

**IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)**

HELD AT MASERU

CCT/ 0421/ 2017

JEREMANE RAMATHEBANE

APPLICANT

AND

NEDBANK LESOTHO LTD

1ST RESPONDENT

THE DEPUTY SHERIFF (Mr Mokhothu)

2ND RESPONDENT

Neutral Citation: Jeremane Ramathebane v Nedbank Lesotho Ltd and another
CCT/0421/2017 [2021] LSHC 148 COM (10th December, 2021)

JUDGEMENT

CORUM:

MATHABA J

DATE OF HEARING

1st December 2021

DATE OF RULING:

10th December 2021

Summary

Rescission of summary judgment- Rule 45(1)(a) -Judgment granted in the absence of the applicant in circumstances where the applicant had not filed affidavit to resist summary judgment application - Order not erroneously sought or granted.

Annotations:

Statutes:

High Court Rules, 1980

Cited Cases:

Lesotho

CGM Industrial (pty) Ltd v Adelfang Computing (Pty) Ltd LAC (2007- 2008)

Dodi Store v Herschel Foods (Pty) Ltd 1982 – 84 LLR 378

Kose Mafereka v Tlali Lefeta and Another CIV/APN 510/93

Napo Thamae and Another v Agnes Kotelo And Another C of A (CIV) No 16/2005

Olaf Leen v First National Bank Cof A (CIV) No, 16A/16

South Africa

Colyn v Tiger Food Industries Limited trading as Meadow Feed Mills Cape

[2003] 2 ALL SA 113

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

Deputy Sheriff Witwatersrand v Goldberg 1905 T.S 680

JC Schutte v Nedbank Limited Case No73759/17

Joob Investments (Pty) Limited v Stocks MavundlaZek Joint Venture 2009 (5) (SCA)

Katritsis v De Macedo 1966 (1) SA 613 (A)

Maharaj v Baclays National Bank ltd 1976 (1) SA 418

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

Pansera Builders (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport) 1986 (3) SA 654 (C)

Plascon – Evans Paints Limited v Van Riebeck Paints 1984 (3) SA 623

Silber v OzenWholesalers (Pty) Ltd 1954 (2) SA 345 (AD)

Taso Anastasiou and Others v Katie K.P Jordaan (18524/2015) [2016] ZAGPJHC 288 (31 October 2016)

Tshivhase Royal Council v Tshivhase: Tshivhase v Tshivhase 1992 (4) SA 852

Van Der Merwe v Bonaero Park (EDMS) BPK 1998 (1) SA 697

INTRODUCTION:

[1] This is an application for stay of execution and rescission of summary judgement granted on default by Chaka – Makhooane J, as she then was, on the 26th February 2018. The application was brought on an urgent basis on the 19th September 2018. The applicant is seeking prayers in the following terms:

- “1. That a rule *nisi* be issued returnable on the date to be determined by this Honourable Court calling upon the respondents to show cause (if any) why:-

- a) Execution of Judgement in CCT/0421/17 shall not be stayed pending the finalization hereof;
- b) The Judgement in CCT/0421/17 shall not be rescinded;
- c) The Rules as to form and notice shall not be dispensed with on account of urgency;
- d) The Respondents Shall not be directed to pay costs hereof only in the event of their opposition hereto;
- e) The applicant shall not be granted further and/ or alternative relief;

2. That prayers 1(a) and (c) operate with immediate effect as an interim Court Order pending the finalization hereof.”

There is nothing in the Court file to indicate that the interim relief was pursued or granted. The application is opposed by the first respondent.

BACKGROUND:

[2] The first respondent issued out summons as plaintiff against applicant as defendant in the trial on the 5th December 2017 claiming amongst others payment of the sum of M113, 971.55 (One Hundred and Thirteen Thousand, Nine Hundred and Seventy One Maloti and Fifty Five Lisente), interest thereon at the prime rate plus 10% per annum from the 12th September 2017 to date of payment and costs of suit on attorney and client scale.

[3] The applicant subsequently served the first respondent with notice of appearance to defend on the 12th December 2017 and filed it in Court on the

13th December 2017. On the 19th of January 2018 the first respondent served the applicant with a notice of application for summary judgment with a set down for the 20th February 2018. The application was filed the same day it was served.

[4] The application for summary judgement could not proceed on the 20th February 2018 because the Court was ceased with a constitutional case in the Constitutional Court as a result of which all the matters that could not be heard on the 20th February 2018 were set down for hearing on the 26th February 2018 by the Registrar.

[5] I have confirmed from the roll for the 26th February 2018 annexed to the first respondent's answering affidavit that indeed the matter is number one on the list before Chaka – Makhoane J, as she then was. The application for summary judgement was, as a result, moved and granted on the 26th February 2018.

[6] It was only on the 26th February 2018 at 09h19 that the applicant served the first respondent's legal representatives at their offices with an affidavit resisting the summary judgment. This affidavit was only filed in Court on the 8th March 2018. The first respondent contends that at the time the affidavit was so served, its legal representative, Mr. *Fiee*, was already at the Court as a result of which he was not aware of it.

[7] Mr. *Fiee* has not filed a supporting affidavit to confirm that he was already at the Court when the affidavit was served at his offices. The averments

in this regard are therefore hearsay. However, it is clear from the Court record that it is Mr. *Fiee* who moved the application for summary judgment on the 26th February 2018. Taking into account that the business of this Court starts at 9h30 and that the matter was the first on the roll, I have no reason to doubt that Mr. *Fiee* was already at the Court at the time his office received the affidavit from the applicant resisting the application for summary judgment.

[8] *Ex facie* the return of service, the applicant was served with a writ of execution on the 13th March 2017 whereupon a tractor was attached. I have every reason to believe that the year 2017 in this regard is a genuine mistake. The action giving birth to the summary judgment and the consequent writ of execution only commenced in December 2017. In fact, the return of service is dated the 14th March 2018. The second respondent's supporting affidavit which confirms that service was effected on the 13th March 2018 puts the issue to bed. However, according to the applicant, he only became aware on the 14th September 2018 that his property had been attached pursuant to a writ of execution when the deputy sheriff came to remove it. He asserts that he subsequently established that a summary judgment was obtained against him. I will return to this apparent dispute of fact later in the judgment.

[9] It is against this backdrop that the applicant filed an urgent application for stay of execution and rescission of summary judgement. The pleadings were closed without the applicant filing a replying affidavit and the matter was argued before Chaka- Makhooane J, as she then was, on the 6th

March 2019. The ruling was reserved to the 24th October 2019. However, Chaka – Makhoane J, as she then was, passed on in July 2020 before the ruling was delivered.

[10] On the 26th October 2021 Mrs. *Musi-Mosae*, for the applicant and Mr. *Fiee*, for the first respondent, appeared before Court where they agreed that instead of addressing the Court again, judgement should be delivered based on the heads of argument filed of record by both parties. The matter was allocated to me on the 27th October 2021.

APPLICANT’S CASE:

[11] It is the applicant’s case that his erstwhile attorneys were not notified of the fresh date of the 26th February 2018 on which the application for summary judgment was moved and granted. He therefore argues that the matter was not properly before Court on the 26th February 2018 as a result of which summary judgment was erroneously sought and granted. He argues further that he has a *bona fide* defence with prospects of success to the first respondent’s claim.

FIRST RESPONDENT’S CASE:

[12] It is the first respondent’s case that the applicant’s erstwhile attorneys were served with the application for summary judgment clearly indicating that it was going to be moved on the 20th February 2018. The first

respondent argues that the applicant did not file an affidavit before Court in terms of Rule 28(3)¹ which enjoins the party that intends to oppose an application for summary judgment to deliver its affidavit two court days before the date of hearing of summary judgment. As a consequence, so it argues, the matter was unopposed and there was therefore no obligation to serve the applicant with a notice of set down for the 26th February 2018. It is also the first respondent's case that the affidavit which was belatedly filed by the applicant in opposition to the summary judgment does not disclose a *bona fide* defence contrary to the requirement to disclose "fully the nature and grounds of the defence and the material facts relied therefor".

[13] The first respondent further argues that the application for stay and rescission of judgment is not urgent and that the applicant is not candid with the Court when he says that he only knew of the summary judgment on the 14th September 2018. It asserts that the applicant knew of the summary judgment and the writ of execution as far back as March 2018 and made undertaking to settle the claim, though it is clear that the applicant did not have *bona fide* intentions.

ISSUE FOR DETERMINATION:

[14] The issue for determination before this Court is whether the summary judgment was erroneously sought and obtained on the 26th February

¹ High Court Rules 1980

2018. It is unavoidable for me to determine if by virtue of the applicant's failure to file an affidavit envisaged under Rule 28 (3) before noon not less than two court days before the 20th February 2018, the application for summary judgment became unopposed thus unnecessary for the applicant to be notified of the fresh date of the 26th February 2018 when the application was moved.

ANALYSIS:

[15] Rule 45(1)(a) provides that the Court “may in addition to any other powers it may have, **mero motu** or upon the application of any party affected, rescind or vary an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby”.

[16] In the unreported judgement of **Olaf Leen v First National Bank Lesotho (Pty) Ltd**² 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.”

[17] The applicant therefore contends that the judgement was erroneously granted as it was granted in his absence and that it affects his

²Case number C of A (CIV) No.16A/16 at page 17 para 28.

interests because he is facing execution. He relies on **Taso Anastasiou and Others v K. P**³ where the Court in interpreting a similar Rule held that;

“Prerequisite factors for granting rescission under this rule are the following; Firstly the judgement must have been erroneously sought or granted; Secondly, such judgement must have been granted in the absence of the applicant; Lastly, the applicant’s rights or interest must be affected by the judgement”.

[18] In **Katritsis v De Macedo**⁴ the Court held that the concept of default has three components and that it is not confined to failure to file the necessary documents required by the Rules in opposition to the claim, or failure to appear when the case is called, but that it also comprises failure to attend Court during hearing of the matter.

[19] I therefore find that the applicant was in default in all material respects. Faced with an application for summary judgment, the applicant had two options⁵. In this regard Rule 28(3) provides as follows:

- “(3) Upon the hearing of the application for summary judgment, the defendant may –
- (a) give security to the plaintiff to the satisfaction of the Registrar for any judgment including such costs which may be given; or

³ Case No 18524/2015, Gauteng Local Division (accessed on [www. Saflii.org](http://www.saflii.org))

⁴1966(1) SA 613 (A) at 618 B; *Morris v Autoquip (Pty) Ltd* 1985 (4) SA 398 (WLD); *First National Bank of SA Ltd v Myburgh and Another* 2002 (4) SA 176 (CPD)

⁵Olaf Leen, *supra*.

- (b) satisfy the court by an affidavit or, with leave of the court, by oral evidence of himself or of any other person who can swear positively to the fact, that he has a **bona fide** defence to the action.

Such an affidavit, shall be delivered before noon not less than two court days before the hearing of the application. Such affidavit or oral evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor”.

[20] The applicant exercised none of the options stated above. Neither he nor any person who could swear positively to the fact that the applicant had a **bona fide** defence to the action was in Court on the 20th February 2018. It is beyond dispute that the application for summary judgment was served on the applicant’s erstwhile legal representatives and it clearly stated that it was set down to proceed on the 20th February 2018.

[21] I know the crisp question is whether the applicant should have been notified that the matter did not proceed on the 20th February 2018 and that it was set down to proceed on the 26th February 2018. I find, without hesitation that, with the applicant having defaulted on any of the options in Rule 28(3), as well as not being in attendance on the 20th February 2018, the first respondent was perfectly entitled to treat the application as unopposed and move it without notice to the applicant on the 26th February 2018.

[22] If the applicant seriously intended to resist the summary judgment application, he had a second chance to file his affidavit before noon not less than two court days before the 26th February 2018. In the first place, the applicant should have exercised the options presented by Rule 28(3) before the 20th February 2018 or be in Court on the 20th February 2018 to seek leave to present evidence personally or through another person to demonstrate that he had a *bona fide* defence to the claim.

[23] Following the obvious sluggishness stated above, coupled with his absence in Court on the 20th February 2018, a diligent litigant would have, personally or through his legal representatives inquired as to what happened to the matter on the 20th February 2018. I have every reason to believe that the applicant or his lawyers indeed found out that the matter did not proceed on 20th February 2018. They knew that the matter was ‘live’ even after the 20th February 2018. This explains why the first respondent’s legal representatives were served with the applicant’s affidavit on the 26th February 2018 though it was a bit late in the day to thwart the first respondent’s effort to obtain summary judgment. Had the affidavit been filed timeously, the Court would not have disregarded it considering the drastic nature of summary judgment.

[24] Having already found in paragraph 21 of this judgment that it was not necessary for the applicant to be served with a notice of set down for the 26th February 2018 in the circumstances where there was no opposition to summary

judgment application, I conclude that there was no procedural irregularity or mistake in respect of the issue of the summary judgment. I therefore have no basis to hold that the summary judgment was erroneously sought by the first respondent or erroneously granted by the Court. In the absence of affidavit in terms of Rule 28(3) when the matter was heard on the 26th February 2018, there was no reason for the late Chaka – Makhooane J, as she then was, not to grant the summary judgment.

[25] Assuming that I am wrong that the first respondent was not obliged to serve the applicant with a notice of set down for the 26th February 2018 and that the judgment was therefore erroneously sought and granted, this is a good case where I would still refuse rescission application under Rule 45(1). I remain persuaded by South African judicial decisions that a Court still has a discretion in appropriate cases to refuse rescission even when jurisdictional facts under rule 42 (1) (an equivalent of Rule 45(1)) are met. *See: Tshivhase Royal Council v Tshivhase: Tshivhase v Tshivhase*⁶; *Van Der Merwe v Bonaero Park (EDMS) BPK*⁷; *Colyn v Tiger Food Industries Limited trading as Meadow Feed Mills Cape*⁸; *JC Schutte v Nedbank Limited*⁹

[26] While the applicant is certainly not required in the proceedings for summary judgment to prove his defence¹⁰, it bears emphasising that an affidavit

⁶1992 (4) SA 852 at 863 J AD

⁷1998 (1) SA 697 at 702 G-H/I) (TPD)

⁸ [2003] 2 All SA 113 at 116 para [5] (SCA)

⁹Case No: 73759/17 at page 7 to 8.

¹⁰FNB v Meyburgh 2002 (4) SA 176 (E) at para [9] and [10].

resisting summary judgment must “disclose fully the nature and grounds of the defence and the material facts relied upon therefor”¹¹.

[27] In dealing with a similar situation in **Maharaj v Barclays National Bank Ltd**¹² Corbett JA said that:

“...One of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully', as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence”.

¹¹Rule 28 (3)

¹²1976 (1) SA 418 (A) at 426 A- D

[28] In **Joob Investments (Pty) Limited v Stocks MavundlaZek Joint Venture**¹³ the Court indicated that in **Maharaj** case, *supra*, Corbette JA was keen to examine whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded as well as to consider if the defence so disclosed was both bona fide and good in law. Again, where the facts before Court raise doubt as to whether the plaintiff's case is 'unanswerable' summary judgment should be refused. But in the absence of the necessary allegations upon which a defence can be found, it would be contrary to a judicial approach to exercise a discretion against the plaintiff and in favour of the defendant. *See: Pansera Builders (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport) 1986 (3) SA 654 (C).*

[29] In my view, the applicant's affidavit which was filed in Court only on the 8th March 2018 did not constitute a sufficient defence to ward off summary judgement even if it had been timeously filed. The affidavit was clearly cobbled together in the hope that by kicking up enough dust, the applicant will postpone the inevitable.

First respondent's claim

[30] Regarding its claim, the first respondent alleged in its particulars of claim that on or about the 12th May 2016 it agreed to extend credit facilities in a form of personal loan and an overdraft to the applicant and that a letter in that

¹³2009 (5) (SCA) at 31

regard dated the 12th May 2016 was directed to the applicant. The first respondent has annexed to its particulars of claim as annexure A, a loan agreement between the parties signed on the 12th May 2016. It has alleged further that the applicant was to repay the loan by monthly instalments of M8 928.57 inclusive of interest but that the applicant failed to pay the monthly instalments as agreed as a result of which as at the 6th November 2017, the applicant was in arrears in the sum of M6 840.95 while full amount due and payable as at that date was the sum of M113 971.55 together with interest at the prime rate plus 10% per annum which the applicant has failed to pay despite demand.

Applicant's defense

[31] It his affidavit (which was belatedly filed) resisting the summary judgment application, all that the applicant says is that he never applied for a loan and/or overdraft from the first respondent and that he has been to the offices of the first respondent several times demanding proof that he received a loan or overdraft from the first respondent.

[32] The applicant's affidavit resisting summary judgment application is hopelessly insufficient – it is evasive and devoid of particulars. The nub of the first respondent's claim is that it entered into a loan agreement with the applicant. The applicant does not deny that he entered into a loan agreement

with the first respondent, neither does he challenge or denounce the loan agreement. He simply asserts that he never applied for a loan or overdraft without explaining why then he entered into the loan agreement.

[33] I observe that the signature appearing under the name of the applicant in the loan agreement is markedly similar to the applicant's signature in the founding affidavit in respect of rescission application. I have no hesitation in concluding that the defence advanced by the applicant is not *bona fide* and is inherently and seriously unconvincing. No material facts have been alleged in support of the defence by the applicant.

[34] The first respondent seems to have gone for an overkill when it annexed to its answering affidavit the applicant's letter dated the 13th April 2016 where he applied for a loan. This must be a reaction to the applicant's assertion that he never applied for a loan or overdraft. Equally, the signature on this letter is markedly similar to the applicant's signature in the founding affidavit. Consequently, even if the applicant had established jurisdictional facts under Rule 45(1), I was not going to exercise my discretion in favour of granting the rescission application in the circumstances of this case.

COMMON LAW RESCISSION:

[35] While the application was brought under Rule 45 (1) I proceed to consider it under common law as I am not precluded from doing so¹⁴. I do not see any prejudice to the first respondent as it has filed comprehensive affidavits.

[36] In *CGM Industrial (Proprietary) Limited v Adelfang Computing (Proprietary) Limited*¹⁵, Smalberger JA, as he then was, quoted with approval the decision of Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764 to 765D which sets out the principles that apply to an application for rescission under the common law as follows:

“The appellant’s claim for rescission of the judgment confirming the rule nisi cannot be brought under Rule 31(2) (b) or Rule 42(1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown. (See De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A) at 1042 and Childerly Estate Stores v Standard Bank of SA Ltd 1924 OPD 163.) The term ‘sufficient cause’ (or ‘good cause’) defies precise or comprehensive definition, for many and various factors require to be considered. (See Cairn’s Executors v Gaarn 1912 AD 181 at 186 per INNES JA.) But it is clear that in principle and in the long-standing practice of our Courts two essential elements of ‘sufficient cause’ for rescission of a judgment by default are:

(i) *that the party seeking relief must present a reasonable and*

¹⁴De 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 470 para [12]

¹⁵CGM Industrial (Pty) Ltd, supra, page 427 para [19].

acceptable explanation for his default; and

- (ii) *that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success. (De Wet's case supra at 1042; PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A); Smith NO v Brummer NO and Another; Smith NO v Brummer 1954 (3) SA 352 (O) at 357-8.)”*

[37] In considering the application for rescission, a Court “should not treat each requirement in a vacuum. There is an obvious inter-relationship between all the requirements and a weakness in one respect can be compensated for by strength in others”. See: **Napo Thamae and Another v Agnes Kotelo and Another** C of A (CIV) No 16/2005, page 13.

[38] Again, the Court does not have to delve too deeply into the merits in considering whether the applicant has a bona fide defence. It is sufficient that the defence raised is not excipiable and that on simple facts deposed to, the matter cannot be decided finally as a matter of law. See: **Kose Mafereka v Tlali Lefeta and Another** CIV/APN 510/93, page 7.

[39] I observe right away that the applicant has not explained why the affidavit in terms of Rule 28(3) was not filed on time, neither was the affidavit accompanied by application for condonation. In addition, the application for rescission was only filed six months after the applicant was served with a writ of execution and a Court Order. The applicant wants this Court to believe that

he only became aware after the 14th September 2018 that the summary judgment was obtained against him. This is around the period that the second respondent went to remove the property that had been attached pursuant to the writ of execution. For reasons that immediately follow, I refuse to allow the applicant to take this Court for a ride.

[40] The evidence indicates overwhelmingly that the applicant knew way back on the 13th March 2018 that a summary judgment was obtained against him when he was served with a writ of execution and the Court Order. As it has already been observed, the second respondent filed the return of service of record on the 14th March 2018 to the effect that he served the applicant with the writ of execution on the 13th March 2017. I have already explained in paragraph 8 of this judgment that 2017 is a genuine mistake and that the correct date should be the 13th March 2018 as confirmed by the second respondent in his detailed supporting affidavit.

[41] The second respondent further indicates that before he could attach anything at the applicant's home, the applicant drove him to his farm in Mohale's Hoek whereupon he advised him to attach one of his tractors at the farm which he estimated to worth over M300 000.00. He asserts that the applicant undertook to pay the respondent and indicated that it would not be necessary to remove and sell the tractor in execution.

[42] The second respondent has gone further in his affidavit to indicate that he conveyed the applicant's undertaking to the first respondent's legal

representatives who instructed him to hold off the removal and the sale in execution as they had also communicated with the applicant's legal representatives who had confirmed the applicant's undertaking to pay the first respondent's claim.

[43] At the time he filed the rescission application, the applicant was aware of the return of service and its contents. In fact, he has attached the return of service as annexure "JM2" to his founding affidavit. The applicant never challenged the contents of the return of service regarding the period when the writ of execution was served. To successfully do so, he would be required to provide the clearest and most satisfactory evidence as the return of service is considered to be *prima facie* evidence of what is stated therein. See: **Deputy Sheriff Witwatersrand v Goldberg** 1905 T.S 680 at 684 and **Dodi Store v Herschel Foods (Pty) Ltd** 1982 – 84 LLR 378 at 379.

[44] I do not find it awkward in the circumstances of this case that the applicant has not filed a replying affidavit to rebut the damning allegations in the answering and supporting affidavits. But I find it extremely significant. That the applicant never bothered to file a replying affidavit confirms my suspicion that he never seriously intended to resist the first respondent's claim but is just delaying the inevitable.

[45] Contrary to the picture which the applicant wanted to portray regarding the period when he became aware of the summary judgment, his failure to file a replying affidavit means that he has not denied that service of

the Court Order and the writ was effected on the 13th March 2018. Neither has he denied that he is the one who identified the tractor for attachment whereupon he requested the second respondent not to remove the tractor and undertook to pay the first respondent.

[46] I observe that the second respondent has meticulously provided a detailed account of how service was effected and how he ended up attaching the tractor and not removing it. It bears repeating that the applicant has not filed the replying affidavit to dispute evidence tendered in the answering and supporting affidavits. This is a proper case where I have to follow the principles laid down in **Plascon – Evans Paints Limited v Van Riebeck Paints** 1984 (3) SA 623 and prefer the version of the respondents.

[47] In order for the applicant in the rescission application to show good cause, he must furnish an explanation of his default sufficiently to enable the Court to understand how the default came about and also to assess his conduct and motive. *See: Silber v OzenWholesalers (Pty) Ltd* 1954 (2) SA 345 (AD). The applicant never bothered to explained why he did not file his affidavit resisting the summary judgment application timeously. He never even saw it fit to file a condonation application. This is exacerbated by the fact that the applicant filed his rescission application only six months after the judgment and the writ came to his notice, still without any explanation. The impression which the applicant wanted to create that he only knew of the summary judgment and

the writ of execution after the 14th September 2018 quickly disappeared into nothingness upon interrogation.

[48] Again, I have no basis to find that the applicant has provided a *bona fide* defence when he has not denied that he entered into a loan agreement with the first respondent and in view of damning uncontroverted evidence that he undertook to pay the first respondent's claim at the time he asked the second respondent not to remove the tractor after attachment. The particulars of claim and the loan agreement attached thereto, together with the answering affidavit from the first respondent provides a detailed account of how the debt and liability came about.

[49] I therefore find that the applicant has not disclosed the basis of his defence and that whatever his contention is, he does not have prospects of success in the trial. The applicant cannot say he never applied for a loan or overdraft and remain conspicuously silent about the loan agreement which is annexed to the particulars of claim. He equally decided not to file a replying affidavit to denounce his application letter for a loan as well an extract from the ledger showing his liability. On what basis do I then say that the applicant has a *bona fide* defence?

[50] In the result, the applicant has not shown that he is entitled to rescission in terms of Rule 45(1) and he has not shown good cause for rescission order under common law.

[51] I have been asked to award costs on attorney and client scale and I am inclined to do just that. The application for stay of execution and rescission is frivolous and manifestly inappropriate – it is devoid of any *bona fides*. The applicant insisted that he never applied for a loan or overdraft from the first respondent even when the loan agreement is annexed to the summons, which he never denounced.

[52] It remains uncontroverted that the applicant undertook to pay the second respondent at the time that his tractor was attached by the second respondent, which he never did. Rather, he launched the application for rescission purely to frustrate enforcement of the writ of execution. The first respondent was unnecessarily made to incur legal costs in opposing this frivolous application. The applicant has clearly engaged in frivolities with the sole aim of frustrating execution of his property. He surely cannot be allowed to drag the Court along with him.

ORDER:

[53] On the basis of the foregoing, I make the following order:

1. The application for stay of execution and rescission of judgement in CCT/0421/17 is dismissed with costs on attorney and client scale.

R. MATHABA
Judge of the High Court

For the Applicant: Mr. R.D Setlojoane

For the First Respondent: Mr. E.T Fiee