

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 12942/2013

(1)	REPORTABLE: YES <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES <u>NO</u>
(3)	REVISED. <u>✓</u>
<u>25-11-16</u>	
DATE	<u>[Signature]</u>
	SIGNATURE

In the matter between:

**DR MNCUBE VUSUMUZI STANLEY**

First Applicant

**MNCUBE NONQHELE NONKULULEKO**

Second Applicant

and

**ABSA BANK LIMITED**

Respondent

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**JUDGMENT**

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**WEINER, J:**

[1] In this matter, the applicants apply for a rescission of a judgment granted by this court on 25 November 2014. It is common cause that the respondent applied for summary judgment and that the applicants filed an affidavit resisting summary judgment. There was no appearance for

the applicants at the hearing and summary judgment was granted.

[2] The applicants now apply for rescission of the judgment. The law is clear that where pursuant to an application for summary judgment, the defendant filed affidavit in opposition to the application for summary judgment, the court is not entitled to ignore such affidavit. It cannot be said that defendant is in default because he/she or his/her counsel fails to appear when the application is heard. See *Morris v Auto Quip (Pty) Ltd*<sup>1</sup>

[3] Where summary judgment is granted under these circumstances, there is accordingly no default and the defendant cannot apply for rescission of judgment. See *Verrijdt v Honeydew Tractors and Implements (Pty) Ltd*<sup>2</sup> which held that, when a party is not represented by counsel, he is not in default, if an affidavit has been filed.

[4] There is a further case of *Slabbert v Volkskas Bank*<sup>3</sup>, an appeal heard by Melamet and Ackermann JJ where it was argued that, having considered the opposing affidavit, the learned Judge exercised a value judgment on the merits of the matter. Therefore, the only remedy open to the applicant is to ask for leave to appeal and condonation for the late filing of the appeal.

[5] There is no default in the sense in which the word is used in *Katritsis v Macedo*<sup>4</sup> where the meaning of the word 'default' was considered in

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<sup>1</sup> 1985 (4) SA 398 (W)

<sup>2</sup> 1981(1) SA 787 (T)

<sup>3</sup> 1985 (1) SA 141 (T)

<sup>4</sup> 1966(1) SA 613(A)

relation to non-appearance of counsel or a litigant at a trial action. The Court held that the situation was different in a trial action. A judgment can be granted by default when a party fails to appear in a trial action, as a court is not in possession of an affidavit setting out a defence, to which reference can be made, prior to judgment being granted in the summary judgment scenario. It was held, in that matter, that there was no default in that sense and the application brought for the rescission of the summary judgment, was the wrong procedure. The present case is on all fours with *Katritsis* and accordingly the application for rescission must fail. The applicant may be entitled to apply for leave to appeal but rescission is the incorrect procedure.

[6] Accordingly, the application for rescission is dismissed with costs.



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**S WEINER  
JUDGE OF THE HIGH COURT  
OF SOUTH AFRICA  
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JOHANNESBURG**