REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A5090/14
GLD CASE NO: 36282/2010

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

JEAN-PIERRE VAN TONDER Appellant
(Second Defendant in the Court *a quo*)

and

PEERS DONALD EILERTSEN BAILIFF Respondent
(Plaintiff in the Court *a quo*)

In re:

PEERS DONALD EILERTSEN BAILIFF Plaintiff/Respondent

and

JPVT PROPERTY DEVELOPMENTS CC First Defendant

JEAN-PIERRE VAN TONDER Defendant/Applicant

BRENDAN DAVID PRITCHARD Third Defendant

SUMMARY

Practice and procedure – appeal against refusal of rescission of default judgment – rescission of default judgment on grounds that plaintiff's amended particulars of claim not perfected at time of application for default judgment; that the National Credit Act 34 of 2005 ("*the NCA*"), applied retrospectively; and that defendant did not receive summons served at chosen *domicilium citandi et executandi* – condonation for late launching of application for rescission of judgment – requirements for successful condonation – inordinate delay in applying for both condonation and rescission – the NCA and applicability of retrospectivity not proved – application for condonation refused – appeal dismissed with costs.

J U D G M E N T

MOSHIDI, J (M L MAILULA AND M P TSOKA CONCURRING):

INTRODUCTION

[1] The appellant was the second defendant in the action instituted by the plaintiff (respondent) in the court *a quo* against the appellant and two other defendants, i.e. the first defendant and the third defendant, respectively. I shall henceforth, and for ease of convenience, refer to the parties herein as "*the appellant*", "*the respondent*", "*the first defendant*" and "*the third defendant*", respectively.

[2] The appellant appeals, with the leave of the court *a quo*, against the judgment and order of Cook AJ ("*the court a quo*") in dismissing his application for rescission of the default judgment on 30 September 2014. The default judgment was granted by Coetzee J on 19 July 2011. In terms of the default judgment, the appellant, the first defendant and the third defendant were ordered to pay to the respondent jointly and severally, the sum of R1 800 000,00 (one million eight hundred thousand rand) together with interest and costs of suit on the attorney and client scale.

[3] Both the appellant and the respondent are businessmen. The first respondent is JPVT Property Developments CC, a close corporation ("*the close corporation*", where necessary). Mr Brendan David Pritchard is the third defendant.

SOME COMMON CAUSE FACTS

[4] It is common cause that on 24 December 2004, the respondent and the first defendant, duly represented by the second and third defendants, entered into a written agreement, annexure "PDEB". In terms of the PDEB agreement, the respondent purchased in the development the erf situated at number [.....], Bedfordview, Gauteng ("*the property*") from the first defendant for an amount of R700 000,00 (seven hundred thousand rand).

[5] At the same time, the respondent entered into a written building contract with the first defendant, annexure "B" ("*the building contract*"). In terms of the building contract, the first defendant undertook to build for the

respondent a unit, measuring not less than 320 m² (three hundred and twenty square metres) on the property against payment by the respondent of an amount of R1 100 000,00 (one million one hundred thousand rand). The additional material terms of the agreement briefly were that: the respondent agreed to advance to the first defendant the amount of R1 800 000,00 (one million eight hundred thousand rand); the respondent consented to the immediate use of these funds by the first defendant in order to enable the first defendant to proceed with the sub-division and development of the property; the first defendant in turn, would meet the obligations of the respondent for payment of any amount(s) to be paid by the respondent on due dates; the transfer of the property into the name of the respondent would not be effected until the proclamation and sub-division of the property had occurred; the transfer of the property into the respondent's name would not be possible before end of July 2005; and should the proclamation and sub-division of the property not occur before the end of July 2005, the respondent, "*may elect to cancel this memorandum of agreement, the offer to purchase, and the building contract. In such event, the developer shall return to the purchaser the payment made to the developer of R1 800,000.00 (one million eight hundred thousand rand) and thereafter neither party shall have a claim on the other*".[1] It is also not in dispute that on 24 December 2004, the second and third defendants, in writing, bound themselves as sureties and co-principal debtors with the first defendant for the due and punctual performance by first defendant of all its obligations under the agreement.[2] It is equally not in dispute that the respondent duly complied with all his obligations in terms of the agreement(s). Further that the first defendant failed to ensure that

[1] See clause 6 of memorandum of agreement, PDEB, vol 1 of appeal record p 13.
[2] See annexure "C" to particulars of claim.

proclamation and sub-division in respect of the property occurred before the end of July 2005. The respondent subsequently and, in November 2008 or February 2009, cancelled the agreement(s).

[6] The only dispute between the parties was what occurred subsequent to the conclusion of the agreement(s) by the respondent. These disputes, and I must hasten to describe them as unmeritorious, as dealt with later, and as mirrored in the appellant's affidavit in support of the rescission of the default judgment,[3] and in the judgment of the court *a quo* refusing rescission.

THE PLAINTIFF'S AMENDMENT

[7] However, before I deal with the grounds of the rescission application, I need to mention one other development in the pleadings on which reliance is placed by the appellant, not only before the court *a quo*, but also on appeal before us. This is that, on 10 February 2011 (before the application for default judgment was launched), the respondent served and filed a notice of amendment of his particulars of claim ("*the amendment*").[4] The amendment sought to allege additionally that at all material times, the first defendant close corporation was a juristic person whose asset value or annual turnover equalled or exceeded R1 000 000,00 (one million rand), and that consequently, the credit agreements entered into between the parties are not subject to the provisions of the National Credit Act,[5] ("*the NCA*"). The notice of amendment, given in terms of rule 28(1) of the Uniform Rules of Court, also

[3] See appeal record vol 1 pp 53 to 72.
[4] See appeal record, vol 1 pp 86 to 88.
[5] Act 34 of 2005.

enclosed a tender for costs on the unopposed scale. It is common cause that subsequently and on 3 March 2011, since there was no opposition to the amendment, the respondent filed amended particulars of claim.

THE APPELLANT'S CONTENTIONS *A QUO*

[8] In the court *a quo*, the appellant, not only raised certain defences, but was also compelled to apply for condonation for the late bringing of the rescission application. In regard to the condonation application, the appellant contended that since his rescission application was brought under rule 42(1) of the Uniform Rules, which does not specify a time limit and is a discretionary remedy, he brought the application within a reasonable period. He alleged that since the summons was served at a chosen *domicilium citandi et executandi* on 14 February 2011 by affixing to the principal door, the summons never came to his attention, and he only saw the summons for the first time during the rescission process.[6] Significantly, the rescission application was launched during March 2013 and the answering papers filed during May 2013. Surprisingly, the appellant, in the same breathe, also contended that he "*became aware of the respondent's intention to enforce a judgment against the appellant when it received a copy of a sec 65 of the magistrate's court notice to attend a debtor's inquiry, which process the appellant received on the 4th February 2013*".[7] This was in respect of the same default judgment under discussion. The respondent in the answering papers, additionally contended that in any event, based on certain events, it was clear that the appellant became aware of the default judgment already

[6] See para 87, in particular 8.7.1 p 6 of the appellant's heads of argument.
[7] See para 8.7.2 p 6 of the appellant's heads of argument.

during about 3 August 2011, and did nothing in order to seek rescission. I deal with this rather crucial date later below.

[9] The appellant further alleged that when he became aware of the default judgment, on his version, and since he had every intention of defending the action, he immediately sought legal assistance. The first opportunity he had to consult with his attorney was on 12 February 2013. He was required to search for certain documentation, in particular, documentation relating to what is described later herein as the Zambli cession. On 15 February 2013 he informed the respondent of his intention to apply for the rescission of the judgment, and thereafter on 7 March 2013, he became aware of the precise details of the judgment. On 8 March 2013 the appellant supplied his attorney with the relevant documentation. The appellant placed excessive reliance on the importance of the Zambli documentation as well as the difficulty involved in accessing such documentation and the court file. He eventually delivered the rescission of judgment application on 22 March 2013, some ten days after investigations and drafting a founding affidavit, on his version. He says that this time lapse was not unreasonable and was a reasonable explanation for the delay in launching the application.

[10] The respondent opposed strongly the condonation application on several grounds, and based on various emails and correspondence exchanged between the parties. The main and crucial event is what transpired on 3 August 2011. On this date, the respondent's attorney, Mr J J Strydom ("*Strydom*"), had a discussion with the appellant about the matter.

On the same day, Strydom addressed an email to the applicant in the following terms:

> "*We refer to the above matter and the telephone discussion between yourself and the writer hereof earlier today. We attach hereto a copy of the default judgment granted in this matter on 19 July 2011. Kindly furnish us with your proposals as far as payment of the amount is concerned, as well as a copy of the agreement entered into between Mr Pritchard, as discussed.*"[8]

(Mr Pritchard is the third defendant.) Strydom followed up on the email with a letter, annexure "PB6".[9] Despite the invitation to present a repayment plan, the appellant simply ignored the correspondence. However, some eight months later, and on 18 April 2012, the appellant addressed an email to the respondent. It is instructive to recite in part only the contents of the email which read:

> "*… I don't know where to start or how to start but to say I'am sincerely sorry for what has happened. I am sorry for not being in contact the last couple of years and it might seem that I was ignoring the fact or running away of it but that wasn't the case. I needed the time and space to get myself back on my feet and get Helivac up and running to kill all the fires left from the developments. In no way or form did I ever right off our friendship or the fact that I need to make right with you … and as soon as I'am in a position to start settling my accounts you will be on that list. I know the attorneys have been in contact with each other and my attorney has helped me survive over the last couple of years and fought to give me time and space. So no matter what happened their pleas know that as soon as I can things will be made right and I hope and trust that we should one day be able to look past the last three years. I hope and trust you are doing well in all your ventures, it seems like you successful in Dubai and having fun at the same time. Hopefully one of these days I can come deliver some greenbacks to you in Dubai and have a holiday at the same time.*"

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[8] See annexure "PB5", answering affidavit p 130 vol 2 record.
[9] See p 132 record vol 2.

The respondent submitted that the contents of this email showed that the appellant unequivocally admitted that he owed the money advanced by the respondent to him and expressed the intention to repay the money. The respondent also contended that, based on the above, some nineteen months had elapsed since the default judgment was granted leading up to the rescission hearing. There were other emails and correspondence which have a bearing on this matter which may become relevant later in the judgment.

[11] The court *a quo*, in spite of the applicant's attitude that condonation was unnecessary, found that the delay in launching the rescission application was unacceptable. This, mainly on the ground that the appellant had knowledge of the default judgment as far back as 3 August 2011. He only applied for rescission during March 2013. This, when it became plain to the appellant that he was being subjected to proceedings under sec 65 of the Magistrates' Courts Act. The grounds of appeal contend otherwise, namely that the appellant has given an acceptable and reasonable explanation as to why the application could only be brought when it was, and why the application could not be brought any earlier or within the requisite court time period. I shall revert to these assertions later below.

[12] On the merits of the case, the appellant raised in the court *a quo* the issue of the amendment. This was that, the default judgment was erroneously sought and granted in the incorrect belief that the amendment had been served on the appellant and the other defendants, and perfected as contemplated in terms of Uniform Rule 28. The amendment, so the argument continued, was never properly filed at court and as such was never properly

delivered in terms of the rules; the respondent did not deliver amended pages pursuant to the delivery of his notice of amendment; and *inter alia*, that the appellant, as one of the defendants, was not yet on terms to file an intention to defend to the amended particulars of claim. It was also argued that there was no complete amendment, resulting in the unamended summons failing to deal with the consequences of the NCA on the transaction, namely that the first defendant was a juristic person with assets and turnover over the statutory R1 million threshold and in the absence of such an averment, the NCA would have applied to such transaction. Finally, on the aspect of any alleged irregularity in the granting of the default judgment, it was contended that the Judge who granted the default judgment, erred and omitted to take judicial notice of the unamended particulars of claim. In the alternative, the appellant, in the heads of argument, contended for the rescission of the default judgment in terms of Uniform Rule 31(2)(b) and/or the common law. I must hasten to observe that the argument relating to the provisions of the NCA, is plainly without merit and capable of disposal with relevant ease, as correctly submitted by the respondent. The NCA came into full force and effect on 1 June 2007.[10] However, the agreements between the parties undoubtedly predate the provisions of the NCA in that the parties entered into the agreements in question about 24 December 2004.[11] In terms of the agreements, the appellant and the first defendant had to comply with their obligations before 31 July 2006. This failure to comply with their obligations meant that the defendants in the action had breached the agreements even before the NCA came into effect.

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[10] The Act became operative in three phases and was further amended by the National Credit Amendment Act 19 of 2014.

[11] See paginated page 5, paras 5 and 7.7 of the particulars of claim.

RETROACTIVITY OF LEGISLATION

[13] In the circumstances of this matter, it can hardly be argued that the applicable provisions have retrospective force. This is so since generally, statutes are construed as operating prospectively only, unless the legislature has clearly expressed a contrary intention. In *S v Acting Regional Magistrate, Boksburg, CC,*[12] the Court said:

> "*It is presumed that a statute does not operate retrospectively, unless a contrary intention is indicated, either expressly or by clear implication. This presumption is consistent with the fair-trial provisions of the Constitution, and was approved by this court in Veldman.*"

See also *Curtis v Johannesburg Municipality.*[13] There is also authority in abundance for the proposition that retrospective legislation will not be given effect to if vested rights are removed or affected, or new obligations are created, or a new duty is imposed. See in this regard, *inter alia*, *Minister of Safety and Security v Molutsi and Another.*[14] In the present matter, there is also no evidence or proof that the agreements are credit agreements which would fall foul to the provisions of the NCA.

[14] The above approach and legal principles plainly put paid to the appellant's contentions based on the NCA. For the same reasons, and others dealt with immediately below, the appellant's assertions based on the amendment, must fail.

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[12] 2011 (2) SACRA 274 CC para 16.
[13] 1906 TS 308 at 311 and 312.
[14] 1996 (4) SA 72 (A) 88D-E.

[15] In *De Wet and Others v Western Bank Ltd,*[15] which was subsequently partly upheld on appeal in *De Wet v Western Bank Ltd,*[16] where default judgment was granted erroneously in circumstances where there was no error on the part of the Court, but on the part of the legal representatives, the Court at p 8 said:

> "*The Court need not be party to the common mistake between the parties before relief can be granted under the provisions of Rule 42(1)(c).*"

In *Lodhi 2 Properties Investments CC v Bondev Developments* 2007 (6) SA 87 (SCA) at para [25], the Court said:

> "*However, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware, as was held to be the case by Nepgen J in Stander. See in this regard Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) ([2003] 2 All SA 113) in paras 9-10 in which an application in terms of Rule 42(1)(a) for rescission of a summary judgment granted in the absence of the defendant was refused notwithstanding the fact that it was accepted that the defendant wanted to defend the application but did not do so because the application had not been brought to the attention of his Bellville attorney. This Court held that no procedural irregularity or mistake in respect of the issue of the order had been committed and that it was not possible to conclude that the order had erroneously been sought or had erroneously been granted by the Judge who granted the order.*"

<u>THE CRUCIAL ISSUE</u>

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[15] 1977 (4) SA 770 (T).
[16] 1979 (2) SA 1031 (A).

[16] The crucial issue in this appeal remains the question whether the appellant is entitled to condonation for the delay in bringing the rescission application in terms of Rule 42(1)(a) or Rule 31(2)(b) and/or the common law on the facts of the case, as contended by him.

THE FINDINGS OF THE COURT *A QUO*

[17] The court *a quo* found that '*the appellant had knowledge of the default judgment when Strydom telephoned him on the 3rd August 2011. He only applied for rescission in March 2013, when it became apparent to him that he was being subjected to proceedings in terms of section 65 of the Magistrates' Courts Act. The delay in launching the rescission application is an unacceptable delay. Moreover, the delay, accompanied by the statements contained in the email of 18 April 2012, are compelling evidence of acquiescence in the judgment*'.[17]

SUFFICIENT CAUSE UNDER THE COMMON LAW

[18] In *Harris v Absa Bank Ltd t/a Volkskas,*[18] an application for rescission of a default judgment was brought under the common law. In dealing with the issue of sufficient cause, the Court, at paras [4] and [5] said:

> "*[4] This application for rescission of judgment was brought under the common law. The applicant, being the party which seeks relief, bears the onus of establishing 'sufficient cause'. Whether or not 'sufficient cause' has been shown to exist depends upon whether:*

[17] Pages 45 to 47 of judgment – court *a quo*.
[18] 2006 (4) SA 527 (T).

(a) the applicant has presented a reasonable and acceptable explanation of her default; and

(b) the applicant has shown the existence of a bona fide defence, that is one that has some prospect or probability of success. See Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764J, 765A - D.

[5] The test whether 'sufficient cause' has been shown by a party seeking relief, is dual in nature, it is conjunctive and not disjunctive. An acceptable explanation of the default must co-exist with evidence of reasonable prospects of success on the merits. In Chetty v Law Society (supra) Muller JA explained this Rule thus:

> *'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. An 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 for 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.'*"

At para [8] of the judgment, the Court went on to say that:

> "*Before an applicant in a rescission of judgment application can be said to be in 'wilful default' he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. 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.*"

The principles set out above of presenting a reasonable and acceptable explanation for default, and that on the merits of the case an applicant for rescission has to show a *bona fide* defence which, *prima facie*, carries some reasonable prospect of success, were emphasised in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*[19]. In *Saphula v Nedcor Bank*

[19] 2003 (6) SA 1 (SCA) at 11.

Ltd[20]*,* the Court refused an application for rescission on the ground that the applicant failed to demonstrate a *bona fide* defence to the plaintiff's claim.

INORDINATE DELAY

[19] In addition to the above legal principles, the issue for decision in this appeal is the unquestionable inordinate delay taken by the appellant in launching the rescission application. In my view, this question is decisive of the outcome. He argued that the default judgment was erroneously sought and granted for reasons already alluded to earlier in the judgment. In regard to the delay, this was ascribed partly to himself and partly to his attorney of record in searching for the requisite documentation, especially in regard to the Zambli alleged cession. Firstly, in regard to the documentation, it is settled law that condonation of the non-observance of the rules is by no means a mere formality since the *onus* is on the applicant to satisfy the court that there is sufficient reason for excusing him/her from compliance. It is equally trite that under Uniform Rule 42(1)(a), an order or judgment is also erroneously granted if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such an order, as was held in *inter alia*, *De Wet v Western Bank Ltd (supra)* at 1038D, and *Promedia Drukkers and Uitgewers (Edms) Bpk v Kaimowitz*[21]*,* respectively. The explanation for the delay and the grounds for condonation in the present appeal have already

[20] 1999 (2) SA 76 (W).
[21] 1996 (4) SA 411 (C) at 417G-H.

been dealt with. In *Commissioner for Inland Revenue v Burger*[22], the Court said:

> "*Whenever an applicant realises that he has not complied with a Rule of Court he should, without delay, apply for condonation. Cf. Crouser v Standard Bank, 1934 A.D. 77 at p. 79; R v Mkize, 1940 A.D. 211 at p. 213; and Reeders v Jacobsz, 1942 A.D. 395 at p. 397.*"

In the case just quoted, the Court described the delay in applying for condonation, viewed as a whole, as '*so protracted as to be inexcusable*'. In my view, the same can be said with regard to the facts presented in the instant matter, as well as the eventual launching of the rescission application. None of the issues laid down in the *Burger* case have been complied with in the context of the present appeal. As stated before, the credible evidence showed that the appellant became aware, or ought reasonably have become aware of the default judgment as far back as 3 August 2011. His version that it was 7 March 2013, lacked credibility. Similarly, the contention in the heads of argument, to the effect that the application for rescission was brought within a reasonable time, "*but if it is necessary to seek condonation, the appellant seeks condonation for any failure to bring the application within a reasonable period of time or for any non-compliance with the High Court Rules*"[23], was not supported by the objective facts at all. What compounded the appellant's cause, was that, in this appeal, he also seeks condonation for the late prosecution of the appeal, as well as for the late delivery and inclusion of the court order of the court *a quo* of 30 September 2014 when dismissing his application for rescission of judgment. For the same reasons advanced above, these arguments lacked credibility and substance, as they too, were

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[22] 1956 (4) SA 446 (A) at 449G.
[23] See para 8.6 p 6 of the heads of argument.

dated as late as 7 April 2015. The submission in essence, overlooked that what called for an explanation is not only the delay in the timeous prosecution of the appeal, but also the delay in seeking condonation. See in this regard, *Commissioner South African Revenue Service v Van der Merwe*[24].

[20] The findings of the court *a quo*, which included that the delay in launching the rescission application was an unacceptable delay; that it rejected the appellant's explanation about his failure to address the correspondence sent to him by Strydom during August 2011; that the appellant admitted the telephonic discussion with Strydom during August 2011; that during such telephonic discussion, Strydom informed the appellant that default judgment was granted against him on 19 July 2011; and that the appellant only launched the rescission application on 22 March 2013, cannot be faulted at all.

THE LEGAL PRINCIPLES ON APPROACH TO FINDINGS OF COURT *A QUO*

[21] In considering all the circumstances of the appeal and in drawing to a conclusion in this matter, two critical principles come to mind. The first is that the respondent's interests in having finality of his judgment and finality in

[24] [2015] 3 All SA 387 (SCA) at 396.

litigation. For, as far back as 1912, the Court in *Cairns' Executors v Gaarn*[25], in which a special appeal was brought out of time, said:

> "*After all the object of the rule is to put an end to litigation and to let parties know where they stand. It would be intolerable, if there were no reasonable limit of time within which appeals might be brought, and it is to the interest of the public that the time should be limited. When a party has obtained a judgment in his favour and the time allowed by law for appealing has lapsed, he is in a very strong position, and he should not be disturbed except under very special circumstances.*"

See also *Minister of Land Affairs and Agriculture and Others v D F Wevell Trust*[26].

[22] In the present matter, the summons was issued as far back as September 2010. On 16 September 2010, the summons was served on the appellant. The appellant, however, did not enter an appearance to defend for reasons already described above. On 19 July 2011 the respondent obtained the default judgment under discussion. Surely, finality in this litigation must now prevail. In the absence of any special circumstances, public interest so demands.

[23] The second legal principle of procedure is that the power of a court of appeal to disturb factual findings of a court *a quo* is limited, unless there is some patent irregularity or misdirection, or the order granted is clearly wrong. See for example, *Ndlovu v A A Mutual Insurance Association Ltd*[27], and *R v Dhlumayo and Another*[28]. In the latter case, some of the principles include situations where the Appellate Court may be in as good a position as the trial

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[25] 1912 (A) 181 at 193.
[26] 2008 (2) SA 184 (SCA) at 199B-D.
[27] 1991 (3) SA 655 (E) 659E-F.
[28] 1948 (2) SA 677 (A) 698.

judge to draw inferences, whether they are either drawn from admitted facts or from the facts as found by him/her, and that where there has been no misdirection on fact by the trial court, the presumption is that his/her conclusion is correct. The Appellate Court will in such case only reverse the conclusion where it is convinced that it is wrong. See too, *Kunz v Swart and Others*[29], which was quoted with approval in Taljaard v Sentrale Raad vir Koöp Assuransie Bpk[30].

APPLYING THE ABOVE LEGAL PRINCIPLES TO THE FACTS OF THIS CASE

[24] In applying the above principles to the facts of the present matter, the court *a quo's* findings that the appellant knew of the default judgment since 3 August 2011; that there was an inordinate delay in bringing the rescission application, and that the appellant's statements as contained in the relevant email correspondence referred to above, are factually compelling evidence of acquiescence in the judgment, cannot be faulted. Similarly, the court *a quo's* finding that the email (from the appellant to the respondent on 18 April 2012)[31], read in context of the appellant's knowledge of the default judgment, as well as the sequence of past events, all amount to a tacit acknowledgement toward the respondent, and an intention to pay, is indisputable, cannot be criticised. There was in fact no convincing reasons advanced by the appellant why the factual findings by the court *a quo* should be reversed. When properly considered, the conclusions reached by the

[29] 1924 (A) 618 at 655.
[30] 1974 (2) SA 450 (A) at 451H.
[31] Paginated p 134 vol 2, record.

court *a quo* are indicative of the fact that the appellant has no *bona fide* defence, which *prima facie* has some reasonable prospects of success, to the respondent's claim, as correctly argued by the respondent in closing argument. It follows therefore that the appellant failed to make out a case for the rescission of the judgment either under the common law, Rule 31(2)(b) or Rule 42(1)(a). The appellant's assertions in respect of the alleged Zambli cession, which were not pursued with any vigour in closing argument, should suffer the same fate, in my view. The alleged cession could not legally and validly have ceded the respondent's rights originally acquired in terms of the contracts mentioned in paras [4] and [5] of the judgment, to say the least.

CONCLUSION

[25] I conclude that for all the aforegoing reasons, the appeal must fail. The costs ought to follow the result.

ORDER

[26] The following order is made:

1. The appeal is dismissed with costs.

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D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

_____

M L MAILULA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

_____

M P TSOKA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING	28 OCTOBER 2015
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