REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:68433/2016

DOH: 12 August 2019

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

..... 2019-09-12
SIGNATURE **DATE**

In the matter of:

DE BRUYN & DE KOCK INC. **FIRST APPLICANT**

(Reg No: 2005/011768/21)

JAN DANIEL DE KOCK **SECOND APPLICANT**

and

JAN HENDRIK THEUNISSEN **RESPONDENT**

JUDGEMENT

N N Bam AJ

A. Introduction

1. This is an application for rescission of a default judgement granted by this court on 9 November 2017. The application is brought in terms of Rule 31 (2) (b) of the Uniform Rules of Court. For convenience, I refer to the parties as they were in the main matter. In this regard, I refer to plaintiff when referring to respondent, and first and second defendants when referring to first and second applicants.

2. The application is brought only by the second defendant and it is opposed by the plaintiff for reasons I will soon refer to.

3. It is expedient that I first deal with the absence of the first defendant in these proceedings. At the start of her address, counsel dealt with the issue of deregistration of first defendant. It appears that the deregistration was effected on 26 August 2016 by the Companies Intellectual Property Commission (CIPC). Information about the deregistration only recently

came to the attention of the directors of the first defendant. It appears from the CIPC report submitted by counsel that the deregistration[1] was as a result of first defendant's non-compliance with filing of annual returns. As the first defendant's deregistration took effect prior to the commencement of plaintiff's action[2], the judgment subsequently granted against it amounts to a nullity, so it was submitted. I agree with the submission[3].

B. Background

4. The submissions by both parties are extensive, perhaps indicating that the stakes are high on both sides. However, I deal solely with the essence of what I am required to decide in this type of application. The background simply is: During or about September 2010, plaintiff, following an accident on 25 August 2010, in which he was severely injured, placed instructions with the defendants to prosecute a claim against the Road Accident Fund (the Fund) on his behalf. Those instructions were not properly carried out in that he discovered sometime in September 2015 that, bar the initial correspondence, no follow up had ever been made. As a consequence, whatever claim he may have had against the Fund had by then prescribed. As a result, plaintiff's papers indicate, he can no longer go back to his pre-morbid occupation within the construction industry, has no income and is in

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[1] Sec 82 of the Companies Act, Act 71 of 2008

[2] Summons was issued on 31 August 2016

[3] *R Miller v Nafcoc Investment Holding Company* (324/09) [2010] ZASCA 25 (25 March 2010), para 11; *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* (086/2014) [2015] ZASCA 25; 2015 (4) SA 34 (SCA); [2015] 2 All SA 322 (SCA) (20 March 2015) para 15

need of medical care. It is common cause that in dealing with first defendant, plaintiff dealt with second defendant.

5. The application is resisted by the plaintiff for a number of reasons. The first has to do with an undertaking allegedly made by the directors of the first defendant firm to assist him (plaintiff) in collecting the judgement amount from the second defendant. This allegation is refuted by the directors of the first respondent. In this regard, the court has been provided with affidavits denouncing the allegations. I need not take this issue any further in this application.

6. Plaintiff further submits that the balance of conveniences favours him in that he had proved his claim and that the court had, prior to granting judgement, assessed it and found it persuasive. I interpose to state that this averment is incorrect. Plaintiff's damages were not proved[4] and this is evident from the record of the default judgement. He states that he will suffer prejudice in the event this application is granted. He is in need of medical care and income which he can no longer claim as a result of the defendant's negligence. He concludes that the application is merely a dilatory tactic on the part of second defendant as he have neither an explanation for his default nor does he have a bona fide defence.

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[4] See in this regard Venter v Nel 1997 SA 1014 Dhooma v Metha 1957 (1) SA 676 (N); Harms, Amler's Precedents of Pleadings, Ninth Edition P 245

C. Legal Position

7. A judgement taken in the absence of a party may be rescinded by means of:

   7.1 Rule 31 (2) (b); or

   7.2. Rule 42 (1) (a); or

   7.3 Common law.

8. This application is brought in terms of Rule 31 (2) (b). The rule reads:

   'A defendant may, within 20 days after he has knowledge of such judgment, apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.' (own underline).

9. There is no question whether second defendant brought the application within the time specified in the rule. What is in dispute is whether he has made out a case for the rescission in the sense of meeting the requirement of showing good cause.

10. Research reveals that our courts have not defined the meaning of 'good cause' or 'sufficient cause' as is referred to in a number of authorities. In *Grant v Plumbers*[5], the court alluded to the following:

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[5] 1949(2) SA 470 (TPD) at 476

"(a) He must give a reasonable explanation of his default. If it appears that his default was willful 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 defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence 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."

11. In *HDS Construction (Pty) Ltd v Wait*[6], where the court was concerned with an application for rescission of default judgment granted against an attorney, in circumstances where the attorney had been negligent in handling his client's affairs, the following remarks were made:.

'It is not in dispute that the defendant's application is bona fide and that he has shown that he has a bona fide defence to the plaintiff's claim. What is in issue is whether he has given a reasonable explanation for his default. .....In determining whether or not good cause has been shown,..... the Court is given a wide discretion in terms of Rule 31 (2) (b). When dealing with words such as good cause and sufficient cause in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to

[6]1979 (2) SA 298 (E) 298

abridge or fetter in any way the wide discretion implied by the words.....

At p301: While it is said in Grant's case that a court should not come to the assistance of a defendant whose default as willful or due to gross negligence, I agree with the view of Howard J in the case of Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd[7], that while a Court may well decline to grant relief where the default has been willful or due to gross negligence it cannot be accepted 'that the absence of gross negligence in relation to the default is an essential criterion or an absolute prerequisite, for the granting of relief under Rule 31 (2) (b)'

12. There is no standard approach in deciding whether good cause has been shown. Each case must be decided on its own merits to ensure justice. In *South African Forestry Co Ltd v York Timbers Ltd*[8], and in an entirely different context to the present, the court had occasion to deal with the meaning of good cause. It reasoned:

'That is not the test that the Court was enjoined to apply - an award maybe remitted where 'good cause' has been shown for doing so and not only where circumstances are compelling. Good cause is a phrase of wide import that requires a Court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances. As pointed out by Innes

[7]1975 (1) SA 612 (D) at 615
[8]2003 (1) SA 338, SCA, para 14

CJ in *Cohen Brothers v Samuels*[9] in relation to that phrase albeit in another context:

'No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits, and decide in each case whether good cause has been shown'.'

13. The court is obliged to look into the case as a whole to decide whether good cause has been shown. Where one element appears to be lacking, it could be complemented by another. In *NUMSA obo Mtshali v Eskom Holdings (Pty) Ltd*[10]:

"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 thereof, 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 the true discretion, save of course that if there are no prospects of success there would be no point of 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 helps to compensate for the

[9]1906 TS 224
[10](JS 72/09) [2009] ZALC 131 (22 December 2009)

prospects of success which are not strong or the importance of the issue and the strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavit."

14. There is also a view that the court should not come to the rescue of an applicant who has a poor or no explanation for his default as that would interfere with the order with which courts carry out their work. In *Cary Lawrence Praetor v Geothermal Energy Systems (Pty) Ltd & 1*[11], it was noted that:

'It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.'

15. It all revolves around the question of fairness, said the court in *Mothupi v MEC, Department of Health Free State*[12], referring to *Madinda v Minister of Safety and Security*[13]:

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[11]ZAWCHC 162/2016/ 15 Feb 2017, para 6:
[12](20598/2014) [2016] ZASCA 27 (22 March 2016), para 14
[13] 2008 (4f) SA 312 (SCA) para 10

'Good cause looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many of such possible factors become relevant. These may include prospects of success in the proposed action, the reason for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefore.

(a) Not in willful default

16. It is against the preceding background that the second defendant's case must be assessed. In demonstrating that he was not in willful default, second defendant avowed that he had a *bona fide* belief that the Attorneys Indemnity Insurance Fund (AIIF) would deal with the matter. Elaborating, second defendant noted that upon receiving the Notice of Bar, he duly forwarded it to the AIIF. He further forwarded a copy of the plaintiff's file to the AIIF on 12 December 2016. It was only on 19 April 2018, when a Notice of intention to Tax a bill of costs was served on their offices, with a copy of the judgment granted on 9 November 2017, that the defendants became aware of the judgement. Laying the blame squarely at the doors of the AIIF, second defendant averred that the AIIF failed to file the plea, alternatively, it failed to instruct the defendants to file same.

17. I had several difficulties with this explanation. Apart from blaming the insurers, second defendant could not provide any correspondence that he had communicated with the insurers at the earliest reasonable opportunity of becoming aware that there may be a possible claim. It is not in dispute that the first letter of demand was served upon defendants on 20 October 2015 in which plaintiff sought to recover from the defendants, jointly and severally, an amount of R2 100 000, as damages. The second and final demand was served on 20 May 2016. Yet the only proof of correspondence that second defendant can provide of his communication with the insurers was on December 2016, more than a year after he first became aware that there might be a possible claim. How then could second defendant entertain the belief that the insurers were to file the plea and continue to defend the matter if he cannot even not produce evidence that: (a) the insurers had been notified of the claim at the earliest reasonable opportunity (in 2015, in other words) and, (b) that they had acknowledged receipt and confirmed their handling of the case? The question was avoided. Significantly, it was submitted that such a question went into the merits of the main case. On the contrary, the question tested the *bona fides* or otherwise of the belief entertained by second respondent and consequently, whether the default had been properly explained. Looking at the circumstances of this case, second defendant had no basis believing that the insurers would file the plea. It is not surprising that to this date, almost three full years since his referral of the plaintiff's case to the AIIF, second defendant still has neither an acknowledgment nor confirmation of acceptance of the claim from the

insurers. Even in preparation for the hearing of this application, second defendant can produce no correspondence to demonstrate that he sought confirmation of the insurer's acceptance of the claim. His conduct in so far as explaining the default is wholly unsatisfactory. It follows that the default has not been properly explained.

(b) Bona fide defence

18. Referring to the accident claim form, second defendant stated that the plaintiff was negligent. On that basis, he had advised plaintiff that he did not have good chance of success with his claim but plaintiff insisted that he proceed. [*Plaintiff's version of the accident indicates that he collided with a heavy-duty vehicle by hitting it from the rear right hand side. He had not realized that the vehicle was stationery, owing to distraction by a pedestrian*]. He further mentioned that the plaintiff would have had difficulty proving the amounts he sought to recover owing to pre-existing conditions which would have influenced any award made by the Fund. With regard to loss of earning, he noted that the plaintiff worked for himself and received cash payments. Second defendant concluded that, on the whole, it would have been extremely difficult for the plaintiff to prove past and future loss of earnings.

19. There is a further issue, which is apparent from the application for default judgement itself, and that is, no evidence was led nor were there affidavits placed before the court to establish plaintiff's damages prior to granting

default judgment. On this basis, second defendant submits that plaintiff had not proved his damages. In summation, second defendant requests the court to set aside the judgment so that the matter can be properly ventilated and an appropriate award made.

20. Having regard to the conspectus of all the facts of this case, it appears to me that even though the default has not been properly explained, the defendants have demonstrated that they have a *bona fide* defence, which they intend to raise, against the plaintiff's claim. They have further demonstrated that they have prospects of success. I must at once highlight that poor as second defendant's explanation of the default is, nothing therein demonstrate a flagrant disregard of the rules of court. I am of the view that justice would be served by setting aside the default judgment in order to allow proper ventilation of plaintiff's damages, with the result that he be compensated for what he can prove. My reasoning is fortified by the remarks of the SCA in SA Forestry[14]. Even though the plaintiff may experience inconvenience, justice will not be done until the quantum of his damages is properly ventilated and an appropriate award is made.

21. In the circumstances, the following order is made:

    21.1 The default judgment granted against second defendant on 9 November 2017 under case number 68433/2016 is hereby rescinded.

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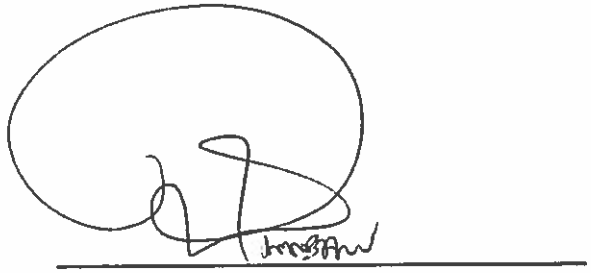
[14] note 7 supra

21.2 Second defendant is hereby ordered to file his plea within 15 (FIFTEEN) days from date of this order.

21.3 Second defendant shall bear the costs of this application, including the costs attendant to the default judgement application on a scale as between attorney and client.



NN BAM

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

APPEARANCES

DATE OF HEARING	:	**14 August 2019**
DATE OF JUDGMENT	:	**13 September 2019**

SECOND APPLICANT'S COUNSEL	:	**Adv G Swanepoel** **HIGH COURT CHAMBERS** **PRETORIA** **INSTRUCTED BY:** **DE BRUYN & SMIT Inc** **13 STAMVRUG STREET** **VAL DE GRACE, PRETORIA**
RESPONDENT'S COUNSEL	:	**ADV BRENKMAN** **INSTRUCTED BY:** **FVS ATTORNEYS** **273 STOKKIESDRAAI** **STREET** **ERASMUSRAND, PRETORIA**