

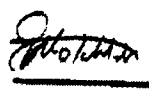
IN THE HIGH COURT OF SOUTH AFRICA



THE REPUBLIC OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

19/9/2016

✓	REPORTABLE: NO
✓	OF INTEREST TO OTHERS JUDGES: NO
✓	REVISED
DATE : 16 September	
SIGNATURE	
	

Case number: 72948/2014

In the matter between:

NICHOLAS MOSES MOOSA

APPLICANT

and

STHALANE TIMOTHY HLONGWA

RESPONDENT

Heard:

Delivered:

19/9/2016

Judgment

Molahlehi AJ

Introduction

[1] This is an application for the rescission of the default judgment which was granted by this court on 12 February 2015 in favour of the respondent.

[2] The applicant has also applied for condonation for the late filing of the rescission application. The application was twenty four days late. The application was brought in terms of rule 42 of the Uniform Rules of the High Court. The Rules makes no provision for the time frame within which a rescission application should be made. The application was launched about twenty four days after the order came to the attention of the applicant. The respondent did not take issue with this point.

The background facts

[3] The applicant is a professional motor mechanic, trading as Notorious Spares and Tyres, with the principal place of business at number 2 Staten street, Barbaton.

[4] According to the applicant, he entered into an oral agreement with the respondent, on 15 August 2013, in terms of which he amongst other things was to repair the car of the

respondent at the costs of R85 000,00. The respondent paid the deposit of R17 000,00 and thereafter failed to pay the remainder by monthly instalments.

[5] As a result of the failure by the respondent to pay his monthly installments a dispute arose between the parties. They then with the assistance of the attorney of the respondent signed an acknowledgement of debt agreement. In terms of that agreement respondent acknowledged that he was indebted to the applicant in the amount R85 000,00 and that he would pay this amount by way of a monthly installment in the amount of R4000,00. It was further agreed that in the event of failure to pay the monthly installments the capital amount would be come due immediately.

[6] The applicant states in the founding affidavit that the respondent again failed to meet his obligation in terms of the agreement in that he failed to pay the monthly instalments.

Legal principles

[7] It is trite that in order to succeed in an application for the rescission of a judgment or an order of the court, the applicant has to show good cause and that he or she has a *bona fide* defense. In general good cause entails having to provide for an acceptable and reasonable explanation for the default. This includes having to show that there was no wilful noncompliance with the rules of the court.

[8] As was stated in *Silber v Ozen Wholesalers (Pty) Ltd*,¹ the applicant for a rescission should at least furnish an explanation of his or her default sufficiently full to enable the Court to understand how the default came about and to assess his conduct and motives.

[9] In *Grant v Plumbers*,² the court set out the following as grounds for a successful application for rescission:

- “(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.
- (b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.
- (c) He must show that he has a bona fide defense to plaintiff's claim. It is sufficient if he makes out a prima facie defense in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.”

Evaluation/ Analysis

[10] The applicant in this matter was called upon by the respondent in his notice of motion, in the urgent application that he had instituted, to file his notice to oppose that

¹ 1954(2) SA 345 (A) at 353.

² 1949(2) SA 470 (TPD) at 476.

application within 5 days of service of the notice of motion. The applicant was further required to file the answering affidavit within 15 days of service of the notice of motion.

[11] The issue in this matter is whether the applicant was in wilful default and if not whether he is entitled to have the default judgment against him rescinded.

[12] It is common cause that the applicant never filed the notice to oppose or the answering affidavit. It follows from this that the first thing which the applicant needed to explain is why he failed to file the notice to oppose and the answering affidavit. This issue concerns whether he was served with the urgent application which the respondent had instituted against him.

[13] The respondent attaches to his answering affidavit both the return of service of the notice of motion and the notice of set down on the applicant. The return of service of notice of motion indicates that the papers were served on Ms Constance Watp who was in charge of the residence of the applicant. The return of service in relation to the notice of set down indicates that the papers were served Mr Raymond Nkosi, also in charge of the residence of the applicant.

[14] In his founding affidavit under the heading, "REASONABLE EXPLANATION OF THE APPLICANT'S DEFAULT," the applicant states that he "became aware of the court order dated 12th February 2015 when my house keeper, who was not aware of the importance of such documents, presented them to me on the 24th March 2015." The other reason

given by the applicant is that he was away from his residence from the 10th February 2015 to 24th March 2015.

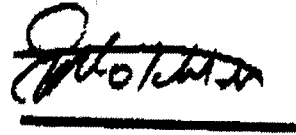
[15] The applicant in both his founding affidavit and replying affidavit does not deal with the issue of the service of the notice of motion and notice of set down on him. And in relation to the court order he simply states that his house keeper brought it to his attention. He does not mention the name nor does he attach the supporting affidavit of the house keeper.

[16] In my view, the dates that the applicant says he was away from his house are irrelevant because that period has no relation to the period when he was afforded the opportunity to defend the urgent application and when he was invited to appear before the court. There is therefore no explanation from the applicant as to why he did not comply with the rules and file notice of intention to oppose or more importantly why did he not attend the court when he was notified to do so.

[17] In light of the above I am of the view that the applicant has failed to make out a case for the rescission of the court order dated 12 February 2015. I see no reason why costs should not follow the results.

Order

[18] In the premises the applicant's application to rescind the order of this court made on 12 February 2015 is dismissed with costs.



E.M . Molahlehi

Acting Judge of High Court
of South Africa: Gauteng
Division, Pretoria.

Appearances:

For the Applicant: Adv. M M Ncongwane instructed Macbeth Attorneys Inc.

Tel: (012) 452 3500

Fax: ----

For the Respondent: Adv L Thobejane instructed by Botha Massyn & Thobejane Associated
Attorneys.

Tel (012) 341 7964.