and the Supreme Court of Appeal. However, it seems to me, with respect, that the judgment in the R.F.S. Catering Supplies is not compatible with those principles. The applicant in that case had failed to establish a single one of the essential

elements of “good cause” or “sufficient cause” for rescission at common law, as set out in the decisions of the Appellate Division and the Supreme Court of Appeal to which I have referred above. Thus there was no explanation proffered for the applicant’s failure to defend the action other, perhaps, than that there was no defence to it, and that does not seem to me to be reasonable or acceptable as an explanation. There was no allegation or even suggestion that the applicant had any defence to the action, let alone a bona fide defence which prima facie carried some prospect of success. And the facts relied upon by the applicant in its application for rescission, viz. the satisfaction of the judgment and the judgment creditor’s consent to its rescission, all arose after the judgment had been granted.

Secondly, as to the development or adaptation of the common law to which Josman, J. refers at 903 A – B of the R.F.S. Catering Supplies case, supra, it is my respectful view that where, as here, certain principles have been clearly laid down by the Appellate Division or the Supreme Court of Appeal it is not for a Provincial or Local Division of this Court to depart from them in the name of development or adaptation of the law so as to meet altered social circumstances, no matter how unpalatable or outdated such a Division may find those principles: in such circumstances, it seems

to me, with respect, to be the exclusive prerogative of the Supreme Court of Appeal or, perhaps, of the Constitutional Court, to bring about any development or adaptation of the law which may be called for. Otherwise, in my respectful view, the time-honoured rules and conventions pertaining to the hierarchy of Courts in South Africa and the principles of stare decisis would be at risk of being eroded with a resultant detrimental dilution of certainty in the law.

Thirdly, I am unable to agree with Josman, J.'s finding in the R.F.S. Catering Supplies case, supra, at 902 E – G that in cases such as the present one the dictates of justice and fairness call for the rescission of the judgment concerned. The judgment in that case had been regularly, properly and competently granted, as it has in the present matter. The fact that the judgment was taken was due entirely and exclusively to the fault of the applicant, who neither paid his debt when it fell due, nor settled with his creditor, nor entered appearance to defend the action when he was sued for the debt. I find myself in respectful agreement with what was said in this regard by Meskin, J. in Weare v. ABSA Bank Ltd., supra, at 216 D – H:

> "In short, in my opinion, on the evidence, the respondent has only himself to blame for the fact that judgment was taken against him.

> In my opinion, a contention that there is sufficient cause for rescission of a lawfully granted judgment where the judgment debt has been discharged, simply because the fact that the judgment was granted is prejudicial to the former judgment debtor in relation to his 'business activities', is unsound. The short answer to such contention is that, if one is concerned that there should be no judgment against one because its existence would be prejudicial to one in one's 'business activities', then one should promptly discharge the related indebtedness and thereby prevent the issue of summons against one, or otherwise conclude, if possible, some appropriate agreement with one's creditor. It follows that the evidence contained in para. 14 of the applicant's affidavit does not assist him.
>
> The suggestion that it would be just and equitable to rescind the judgment is without substance. It is neither unjust nor inequitable to the applicant that the judgment should continue to exist where, as I have endeavoured to indicate, the fact that it was granted is to be attributed entirely to the applicant's own fault.
>
> Accordingly, in all the circumstances, I consider that the applicant has signally failed to establish sufficient cause for rescission of the judgment."

Furthermore, it seems to me that the public has a legitimate interest in what happens in the Courts, and, in particular, in what judgments and orders are handed down by them. Justice and fairness must also be extended to members of the public other than the judgment debtor, including his or her potential future creditors; it cannot be properly served, I do not think, by

expunging from the Court's records judgments and orders which have been correctly and lawfully granted.

Fourthly, I also find myself in respectful agreement with the following statements in the judgment of Melamet, J. in de Wet and Others v. Western Bank Ltd., 1977(4) SA 770 (T) at 780 H:

> "A Court obviously has inherent power to control the procedure and proceedings in its Court. This is done to facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible. This has been recognised in many decided cases which are collected by the learned authors of Herbstein and Van Winsen, *The Civil Practice of the Superior Courts of South Africa*, 2nd ed., pp. 20-21. This, in my view, does not include the right to interfere with the principle of the finality of judgments other than in circumstances specifically provided for in the Rules or at common law. Such a power is not a necessary concomitant to the inherent power to control the procedure and proceedings in a Court." (My emphasis)

In my respectful view the decision in the R.F.S. Catering Supplies case, supra, interfered with the principle of the finality of judgments in circumstances other than those specifically provided for either in the applicable rules or in the common law. I have already set out above what I

consider to be the provisions of the common law in this regard, as expounded in various judgments of the Appellate Division and of the Supreme Court of Appeal. I shall return presently to Rule 31(2)(b).

Fifthly, it seems to me that what the applicants seek in this application is this Court's participation in what would, I think, be tantamount to the publication of a fiction, that is to say, the creation of an impression, which would be false, that the judgment here concerned had not been lawfully, regularly, properly and competently granted in the first place. In Venter v. Standard Bank of S.A., supra, Joffe, J. said at 283 f-g:

> "If there is a commercial need for judgments properly sought and granted in the courts to be rescinded it is for the legislature to provide the necessary enactment. It is certainly not the function of the courts to make themselves a party to a fiction to satisfy what may be commercial needs."

In Saphula v. Nedcor Bank Ltd., supra, Flemming, DJ.P. referred with disapproval at 78 A to "falsifying the past (altering what is judicata) only in order to make life easier for a party". At 78 G – I the learned Judge proceeded to say:

> "The matter of the credit reputation being the only explanation of the present application, I must also recognise that it is known that for several years these credit bureaus have been pushing for procedures for rescission of judgments to readily help a debtor who settled the debt after judgment had been granted. What they are seeking is that courts participate in falsifying a true perspective of the past. To them the only way to say that a judgment should no longer weigh (or weigh too much) against creditworthiness is to require court records to create the false impression that the person never had any adverse default. For that purpose it is sought to prod courts into saying that the judgment was wrong and a defence is available although the judgment was in fact correctly granted."

See, also, Lazarus and Another v. Nedcor Bank Ltd., supra, at 786 C – D and Swart v. ABSA Bank Ltd., supra, at 222 E – G. I respectfully agree with what was said in these judgments. More than 60 years ago George Orwell warned in "Nineteen Eighty-four" against the dangers of attempting to re-write history. It cannot be done with any semblance of propriety.

Sixthly, it is highly significant, I think, that there is and has never been any real dispute between the parties to this matter: there certainly is and has never been anything between them which even remotely resembles a triable issue. In the Saphula case, supra, the Court said at 79 B-D:

> "I can therefore see nothing in the needs of these credit bureaus or their masters (or of the debtor who was indebted at the time), for the Court process to be abused by granting leave to defend a matter in which the cause of action is dead. The object of rescinding judgment is to restore a chance to air a real dispute. On a more technical level, a requirement for the granting of rescission remains lacking in such cases. It has always been the hallmark of what lawyers call a *bona fide* defence (which has to be established before rescission is granted), that defendant honestly intends to pursue before a Court a set of facts which, if true, will constitute a defence. That requirement is lacking in this case despite the problems which applicant has with inert commercial instances."

I agree, with respect.

Seventhly, there are, or may be, far-reaching consequences and ramifications to the rescission of judgments such as these. Such rescissions would presumably operate ex tunc: the position after rescission would be as if the judgment concerned had never been granted. The normal consequence of this would be that the judgment debtor would be entitled to restitutio in integrum. Does this mean that he would be entitled to recover what he had paid to the judgment creditor in satisfaction of the judgment? Furthermore, the rights of third parties might be adversely affected, e.g. a bona fide purchaser of property which has been sold in

execution pursuant to the judgment: must he now return the property to the judgment debtor? Must the judgment creditor reimburse the purchaser his purchase price? Such questions were not considered in the R.F.S. Catering Supplies case, supra, nor in the cases in which that decision was followed, but were adverted to briefly by Cloete, J., as he then was, in the Lazarus case, supra, at 786 D – E.

Finally, as was said in that case at 786 E – F:

> "I further question the morality of a commercial system which considers a default judgment (whether satisfied or not) to be an absolute bar to the obtaining of credit facilities, but which countenances support of an application for the rescission of such a judgment by the creditor once he has been paid. The predicament in which members of the public such as the present applicants find themselves is not the making of the Courts nor does the solution lie with the Courts."

I respectfully agree. It seems to have been considered by some to be hard, unjust or inequitable that a debtor who has failed to pay his debt when it fell due, and has subsequently allowed judgment to be given against him for it by default, should thereafter indefinitely be barred from further credit, or should experience difficulty in obtaining it. But such hardship as may be

occasioned in this way has now been dealt with by the legislature, and it seems to me that, whatever the position may have been before, there can no longer be any equitable need to interfere with the principle of finality of judgments in the manner countenanced in the R.F.S. Catering Supplies case, supra. I refer to the provisions of sections 43 and 70 of the National Credit Act, No. 34 of 2005 and the regulations promulgated under that Act, which provide for the automatic and compulsory expungement of default judgments from the records maintained by credit bureaux after the passage of a certain period. Alternatively, the regulations also provide for the expungement of civil judgments from such records even before the passage of such period, where the judgment concerned has been abandoned by the judgment creditor in terms of sec. 86 of the Magistrates' Courts Act, No. 32 of 1944. Some of these provisions were discussed by Binns-Ward, A.J. in the Damon case, supra, at para's [10] – [18]. I respectfully agree with him when he says, at para.[15]:

> "It should therefore no longer be necessary to seek adaptations to the common law, arguably by uncomfortable and artificial contrivance, to address the sort of unhappy predicament that the applicants in this case find themselves in. In future persons who find themselves in this predicament through failure to make responsible use of the machinery which the Act provides should, in my view, have to wait out the five year period provided under the regulations to the Act, after

> which default judgments fall automatically and compulsorily to be expunged from the records maintained by credit bureaux."

So that, whatever equitable need may in the past have been felt to exist for departing from the long-established principles of law to which I have referred, has now been more or less effectively dealt with by the legislature. I hasten to add that the mere expungement of certain information about debtors from the statutory records maintained by debit bureaux is, of course, something entirely different from and far less radical than the expungement from Court records of judgments and orders which have been lawfully, competently, regularly and properly handed down by the Courts.

For the above reasons I conclude that the applicants have failed to establish a valid basis at common law for the rescission of the default judgment granted against them in this matter.

I return now to the relevant provisions of Rule 31, which I have set out above. That is the only alternative basis, other than the common law, on which this application could have been brought, and, indeed, it was the basis on which it was brought. Not much requires to be said about it. In

the Lazarus case, supra, Cloete, J., as he then was, dealt with it as follows at 785 B – D:

> "So far as Rule 31 is concerned, a long line of cases, commencing with *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O), has laid down the requirement that in order to show 'good cause' as required by Rule 31(2(b), or 'sufficient cause' as was required by previous Rules of Court which governed the position, an applicant for rescission of a default judgment must show *inter alia* that he has a *bona fide* defence to the plaintiff's claim. On that approach, which seems to be universally adopted by Provincial and Local Divisions in South Africa and by other Courts in neighbouring States, the applications could not succeed under Rule 31(2)(b). There would also be no basis upon which a judgment granted by the Registrar could be reconsidered under Rule 31(5)(d) - if a judgement granted by a Court can only be set aside if a *bona fide* defence is disclosed, the same must surely apply to a judgment granted by the Registrar."

I respectfully agree. An application for rescission brought under Rule 31 is doomed to failure unless the applicant can show "good cause" or "sufficient cause", and that means that he must establish, inter alia, that he has a bona fide defence to the plaintiff's claim against him. As I have said, the applicants in the present matter have not even attempted to satisfy this requirement. Consequently, in my judgment their application must fail on this basis, too.

Neither party seeks costs from the other, and so no order will be made as to costs.

The application is refused.

THRING, J.

I agree.

MOOSA, J.

I agree.

BAARTMAN, J.