CASE NO: 47959/2012

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

PRETORIA 09 JUNE 2017

BEFORE THE HONOURABLE MADAM JUSTICE KHUMALO

In the matter between:

DINARTE BRUNO AGUIAR DE FARIA	1ST APPLICANT
FABIO SERGO DE FARIA	2ND APPELLANT
AND	
MACHABELA FREDDY LETSOALO	1ST RESPONDENT
ANDRIES ISAAC SIBIYA	2ND RESPONDENT
IN RE:	
MACHABELA FREDDY LETSOALO	APPLICANT/PLAINTIFF
AND	
DINARTE BRUNO AGUIAR DE FARIA	1ST RESPONDENT
FABIO SERGO DE FARIA	2ND RESPONDENT

HAVING read the documents filed of record, heard counsel and considered the matter:

IT IS ORDERED THAT:

The applicant's application for rescission of Kollapen J's order of the 26 August 2013 is dismissed with costs.

BY THE COURT

REGISTRAR
CB

Attorney:
302

IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURTOF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: NO	
(2)	OF INTEREST TO OTHER JUDGES: NO	
(3)	REVISED.	09/06/2017
(4)	SIGNATURE	DATE

CASE NO: 47959/2012

DINARTE BRUNO AGUIAR DE FARIA	**FIRST APPLICANT**
FABIO SERGO DE FARIA	**SECOND APPELLANT**
and	
MACHABELA FREDDY LETSOALO	**FIRST RESPONDENT**
ANDRIES ISAAC SIBIYA	**SECOND RESPONDENT**
In re:	
MACHABELA FREDDY LETSOALO	**APPLICANT/PLAINTIFF**
and	
DINARTE BRUNO AGUIAR DE FARIA	**FIRST RESPONDENT**
FABIO SERGO DE FARIA	**SECOND RESPONDENT**

JUDGMENT

KHUMALO J

[1] On 15 November 2012, Dinarte Bruno Aguiar and Fabio Sergo De Faria, the 1st and the 2nd Applicant, respectively (hereinafter referred to as "the Applicants") were granted Default Judgment by the Registrar as Plaintiffs in an action ("the main action") they had instituted against Machabela Freddy Letsoalo, the 1st Respondent, as the Defendant for the payment of an alleged debt amount of R612 800.00.

[2] Following the default Judgment, the Applicants issued and executed without delay or any further notice on 26 November 2012 a warrant against the 1st Respondent's immovable property. The property was subsequently sold by the sheriff in execution to the 2nd Respondent on 13 February 2013.

[3] On or about May 2013 the 1st Respondent launched an Application for rescission of the Default Judgment wherein he also sought the setting aside of the sale and retransfer of his property. It is common cause that the Application was duly served on the Applicants' attorneys on 14 May 2013. No opposition was noted. In the meantime the transfer of the property took place on 2 June 2013.

[4] As a result of there being no opposition, Kollapen J on 26 August 2013 granted an order rescinding the Default Judgment. He however postponed *sine die* the application for an order setting aside the sale and retransfer of the property with a directive that the rescission order and the entire application be served on the 2nd Respondent personally before the 1st Respondent can proceed with the remaining relief.

[5] On receipt of the Application, the 2nd Respondent served on the 1st Respondent and the Applicants a notice of joinder. The 1st Respondent similarly filed a notice to join the 2nd Respondent in the Application for the remaining prayers. In an Application for cancellation of a sale of immovable property, the purchaser is supposed to be cited and served with the Application.

[6] At that time the matter took an interesting turn, instead of the matter following the normal cause, with each party waiting to argue their case at the trial, the Applicants launched an Application seeking to set aside Kollapen J's order that rescinded the Default Judgment. The reason tendered by the Applicants for bringing up such an Application was that they wanted to ensure that each party has his day in court and that they have an opportunity to oppose 1st Respondent's rescission application which they feel the court was not supposed to have granted considering all the circumstances.

[7] In common law, the general principle applicable is that the Applicant as the party that seeks relief, bears the *onus* of establishing a "*sufficient cause*" for the order or judgment to be rescinded. Whether or not sufficient cause has been shown to exist depends upon whether:

(a) the Applicant has presented a reasonable and acceptable explanation of his default.

(b) the Applicant has shown the existence of a bona fide defence, that is one that has some prospect or probability of success.

See *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E); *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd)* 1980 (4) SA 794 (A).

[8] Rule 31 (2) (b) of the Uniform Rules of Court requires that 'good cause' be shown for rescission of a default judgment to be granted. The same as it is in common law, it does not seem to be an express requirement of the rule that wilful default be absent. It is, however, clear law that an enquiry whether 'sufficient cause' has been shown is inextricably linked to or dependent upon whether the Applicant acted in wilful disregard of court rules, processes and the time limits. While wilful default may not be an absolute or independent ground for refusal of a rescission application, a display of wilful neglect or deliberate default in preventing judgment being entered would sorely co-exist with sufficient cause; See *Harris v Absa Bank Limited t/a Volkskas* (2006) (4) SA 527 (T) at par [6].

[9] In *Harris* on par [5], Moseneke J (as he was then) in a full bench appeal explained that a reasonable and an acceptable explanation of the default must co-exist with the evidence of reasonable prospects of success on the merits. He made a reference to Muller JA's explanation of the rule in *Chetty v Law Society* (At 765D-E) 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. **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."** (*my emphasis*)

[10] Muller JA's explanation however creates a conundrum as weighing prospects of success might show that the Plaintiff, taking into consideration the facts as established or proven by the Defendant, was not entitled to Default Judgment. If the Defendant has however displayed utter disregard of the rules and acting with total indifference failed to oppose the Application, will refusal of rescission be appropriate under the circumstances.

[11] Appreciating the danger of following the dicta of Moseneke J in Harris verbatim, he amplifies the preferred approach by quoting in par [11] the statement by Jones J in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 711F-I that:

> "An application for rescission is never simply an enquiry whether or not to penalise a party for failure to follow the rules and procedures laid down for civil proceedings in our courts. **The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the Application for rescission is not bona fide. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties.... He should also do his best to advance the good administration of justice.** In the present context this involves weighing the need, on the one hand, to uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised and heard.

[12] The *dicta* indicates that in determining whether or not a rescission of judgment would be appropriate, the court in some instances when exercising its discretion has got to look at various other factors beyond the finding of wilful default and prospects of success. The interests of the parties have to be balanced looking at the prejudice that might be caused to each party, its decision ensuring that good administration of justice is advanced, that judgments of the courts which are properly taken in accordance with procedures are upheld at the same time preventing an injustice that might arise from allowing the execution of judgment which should not have been taken. This answers to the *bona fide* of the Application, that is, whether or not the Application is made with good intentions. Which is the principle that is applicable in this matter. *De Wetts* confirms the approach, in accepting that:

> " the wilful or negligent or blameless nature of the Defendant's default now becomes one of the **various considerations which the courts will take into account** in the exercise of their discretion to determine whether or not good cause shown."

[13] In *HDS Construction (Pt) Ltd v Wait* 1979 (2) A 298 (E) at 300G-301E the court held that:

> "the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, **and in the light of all the facts and circumstances of the case as a whole**."

[14] Applicants had set out extensive background facts which I would deal with when I consider the aspect that relates to the prospects of success. First, as is the general practice, it should be established whether or not the Applicants were in wilful default when they failed to defend the 1st Respondent's Application.

Explanation of default

[15] Applicants in their Founding Affidavit deposed to by the 1st Applicant allege that on or about June 2013 a dispute arose between them and their attorneys regarding monies that the attorneys were supposed to pay over to them. It was at that time that their attorneys informed them about the **1st Respondent's Application. They were told that that 1st Respondent was apparently in a process of trying to overturn the Default Judgment. The attorneys specifically told them that the attempts by 1st Respondent were without merit and that they need not trouble themselves with those matters. They were also told that they need not worry, they** will attend to the matter. **They allege that the attorneys did not** provide them with copies of the rescission application or inform them of the process involved including the time periods or opposing affidavits that needed to be prepared. They submit that they therefore had no reason to be concerned and were left in the lurch. **They then reasonably assumed that nothing came out of the 1st Respondent's attempts and had thought that the attorneys would advise them if anything further became of the matter.**

[16] Applicants further allege that **they were completely unaware of the 1st Respondent's rescission application** and have never seen a copy of that application until after default judgment was rescinded. **They reckon if they were made aware of the application they would have immediately proceeded to oppose it and to ensure that proper steps were taken. They say they have assumed that what the attorney meant by**

an attempt by 1st Respondent to *overturn the Default Judgment* was the rescission application.

[17] In addition, Applicants **allege that the first indication they had that such an application was launched was when the 2nd Respondent's Application for joinder was served upon them on 17 July 2014.** They consulted the sheriff on receipt of the documents who advised them to instruct new attorneys and ended up with the present attorneys on 30 July 2014. Thereafter they managed to get hold of the file from their erstwhile attorneys on 9 September 2014 and started to prepare for their application. **They submit that if they were made aware of the Application and of the process to oppose same,** they would have taken all steps to oppose that Application.

[18] The 1st Respondent's rescission application was served on the Applicants' attorneys on 14 May 2013. The Applicants as it has also been conceded by Mr Groenewald in their heads of argument, were then informed and made aware by their erstwhile attorneys that the 1st Respondent is trying to overturn the default judgment, which was exactly what the rescission application is all about, its purpose being to overturn the default judgment. Applicants' contention therefore that they were unaware of the Application until after rescission was granted and only when the Joinder Application was served on them on 17 July 2014 did they become aware or had an indication that the Application had been launched is consequently disingenuous. Also their allegation that they were not told what the Application was about is not correct. They were told the Application was to overturn the judgment. So they were quite aware of the 1st Respondent's attempt.

[19] Mr Groenewald who appeared for the Applicants argued that Applicants did not bother themselves with the Application because they were told that 1st Respondent's attempts were not going to succeed and nothing was going to come out of it. That is the main reason for their failure to instruct their attorneys to oppose the Application, it was their belief that nothing was going to come out of it as advised by their erstwhile attorneys. They confirm that they thought indeed nothing came out of it when thereafter in June 2013 they received a payment from their attorneys which were the proceeds of the sale. Their contention therefore that if they had known what the Application was all about they would have instructed their attorneys to oppose it is not sincere. Even though the launching of the Application was made known to them in time and what it was about, they failed to instruct their attorneys to oppose because they believed that nothing was going to come out of the Application. Now that the Application took a different turn and had an outcome they did not expect, they want the matter to be reheard to get a chance to oppose the Application. To achieve that they now conveniently allege to have become aware of the Application when the joinder Application was served upon them on 17 July 2014, which factually is not true.

[20] It would certainly be contrary to the advancement of the administration of justice and an ordered judicial process, if the order for rescission of a default judgment would be set aside for the purpose of giving a litigant, who had due legal representation and both him and his legal representative being aware of the proceedings had, owing to a believe that the Application would not succeed, deliberately not opposed the application, a chance to attempt to reverse the outcome so that he can then oppose the Application. The Applicants have failed to establish the absence of wilful default by giving a reasonable and a credible explanation for their default.

[21] It is also common cause that the Applicants were delayed in bringing the Rescission Application and have applied for condonation. The rescission Application was finally filed only in 2015, 1st Respondent did not oppose their Application indicating that they did not wish for the matter to be delayed any longer. The condonation would then be granted. The 1st Respondent was in turn also delayed in filing the answering affidavit and the Applicants had elected not to oppose the application for condonation but to abide by the court's decision. I had therefore considered granting condonation to both parties' applications.

Applicant's bona fide and the prospects or probability of success.

[22] The Applicants have outlined their case against the 1st Respondent which is largely not disputed by the 1st Respondent. It is common cause that the Applicants and 1st Respondent entered into a sale agreement on 13 April 2013 with the 1st Respondent purchasing the Applicants' business for a R1 000 000.00. The parties agreed that 1st Respondent was to pay a deposit of R500 000.00 on date of signature and thereafter to transfer ownership of its truck to the Applicants with the agreed value of R150 000.00 and the difference of R350 000.00 to be paid in monthly instalments of R20 000 until the full purchase price is paid.

[23] It is also common cause that 1st Respondent paid an amount of R207 200.00 on 13 April 2012, transferred ownership of the man horse with the value as agreed in their agreement, of R150 000.00 to the Applicants. He also arranged for an amount of R292 800 that was payable to him by Sparax Trading 145 (Pty) Ltd("Sparax") to be paid to the Applicants by having Sparax draw a cheque in their favour to make up for the shortfall in the deposit, which cheque was accepted by the Applicants. He therefore *de facto* ceded his claim of R292 000. Thereafter 1st Respondent took over the business on 16 April 2012 and transferred a trailer to the Applicants followed by two payments totalling R30 0000. all these facts are not denied by the Applicants.

[24] However there is an argument about the value of the trailer and the total monthly payments made. 1st Respondent alleges that the trailer is worth R55 000.00 whilst the Applicants allege that it is R50 000.00. The monthly payments are said to be only R30 000 by the Applicant whilst 1st respondent alleges to have paid R67 000.00.

[25] The Applicants have alleged in their Founding Affidavit and claimed in their summons that resulting from 1st Respondent's default an amount of R612 800.00 was due and owing to it. In their summons no mention is made of the trailer or the amount of R292 000.00. The Applicants only acknowledged in their particulars of claim receipt of the R207 200, the handing over of the heavy duty man horse of R150 000 and instalment payments of R30 000 which equals R387 200.00 leaving a balance of R612.800.00, the amount of the Default Judgment. Nothing further is said about the debt.

[26] On their Application to set aside the Default Judgment, the 1st Respondent referred to the fact that the Applicants have omitted to mention a trailer in the value of R55 000.00 that was also transferred to the Applicants and a claim for R292 800.00 owed to it by Sparax which they ceded to the Applicants. He alleged that Applicants had accepted the cession and thereafter collected the cheque from Sparax as part of the deposit. They proceeded to sue and obtain judgment against Sparax in their favour for the payment of the amount, when the cheque was dishonoured. The judgment was obtained on 12 October 2012 before

they applied for default judgment against him. 1st Respondent argued that the amount that was as a result paid to the Applicants was therefore not R387 000.00 as claimed by the Applicants. Therefore the Registrar was misled by not being informed of the other arrangements between the parties. He alleges the amount of R200 000.00 to have been paid on 31 March 2012 before the signing of the agreement with Applicants accepting the different form of payment. As a defence to the remaining amount he alleged that the Applicants had in breach of their agreement removed certain items from the business and that made it difficult for him to operate the business profitably, as a result the business did not generate the monthly income that was expected from which he was supposed to pay monthly instalment. There is also a contention raised regarding the amount paid by electronic transfer.

[27] In their Founding Affidavit, Applicants now allege, contrary to what is in their particulars of claim, that the man horse was not in a running condition and needed substantial repair work of approximately R100 000.00. The tyres and the battery were missing. They also claim for the first time that the parties as a result agreed to amend the agreement and agreed on a value of R100 000.00 for the man horse. They for the first time also mention the trailer being transferred to them albeit for the value of R50 000 and together with the horseman to have made up the amount of R150 000.00 that was initially agreed upon for the man horse. Applicants at the same time deny that the agreement was ever amended and therefore that the 1st Respondent ceded Sparax's debt of R292 800.00 to them. They argue that no payment was received from Sparax which implies that the R292 800.00 remains owing. However they do not mention that they did not only bank the cheque but also proceeded to enforce the claim by suing Sparax when the cheque was dishonoured. They subsequently obtained a default judgment against Sparax, an indication not only of having accepted the cession but of Applicants enforcing the ceded claim.

[28] The aforementioned facts were not revealed in the summons upon which the Applicants had obtained judgment against the 1st Respondent. The Registrar in that case did not consider these facts when the Default Judgment was granted. Therefore on the facts as established by the 1st Respondent, he had shown good cause for the default judgement to be set aside. Kollapen J therefore exercised his discretion properly when he at the time granted the 1st Respondent the order setting aside the Default Judgment that was granted in the absence of the 1st Respondent. I have left the consideration of 1st Respondent's allegation on the immovable property for proper consideration by the court that will be hearing the application on the 2 prayers postponed sine die.

[29] Kollapen J further properly exercised his discretion when he, even though the 1st Respondent had alleged to have sent a letter to the 2nd Respondent notifying him of the Rescission Application and made him aware of the documents that were filed, took into consideration the interest of the parties and postponed the two prayers that refers to the cancellation of the sale *sine die* with the order that 1st Respondent serve the Application personally on the 2nd Respondent. For that reason there is no justification for the order of Kollapen J to be set aside. By making such an order he had made sure that the prejudice that 2nd Respondent could have suffered as a result of the Applicants failure to oppose the matter is prevented.

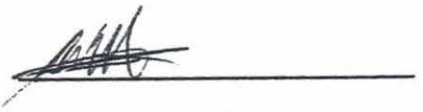
[30] The Applicants have failed to show the *bona fides* of their Application that would justify the prevention of the matter being sent to trial. On their papers the disputes on the facts are apparent since they have now in their Founding affidavit made new allegations upon which their claim is allegedly founded. Interestingly even then they do not dispute what the 1st Respondent is alleging, the transfer of the trailer albeit the R5 000.00 difference on the value, the receipt of the cheque R292 800 and not divulging that they obtained judgment on the cheque. Their claim clearly lacks the *bona fides* inherent in the application. They have failed to make a case for the reversal or setting aside of the order by Kollapen J.

[31] The purpose of rescinding a judgment is 'to restore a chance to air a real dispute, as correctly pointed out by "Mr Leballo, 1st Respondent's counsel. The parties will get a proper opportunity to deal with the apparent disputes and finally deal with the matter in the trial, since there is no advantage or disadvantage that can flow from a rescinded default judgment.

[32] Under the circumstances taking into account the nature of the Applicants claim whose cause of action was not fully pleaded when default judgment was granted, Kollapen J's order was correct and would not be in the interest of justice to set aside.

I therefore make the following order:

1. The Applicants Application for rescission of Kollapen J's order of the 26 August 2013 is dismissed with costs.



N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

On behalf of Appellants:	**ADV R J GROENEWALD**
Instructed by:	**HOUGH & BREMNER ATTORNEYS** **C/O CHRISTO COETZEE ATTORNEYS** **REF: MR BREMNER/mv/ D22/16-D1814** **TEL: 013 752 3177** **REF: C COETZEE/wr/GD0002** **TEL: 012 342 1930/ 013**
On behalf of Respondent:	**ADV L T LEBALLO**
Instructed by:	**M J MOSIKARI ATTORNEYS** **REF: MS MOSIKARI/MJM/00293** **TEL: 012 328 6180**

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JUDGMENT

KHUMALO J

[1] On 15 November 2012, Dinarte Bruno Aguiar and Fabio Sergo De Faria, the 1st and the 2nd Applicant, respectively (hereinafter referred to as "the Applicants") were granted Default Judgment by the Registrar as Plaintiffs in an action ("the main action") they had instituted against Machabela Freddy Letsoalo, the 1st Respondent, as the Defendant for the payment of an alleged debt amount of R612 800.00.

[2] Following the default Judgment, the Applicants issued and executed without delay or any further notice on 26 November 2012 a warrant against the 1st Respondent's immovable property. The property was subsequently sold by the sheriff in execution to the 2nd Respondent on 13 February 2013.

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[4] As a result of there being no opposition, Kollapen J on 26 August 2013 granted an order rescinding the Default Judgment. He however postponed *sine die* the application for an order setting aside the sale and retransfer of the property with a directive that the rescission order and the entire application be served on the 2nd Respondent personally before the 1st Respondent can proceed with the remaining relief.

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(a) the Applicant has presented a reasonable and acceptable explanation of his default.

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See *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E); *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd)* 1980 (4) SA 794 (A).

[8] Rule 31 (2) (b) of the Uniform Rules of Court requires that 'good cause' be shown for rescission of a default judgment to be granted. The same as it is in common law, it does not seem to be an express requirement of the rule that wilful default be absent. It is, however, clear law that an enquiry whether 'sufficient cause' has been shown is inextricably linked to or dependent upon whether the Applicant acted in wilful disregard of court rules, processes and the time limits. While wilful default may not be an absolute or independent ground for refusal of a rescission application, a display of wilful neglect or deliberate default in preventing judgment being entered would sorely co-exist with sufficient cause; See *Harris v Absa Bank Limited t/a Volkskas* (2006) (4) SA 527 (T) at par [6].

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Explanation of default

[15] Applicants in their Founding Affidavit deposed to by the 1st Applicant allege that on or about June 2013 a dispute arose between them and their attorneys regarding monies that the attorneys were supposed to pay over to them. It was at that time that their attorneys informed them about the **1st Respondent's Application. They were told that that 1st Respondent was apparently in a process of trying to overturn the Default Judgment. The attorneys specifically told them that the attempts by 1st Respondent were without merit and that they need not trouble themselves with those matters. They were also told that they need not worry, they** will attend to the matter. **They allege that the attorneys did not** provide them with copies of the rescission application or inform them of the process involved including the time periods or opposing affidavits that needed to be prepared. They submit that they therefore had no reason to be concerned and were left in the lurch. **They then reasonably assumed that nothing came out of the 1st Respondent's attempts and had thought that the attorneys would advise them if anything further became of the matter.**

[16] Applicants further allege that **they were completely unaware of the 1st Respondent's rescission application** and have never seen a copy of that application until after default judgment was rescinded. **They reckon if they were made aware of the application they would have immediately proceeded to oppose it and to ensure that proper steps were taken. They say they have assumed that what the attorney meant by**

an attempt by 1st Respondent to *overturn the Default Judgment* was the rescission application.

[17] In addition, Applicants **allege that the first indication they had that such an application was launched was when the 2nd Respondent's Application for joinder was served upon them on 17 July 2014.** They consulted the sheriff on receipt of the documents who advised them to instruct new attorneys and ended up with the present attorneys on 30 July 2014. Thereafter they managed to get hold of the file from their erstwhile attorneys on 9 September 2014 and started to prepare for their application. **They submit that if they were made aware of the Application and of the process to oppose same,** they would have taken all steps to oppose that Application.

[18] The 1st Respondent's rescission application was served on the Applicants' attorneys on 14 May 2013. The Applicants as it has also been conceded by Mr Groenewald in their heads of argument, were then informed and made aware by their erstwhile attorneys that the 1st Respondent is trying to overturn the default judgment, which was exactly what the rescission application is all about, its purpose being to overturn the default judgment. Applicants' contention therefore that they were unaware of the Application until after rescission was granted and only when the Joinder Application was served on them on 17 July 2014 did they become aware or had an indication that the Application had been launched is consequently disingenuous. Also their allegation that they were not told what the Application was about is not correct. They were told the Application was to overturn the judgment. So they were quite aware of the 1st Respondent's attempt.

[19] Mr Groenewald who appeared for the Applicants argued that Applicants did not bother themselves with the Application because they were told that 1st Respondent's attempts were not going to succeed and nothing was going to come out of it. That is the main reason for their failure to instruct their attorneys to oppose the Application, it was their belief that nothing was going to come out of it as advised by their erstwhile attorneys. They confirm that they thought indeed nothing came out of it when thereafter in June 2013 they received a payment from their attorneys which were the proceeds of the sale. Their contention therefore that if they had known what the Application was all about they would have instructed their attorneys to oppose it is not sincere. Even though the launching of the Application was made known to them in time and what it was about, they failed to instruct their attorneys to oppose because they believed that nothing was going to come out of the Application. Now that the Application took a different turn and had an outcome they did not expect, they want the matter to be reheard to get a chance to oppose the Application. To achieve that they now conveniently allege to have become aware of the Application when the joinder Application was served upon them on 17 July 2014, which factually is not true.

[20] It would certainly be contrary to the advancement of the administration of justice and an ordered judicial process, if the order for rescission of a default judgment would be set aside for the purpose of giving a litigant, who had due legal representation and both him and his legal representative being aware of the proceedings had, owing to a believe that the Application would not succeed, deliberately not opposed the application, a chance to attempt to reverse the outcome so that he can then oppose the Application. The Applicants have failed to establish the absence of wilful default by giving a reasonable and a credible explanation for their default.

[21] It is also common cause that the Applicants were delayed in bringing the Rescission Application and have applied for condonation. The rescission Application was finally filed only in 2015, 1st Respondent did not oppose their Application indicating that they did not wish for the matter to be delayed any longer. The condonation would then be granted. The 1st Respondent was in turn also delayed in filing the answering affidavit and the Applicants had elected not to oppose the application for condonation but to abide by the court's decision. I had therefore considered granting condonation to both parties' applications.

Applicant's bona fide and the prospects or probability of success.

[22] The Applicants have outlined their case against the 1st Respondent which is largely not disputed by the 1st Respondent. It is common cause that the Applicants and 1st Respondent entered into a sale agreement on 13 April 2013 with the 1st Respondent purchasing the Applicants' business for a R1 000 000.00. The parties agreed that 1st Respondent was to pay a deposit of R500 000.00 on date of signature and thereafter to transfer ownership of its truck to the Applicants with the agreed value of R150 000.00 and the difference of R350 000.00 to be paid in monthly instalments of R20 000 until the full purchase price is paid.

[23] It is also common cause that 1st Respondent paid an amount of R207 200.00 on 13 April 2012, transferred ownership of the man horse with the value as agreed in their agreement, of R150 000.00 to the Applicants. He also arranged for an amount of R292 800 that was payable to him by Sparax Trading 145 (Pty) Ltd("Sparax") to be paid to the Applicants by having Sparax draw a cheque in their favour to make up for the shortfall in the deposit, which cheque was accepted by the Applicants. He therefore *de facto* ceded his claim of R292 000. Thereafter 1st Respondent took over the business on 16 April 2012 and transferred a trailer to the Applicants followed by two payments totalling R30 0000. all these facts are not denied by the Applicants.

[24] However there is an argument about the value of the trailer and the total monthly payments made. 1st Respondent alleges that the trailer is worth R55 000.00 whilst the Applicants allege that it is R50 000.00. The monthly payments are said to be only R30 000 by the Applicant whilst 1st respondent alleges to have paid R67 000.00.

[25] The Applicants have alleged in their Founding Affidavit and claimed in their summons that resulting from 1st Respondent's default an amount of R612 800.00 was due and owing to it. In their summons no mention is made of the trailer or the amount of R292 000.00. The Applicants only acknowledged in their particulars of claim receipt of the R207 200, the handing over of the heavy duty man horse of R150 000 and instalment payments of R30 000 which equals R387 200.00 leaving a balance of R612.800.00, the amount of the Default Judgment. Nothing further is said about the debt.

[26] On their Application to set aside the Default Judgment, the 1st Respondent referred to the fact that the Applicants have omitted to mention a trailer in the value of R55 000.00 that was also transferred to the Applicants and a claim for R292 800.00 owed to it by Sparax which they ceded to the Applicants. He alleged that Applicants had accepted the cession and thereafter collected the cheque from Sparax as part of the deposit. They proceeded to sue and obtain judgment against Sparax in their favour for the payment of the amount, when the cheque was dishonoured. The judgment was obtained on 12 October 2012 before

they applied for default judgment against him. 1st Respondent argued that the amount that was as a result paid to the Applicants was therefore not R387 000.00 as claimed by the Applicants. Therefore the Registrar was misled by not being informed of the other arrangements between the parties. He alleges the amount of R200 000.00 to have been paid on 31 March 2012 before the signing of the agreement with Applicants accepting the different form of payment. As a defence to the remaining amount he alleged that the Applicants had in breach of their agreement removed certain items from the business and that made it difficult for him to operate the business profitably, as a result the business did not generate the monthly income that was expected from which he was supposed to pay monthly instalment. There is also a contention raised regarding the amount paid by electronic transfer.

[27] In their Founding Affidavit, Applicants now allege, contrary to what is in their particulars of claim, that the man horse was not in a running condition and needed substantial repair work of approximately R100 000.00. The tyres and the battery were missing. They also claim for the first time that the parties as a result agreed to amend the agreement and agreed on a value of R100 000.00 for the man horse. They for the first time also mention the trailer being transferred to them albeit for the value of R50 000 and together with the horseman to have made up the amount of R150 000.00 that was initially agreed upon for the man horse. Applicants at the same time deny that the agreement was ever amended and therefore that the 1st Respondent ceded Sparax's debt of R292 800.00 to them. They argue that no payment was received from Sparax which implies that the R292 800.00 remains owing. However they do not mention that they did not only bank the cheque but also proceeded to enforce the claim by suing Sparax when the cheque was dishonoured. They subsequently obtained a default judgment against Sparax, an indication not only of having accepted the cession but of Applicants enforcing the ceded claim.

[28] The aforementioned facts were not revealed in the summons upon which the Applicants had obtained judgment against the 1st Respondent. The Registrar in that case did not consider these facts when the Default Judgment was granted. Therefore on the facts as established by the 1st Respondent, he had shown good cause for the default judgement to be set aside. Kollapen J therefore exercised his discretion properly when he at the time granted the 1st Respondent the order setting aside the Default Judgment that was granted in the absence of the 1st Respondent. I have left the consideration of 1st Respondent's allegation on the immovable property for proper consideration by the court that will be hearing the application on the 2 prayers postponed sine die.

[29] Kollapen J further properly exercised his discretion when he, even though the 1st Respondent had alleged to have sent a letter to the 2nd Respondent notifying him of the Rescission Application and made him aware of the documents that were filed, took into consideration the interest of the parties and postponed the two prayers that refers to the cancellation of the sale *sine die* with the order that 1st Respondent serve the Application personally on the 2nd Respondent. For that reason there is no justification for the order of Kollapen J to be set aside. By making such an order he had made sure that the prejudice that 2nd Respondent could have suffered as a result of the Applicants failure to oppose the matter is prevented.

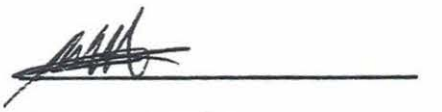
[30] The Applicants have failed to show the *bona fides* of their Application that would justify the prevention of the matter being sent to trial. On their papers the disputes on the facts are apparent since they have now in their Founding affidavit made new allegations upon which their claim is allegedly founded. Interestingly even then they do not dispute what the 1st Respondent is alleging, the transfer of the trailer albeit the R5 000.00 difference on the value, the receipt of the cheque R292 800 and not divulging that they obtained judgment on the cheque. Their claim clearly lacks the *bona fides* inherent in the application. They have failed to make a case for the reversal or setting aside of the order by Kollapen J.

[31] The purpose of rescinding a judgment is 'to restore a chance to air a real dispute, as correctly pointed out by "Mr Leballo, 1st Respondent's counsel. The parties will get a proper opportunity to deal with the apparent disputes and finally deal with the matter in the trial, since there is no advantage or disadvantage that can flow from a rescinded default judgment.

[32] Under the circumstances taking into account the nature of the Applicants claim whose cause of action was not fully pleaded when default judgment was granted, Kollapen J's order was correct and would not be in the interest of justice to set aside.

I therefore make the following order:

1. The Applicants Application for rescission of Kollapen J's order of the 26 August 2013 is dismissed with costs.



N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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