

IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU

CCT/0416/17

In the matter between:

LESIA NKHAHLE

APPLICANT

And

OVK OPERATIONS LTD

1ST RESPONDENT

**THE DEPUTY SHERIFF
(MR. V MASENYETSE)**

2ND RESPONDENT

**Neutral Citation: Lesia Nkhahle v OVK Operations Ltd and Another
[2022] LSHC 182 Com (19 August 2022)**

JUDGMENT

CORAM: A.R. MATHABA J

HEARD ON: 27th October 2021

DELIVERED ON: 19th August 2022

SUMMARY

Judgments and orders – Rescission under rule 45(1)(a) – Whether admission by Counsel acknowledging service of court process to his client is hearsay - The amount already paid not discounted when summons was issued – Whether judgment was erroneously granted.

ANNOTATIONS

CASES

LESOTHO

Chaka v First National Bank CCT/0420/2019 [2021] LSHC 45

Lebohang Monaheng v Mapiloko (C of A (CIV) 49/17) [2019] LSCA 50

Olaf Leen v First National Bank (Pty) Ltd (C of A (CIV) No 16A of 2016) [2016] LSCA 27

Richard Friedland and others v Lehlohonolo Mosotho and Others, (CCA/0063/20) [2020] LSHC 25

SOUTH AFRICA

Bakoven Ltd v GJ Howen (Pty) Ltd 1992 (2) SA 466 (E)

Colyn v Tiger Food Industries t/a Meadow Feed Mills (127/2002) [2003] ZASCA 36; [2003] 2 ALL SA 113 SCA

De Wet Nel v Jacoba Susanna Susara and Others Case Number:207/2019

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

Industrial Development Corporation of South Africa (Pty) Ltd v Silver 2002 (4) SA 316 SAC @ 369.

**Kettie Phakathi & Others v Jabulani Ndluvu and Others (15653/2019)
[2021] ZAGP JHC 621 (2 September 2021)**

Kili v Msindwana in Re: Msindwana v Kili [2001]1 ALL SA 339 (TK)

Mutebwa v Mutebwa 2001 (4) SA 193

Nyingiva v Moolman NO 1993 (2) SA 508

Stander v ABSA Bank BPK 1997 (4) SA 873 at 882 (ECD)

**Theron NO v United Democratic Front (Western Cape Region) 1984 (2) SA
532 C**

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

STATUTES

High Court Rules, Legal Notice No. 9 of 1980

BOOKS

**Herbestein and Van Winsen, Civil Practice of the High Court of South
Africa 5th ed Vol 1**

INTRODUCTION:

[1] This is an application for rescission in terms of rule 45 of High Court Rules of 1980, (*“the rules”*). It is against an Order granted by default by the late *Chaka - Makhooane J* on the 13th February 2018. The application is opposed by the 1st respondents. The present applicant was the defendant in the main action instituted by the respondent who was the plaintiff in whose favour default judgment was sought and granted. Following granting of the Order, Writ of Execution was issued against applicant’s movable property. The applicant

then approached this Court with an urgent application amongst others for stay of execution and the rescission of the Order.

[2] The application for rescission was heard on the 27th November 2018 and judgment was reserved to a date to be conversed to the parties; unfortunately, Her Ladyship passed on before delivering judgment. The matter was then re-allocated to me on the 27th October 2021 preceding a roll call that was held on the 25th October 2021 where the parties agreed that the Court should consider and deliver judgment based on their written submissions.

BACKGROUND:

[3] Sometime in June 2016, the respondent offered credit facility to the applicant in the sum of M321,582,00 payable in monthly instalments. The applicant subsequently confirmed his indebtedness in the sum of M321,582,00 by signing an acknowledgement of debt on the 9th March 2017. However, the applicant has failed to make good the debt hence this litigation.

[4] The respondent then instituted an action by way of summons issued out on the 28th November 2017 where it claimed from the applicant payment in the sum of M321,582.00 in respect of the credit facility. The respondent had also claimed interest on the balance of the capital amount

outstanding at the agreed rate per the acknowledgment of debt; alternatively, at 15.5% per annum calculated at *tempore morae* to date of full and final payment.

[5] The applicant did not file an appearance to defend which then prompted the respondent to file an application for default judgment. As a result, an Order was granted by default in terms of which the applicant was ordered to pay the respondent as follows:

- 5.1 The sum of M321,582.00 (Three Hundred and Twenty-One Five Hundred and Eighty-Two Maloti;
- 5.2 Interest on the balance of the capital amount outstanding at the agreed rate per the Acknowledgment of Debt; Alternatively, at 15.5% per annum calculated at *tempore morae* to date of full and final payment; and
- 5.3 Costs as per Acknowledgement of Debt.

[6] It is against this Order that the applicant lodged this application on an urgent basis for stay of execution and rescission the order granted by default.

APPLICANTS' CASE:

[7] The 1st ground for rescission by the applicant is based on rule 4 (1) (a) and (b) of the rules. It is the applicant's contention that, in general, process

must be brought to the notice of the other party by serving a copy of it and any of its annexures in the manner directed by the rules and by explaining the nature and contents thereof to the person whom service is effected. According to rule 4(1)(a) and (b) service may be effected in the following manner:

7.1 by delivering a copy of the process personally to the person served; and

7.2 by leaving a copy process at the place of business or residence of the person to be served.

[8] It is the applicant's contention that the summons was not served on him as required by the rules; nor was it served at his place of business or residence. He contends that he only knew that the respondent had obtained judgment against him when he was served with a writ of execution by the 2nd respondent, the Deputy Sheriff

[9] The applicant contends that according to the return of service relied upon by the respondent, service was effected on one Mr. *Moleleki*, who on the return of service is purported to be his manager. He asserts that he has no manager by the name of *Moleleki* and submits that the return does not indicate where service was effected. Thus, the Order was erroneously sought or

erroneously granted in his absence as proper service was not effected per the rules, so argues the applicant.

[10] The 2nd ground for rescission is based on the suretyship agreement attached to the summons. The applicant argues that prior to institution of legal proceedings, he was entitled to 10 days written notice in terms of the agreement. He asserts that the summons was issued prematurely as he was not given the specified notice contrary to the agreement.

[11] The 3rd ground for rescission is that the amount appearing in the summons and on which the default judgment was granted was wrong in that it did not take into account M15,000.00 which the applicant had already paid.

[12] The 4th ground for rescission relied upon by the applicant is that the summons was defective and irregular in that the respondent relied on contract yet it failed to state in the summons where and by whom the contract was concluded as per the rules. The applicant relies on rule 20 (6) of the rules. The rule provides that where a party in the pleadings relies upon a contract he shall state whether the contract was verbal or in writing and where and by whom it was concluded.

[13] In the light of the above grounds the applicant submits that in granting the Order the Court was unaware of the irregularities. As a result, the Order was erroneously granted and therefore should be rescinded.

1st RESPONDENT'S CASE:

[14] The respondent alleges that the summons was served on the manager of the applicant as is evident from the return of service. The return of service states that the Deputy Sheriff served the combined summons by handing a copy to the applicant's manager, one Mr. *Moleleki* who in the presence of the Deputy Sheriff telephoned the applicant whereupon the applicant requested that the Deputy Sheriff should leave a copy with the said Mr. *Moleleki*. The combined summons was read to Mr. *Moleleki* and the nature and exigency thereof explained to him though he declined to sign for it. The confirmatory affidavit of the Deputy Sheriff is filed of record.

[15] To demonstrate that the applicant was served, the respondent relies also on the contents of a letter dated 8th March 2018 sent to its attorneys of record by Advocate *PC Ntsihlele* acting as a legal representative of the applicant. In the letter, applicant's counsel acknowledges that the summons was duly served on the applicant who on the other hand failed to bring them to their attention. The respondent therefore argues that the applicant's contention

that he only got to know about this matter when the writ was served upon him is false.

[16] The respondent contends that it sued the applicant on the acknowledgement of debt, whereas the contested M15,000.00 was paid after the acknowledgment of debt was signed. Thus, failure to discount M15,000.00 in the request for default judgment and the Order was an oversight. The respondent has abandoned M15,000.00 together with interest calculated thereon.

[17] It is the respondent case that applicant did not defend the action and therefore the judgment was not erroneously sought and granted. In its opposing papers, the respondent alleges that prior to the issuing of the summons the applicant was informed of the amount due and that if payment was not made within seven days of date of the demand letter, summons will be issued for recovery of the capital amount with interest and costs.

[18] In responding to applicant's contention that he is entitled to notice, the respondent alleges that the applicant was not sued in his capacity as surety as a result of which reliance on the notice period in the suretyship agreement is misplaced. Conversely, the respondent makes reference to clause 8.1 of the

acknowledgment of debt which provides that if the applicant breaches any term thereof the respondent shall without further notice proceed with legal action.

[19] In response to the contention that contrary to rule 20(6) of the rules the summons did not disclose where and by whom the contract was concluded, the respondent makes reference to the application for credit facility and specifically to the 3rd page which it alleged shows one Mr Louis P. Fourier as its representative and that the application was made at Ladybrand on 9th June 2016. It argues that the declaration must be read with the application for credit facility which has been annexed to the declaration and specifically referenced.

THE ISSUES:

[20] The central issue for determination before me is whether or not the applicant brought himself within the ambit of rule 45 (1) (a) of the rules in order to establish that the judgement was erroneously sought and or granted in his absence.

LEGAL PRINCIPLES:

[21] I must at the outset mention that this is one of the most common applications in this Court. A useful starting point in an application of this nature is to ascertain the sphere under which it is brought. An application for

rescission may be brought under either rule 27 (6)(a), rule 45 (1)(a) or under common law. The present application has been brought in terms of rule 45(1) (a). In that regard I do not deem it necessary to traverse rule 27 (6) (a) requirements. Neither will I consider the application under common law as pleaded facts are confined to rule 45.

[22] In terms of rule 45 (1) (a) 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. The rule governing rescission applications is a procedural step designed to correct expeditiously an obviously wrong judgment. See: **Herbestein and Van Winsen, Civil Practice of the High Court of South Africa 5th ed Vol 1 @ 930** see also **Kili v Msindwana in Re: Msindwana v Kili** [2001]1 ALL SA 339 (TK) @345.

[23] It is entirely in the court’s discretion whether to rescind and set aside a judgment or an order which it has granted. The discretion in dealing with rescission applications under rule 45 (1) (a) was well elaborated in **Lebohang Monaheng v Mapiloko (C of A (CIV) 49/17) [2019] LSCA 50 @ para 13** where the Court of Appeal stated that:

“... accordingly the discretion of the court to grant rescission under this Rule is an extremely narrow one. Once an applicant has established the

prerequisites in terms of Rule 45(1) (a) the court is obliged to grant rescission of judgment where there is an error of law ex facie the summons and declaration, accordingly if default judgment was granted by the court, it was erroneously granted.”

[24] In interpreting rule 42, an equivalent of rule 45, South African courts have been inconsistent whether rescission should automatically be granted once it is established that the judgment was erroneously granted. The issue appeared to have been settled in **Colyn v Tiger Food Industries t/a Meadow Feed Mills** (127/2002) [2003] ZASCA 36; [2003] 2 all SA 113 SCA @ para 5 where the Supreme Court of Appeal, indicated that

“it is against this common law background which imparts finality to judgments in the interest of certainty that Rule 42 was introduced. The rule caters for mistakes. Rescission or variation does not follow automatically upon proof of mistake. The rule grants the court a discretion to order it which must be exercised judicially.”

[25] However, in **Kettie Phakathi & Others v Jabulani Ndluvu and Others** (15653/2019) [2021] ZAGP JHC 621 (2 September 2021) at para 21, *Majavu AJ* reverted to the earlier position that *“once the applicant can point at*

an error in the proceedings, he is, without further ado entitled to rescission”. Perhaps *Majavu AJ* was not aware of the decision in **Colyn**, *supra*, which was binding on him it being the decision of a superior court.

[26] Be that as it may, this Court is constrained to rely and follow the decision of the Court of Appeal in **Monaheng v Mapiloko**, *supra* that once an applicant has established the prerequisites in terms of rule 45 the court is obliged to grant rescission of judgment where the judgment was erroneously granted as its discretion is extremely narrow.

[27] In **Chaka v First National Bank** CCT/0420/2019 [2021] LSHC 45 at para 17 – 18, His *Lordship Sakoane CJ* relying on *Tshabalala and Another v Peer* 1979(4) SA 27 T @ 30 D-E remarked that if the court holds that an order or judgment was erroneously sought and granted in the absence of the respondent, the order should, without further enquiry, be rescinded. The court further stated that it suffices under rule 45 for the applicant just to show that the order was granted in his absence for failure to serve him with the summons or notice of set down.

[28] In demystifying the words “erroneously granted” the Court of Appeal in **Monaheng v Mapiloko** *supra* at para 11 stated that:

“... the words erroneously granted have two meanings; the first meaning is that the Court must have committed a mistake in law which appears from the record of proceedings itself. The second meaning is that at the time of the issue of the judgment there existed a fact of which had the judge been aware he would not have granted the judgement.”

[29] In **Olaf Leen v First National Bank** (Pty) Ltd (C of A (CIV) No. 16A of 2016) [2016] LSCA 27 (28 October 2016) paragraph 28 the Court of Appeal stated that -

*“The rule [rule 45 (1) (a)] provides that the court may rescind or vary a judgment erroneously sought or granted in the absence of any party affected thereby. A judgment is erroneously granted in error if as stated in **Nyingwa v Mooloman** 1993 SA 508 @ 510 at the time of its issue there existed a fact of which had the judge been aware, he would not have granted the judgment.”*

[30] This was reiterated in the case of **Mutebwa v Mutebwa** 2001 (4) SA 193 para 15 where the court held that the purpose of rule 42 (1)(a), akin to rule 45, is to correct obviously wrong judgment or order and requires proof that the judgment or order could not lawfully have been granted; that it was granted

in the absence of a party and that such party's rights or interests were affected by the judgment.

[31] Whether the error must be patent from the record of proceedings or external evidence of the error was permitted has been a subject of controversy in the interpretation of rule 42(1)(a). In **Bakoven Ltd v GJ Howen (Pty) Ltd** 1992 (2) SA 466 (E) and **Tom v Minister of Safety and Security** [1998] 1 All SA 629 (E) it was held that the error must be patent on the face of the record of proceedings while in **Stander v ABSA Bank BPK** 1997 (4) SA 873 at 882 (ECD) it was held that external evidence of the error was permitted. However, the contradictions are not significant for purposes of this judgment.

[32] An order granted in the absence of a party who has direct and substantial interest in the outcome of the case falls within the mould of erroneously granted judgments, if a court had proceeded under the impression that the party in default knew of the date of hearing. See: **Richard Friedland and others v Lehlohonolo Mosotho and Others**, (CCA/0063/20) [2020] LSHC 25 (15 October 2020) @ para 10 and **De Sousa v Kerr** 1978 (3) SA 635 (W) at 638.

[33] A court will normally exercise its discretion in favour of an applicant who through no personal fault was not afforded an opportunity to

oppose the order granted against him and who having ascertained that such an order has been granted takes expeditious steps to have the position rectified. See: **Theron NO v United Democratic Front (Western Cape Region)** 1984 (2) SA 532 C @ 536 and **Nyingiva v Moolman NO** 1993 (2) SA 508 @510 - 511 and 512.

[34] This Court emphasised in **Morrison supra** at paragraph 14 that though there is a provision for rescission, courts do not come to assistance of litigants who are in wilful default. An applicant is considered to be in wilful default if she or he 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 527T @530, *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.

APPLICATION OF LEGAL PRINCIPLES:

[35] The arguments before me centre on the question whether the facts upon which the applicant relies give rise to the sort of error for which the rule provides and if so, whether the order was erroneously sought or erroneously granted because of it. The crux of the applicant's case as I understand it as

captured in paragraph 5 of the founding affidavit is that there was no service of the summons, particularly because there was no return of service evidencing service of the summons.

[36] I turn to applicant's grounds for rescission. The applicant 's contention that he was not served with the summons and that there is no return of service lacks merit for at least two reasons –

36.1 Firstly, there is a return of service filed of record to the effect that service was effected on the applicant's manager, Mr. *Moleleki* who had telephoned the applicant in the presence of the Deputy Sheriff before accepting service. The Deputy Sheriff who effected service has filed a confirmatory affidavit with respect to service of the summons.

36.2 Secondly, on the 8th March 2018 the applicant 's Counsel then, wrote a letter in the following terms to the respondent's attorneys confirming service to the applicant:

“We discover that by the time your good office wrote us the above mentioned letter of 15 December, 2017, you had already filed summons in this matter and we

wish to admit that our client on the other hand failed to bring them to our attention yet they were duly served on him”.

[37] The applicant denies knowing Mr. *Moleleki* and challenges his erstwhile legal representative’s admission that he was served on the basis that it is hearsay. However, the applicant does not explain why the Deputy Sheriff would concoct the story that the summons was left with Mr. *Moleleki* after the latter had telephonically conferred with the applicant. Tellingly, the applicant does not challenge the veracity of the admission by his erstwhile legal representative regarding service, he simply says it is hearsay.

[38] The applicant’s endeavour to disassociate himself from the admission made by his legal representative is disingenuous. The applicant does not dispute his legal representative’s mandate. Neither is it his case that his legal representative acted outside the instructions or that there was miscommunication between them. It would occasion a grave absurdity if clients were to be allowed to freely disassociate themselves from communication made by their legal representatives on the basis that it amounts to hearsay.

[39] Absent evidence that the legal representative acted beyond his mandate or did not have instructions, the contents of the letter are binding to the

applicant. The legal representative acted as his agent in writing the letter as a result of which the applicant is bound by the contents of the letter as though he is the one who authored the letter. Though the relationship between a legal practitioner and his client is of a very special nature with certain peculiar aspects, the legal principle applicable in the relationship are generally those of the law of agency. *See: De Wet Nel v Jacoba Susanna Susara and Others* Case Number:207/2019 at para 21.

[40] I find that the process reached the applicant's attention. To the extent that the applicant's erstwhile legal representative acknowledged that the applicant received the summons, that in my view is enough to accept the respondent's version. The applicant's contention that he never received the summons rings hollow, the insurmountable question facing him being why his erstwhile legal representative would concede to service of the summons per his letter if service did not happen.

[41] The essence of the respondent's version with regards the service of the summons remains unassailed. I accordingly accept it to be true. Applicant's version that he never received summons is questionable in the light of his erstwhile Counsel's concession that the applicant failed to bring the summons to their attention. In the circumstances, I am not satisfied that the Order was erroneously granted on that ground. It is beyond dispute that the applicant

had interest in the main matter and that the Order was granted in his absence. However, the applicant failed to take the necessary steps to avoid the default.

[42] Regarding failure to discount M15,000.00 that was already paid when the summons was issued, the respondent has conceded that this amount should have been deducted and has filed notice in terms of rule 44 abandoning this M15,000.00. Notwithstanding the concession by the respondent, the Court is of the view that the mistake complained of is not an error envisaged in rule 45 (1) (a). This is not an error of law that appears *ex facie* the summons or declaration. Neither can it be said that there was an error of fact that existed at the time the Order was granted, which had *Chaka – Makhooane J* been aware of, she would not have granted the Order. The dictates of justice would have required her to discount M15,000.00 and still grant the Order.

[43] Again, even if the mistake complained of in *casu*, is the one envisaged in rule 45(1) (a), the Court would simply discount M15,000.00 and vary the Order taking in account rule 45 (1) which gives the Court a discretion to *mero motu*, rescind or vary judgments or orders. There would be no prejudice suffered by applicant as he acknowledged his indebtedness to the respondent save for M15,000.00 which was inadvertently not discounted when summons was issued and the Order granted.

[44] The Court finds the contention that the respondent issued the summons prematurely devoid of merit. The respondent argues that the applicant's reliance on the suretyship agreement for 10 days' notice is misplaced as the applicant was not sued in this capacity as a surety. Considering the contents of the summons as well as the declaration attached thereto, the respondent's argument has merit and must be accepted.

[45] In terms of clause 8.1 of the acknowledgment of debt which the applicant signed, the respondent was entitled to institute action against the debtor, (applicant) without prior notice. A court will not normally interfere with the party's agreement unless it is shown that the term of the contract which the other party wishes to enforce is unreasonable or unfair. The applicant has not established that the term relied by the respondent is unfair or unreasonable. The Court has to observe the clause, particularly taking into consideration the facts of the case where the applicant has never denied his indebtedness to the respondent. Thus, the applicant was rightfully sued as a debtor.

[46] The last ground which the applicant relies upon is that combined summons was defective in that they do not disclose where and by whom the contract was concluded as per the rules of this court, yet the respondent relied on a contract. The applicant's contention that the summons was supposed to disclose where and by who the contract was signed is correct.

[47] On the other hand, the respondent asserts that the declaration must be read together with referenced annexures thereto. It submits that the application for credit facility reflects that it was signed in Ladybrand on the 9th June 2016 and shows that Mr. Loius Fourie represented the respondent while the applicant acted personally. It argues further that the acknowledgement of debt reflects that it was signed by the applicant in Ladybrand.

[48] The Court has confirmed that both the application for credit facility and acknowledgement of debt are referenced and annexed to the summons. However, Mr. Fourie appears to have signed as a witness in the application for credit facility. Again, the acknowledgment of debt was signed on the 9th March 2017 in Ladybrand by the applicant.

[49] For the proposition that application for credit facility and acknowledgement of debt are incorporated in the summons by reference, the respondent relies on the case of **Industrial Development Corporation of South Africa (Pty) Ltd v Silver** 2002 (4) SA 316 SAC @ 369. The law required that for a contract of suretyship to be valid, the terms thereof were to be embodied in the written agreement signed by or on behalf of the surety. The contract of suretyship did not reflect the identity of principal debtor and its validity was questioned. Reliance was placed on the reference in the deed of

suretyship to the loan agreement which in turn disclosed the identity of the principal debtor. The Supreme Court of Appeal upheld the contention that the loan agreement was incorporated by reference into the deed of suretyship as a result of which there was compliance with the law despite the blank space in the deed of suretyship where the name of the principal debtor ought to have been inserted.

[50] I am persuaded that the information that is missing in the summons has been incorporated by reference. The applicant has not suffered any prejudice as the particulars were clear from the summons read together with the annexed documents.

CONCLUSION:

[51] The applicant has failed to proffer a reasonable explanation for his default. He was served with the summons. Thus, the applicant is in wilful default for not having taken the necessary steps to defend the matter. Again, none of the grounds advanced by the applicant are tantamount to error envisaged in rule 45 of the rules. A notice in terms of rule 44 has already been filed by the respondent abandoning the amount of M15,000.00 as a result of which it is no longer necessary for the Court to vary the Order that was granted by default.

COSTS:

[52] The respondent has asked that the application be dismissed with punitive costs. Inasmuch as I have found that the applicant was in wilful default, I do not think that his case was completely meritless. He has been able to show that an amount of M15,000.00 should have been discounted. Again, I do not think that the applicant 's conduct of the case warrants punitive costs. In short, there is no special consideration warranting special costs.

ORDER:

[53] In the result the application is dismissed with costs at the ordinary scale.

A.R. MATHABA J
Judge of the High Court

For Applicant: Mr. R. Maepe

For 1st Respondent: Mr. P.R. Cronjé

