IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 48567/2014

CASE NO: 29708/2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 17 March 2022

SIGNATURE : [redacted]

In the matter between:

NT MAKHUBELE ENTERPRISES CC	First Applicant
NATHANIEL TSAKANE MAKHUBELE	Second Applicant
HITEKANI FAST FOOD CC	Third Applicant

And

BUSINESS PARTNERS LIMITED	First Respondent
SHERIFF OF THE HIGH COURT – SOWETO WEST	Second Respondent

REGISTRAR OF DEEDS- JOHANNESBURG Third Respondent

TAXING MASTER- HIGH COURT Fourth Respondent

This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded on Case lines and is deemed to be 17 March 2022.

JUDGMENT

Munzhelele J

Introduction

[1] The applicants brought an application for rescission of a summary judgment and an application for condonation. The applicants opposed the summary judgment. This rescission is not coming on the basis of default by the applicants; therefore, the applicants should apply based on the nullity of the judgment. Judge Makume delivered the judgment to be rescinded on 20 August 2015. There is no time limit to bring this rescission; however, rescission should be brought within a reasonable time. This rescission application is brought after six years of the delivered judgment. Therefore, it is in the interest of justice that the applicants should explain their delay in bringing the application for rescission of this judgment and show the prospects of success.

[2] Before the application for rescission was heard, the applicant again brought an application for reconsideration, which was no different from the application for rescission of judgment. This is a trend which the applicants have been doing for quite a long time. He would constantly file applications one after the other even when they contained similar averments.

[3] The third application was a *rule nisi* for an application for contempt of court order against the respondents. All these applications were opposed by the first respondent, who also brought an application to interdict the applicant from bringing appeals or rescission of the judgment of Judge Makume of 20 August 2015 without having paid the costs under case numbers 48567/2014 and 29708/2018.

Background facts of the case

[4] Summons against the applicants were issued, and the applicants entered a notice to defend the summons. Summary judgment was requested against the applicants, and it was granted in the amount of R314 398, 88 (three hundred and fourteen thousand three hundred and ninety-eight rand and eighty-eight cents). This money arose from the loan agreement, which was granted in favour of the first applicant by the first respondent. The second and the third applicants bound themselves as sureties and co-principal debtors; hence they were joined in on the judgment. The second defendant, as additional security, bonded the ERF 1838 Protea North Township House as security for the loan; hence the house is attached. The applicants failed to pay the loan. The judgment was granted on 20 August 2015 against the applicants jointly and severally, the one paying the other to be absolved.

[5] It is against this judgment that the applicants bring the application for rescission and condonation.

Condonation application

[6] For an application for condonation to succeed, the applicants should show; the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the rescission of judgment and the prospects of success.

[7] In this condonation application, the applicants are expected to fully explain the delay, covering the entire period. The applicants in their application explained how they have been pursuing the application for leave to appeal before the Constitutional Court all these years. They explained that on 14 December 2015, they brought an application for leave to appeal, and Judge Makume denied such leave. This application was brought four months after the judgment of Judge Makume was delivered. They did not explain what they did between 20 August 2015 and 14 December 2015.

[8] They explained that rescission of judgment was brought before Judge Tuchten on 11 November 2017, but this was three years after the summary judgment was granted. There was no explanation why it took such a long time to bring the rescission. However, one thing that is brought to light is that this explanation informs me that Judge Tuchten had already entertained the application for rescission of judgment; and as such, the applicants want the second bite of the cherry. Judge Tuchten denied the rescission for judgment on similar averments.

[9] Judge Fabricius also refused the application for leave to appeal the summary judgment, which was brought before him on 4 May 2018, six months later, after Judge Tuchten had already entertained the applicants' application for leave to appeal and the rescission application.

[10] On 13 September 2018, the applicant petitioned the Supreme Court of Appeal for leave to appeal the summary judgment, and same was denied on 21 November 2018. The applicant then requested the rehearing of the application for leave to appeal, and it was denied. Again the applicant could not explain the time between 4 May and 13 September 2018.

[11] On 10 March 2021, the applicant approached the Constitutional Court for leave to appeal the summary judgment, and it was denied. He failed to account for the period between 13 September 2018 and 10 March 2021. The whole three years was uncounted

for. An application for condonation must give a reasonable and full explanation covering the entire period of the delay. See *Van Wyk v Unitas Hospital and Another* [1].

[12] The applicant's explanation is not even reasonable at all. The fact that he was involved in litigation with the respondent for the leave to appeal is not enough reason to prevent him from bringing the application for rescission. There are so many years that have gone uncounted for. The applicant brought this application for rescission of summary judgment to avoid the execution of his house, which has been attached. If it were not so, the applicants would not have brought this application. Six years have elapsed since the judgment of Judge Makume. Surely it cannot be in the interest of justice for this Court to be entertaining this application for rescission without a reasonable and complete explanation.

[13] The applicants are expected to have explained the prejudice suffered by the respondent who has been waiting to execute the judgment since 2015. They again chose to be silent about this prejudice.

[14] The applicants never entertained the issue of the prospect of success of their application for rescission of the summary judgment. It is clear that the rescission application could not succeed because Judge Tuchten had already entertained the application on 11 November 2017. The requirements for granting condonation application are not met. Condonation is not there for just taking. Parties should prove that it is in the interest of justice that they are condoned to bring their application out of time.

In the case of *Tshivhase Royal Council and another v Tshivhase and Another* [2] Nestadt JA stated that:

'this Court has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation, the indulgence of condonation may be refused

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[1] [2007] ZACC 24; 2008 (2) SA 472 (CC) para 22

[2] [1992] ZASCA 185; 1992 (4) SA 852 (AD) at 859E-F

whatever the merits of the appeal are; this applies even where the blame lies solely with the attorney. The applicants did not meet the requirements for application for condonation.'

Application for rescission of judgment /reconsideration/ vexatious litigation application and contempt of court order

[15] The applicants have already brought an application for rescission of the summary judgment before Judge Tuchten, as I have touched on this on para 6 and 12 above. After careful study of the judgment of Judge Tuchten and the rescission application before me, it is clear that the applicants intend to deliberately annoy the first respondent by repetitively bringing their rescission applications on similar issues when they know that this application was already denied on 11 November 2017 by Judge Tuchten. The applicants are abusing the court process by bringing their meritless applications and, in the process, harassing the first respondent. They are vexatious litigants who should be stopped in their tracks.

[16] The application for leave to appeal, which came before the Supreme Court of Appeal, was brought on similar averments as before me on the rescission of judgment. The Supreme Court of Appeal found that there were no prospects of success on the applicants' appeal against the judgment of Judge Makume. Seeing that similar averments were dismissed on the application for leave to appeal the summary judgment at the Supreme Court of Appeal, I have concluded that the applicants are trying to appeal here at the High Court before me in disguise. The situation in which the applicants are on right now is thus untenable. The fundamental issue is that:

1. Procedurally the Court could not now consider applicants' application for rescission of the summary judgment for the second time.

2. These issues were already dealt with on rescission before Judge Tuchten and were denied,

3. These issues were brought on leave to appeal the summary judgment before the Supreme Court of Appeal and were denied because there were no prospects of success.

4. These issues were brought to the Constitutional Court on leave to appeal the Supreme Court of Appeal decision, and the Constitutional Court denied hearing the matter.

5. Now, it will no longer be in the interest of justice for me to hear this application procedurally and factually.

[17] A person cannot litigate one thing endlessly. The element of good faith will not permit that adjudication should be done more than once. Surely they should know that a final judgment by a competent court between them and the first respondent based on the summary judgment of 20 August 2015 has already been made. He could appeal the judgment; however, he cannot appeal because the appeal was denied even by the Supreme Court of Appeal. This means that the applicants should accept their fate in this regard. A long-established principle of English law in the case of *Henderson v Henderson* (1843) 3 Hare 100 stated that:

'Parties to a litigation are required to bring their whole case at once rather than re-litigating the same subject matter concerning the same parties in serial litigation. There should be finality in litigations. I agree with the respondents that the applicants should be interdicted from abusing the court process and harassing the respondent with an application for rescission of judgment.'

[18] On that point, I will not entertain the application for rescission of judgment any further, and I cannot refer the rescission of judgment for oral evidence. The application is bound to fail. The application for reconsideration has no merits because it is a repetition of the rescission of judgment application. Where the rescission application was denied, the warrant of execution remained active or effective.

[19] The application for contempt of court order not supported by an affidavit cannot succeed. For the application of contempt of Court to succeed, the following requirements should be met through the evidence on affidavit to prove beyond reasonable doubt that there was indeed contempt of Court. The applicants should have proved the following as per the case of *Fakie No v CCII Systems Pty Ltd*[3] para 42, it was said:

> 'The civil contempt procedure is a valuable and important mechanism for security compliance with the court order and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements. The respondent in such proceedings is not an accused person but is entitled to analogous protection – as are appropriate to motion proceedings in particular the applicant must prove the requisites of contempt **(the order, service, or notice, non –compliance and wilfulness, and mala fides) beyond a reasonable doubt.** But, once the applicant has proved the order, service, or notice and non-compliance the respondent bears an evidential burden concerning wilfulness and mala fides. Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide? Contempt will have been established beyond a reasonable doubt.'

[20] The applicants failed to prove all of the above requirements. Their application cannot succeed.

Costs

[21] The applicants' applications were all denied; as such, they have to pay the costs of these applications jointly and severally, the one paying the other to be absolved.

Order

[22] As a result, the following order is made:

1. The application for condonation is denied.

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[3] 2006 (4) SA 326 (SCA)

2. The application for rescission of judgment is denied with costs.

3. Application for reconsideration is denied with costs.

4. Application for contempt of Court is denied with costs.

5. Rule nisi granted on case no: 37787/21 is discharged and set aside.

6. It is ordered that the applicants may not file any further application for leave to appeal or rescission application under case no: 48567/2014 or 29708/2018 without first obtaining permission to do so from the Judge of this division in chambers.

    6.1 The applicants to pay costs of this counter application on a party and party scale.

    6.2 The costs ordered on these applications are to be paid jointly and severally the one paying, and the others to be absolved.

[redacted]

M. Munzhelele

Judge of the High Court Pretoria

Virtually heard: 15 November 2021
Electronically Delivered: 17 March 2022

APPEARANCES:
For the Applicant: Mr Makhubele in Person

For the respondent: Adv. MT Shepherd

Instructed by: Strydom Britz Mohulatsi Inc