Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 16639/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED:

13 June 2024

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DATE SIGNATURE

In the matter between:

SIYANDASABELO TRADING (PTY) LTD First Applicant

and

RIVER MEADOW MANOR PROPERTIES (PTY) LTD First Respondent

In re:

RIVER MEADOW MANOR PROPERTIES (Pty) Ltd **Plaintiff**

and

SIYANDASABELO TRADING (PTY) LTD **Defendant**

JUDGMENT

COWEN J

1. The applicant, Siyandasabelo Trading (Pty) Ltd (Siyandasabelo) has applied to rescind an order granted by default before Ally AJ on 14 September 2022. The order was granted at the instance of the respondent, River Meadow Manor Properties (Pty) Ltd (RRM) pursuant to an action for payment under a repayment agreement. The rescission is sought in terms of Rule 31. Relief is sought in terms of Rule 31(1)(2)(b) of the Uniform Rules of Court.

2. Rule 31(1)(2) provides:

> (2)*(a)* Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.
> *(b)* A defendant may within 20 days after acquiring 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 it deems fit.

3. The requirements to establish good cause under the sub-rule are:[1]

   3.1. A reasonable and satisfactory explanation for default. If the default appears to be willful or due to gross negligence the Court should not come to an applicant's assistance;

   3.2. The application must be *bona fide* and not made with intention merely to delay;

   3.3. An applicant must show a *bona fide* defence to the claim, which *prima facie* carries some prospects of success. It suffices to make out a *prima defence* in the sense of setting out averments which, if established at trial, would entitle him to the relief. It is not necessary to deal fully with the merits and produce evidence that the probabilities are actually in its favour.

4. It was the respondent that set down the rescission application. However, on the day of the hearing, and notwithstanding due service of the notice of set down, there was no appearance for the applicant. Although the applicant was directed to deliver heads of argument,[2] it did not do so. I have accordingly approached the matter having regard to the issues the applicant raised in the founding and replying affidavits.

5. The order sought to be rescinded directed the applicant to repay the respondent an amount of R1 104 798.90 and interest based on an alleged breach of a repayment agreement.

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[1] *Federated Timbers Ltd v Bosman NO and others 1990(3) SA 149 (W) at 155F-156*F. The meaning to be given to good cause is informed by the common law remedy for rescission which is dealt with in *Chetty v Law Society, Transvaal* 1985(2) SA 756 (A) at 765B-D; *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013(5) SA 325 (CC); 2013(10) BCLR 1103 (CC) at para 85 confirmed in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and others* [2021] ZACC 28; 2021(11) BCLR 1263 (CC).

[2] By order of Van der Schyff J of 5 October 2023

6. In the founding affidavit, Siyandabela's director and sole shareholder, Siyanda Sabelo Dlamini, explains that the summons was served on both its chosen *domicilium* address and its registered address, both by affixing. However, it did not come to his attention and was accordingly not defended. The matter came to his attention only when the Sheriff served a writ of execution on 19 October 2022, at a different address being No 1 Twin River Estate, 53 Jan Smuts Avenue, Irene, Centurion (the Twin River address). Mr Dlamini was not familiar with the matter and handed it to the applicant's attorney. This occurred in circumstances where the applicant and respondent are involved in a series of inter-related litigious disputes, all of which had been running during 2022. Not long thereafter, the applicant terminated the mandate of its erstwhile attorneys and appointed its new attorneys, Richter Attorneys. The Sheriff again attended at the Twin River address on 17 November 2022 with an issued writ of execution. Mr Dlamini immediately contacted his new attorneys with an instruction to establish what it related to. It was only on that day that Richter Attorneys obtained access to CaseLines and the applicant became aware of the nature of the action and that default judgment was granted on 14 September 2022.

7. Mr Dlamini explains that while the addresses upon which service was effected are the *domicilium* and registered addresses. However, he avers that the respondent was aware that service thereon would not be effective. Mr Dlamini previously resided at the *domicilium* address, but had, in 2020, moved. His actual place of residence and business was, he says, known to the respondent. He accepts that it was his duty to change the *domicilium* address and says he was under the *bona fide* impression that

in circumstances where the respondent knew where he was and was in regular contact with him, service would be effected at the place he resided and not at a place where they knew he did not reside any longer. This, he says, is apparent from the fact that the writ of execution was served at his known address. As for the registered address, Mr Dlamini explains that he owns the property, rents it and has a gardener living there. The summons was affixed to an entrance that is not used by either the tenant or the gardener and is not the main entrance. The respondent does not seriously or unambiguously dispute its knowledge of the residence of place of business of the applicant and it is difficult to understand why, on the facts of this case, the respondent and its attorneys did not, in the face of this knowledge, ensure effective service.

8. The rescission application was delivered on 9 December 2022, in circumstances where the writ of execution came to its knowledge on 19 October 2022. If that date is used as the applicable date, the rescission application was delivered outside the 20-day period prescribed by Rule 31(2)(b), which would have expired on 15 November 2022. The application would have been 18 days out. The applicant sought condonation in the founding affidavit as far as necessary. In my view 19 October 2022 should be regarded as the applicable date given the import of a writ of execution and the information that is available from that document itself. Viewed in this way, however, the explanation for delay effectively relates to the termination of the former attorney's mandate and a change in attorneys, and the applicant's belief that the matter was being attended to. Mr Dlamini explains that what had transpired is that

the files – which related to various matters – had been handed over in a state of disarray and the new attorneys did not immediately realise that the matter required its attention. Indeed, it appears that no documents relating to the matter were handed to the new attorneys. The respondent seeks to take issue with the applicant's good faith in this regard, but I am unpersuaded that there are grounds to do so on the evidence before me. Moreover, it is clear that once the new attorneys became apprised of the matter, and obtained access to the CaseLines files, they acted swiftly to remedy the situation. In my view condonation should be granted. Indeed, while RRM did not expressly abandon its objection to the delay, this issue was not pressed in argument.

9. Moreover, in the circumstances of this case, the explanation for default that has been proffered is reasonable and satisfactory, and I am satisfied that the default was not willful or grossly negligent.

10. The issue is then whether there is a *bona fide* defence to the claim which *prima facie* carries some prospects of success.

11. It is common cause that the applicant and the respondent concluded a repayment agreement on 12 February 2022, which was concluded subsequent to a sale of business agreement concluded between the same parties in 2019 and in terms of which the applicant purchased a business known as River Meadow Manor as a going concern. A further agreement concluded as a sale of property agreement concluded between the applicant, as purchaser and RMM Capital (Pty) Ltd which is related to the respondent. The property that was subject of that agreement is the property on which

the business is operated. The repayment agreement regulated the payment of the balance of the purchase price of the business, which was R12 500 000.00. The applicant is now in litigation with the respondent in an action for damages arising from alleged breaches and misrepresentations relating to the transactions. SEE SSD6.

12. In terms of the sale of business agreement, the respondent was obliged to deliver to the applicant, on the effective date, the business, including the business assets. The applicant alleges that the business assets include three vehicles, being a Toyota Prius, a BMW X3 and a BMW 118. These were not delivered and in its action, the applicant claims their delivery. The applicant pleads in the rescission application that payment for outstanding amounts under the repayment agreement do not become due until the vehicles have been delivered. The applicant has already paid over R11 million for the sale of business. In short, the applicant thus contends that it is entitled to withhold payment of the outstanding amount under the repayment agreement pending delivery of the three vehicles.

13. I am unable to conclude on the information before me that the applicant has established a *bona fide* defence with *prima facie* prospects of success. In arriving at this conclusion I am very mindful of the test that must be met as referred to above. First, the applicant avers that the vehicles formed part of the sale of business agreement, referring to both its content and related inventory. Neither are attached. The respondent attaches both and there is no mention of the vehicles in what is a highly detailed inventory. Secondly, the repayment agreement, which is common cause, expressly requires repayment of the outstanding amount (recorded as amounts

due) with interest by a fixed date being 31 March 2020. Moreover, it includes a no variation clause whereby any variation, alternation, addition, consensual cancellation or waiver must be reduced in writing and signed by the parties. In these circumstances, I am unable to see how a defence has been mounted with any prospects of success. Moreover, it appears that the real purpose of the application is delay.

14. In arriving at this conclusion, I am mindful of the parallel action instituted by the applicant against the respondent which includes a prayer for delivery of the vehicles pursuant to the agreement and I thus accept that in those proceedings it may transpire that the applicant can succeed. There is however nothing before the Court in the rescission application that allows a finding in its favour.

15. The application must accordingly be dismissed. The respondent only persisted with seeking party and party costs. After the hearing the respondent's counsel delivered a short note dealing with the scale of costs in terms of the newly amended Rule 67A(3)(c). This Court has held that the amended Rule applies to cases pending at the time the amendments came into effect on 12 April 2024, but only in respect of work done after that date.[3] In my view, while Scale A would ordinarily be appropriate in a matter of this sort viewed alone, Scale B is appropriate in this case because of the complexities that arise by virtue of the plethora of interrelated litigation simultaneously at play.

16. I make the following order:

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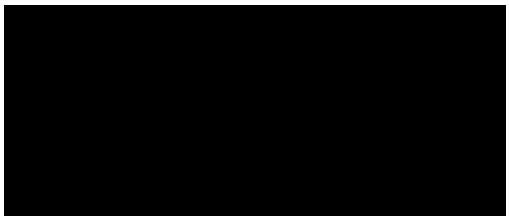
[3] Mashava v Enaex Africa (Pty) Ltd [2024] ZAGPJHC 387.

17. The application is dismissed with costs on a party and party scale with counsel feels to be paid for work done after 12 April 2024 on Scale B.



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JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances

Counsel for applicants: Adv C R F De Villiers

Attorney for applicants: Deneys Zeederberg Attorneys Inc

Respondents: No appearance

Date heard: 14 May 2024

Date of Judgment: 13 June 2024