IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 52390/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

18/12/2019

E.M. KUBUSHI DATE

In the matter between:

NAOMI NGWENYA	Applicant
and	
STANDARD BANK OF SOUTH AFRICA LIMITED	First Respondent
BESTCARE MEDICAL SUPPLIES (IN LIQUIDATION)	Second Respondent
CRAIG VAN DIGGELEN N.O.	Third Respondent
GEORGE DA SILVA RAMALO N.O.	Fourth Respondent
MPHO ERIC MATOLA N.O.	Fifth Respondent
THE MASTER OF THE HIGH COURT	Sixth Respondent
(GAUTENG DIVISION, PRETORIA)	
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Seventh Respondent
THE SHERIFF CENTURION WEST	Eighth Respondent

JUDGMENT

KUBUSHI J,

[1] The applicant hereby applies for leave to appeal to the Full Court of this Division *alternatively* to the Supreme Court of Appeal, against the entire judgment and orders I issued on 28 March 2019. The application is opposed.

[2] The grounds for the application for leave to appeal are stated in the said application as follows:

> "1. *The learned judge erred in not finding that the applicant has locus standi to bring the rescission application under circumstances where the court had found that the applicant had an interest in the manner of administration of the two insolvent estates.*
>
> 2. *The learned judge erred in finding that locus standi was dependent upon evidence of the applicant having previously approached and demanded the liquidators to demand a proper account from the first respondent;*
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> 3 *The learned judge erred in finding that the judgment sought to be rescinded did not constitute a judgment granted by default, under circumstances where the applicant's position was not argued at the hearing of the main application,*
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> 4 *The learned judge erred in finding that the case of* **Katritsis v De Macedo** *1966 (1) SA 613 (A) is distinguishable from the current matter.*
>
> 5. *The learned judge ought to have found that, on the basis of the principles set out in* **Katritsis supra**, *the judgment granted falls within the ambit of a judgment by default;*
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> 6 *The learned judge erred in finding that the orders were not erroneously sought and granted under the circumstances where further evidence tends to show that all parties, including the court, at the time of the judgement laboured under a mistake as to the alleged fact that the applicant was in fact in arrears with payment under the various loan agreements;*
>
> 7 *The learned judge ought to have found that, had the court been aware of the true factual position existing at the time when the judgment was granted, the court would not have granted the order as it did, thus the orders granted were erroneously sought and granted;*
>
> 8 *In the alternative the court ought to have found that the availability of subsequently discovered evidence, relating to facts which existed at the time that the judgement was granted, justifies the setting aside of the order granted and justifies affording the applicant a further opportunity to supplement existing papers.*

9 *The learned judge erred in finding that the applicant's failure to allege fraud and/or misrepresentation should count against her. The court ought to have found that the facts presented sufficiently speak for themselves in justifying an order for rescission."*

[3] In essence the applicant seeks to appeal the adverse findings of the court *a quo* in respect of the *locus standi* of the applicant, judgment granted by default, judgement not erroneously sought and granted, and/or failure to allege fraud and misrepresentation to prove the relief sought.

[4] The application for leave to appeal was filed out of time. In fact it was filed eighty-three (83) days after the judgment was handed down, which makes it approximately three (3) months out of time. The applicant has, as a result filed, together with the application for leave to appeal, an application for condonation of the late filing of the application for leave to appeal. The respondent is opposing the application for condonation and has filed an answering affidavit. I shall, therefore, deal first with the application for condonation before I deal with the main application.

[5] The legal framework applicable to the application for condonation has been succinctly set out in the respondent's heads of argument. I shall therefore, without having to reinvent the proverbial wheel, quote copiously from that framework in my judgment.

[6] In terms of Uniform Rule 27 (3) the court may, on good cause shown, condone any non-compliance with the Rules of Court. The court is vested with a wide discretion in this respect, but with the added safeguard for the applicant to show good cause, for the court to exercise the discretion.[1]

[7] Courts have consistently refrained from attempting to formulate an exhaustive definition for what constitutes "good cause". Three principal requirements have crystallised, namely:-

7.1 First, the applicant should satisfactorily explain the delay;

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[1] See Erasmus: Superior Court Practice 2nd Volume 2 pD1-326.

7.2 Second, the applicant should satisfy the court that it has a *bona fide* claim or defence (in this instance the applicant must show that there is a *bona fide* basis for the application for leave to appeal to be granted);

7.3 Finally, the granting of any indulgence must not be to the prejudice of the other party to an extent, which cannot be cured by the appropriate cost order

[8] The factors to take into account when considering an application for condonation are set out in the then Appellate Division judgment in *Melane v Santam Insurance Co Ltd*,[2] as follows.

> *"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."*

[9] In this instance, it is my view, for reasons I shall state later in this judgment, that there are no prospects of success on appeal and thus it will not help to grant condonation herein. I shall in that regard deal with the grounds raised by the applicant hereunder in turn.

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[2] 1962 (4) SA 531 (A) at 532B-E

Ad finding of lack of *locus standi*

[10] Although I made a finding that the applicant has no *locus standi*, this issue should not form part of this application because in essence I found in the applicant's favour by considering the merits of the case.

Ad finding re: No Default of the part of the applicant

[11] The argument by the applicant's counsel is that I ought to have followed the judgment in *Katnitsis* and found in favour of the applicant. What counsel fails to appreciate is that *Katnitsis* dealt with action proceedings rather than motion proceedings, as is the case in this instance. That is exactly what distinguishes the two matters.

[12] The court in *Katnitsis* dealt with the case where a judgment was taken against a defendant who absented himself mid-way through trial. The defendant's counsel had withdrawn and the defendant was refused postponement and being unable to place his case before court whilst acting in person, the defendant opted to leave. The trial proceeded in his absence and judgment was granted against him. The court held, on appeal, that the judgment granted in the court below was in default.

[13] *Katnitsis* was referred to with approval in *Ferreiras (Pty) Limited v Naidoo*,[3] a judgment with which I am in alignment with, wherein the court at para 8 held that, as in the common law, our courts are not only concerned with the physical presence of the parties. The distinguishing feature is that in action proceedings there is no evidence before court whereas in motion procedures the affidavits serve as evidence. That court in coming to its decision, differentiated between judgments by default in action proceedings as against judgments by default in motion proceedings. The court at para 17 of its judgment, set out circumstances under which judgment by default may be granted in motion proceedings, as

> *"[17] It seems to me that a judgment could be given by default in the normal course in motion proceedings as a result of (a) default of opposition, (b) in default of an appearance at the hearing, or (c) in default of a party placing its version before the court. ..."*

[3] (69094/2014) [2017] ZAGPJHC 392 (11 December 2017)

[14] It is quite evident that the above propositions of default are not applicable in this instance. It is common cause, as I have found in the main judgment that the motion proceedings were opposed, there was appearance of counsel and the applicant was present at the hearing of the application and the applicant's version was placed before the court and even argued.

Ad finding re: Judgment not erroneously sought or granted

[15] It is decided in *Kgomo v Standard of South Afrca*[4] that a rescission of judgment application cannot be based on an alleged "defence" which was not placed before the court that heard the matter. The defence must be already in existence at the time the matter is heard.

[16] I find in my judgment that the availability of the report showing that the arrears were not correctly calculated does not provide a basis upon which rescission of judgment can be granted as the report (or evidence) of such arrears should have been in existence at the time that the judgment was granted. On the applicant's own version, the report was received during December 2016, which is approximately a year after the respective orders were granted.

[17] The contention by the applicant's counsel that I ought to have set aside the order granted and afforded the applicant an opportunity to supplement her existing papers with the newly discovered evidence, is not sustainable.

[18] There is no rule or law that allows for supplementation of evidence after the matter having been fully ventilated except through the appeal procedure.[5] Once a judgment has been granted the judge becomes *functus officio*, but subject to certain exceptions of which rule 42 (1) *(a)* is one. The said exceptions do not in any way allow for supplementation of evidence after the matter has been finalised.[6]

Ad finding re: failure to allege fraud or misrepresentation

[19] The argument by the applicant's counsel is that the respondent acted unlawfully by making wrong calculations of the arrears and on that basis I should

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[4] 2016 (2) SA 184 (GP) para 10 at 188B.

[5] See section 19 (b) of the Superior Courts Act 10 of 2013 read with Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others 2011 (1) SA 70 (SCA) para 21.

[6] See Kgomo, above at para 11 at 157H

have found in favour of the applicant even though fraud and/ or misrepresentation was not alleged in the applicant's papers. Counsel further submitted that I should have ventured into the merits of the case to find that the provisions of section 149 (1) and (2) read with section 150 of the Insolvency Act[7] which allows a party to rescind an order of a court, applicable.

[20] The applicant had founded her case squarely on rule 42 (1) *(a)* or the common law and it is against this backdrop that the application for rescission of judgment was to be considered and was indeed considered. Since I made a finding, correctly so, that rule 42 (1) *(a)* is not applicable due to the fact that the orders were not granted in default or were not erroneously sought or granted, the only other application would be the common law. However, on the matrix of the applicant's case the common law would also not apply because the error relied on by the applicant is not *iustus error* as is a requirement in common law. This is so, simply because the applicant did not allege any fraud or misrepresentation in order to found *iustus* error.

CONCLUSION

[21] In terms of section 17 (1) of the Superior Courts Act, leave to appeal may only be granted where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard.

[22] I have already at the level of the condonation application found that there are no prospects of success; this will in effect impact on the envisaged prospects of success on the appeal itself.

[23] I find as such that, the entire premise upon which the grounds presented by the applicant to found that there are prospects of success in his condonation application ill-founded and of no consequence. The condonation application ought, therefore, to be dismissed.

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[7] Act 24 of 1936.

THE ORDER

[24] I make the following order -

The application for condonation for the late filing of the leave to appeal is dismissed with costs.

E.M KUBUSHI
JUDGE OF THE HIGH COURT

Appearance:

Appellant's Counsel	**: Adv. A. Njeza**
Appellant's Attorneys	**: Venfolo Attorneys**
Respondents' Counsel	**: Adv. C.G.V.O. Sevenster**
Respondents' Attorneys	**: Vezi & De Beer Inc**
Date of hearing	**: 4 December 2019**
Date of judgment	**: 18 December 2019**