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

REPORTABLE

CASE NO: 18439/13

In the matter between:

B HAFFEJEE	Applicant/Second Defendant
And	
BYTES TECHNOLOGY GROUP SOUTH AFRICA (PTY) LTD t/a BYTES DOCUMENT SOLUTIONS	First Respondent/Plaintiff
D DE JAGER	Second Respondent/First Defendant
E JACOBS	Third Respondent/Third Defendant

JUDGMENT DELIVERED ON 24 MAY 2016

SHER, AJ:

[1] First respondent was the plaintiff in an action which it instituted in November 2013 against applicant and second and third respondents, in their capacity as

members of a partnership trading under the name and style of Neon (Cape), which had its principal place of business situated at premises in Ndabeni, Cape Town.

[2] In its particulars of claim first respondent alleged that during the period between May and June 2013, it had entered into various oral agreements with members of the partnership, in terms of which it sold and delivered goods to it to the value of R115 547.37, for which it was not paid.

[3] On 24 January 2014 the Registrar granted judgment against all three defendants in default of entry of appearance to defend, in the amount claimed, together with interest thereon at the rate of 15.5% per annum *a tempore morae*. Applicant now makes application for rescission of such judgment, in terms of Rule 31(5)(d) of the Uniform Rules.

[4] It is trite that a default judgment may be set aside either under the provisions of the common law or Rule 42. In addition, Rule 31(2)(b) of the Uniform Rules provides a third mechanism for setting aside a judgement where it was granted by a court, and Rule 31(5)(d) for where it was granted by the Registrar.[1]

[5] Given that the provisions of sub-Rule (5)(d) are the subject of conflicting judgments in relation to a court's powers under and in terms thereof, it is appropriate to briefly restate the position as far as the common law is

[1] In terms of Rule 31(5)(b)(i) and (ii).

concerned. In this regard, in *De Wet and Ors v Western Bank Ltd*,[2] Trengove AJA (as he then was), pointed out that in Roman-Dutch law courts had a relatively wide discretion to rescind judgments obtained in default of appearance on *"sufficient"* cause shown, which went beyond the grounds provided for in Rule 31 and Rule 42.[3] The Appellate Division held that although no *"rigid limits"* were set as to the circumstances which constituted sufficient cause, the courts had nevertheless laid down certain general principles for themselves to guide them in the exercise of their discretion. To this end, and broadly speaking, the exercise of the court's discretionary power was influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it.

[6] As the court further pointed out, these powers were wider than the statutory powers afforded a court under the provisions of Rule 31 and Rule 42, as the grounds for rescission of a default judgment in terms of these Rules did not cover the case of a litigant who found himself in default because of unforeseen circumstances beyond his control, such as illness or *"some other misadventure,"* and one could envisage many other situations in which logic and common sense dictated that a defaulting party should, as a matter of justice and fairness, be afforded relief at common law[4].

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[2] 1979 (2) SA 1031 (A).

[3] Rule 42(1) deals with the powers of a court to rescind a judgment erroneously sought or granted in the absence of any party affected thereby, or one granted as a result of a mistake common to both parties, or in respect of which there was an ambiguity or patent error or omission.

[4] At 1042H-1043A.

[7] In a long line of cases the courts have held that the requirement of *"sufficient cause"* for rescission at common law, is synonymous with the requirement of *"good cause"* which is required in terms of the provision of Rule 31(2)(b).[5] In this regard what an applicant is required to show, in essence, is a reasonable explanation for his default (it has also sometimes been described as an *"acceptable"* explanation)[6] and a *bona fide* defence to the plaintiff's claim, which *prima facie* has *"some prospect of success"*.[7]

[8] In contrast to the powers of a court to set aside a default judgement in terms of the common law, and in terms of the Rules previously referred to, Rule 31(5)(d) provides that *"any party dissatisfied with a judgment granted or direction given by the Registrar may, within 20 days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court"*.

[9] The powers of a court to *"reconsider"* a judgment granted by default by the Registrar, must be contrasted with the powers of a court to set aside a judgment granted by default by it. In this regard, the relevant sub-Rule[8] provides that a defendant may similarly, within 20 days after he or she has acquired knowledge of such judgment, apply to the court to set aside such

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[5] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) 352G; *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) 300 *in fine-301B; Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) 765A.

[6] Some of the cases refer to this as not being in *"wilful"* default.

[7] *Silber* 352G; *Chetty* 765A-D; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para [11], 9E-F.

[8] Rule 31(2)(b).

judgment, which the court may do upon *"good cause"* being shown, and on such terms as to it seems meet.

[10] In *Lourenco and Ors v Ferela (Pty) Ltd and Ors (No. 1)*[9] the court held, with reference to the ordinary grammatical meaning of the word, that the power to "*reconsider*" means the power to consider a decision for a second time with a view to changing, amending, rescinding or altering it. Such a power is thus, by definition, a wider power than a power to set aside.

[11] In *Bloemfontein Board Nominees Ltd v Benbrook*,[10] Hancke J remarked as follows in regard to the power of reconsideration which a court has in respect of a judgement granted by default by the Registrar:

> *"Die "heroorweging" (die Engels lees "reconsideration") blyk volgens bogemelde subreël 'n heroorweging van 'n vonnis of voorskrif deur die griffier gegee en beteken, na my mening, nie dat die hof nou sy diskresie in die plek van die griffier s'n sal stel nie, maar dat 'n hof slegs sal inmeng met 'n vonnis of voorskrif deur die griffier gegee indien dit van mening is dat die griffier fouteer het"*.

[12] In *Pansolutions Holdings Ltd v P&G General Dealers and Repairers CC*,[11] Swain J (as he then was) disagreed with Hancke J's interpretation of the Rule. In his view, the ambit of the court's discretion as provided for in terms of the Rule, when reconsidering a judgment granted by the Registrar, had been defined too narrowly therein.

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[9] 1998 (3) SA 281 (T) 290D-E.

[10] 1996 (1) SA 631 (OPD).

[11] 2011 (5) SA 608 (KZD).

[13] In arriving at a determination of what the ambit of the court's powers of *"reconsideration"* included, he was of the view that guidance could be obtained from decisions dealing with the ambit of the court's discretion in terms of Rule 6(12)(c), to reconsider orders granted *ex parte* in urgent applications. He endorsed the view adopted by the court in *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Ors*,[12] that the dominant purpose of the exercise in terms of that Rule, was to afford an aggrieved party a mechanism to redress *"imbalances in and injustices and oppressions flowing from"* orders granted as a matter of urgency in the absence of a respondent. In *ISDN* the court held that this reconsideration involved a wide discretion, in the exercise of which a number of factors could be taken into account including the reasons for the respondent's absence, the nature of the order and relief granted and the period during which it was to remain operative, as well as *"questions relating to whether an imbalance, oppression or injustice"* had resulted, and whether redress was available by means of alternative remedies.[13] In the result, Swain J was of the view that when it came to a reconsideration of a default judgment granted by the Registrar,[14] the *"underlying need for the grant of such a power is equally the absence of the aggrieved party, at the time the judgment was granted. The object is equally to obtain redress against an injustice, or an imbalance created by the judgment"*[15] and in carrying out such reconsideration, factors relating to the

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[12] 1996 (4) SA 484 (W) 486I.

[13] *Id* at 487B-C.

[14] In terms of Rule 31(5)(d).

[15] *Pansolutions* n11 para [10] at 610F-G.

reason for the absence of the aggrieved party as well as the length of time the judgment had been in force, were also relevant.

[14] Consequently, he disagreed with the position adopted by the court in *Bloemfontein Board Nominees* and was of the view that the power accorded to the court in reconsidering a default judgment was *"precisely that of substituting its discretion for that of the Registrar"*.[16]

[15] In my view, although some guidance can be obtained by having regard for the meaning afforded to a court's power to *"reconsider"* a matter in terms of the provisions of sub-Rule 6(12)(c), a court should be careful of transplanting interpretations pertaining thereto, in regard to the *"reconsideration"* exercise which it must perform in terms of the provision of the sub-Rule under discussion. I say that for the following reasons.

[16] The jurisdictional facts necessary for the exercise of a court's discretion in terms of sub-Rule 6(12)(c) when reconsidering a matter which has come before it by way of an application, are simply that an order was granted in the absence of a party, in urgent proceedings.[17] The kinds of orders and the nature of the relief sought in application proceedings in terms of Rule 6, are wide and far-ranging. As a result, in order to afford some protection against orders being taken in the absence of a party, there is a long-established principle in *ex parte* applications that an applicant is to adhere to the requirements of *uberrimae fides* ie should make a full and honest disclosure

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[16] *Id* para [11] at 610H-I.

[17] *Sheriff Pretoria North-East v Flink* [2005] 3 All SA 492 (T) 498f-499F.

of all relevant material facts and circumstances, even those which may not be in his favour. Where this principle is not adhered to, unless there are very cogent reasons why the order obtained *ex parte* should not be rescinded the court will invariably do so, if it was based on incomplete disclosure, even if the very same relief could be obtained on a subsequent application by the same applicant.[18]

[17] In addition, in the nature of it, the court in an application will have before it the affidavits enclosed in support of the intial order which was obtained, as well as those subsequently lodged against it, when reconsidering it, in which a story will be told from which the court will be able to ascertain where the equities lie, and whether there has been any unfairness.

[18] In contrast to this, the nature of the orders which can be obtained and the relief which can be sought in applications for judgment by default before the Registrar, are circumscribed. It is only in respect of a monetary debt or a liquidated demand (ie a claim for a "*fixed, certain or ascertainable*" amount or thing)[19] that the Registrar has power to grant judgment by default.[20] In considering whether or not to grant judgement the Registrar does not have the power to hear evidence and will have before him only the summons and particulars of claim, and the application for default judgement, and will thus have no idea of the background facts and circumstances which gave rise to

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[18] *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) 350B-C cited with approval in *National Director of Public Prosecutions v Braun* 2007 (1) SA 189 (C) para [26] at 197F-G.

[19] Erasmus *Superior Court Practice* (2nd ed), D1-371 and the authorities referred to at ftnte 6 thereof.

[20] Rule 31(5)(a).

the application which is before him. The powers of the Registrar are circumscribed to granting judgment in respect of the amount (or thing) claimed as requested,[21] or in respect of part of the claim only[22] or on amended terms (ie in respect of a lower or lesser amount),[23] or he may refuse judgment[24] or make ancillary directions in regard to such powers.[25] Given these circumstances, as before the Registrar, considerations of equity (ie justice and fairness) will surely rarely come into play, if at all, except in regard to the matters set out in the Rule where the Registrar can exercise a discretion of sorts, such as the grant of a postponement, or a directive that submissions be made, or that the matter be set down in open court.

[19] In *Vilvanathan and Ano v Louw NO*,[26] a Full Bench of this Division held (per Thring J) that whereas the court's common law power to rescind its judgments and orders, in default of appearance and on sufficient cause shown, was a discretionary power in which considerations of justice and fairness played a role, such considerations pertained to the requirement of good cause and that the applicant present a reasonable and acceptable explanation for his/her default, and did not extend to a general power to rescind a judgment, because in broad terms, it could be said to be hard on, or unfair to, a debtor. The court

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[21] Rule 31(5)(b)(i).

[22] Rule 31(5)(b)(ii).

[23] *Id*.

[24] Rule 31(5)(b)(iii).

[25] Thus, he may postpone the application on such terms as he or she may consider just (Rule 31(5)(b)(iv)); request or receive oral or written submissions (Rule 31(5)(b)(v)) or require that the matter be set down for hearing in open court (Rule 31(5)(b)(vi)).

[26] 2010 (5) SA 17 (WCC).

pointed out that although it had an inherent power to control the procedures before it,[27] such power did not include a general right to interfere with the well-established principle of finality of judgments, other than in circumstances specifically provided for in the Rules, or at common law.[28] In the circumstances, the court held that the decision which was taken in this division by Josman and Van Reenen JJ in *RFS Catering Supplies v Bernard Bigara Enterprises CC*,[29] interfered with the principle of finality, was wrongly decided and ought not to be followed.[30]

[20] In *RFS Catering Supplies* the court was seized with an appeal against a magistrate's refusal of an application to rescind a judgment, after the judgment debtor had satisfied the judgment, and the judgment creditor had consented to its rescission. The court held that in the exercise of its powers to develop the common law according to the changing needs of society, these facts were sufficient to constitute the good cause requirement that was necessary in order to rescind the judgement, as these facts fell within the ambit of considerations of justice and fairness which lay at the root of the good cause requirement.[31]

[21] The decision in *Vilvanathan* followed a long line of earlier cases in which courts in various divisions refused to rescind default judgments that had been

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[27] This power is well recognized at common law, and in terms of s173 of the Constitution, which provides that the High Court has the inherent power to protect and regulate its own process.

[28] At 29A-C referring to *De Wet and Ors v Western Bank* 1977 (4) SA 770 (T) at 780H.

[29] 2002 (1) SA 896 (C).

[30] *Vilvanathan* n 26 at 27A.

[31] Note 29 at 902E-G.

granted, where these judgments had been satisfied and the judgment creditors had not opposed subsequent applications for rescission.[32]

[22] Thring J pointed out that as far as the rescission of default judgments was concerned, there were two well-established elements that needed to be made out in order to show good or sufficient cause ie the party seeking relief was to present a reasonable (and as has sometimes been said, *"acceptable"*) explanation for his default and was required to show that on the merits, he had a *bona fide* defence which *prima facie* carried some prospect of success.[33] Consequently, in his view the court in *RFS Catering* was not venturing into *terra nova* and as such it was not at liberty to depart from well-established principles which had been settled in a long line of cases, by the Appellate Division and the Supreme Court of Appeal.[34]

[23] In the circumstances, care should be taken not to extend considerations of justice and fairness (which are accepted considerations to have regard for in relation to whether or not good or sufficient cause has been made out for rescission of a judgement), in order to afford a court seized with a reconsideration of a judgement which has been granted by default by the Registrar, a general discretionary power to set aside such a judgment simply on the grounds that this would correct some *"imbalance, oppression or*

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[32] *Weare v ABSA Bank Ltd* 1997 (2) SA 212 (D) 215E-F, 216H; *Venter v Standard Bank of South Africa* [1999] 3 All SA 278 (W) at 281*b-d*, 283*f-g*; *Saphula v Nedcor Bank Ltd* 1999 (2) SA 76 (W) 79C-D; *Lazarus and Ano v Nedcor Bank Ltd; Lazarus and Ano v ABSA Bank Ltd* 1999 (2) SA 782 (W), 787D-E; *Swart v ABSA Bank Ltd* 2009 (5) SA 219 (C).

[33] *Vilvanathan* n 26 at 27B-C; *Chetty* n 5 at 765A-D; *Colyn* n 7 at 9E-F.

[34] *Vilvanathan* n 26 at 27E-F.

injustice" which may have resulted, consequent to the judgment having been granted.

[24] In my view, although considerations of justice and fairness must properly be had regard for in respect of the elements which an applicant needs to make out in order to show good or sufficient cause for rescission (ie an absence of wilful default, a reasonable explanation for his failure and a *prima facie* defence), where a judgment has been granted by the Registrar *"regularly, properly and competently"*[35] it should ordinarily be upheld.

[25] In *Weare v ABSA Bank Ltd*,[36] Meskin J pointed out that good and sufficient cause for the rescission of a default judgment granted lawfully and regularly, would not exist, even though the judgment debt had been discharged simply because the continued existence of the judgment was prejudicial to the judgment debtor's business activities or his commercial reputation:

> *"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"*.

[26] Insofar as I may be wrong in this regard, and insofar as considerations of justice and fairness extend beyond the elements of good or sufficient cause and relate to a general discretionary power on the part of the court, it should be borne in mind that such considerations extend not only to the interests of

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[35] *Vilvanathan* n 26 at 28C-D.

[36] Note 32 at 216D-H.

the judgment debtor, but also include the interests of justice, and of the general public. As Thring J put it in *Vilvanathan*:

> *"Justice and fairness must also be extended to members of the public other than the judgment debtor including his or her potential future creditors"*.[37]

[27] In my view, whereas factors pertaining to balance, oppression and/or injustice thus very properly constitute factors which are applicable in terms of Rule 6(12)(c) in the reconsideration of an order granted *ex parte* in an application, such considerations, if adopted willy-nilly as part of the exercise of reconsideration which a court must carry out in terms of an application for rescission of a judgment granted by default by a Registrar, in terms of the provisions of Rule 31(5)(d), may constitute unruly horses that will drive a hole through the well-established principles pertaining to good and sufficient cause carefully laid down over many years in decisions of the Appellate Division and the Supreme Court of Appeal.

[28] I also do not, with respect, agree with the view expressed in *Pansolutions* that the power afforded the court in terms of Rule 31(5)(d) *"is precisely that of substituting its discretion"* for that of the Registrar.[38] Insofar as this statement was based on a comment made by Hancke J in *Bloemfontein Board Nominees (supra)*, it bears closer analysis.

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[37] Note 26 at 28I-J.

[38] Note 11 para [11] at 610H-I.

[29] In that matter the Registrar had granted default judgment in the sum of R60 000.00 plus interest and, because in his view the matter fell within the jurisdiction of the magistrate's court, in terms of Rule 31(5)(e) he only granted costs in the amount of R200.00 together with Sheriff's fees, and declined to award costs on an attorney/client scale, as taxed. The comments made by Hancke J must be understood in the context of the well-accepted principle that an award of costs lies within the discretion of a presiding officer, given that the rule provided for such lower award of costs. As such, to my mind there was nothing wrong in the statement by Hancke J that, before a court was to interfere with the judgment of the Registrar in this regard, it needed to be satisfied that the Registrar had erred. This was nothing more than a restatement of the general principle applicable to the reconsideration of a costs order by a court on appeal or review. It gives effect to the judicial deference which an appellate or reviewing court is, of necessity, required to show in regard to the exercise of a discretion *a quo*.[39] In my view, Hancke J's approach was correct and I do not agree with the view expressed in *Pansolutions*[40] that the power which a court exercises in a reconsideration of a matter in terms of Rule 31(5)(d), *"is precisely that of substituting its discretion"* for that of the Registrar.[41] In my view, the court in *Pansolutions* failed to distintinguish between the powers a court has in its reconsideration of a direction made by the Registrar in the exercise of a discretion, versus the

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[39] This judicial deference in regard to the exercise of a discretion is well accepted, not only in relation to the issue of costs, but also in relation to other issues involving the exercise of a tribunal's discretion ie the imposition of a suitable and appropriate sentence in criminal proceedings.

[40] Note 11 para [11] at 610H-I.

[41] *Id*.

reconsideration of a judgment granted by the Registrar, in terms of the Rule. In this regard, directions by the Registrar that the application be postponed on such terms as he or she may consider just,[42] that written submissions be supplied,[43] or that the matter be set down for hearing in open court[44] would constitute directions made in the exercise of a discretion and, as such, any court reconsidering the Registrar's decision on any such aspects would ordinarily be required to show deference to that exercise of discretion, provided that it was not arbitrary, irrational, or capricious. The fact that the court may not have made such a direction had it been seized of the matter would, in my view, not entitle it to interfere and to set it aside. The same would hold good in respect of the exercise of the Registrar's discretion in regard to costs, where a matter exceeded the jurisdiction of the magistrate's court and the application for default judgement required costs to be taxed, or the Registrar required the court to pronounce on the issue of costs.[45]

[30] On the other hand, any judgment granted, as requested, in repect of a monetary debt or liquidated demand[46] or for part of such a claim only,[47] or on amended terms (ie for a lesser capital amount or for a lesser rate of interest),[48] or any judgment which was refused (wholly or in part),[49] would be

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[42] Rule 31(5)(b)(iv).

[43] Rule 31(5)(b)(v).

[44] Rule 31(5)(b)(vi).

[45] Rule 31(5)(e).

[46] Rule 31(5)(b)(i).

[47] Rule 31(5)(b)(ii).

[48] In terms of Rule 31(5)(b)(ii).

[49] Rule 31(5)(b)(iii).

subject to a different form of reconsideration by a court, more akin to one that applies in the case of an appeal or a review. In such an inquiry, the court would have regard for the provisions of the Rule in terms of which the judgment was so granted or refused,[50] and central to such a consideration would be factors such as whether the judgment had been properly granted against the correct party, properly pertained to a monetary debt or a liquidated demand, whether the defendant was in default of delivery of a notice of intention to defend or of a plea and whether the relevant time limits, forms and Rules prescribed in this regard had been complied with.[51] The central inquiry thus would be whether or not the judgment had been granted or refused *"regularly, properly and competently"*[52] and would not be about whether a discretion had been properly exercised, or should be substituted.

[31] In considering whether it should rescind any such judgment, the court would, in my view, thus not be busying itself with a reconsideration of the exercise of the Registrar's discretion, nor would it be substituting its discretion for that of the Registrar.[53] Of course, as I have previously attempted to point out, where the exercise of a discretionary power by the court would come into play, is in regard to its evaluation of the requirement that the applicant had shown good or sufficient cause for the rescission sought. As set out above, the court would exercise its discretion in favour of the applicant if it was of the view that

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[50] Rule 31(5)(a) sets out the requirements in this regard.

[51] For example where the defendant is in default of delivery of a plea, the plaintiff is required to give it not less than 5 days' notice of his or her intention to apply for default judgment.

[52] *Vilvanathan* n 26 at 28C-D.

[53] *Pansolutions* n 11 para [11] at 610H-I.

he had shown, on a balance of probabilities, that he was not in wilful default of appearance ie that he had a reasonable and acceptable explanation therefor and that *prima facie* he had a *bona fide* defence to the claim.

[32] To this end, I agree, as the court held in *Pansolutions*,[54] that although a defendant against whom default judgment has been granted by the Registrar is not, in terms of the wording of the sub-Rule, required expressly to show good cause in order to succeed in rescission proceedings (unlike a defendant who seeks to set aside a default judgment granted by a court),[55] such a requirement should be read therein, as applying equally to him or her.

[33] Against that background, I now turn to consider the case made out by the applicant. As regards his explanation for being in default of an entry of appearance to defend, he pointed out that the Sheriff's return of service indicated that the summons had been served on 14 November 2013 at the principal place of business of the partnership ie at the address from which it traded in Ndabeni in Cape Town, and that such service was effected on a receptionist, and not personally on him. He said that he first became aware of the judgement when the Sheriff attended on his home in Oaklands, Johannesburg to execute a writ of execution which was granted in March 2014.

[34] He said that during 2012 he had indicated to his co-partners that he wished to exit the partnership on account of *"misgivings"* he had with its 'administrative'

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[54] *Id* para [14] at 611F.

[55] Compare Rule 31(2)(b) and 31(5)(a).

affairs. Consequently, he arrived at an agreement with them in terms of which he sold his 40% interest in the partnership to the second respondent, and exited the partnership with effect from 28 February 2013. In terms of such exit agreement, second respondent agreed, as purchasing partner, to pay all outstanding debts of the partnership and to assume and honour all its obligations including *"all the covenants of the leases"* of the partnership. He also undertook to continue to perform all outstanding contracts and obligations as were required to be performed by the partnership, and to indemnify the applicant against any claim that might arise by reason of any such debts, obligations or agreements.

[35] Applicant said that, given the exit date was 28 February 2013, insofar as the first respondent alleged in its particulars of claim that during May – June 2013 it had entered into various oral agreements with members of the partnership, in terms of which it sold and delivered goods to it, he had not been party to any such agreements and could thus not be held liable under or in terms thereof. On the face of it therefore, the applicant gave both a reasonable and acceptable explanation for his default in respect of entry of appearance to defend and set out a *prima facie* and *bona fide* defence in respect of the first respondent's claim as it was formulated.

[36] However, in response thereto, first respondent contended that during or about July 2007 the partnership had made written application to it for a credit facility. In such application (which I may point out was completed and signed by the second respondent and was not signed by the applicant or the remaining

partner), it was provided that the partnership would undertake to notify first respondent forthwith of any material change in respect of ownership, shareholding or status, and it was further agreed that such provision would apply as a condition of sale to all contracts to be entered into between first respondent and the partnership, in terms of which the partnership would purchase goods from first respondent. First respondent contended that contrary to this provision, it had not been informed, prior to the launching of the rescission application that there had been a change in the partnership, or that the partnership had been terminated or reconstituted. It averred that, had it been so informed, it would have reassessed whether or not it would have been prepared to continue granting facilities to the new partnership and in all likelihood, had it done so, this would have been on terms which would have been more favourable to it and which would have reduced its exposure. Consequently, first respondent submitted that applicant was estopped, in law, from denying that he was a member of the partnership at the time when the agreements were entered into and the goods were sold and delivered, as also at the time when the judgment was obtained.

[37] It is trite that the dissolution of a partnership will only serve to operate against third parties if they were informed thereof, or otherwise obtained knowledge of such dissolution. If due and proper notice of the dissolution was not given to third parties, an erstwhile partner can still be held liable both in terms of the common law as well as on the basis of the doctrine of estoppel, to a third

party who continued transacting with the former partners or with the new entity which replaced it.[56]

[38] As far as estoppel is concerned, in *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* [57] Corbett CJ explained that:

> *"The essence of the doctrine of estoppel by representation is that a person is precluded ie estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice … The representation may be made in words ie expressly, or it may be made by conduct, including silence or inaction ie tacitly … and in general it must relate to an existing fact"*.[58]

[39] Although a partner may not have personally given notice of his exit from a partnership and its resultant dissolution, the central enquiry will be whether in the circumstances of the matter, by doing so he/she held himself/herself out as still being a partner of the firm.[59] Before he or she will be held liable to a third party on the basis of estoppel, the third party will need to show that it was because of such representation (whether it was constituted positively and expressly by conduct or negatively by silence or inaction), that the third party was so induced to contract ie the necessary causal connection between the former partner's representation and the resultant loss will need to have been established.

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[56] *Koekemoer v Langeberg Stene BK* 1999 (1) SA 361 (NCD), 368C-E, 369H.

[57] 1981 (3) SA 274 (A).

[58] *Id* at 291D-E.

[59] *Midlands Auctioneers (Pty) Ltd v Bowie* 1975 (1) SA 773 (R) 775E-I.

[40] First respondent pointed out that it had not been alleged by the applicant that either he or any of his erstwhile partners had given notice of his exit from the partnership, or its resultant dissolution, to creditors or third parties. Consequently, it averred that on the applicant's own papers I should find that the requirements for estoppel had been duly made out. Inasmuch as I am constrained to deal with such facts as have been set out in the papers which are before me and have not heard any *viva voce* evidence, unlike the decision in *Koekemoer,*[60] this is not an instance where all the relevant facts are before the court and the law need only to be applied thereto.[61]

[41] I have previously pointed out that in setting out the basis for his application for rescission, applicant dealt with the cause of action as pleaded by first respondent in its particulars of claim, and the facts it set out therein in support thereof. To this end, applicant dealt with the allegation that first respondent had entered into various oral agreements with members of the erstwhile partnership in terms of which it sold and delivered goods to it and he pointed out that at the relevant time ie between May and June 2013 he was no longer a member of the partnership, and as he had not personally contracted with first respondent could thus not be held liable to it in terms of any such alleged agreements. It was in response thereto that first respondent alleged that applicant was estopped from denying his liability, on the basis that notice of dissolution of the partnership had never been given to it by the applicant.

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[60] Note 56.

[61] *Id* at 373D.

[42] Perhaps because he was alive to potential liability being suggested on the grounds of estoppel (even though no basis for this was pleaded by first respondent in its particulars of claim), in paragraph 15 of his affidavit the applicant did state, in passing, that it could *"well be"* that second or third respondent misrepresented to first respondent that he was still a partner in Neon (Cape), or held out that they were acting as his agent. He pointed out that since he had become aware of the judgment (after the Sheriff attended upon his premises in order to effect service of a writ of execution), third respondent had not taken a single telephone call from him despite numerous attempts in this regard, and he suspected that third respondent might have made such a misrepresentation to the first respondent.

[43] In *Stellenbosch Farmers Winery Ltd v Vlachos t/a The Liquor Den*,[62] the respondent, who owned and operated a bottle store which traded under the name of The Liquor Den, sold the business to a close corporation without notifying the appellant, who was one of its suppliers. The appellant continued to supply the business with goods on credit. At some stage however, a credit controller employed by the appellant contacted the business to make enquiries, as she suspected that the business had changed hands. During a telephone conversation which she had with the new owner ie the member of the CC, she was falsely reassured by him that no change in ownership had taken place, and based on this reassurance the appellant continued to supply goods to the business on the same basis as it had previously done. Eventually however, certain of its cheques were dishonoured and the sole

[62] 2001 (3) SA 597 (SCA).

member of the CC stripped the premises and disappeared without trace. The appellant then looked to the respondent for payment. In response to the respondent's plea that the debt was not his, the appellant alleged that respondent had a duty to disclose that he had sold the business and pleaded an estoppel. In this regard it appears that in applying for credit facilities with the appellant the respondent had completed an application form in which he undertook to inform it of any change of ownership.

[44] The trial court found that although the respondent had indeed been under a duty to disclose that the business had been sold and that he was thus no longer liable for its debts, it was not his silence which had induced the further transactions on which the appellant had sued, but the deception of the member of the CC in impersonating the former owner which had. In the circumstances the estoppel failed. The decision was upheld by the Supreme Court of Appeal.

[45] First respondent contended that, at best, applicant's comments in regard to a possible misrepresentation by third respondent amounted to no more than speculative conjecture, and did not meet the test adopted by the court in *Pansolutions* viz that applicant needed to set out averments "*which if established at the trial will entitle"* him to succeed.[63]

[46] It is indeed so that the court in *Pansolutions* framed the test in these terms, but, in my view this appears to have been no more than an unfortunate turn of

[63] Note 11 para [17] at 612A-B and para [21] at 612F.

phrase, as immediately after this it pointed out that an applicant in proceedings such as these was not "*obliged to deal fully with the merits of the case*" and was not required to produce evidence to show that the probabilities were actually in his favour.[64]

[47] Given that the accepted and long-established test is that the applicant must simply set out a defence, which *prima facie* has "*some prospects of success*" in my view this must mean that as far as rescission proceedings are concerned he is not required to prove that this defence will succeed in the main matter, on a balance of probabilities.

[48] In support of this I point out that in *Pansolutions* the court held that an application for rescission was not the appropriate stage to decide issues of estoppel and ratification and in order to attempt to do so the applicant would have to deal fully with the merits of the case and to produce evidence that the probabilities were actually in his favour, which he was not obliged to do.[65] I agree with this approach. It may well be that first respondent may prevail on the issue of estoppel at the trial of the matter, but on the papers before me the issue is not clear cut and I am not disposed to closing the door in the applicant's face, on this basis.

[49] But there is a further reason why, in my view, the judgement cannot stand, although the point was only taken in argument and was not raised in the applicant's founding affidavit. It is that, notwithstanding that the applicant and

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[64] *Id* referring to *Colyn* n 3 at 9E-F.

[65] Note 11 para [21] at 612F.

his co-partners were sued on the basis that they were (ex)-partners in Neon (Cape), the judgment which was granted by the Registrar was against them in their personal capacity, as was the writ which was subsequently issued, which was also directed at them in their personal capacity. It is common cause that first respondent had not sought to first execute against the former partnership's assets or to excuss the ex-partners in respect of their share of such assets, before seeking to proceed against them in their personal capacity. First respondent's counsel rightly conceded that in the circumstances, the judgement was assailable on that ground alone,[66] but he submitted that this was merely a technicality and that there was no doubt that first respondent would not have been able to satisfy the judgement from these sources, and would inevitably have sought to execute against the ex-partners in their personal capacity, even had it gone through the motions of seeking to execute against these sources first, as it was obliged to do. He may well be right, that ultimately, the judgement creditor will be knocking on the doors of the ex-partners in their personal capacity, but to my mind, that is not something that should properly stand in the way of the judgement being rescinded, if it was granted incorrectly. Although this would more properly have been grounds for seeking to rescind in terms of Rule 42(1) (on the basis that the judgement had been erroneously sought or granted), to my mind the court is at liberty to arrive at the same result by applying the provisions of Rule 31(5)(d).

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[66] See 'Partnership' in *LAWSA* (2nd Ed), Vol 19 at paras 313 and 314 pp 279, 282-283 and the authorities cited at ftnte 17, pp 284-285.

[50] As far as the issue of costs is concerned, although the applicant is seeking an indulgence,[67] in my view the fairest order to make is that this should stand over for determination by the court at the hearing of the main matter.[68] It will be best placed to decide on whether or not the riposte of estoppel will succeed, or whether the applicant will prevail.

[51] In the result, I make the following Order:

1) The judgement which was granted by default by the Registrar in terms of Rule 31(5)(b) on 24 January 2014, in favour of first respondent against the applicant, is rescinded.

2) Costs of this application shall stand over for determination by the trial court.

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SHER AJ

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[67] In *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd 2000 (2) SA 1007 (C)* it was held that as such, the applicant should be liable for the costs of the application if the respondent's opposition was reasonable.

[68] A similar order was made in *Pansolutions* n 11 para [24] at 612I.