IN THE HIGH COURT OF LESOTHO

(Commercial Court Division)

HELD AT MASERU **CCT/0206/2020**

In the matter between: -

SCLC POLIHALI DIVERSION TUNNEL JOINT VENTURE **APPLICANT/DEFENDANT**

And

FUSI LEHOBO T/A LEHOBO FUSI TRANSPORT **RESPONDENT/PLAINTIFF**

Neutral citation: SCLC Polihali Diversion Tunnel Joint Venture v Fusi Lehobo T/A Lehobo Fusi Transport [2020] LSHC 82 COM (27 April 2022)

CORAM: MATHABA J

HEARD ON: 7th and 14th March 2022

DELIVERED ON: 27th April 2022

SUMMARY:

Judgments and orders – Rescission – A claim for compensation arising out of breach of contract – Court granting default judgment without evidence being tendered – High Court Rule 45(1) – Whether an order erroneously granted.

ANNOTATIONS:

Statutes:

High Court Rules 1980

Cases:

Lesotho

CGM Industrial (Proprietary) Limited v Adelfang Computing (Proprietary) Limited LAC 2007 – 2008 463

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

Kose Mafereka v Tlali Lefeta and Another (CIV/APN 510/93) [1994] LSCA 16

Lebohang Monaheng v Mojalefa Mapiloko [2019] LSCA 50

Lesotho Nissan (Pty) Ltd v Katiso Makara (C of A (CIV) 72 of 2014) [2016] LSCA 20

Mamello Morrison and Another v Salvation for All Church and 2 Others CCT/0259/2019 [2021] LSHC 126 COM

Matau Rahlao v Lesotho Bank (1999) Limited (CIV/T/716/2002) [2005] LSHC 29

Napo Thamae and Another v Agnes Kotelo and Another (C of A (CIV) N016/2005) (NULL) [2006] LSHC 40

Olaf Leen v First National Bank Lesotho (Pty) Ltd (C of A (CIV) NO16A of 2016) [2016] LSCA 27

Total Lesotho (Pty) Ltd v Hanyane LAC (2000-2004)

South Africa

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

Chetty v Law Society Transvaal 1985 (2) SA 756 (A)

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

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

Deputy Sheriff Witwatersrand v Goldberg 1905 T.S 680

Grant v Plumbers (Pty) Ltd 1942 (2) SA 470 (0)

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

JC Schutte v Nedbank Limited (73759/17) [2019] ZAGPPHC 950

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

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

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

Stander v ABSA Bank BPK 1997 (4) SA 873

JUDGMENT

INTRODUCTION:

[1] The present applicant was defendant in the main action instituted by the respondent who was the plaintiff and in whose favour the default judgment was sought and granted. The respondent obtained default judgment against the applicant on the 16th March 2021 before *His Lordship Makaja J*.

[2] The default judgment necessitated the applicant to institute the instant application on the 15th June 2021 on an urgent basis where amongst others it wants stay of execution and rescission of the default judgment on the ground that it was irregularly and/or erroneously granted. There is nothing of record to indicate that the interim relief for stay of execution was pursued or granted.

THE PARTIES:

[3] The applicant herein is *SCLC Polihali Diversion Tunnel Joint Venture*. At all material times relevant to this matter, the applicant was engaged by the *Lesotho Highlands Development Authority* to construct *Polihali diversion tunnel*, a component of *Polihali dam* construction that is taking place in the district of Mokhotlong.

[4] The respondent herein is *Fusi Lehobo,* an adult male of Mapholaneng in the district of Mokhotlong. At all material times relevant to this matter the respondent was in the business of providing transport services trading as *Lehobo Fusi Transport.*

BACKGROUND:

[5] Sometime in May 2019, the parties herein entered into a written contract in terms of which respondent provided transport services to the applicant. It is not in dispute that the respondent had dedicated two of his motor vehicles to the applicant for this purpose, and that the respondent was paid M15,000.00 for each vehicle per month. The contract was not for a specified duration and could be terminated by either party on one day notice.

[6] On the 27th May 2020 the applicant, through its lawyers, terminated the contract with one day notice. In response, the respondent sued out summons

claiming amongst others, payment of M30,000.00 in respect of invoice for April 2020 and payment of compensation in the sum of M180,000.00.

[7] The basis for M30,000.00 according to the respondent is that though it relates to the period during COVID 19 lockdown, the applicant was still active during the period and had asked for his vehicles to be on standby in case they were required. He asserts that the applicant's transport officer asked him to submit April 2020 invoice which he duly did but was not paid. On the other hand, the basis for M180,000.00 is that the respondent had the expectation to provide transport services to the applicant for the duration of the project which was 18 months and that at the time the applicant terminated the contract, it was left with six months before its expiry. According to the respondent, the contract was going to expire upon the completion of the project by the applicant.

[8] Despite receiving the summons, the applicant did not defend the matter as a result of which the default judgment was granted on the 16th March 2021 in terms of which the applicant was ordered to pay the sum of M30,000.00 for the April 2020 invoice as well as compensation in the amount of M180,000.00 and interest at the rate of 12%. This is what actuated the instant application.

APPLICANT ‘S CASE:

[9] The mainstay of the applicant ‘s case is that the default judgment was erroneously granted in that the respondent ‘s claim in the main action was not liquidated nor based on a liquid document, yet judgment was granted without the court hearing *viva voce* evidence or an affidavit filed to sustain such a claim. The applicant asserts that the contract between the parties was not exclusive in that the applicant was not obliged to recall the respondent ‘s vehicles after it resumed operations following the lockdown. It contends that paying respondent for April 2020 when all production was halted during lockdown would lead to unjust enrichment.

RESPONDENT ‘S CASE:

[10] The respondent asserts that the M30,000.00 claim in relation to April 2020 invoice was liquidated in that it was for a fixed sum of money.As for compensation, he contends that it relates to six months period that was remaining on the project when the applicant breached the contract and subsequently terminated it. He contends that he was paid M30,000.00 per month for the two vehicles which would translate into M180,000.00 for the remaining six months. He argues that the amount was readily ascertainable as a result of which there was nothing irregular or erroneous with the court granting it in the absence of evidence supporting it.

[11] In substantiating his claim for breach of contract on the basis of which he is claiming M180,000.00 from the applicant, the respondent contends that after the applicant breached the contract, he caused a letter of demand to be written to the applicant reminding it of the existence of the contract. According to the applicant at first denied the existence of the contract through its lawyers, only to cancel the contract later when they were provided with a copy thereof. In respect of this the respondent relies on the letters of the 19th May 2020 and the 27th May 2020 from the applicant's lawyers. The respondent asserts that the applicant denied the existence of the agreement. As a consequence, so argues the respondent, the applicant breached the contract and later on came back to cancel it.

ISSUES FOR DETERMINATION:

[12] The issue for determination before this Court is whether the respondent 's claim was liquidated and or based on liquid document as a result of which there was no need for evidence to be tendered before the default judgment was granted. If so, has the applicant made a case for rescission under rule 45(1) of the High Court Rules of 1980?

THE LAW:

Liquidated demand

[13] There is no reference to rule 27 of the High Court Rules of 1980 in the notice of default judgment that was filed by the respondent. However, it seems to be common cause that this is the rule under which the default judgment was obtained. The relevant part of rule 27 provides that –

> "(3) Whenever the defendant is in default of entry of appearance or is barred from delivery 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.
>
> (4) …
>
> (5) Whenever the plaintiff applies for judgment against defendant in terms of sub-rule (3) herein, the court may grant judgment without hearing evidence where the claim is for a 1iquidated debt or a liquidated demand. In the case of any other claim the court shall hear evidence before granting judgment. or may make such order as it seems fit."

[14] In **CGM Industrial (Proprietary) Limited v Adelfang Computing (Proprietary) Limited** LAC 2007 – 2008 463 at 473 para 22, the Court of Appeal referred to *SA Fire and Accident Insurance Co. Ltd v Hickman*

1955 (2) SA 131 (C) at 132H where it said that "it was held that in order to be a liquidated demand a claim must be so expressed that the ascertainment of the amount is a mere matter of calculation." The Court further said that the words "liquidated demand" are derived from the English Rules, where they are afforded the following meaning:

> "A liquidated demand is in the nature of a debt, ie a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand', but constitutes damages."

[15] Based on the rich jurisprudence on the matter in this jurisdiction, a liquidated debt is a claim that is capable of speedy and prompt ascertainment. Its determination is a matter of a mere arithmetic calculation. *See*: **Lesotho Nissan (Pty) Ltd v Katiso Makara** (C of A (CIV) 72 of 2014) [2016] LSCA 20 (29 April 2016); **Matau Rahlao v Lesotho Bank (1999) Limited** (CIV/T/716/2002) [2005] LSHC 29 (14 February 2005).

Rescission under rule 45

[16] In this jurisdiction a judgment that is taken in the absence of the other party affected thereby may be set aside under rules 27 (6) or 45 (1) of the High Court Rules or under common law. The instant application has been brought in terms of rule 45(1). The fact that application for rescission 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. *See*: **De Wet 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**, *supra*, at para 12. Rule 27(6) is out of the picture in *casu*. As a result, I will proceed to consider this application under the common law should it not succeed under rule 45(1)(a). The application has been sufficiently widely presented to encompass even rescission under common law as a result of which no party will suffer prejudice with the approach I intend adopting in this matter.

[17] 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*".(My emphasis).

[18] In considering the words "*erroneously granted"* in the context of rule 45(1), the Court of Appeal in **Lebohang Monaheng v Mojalefa Mapiloko**

[2019] LSCA 50 (01 November 2019) relied on its earlier decision in **Olaf Leen v First National Bank Lesotho (Pty) Ltd** (C of A (CIV) No.16A of 2016) [2016] LSCA 27 (28 October 2016) as well as being influenced by the decision in **Bakoven Ltd v GJ Howen (Pty) Ltd** 1992 (2) SA 466 at page 471 E to H. It concluded 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 the 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 judgment."

[19] In my view, the second meaning accommodates external evidence of the error. *See*: **Stander v ABSA Bank BPK** 1997 (4) SA 873 at 882 (ECD).

[20] Again, courts in South Africa have been inconsistent whether rescission under rule 42(1), an equivalent of rule 45(1), should be automatically granted without further enquiry once it is found that the judgment was erroneously sought or obtained. Some decisions maintain that even when jurisdictional facts under rule 42(1) have been established, courts still retain a discretion in an appropriate case to refuse rescission. Other decisions are to the contrary. They maintain that once jurisdictional facts under the rule are met, rescission has to be granted. I had the occasion to deal with this issue

comprehensibly in **Mamello Morrison and Another v Salvation for All Church and 2 Others** CCT/0259/2019 [2021] LSHC 126 COM (9th November 2021) where I referred to a plethora of authorities for and against.

[21] Though rescission application was granted in **Mamello Morrison and Another v Salvation for All Church and 2 Others,** *supra,* I endorsed judicial decisions to the effect that, in appropriate cases, courts still retain discretionary powers to refuse rescission despite jurisdictional facts being met even under rule 45(1)(a). I understand the word *"may"* in the rule to relate to the words "*rescind or vary"* and concluded that it underscores the presence of discretionary powers in that regard.

[22] I am now aware of the decision in **Lebohang Monaheng v Mojalefa Mapiloko,** *supra,* (which I was then not aware of) where the Court of Appeal found that the discretion under rule 45 (1) is narrowly circumscribed. It said the following:

> "[12] Accordingly the discretion the Court has 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 and, accordingly if default judgment was granted by the Court, it was erroneously granted." (my emphasis)

[23] In arriving at its decision on the interpretation of rule 45(1), the Court of Appeal was influenced by the decision of **Mutebwa v Mutebwa and Another** 2001 (2) SA 193 at page 194 E-G on rule 42 (1). It quoted *Jafta J*, as he then as, where he stated that:

> "Although the language used in rule 42(1) [our Rule 45(1)] indicates that the Court has a discretion to grant relief, such discretion is narrowly circumscribed. The use of the word 'may' in the opening paragraph of the rule tends to indicate circumstances under which the Court will consider a rescission or variation of judgment, namely that it may act mero motu or upon application by an affected party. The Rule maker could not have intended to confer upon the Court a power to refuse rescission in spite of it being clearly established that the judgment was erroneously granted. The Rule should, therefore, be construed to mean that once it is established that the judgment was erroneously granted in the absence of a party affected thereby a rescission judgment of the judgment should be granted."

[24] In considering the decision of **Mutebwa v Mutebwa,** *supra*, in interpreting rule 45(1), it does not appear that the Court of Appeal was aware of the decision in **Colyn v Tiger Food Industries limited trading as Meadow Feed Mills Cape**[2003] 2 All SA 113 at 116 para [5] (SCA). Inasmuch as South African decisions only have a persuasive effect, I still believe that the Court of

Appeal would have commented why it preferred the decision of a lower court over that of a higher court. In the latter decision, 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…" (my emphasis)

[25] Moreover, in **JC Schutte v Nedbank Limited** (73759/17) [2019] ZAGPPHC 950 at page 7 to 8 *Movshovich AJ,* said the following having found an irregularity which rendered the seeking or granting of judgment erroneous:

> "[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. As held in *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T) ("***Bonaero Park***") and *Tshivhase and Another v Tshivhase and Another* 1992 (4) SA 852 (A), 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).

[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), "*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. 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)." (footnote omitted)

[26] I endorse decisions to the effect that, in appropriate cases, courts still retain discretion to refuse rescission even where jurisdictional facts under rule 45 (1) are met. However, I remain bound by the decision of the Court of Appeal, which is to the contrary in **Lebohang Monaheng v Mojalefa Mapiloko,** *supra.* This is the law as it exists in Lesotho.

Common law rescission

[27] As a general rule, a court will not come to the assistance of a defendant whose default was wilful or due to gross negligence: *See*: **Grant v Plumbers (Pty) Ltd** 1942 (2) SA 470 (0). 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*. (my emphasis).

[28] 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. *See:* **Scholtz and Another v Merryweather and Others** 2014 (6) SA 90 (WCC) at para 66.

[29] In **CGM Industrial (Proprietary) Limited v Adelfang Computing (Proprietary) Limited**, *supra***,** page 473, para 19**,** *Smalberger JA*, as he then was, quoted with approval the decision in *Chetty v Law Society*, Transvaal 1985 (2) SA 756 (A) at 764 to 765D which sets out the principles that apply in rescission application under 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 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.)"

[30] 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) N016/2005) (NULL) [2006] LSHC 40, page 13.

[31] However, in **Chetty v Law Society,** *supra*, page 765 para A – E, *Miller JA*, as he then was, had clarified that –

> "It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits. The reason for my saying that the appellant's application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, or elsewhere in the papers,

> any reasonable or satisfactory explanation of his default and total failure to offer any opposition whatever to the confirmation on 16 September 1980 of the rule nisi issued on 22 April 1980."

[32] With respect to bona fide defence, a court does not have to delve too deeply into the merits in considering this requirement. 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) [1994] LSCA 16**,** page 7.

[33] Again, to show good cause, the applicant 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 Ozen Wholessalers (Pty) Ltd** 1954 (2) SA 345 (AD).

ANALYSIS:

Rule 45(1) rescission

[34] I turn now to the contention by the applicant that the respondent 's claim was not liquidated and or based on liquid document. It has already been said elsewhere in this judgment that based on jurisprudence, liquidated debt is a

claim that is capable of speedy and prompt ascertainment and whose determination is a matter of a mere arithmetic calculation.

[35] I start first with M30,000.00 claim. According to the combined summons, the parties had agreed that the respondent would be paid M15,000.00 for each of the two vehicles that were hired by the applicant. It is not disputed that the transport officer of the applicant asked the respondent to submit April 2020 invoice, which he did, since the vehicles had to be on standby in case they were required though it was during COVID 19 lockdown.

[36] The basis of the claim is the contract entered into by the parties in May 2019 for provision of transport services in terms of which respondent was to be paid M15,000.00 for each vehicle. This contract was still in existence in April 2020. I am therefore of the view that the determination of the M30,000.00 claim was capable of speedy and prompt ascertainment. This amount was based on agreed monthly rental for each vehicle. The claim did not require any investigations. It was indeed a liquidated demand.

[37] The contention by the applicant that the respondent should have annexed the April 2020 invoice on the summons is not sustainable. There is no

such a requirement in law. In fact, *Lyons AJ*, (as he then was), strongly criticised the practice of annexing evidential documents to pleadings in **Standard Lesotho Bank Ltd v Ileck Mahomed (**CIV/T/182/2010) (NULL) [2010] LSHCCD 9 at pages 2 to 4. Plaintiff is required to annex a copy of a liquid document to an affidavit when he or she applies for a summary judgment in terms of rule 28(1) and not for default judgment under rule 27(3) of the High Court Rules 1980. I therefore find that the claim of M30,000.00 was not erroneously sought or granted.

Common law rescission

[38] I now proceed to consider whether the applicant has made a case for rescission under common law with respect to the M30,000.00 claim. In considering whether the applicant has shown "good cause" for its default, or its failure to deliver appearance to defend or whether the applicant has a reasonable, satisfactory and acceptable explanation, I am enjoined to determine whether the reasons proffered by the applicant justify the rescission of the default judgment.

[39] According to the applicant, it received the summons on the 30th July 2020, but did not file appearance to defend the matter "due to the fact that to the personnel's understanding and not knowing the repercussions service of the summons may have, the matter with Lehobo transport was finalised upon termination of our relationship around the end of March 2020."

[40] If I correctly understand the applicant's explanation, it did not defend the matter because it did not understand the consequences of service of summons and in its understanding, the dispute between the parties was finalised when the contract between the parties was terminated in March 2020.

[41] I have serious reservations accepting the applicant 's explanation for the default as reasonable and satisfactory. It is riddled with improbabilities. I interpose to indicate that the contract between the parties was terminated in May 2020. At the time the parties were already at loggerheads and communicating through lawyers. It is highly improbable that the letter of termination was going to wish away the dispute. If anything, it was clearly going to harden the attitudes and escalate the dispute. Consequently, the suggestion that the applicant thought that the dispute was finalised upon termination of the relationship between the parties is disingenuous.

[42] Summons in the main matter are written in English language and have itemised the reliefs that the respondent wanted against the applicant. They are also augmented by declaration. Even if I were to give the applicant's personnel a benefit of doubt and accept that they did not understand the summons or their implications, it is inexplicable why then they did not refer the summons to the applicant's lawyers who were already handling the dispute.

[43] That the applicant 's explanation for the default is improbable is put beyond disputation by the return of service. It clearly states, and has not been challenged, that the nature and exigencies of summons were explained to the applicant. The return of service is *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 am of the view that the applicant is not making full disclosure of the reason why it did not defend the matter, or it deliberately refrained from defending the matter with full appreciation of the legal consequences of its election. The applicant already had lawyers handling the dispute before it was sued, but it did not defend the matter when it was finally sued. One gets the

impression of mood swings between the desire to oppose the matter and total indifference to do so. My view in this regard is also confirmed by the fact that it took the applicant more than a month to lodge this application after it learned of the default judgment. No explanation has been provided for this delay.

[45] I have already dismissed as improbable the explanation that the applicant thought that the letter of termination was going to wish away the dispute in the circumstances of this case. Again, if it is true that the applicant did not understand the implications of the summons but elected not to consult its lawyers, it was clearly grossly negligent, and this Court cannot come to its assistance. The applicant has therefore failed to present acceptable and reasonable explanation for its default.

[46] In view of the fact that the applicant has provided improbable explanation for the default, which upon interrogation disappeared into nothingness, I do not consider it necessary to consider whether it has a bona fide defence. All the requirements must be met. *See:* **Chetty v Law Society,** *supra*, page 765 para A – E. Only if the explanation for the default was just weak was, I going to check if, perhaps, it would not be cancelled by the applicant being able to put up a bona fide defence which has not merely some

prospects, but good prospects of success. See: **Colyn v Tiger Food Industries limited trading as Meadow Feed Mills Cape,** *supra*, para 12.

[47] Payment of compensation in the amount of M180,000.00. Based on combined summons, this amount of money is in relation to breach of contract. The respondent contends that the contract was left with six months before the breach and subsequent termination. The respondent is mathematically correct that, had the contract been seen out, he was going to get M180,000.00 for the remaining six months if each vehicle was paid M15,000.00 per month.

[48] However, the fundamental rule in regard to the award of contractual damages, which should apply to compensation as well, is that the plaintiff should be placed in the position he would have been had the contract been fully performed and that the true measure of damages is based on the profits that the plaintiff lost. *See*: **CGM Industrial (Pty) Ltd v Adelfang Computing,** *supra;* **Total Lesotho (Pty) Ltd v Hanyane** LAC (2000-2004). In determined the profits, expenses incurred in the generation of the gross income must be deducted. *See*: **Lesotho Nissan (Pty) Ltd v Katiso Makara**, *supra*.

[49] In *casu*, there respondent ‘s claim was for compensation allegedly flowing from applicant ‘s breach of contract for not using respondent ‘s motor

vehicles and thereafter denying the existence of such a contract. In order to justify why the respondent was entitled to the gross amount, it was argued that the applicant was taking care of fuel expenses in terms of the contract and that there were no staff related costs as the vehicles were driven by the applicant ‘s employees.

[50] In my view, there were obviously expenses that were incurred in generating the M30,000.00 per month which were supposed to be deducted from this amount to determine the profits which the respondent lost. There should have been evidence tendered regarding expenses which it was argued were shouldered by the applicant. The contract between the parties is annexed to the summons and indeed shows that fuel expenses were shouldered by the applicant.

[51] The insurmountable challenge for the respondent is that this contract was not tendered in evidence as none was led or provided by way of affidavit. Again, the contract makes no reference to other expenses that are normally associated with transport business like staff related costs and repairs and maintenance. Evidence should have been led on these costs. The suggestion that the plaintiff was not going to incur any operating costs is indeed preposterous.

[52] Unlike the first claim which was covered by the contract, the claim for compensation was not a matter of mere of arithmetical calculation. It required further investigations. Therefore, the claim is not liquidated or based on liquid document as a result of which it required evidence to be tendered to demonstrate expenses and other deductions to be made from the gross amount. I hold the view that the judgment in respect of the second claim relating to M180,000.00 was erroneously sought and granted there having been no evidence tendered in support of the claim.

CONCLUSION:

[53] On these premises, and in the light of the totality of the foregoing, I hold the view that the first claim of M30,000.00 was liquidated or based on liquid claim as a result of which it did not require evidence to be tendered. It was therefore not erroneously sought or granted. On the other hand, the second claim relating to compensation of M180,000.00 was not liquidated or based on liquid document. Consequently, evidence in support therefore should have been tendered. I find that the applicant has met jurisdictional facts under rule 45(1) as a result of which rescission of judgment has to be granted without further enquiry as far as it relates to the claim of M180,000.00

ORDER:

[54] In the circumstances, it is ordered as follows:

1. Rescission of Court Order dated the 16th March 2021 -
   (a) is refused in respect of payment of the sum of M30,000.00 for the invoice of April 2020;
   (b) is granted in respect of payment of compensation in the amount of M180,000.00.

2. Costs be costs in the cause.

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A.R. MATHABA J

Judge of the High Court

For Applicant: Adv. M. Chaka

For Respondent: Adv. L. Motsoehli