IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED ✓
23-3.16.
DATE SIGNATURE

CASE NO: 56672/2013

DATE: 23/3/2016

IN THE MATTER BETWEEN

STANDARD BANK OF SOUTH AFRICA LTD APPLICANT

AND

CARIEN ERASMUS RESPONDENT

JUDGMENT

MSIMEKI, J

[1] The application is based on Rule 27 of the Uniform Rules of Court. It concerns condonation which applicant seeks for the late filing of its opposing affidavit to respondent's application for the rescission of a default judgment which applicant obtained against respondent.

[2] Applicant and respondent are represented by Adv C G V O Sevenster ("Mr Sevenster") and Adv P J Vermeulen ("Mr Vermeulen") respectively.

[3] Applicant instituted an action and on 18 October 2013 obtained judgment by default against respondent. Payment was claimed by applicant from respondent in her capacity as surety for loans made to N J Erasmus Family Trust. The Trust no longer exists. Respondent's husband who is said to have been a co-surety was also sequestrated. On 24 June 2014 respondent, as applicant, applied for the rescission of the default judgment. On 27 June 2014 applicant in this condonation application filed a notice of intention to oppose the rescission application. Applicant's affidavit opposing the rescission application was filed on 23 October 2014 ie three to four months out of time. Respondent then served applicant with a notice in terms of Rule 30 of the Uniform Rules of Court on the basis that the filing of applicant's opposing papers in the rescission application constituted an irregular step in the absence of a condonation application. Applicant then became obliged to apply for condonation for the late filing of its opposing affidavit in the rescission application. This application is opposed by respondent.

[4] This application is based on Rule 27(1) which provides as follows:

> "27. **Extension of time and removal of Bar and condonation**
>
> (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court fixed by an order extending or abridging any time for doing any act or taking any step in connection with

any proceedings of any nature whatsoever upon such terms as to it seems meet."

[5] Respondent contends that condonation should not be granted because applicant:

- failed to furnish a satisfactory explanation for the delay;
- has not shown that it is *bona fide* in its application;
- in its conduct has shown reckless or wilful neglect of the court rules;
- has failed to show that its application is not ill-founded; and
- that the granting of condonation will result in prejudice to respondent.

[6] Applicant, on the other hand, contends that it has given a satisfactory explanation for the delay and demonstrated that it has a *bona fide* defence and that it will be prejudiced should condonation not be granted.

THE ISSUE

[7] The issue to be determined is whether, at the end of the application, applicant has indeed established that it is entitled to the relief that it seeks.

COMMON CAUSE FACTS

[8] These are that:

1. On 10 October 2013, under the above-mentioned case number, the court granted judgment by default against respondent in favour of applicant.
2. On 24 June 2014 respondent filed an application for the rescission of default judgment.

3. On 27 June 2014 applicant filed a notice of intention to oppose the rescission application.

4. Applicant, in terms of Rule 6(5)(d)(ii) of the Uniform Rules of Court, had to deliver its opposing affidavit within fifteen days from 27 June 2014 which would have been on or before 21 July 2014.

5. Applicant did not deliver the opposing affidavit by 21 July 2014.

6. Applicant did not approach respondent, her attorneys or the court for an extension of time within which to deliver its opposing affidavit.

7. Respondent's attorneys then enrolled the application for the rescission of the judgment on the unopposed roll of 11 August 2014.

8. On 11 August 2014, by agreement between the parties, applicant's time to deliver the opposing affidavit was extended to 30 August 2014. The agreement was made an order of the court.

9. Applicant, in breach of the agreement which had been made an order of the court and the court order, failed to deliver the opposing affidavit on or before 30 August 2014.

10. Respondent's attorneys, as they were entitled so to do, again enrolled the application on the unopposed roll for hearing on 27 October 2014.

11. The notice of set down was served on applicant's attorneys on 4 September 2014.

12. On 23 October 2014, which was two court days before the application was to be heard, applicant delivered the opposing affidavit at the offices of respondent's attorneys.

13. The opposing affidavit was not accompanied by an application for condonation for its late filing.

14. Respondent's attorneys were then prompted to serve a notice in terms of Rule 30 of the Uniform Rules of Court on applicant's attorneys. This, as respondent contends, was an irregular step.

15. The service of the Rule 30 notice then prompted applicant to launch this application seeking the necessary condonation.

[9] The use of the word "may" in Rule 27(1) denotes that the court has a discretion to grant or not to grant condonation.

In *United Plant Hire (Pty) Ltd v Hills and Others* 1976 1 SA 717 (A) at 720E-F Holmes, JA said:

> "It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice."

THE LAW

[10] In *Immelman v Loubser en 'n Ander* 1974 3 SA 816 (A) at 820D Muller, AR said:

> "Dat kondonasie van die versuim van 'n appellant om die Hofreëls na te kom nie net 'n blote formaliteit is nie, is meermale deur hierdie Hof beklemtoon."

(See also *Meintjies v H D Combrinck (Edms) Bpk* 1961 1 SA 262 (A) at 263-264.)

In *Meintjies v H D Combrinck (supra)* at 264A-B Steyn, HR said:

> "Die Hofreëls stel termyne om nagekom te word, nie slegs vir die gerief van die Hof en om in belang van die regsadministrasie onnodige vertraging by gedinge uit te skakel nie, maar ook omdat die partye, met inbegrip van die teenparty, daar belang by het; en waar 'n appellant vind dat hy in versuim geraak het, is dit sy plig om sonder verdere uitstel aansoek om kondonasie te doen."

(See also *Commissioner for Inland Revenue v Burger* 1956 4 SA 446 (A) at 449G-H.)

[11] Courts have held that where non-compliance with the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be. (See *Dairries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 3 SA 34 at 41A-D.)

[12] In *Siber v Ozen Wholesalers (Pty) Ltd* 1954 2 SA 345 (A) at 353A Schreiner, JA said:

> "It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently to enable the court to understand how it came about and to assess his conduct and motives."

Rule 27(1) of the Uniform Rules of Court requires that "good cause" or "sufficient cause" must be demonstrated before condonation can be granted.

In *Cairns' Executors v Van Gaarn* 1912 (AD) at 186, the court noted that the expression "sufficient cause" seemed to be used in a wider sense, "as covering any

cause sufficient to justify the Court in granting relief from the operation of the earlier rule".

[13] In *Smith NO v Brummer NO and Another* 1954 3 SA 352 at 358A Brink, J considered and summarised the factors which the court must consider in determining whether or not condonation should be granted. These, in short, are:

1. whether a reasonable explanation has been given for the neglect;
2. whether the application is *bona fide* and not brought with the intention to delay the other party's claim;
3. if there is absence of reckless or wilful neglect of the Court Rules;
4. whether or not applicant's case is ill-founded;
5. if, where there is prejudice, such cannot be compensated with a proper costs order.

[14] In *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as amicus curiae)* 2008 2 SA 472 at [33] the court said:

> "Prospects of success pale into insignificance where, as here, there is an inordinate delay coupled with the absence of a reasonable explanation for the delay."

The court then dealt with its displeasure where litigants do not comply with the time-limits or directions setting out the time-limits. Courts are also unhappy with litigants dumping their matters with their attorneys and failing to make the necessary follow-ups. Courts have expressed their unhappiness where a litigant blames his attorney without demonstrating that he or she is not to blame for the ineptitude or

remissness of his or her attorney. (See *Saloojee and Another NN.O v Minister of Community Development* 1965 2 SA 135 at 141D-H; and *Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape)* 2003 6 SA 1 (SCA) at p9 [12].)

FACTS OF THE CASE

[15] Applicant contends that after the application for the rescission of the judgment was served on it, it was discovered that respondent (applicant in the main application for rescission) was denying and disputing that she had signed the suretyship agreement. The signature, according to respondent, is not hers. She believes that the signature has been forged. Applicant contends that a considerable time was taken by it while trying to obtain original documents which would help it disprove respondent's defence. These documents are: the original deed of suretyship, the loan agreement and the mortgage bond. The documents were required by applicant's expert who had wanted to compare the signatures. This was occasioned by the fact that respondent had employed an expert to deal with the issue of the alleged forged signature.

[16] Respondent contends that applicant's contention does not assist it. The matter, in the first instance, was handled by experienced attorneys who knew more about the time-limits. Despite the time within which to file the opposing affidavit having expired, applicant or its attorneys did not deem it fit to approach respondent or her attorneys or the court to have the time-limit extended. In the absence of an agreement or consent or such an approach by applicant or its attorneys, respondent set the application for the rescission down for hearing. On the day the application was to be heard the parties agreed on when the opposing affidavit would be filed and this was

30 August 2014. The agreement was made an order of the Court. Applicant did not comply with the agreement and the court order. No opposing affidavit was filed.

[17] Respondent again set the application down for hearing on the unopposed roll. The notice was served on applicant's attorneys. Two court days before the application was heard applicant's attorneys filed applicant's opposing affidavit well out of time. The affidavit was not accompanied by an application for condonation. This then prompted respondent's attorneys to serve a Rule 30 notice on applicant's attorneys. The notice prompted this application.

[18] Applicant further contends that trying to unearth the required documents took a long time as it was important to get the documents which would disprove respondent's version. The documents were not found. What I find strange is that it took such a long time to enquire from the Master of the High Court and the conveyancers as well as exhausting the search at its offices. The court is not told where the documents were stored. Mr Vermeulen submitted that it had to be remembered that the documents applicant was looking for belong to it.

[19] The affidavit, once ready, was allegedly sent to the deponent for signature. It is said that the documents again had to be forwarded to the deponent for signature. This, according to Mr Vermeulen, does not appear very clearly from the papers. It is Mr Vermeulen's submission that it cannot therefore be said that applicant has fully disclosed an acceptable explanation for the default or the inordinate delay. What is more, applicant still did not seek the extension of the time-limit. It proceeded to file the opposing affidavit without the necessary condonation application. What

aggravates applicant's position is that applicant failed to comply with the agreement between the parties and the court order. If this is not reckless or wilful disregard of the agreement and the court order what else shall this behaviour be called?

[20] A submission was made on behalf of respondent and this is that respondent sufficiently explains that she did not sign the deed of suretyship. The signature appearing thereon, according to her, has been forged. It appears the deed of suretyship was signed in Naboomspruit while the witnessing took place in Kempton Park. No explanation for this has been forthcoming. The witnesses are said not to remember anything about the deed of suretyship. There is no affidavit to this effect and the issue has not been dealt with let alone sufficiently.

[21] It is noteworthy that the default judgment was obtained on this alleged deed of suretyship. Mr Vermeulen submitted that "at least one of the signatures (of a witness) is clearly a forgery".

[22] If indeed the deed of suretyship was forged then it means that the judgment was obtained on such a deed of suretyship. Does this leave applicant with a *bona fide* defence? On this basis not.

[23] If the deed of suretyship was forged that then would explain why respondent contends that she neither received the letter of demand nor the summons. This would then explain why applicant's relief is for the rescission of the judgment.

[24] It is again noteworthy that applicant has to prove that respondent signed the deed of suretyship. The originals are not there. There is no evidence from applicant's expert dealing with whether the deed has been forged or not. There is no one to gainsay that respondent did not sign the deed of suretyship.

[25] Applicant contends that respondent's application for rescission is defective in that it has been brought out of time and that the application is further fatally defective in that the notice of motion does not make provision for a prayer regarding condonation. Mr Vermeulen, for respondent, submitted that prayer 4 of the notice of motion covers a prayer such as applicant refers to. The prayer is "further and/or alternative relief". Respondent, in the rescission application, specifically states that condonation for the late filing will be requested if necessary. Mr Vermeulen's submission seems to have merit. However, this issue is best left to the court which will deal with the rescission application. Mr Vermeulen submitted that instead of invoking Rule 30, applicant chose to take a further step. This, according to him, could not be done at this late stage.

[26] Mr Vermeulen submitted that applicant failed to furnish a sufficient explanation as the documents that they looked for and failed to get are the applicant's own documents filed within its own system. There is, in my view, merit in the submission. The delay which, according to Mr Vermeulen, amounts to four months is inordinate, unjust and substantial. It is also not accompanied by an acceptable and sufficient explanation therefor.

[27] It was, on behalf of respondent, submitted that applicant in a number of instances gave hearsay evidence. The paragraphs which are said to be dealing with hearsay evidence have been enumerated. Mr Vermeulen, for respondent, submitted that belatedly applicant annexed two affidavits, one by T T Singh, deponent to the founding affidavit, and the second by an attorney. Mr Vermeulen implored the court to strike out paragraphs which contained hearsay evidence. Mr Sevenster disagreed, submitting that striking out required invoking Rule 23(2) of the Uniform Rules of Court and that the application would have to be set down in accordance with Rule 6(5)(f). This is correct.

[28] It is noteworthy that applicant's case must appear in the founding affidavit. This is because it is not permissible to rectify an omission in a founding affidavit in a replying affidavit. Applicant must make out its case in its founding affidavit. It must either stand or fall by its founding affidavit. (See *Bayat and Others v Hansa and Another* 1955 3 SA 547 (A) at 553D-E and *Titty's Bar and Bottle Store v A B C Garage and Others* 1974 4 SA 362 (T).

[29] That applicant's founding affidavit must embody its case is a principle of our law. In *Bayat and Others v Hansa and Another (supra)* at 553D-E Caney, J said:

> "... an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving *ex parte* or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the

respondent in his answering affidavits), still less make a new case in his replying affidavits."

[30] The question to be answered is whether applicant, with the evidence at the disposal of the court, has made out a case to be entitled to the relief that it seeks.

[31] Applicant, after filing a notice of its intention to oppose the rescission of judgment application, waited too long before filing its opposing affidavit. Respondent twice set the application down for hearing on the unopposed roll because of applicant's conduct. The parties agreed that applicant would file its opposing papers on or before 30 August 2014. Applicant did not file the papers. Respondent, in the absence of any action from applicant, had to again set down the application for hearing on the unopposed roll. Two court days before the hearing of the matter, applicant then filed its opposing affidavit. However, the answering affidavit was filed without any indication that an application would be made for condonation of its late filing of its answering affidavit. Applicant had to be forced to bring this application by the service on it of a Rule 30 notice. It will be remembered that applicant all along has been represented by a firm of experienced attorneys.

[32] During all these occurrences, neither applicant nor his experienced attorneys, deemed it fit to approach either respondent, her attorneys or the court for an extension of the time within which it had to file its opposing papers. This was only forced down its (applicant's) throat through the use of the Rule 30 notice.

[33] All applicant furnishes, as a reason for the delay, is that it was relentlessly looking for original documents to counter respondent's version that the deed of suretyship was forged. The reason, in my view, is not convincing and satisfactory. I also do not find as a satisfactory reason the fact that once settled the opposing affidavit went astray. If everything had been done with the haste and seriousness the matter deserved, that would not have come to this.

[34] Respondent's version that the deed of suretyship was forged presents another problem for applicant. How the document was signed and the signing witnessed remains another hurdle for applicant. There is hardly any noteworthy explanation. The witnesses are said to be unable to recall what happened when the signing took place. Original documents are missing and applicant's handwriting expert could, as a result, not assist applicant. Judgment was taken under circumstances which do not demonstrate that original documents at the time existed. This, according to Mr Vermeulen, does not demonstrate the *bona fides* on the part of applicant. I must agree.

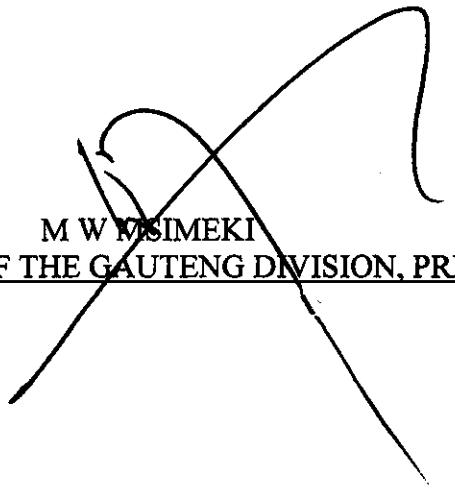
[35] The time that elapsed before the opposing affidavit was filed is inordinate and needed proper, acceptable and sufficient explanation. This explanation, in my view, has not been fully and sufficiently given. Respondent indeed was entitled to oppose this application. She is, as a result, entitled to her costs.

[36] Applying the law to the facts of this case, it becomes abundantly clear that the application should fail.

[37] The following order is therefore made:

1. The application for condonation is dismissed.

2. Applicant is ordered to pay the costs of the application.



M W MSIMEKI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

56672-2013

HEARD ON: 28 APRIL 2015
FOR THE APPLICANT: ADV C G V O SEVENSTER
INSTRUCTED BY: VEZI & DE BEER INC
FOR THE RESPONDENT: ADV P J VERMEULEN
INSTRUCTED BY: W F BOUWER ATTORNEYS