REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 20955/2022

In the matter between:

In the matter between:

HAMZE TRADING (PTY) LTD Applicant

and

A L F ' S T I P P E R S C C

Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 6 May 2024.

JUDGMENT

MEIRING, AJ:

INTRODUCTION

[1] This is an application for the rescission of a judgment granted by default in the respondent's favour on 20 October 2022.

[2] The applicant seeks this relief on two alternative grounds, namely under rule 31(2)(b) of the Uniform Rules of Court or, otherwise, at common law.

FACTS

[3] Both the applicant's affidavits are thin. Contrariwise, in the answering affidavit, over 159 paragraphs and 30 pages, the respondent puts up a wealth of granular detail. Oddly, while in the replying affidavit repeatedly asserting its utmost good faith, the applicant makes no general denial of the averments in the answering affidavit. Also unhelpfully, saying that it was so advised, it pointedly refrains from responding *seriatim* or point-by-point to the contents of the answer. Accordingly, despite the ample rhetoric of denial in the reply, the bulk of the specific factual averments in the answering affidavit must be taken to be admitted. The heft of the applicant's position came to the fore only in its heads of argument.

[4] Fairly considered, then, the central facts forming the backdrop to this application are these.

[5] On or shortly after 14 December 2021, the applicant, Hamze Trading, and the respondent, Alf's Tippers, both duly represented, concluded a written agreement of *locatio conductio*, comprised of a quotation of Alf's Tippers, dated 14 December 2021, and its standard terms and conditions, both with the name Alf's Tippers printed at the top.

[6] The object of the agreement was that the respondent would provide to the applicant tipper trucks with drivers at an hourly rate of R245, fuel and VAT excluded, and calculated on a minimum of nine hours per shift. The applicant was to use them at its mine site at Vioolsdrift, a village in the Northern Cape, on the Orange River –

named it seems for Jan Viool, a Nama fiddler, who sometime in the nineteenth century was wont musically to guide ox wagons across the ford.

[7] On 16 January 2022, four trucks left Elsburg, to Vioolsdrift. On 21 January 2022, another one set off. Upon arrival, after the 15-hour trek, they were put into service.

[8] On 7 February 2022, Tanya Lourenco of the applicant sent an e-mail message to Sarie Horn of the respondent, saying: "*The 5 tippers have been assisting so nicely at the site and therefore we require them for another 252 hours. … Please send us a quote for the 5 tippers for 252 hours each.*"

[9] The applicant thus wanted each tipper to work two shifts a day, which proved to be too onerous in the light of the extreme conditions at the site. Accordingly, the parties agreed that a further five trucks should be delivered to the applicant's site. Thus, the written agreement was amended orally – despite the whole-agreement clause in the terms and conditions and the provision there precluding variation or amendment other than in writing signed by both parties.

[10] On 28 February 2022, another four trucks left Gauteng to the Orange River. On 3 March 2022, the last of the team of ten set off.

[11] While in the founding affidavit the applicant alleges generally that the trucks performed poorly and were already mechanically faulty once they arrived – a position contradicted by Ms Lourenco's e-mail message to Ms Horn, quoted above – the respondent denies this, averring that the root cause of whatever difficulties arose was that the site at Vioolsdrift is "*extremely challenging*", the heat sweltering and the roads poorly maintained, causing considerable wear and tear.

[12] Soon, the contractual relationship between the parties fizzled out. On the respondent's version, which I am enjoined to accept, it terminated the contract on 6 April 2022, in the light of the applicant's failure to make proper payment. In March 2022, the applicant had started querying the number of hours during which work had

been done for which it was being charged, despite, as the respondent says, the hours having been based "*upon time sheets signed off by [the applicant's] supervisor*".

[13] On 6 April 2022, Alf's Tippers collected the full cohort of ten trucks for the long trip back to Germiston.

[14] After various e-mail exchanges between the parties in the following weeks over the amount due and outstanding, on 27 May 2022, under section 345(1)(a)(i) of the Companies Act, 1973, the respondent directed to the applicant a demand for payment of R350,075.54.

[15] On 2 June 2022, the applicant's attorneys responded, contesting the suggestion of Hamze Trading's insolvency, and requesting a debatement of the account (oddly, perhaps, since recordkeeping at the coalface, so to speak, was partially in its hands). The applicant did not accede to the demand for payment.

[16] On 15 June 2022, the respondent issued summons against the applicant for payment of R292,575.54. (The difference between the amounts in the section 345(1)(a) notice and the summons is accounted for by the fact that the holding deposit for the ten trucks came to be credited to Alf's Tippers.)

[17] On 29 June 2022, the sheriff served the summons on the applicant at its registered office, namely 3[…] P[…] C[…], in Royldene, Kimberley. That, as will appear below, is a secure residential complex. On 6 October 2022, under rule 31(5)(b)(iv), a notice of set-down was served at the same address.

[18] In both cases, having made a diligent search, the sheriff decided that there was no other means of effecting service and indeed effected service by affixing the document to the post box of the unit of the applicant. As is borne out by a photograph enclosed with the answering affidavit, the post boxes are located outside the main gate of the complex in a covered space past which cars entering the complex would have to drive. The affixed documents, so the respondent avers,

would have been clearly visible to anyone entering the complex. In the light of the approach the applicant has taken to its replying affidavit, it does not deny this. Indeed, the picture bears this out.

[19] On 22 October 2022, this court (*per* Wright J) granted default judgment against the applicant in an application brought under rule 31(5)(a). On 7 February 2023, a writ of execution was issued against the moveable and incorporeal property of the applicant.

[20] Only on 8 March 2023 did the applicant learn of the default judgment. On 3 April 2023, the applicant brought this application.

THE LAW ON RESCISSION

Introduction

[21] The applicant seeks an order of rescission on two alternative grounds, namely rule 31(2)(b) or at common law.

[22] Rule 31 is one of the Uniform Rules of Court. It is no source of substantive rights. In *Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills (Cape)*, the Supreme Court of Appeal dealt with the similar interplay between rule 42 and the common law, which by parity applies here too:
"*[Rule 42(1)(a)] is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law. That is why the common law is the proper context for its interpretation. Because it is a Rule of Court its ambit is entirely procedural.*"

[23] At common law, there are various grounds upon which a judgment might be set aside. One such case is where judgment was granted by default of appearance on the part of the defendant, provided that good or sufficient cause for the rescission is shown.

[24] Rule 31(2)(b) restates that common-law position, adding the limitation that it applies only to claims that are not for a debt or a liquidated amount (sub-rule 2(a)) and the requirement that the application be brought within 20 days of the applicant obtaining knowledge of the default judgment (sub-rule 2(b)).

[25] Rule 31(2) provides:

"*(2)(a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.*

(b) A defendant may within 20 days after he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit."

[emphasis added]

[26] I turn then to consider what good or sufficient cause is.

Good or sufficient cause

[27] In a series of judgments, our courts have grappled with the meaning of the synonymous notions of "*good cause*" and "*sufficient cause*". The following *dicta*, marshalled chronologically, encapsulate the considerations of which our courts have taken account. Having them serried sequentially, as below, allows one to appreciate how the framing of the test has undergone some changes of emphasis and nuance. It is not uncommon for counsel to alight upon the three requirements stated in *Grant* (see below) or the two in *Chetty* (see below) as if a box-ticking exercise is both necessary and sufficient. The inevitable result is some measure of confusion: are there two or are there three requirements (and are they requirements)?

[28] A good place to start is the eloquent *locus classicus* of *Cairns' Executors v*

Gaarn, a decision of the Appellate Division in its infancy, in 1912. In dealing with the meaning of "*sufficient cause*" as used in rule 12 in the Appellate Division Rules, Innes JA said this:

"*It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive and which it is highly desirable not to abridge. All that can be said is that the applicant must show … 'something which entitles him to ask for the indulgence of the Court'. What that something is must be decided upon the circumstances of each particular application*."

[29] On the eve of the Second World War, in 1938, in *Scott v Trustee, Insolvent Estate Comerma*, the Witwatersrand Local Division (*per* Murray J) observed:

"*If the defendant's conduct is* mala fide *and the Court is convinced that he has no belief in the justice of his case but is merely alleging a defence to delay enforcement of the plaintiff's just claim, he is naturally not entitled to any relief for his default. But where he has never clearly acquiesced in the plaintiff's claim, but actually persisted in disputing it, it seems to me that the Court should be slow to refuse him entirely the opportunity of having his defence heard*."

[30] In 1949, having surveyed among others those two *dicta*, in *Grant v Plumbers (Pty) Ltd*, the Orange Free State Provincial Division (*per* Brink J) said:

"*Having regard to the decisions above referred to, I am of opinion that an applicant who claims relief under Rule 43 should comply with the following requirements:*

(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

(b) His application must be bona fide *and not made with the intention of merely delaying plaintiff's claim.*

(c) He must show that he has a bona fide *defence to plaintiff's claim. It is sufficient if he makes out a* prima facie *defence in the sense of setting out averments which if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the*

probabilities are actually in his favour."

[31] Then, in 1979, in *HDS Construction (Pty) Ltd v Wait*, the Eastern Cape Division (*per* Smalberger J) observed:

"*In determining whether or not good cause has been shown, and more particularly in the present matter, whether the defendant has given a reasonable explanation for his default, the Court is given a wide discretion in terms of Rule 31(2)(b). When dealing with words such as 'good cause' and 'sufficient cause' in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge of fetter in any way the wide discretion implied by these words … The Court's discretion must be exercised after a proper consideration of all the relevant circumstances. While it was said in* Grant's *case that a Court should not come to the assistance of a defendant whose default was wilful or due to gross negligence, I agree with the view … that while a Court may well decline to grant relief where the default had been wilful or due to gross negligence it cannot be accepted 'that the absence of gross negligence in relation to the default is an essential criterion, or an absolute prerequisite, for the granting of relief under Rule 31(2)(b)'*.

It is but a factor to be considered in the overall determination of whether good cause has been shown although it will obviously weigh heavily against the applicant for relief."

[32] Less than a decade later, in 1985, in *Chetty v Law Society, Transvaal*, the Appellate Division (*per* Miller JA) again turned its attention to the question:

"*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 …*

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."
[emphasis added]

[33] In 2003, in *Colyn v Tiger Foods*, the Supreme Court of Appeal (per Jones AJA) said this:
"*I turn now to the relief under the common law. In order to succeed an applicant for rescission of a judgment taken against him by default must show good cause (*De Wet and others v Western Bank Ltd supra*). The authorities emphasize that it is unwise to give a precise meaning to the term good cause. As Smalberger J put it in* HDS Construction (Pty) Ltd v Wait*:*
'When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (*Cairns' Executors* v *Gaarn* 1912 AD 181 at 186; *Silber* v *Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352–3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'
With that as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide*; and (c) by showing that he has a* bona fide *defence to the plaintiff's claim which* prima facie *has some prospect of success (*Grant v Plumbers (Pty) Ltd*,* HDS Construction (Pty) Ltd v Wait supra*,* Chetty v Law Society, Transvaal.*)*"
[emphasis added]

[34] Accordingly, while the Supreme Court of Appeal in *Colyn v Tiger Foods* rests

its statement of the law partially upon the authority of *Chetty*, it unsettles the apparently firm position in that decision, underlined in the quotation above, which came close to doing exactly that against which Innes JA had cautioned in 1912, namely of abridging the wide discretion of the court. In the wake of *Colyn v Tiger Foods*, the correct position is that the court's discretion is wide and that it will generally expect that, in endeavouring to show good cause, an applicant will give a reasonable explanation of default, show that the application is made *bona fide* and that it has a *bona fide* defence to the plaintiff's claim that *prima facie* has some prospect of success. It is not necessary for the applicant to demonstrate both of the *Chetty* legs, on pain of dismissal of the application if both are not satisfied. Rather, it should try to make out a case under each of the three rubrics in *Colyn v Tiger Foods*. While it would be a peculiar case where an applicant for rescission succeeds without, for example, giving a proper explanation for default, it is at least theoretically possible.

[35] In sum, then, to prevail in an application under rule 31(2)(b), an applicant must show that the application was brought within 20 days of its gaining knowledge of the judgment. Next, it must show good cause. To prevail at common law, the applicant must only show good cause.

Debt or liquidated demand

[36] As was the case in *Ellis v Eden; Eden v Ellis*, heard in the Western Cape High Court, I was not addressed on whether the claim in the action was one for a "*debt or liquidated demand*". At first blush, this affects whether the relief is cognisable under rule 31(2)(b) or only at common law. In the action, the respondent indeed claimed a debt or liquidated demand. With the particulars of claim was enclosed a certificate of balance dated 9 June 2022.

[37] In *Ellis v Eden*, the court observed:

"*The cases are not harmonious as to whether, in the case of a claim for a debt or liquidated demand, a plaintiff may seek default judgment from the Court rather than the registrar. In this Division, it was held in* Snyders *that rule 31 in its current form*

does not remove the Court's jurisdiction to grant default judgment in such cases, and in my experience this is often done."

[38] The court continued:

"*The learned authors of* Erasmus Superior Court Practice *submit that if a Court, rather than the registrar, grants default judgment on a claim for a debt or liquidated demand, neither rule 31(2)(b) nor rule 31(5)(d) applies, and that a defendant must seek rescission in terms of the common law or rule 42(1). In my opinion, however, there is no rational basis for excluding such a case from the scope of rule 31. The relevant parts of the rule were no doubt drafted on the assumption that, in the case of a debt or liquidated demand, the plaintiff would follow the less expensive procedure laid down in rule 31(5). But where, on such a claim, default judgment is instead granted by the Court, there is no reason to deprive a defendant of the benefit of rule 31(2)(b) and, conversely, there is no reason why such a defendant should not be bound by the 20-day time limit specified in rules 31(2)(b), as would have been the position in terms of 31(5)(d) had the default judgment been granted by the registrar. Reading rule 31 purposively, I consider it to be necessarily implied that rule 31(2)(b) applies where, for any reason, the Court rather than the registrar has granted default judgment on a claim for a debt or liquidated demand*."

[39] I agree with this exposition. The fact that this is a claim for a debt or a liquidated amount, but the court granted default judgment in an application under rule 31(5)(a), should not deprive an applicant of access to the machinery of rule 31(2)(b).

[40] The applicant says that it became aware of the judgment on 8 March 2023, when its attorney advised it that default judgment had been obtained on 22 October 2022. This application was delivered on 3 April 2023, within the 20-day window. In the answering affidavit, the respondent does not contest this.

[41] Accordingly, both as far as rule 31(2)(b) and the common law go, this application turns on whether the applicant has shown good cause in the sense described above.

[42] In the debate between the parties over good cause, two questions predominated, namely whether there was a proper explanation for the applicant's default – which centred upon the facts surrounding service of the summons – and whether the applicant had put up a *bona fide* defence with at least *prima facie* prospects of success. At various junctures, the respondent also directed at the applicant aspersions of a lack of general *bona fides*.

[43] To determine the question of good cause, I turn to consider the arguments mounted over the service of the summons and the defence that the applicant has described.

SERVICE

The purpose of service

[44] It is a fundamental principle of our legal system that someone is entitled to get notice of legal proceedings against them. The purpose of a summons or a notice of motion is to implicate or involve a defendant or respondent in a suit. Although an action is commenced when summons is issued, the defendant is not involved until there has been service. It is only then that a formal claim is made upon it. Only once service has been effected of the summons or notice of motion, is the defendant or respondent implicated.

[45] Rule 4(1)(a) provides that service of any process of the court directed to the sheriff "*shall be effected by the sheriff in one or other of the following manners*". Across paragraphs (i) to (ix) follows a list of modes of service, each of which is framed in the alternative to the others (and some of which are specific to certain types of defendants).

[46] Rule 4(1)(a)(iv) says that, if the person to be served has chosen a *domicilium citandi et executandi*, the sheriff might effect service "*by delivering or leaving a copy*" of the document at that chosen *domicilium*.

[47] In turn, rule 4(1)(a)(v) provides that, for a corporation or company, the sheriff might deliver "*a copy [of the document] to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law …*".

[48] Upon a survey of the cases, a tension appears between two opposing goals. On the one hand, there is the understanding that the notion of service denotes a document being "*legally delivered*". In other words, as long as service has been effected in compliance with one of rules 4(1)(a)(i) to (ix), that should suffice. The drafters of the Uniform Rules considered that each of those would be effective service. On the other hand, over and above compliance with one of the above subparagraphs of rule 4(1)(a), there is an overriding concern that service should be effective. In other words, the defendant or respondent should obtain actual notice.

[49] So, for instance, in the context of service at a *domicilium* address, in *Amcoal Collieries Ltd v Truter*, the court held:
"*It is a well-established practice … that, if a defendant has chosen a* domicilium citandi*, service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found*."

[50] Amcoal Collieries was referred to in *Absa Bank Limited v Mare and Others*, in which this court observed thus:
"*The delivery requirement at a* domicilium citandi*, as was said by Margo J in* Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd *1984 (3) SA 834 (W) at 849A–B,* '… presupposes delivery in any manner by which in the ordinary course the notice would come to the attention of and be received by the lessor. The obvious method would be by handing the notice to a responsible employee, or by pushing it under the front door, or by placing it in the mailbox.'"

[51] The question of effective service will always be a contextual and fact-specific

one, tested against the principle that defendants and respondents are implicated only once they have been served and thus have notice.

The parties' contentions on service

[52] The applicant assails the service effected at the post box in Royldene. Its main complaints over service fall under three heads. I deal with those first.

[53] First, the applicant says that in the lease agreement the parties chose a *domicilium citandi et executandi* for the applicant. Accordingly, the respondent was obliged to use that address. Second, it argues that, since there was no employee at its registered address, service of the summons there was not effective service. Third, the applicant contends that the respondent ought to have effected service upon the attorneys representing it.

Domicilium citandi et executandi

[54] In the *locatio conductio*, the parties chose a *domicilium* address for the applicant. Clauses 68–70 of the respondent's terms and conditions read:

> "*The Hirer chooses the address of the Site and the email address and facsimile number set out in the quotation and tax invoice as its addresses or facsimile number at which all notice, legal processes and other communications must be delivered for the purpose of this agreement.*
>
> *The Hirer may by written notice to Alf's Tippers CC change its chosen address to another physical or email address or change its facsimile number, provided that the change shall become effective on receipt of the notice by Alf's Tippers CC.*
>
> *Any notice to the Hirer (a) delivered by hand to a responsible person during ordinary business hours at its chosen address; or (b) faxed to its chosen facsimile number; or (c) mailed electronically shall be deemed to have been received in the case of delivery by hand, faxing or emailing, on the day of*

delivery, faxing or emailing thereof."

[55] Accordingly, the *locatio conductio* came about a bit like a contract of adhesion might have done: that the site is the applicant's *domicilium* address appears among the respondent's pre-printed terms and conditions. Yet, clause 69, quoted above, provides that, had the applicant been dissatisfied with that arrangement, it could have changed its *domicilium* address by written notice. It did not exercise its right under clause 69, and the pre-printed *domicilium* address remained in place.

[56] The question then arises as to the meaning and effect of that agreement: whether it obliged the parties to use the *domicilium* address to the exclusion of other modes of service provided for in rule 4. Certainly, clause 68 is framed in peremptory language: "*at which all notice, legal processes and other communications must be delivered for the purpose of this agreement*".

[57] In the light of how the agreement came about, and the terms of clause 68, it is surprising that in the answering affidavit the respondent goes as far as to say this: "*It would not make any sense for the respondent to serve summons at the site, given that the applicant's registered address is in Kimberley and address of its principal place of business in Bedfordview, a distance of 900km and 1300km from Vioolsdrift, respectively.*" One wonders why a contracting party would propose and agree to a *domicilium* address for the other party – indeed have it printed among its terms and conditions, for general use – if it was minded that the use as such of that address (at a mining site) "*would not make any sense*".

[58] Be that as it may, the respondent sets out no facts, other than the distance between the site and the applicant's registered office and principal place of business, respectively, to bear out its contention that service at the site "*would not make any sense*". Accordingly, I cannot find that, because service at the site was an impossibility, the respondent was for that specific reason permitted, despite clause 68, to use one of the other modes of service provided for in rule 4(1). That would have been an easy way out of the quandary.

[59] Yet, accepting that – contrary to the respondent's suggestion – effective service could be made at the site, the question is whether the respondent might nevertheless have elected to serve at the registered office of the applicant.

[60] The applicant relied on the decision of this court in *Sandton Square Finance (Pty) Ltd and others v Biagi, Bertola and Vasco and another*, which held: "*The mere fact that a domiciliary address has been chosen does not preclude effective service through one of the other methods prescribed under the Uniform Rules of Court*." This *dictum*, it contended, was approved of and elaborated upon in *Motloung v Meyersdal Nature Estate Homeowners Association*, where this court held that "*the choice of a* domicilium *address by a defendant does not preclude or prevent a plaintiff from invoking an alternate method provided for in terms of Rule 4, if use of such alternate method is necessary in order to achieve effective service on the defendant*".

[61] Neither of those judgments quotes the words in which the *domicilium* clauses in question were couched. Accordingly, it is not clear whether they were only permissively framed, or peremptorily, as here.

[62] At first blush it appears that *Motlaung* might indeed go further than *Sandton Square*, by holding that service should in the first place be effected at the *domicilium* address and, only if it is "*necessary*" to achieve effective service, might another mode of service under rule 4(1)(a) be used. This is how the applicant construed *Motloung*, namely as holding that "*necessity*" was indeed a requirement for service in another way where there is a *domicilium* address.

[63] The question, then, is whether service that was effected by affixing at the registered office of the applicant could be valid service or whether it was precluded by clause 68 of the respondent's standard terms and conditions.

[64] In my view, the answer resides in the following considerations.

[65] I might first say that, had the *Motloung* court intended thus to hem in the

broader statement of the law in *Sandton Square*, it would have done so explicitly. The *dicta* in paragraphs 17, 18 and 25 of *Motloung* can be read consistently with *Sandton Square*, namely that the choice of a *domicilium* clause does not preclude the use of one of the other modes of service in rule 4(1)(a). Naturally, whenever service is at issue, its effectiveness is paramount. The applicant's position, allowing the use of another mode of service in the presence of a *domicilium* address only if it is necessary for effective service, would make the sheriff, more than they already are, the unhappy arbiter of effectiveness, which would likely lead to a spate of disputes.

[66] What is more, in applying the principles in *Natal Joint Pension Fund v Endumeni Municipality* to discern the meaning of the *domicilium* clause in the *locatio conductio*, it must be understood in its proper context, part of which is rule 4(1)(a), against the background of which it necessarily functions.

[67] The drafters of the rules chose to frame rule 4(1)(a) thus: "*Service of any process of the court directed to the sheriff and … any document initiating proceedings shall be effected by the sheriff in one or other of the following manners …*"
[emphasis added]

[68] The general tenor of the language is peremptory. The sheriff must use one or other of the methods set out in rule 4(1)(a). But that is hardly determinative of this question. As I observe above, rule 4(1)(a)(iv) provides that service at a chosen *domicilium* address is one of "*the following manners*". The drafters of the rules constructed rule 4(1)(a) to facilitate effective service on a defendant or respondent. The various alternative modes of service, some applicable only to specific cases, were set in place so that the likelihood of effective service on a defendant was increased.

[69] Section 23(3) of the Companies Act, 2008, provides that each company must continuously maintain at least one office in South Africa, and register the address of that office (or of the principal office, if there are more than one) by providing that

information on its notice of incorporation.

[70] Accordingly, it is plain that a company's registered office is important. Each company must have one. A company will apply its juristic mind to the question of what an appropriate and effective registered office would be for it. Service should be expected to be routine at that address. It is perhaps not fanciful to say that, in the light of the importance thus accorded to it by statute, that address is something like a statutorily mandated *domicilium* address. In other words, while a company might for whatever reason choose a specific *domicilium* address in a contract, as a matter of law it must always have a registered office that it has chosen. In *Malvern Trading CC v Absa Bank Ltd*, this court observed: "*The rationale behind a registered address is indeed that third parties can with ease communicate with a company or corporation or serve process at the registered address. This is in the context of the fact that it is often difficult for an outsider to determine the locality of a company or close corporation's principal place of business.*" Indeed, not surprisingly, rule 4(1)(a)(v) provides that, in the case of a company, the sheriff might effect service at its registered office.

[71] The peculiarity of the facts of this case then come into focus. The applicant had no role in the choice of the *domicilium* address. While it was entitled to change its *domicilium* address from the site stipulated in the respondent's standard terms and conditions, as a matter of practical reality this was highly unlikely ever to happen. Having received the standard terms and conditions, the applicant probably gave not a second thought to the *domicilium* address effectively foisted upon it.

[72] Accordingly, on these facts, where the site as *domicilium* address was something of the respondent's choosing, I cannot see how – even if it is as peremptorily worded as here – a *domicilium* clause might be construed as excluding the entitlement of the sheriff to serve in another way, especially not under rule 4(1)(a)(v), which hinges upon a company's statutorily ordained registered office.

[73] Accordingly, I find that this *domicilium* clause, however peremptorily worded, does not exclude the power of the sheriff to serve under one of the other

subparagraphs of section 4(1)(a).

[74] I leave open the question whether there might be *domicilium* clauses, worded differently, having that effect.

What rule 4(1)(a)(v) permits

[75] The applicant's second complaint over service is this. The decision of the Eastern Cape Division in *Magricor (Pty) Ltd v Border Seed Distributors CC* precludes service under rule 4(1)(a)(v) at a registered address when no-one – be it an employee of the defendant or anyone else – is present at that address. Accordingly, for this reason, the respondent could not permissibly affix the summons to the post box at the applicant's registered office (nor indeed to its main door).

[76] The core of the reasoning of the *Magricor* court is this passage:

> "*[T]he jurisdictional requirements for service by the sheriff by affixing a copy of process to the main door of a company's registered office or principal place of business in the court's jurisdiction, are (a) that a responsible employee of the company must be present at such office or place of business; and (b) that such employee must be unwilling to accept service.*
>
> *If there is an employee willing to accept service on behalf of the company, there would have been good and valid service upon the company. Where not a single employee amongst those present is willing to accept service on behalf of the company, there would be good and valid service upon the company if the sheriff were to affix the process to the main door of a company's registered office or principal place of business. I respectfully align myself with the view of Hartzenberg J when he had the following to say in this regard in* Chris Mulder Genote Ing v Louis Meintjies Konstruksie (Edms) Bpk:
>
> 'Indien die kwessie van betekening van die dokument later 'n twispunt sou word sou dit vir litigante van groter hulp wees om te weet dat meneer X of mejuffrou Y die dokument ontvang het as bloot om te weet dat dit teen 'n deur opgeplak was. Daar moet derhalwe by 'n geregistreerde adres nagegaan word of daar werknemers is van die besigheid wat daar bedryf word. As

daardie dan die geregistreerde adres van die maatskappy is aan wie betekening moet geskied moet 'n verantwoordelike werknemer opgespoor word en indien so 'n werknemer bereid is om betekening namens die maatskappy te aanvaar moet aan daardie persoon beteken word. Dit is denkbaar dat die werknemers by so 'n adres om een of ander rede nie bereid mag wees om betekening namens die maatskappy te aanvaar nie. Dan mag betekening geskied deur die dokument teen die deur vas te plak soos wat subreël (v) van Hofreël 4(1)(a) die adjunk-balju toelaat.'

The purpose of rule 4(1)(a)(v) is to ensure that the process served by the sheriff comes to the attention of the juristic entity. It is for that reason that the subrule prefers service on an employee of the company. The subrule makes provision for two scenarios of service on a company. The first is 'by delivering a copy to a responsible employee'. Such an employee would obviously be willing to accept service. The second scenario is when the sheriff finds an employee or employees of the company at the company's registered address but not a single one is willing to accept service on behalf of the company. Only then does the subrule authorise service 'by affixing a copy to the main door'. It will be noticed that in both scenarios there would have been personal interaction between the sheriff and the employee to whom the process was delivered, on the one hand, and the sheriff and the employee who was unwilling to accept such service, on the other hand. In the first case the employee would bring the process to the company's attention. In the second case, the sheriff's return of service would reflect that he spoke to employee X who was unwilling to accept service. In both cases the employees, the employee who accepted service and the one who was unwilling to accept service, would be of great assistance, through his willingness or, ironically, unwillingness, to prove service in terms of the subrule."

[77] The respondent's position is that *Magricor* was wrongly decided. Of course, it bears emphasis that this court is not bound by that ruling. Indeed, in *Malvern Trading CC*, without considering the contrary authority in *Magricor* and without explaining its own reasoning, this court accepted that rule 4(1)(a)(v) has a different meaning:

"*The return of service in this matter reveals that the notice of motion was*

served at the registered address of the applicant, by affixing it to the principal door, as no other manner of service was possible. It was recorded by the sheriff that the premises were vacant. There was obviously no employee of the applicant present who could accept service.
Consequently, valid service was effected in terms of Rule 4(1(a)(v)."

[78] What is more, the facts in *Chris Mulder*, upon which the *Magricor* court relied, were rather different. An order for provisional liquidation stipulated that it had to be served on the respondent company at its registered office, which was at the office of a large auditing firm. The sheriff's return said that, since, after a "*ywerige*" search, no responsible person had been found, the order was affixed to the main door of the office. Upon enquiry by the Judge, it transpired that the practice of this particular sheriff's office was that, where service was effected at the office of a firm of professionals like auditors or attorneys, and no partner was present, it would be accepted that there was no responsible person for purposes of service. The receptionist had taken the sheriff to the board indicating that it was the registered office of the company, whereupon he affixed the order to the main door. The receptionist promptly removed it, acting as if it had been served upon her.

[79] This is the context of the quotation from *Chris Mulder* in *Magricor*. Indeed, the extract above from *Chris Mulder* is preceded by this statement:

"*Dit lyk vir my in ieder geval uit 'n praktiese oogpunt baie meer logies om wanneer betekening by 'n ouditeursfirma, of dergelike firma, geskied, 'n afskrif van die dokument te oorhandig aan 'n persoon wat hom of haarself identifiseer en wat betekening aanvaar eerder as om bloot die dokument teen 'n deur vas te plak.*"

[80] Accordingly, in *Chris Mulder* there were indeed other persons present at the registered office in question. Yet, since there was no partner in the auditing firm present, the sheriff chose to affix the order to the front door, ignoring the non-partner employees at that time present at the firm. Accordingly, the *dictum* from *Chris Mulder* quoted in *Magricor* and recited above does not speak to the case where no-one is

present at the registered office.

[81] In *Magricor*, the court went on to observe:

> "*What about the situation where the company is locked and there are no employees or other persons at its registered office? In my view the subrule does not make provision for that scenario. That scenario will obtain if the word 'willing' is deleted from the subrule. Without that word the subrule would mean that service may be effected by the sheriff by affixing a copy of the process to the main door 'if there be no [responsible] employee to accept service'. In other words, affixing would then have been permitted in the absence of responsible employees. But the drafters of the subrule insisted on the insertion of the word 'willing' which, in my view, relates to the personal interaction dealt with above. The fact that the subrule does not cater for the service of process on a company where its employees are absent to accept service, is a* lacuna *best dealt with by the drafters of the rules.*
>
> *In my view, the absence of employees of a company from the registered office or principal place of business does not permit the sheriff to effect service by affixing the process to the company's main door at its registered office or principal place of business. For that kind of service to be effected the employees of the company must be unwilling to accept service.*"

[82] Thus, the *Magricor* court's reasoning turns upon the drafters' insertion in rule 4(1)(a)(v) of the adjective "*willing*" after the noun "*employee*". However, there is another way of reading the condition "*if there be no such employee willing to accept service*", namely encompassing both where there is an employee but she refuses to accept service (surely a rare occurrence) and where there is no employee whatsoever. In the latter case, it does no violence to the language nor, in my view, to the logic of rule 4(1)(a)(v) to say that there is also no employee willing to accept service. In other words, the condition "*if there be no such employee willing to accept service*" can quite easily be read to include both where there are unwilling employees and no employees at all. In my view, if the drafters of the rules had meant to insert this condition, they would have done so clearly and explicitly.

[83] The *Magricor* court concedes that its reasoning leads to a *lacuna*. The Latin maxim *ut res magis valeat quam pereat* encapsulates the canon of construction that it is preferable to give effect to a provision rather than having it fail. It is applied when alternative readings are possible, one of which would achieve the manifest purpose of the provision and one of which would reduce it to futility or absurdity. The interpreter is enjoined to choose the one that gives effect to the purpose of the provision. By parity of reasoning, the alternative construction of rule 4(1)(a)(v), set out in the previous paragraph, is in accord with this canon of construction.

[84] For these reasons, I respectfully disagree with the reasoning in *Magricor*. In my view, rule 4(1)(a)(v) permits service by affixing at the main door of a registered office where, as in *Malvern Trading*, there is no-one to be found at that office.

Attorneys of record

[85] In the third place, the applicant contends that, from at least 2 June 2022, twenty-four days before the summons was issued, the respondent and its attorneys of record knew who the applicant's attorney was, when the latter answered the demand under section 345(1)(a) of the Companies Act. In that letter, it said that those attorneys "*have instructions to oppose any legal action that your client intends to take against our client*".

[86] Accordingly, the applicant asks rhetorically why the respondent "*persisted with service on the registered address full well knowing the identity and contact details of Hamze's attorney of record*".

[87] Rule 4(1)(a)(aA) provides:

> "*Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings*."

[88] Yet, service under rule 4(1)(a)(aA) might be effected only if a party is represented by an attorney who had formally placed themselves on record as representing that party in proceedings already instituted.

[89] In *ABM Motors v Minister of Minerals and Energy and others*, the court observed:

> "*Secondly, this is not what 'attorney of record' means in the context of rule 4(1)(aA). In the context of the Uniform Rules of Court, an attorney of record is one who has formally placed himself on record as representing a party in legal proceedings before the court. In* BHP Billiton Energy Coal South Africa Ltd v Minister of Mineral Resources and Others*, the court said, with reference to* Herbstein & Van Winsen*, that it is apparent that rule 4(1)(aA) applies to proceedings already instituted, so that it in effect applies to ancillary and interlocutory applications.*"

[90] Accordingly, there is no substance to the applicant's complaint in this regard.

[91] Indeed, rule 4(1)(a)(aA) could not permissibly have been used here.

Other complaints over service

[92] The applicant also raises these complaints over service.

[93] First, it says that the sheriff's return of service states that service was effected under rule 4(1)(a)(iv), namely at the applicant's *domicilium* address, whereas it was, of course, actually effected at the applicant's registered office, at Royldene in Kimberley.

[94] "*The service*" the applicant proceeds to say, "*was therefore in terms of Rule 4(1)(a)(v) and not Rule 4(1)(a)(iv) as stated by the sheriff and therefore already defective and misleading as it presented to the court that this was the address chosen by the parties, which it was not*".

[95] The respondent correctly observes that, while the incorrect subparagraph of rule 4(1)(a) was indeed cited, both returns go on to say that it was the "*registered address*" of the applicant.

[96] While a return ought naturally to be as accurate as possible, the reality is that many are far from epitomes of precise drafting. A court should be wary of exacting too high a standard, especially where here, despite the error, there could not have been any confusion.

[97] The sheriff made an error. There is no factual basis for the applicant's speculative suggestion that the attorney of the respondent had instructed him "*to serve under the incorrect subparagraph …*"

[98] The applicant also complains that the sheriff's returns did not contain the statement that he had verified the registered address of the applicant by way of a board present there. The applicant refers to paragraph 9.19.3 of the practice manual of January 2017. The respondent says that that manual had been overtaken by two others. Yet, the requirement that the sheriff make a statement to the above effect is qualified by a requirement that, in the absence of such a statement in the return, the registered address "*must be proved by filing in the court file an official document proving the registered address*". In the default application, the respondent did just that, under oath.

[99] There is no merit in these arguments.

Effective service

[100] Accepting, then, that service could be effected at the registered office of the applicant, in the face both of the *domicilium* clause in the writing recording the *locatio conductio* and the fact that there were no employees of the applicant present there, whether willing to accept service or otherwise, the question arises whether the service in question was effective.

[101] In both returns, the sheriff says that, having made a diligent search, he decided that there was no other means of effecting service and he then indeed effected service by affixing the document to the post box of the unit of the applicant.

[102] Surprisingly, it is hard to find authorities that speak to facts like these. Two judgments that are tangentially instructive are these.

[103] In *BJB Project Services v Reatlegile Projects* CC, this court held:

> "*[Affixing to the main door] cannot be construed to mean by sticking the process under the principal door, although this would have readily come to the applicant's attention. However, I am concerned by the averment that the intercom was not working. If this is the case, the process could only have been affixed to the outer perimeter gate, which would not have been sufficient.*"

> [104] In *Mathome Training Development (Pty) Ltd v Finsch Diamond Mine Training Centre & One*, the Northern Cape Division, in Kimberley, observed:
>
> "*The difficulty encountered in this matter is that though Rule 14(1)(a)(iv) allows for service at a chosen* domicilium citandi*, the defendants chose a Post Office Box as their* domicilium*.*
>
> *…*
>
> In casu*, and having chosen a Post Office box as* domicilium*, it is difficult to imagine a situation where the sheriff would be able to hand over the process to a person at the* domicilium*, neither slipping it under the front door nor affixing it thereto. The sheriff, literally interpreting the Rule, delivered a copy of the summons at the chosen* domicilium *by affixing it to the postbox. Had this been the only form of service, it would most likely be found not to be good service in terms of the Rule in light of the* Mare *judgment. However the sheriff went further and sent the summons by registered mail to the chosen* domicilium*.*"

[105] The approach in both those decisions is a conservative one, requiring a significant measure of fidelity to the words in which rules 4(1)(a)(iv) and (v) are cast.

[106] Perhaps nearer the other end of the continuum is *Arendsnes Sweefspoor CC v Botha*. There, the sheriff attempted service on the registered address of the defendant only to be told that the defendant had ceased trading at the premises. All that remained on the site was a restaurant operated by the son-in-law of the defendant's sole member. Upon ceasing trading, the defendant had failed to deregister the company. Accordingly, its registered office was still at the premises. The sheriff served the summons on an employee of the restaurant, who failed to give the summons to the defendant. The defendant's contention was that, since he had received a copy of the summons neither from the sheriff, nor from Mr Pretorius, the employee in question, the summons had not been properly served. The Supreme Court of Appeal held that this form of service constituted substantial compliance with rule 4(1)(a)(v).

[107] Nevertheless, *Arendsnes* points to the danger of service on a person unrelated to the defendant. There, the summons did not reach the defendant.

[108] In the light of these decisions, I say this. It is unfortunate that the applicant chose a registered office that it must have known would make service under rule 4(1)(a)(v) very difficult if not impossible. Yet, it is not this court's role to punish the applicant for that decision.

[109] Contrariwise, it is also unfortunate that the sheriff did no more than affix the summons and the notice of set-down to the post box in question. I have no idea what means he used to do the affixing. While the photograph of the entrance to the complex in Royldene indeed indicates a degree of enclosure, photographs can be deceptive. I have no way of knowing whether at times the entrance becomes a wind tunnel in which documents, however sturdily affixed, might be swept away. While the sheriff says that there was no other means of effecting service, had he done more, by also depositing a copy in the post box itself or by handing it to a security guard at the entrance of the complex – the latter in pursuance of *Arendsnes* – I might have been more sanguine on the effectiveness of the service.

[110] It also must not be forgotten that the respondent had various other means at its disposal of reaching the applicant. Upon receiving the return from the sheriff, it might well have adopted a more cautious approach by ensuring that it also used other means to bring the summons and the notice of set-down to the attention of the applicant.

[111] In sum, for all these reasons, I do not consider the service that was effected at the post box to the unit in question to have been effective service under rule 4(1)(a)(v). It was not in compliance with the subrule, which, where there is no employee present, allows affixing to the main door of the applicant.

[112] While the sheriff asserts that no other means of service was possible, it is my considered view that more might have been done to achieve effective service under rule 4(1)(a).

***Bona fide* defence**

[113] The applicant relies upon the decision of the Supreme Court of Appeal in *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* as far as the requirement goes that an applicant set out its *bona fide* defence for purposes of rescission:

> "*It is trite law that an applicant in an application for rescission of judgment need only make out a* prima facie *defence in the sense of setting out averments which, if established at trial, would entitle her or him to the relief asked for. Such an applicant need not deal fully with the merits of the case and produce evidence that shows that the probabilities are in its favour. That is the business of the trial court. The object of rescinding a judgment is to restore the opportunity for a real dispute to be ventilated.*"

[114] The Supreme Court of Appeal added:

> "*[F]or the appellant to be successful in its application for rescission of judgment, it needs to set out averments which, if established at trial, would entitle it to the relief asked for. It need not deal fully with the merits of the case and produce evidence that shows that the probabilities are actually in its*

favour."

[115] As I observe above, the applicant's papers are wafer thin. The founding affidavit comprises 35 paragraphs over nine pages. The replying affidavit has 28 paragraphs over five pages. The lion's share of the averments in both are devoted to the question of service.

What the applicant says its *bona fide* defence is

[116] As to its *bona fide* defence, under the heading "DEFENCE" in the founding affidavit the applicant says only this:

> "*Hamze kept record of the hours that the trucks were working at the Vioolsdrift site. Alf's provided three trucks with serious mechanical problems, in terms of the agreement. The three trucks couldn't work due to the mechanical defects, which were not the responsibility of Hamze. This allegation will be proven by the leading of evidence from the employees at the Vioolsdrift site.*
>
> *The essence of Hamze's defence is that the quantum calculated by Alf's is incorrect and disputed. Alf's charged Hamze for at least three trucks, which couldn't perform services due to mechanical problems.*"

[117] In the earlier part of the founding affidavit, in which the applicant's deponent sets out what he calls the background, he says that "*[d]uring the period January to March 2022, Hamze raised concerns in relation to the agreement*", which included "*continuous poor performance of the trucks, which were already mechanically faulty when they arrived at the mining site, causing delays*", and "*incorrect billing, resulting in the applicant being overcharged for hours worked by drivers when no work was performed*".

[118] He adds that a "*dispute arose between the applicant and respondent regarding billing hours and poor performance of the trucks that were already defective when arriving on site pertinently trucks 120, 121 and 122*".

[119] These are broad and vague averments. The applicant does not set out

specific facts from which its defence appears, as is required of the applicant in this rubric of an application for rescission.

[120] Over and above this difficulty, there are various other difficulties, too, with the account of the applicant's *bona fide* defence, read, as it must be in the light of all the other facts it sets out in its papers.

Factual inaccuracies in the applicant's account

[121] The applicant's account of the contract and its implementation is riddled with puzzling errors.

[122] While in its initial written form the contract was for five tipper trucks, the applicant soon asked that five more be dispatched. Accordingly, construed in totality, the contract was for ten tipper trucks. Yet, the applicant's version on oath is to the effect that only five tipper trucks were dispatched to its site. It states it in two places in the founding affidavit. This is obviously wrong.

[123] It is contradicted by *inter alia* the e-mail message of the applicant of 22 April 2022, once the contractual relationship between the parties had already unravelled, in which it sent a reconciliation to the respondent, a copy of which is enclosed with the answering affidavit, in which ten tippers, each with an assigned number, are listed.

[124] Bizarrely, the answering affidavit having clearly apprised the applicant of its factual error in this regard, in the replying affidavit the applicant's deponent refrains from addressing this, by acknowledging his earlier mistake and offering some explanation for it. He simply ignores it.

[125] As I say above, the applicant also says that "*[d]uring the period January to March 2022, Hamze raised concerns*" *inter alia* with "*continuous poor performance of the trucks*". Yet, the e-mail message to which I refer above that Ms Lourenco sent to Ms Horn on 7 February 2022 mentions how "*nicely*" the first five tipper trucks were

performing.

[126] In paragraph 10 of the founding affidavit, the applicant's deponent says that the contract "*terminated on or about due to the unresolved disputes*" [*sic*], apparently omitting the date. In the following sub-paragraph, he says that the respondent recalled its trucks on 11 March 2022, suggesting that that is the date omitted just before. Yet, the truth of the matter, borne out by contemporaneous documents, is that the contract was still being implemented in early April 2022. Enclosed with the answering affidavit is a time sheet recording work performed on 4 and 5 April 2022. It is signed off by Ms Zandramé Brits of the applicant. It is consistent with the respondent's version in the answering affidavit that it recalled its cohort of ten trucks only on 6 April 2022.

[127] Accordingly, the statement in the next sub-paragraph is also falsified, namely that, after the date 11 March 2022, the respondent "*refused to engage*" with the applicant. The contract was then still in train. Many engagements occurred.

[128] Contrary to the terms of the *locatio conductio*, the computation of 12 April 2022 that the applicant prepared, excluded VAT, which had to be added to the quoted rate.

[129] These are the most salient of the factual inaccuracies in the applicant's affidavits.

[130] In sum, the version of the applicant is riddled with demonstrable factual errors, which it did not correct in reply. It is hard to see how the applicant's deponent could have committed all those errors and blithely have stuck to that version once the answering affidavit showed them up.

[131] In a sense, the applicant put up a largely fictional account. This being so, it is hard for this court overall to give credence to its version.

Unexplained difficulty in the applicant's defence

[132] The certificate of balance enclosed with the particulars of claim lists various *quanta* corresponding with specific invoices that the respondent had provided to the applicant. It is those amounts that total the amount for which default judgment was granted to the respondent.

[133] The respondent says that the invoices were created on the basis of weekly time sheets that were filled in by the drivers in charge of the various tipper trucks. A copy of five examples of such time sheets was enclosed with the answering affidavit. They reflect the very process that the respondent described. In each case, at the foot they bear the signature of a supervisor.

[134] While the applicant speaks of "*incorrect billing, resulting in the applicant being overcharged for hours worked by drivers when no work was performed*" and while the applicant concedes that three of the second team of five trucks experienced difficulties, the applicant sets out no facts to demonstrate precisely what its complaint is.

[135] It does not say that drivers committed fraud by filling out false time sheets, which served to pull the wool over the supervisors' eyes. In the context of the process of time sheets being approved by the applicant's supervisors and those in turn being used to generate the respondent's invoices, the applicant would need to make such an allegation supported by some facts, or provide another cogent explanation as to how this process, in which it participated at its site, could have produced incorrect invoices.

[136] The applicant does not do so. It leaves the court entirely in the dark.

Conclusion on *bona fide* defence

[137] For all these reasons, I cannot find that the applicant has demonstrated that it

has a *bona fide* defence to the respondent's claim that *prima facie* has some prospect of success.

[138] The facts here are markedly different to those in *EH Hassim Hardware*, upon which the applicant relied. There the court had the benefit of a clearly delineated counter-claim that the applicant for rescission was minded to bring.

[139] Here, despite my best efforts, I cannot see what the factual basis of the applicant's defence might be. Over and above its broad, vague, and hard-to-fathom assertions of an overpayment, it fails to plead the simple facts that would permit that conclusion.

[140] That is what an applicant for rescission is enjoined to do.

DISCRETION

[141] In the light of what I say above, I do not consider that it would be a judicial exercise of my discretion to grant the rescission sought. The applicant has failed to plead the facts that might underpin a cognisable *bona fide* defence. What is more, in the light of the remarkable way in which the applicant's affidavits have been drawn, it is not possible to find that it has demonstrated a *bona fide* intention to resist the respondent's claim.

COSTS

[142] The costs are to follow the result.

ORDER

1. The application is dismissed.
2. The applicant is to pay the costs of this application, including the costs

of counsel.

J J MEIRING
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing:	15 November 2023
Date of judgment:	6 May 2024

APPEARANCES

For the applicant:	Adv C Britz
Instructed by:	Fredrick Inc. Attorneys
For the respondent:	Adv C van der Merwe
Instructed by:	Warffemius Van der Merwe Inc.