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

Case no: 25312/2016

1.	REPORTABLE:	No
2.	OF INTEREST TO OTHER JUDGES:	No
3.	REVISED:	No

DATE: 4 November 2021

SIGNATURE OF ACTING JUDGE:

In the matter between:

MPOYANA LAZARUS LEDWABA N.O. Applicant

and

MILONG LAZARUS MTHEMBU First Respondent

LANNIS FATHER MAKUME Second Respondent

THE REGISTRAR OF THE DEEDS OFFICE JOHANNESBURG Third Respondent

THE ESTATE MAGISTRATE, JOHANNESBURG MAGISTRATE COURT Fourth Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG Fifth Respondent

THE MASTER OF THE HIGH COURT, PRETORIA Sixth Respondent

In re:

MILONG LAZARUS MTHEMBU Applicant

and

LANNIS FATHER MAKUME First Respondent

THE REGISTRAR OF THE DEED OFFICE Second Respondent

THE ESTATE MAGISTRATE, JOHANNESBURG MAGISTRATE COURT Third Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG Fourth Respondent

JUDGEMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 12h00 on 4 November 2021.

PRETORIUS AJ:

[1] The applicant applies for leave to appeal against the whole of the judgment and order granted by me on 30 August 2021. In terms of that order the applicant's rescission application was dismissed with costs.

[2] My judgment is comprehensive, and I stand by the reasons set out therein.

[3] I have considered the papers filed of record and the grounds set out in the applicant's application for leave to appeal as well as the parties' arguments for and against the granting of leave to appeal. I have further considered the submissions made in the parties' respective heads of argument and the authorities referred to by the respective parties.

[4] It must be considered whether there is a sound and rational basis for reaching a conclusion that there are prospects of success on appeal[1], considering the higher threshold test[2] envisaged by section 17 of the Superior Courts Act[3] ("*the Act*").

[5] The applicant launched an application for the rescission of the order granted by Monama J on 31 August 2016 ("*the 2016 order*"). The applicant contended that he learnt of the said order on 7 August 2017. The rescission application was launched by the applicant and served on the first respondent on 20 August 2018. The history of the matter is summarised in my judgment of 30 August 2021.

[6] The essence of the applicant's application for leave to appeal is that I erred in refusing the rescission application on the basis that the said application was not launched within a reasonable time after the applicant obtained knowledge of the 2016 order.

[7] The applicant contends that I erred in not placing reliance on the judgment of the Supreme Court of Appeal in *Rossitter v Nedbank Ltd*.[4] The applicant emphasised the following passage in *Rossitter*:

> "If the default judgement was erroneously sought or granted, a court should, without more, grant the order for rescission." [emphasis added]

[8] The applicant argued that the words "*without more*" in the passage quoted means that it is not necessary for a court to consider condonation for the late filing of a rescission application in terms of rule 42.[5]

[9] The applicant contends that the fact that he was not joined in the first respondent's application (pursuant to which the 2016 order was granted) and the fact that Monama J was not made aware of the application instituted by the applicant in 2014 are facts which would have precluded the granting of the 2016 order had they

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1 *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) at para 34
2 *Acting National Director Public Prosecutions and Others v Democratic Alliance* [2016] ZAGPPH 489 (24 June 2016) at para 25
3 Act 10 of 2013
4 *Rossitter v Nedbank Ltd* 2015 JDR 2629 (SCA)
5 The applicant also relied on *Mutweba v Muthweba and another* 2001 (2) SA 193 (TkH) at 199

been brought to the knowledge of Monama J. As such, the applicant argues, the 2016 order was erroneously sought and granted and that I should have rescinded the said order without more.

[10] I was not persuaded by the applicant that Monama J was not aware of these facts[6] or that they would have precluded the granting of the 2016 order. But even if I erred in this regard, the enquiry does not stop there. In terms of rule 42(1), "*the court may … rescind or vary*" an order, giving the court a discretion whether or not to grant a rescission.[7] Accordingly, even if the applicant proved the requirements of rule 42(1)(a), the court has a discretion, particularly in respect of the time within which the rescission application was launched.[8]

[11] Unlike rule 31(2)(b), rule 42, similar to the common law, does not specify a period within which a rescission application in terms thereof should be launched. However, a rescission application in terms of rule 42 or the common law must be launched within a reasonable period. What is a reasonable period depends upon the facts of each case.[9] The purpose of rule 42 is to correct expeditiously an obviously wrong judgement or order.[10]

[12] In his notice of motion, the applicant sought that the late filing of his application be condoned to the extent necessary. In support of the application for condonation for the filing of the rescission application, approximately one year after becoming aware of the judgment, the applicant relied on the lack of funds. I was not persuaded by the explanation and concluded that the reason for the filing of the recission application a year after knowledge thereof, was unconvincing, and that the time within

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6 Despite an offer in the applicant's founding affidavit that the papers of his 2014 application and the first respondent's 2016 application would be made available at the hearing of the matter, they were not. It was accordingly not possible to determine whether the facts, relied upon by the applicant for the present application, was known to Monama J at the time the 2016 order was granted.

7 *Tshivhase Royal Council v Tshivhase* 1992 (4) SA 852 (A) at 862J–863A; *First National Bank of Southern Africa Ltd v Van Rensburg NO* 1994 (1) SA 677 (T) at 681F

8 *Firestone South Africa (Pty) Ltd v Gentiruco* AG 1977 (4) SA 298 (A) at 306H; *Colyn v Tiger Food Industries Ltd T/A Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para 5

9 *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 421G

10 *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E–F; *Promedia Drukkers & Uitgewers (Edms)Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417B–I

which the rescission application was launched was not reasonable in the circumstances of this matter.[11]

[13] Condonation may be sought by a party not complying with the provisions of the rules. Because rule 42 does not provide for a time period within which a rescission application in terms thereof must be launched, there cannot be non-compliance with the rule in this regard. However, this does not mean that an application in terms of rule 42 should not be launched timeously. A rescission application under rule 42 should be launched within a reasonable time and an applicant's failure to do so can lead to the dismissal thereof.[12] It is in this context that the applicant's application for condonation was considered by me.

[14] In *Rossitter* the applicant for rescission launched the application within a month of becoming aware of the judgment. Whether the application was filed within a reasonable time was accordingly not an issue.

[15] The applicant's explanation for the late launching of the rescission application is limited to the lack of funds to launch the application timeously. His explanation for launching the application a year after obtaining knowledge of the order is ambiguous and unconvincing. Consequently, I concluded that the application was not launched within a reasonable time.

[16] Related to the aforesaid ground for leave to appeal, the applicant contends that I erred in failing to determine what would have been a reasonable period to launch the rescission application. The applicant could not refer me to any authority which requires of me to make such a determination. As such, I conclude that there is no merit in the argument that the absence of a determination of what a reasonable time would be should justify leave being granted.

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11 Relying on *inter alia* a judgment by Fisher J in this Division in *Northern Wholesale Tiles CC v K Warmback* 2017 JDR 1066 (GJ) with similar circumstances.

12 *First National Bank of Southern Africa Ltd v Van Rensburg NO: in re First National Bank of Southern Africa Ltd v Jurgens* 1994 (1) SA 677 (T) at 681B–G; *Firestone South Africa (Pty) Ltd v Gentiruco* AG 1977 (4) SA 298 (A) at 306H

[17] Therefore, I am not persuaded that there is a reasonable prospect of success on the grounds set out in paragraphs 1, 2, 3, 5, 8 or 9 of the application for leave to appeal.

[18] The applicant contends that I failed to have regard to the prejudice the applicant, as the executor of the deceased estate, and the heirs of the estate may suffer if the rescission application was not granted, and that I only considered the prejudice the first respondent may suffer.

[19] In its founding papers, the applicant contends that the prejudice to be suffered by him, should the rescission application not be granted, is that he would be unable to perform his functions as executor and fail to distribute the due inheritance to the heirs of the estate. It is in this context that I dealt in the judgment with the applicant's conduct, or lack thereof, since he was appointed as executor.

[20] However, it is not the prejudice of the applicant but the prejudice of the opposing party, the first respondent, which should be given consideration to when an indulgence is sought by the applicant.[13]

[21] As a consequence, I am not persuaded that there is a reasonable prospect of success on the grounds set out in paragraphs 4 and 6 of the application for leave to appeal.

[22] The applicant contends that I erred in taking into account the events prior to 2012, which events, so the applicant argued, are irrelevant to the rescission application.

[23] I considered the events since 1993, not only because they were ventilated in the papers of the applicant and the first respondent, but also in the context of the delays in bringing the matter to finalisation and the first respondent's possible prejudice. According to the applicant, the other parties who would suffer prejudice in the event of the rescission application not being successful include Mrs Makume, the

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[13] See for instance *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC) at par [8] relied on by the applicant.

deceased's wife who was appointed executrix in 1993, and the heirs in terms of the deceased's will. The pre-2012 facts ventilated in the papers demonstrate that Mrs Makume, despite her appointment in 1993, apparently performed no functions as executrix until 2010 when the applicant was appointed as executor. The papers demonstrate further that no functions were performed by the applicant as executor since his appointment in 2010 until the launch of the 2014 application, save for a valuation requested in 2010, the two letters addressed by the applicant to the second respondent in 2010 and 2013 respectively, and the letter to the first respondent in 2013. These facts weigh in, albeit to a limited extent, on the circumstances pertaining to the reasonableness of the period within which the rescission application was launched.

[24] Therefore, I am not persuaded that there is a reasonable prospect of success on the grounds set out in paragraphs 7 and 10 of the application for leave to appeal.

[25] The applicant contends that I erred in overlooking the fact that the second respondent did not oppose the application and that he did not have the authority to deal with the estate of the late Mr Makume. The second respondent had passed prior to the application being heard. It is accordingly not known why the second respondent did not oppose the application or whether he was able to do so.

[26] In any event, I am not persuaded that the absence of opposition by the second respondent creates a reasonable prospect of success for the application for leave to appeal.

[27] Lastly, the applicant contends that I erred in overlooking the fact that the first respondent had to prove that he was a *bona fide* purchaser and therefore entitled to the ownership of the property which is the subject matter of the litigation.

[28] The first respondent stated in his answering papers that he purchased the properties from the deceased estate in 2011 whilst he was firmly under the impression that the second respondent was the executor of the estate. The first respondent leased the properties from the estate, represented by the second respondent, since 2008. The sale agreement and related documents were attached to the answering

affidavit. After taking transfer of the properties, the first respondent effected substantial improvements thereon by *inter alia* constructing a block of flats on one of the erven, housing 23 families, and businesses on the other two erven, which businesses serve the needs of 60 people in the community and provide employment for eight people.

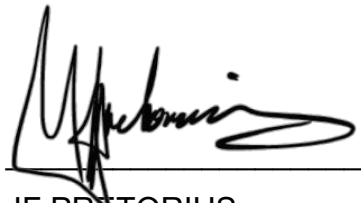
[29] The applicant did not advance any evidence to refute the first respondent's evidence in this regard.

[30] Consequently, I am not persuaded that there is a reasonable prospect of success on the ground set out in paragraph 12 of the application for leave to appeal.

[31] Upon consideration of the issues raised, I conclude that the appeal would not have a reasonable prospect of success as contemplated in section 17(1)(a) of the Act.

In the circumstances I make the following order:

1. The application for leave to appeal is dismissed with costs.



JF PRETORIUS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

DATE OF HEARING:	14 October 2021
DATE OF JUDGMENT:	4 November 2021
COUNSEL FOR THE APPLICANT:	NS Mteto
INSTRUCTED BY:	Mpoyana Ledwaba Inc.

COUNSEL FOR THE RESPONDENT:	D Gondo and N Nyembe
INSTRUCTED BY:	P Nkosi