


**REPUBLIC OF SOUTH AFRICA**



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

Case Number: 2023/034930

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
20 May 2024	
DATE	SIGNATURE

In the matter between:

**GROWTHPOINT PROPERTIES LIMITED**

Plaintiff/Respondent

and

**NMR PROPERTIES (PTY) LTD**

First Defendant/Applicant

**NHLANHLA NDHLOVU**

Second Defendant/Applicant

*This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 May 2024.*

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**JUDGMENT**

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Mudau, J:

*Introduction*

- [1] This is an opposed application for rescission of judgment in terms of rule 31(2)(b) of the Uniform Rules of Court with costs. Judgment was granted by default due to the applicant's failure to enter an appearance to defend, despite proper service of the combined summons on the applicants.

*Background facts*

- [2] The first applicant, NMR Properties (Pty) Ltd ("NMR") entered into a commercial lease agreement with the respondent, Growthpoint Properties Limited, but failed to make payment in terms of the lease agreement after paying a deposit. NMR failed to take occupation of the leased premises, thereby repudiating the lease agreement, which repudiation was accepted by the respondent. The respondent's cause of action is accordingly based on a commercial lease agreement, after NMR repudiated the agreement.
- [3] The second applicant, Nhlanhla Ndhlovu ("Ndhlovu") is the sole director of NMR. In the main action, the respondent claimed payment of R 644 703.74 for the pre-estimated damage, interest, and costs due to NMR's repudiation, which liability fell onto the second applicant by virtue of a deed of surety.
- [4] On or about the 19<sup>th</sup> day of April 2023, a copy of the combined summons was duly served on Ndhlovu, by affixing at his residential address and *domicilium citandi et executandi* situated at ■Aberfeldy Avenue, Morningside, Sandton. On or about the 20<sup>th</sup> day of April 2023, a copy of the combined summons was duly served on NMR, by affixing at its registered address situated at 168 14<sup>th</sup> Road, Tuscan Gardens, Noordwyk, Johannesburg. The respondent also sent a copy of the served summons, to Ndhlovu's registered email address to bring that fact to his attention. It is, accordingly, common cause that summons in this matter was properly served in accordance with the Uniform Rules of Court.

- [5] The application is primarily based on the following. Although the applicants admit to the repudiation of the commercial lease agreement and admit the respondent's acceptance of such repudiation, the applicants nevertheless allege that the respondent did not indicate whether it elected to cancel or enforce the agreement thereby creating ambiguity and causing the applicants' confusion. Further, it is alleged that since the applicants did not pay the deposit of about R 76 000.00 that was due and owing in terms of the lease agreement, the commencement of rights and duties in accordance with the terms of the lease agreement did not come into effect. The applicants make this averment on the basis that the deposit was allegedly a suspensive condition of the lease agreement, which suspensive condition was not fulfilled.
- [6] Importantly, the applicants allege that payment in the sum of R 644 703.74 to the respondent as damages would unduly benefit the respondent; be against public policy and against the interest of justice, in circumstances where when the premises are either currently leased or fully capable of being leased to another tenant. Finally, the applicants allege that payment of R 87 128.80 was demanded as a penalty by the respondent, and that such amount ought to be reduced in respect of the Conventional Penalties Act<sup>1</sup>.
- [7] On the other hand, the respondent's case is that the acceptance of the repudiation led to the cancellation of the agreement which is what happened in this case. Further, the deposit for the lease agreement was in no way a suspensive condition of the agreement, in that the parties agreed that the lease agreement would come into effect as of the commencement date, subject to signature of the lease agreement.

#### *The Law and application*

- [8] The requirements for an application for rescission under this subrule are trite and have been stated to be as follows:<sup>2</sup>

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<sup>1</sup> 15 of 1962 ("Penalties Act").

<sup>2</sup> See in this regard *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A); [1985] 2 All SA 76 (A) at 765B–D; *Federated Timbers Ltd v Bosman* NO 1990 (3) SA 149 (W) at 155G–H; *Cofyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA); [2003] 2 All SA 113 (SCA) at 9F.

- a. He (i.e. the applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence, the Court should not come to his assistance.
- b. His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.
- c. He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are in his favour.

[9] As counsel for the respondent submitted, and it is trite that the success of an application for rescission of judgement is directly dependent on the explanation surrounding the default, as well as any accompanying conduct by the defaulter, be it wilful or negligent, as provided for by the applicant. The full purpose of service is for a process to be brought to the notice of the party against whom legal proceedings are being instituted against. As there was proper service of the summons, I have no difficulty in concluding that the applicants in this instance, did receive the combined summons but failed to take the necessary legal steps to defend the matter. Service by affixing on both a residential and registered business address is good and proper service.<sup>3</sup>

[10] It is also trite that the court has a wide discretion in evaluating 'good cause' to ensure that justice is done.<sup>4</sup> In *Silber v Ozen Wholesalers (Pty) Ltd*,<sup>5</sup> the Appellate Division held that 'good cause' includes, but is not limited to, the existence of a substantial defence. It has been held that the requirement of 'good cause' cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence but, in addition, of the bona fide presently held desire on the part of the applicant for relief actually to raise the defence concerned in the event of the judgment being rescinded.<sup>6</sup> It is trite that the

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<sup>3</sup> See in this regard *Arendsnes Sweetspoor CC v Botha* [2013] ZASCA 86; 2013 (5) 399 (SCA).

<sup>4</sup> *Wahl v Prinswil Beleggings (Edms) Bpk* 1984 (1) SA 457 (T).

<sup>5</sup> 1954 (2) SA 345 (A).


<sup>6</sup> *Id* at 352G-H.

hallmark of a bona fide defence, which has to be established before rescission is granted, is that the defendant honestly intends to place before a court a set of facts, which, if true, will constitute a defence.<sup>7</sup>

[11] In this case, I am satisfied that payment in the sum of R 644 703.74 to the respondent as damages would prima facie unduly benefit the respondent in circumstances where the premises are either currently leased or fully capable of being leased to another tenant as the applicants allege. The applicants have in my view succeeded to establish a prima facie case, or the existence of a triable issue, which is fit for trial regarding this matter.

[12] I make the following order:

1. The judgment granted on the 3rd of August 2023 under case number 34930/2023 is rescinded.
2. The applicants are granted leave to defend the main action and to file their plea within 15 days of this order.
3. Each party to pay its own costs.

  
TP MUDAU  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 07 May 2024

Date of Judgment: 20 May 2024

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<sup>7</sup> *Saphula v Nedcor Bank Ltd* 1999 (2) SA 76 (W) at 79C-D.

**APPEARANCES**

Counsel for the Applicant: Mr. B Lesomo  
*Instructed by:* Lesomo & Associates

Counsel for the Respondent: Adv. T Mirtle  
*Instructed by:* NLH Inc