IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

3/5/2016

CASE NUMBER: 34218/2014

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED.

3/5/2016
DATE

SIGNATURE

In the matter between:

THE MINISTER OF POLICE Applicant

and

BONGANI PETER JOHN GROOTBOOM Respondent

JUDGMENT

BRENNER AJ

1. This is an application for the rescission of a default judgment granted on 10 October 2014 against the applicant. The applicant is the Minister of Police,

who is the defendant in the main action ("the Minister"). In terms of the default judgment order, merits were separated from quantum, and the Minister was directed to compensate the defendant, Mr Bongani Grootboom ("Grootboom"), for all proven and/or agreed damages sustained by Grootboom. This arising from his alleged unlawful arrest on 4 August 2013, at the Loerie informal settlement in Hankey, Eastern Cape.

2. Simultaneously, condonation is sought by the Minister for the late service of the rescission application.

3. The Minister appears to rely on the common law and/or the provisions of Rule 31 (2) (b) of the Uniform Rules of Court in its application. Under this Rule, a applicant may, within 20 days after it has knowledge of the judgment, apply to rescind same upon good cause shown. "Good cause" requires that the applicant provides a reasonable explanation for the default, that the application is bona fide and not made with the intention of delaying the claim against it, and that it has a bona fide defence to the respondent's claim. A prima facie defence suffices. It is not necessary for the applicant to traverse the merits in detail or to produce evidence that the probabilities are in its favour.

4. The following chronology of events merits mention.

5. Although Grootboom avers that his arrest occurred on 4 August 2013, it appears from the papers that he was mistaken and that the arrest, for suspected housebreaking and theft and possession of stolen goods, took place on 19 August 2013. He was held in custody until 19 September 2013, and thereafter, the charges were withdrawn against him.

6. Summons for payment of damages arising from Grootboom's alleged unlawful arrest, in the sum of R300 000,00, was served on the Minister, care of the State Attorney, on 16 May 2014. The receptionist at its office, Mrs Liversage, accepted service.

7. Ten days later, on 26 May 2014, Ms Nangamso Qongqo ("Qongqo"), an attorney employed at the State Attorney's office, sent the Summons to a certain Colonel Groenewald, to ask for "documents and instructions". Qongqo

did not enter an appearance to defend because she believed that she should obtain instructions in the first place.

8. On 28 October 2014, Grootboom's attorneys applied for, and were granted, default judgment on the merits. In the result, all that remained to be determined was the quantum of Grootboom's claim. It would appear from the papers before Court that no notice of set down for this judgment was served on the Minister. Grootboom was not obliged to do so, in terms of the practice manual of this Court, as the six month period from the date of service of the Summons had not yet expired.

9. On 12 January 2015, the State Attorney, acting for the Minister, entered an appearance to defend the action, almost eight months after service of Summons. It is strange that, when doing so, Qongqo did not appreciate that the notice was being served some eight months after the date of service of the Summons. Qongqo does not address this fact in her affidavits.

10. On the following day, being 13 January 2015, Qongqo sent a letter to Colonel Roodt and Brigadier Mulder of the SAPS Pretoria, to ask for further instructions.

11. In the rescission application, there is no intimation at all that replies to Qongqo's letters were ever received from the representatives of the Minister. Nor that any phone calls took place between them.

12. On 24 April 2015, by notice of set down, Grootboom's attorneys enrolled the matter for hearing on 5 November 2015, for adjudication on quantum. The notice of set down was served on the State Attorney, and came to the attention of Qongqo.

13. Qongqo wrote a letter to Grootboom's attorneys on 5 May 2015 asking for the reasons why the matter was enrolled for this date. The order of 28 October 2014 was provided to her on 2 June 2015, under cover of a letter dated 26 May 2015. In reply to this letter, Qongqo notified Grootboom's attorneys of the Minister's intention to apply for rescission of the order.

14. The rescission application was launched on 14 September 2015, just over three months after receipt of the default judgment order.

15. Grootboom's opposing affidavit was served on 7 October 2015, and the Minister's replying affidavit was served on 23 October 2015. The application for default judgment on quantum was removed from the roll on 5 November 2015.

16. In support of condonation, Qongqo states that, at any given time from May 2014 to the date of the application, being September 2015, she had been, and still was, "seized with approximately 600 active matters." This had placed tremendous pressure on her time, to keep track of developments on every file. She concedes that she took from May 2014 to January 2015 to follow up on instructions sought. She accepts that she could have been more diligent in her handling of the matter and avers that the matter did not receive the attention it deserved due to her extensive workload. She did not deem it proper to defend the action in the absence of instructions from her client.

17. She realised that the case had escaped her attention when she received the notice of set down on 24 April 2015. We interpose to mention that Qongqo signed the notice to defend on 9 January 2015, and we are not apprised of whether Qongqo realised at this time that the notice was being served eight months after service, because this is not traversed in her affidavits.

18. Qongqo states that she entertained logistical difficulties in procuring information. She also had problems with securing police and prosecutorial documents and with consultations with material witnesses. It should be borne in mind that the incident occurred in the Eastern Cape.

19. In support of the Minister's defence on the merits, Qongqo submits that the arrest without warrant was lawful and justified in terms of section 40(1)(e) of the Criminal Procedure Act, 51 of 1977. Attached to the founding affidavit are copies of statements procured from the police docket at the Thornhill police station, made by the arresting officer, Warrant Officer Marisa Louw ("Louw"), and by the complainant, Gerhard Moolman ("Moolman"). It is contended that Louw was justified in the arrest of Grootboom "on the strength of information

already in the docket which was opened" upon the complaint of Moolman. It is pointed out that Grootboom's case is limited to the unlawfulness of his arrest and no case is pleaded to complain of his continued detention based on a breach of a legal duty by the police in the exercise of their discretion. Accordingly, so it is argued, the Minister had a complete defence to Grootboom's claim, based on the merits.

20. It is appropriate to mention that the particulars of claim articulate that damages were suffered by Grootboom "as a result of the... wrongful arrest and detention", and that same were for "deprivation of freedom, contumelia and discomfort" suffered by him.

21. The enquiry regarding condonation overlaps with the enquiry regarding the entitlement to set aside an order of Court granted by default, inasmuch as both entail an analysis of the prospects of success on the merits.

22. The requirements for condonation were enunciated in **Minister of Safety and Security v Scott and Another 2014 (6) SA 1 (SCA):** "*The principles relating to condonation are well established. The factors that this court will have regard to in considering such an application include the adequacy of the explanation, the extent and cause of the delay, any prejudice to the parties, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the avoidance of unnecessary delay in the administration of justice and the applicant's prospects of success on the merits. Condonation is an indulgence, not to be had for the asking. A litigant who does not comply with the rules is required to show "good cause" why the rules should be relaxed.*"

23. The judgment of **Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)** involved a case in which the Bellville office of a firm of attorneys were instructed to defend the case but the proper address for service of process was that of its Cape Town office. The Cape Town office received a summary judgment application but failed to notify the Bellville office as it should have done. Summary judgment was duly granted. The Court had this to say, at page 9F et sequitur, about the explanation for the default of the applicant in its rescission application: "*I have reservations*

about accepting the defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a ***reasonable*** *explanation. While the Courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys (Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A).) Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success (Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)").*

24. The delay in the launch of the rescission application was not inordinate, a fortiori in the light of the logistics. However, as indicated by the above cases, this fact simpliciter is not dispositive of the matter.

25. The explanation for the default must be reasonable. On the facts before Court, the explanation falls far short of this. Cognisance has been taken of the fact that Qongqo was ingenuous, frank and forthright, and indeed apologetic in her explanation for the default, and that her workload was overwhelming, and created a difficulty in keeping abreast of 600 files at a time. This is an administrative challenge within the office of the State Attorney which should be addressed by it, to avoid similar incidents.

26. But these facts do not militate against a finding of gross negligence on the part of both the State Attorney's office and the Minister, in their disregard of the Summons. Attorneys are legitimately expected to know about the consequence of ignoring a Summons. There is a level of urgency attached to taking instructions prior to defending a case, because of a limited period within which to defend. Follow up phone calls should have been made,

because it cannot be taken for granted that correspondence will be dealt with urgently. Albeit that this may have been an oversight, Qongqo does not explain why she failed to apply her mind to the matter when the appearance to defend was signed on 9 January 2015.

27. The wanton disregard of the case by the Minister's office should also be noted. There is no affidavit from the Minister to explain why no steps were taken to address Qongqo's queries. Not a single letter from the Minister is produced, whether in reply to Qongqo's correspondence, or at all. There is no suggestion by Qongqo that her letters were not received. There is no mention of any telephone conversations between the parties, either.

28. If the Minister's stance is that its office can hide behind its attorney's conduct without further ado, it is mistaken. As indicated in the **Colyn** judgment, supra: "*While the Courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys*".

29. We refer to the defence on the merits which, if it reveals good prospects of success, on a prima facie basis, may potentially compensate for the poor explanation for the default.

30. Based on the papers in the application, the Minister's prospects of success are poor. The Minister relies on section 40(1)(e) of the Criminal Procedure Act, 51 of 1977, as justification for the arrest. The section provides:

"A peace officer may without warrant arrest any person –

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing."

31. The question concerning "reasonable suspicion" entails an objective enquiry into reasonableness. As stated in **Manase v Minister of Safety and Security and Another 2003 (1) SA 567 (CkH)** at page 574:

"The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without

checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest.... The section requires suspicion, not certainty."

32. Grootboom has objected to the introduction of Louw's statement as hearsay, while at the same time relying on it in its argument before Court. In the interests of justice, I have resolved to accept same as evidence in this application.

33. The statement of Louw dated 19 August 2013 notes that, while on duty at about 15h00 on 19 August 2013, she received information that certain stolen goods could be found at 486 Greenfield Loerie. She went to this address where she found four people, including Grootboom. She asserts that several items stolen in the housebreaking were found at these premises.

34. She says as follows: *"Ek het met Neil Rossouw se toestemming die huis begin ondersoek.....Ek het die vier persone nl: Luyanda Duda, Neil Rossouw, Bongani Grootboom en Pumlani Doyi meegedeel dat hulle verdagtes in bogemelde sake is, en die klagtes teen hulle huisbraak en diefstal en dat hulle in besit van gesteelde eiendom gevind is."*

35. Grootboom's answer to the statements in the docket is as follows: *"It appears clearly from the content of these paragraphs that my arrest was unlawful. There were no reasonable grounds for my arrest. Further legal argument will be addressed to the court in this respect."*

36. Counsel for the Minister argued that the above answer does not constitute a denial of the statements attached to the Minister's affidavit. In my view, it was sufficient for purposes of the issues in casu for Grootboom to have denied the lawfulness of his arrest.

37. Section 36 of the General Law Amendment Act, 62 of 1955, appears to be the section relied upon by the Minister, and relates to the failure to give a satisfactory account of possession of goods, in regard to which there is a reasonable suspicion that they have been stolen.

38. Section 37 is interrelated with section 36. Section 37 of this Act requires, inter alia, proof that the accused was found in possession of the goods. In **State v Manamela and Another 2000 (3) SA 1 CC** at paragraph 17, it was held that *"detentio coupled with physical possession will establish possession for the purposes of section 37(1). "*

39. As pertinently pointed out by Grootboom's Counsel, there is no recordal in Louw's statement of any admissions by Grootboom as to any involvement on his part in the commission of the burglary or the receipt of and/or possession of stolen property, this in contrast with admissions allegedly made by the remaining three individuals in the house.

40. Moreover, on Louw's statement, the premises were those of Neil Rossouw, ("Rossouw"), whose permission she sought for purposes of the search. Grootboom appears to have been arrested because he was found to be in the company of three people who made admissions about involvement in the offences in question.

41. He was not found in possession or control of the stolen goods, which appear to have been found in Rossouw's home. He was not implicated in the commission of the offences by any of the three individuals who had admitted to participation in same.

42. In the circumstances, the suspicion of Grootboom having committed any of the crimes in casu was unreasonable and unwarranted, and was uncorroborated, on the Minister's own version.

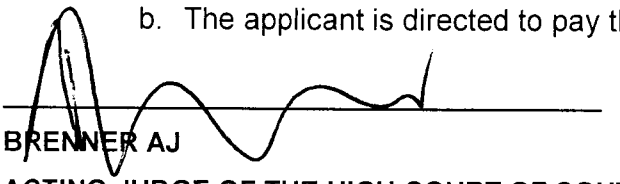
43. On a totality of the evidence, the Minister has failed to prove good cause for the setting aside of the order against it on the merits of the case. Costs should follow the result. The appearance to defend having been entered before judgment on quantum, it remains within the province of the Minister to address issues arising in this regard.

44. In the premises, there was no reasonable explanation for the default of the Minister. Nor was the Minister able to prove a bona fide, prima facie defence with a good prospect of success. The Minister has failed to prove good cause for the relief sought.

45. In the result, the following order is made:

a. The application is dismissed;

b. The applicant is directed to pay the costs of the application.



BRENNER AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

3 May 2016

Appearances

Counsel for the Applicant	: Advocate R Laher
Instructed by	: The State Attorney
Counsel for the Respondent	: Advocate EP van Rensburg
Instructed by	: Van Zyl le Roux Inc