IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

7/11/2014
DATE

SIGNATURE

CASE NUMBER: 57244/2010

DATE: 7 November 2014

MHLABA TRUST	First Applicant
HELLEN MASILELA, N.O.	Second Applicant
ROSE MATHEBULA, N.O.	Third Applicant
AMBROSE KHOZA, N.O.	Fourth Applicant
SIDNEY MATSEBULA, N.O.	Fifth Applicant
TOKA BIYA, N.O.	Sixth Applicant

V

FREE STATE MAIZE (PTY) LTD	First Respondent
SHERIFF OF THE HIGH COURT, BARBERTON/MALELANE	Second Respondent
MAKHOSONKHE FARM MANAGEMENT (PTY) LTD	Third Respondent
SHERIFF OF THE HIGH COURT, POTCHEFSTROOM	Fourth Respondent

JUDGMENT

STRYDOM AJ:

INTRODUCTION

[1] The applicants are applying according to the notice of motion, in terms of Rule 31(5)(d) for an order in the following terms:

> "*1. Rescinding and/or setting aside the judgment or order granted against the Applicants in their absence on 1 December 2010.*
>
> *2. Staying and/or setting aside the warrant of execution and notice of attachment – fixed property dated 14 December 2010.*
>
> *3. Staying and/or interdicting the intended auction of the Applicants' property by the Respondents.*
>
> *4. Condoning the Applicants' late lodging of the application, if indeed late and extending the time periods accordingly.*
>
> *5. That the costs of the application be costs in the main action.*
>
> *6. Alternatively, that any of the Respondents pay the costs of this application if they oppose same, and on the scale as between attorney and client."*

[2] Rule 31(5)(d) of the Uniform Rules make no provision for the relief sought by the applicants. The said Rule make provision for a party dissatisfied with a judgment granted or directions given by the registrar, within the time period of 20 days, to set the matter down for reconsideration by the court. Rescission of default judgments is dealt with in terms of Rule 31(2)(b) of the Uniform Rules. In order to succeed with an application on the latter Rule, the applicants must establish:

1. That the judgment was granted by the Registrar by default;
2. That the default related to a failure to enter appearance[1].

[1] See De Sousa v Kerr 1978(3) SA 635(W) at 637

[3] The application must be made within 20 days after the defendant (applicants) *in casu* had obtained knowledge of the said judgment[2].

[4] On the applicant's version they became aware of the judgment on 15 December 2010 when the writ of execution was served on them[3]. The 20 days time period for lodging of the application on either the aforesaid rules expired on 13 January 2011. The present application was however lodged on 17 February 2011, being 34 days outside the prescribed time periods.

[5] The first respondent entered opposition and filed an answering affidavit to which the applicants replied. The applicants thereafter presumably elected to let the matter die a silent death because they did nothing further, for 3 years, to have the matter finalised. The respondent enrolled the matter, indexed and paginated the documents, whereafter the matter came before me on 3 November 2014.

[6] There was only appearance on behalf of the First Respondent by Adv. JJ Pretorius.

BACKGROUND INFORMATION

[7] The default judgment to which this application relates is contained on page 117 of the paginated pages. The default judgment provides for payment of two amounts

[2] See Rule 31(2)(b)
[3] See: Founding Affidavit page 14 paragraph 26; Annexure "O", page 121.

respectively in the amount of R4 159,308.67 and R5 985,084.77 with interest on both amounts at the rate of prime interest plus 5% per annum *a tempora morae.*

[8] The summons to which the default judgment relates is contained on pages 52 to 64 of the paginated pages. It appears from the particulars of claim attached to the summons that the first respondent claimed judgment against the applicants based on the following sequence of events:

8.1 The first respondent had concluded loan agreements with the third respondent, which indebted the third respondent, to the first respondent in the amount of the judgment debt; ceded all its claims to the first respondent as security of the aforesaid debt.

8.2 The third respondent ceded all its claims to the first respondent as security for payment of the aforesaid debt;

8.3 In terms of the settlement agreement the applicants undertook to reimburse the third respondent for all such expenses and liabilities, including the latter debt.

8.4 The third respondent's claim against the applicants was therefore ceded to the first respondent.

8.5 The first respondent as cessionary of the third respondent's ceded claim against the applicant's debtors, therefore claimed the amount due in terms of the settlement agreement from the said applicants.

[9] On 1 December 2010 the first respondent obtained default judgment from the Registrar against the third respondent (first defendant in the summons). There is no

rescission application for the judgment against the third respondent and the judgment therefore remains in force.

[10] The applicants raised several defences in their founding papers, and subsequently also attempted to raise further defences in their replying affidavit. The applicants, in applying for rescission must make a full disclosure and stand or fall by its founding affidavit. They cannot be permitted to raise new issues and defences in reply. This is especially so where the applicants was in possession of the additional new facts when preparing their founding affidavit. There is no evidence before me that this was not the situation *in casu*. The first respondent is obviously prejudiced therein that it is denied the opportunity to respond to the new defences and matters. I am accordingly reluctant to deal with those issues.

CONDONATION FOR LATE FILING OF RESCISSION APPLICATION

[11] Assuming in favour of the applicants that they intended to bring their application in terms of Rule 31(2)(b) instead of Rule 31(5)(d) the first issue to decide is the applicant's application for condonation for lodging their application outside the 20 day prescribed time period. The applicants appear to be lazy fair in respect of the reasons for the lateness. Although they submit that they have supplied sufficient reasons why their application was not brought timeously they submit no actual reason why this is the case. More in particular they merely refer to the holiday period and the offices of their attorneys which was closed at that time, but failed to explain why appropriate arrangements were not made to lodge the application on or

before 13 January 2011. They further failed to explain the delay from 13 January 2011 until they finally lodge their application 5 weeks later.

[12] It is trite law that condonation is not merely there for the asking and a party that seeks the same should establish good cause for the relief sought. The applicants however are of view that their application is not late. They are patently wrong. Generally two requirements are set for condonation: (a) the applicants must present a reasonable explanation of their delay, and (b) the applicants must demonstrate that they have good prospects of success with their application. This application relates to a rescission application in which the applicants are also required to establish that they have a *bona fide* defence against the plaintiffs' claim in respect of which the default judgment was granted. To a certain extent the prospects of success with the condonation application and the *bona fide* defence against the plaintiff's claim overlaps. It is trite law that condonation may be granted in the event where a party presents a poor explanation for its delay to lodge the application timeously, but have good prospects of success with its main application. I am of the view that in the present matter there is no prospects of success with the application for rescission and the applicants in any event failed to advance proper explanation for their delay to bring the application. Accordingly the condonation application should be dismissed.

ABSENSE OF *BONA FIDE* DEFENCES

[13] The applicants raised the following defences against the first respondent's claim, in respect of which default judgment was obtained against them:

13.1 The summons was not served on the applicants, because they have no employee by the name of Mr. N Shongwe, as reflected on the Sherriff's return of service;

13.2 The summons was not signed by the registrar prior to service on the applicants;

13.3 Morningtide, the service provider, as well as Makhosonkhe has failed to perform the obligations in result of which the applicants on this ground terminated these agreements in March 2010 and April 2010;

13.4 Morningtide had been in breach by failing to finance the applicant's farming operation;

13.5 The loan and cession agreements on which the first respondent's claim are based, are in conflict with the agreements between the applicants, Morningtide and Makhosonkhe.

13.6 More specifically the following breaches are alleged by the applicants:

13.6.1 Morningtide failed to provide the capital for the farming obligations;

13.6.2 Morningtide did not contractually outsourced their responsibilities to the first respondent;

13.6.3 The skills transfer plan and economic empowerment had not been met;

13.6.4 The properties belonging to the applicants may not be used as collateral for any loans;

13.6.5 No dividends had been declared;

13.6.6 No rental had been paid;

13.6.7 The agreement was repudiated, resulting in the applicants cancelling the agreement, and

13.6.8 The signatoree to the agreements had not been authorised.

13.6.9 The suspensive condition requiring the furnishing of proof of the solvency of the third respondent, had not been fulfilled;

13.6.10 The required financial information relevant to the ability of the third respondent to comply with its obligations, had not been established.

13.6.11 No proof of payment or certificate of indebtedness had been furnished;

13.6.12 Annexures "FS3" and "FS4" do not comply with the requirements of statements due to questionable transactions including from and to Makhombo;

13.6.13 The first respondent is not a party to the settlement agreement as reflected in annexure "FS6";

13.6.14 No verification as required by the settlement agreement had been completed;

13.6.15 The required resolutions by the third respondent and Morningtide had not been taken;

13.6.16 The first respondent only sought the declarator against the third respondent;

13.6.17 There had not been proper service on the third respondent's chosen *domicilium* address;

13.6.18 The first respondent failed to give notice to the liquidator of the third respondent;

13.6.19 The *nulla bona* return is questionable;

13.6.20 The respondent is an entity distinct from applicants and had no right to cede the lease agreement to third parties;

13.6.21 The settlement agreement is invalid as being unconscionable and *contra bones mores* and was not to the benefit of the applicants and the beneficiaries.

13.6.22 The court lacks jurisdiction as the matter falls within the exclusive jurisdiction of the land claims court;

13.6.23 The respondents could only borrow in excess of R5 million on authority of a resolution of the members of the third respondent;

13.6.24 Morningtide indemnified the applicants against such claims;

13.6.25 The signatoree Pettitt had been conflicted as being a director of both the first respondent and the third respondent, and;

13.6.26 Lastly, there is no reference to the first defendant in the settlement agreements between the parties.

[14] The volumous defences set out above have no merits on the face thereof. But even if there is some merit in some of the defences, which I doubt, two hurdles stand in the way of the applicant's application for rescission:

14.1 judgment against the third respondents remains in force, triggering the enforcement of the cession against the applicants, and;

14.2 most of these defences were only raised in the applicants' replying affidavit.

[15] I already indicated that the defences raised in reply cannot be entertained. With all fairness to the applicants I will consider the merits of the following defence:

(a) failure of service by the Sheriff,

(b) the summons not signed by the Registrar,

(c) the termination of the agreements by the applicants,

(d) the loan and cession agreements in conflict with other agreements, and lastly,

(e) the exclusive jurisdiction of the labour court to entertain the first respondent's claim.

(A) NO SERVICE OF THE SUMMONS BY THE SHERIFF

[16] The applicants are of the view that there was no proper service of the summons on them by the sheriff and accordingly the rescission should be granted on that basis alone. The applicants however erred about the manner of service of the summons. The summons was properly served in terms of Rule 4(1)(a)(iii). The said Rule provides as follows:

"*By delivering a copy thereof at the place of employment of the said person, guardian, tutor, curator or the like to some person apparently not less than 16 years of age and apparently an authority over him.*"

[17] The farm Uitsig had been the place of employment of the applicants, and not Mr. Shongwe on who the service was affected. The applicants do not dispute this aspect, since they are clearly the trustees of Mhlaba Trust, being the owners of the

farms and farming operations. The latter Rule does not require that Mr. Shongwe have to be an employee of the applicants but that he was a person apparently in charge. It is not further required that Mr. Shongwe was indeed in charge of the premises. It is sufficient for purposes of this Rule that such a person appears subjectively to the Sheriff to be in charge. This is precisely what the Sheriff said in his return of service. There is no reason for me to doubt that the Sheriff served the summons correctly. The defence is accordingly dismissed.

(B) SUMMONS NOT SIGNED BY THE REGISTRAR

[18] It is further the applicants' defence that the summons was not signed by the Registrar prior to service on them and solely based on this defect, rescission of the default judgments should be granted. It appears that this defence is based on the interpretation of the applicants of the note entered on the application for default judgment being: "*Not signed by registrar. Original herewith.*"

[19] The applicants namely assumed that the Registrar had returned their unsigned original summons to the correspondent of the first respondent's attorney of record. On the face value it appears that the interpretation is not fully correct because there are two different handwritings on the document but the registrar had apparently been limited to "*not signed by registrar*". This could only have been recorded at the time of the first official endorsement, being 19 November 2010. This note could only have been directed to the first respondent's correspondent attorney, as entered at the top *"Attorney pigeon hole 350 Reference Mrs A Coetzer"*. The second note had been

entered subsequently, in a different handwriting being "*original herewith*". This could only have been entered at the time when the document was again submitted to the Registrar on 26 November 2010, by the addressee Mrs Coetzer. It followed by necessary implication that the original was in possession of the correspondent after being returned by the sheriff, duly signed by the Registrar upon issuing.

(C) TERMINATION OF AGREEMENTS BY APPLICANTS

[20] This defence cannot on any basis be said to be *bona fide* or have any merit with reference to the timeline of events which appears from the papers before me. The applicants rely on a letter of demand dated 5 March 2010 as required by the agreement as well as a termination letter dated 28 April 2010. It is common cause between the parties that the applicants had signed the settlement agreement on 17 July 2009, in terms whereof all those agreements had already been terminated, by agreement. The third respondent and Morningtide no longer conducted any farming operations, with the applicants, taking over same. It appears therefore impossible for Morningtide and/or the third respondent to could have acted in breach of agreement in March 2010, when the contract was already terminated in July 2009. This defence must accordingly be dismissed.

(D) LOAN AND CESSION AGREEMENTS IN CONFLICT WITH OTHER AGREEMENT

[21] It is further the applicants' case that the loan and cession agreement on which the first respondent based its claim, are in conflict with the agreement between the applicant and Morningtide and/or the third respondent. To this extent the applicants

refer to numerous clauses contained in the agreements concluded by the third respondent. Almost all of these clauses are irrelevant and do not avail the applicant, in view of the judgment of the first respondent against the third respondent, which still remains in force. I find it unnecessary to deal in detail with each of the defences referred to in paragraph 13 above. I accordingly will, however, only deal with the absence of merit in the defences which one pertinent:

21.1 Morningtide was not at any relevant time responsible to provide the necessary capital for the operations of the applicants from their own resources. On the contract it appears that they had merely to secure such capital[4].

21.2 It was expressly agreed that all liabilities shall remain that of the third respondent. The service agreement furthermore does not contain such material alleged obligations which one would otherwise have expected. Morningtide namely secured the financing from the first respondent, to the knowledge of all the parties concerned and with the third respondent utilizing such funds. It follows that there is no merit in this defence.

21.3 The rights and obligations originating from the source agreements per se may not be ceded. The third respondent's claim against the applicants was however founded on the settlement agreement and not on the source

[4] See page 133 clause 5.6

agreement. The third respondent was therefore able to cede such claim to the first respondent, in terms of the cession agreement[5].

21.4 The first respondent's claim was not based on the outsourcing of Morningtide's responsibilities to the first respondent. The first respondent concluded an arms' length financing agreement with the third respondent, as sourced by Morningtide.

21.5 In the absence of any termination of the agreement, the progress with skills transfer; economic empowerment; declaration of dividends; and/or payment of rental amounts are irrelevant, in view of the unconditional settlement agreement and undertaking by the applicants to make payments.

21.6 The properties of the applicants were not used as collateral security. The first respondent had obtained judgment, which claim is only secured by the cession agreement. Should the properties of the applicants be attached and sold in execution, this would not be based on any collateral security, but normal debt enforcement practice.

21.7 The agreement could not be repudiated in 2010, due to the fact that the agreement was already terminated in 2009 as indicated above.

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[5] Annexure "FS5" to the particulars of claim on page 52

[22] It is apparent that the applicants entered into a settlement agreement with the first respondent in terms whereof they had made undertaking to payment of a judgment debt. In return for this undertaking the agreements concluded by the applicants in respect of their immovable properties were terminated and the farming operations returned to the applicant. The applicants received the latter benefit of the settlement but opposed the claim of the first respondent to enforce its *quit pro quo* and thereby attempting to avoid the consequences of the agreement they have entered into. The applicants, after entering the settlement agreement regained control of the farming operation. They were at that time assisted by legal counsel and therefore failed to establish that the settlement had been *contra bones mores*. This defence, however, is belated and raised only in reply.

(E) EXCLUSIVE JURISDICTION OF THE LAND CLAIMS COURT

[23] The first respondent instituted a monetary claim for payment of a debt against the applicant. The claim does not concern a lands claim and/or a matter within the exclusive jurisdiction of the Land Claims Court. The mere fact that the applicants had benefited from such land restitution does not confirm the exclusive jurisdiction in all other non-restitution dispute as for example in the present case upon default judgment for contractual claim for payment by the first respondent.

[24] It follows by necessary implication from what I have founded above that the application for rescission must be dismissed with costs. The applicant seeks the costs of this application to be costs in the main cause, alternatively a punitive cost

order on a scale as between attorney and client against any respondent that might oppose their application, as the first respondent has indeed done. It appears to me that the applicants lodged this application purely to frustrate the claim of the first respondent, for the following reasons:

24.1 After closing of pleadings the applicants did nothing further to finalise their application;

24.2 There is absolutely no merit in the condonation application or late filing of the rescission application;

24.3 There is absolutely no *bona fide* defence raised against the claim of the first respondent in respect of which the default judgment was obtained.

ORDER:

1. The applicant's application for rescission is dismissed.
2. The applicants are ordered to pay the cost of the first respondent, on a scale as between attorney and client, the one to pay the other absolved.

J.S. STRYDOM
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	*No Appearance*
Instructed by:	*Maseko Tilana Inc.*
Counsel for the respondents:	*Adv. J Pretorius*
Instructed by:	*Gerrit Coetzee Inc*
Date Heard:	*3 November 2014*
Date of Judgment:	*7 November 2014*