IN THE HIGH COURT OF LESOTHO- COMMERCIAL COURT DIVISION

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HELD AT MASERU **CCT/0259/2019**

In the matter between: -

MAMELLO MORRISON **1ST APPLICANT/1ST DEFENDANT**

MORRISON FAMILY PRODUCTS

t/a SEQHAQHABOLA PRODUCTS **2ND APPLICANT/2ND DEFENDANT**

And

SALVATION FOR ALL CHURCH **1ST RESPONDENT/ PLAINTIFF**

SHERIFF OF THE HIGH COURT **2ND RESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

Neutral Citation: Mamello Morrison and another v Salvation for All Church and 2 others CCT/0259/2019 [2021] LSHC 126 COM (9th November, 2021)

JUDGMENT

CORAM: MATHABA J

HEARD ON: 4th November 2021

DELIVERED ON: 9th November 2021

SUMMARY:

Judgments and orders – Rescission – Court granting default judgment in disregard for appearance to defend and exception which were entered out of time – High Court Rule 45(1) – Whether an order erroneously granted.

ANNOTATIONS:

LEGISLATION

High Court Rule of 1980

CITED CASES:

LESOTHO:

Cegeleg (Lesotho) Limited v Mahlomola Moabi and One 1995-1996 LLR -LB 504

Lesotho Nissan (Pty) Ltd v Katiso Makara C of A (Civ) 72/14

Michael Mpheta Ramphalla v Barclays Bank PLC and Another CIV/APN/257/95

National University of Lesotho and Another v Thabane LAC (2007-2008) 479

Olaf Leen v First National Bank Lesotho (Pty) Ltd C of A (Civ) No. 16A/16

SOUTH AFRICA

Bakoven Ltd v GJ Howen (Pty) Ltd1992 (2) SA 466 (E)

Colyn v Tiger Food Industries Limited trading as Meadow Feed Mills Cape [2003] 2 All SA 113

De Wet and Others v Western Bank Ltd 1977 (4) SA 770

Firstrand Bank Ltd t/a Wesbank v Sello Elly Mogodiri Case No: 27192/2019

Harris v ABSA Ltd Volkskas 2006 (4) SA 527 (T)

Hart and Another v Nelson 2000 (4) SA 368 (E) 2000 (4) SA 368 (E)

Hessel's Cash and Carry v SA Commercial Catering and Allied Workers Union 1992 (4) SA 593(E)

JC Schutte v Nedbank Limited Case No: 73759/17

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

McGill v Vlakplaas Brickworks (Pty) Ltd 1981 (1) SA 637 (W)

Maujean t/a Audio Video Agencies v Standard Bank of SA Limited 1994 (3) SA 801 (C)

Mthanthi v Pepler 1993 (4) SA 368

Mutebwa v Mutebwa 2001 (2) SA 193 (TkH)

Pangbourne Properties v Pulse Moving 2013 (3) SA 140

Pugin v Pugin 1963 (1) SA 791

Scholtz and Another v Merryweather and Others 2014 (6) SA 90 (WCC)

Stander v ABSA Bank BPK1997 (4) SA 873

Theron No v United Democratic Front (Western Cape Region) and Others 1984(2) SA 532 (C)

Tshabalala and Another v Peer 1979 (4) SA 27

Tom v Minister of Safety and Security [1998] 1 All SA 629 (E)

Topol & Others v L.S. Group Management Services (Pty) Ltd. 1988 (1) S.A. 639

Tshivhase Royal Council v Tshivhase: Tshivhase v Tshivhase1992 SA (4) 852

Trustees Indertyd van M & L Trust v Jason Lucas [1996] 4 All SA 273

Van der Merwe v Bonaero Park (Edms) Bpk 1998 (1) SA 697 (T)

INTRODUCTION

[1] A right to be heard is one of the basic tenants of the rule of law. It is a very important component of the principles of natural justice and occupies special place in the dispensation of justice. In the context of litigation, a person against whom an adverse action or order is proposed must be informed of the intended adverse action or order in order to exercise his or her right to be heard.

[2] The present applicants were defendants in the main action instituted by the first respondent who was the plaintiff and in whose favour the default judgment was sought and granted. I shall, for convenience, refer to the applicants as defendants and to the 1st respondent as plaintiff. The *dramatis personae* in this matter are therefore the plaintiff and defendants. The plaintiff obtained default judgment against the defendants on the 24th September 2019. In response, the defendants approached this Court on the 25th November 2019 with an urgent application amongst others for stay of execution and rescission of the Final Order in CCT/0259/2019. The application was heard on the 11th December 2019 by her Ladyship, the late Chaka – Makhooane, J, as she then was. Mr. *Mokhathali* appeared for the defendants while Mr. *Mokone* appeared for the plaintiff. Judgment was reserved to a date to be communicated. Unfortunately, her Ladyship passed on before delivering judgment.

[3] The parties attended the roll call on the 25th October 2021 where they agreed that the Court should consider and deliver judgments based on the Heads of Argument which they had filed. I was subsequently allocated the matter on the 27th October 2021.

BACKGROUND

[4] Sometime in 2018 the plaintiff and the 1st defendant entered into a sale agreement in respect of rights and interest over land. Clearly things did not go well between the parties. As a result, the plaintiff instituted action against the defendants on the 1st August 2019 for declaration of the sale agreement null and void *ab initio* and for refund of the purchase price in the sum of *Ninety Thousand Maloti (M90,000.00),* amongst others. In terms of the summons, the defendants were given *seven (7) days* to file their appearance to defend if they wished to defend the matter. However, the defendants filed their appearance to defend with exception after the *seven (7)* days period provided for in the summons.

[5] Without notice to the defendants, the plaintiff filed the request for default judgment and moved it on the 24th September 2019. What is clear from the Court record is that at the time he moved the request for default judgment on the 24th September 2019, Mr. *Thaanyane* disclosed to the Court that appearance to defend and notice of exception were already filed, but he moved the Court to disregard them as they were filed out of time. This is also reflected in the

request for default judgment. The Court also recorded on the Court file that the "*notices were both out of time & therefore are disregarded*".

[6] The mainstay of the defendants' case is that the default judgment was erroneously sought and granted without notice to the defendants and in circumstances where the Court did not even have jurisdiction.

ISSUE FOR DETERMINATION

[7] The issue for determination before this Court is whether default judgment that is sought without notice to defendants in disregard for their appearance to defend and exception that is filed out of time is erroneously sought and susceptible to rescission.

THE PARTIES

[8] It is convenient at this stage to comment about the affidavits in this matter. Both the plaintiff and the 2nd defendant are artificial persons. While it is not necessary to annex a resolution evincing that an artificial person has duly resolved to institute or defend court proceedings, minimum evidence is still required. Nowhere does it appear from the Founding Affidavit and the Answering Affidavit that the 2nd defendant and the plaintiff, respectively, duly resolved to institute the proceedings or to oppose them. Since neither party has raised an objection in this regard, I proceed with the understanding that both sides have accepted that all the parties are properly before court.

DEFENDANTS' CASE

[9] It is argued that at the time the order was obtained, the defendants had already filed their appearance to defend and exception, as a result of which they should have been notified of the request for default judgment. According to the 1st defendant, she only became aware of the existence of the judgment in the final week of October when she was served with the Final Court Order. I can only assume that reference to October in the Founding Affidavit means October 2019. This is because the Court Order was obtained on the 24th September 2019 after which the application for rescission was launched.

[10] The affidavit of the 1st defendant has gone further to indicate that the dispute in the main matter concerns a dispute over land as a result of which jurisdiction of this Court was ousted. While there are other triable issues which the 1st defendant has raised, the ground that this Court did not have jurisdiction to entertain the main matter may disappear into nothingness upon closer scrutiny. In addition, the 1st defendant is questing the basis of 18.5% interest that was claimed by the 1st respondent and the costs on a punitive scale on the ground that they were not pleaded.

PLAINTIFF 'S CASE

[11] The plaintiff asserts that even if judgment was granted in the absence of the defendants, the Court committed no error in granting the judgment as the 1st defendant has not even pleaded new facts in her founding affidavit, which were not there when the Court granted the default judgment and which would have persuaded the Court otherwise.

[12] The first respondent argues further that appearance to defend needed to be filed within seven (7) days after receipt of summons but that it was filed twelve (12) days thereafter. It argues that it was not required by the rules to give the applicants notice of application for default judgment.

EVALUATION AND LAW GOVERNING RESCISION OF JUGEMENTS ERRONEOULY SOUGHT OR GRANTED

[13] It is now established in this jurisdiction that there are three ways to set aside a judgment that is taken in the absence of the other party: (a) under Rule 27[1]; (b) under Rule 45[2]; and under common law.

[1] High Court Rule of 1980
[2] High Court Rules, supra

[14] Though there is provision for rescission, Courts do not come to assistance of litigants who are in wilful default. An applicant in a rescission application is taken to be in wilful default if he or she, with knowledge of the action brought against him or her, does not take steps required to avoid the default. In **Harris v ABSA Ltd Volkskas 2006 (4) SA 527 (T),** Moseneke J, as he then was, indicated that:

> *"Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions. A decision freely taken to reform from filing a notice to defend or a plea or from appearing would ordinarily weigh heavily against an Applicant required to establish sufficient cause*. (emphasis added).

[15] In **Scholtz and Another v Merryweather and Others**[3] Gamble, J cited *Maujean t/a Audio Video Agencies v Standard Bank of SA Limited* 1994 (3) SA 801 (C) at 803H-I where it was said that in the context of a default judgement, "wilful" connotes deliberateness where one has knowledge of the action and its legal consequences but consciously and freely takes a decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be.

[16] Inasmuch as there is no specific reference to Rule 45(1)(a) of the High Court Rules[4] in the founding papers, the Court Order is attacked on the

[3] 2014(6) SA 90 (WCC) at para [66]
[4] 1980, supra.

ground that it was erroneously sought – this much is clear from the Founding Affidavit. The Founding Affidavit may have been inelegantly drafted, but the plaintiff is somewhat disingenuous in its suggestion that "*it is not clear whether the Applicant intended to bring the application in terms of Rule 45(1)(a) or Rule 27(3).*" Again, the plaintiff 's Heads of Argument squarely addresses Rule 45(1)(a). Consequently, the focus of this judgment is Rule 45(1)(a).

[17] It is worth noting though that the fact that an application is specifically brought in terms of one Rule does not mean it cannot be entertained in terms of another Rule or under common law provided the requirements thereof are met[5]. As a result, I will proceed to consider the application under the common law as well should it not succeed under Rule 45(1)(a). There can be no prejudice to the plaintiff as the Founding Affidavit has, directly or indirectly addressed the common law requirements as well.

[18] In terms of Rule 45 (1) (a) in addition to any other powers it may have, the Court *may*, **mero motu** or upon the application of any party affected, rescind or vary "*an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby*". (emphasis added). In the

[5] De Wet v Western Bank Ltd 1977 (4) SA 770 (T) at 780H-781A; Mutebwa v Mutebwa 2001(2)SA 193 (TkHC) at paras 11 and 12; CGM Industrial (Pty) Ltd v Adelfang Computing (Pty) Ltd LAC (2007 – 2008) 463 at [12]

unreported judgement of **Olaf Leen v First National Bank Lesotho (Pty) Ltd**[6] the Court of Appeal in discussing Rule 45(1)(a) said the following:

> "The rule provides that the court may rescind or vary a judgment erroneously sought or erroneously granted in the absence of any party affected thereby. A judgment is granted in error if, as stated in Nyingwa v Moolman 1993 (2) SA 508 at 510 (referred to by the judge a quo) at the time of its issue there existed a fact of which had the judge been aware, he would not have granted the judgment."

[19] As to whether the error must be patent from the record of proceedings or external evidence of the error was permitted has been a subject of legal debate in South Africa when Courts had to interpret Rule 42(1)(a), an equivalent of Rule 45(1)(a). In **Bakoven Ltd v GJ Howen (Pty) Ltd**[7] and **Tom v Minister of Safety and Security**[8] it was held that the error must be patent from the record of proceedings while in **Stander v ABSA Bank BPK**[9] it was held that external evidence of the error was permitted. However, the contradictions are not significant for purposes of this judgment.

(20) Again, Courts in South Africa have been inconsistent as to whether a Court should, without further enquiry, grant application for rescission once it finds that the judgment was erroneously sought or obtained. In **Theron No v**

[6] Case number C of A (CIV) No.16A/16 at page 17 para 28, Judgment delivered on the 28th October 2016. See also the unreported Judgment in Michael Mpheta Ramphalla v Barclays Bank PLC & Another CIV/APN/257/95 at page 6 to 7, Judgement delivered on 5th February 1997.
[7] 1992 (2) SA 466 (E) at 471
[8] [1998] 1 All SA 629 (E) at 637
[9] 1997 (4) SA 873 at 882 (ECD)

United Democratic Front (Western Cape Region) and Others[10] Vivier, J said that -

> "The Court has a discretion whether or not to grant an application for rescission under Rule 42(1). In my view the Court will normally exercise that discretion in favour of an applicant where, as in the present case, he was, through no fault of his own, not afforded an opportunity to oppose the order granted against him, and when on ascertaining that an order has been granted in his absence, he takes expeditious steps to have the position rectified".

[21] In **Tshivhase Royal Council v Tshivhase: Tshivhase v Tshivhase**[11]; **Van Der Merwe v Bonaero Park (EDMS) BPK**[12]; **Colyn v Tiger Food Industries Limited trading as Meadow Feed Mills Cape**[13]**; JC Schutte v Nedbank Limited**[14] the general consensus is that the Court still retains discretion even under Rule 42(1)(a) to grant rescission. In **Van Der Merwe**, *supra*, the Court indicated that the applicant in an application under Rule 42(1)(a) need not show good grounds and that the Court has the power in the event of the jurisdictional facts under the rule being met to set aside the order. It indicated that the Court still has a discretion in an appropriate case to refuse rescissions even when jurisdictional facts under rule 42 (1) are met.

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[10] 1984 (2) SA 532 (C) at 536G;
[11] 1992 SA (4) 852 at 863 J AD
[12] 1998 (1) SA 697 at 702 G-H/I) (TPD)
[13] [2003] 2 All SA 113 at 116 para [5] (SCA)
[14] Case No: 73759/17 at page 7 to 8 Judgement delivered on the 13th January 2019 by South Africa High Court, Gauteng Division, Pretoria

[22] In **Colyn,** *supra*, the Supreme Court of Appeal of South Africa said the following:

> "It is against this common law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. The rule caters for mistake. *Rescission or variation does not follow automatically upon proof of a mistake*. The rule gives the courts a discretion to order it, which must be exercised judicially… (emphasis added)

[23] In **JC Schutte,** *supra,* Movshovich AJ, having found an irregularity which rendered the seeking or granting of judgment erroneous, nonetheless said the following:

> "[38] Mr Schutte's counsel contends that the matter ends there, and that I have no discretion to refuse rescission. I do not agree. It is correct that, unlike a rule 31 or common law rescission, good cause need not be shown for an applicant to succeed.[15] As held in *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T)[16] ("***Bonaero Park***") and *Tshivhase and Another v Tshivhase and Another* 1992 (4) SA 852 (A),[17] however, the court plainly retains a discretion to refuse the application for rescission under rule 42, even if all the formal requirements are satisfied. The presence of a discretion is underscored by the use of the word "*may*" in rule 42(1).
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> [39] The discretion must be exercised judicially, but it is not, contrary to what was held in *Mutebwa v Mutebwa* 2001 (2) SA 193 (TkH),[18] "*narrowly circumscribed*" to deciding whether the court will act only on application by a party or *mero motu* in considering rescission. Such a narrow reading is not supported by the words used in rule 42. "*May*" is not limited in this fashion.

[15] *De Wet and Others v Western Bank Ltd* 1977 (4) SA 770 (T), 777.
[16] At 703.
[17] At 862-863.
[18] At para [17].

It is clear from the rule that "*may*" qualifies and relates to the words "*rescind or vary*" and not the words "*in addition to any other powers it may have mero motu or upon the application of any party affected*", which are written in parenthesis. The words in parenthesis simply grant the power to the court to consider the matter either on its own initiative or on application by a party, and clarify that the power to rescind or vary is in addition to all other powers a court may have.

[40] The discretion is a wide one, which must be exercised with reference to all the circumstances. Such a discretion is also in line with the High Court's inherent jurisdiction to regulate its own process (under section 173 of the Constitution.)"

[24] Conversely, in **Tshabalala and Another v Peer 1979 (4) SA 27 at 30 D- E** where Eloff J, as he then was, in delivering the judgment of the Full Bench of the Transvaal Provincial Division said the following regarding rule 42(1):

"The Rule accordingly means – so it was contended – that, if the Court holds that an order or judgment was erroneously granted in the absence of any party affected thereby, it should without further enquiry rescind or vary the order. I agree that is so, and I think that the strength is lent to this view if one considers the Afrikaans text which simply says that: 'Die Hof het benewens ander magte wat hy mag hê die reg om…'"

[25] Also in **De Wet and Others v Western Bank Ltd 1977 (4) SA 770 at 777 F**, (the Judgment of the Full Bench of the Transvaal Provincial Division, that was upheld at the Appellate Division) Melamet J said that:

"As set out above, the above Rule enables the Court, in addition to any powers it has, to grant the relief to an applicant under the circumstances set out in the Rule. It was contended that the word 'may' indicates that the Court has been vested with a discretion and that this should only be exercised in favour of the application if good or sufficient cause – eg probability of success in the action – were shown. There is no basis, in my view, to graft such further requirement onto the Rule and it is clear from the context in which the word is used and the Afrikaans version that the word 'may' is used in the sense that the Court is empowered, in certain defined circumstances, to rescind or vary a judgment".

[26] Lastly in the unreported judgement of **Firstrand Bank Ltd t/a Wesbank v Sello Elly Mogodiri**[19] Cowen AJ, 42 (1) said, in relation to the requirements under Rule 42(1)(a), that "*Once those requirements are shown, an applicant is ordinarily entitled to rescission and is not required also to show good or sufficient cause as is required for rescission under common law*".

[27] While there seems to be an agreement that the applicant under Rule 42(1)(a) need not show good or sufficient cause, whether rescission is granted automatically once the applicant is able to demonstrate that the judgement or order was erroneously sought or granted has been a subject of intense legal debate. In **Firstrand Bank**, *supra*, Cowen AJ must have used the word

[19] Case Number 27192/2019 at page 12 para 14, Judgment delivered on the 7th April 2020 by High Court of South Africa, Gauteng Division, Pretoria.

ordinarily cautiously, particularly in the light of **JC Schutte,** s*upra*, which was delivered from the same Court.

[28] I have not been successful in finding a decision in our jurisdiction where Rule 45(1)(a) was dissected as was the case with Rule 42(1)(a) in South Africa. In the matter of **Michael Mpheta Ramphalla v Barclays Bank PLC and Another**, *supra*, without necessarily analysing the Rule and with reference to **Topol & Others v L.S. Group Management Services (Pty) Ltd. 1988 (1) S.A. 639**, the court said the following:

> *"*It is also correct in my view that once the court come to the conclusion that the judgment was erroneously granted in the absence of any party affected thereby then *an applicant need not establish, in addition, good cause for the rescission which must be granted without any further enquiry"*. *(*emphasis added)

[29] In **Cegeleg (Lesotho) Limited v Mahlomola Moabi and One**[20] which dealt with the application for rescission where judgment was erroneously granted Cullinan CJ, as he then was, indicated that "as the default judgment was granted *erroneously, he was entitled ex debito justitiae to the rescission thereof*". *(*emphasis added).

[30] With respect, I endorse decisions to the effect that while Courts would ordinarily grant rescission where it is shown that a judgment was erroneously

[20] 1995 – 1996 LLR – LB 504 at page 516

sought or granted, Courts still retain discretionary powers to refuse rescission in some cases despite jurisdictional facts being met under Rule 45(1)(a) in the case of Lesotho. The use of the word *may* before the words *rescind or vary*, underscores the presence of discretionary powers. It is not necessary to prescribe circumstances under which a Court would refuse a rescission application despite the presence of jurisdictional facts under Rule 45(1)(a).

[31] Considering the crux of the defendants' complaint, it is imperative to examine the relevant provisions under which the default judgment was granted and see if defendants were entitled to be notified of the application for default judgment and when it was going to be moved. Default judgments are catered for under Rule 27 (3) of the High Court Rules. The Rule indicates that –

> "Whenever the defendant is in default of entry of appearance or is barred from delivering of a plea, the plaintiff may set the action down for application for judgment. When the defendant is in default of entry of appearance no notice to him of the application for judgment shall be necessary but when he is barred from delivery of a plea not less than three days notice shall be given to him of the date of hearing of the application for judgment".

[32] It is common cause in this matter that the defendants were not served with the application for default judgment or the notice of set down for the same. That was notwithstanding the fact that the defendants had filed their appearance to defend as well as the exception, though late. It is clear that plaintiff thought it

was entitled to ignore the appearance to defend and the exception because they were filed late. In **Pangbourne Properties v Pulse Moving**[21] where a Replying Affidavit had been filed out of time, the Court declined the application to disregard it. Wepener J said the following:

> "On the facts of the present matter I deem it unnecessary for either of the parties to have brought a substantive application for condonation. See *McGill v Vlakplaas Brickworks (Pty) Ltd 1981 (1) SA 637 (W)* at *643C-G; Hessel's Cash and Carry v SA Commercial Catering and Allied Workers Union 1992 (4) SA 593(E) at 599F-600B;* and the unreported matter of The National Director of Public Prosecutions referred to above.
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> In the matter under consideration all the papers are before me and the matter is ready to be dealt with. To uphold the argument that the replying affidavit and consequently also the answering affidavit fall to be disregarded because they were filed out of time will be too formalistic and an exercise in futility, and will leave the parties commence the same proceedings on the same facts de novo".

[33] The determining factor in the **Pangbourne Properties,** *supra*, was prejudice. There was no prejudice to any party if the matter was to be disposed of on its merits despite the late filing of the answering and replying affidavits. In **Pugin v Pugin**[22] the Court indicated that though an entry of appearance may have become irregular, the plaintiff cannot ignore it and proceed as if there was

[21] 2013 (3) SA 140 at 148 D - F
[22] 1963 (1) SA 791 at 794

no appearance to defend at all. The Court said that the practise was for Courts to insist on the plaintiff first having the irregular entry of appearance set aside on application before proceeding as an undefended matter or the plaintiff having the defendant himself served with the court process. The notice of bar and notice of trial had been served on the defendant's erstwhile attorney who in turn forwarded them to the defendant. The Court had to satisfy itself that there was sufficient service by registered post before it granted the orders that were sought against the defendant.

[34] In **Mthanthi v Pepler**[23] where a default judgment had been granted against the defendant in disregard for his plea and counterclaim which were filed days after the period prescribed in the notice of bar had lapsed, Hurt J said the following in considering appeal following the magistrate refusal of the rescission application:

> "In my view, therefore, the magistrate to whom the request for default judgement was referred was required, in deciding whether to grant such judgment, to exercise a discretion which was not simply limited to the assessment of the proof of quantum. It would have included, for its proper exercise, a consideration of the question whether default judgment was 'appropriate' in the circumstances. In this regard, the relevant features of the papers as they stood in the court file on the day when the matter was placed before the magistrate were that the defendant had not

[23] 1993(4) SA 368 at page 374 to 375 para I - J

only delivered a plea but also a counterclaim. The inescapable inference must have been that the defendant had given his legal representative instructions to defend the claim and to seek compensation for the damages which his (defendant's) vehicle had sustained. If the magistrate was unaware of the existence of these documents when the matter came before him, then the plaintiff's attorney should have drawn them to his attention in compliance with the general duty of disclosure in *ex parte* applications. If (as seems most probable) the magistrate was aware of the plea and counterclaim, but ignored them because they had not been delivered in accordance with the rules, then the magistrate's approach was erroneous for the reasons set out above. Whatever the situation, I think that the defendant's contention that default judgment should not have been entered is justifiable".

[35] In **Trustees Indertyd van M & L Trust v Jason Lucas**[24] Mpati AJ said the following:

> "It seems to be that entry of appearance to defend is an important step to be taken by the defendant if he intends to defend an action. Even where appearance to defend has been entered after the expiry of the period within which it had to be entered as limited by summons, it is effective. A plaintiff cannot ignore it merely because it has been entered late and proceed to request that default judgment be entered in his favour".

[24] [1996] 4 ALL SA 273 at 240

[36] However, in **JC Schutte**, *supra*, where plea was delivered out of time, the Court said that in the absence of Court's sanction for uplifting the bar or condonation of late delivery of the plea, the plea was not before Court. The Court refused to grant rescission. It must be noted that the defendant, Schutte, was already barred when the plea was delivered.

[37] It is my considered view in this matter that with the defendants having filed appearance to defend and exception, which had been received by the plaintiff 's attorneys without protest or reservation of rights, the defendants were entitled to assume that they would be served with request for default judgment as well as the notice of set down for the same. Therefore they were not in wilful default when the Court Order was obtained. It was not up to the plaintiff to ignore the notices and proceed with request for default judgment without service to the defendants. While it is clear from the court record that the Court was moved and agreed to disregard the appearance to defend and the notice of exception, nowhere does Mr. *Thaanyane* appear to have brought to the attention of the Court that the request for default judgment as well as notice of set down were not served on the defendants.

[38] The cavalier fashion with which the defendants treated the Court by not entering their appearance to defend within the time frame referred to in the summons should be denounced. However, the prejudice they stand to suffer is

obvious if rescission application is not granted in circumstances where judgment was obtained by default against them in disregard for their appearance to defend and exception which they had already filed when the request for default judgment was made. Besides being denied a technical advantage which it had already taken advantage of by seeking and obtaining judgment in default, plaintiff has not identified any prejudice it stands to suffer if the rescission application is granted. In **Hart and Another v Nelson 2000 (4) SA 368 (E)** Horn AJ, as he then was, stated as follows at 374G – 375F:

> "Where strict adherence to a Rule of court would give rise to a substantial injustice the court will grant relief which will prevent such an injustice. The Court has an inherent power to grant relief where an insistence upon the exact compliance with a Rule of court would result in substantial injustice to one of the parties".

[39] It is convenient at this stage to refer to the words of Smalberger JA, as he then was, in **National University of Lesotho and Another v Thabane**[25] where he said the following:

> "Before proceeding I propose to make some comments concerning the Rules. They are primarily designed to regulate proceedings in this court and to ensure as far as possible the orderly, inexpensive and expeditious disposal of appeals. Consequently the Rules must be interpreted and applied in a spirit which will

[25] LAC (2007 – 2008) 479 at 480 to 481 F-J/A. The passage was quoted with approval in Lesotho Nissan (Pty) Ltd v Katiso Makara C of A (CIV) 72/14 at 7 para 10, judgment delivered on the 29th April 2016.

facilitate the work of this court. It is incumbent upon practitioners to know, understand and follow the Rules, most if not all of which are cast in mandatory terms. A failure to abide by the Rules could have serious consequences for the parties and practitioners alike, and practitioners ignore them at their peril. At the same time formalism in the application of the Rules should not be encouraged. Opposing parties should not seek to rely upon non- compliance with the Rules injudiciously or frivolously as an expedient to cause unnecessary delay or in an attempt to thwart an opponent's legitimate rights. Thus what amount to purely technical objections should not be permitted, in the absence of prejudice, to impede the hearing of an appeal on the merits. The Rules are not cast in stone. This court retains a discretion to condone a breach of its Rules (see Rule 15) in order to achieve a just result. The attainment of justice is this court's ultimate aim. Thus it has been said that Rules exist for the court, not the court for the Rules. The discretionary power of this court must, however, not be seen as an encouragement to laxity in the observance of the Rules in the hope that the court will ultimately be sympathetic. There is a limit to this court's tolerance"

[40] In the absence of any prejudice to him, the plaintiff took advantage of a purely technical omission by the defendants to file the appearance to defend timeously. At the time it so moved the request for default judgment, the plaintiff 's attorneys had already been served with the notice of appearance to defend and exception which they received on the 19th August 2019 at 09h03. Coincidentally, that is the date on which the plaintiff's attorneys signed and lodged the first request for default judgment which they seem not to have pursued hence the subsequent request.

[41] One would have thought that the first request for default judgment was abandoned because the plaintiff's attorneys were then in possession of the notice of appearance to defend and the exception. However, still without notice to defendants' attorneys, the plaintiff's attorneys lodged another request for default judgment on the 20th September 2019 which was preceded by a notice of set down for the 24th September 2019. The notice of set down had been filed in court on the 28th August 2019.

[42] In the circumstances of this matter, it was not appropriate for the plaintiff's attorneys to disregard the notice of appearance to defend as well as the exception and set down the request for default judgment for hearing without notice to defendants. The defendants had intimated their desire to be heard and had indeed filed an exception to the summons. This is a case where the defendants' right to be heard should have taken precedence over the technical advantage which the plaintiff exploited. In the peculiar circumstances of this matter, I am satisfied that the defendants ought to have been served with request for default judgment and notice of set down. I reiterate that it does not appear that Mr. *Thaanyane* brought it to the attention of her Ladyship, the late Chaka – Makhooane J, as she then was, that the defendants were not served with the request for default judgment and notice of set down.

[43] I am in agreement with the judgment in **Lodhi 2 Properties Investments CC v Bondev Developments 2007 (6) SA 87 (SCA) at paragraph 24**, where the Supreme Court of Appeal in South Africa held that "*Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of proceedings having been given to him such judgment is granted erroneously*". *(*emphasis added).

[44] Had the fact that the defendants were not served with the request for default judgment as well as the notice of set down brought to the attention of the Court before it granted the default judgment, properly exercising its discretion, the Court would not have granted the default judgment in the circumstances of this case.

[45] I do not consider it necessary to decide whether the application was going to succeed under common law. I am convinced that the Court Order in this case was erroneously sought. Once the defendants had served and filed their appearance to defend and exception, the plaintiff was obliged to give them notice of further steps it wanted to take in the matter, in particular, the request for default judgment and notice of set down. In the result, the defendants have met the jurisdictional facts under Rule 45(1)(a). Without them having been given the appropriate notices, the Order was clearly erroneously sought and granted. Even if it had been brought to the attention of the Court that the

defendants were not served with the request for default judgment and notice of set down, I would still find that the Court Order was erroneously granted.

[46] Again, were I to follow the decision in Tom[26] , *supra*, that rule 42(1)(a), (equivalent of Rule 45(1)(a)) is concerned with mistake or error in the judgement or order, I would still find that the Court Order was erroneously sought and granted as it is directed at the defendants while it was not clear from the prayers against which of the defendants the Court Order was sought. Again, an interest at the rate of 18.5 percent per annum from 5th day of March 2019 to date of full payment had been granted while it was not pleaded and there was no evidence in support of the same. The same applies to costs on attorney and client scale which were granted in the absence of special circumstances justifying them.

Order

[47] In the circumstances, I make the following order:

1. The application for rescission is granted with costs on party and party scale.

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A.R. MATHABA J

Judge of the High Court

For Plaintiff:	Adv. Thaanyane
For Defendants:	Adv. M.E Mokhathali