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

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

09/06/2016
DATE

SIGNATURE

CASE NUMBER: 58143/2015

In the matter between

24/6/2016

JULIA MASHISHI APPLICANT

And

KORI MORABA RESPONDENT

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JUDGMENT

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MOSEAMO AJ

INTRODUCTION

[1] This is an application for rescission of judgment obtained by the respondent against the applicant on the 3rd April 2012 under case number 56709/09. The applicant also seeks an order setting aside the writ of execution.

BACKGROUND

[2] During 2006 the respondent was charged with the rape of the applicant's niece (the minor child) who was 9 years old at the time. The minor child was under the guardianship of the applicant as her mother had died in 1997. The respondent was acquitted of the charge during 2009.

[3] The respondent instituted a claim for damages against the applicant in 2009 for laying a false charge of rape against him. The applicant failed to enter appearance to defend and the respondent obtained default judgment in the sum of R461 950.

ISSUE

[4] The basis of the applicant's application is that judgment was erroneously sought and erroneously granted. The applicant denies that summons was served on her personally as she had relocated after her divorce, prior to the service of the summons. It is also submitted that the respondent mislead the court in his application for default judgment in that he stated in his affidavit in support of the application for default judgment that his claim was for institution of malicious prosecution in that the applicant falsely alleged that respondent had raped her.

DISCUSSION

[5] Rule 42(1) (a) provides as follows:
'The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:
(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;'

[6] Rule 42 caters for a mistake, however rescission or variation does not follow automatically upon proof of a mistake. The court has a discretion, which must be exercised judicially, whether to order it or not. See Theron NO v United Democratic Front (Western Cape Region) and others 1984 (2) SA 532(C) at 536 G

[7] Generally a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have induced the judge if aware of it, not to grant the judgment.

[8] In Colyn v Tiger Food Industries Limited case number 127/2002 (SCA) (31 March 2003) in para 6 it was stated 'Not every mistake or irregularity may be corrected in terms of the rule. It is for the most part at any rate a

restatement of the common law. It does not purport to amend or extend 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.'

Sheriff's return of service

[9] According to the sheriff's return of service summons was served on the applicant personally at 313 Hermanstat, Pretoria on the 17th September 2009. The applicant contends that she never received the summons as she had moved to house number 1262 Beacon Street, Booysens, Pretoria after her divorce in February 2009. The applicant alleges that sheriff's office failed to provide her with proof that she had signed receipt of service.

[10] It is the cornerstone of our legal system that a person is entitled to notice of legal proceedings against him or her. Where summons had not been served on the defendant, a subsequent judgment may be set aside in terms of Rule 42(1)(a). Therefore should the applicant succeed in challenging the sheriff's return of service, she will be entitled to have the judgment rescinded. See Steinberg v Cosmopolitan National Bank of Chicago 1973 (3) SA 885 AD at 892 D; Fraind v Nothmann 1991 (3) SA 837 WLD at 839 H

[11] In terms of s 36 (2) of the Supreme Court Act 59 of 1959 a return of service constitutes prima facie proof of its contents. An impeachment of the return of service will not be lightly upheld in the absence of clear convincing evidence. See Molaudzi v S (72853/12) [2014] ZAGPPHC 582 (31 July 2014)

[12] The return of service that is being challenged by the applicant appears to be regular on the face of it and thus constitutes prima facie evidence of the statement made therein that summons was served on the applicant personally. To successfully challenge a valid return of service, the applicant must provide clear convincing evidence to the contrary.

[13] The applicant is alleging that the sheriff fraudulently stated that the summons was served on her personally. She states in her founding affidavit that she was no longer staying at 313 Hermanstat as she was in the process of a divorce. She attached a decree of divorce as proof. The decree of divorce does not constitute proof that she was not staying at the address of service.

[14] In my view the applicant should have involved the sheriff to ensure that he is given an opportunity to answer allegations of impropriety on his or her part. Alternatively she should have provided evidence that proved that she was no longer staying at that address. I therefore find that the challenge that summons was not served on her is without merit.

Error in the application for default judgment

[15] It is submitted on behalf of the applicant that the respondent misled the court to grant the default judgment by alleging that the applicant falsely accused the respondent of raping her. It is further submitted on behalf of the applicant that the respondent was at all material times aware that charge of rape was for an alleged rape of the minor child and not of the applicant. It is contended that had the court been aware of these facts it would not have granted the order for default judgment.

[16] Both in the summons and in the default judgment application it is stated that the respondent's claim is based on the 'false charge of rape' laid by the applicant against the respondent. It is not in dispute that the applicant is the one who laid a charge of rape against the respondent on behalf of the minor child. The question is whether this kind of mistake is the one referred to in rule 42(1)(a).

[17] In Lodhi Properties Investment Properties Investment CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) it was stated that where the plaintiff was procedurally entitled to the order when it was granted, subsequent facts and the subsequently disclosed defence cannot transform a validly obtained judgment into an erroneous judgment.

[18] The respondent in this matter was entitled to obtain judgment after the applicant failed to enter appearance to defend. In my view the respondent was procedurally entitled to the order when it was granted and the mistake referred to does not make rule 42(1)(a) applicable. I therefore find that the applicant has failed to prove that the judgment was erroneously sought or erroneously granted and therefore the application in terms of rule 42(1)(a) should be dismissed.

CONDONATION

[19] The test applicable in deciding whether or not condonation ought to be granted is well settled. The court has a discretion whether or not to grant the application for condonation. The court will among others consider (a) the degree of non-compliance with the rules; (b) the explanation thereof; (c) the prospects of success; (d) the importance of the case; (e) the respondent's interest in the finality of the case; (f) the convenience of the court; (g) the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive and the factors are not individually decisive. They must be weighed one against the other and therefore a slight delay and a good explanation may help to compensate for prospects of success. See Melane v Santam Insurance 1962 (4) SA 531 (A) at 532 C-F; United Plant Hire (Pty) Ltd v Hills 1976 (1) SA 717 (A) at 720E-G

[20] Summons in this case was issued during 2009 and served on the applicant personally on the 17th September 2009. The respondent obtained default judgment on the 3rd April 2012 after the applicant failed to enter appearance to defend. On the 13th September 2012 a warrant of execution was served on the applicant.

[21] The applicant denies that summons was served on her personally as she had moved from that address after her divorce. There is no confirmation of this fact from any person. It is submitted on behalf of the applicant that she first became aware of the default judgment when the warrant of execution was served upon her.

Delay

[22] The applicant brought an application for rescission of judgment three years after becoming aware of the judgment against her. In an attempt to explain her default the applicant blames the negligence of her erstwhile attorneys. Our courts have often said that an attorney's negligence does not always constitute a reasonable explanation. See Salojee and Another v Minister of Community Development 1965 (2) SA 135 (A) 141 B-E; Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 9H.

[23] In Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) para 6 it was stated: 'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[24] The applicant's explanation for the delay is that she approached legal aid offices for assistance during October 2012 after she was served with a writ of execution. She instructed them to bring an application for rescission of judgment. She later enquired about progress and was informed about correspondence that was send to the respondent's attorneys.

[25] On the 5th February 2015 she received a notice to appear in court in order for the magistrates court to conduct an enquiry into her financial position

in terms of section 65A of the Magistrates Court Act. When she went to her erstwhile attorneys to enquire, she was informed that the attorney who was handling the matter had resigned without preparing the application for rescission of judgment.

[26] The applicant's reasons for the default are not set out fully and sufficiently to enable me to assess her motives. There is no sufficient explanation for the period November 2012, when she appointed attorneys until August 2015 when she finally brought an application for rescission of judgment. There are many gaps in the chronological explanation by the applicant.

[27] Even if it were to be accepted that the applicant only became aware of the judgment during September 2012 when she received the writ of execution, the explanation provided by the applicant as to why the application for rescission of judgment was brought more than three years later is terribly inadequate. The applicant in this case cannot rely on the attorneys' negligence while she does not seem to have done anything reasonably possible to ensure that the application for rescission is brought within a reasonable time.

Prospects of success

[28] It is submitted that the applicant has prospects of success in the main case as she did not falsely accuse the respondent of rape. According to the applicant the rape charge against the respondent, was based on the complaint by the minor child who was under her guardianship. The minor child had told the applicant that the respondent had raped her and the applicant reported the matter to the police as a result. It is further submitted that the doctor who examined the minor child confirmed that the minor child had been sexually penetrated.

[29] The respondent denies that the applicant has prospects of success in the main case as the J88 states that the child did not sustain any injuries around genital area. Upon inspection of the J88 under the heading 'clinical findings' the doctor is supposed to record the nature, position and extent of the injury together with the probable date and the manner of causation. The doctor, in this case, only recorded the allegations reported to him or her and does not record any injuries as required. His or her observations as recorded on the J88 are that there was no swelling, no fresh tears and no clefts. The form does not seem to support the allegation by the applicant that the doctor supported the child's complaint.

CONCLUSION

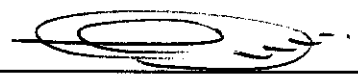
[30] The court has a wide discretion in evaluating good cause in order to ensure that justice is done. Therefore where the applicant has provided a poor explanation for default, a good defence may compensate. See Carolus v Saambou Bank Ltd, Smith v Saambou Bank Ltd 2002 (6) SA 346 (SE) at 349 B – C

[31] The applicant's explanation for the lengthy delay is inadequate she does not have prospects of success on the merits. I have also considered the respondent's entitlement to finality of judgment and the avoidance of unnecessary delays in the administration of justice.

[32] I find that the applicant has failed to make out a case for the indulgence she seeks and therefore the application for condonation should fail.

In the result I make the following order:

1. Application for rescission of judgment is dismissed with costs.
2. Application for condonation is dismissed with costs.



P D MOSEAMO
ACTING JUDGE OF THE HIGH COURT

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**OFFICE OF THE DEPUTY JUDGE PRESIDENT AP LEDWABA**
**HIGH COURT OF SOUTH AFRICA, GAUTENG PROVINCIAL DIVISION, PRETORIA**

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**22 June 2016**

**TO: MOJAPELO &CO. C/O MPHEA & ASS. ATTORNEYS**
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Our Ref. 76836/10/DJP/ RLS

**TO: MOCHE INC**
Fax No .: 012 543 9374
Your Ref.: T60030
Our Ref.: 76836/10/DJP/RLS

Sir/Madam

**RE: PRE-TRIAL CONFERENCE: XULU T vs. ROAD ACCIDENT FUND - CASE NO.:76836/10**

I refer to the above matter.

To pursue effective case flow management on Road Accident Fund matters and to encourage early settlement, I direct that a pre-trial conference be held in the presence of a Judge **on 04 July 2016 from 08h45 in one of the following courts, 6A, or 6B, or 6C, 6D.** (A list showing in which court your matter would be heard will be published on the 6th Floor on 04 July 2016. **Parties are expected to be in court at 08h45.**)

The parties' legal representatives and the representatives from the Road Accident Fund who have knowledge of the matter(s) and can give proper instructions in the matter(s), must attend the pre-trial.

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PG: Polling RB: Relay Broadcast RS: Relay Send BF: Box Fax Forward CP: Completed
SA: Send Again EN: Engaged AS: Auto Send TM: Terminated