IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 6651/2018

REPORTABLE:
OF INTEREST TO OTHER JUDGES:
REVISED

In the matter between:

MICHELLE STARK N.O Respondent/Plaintiff

and

JOHN TSIETSI APHIRI t/a APHIRI ATTORNEYS Applicant/Defendant

JUDGMENT

MADIBA AJ

[1] The applicant is applying for an order rescinding the default judgment granted by the above Honourable Court on 15 May 2018. The application is brought in terms of Rule 42 of the Uniform Rules of the Court alternatively applicant contends that the common law is applicable in the application.

The application is opposed on the basis that: - the applicant has failed to show good cause for the rescission and that the application was not made *bona fide*. It is contended that the applicant failed to comply with the provisions of Rule 42 and no *bona fide* defences have been raised by the applicant.

Background facts

[2] The respondent was appointed by Mr. Oupa Daniël Sepeng as his attorney and was instructed to institute a claim against the Road Accident Fund. During May 2012 the Road Accident Fund conceded the merits and a costs order was granted in favour of Mr. Sepeng. The costs in the sum of R49 654,65 were paid to the respondent.

The outstanding issue of quantum was also settled during the trial. The Road Accident Fund paid R982 885,00 to the respondent as per the court order. It was one of the terms of the court order that the respondent was to create an *inter vivos* trust and the monies so received from the Road Accident Fund were to be kept in an interest bearing account to be opened by the trustee. Accordingly, the applicant in this matter, Michelle Stark N.O., was appointed a trustee and issued with a letter of authority by the Master of the High Court.

The Road Accident Fund paid a further amount of R203 917,97 being for taxed costs to the respondent. The respondent failed to pay all the monies from the Road Accident Fund to the trust as ordered by the court. An amount of R407 322,93 was ultimately paid by the respondent and he failed to properly account and pay the remainder of the monies in his possession to the trust.

On investigations, the respondent's trust account reflected a balance of R2 561,34.

The applicant issued summons against the respondent alleging that the monies retained by the respondent were due and payable to the trust.

In the premises the applicant (plaintiff) claimed payment of R545 189,69 alternatively R1 052 512,12 and further alternatively the capital amount of R982 885,00 and interests emanating from the aforementioned amounts.

In claim 2, the applicant claimed R255 532,98 as interest *a tempore morae* including costs of suit.

The action by the applicant (plaintiff) was defended by the respondent (defendant). An application for summary judgment was launched by the applicant which application the respondent failed to oppose. Summary judgment was granted on the 15th of May 2018 and the following orders were made: -

Claim 1

1. Payment of the sum of R545 189,69.
2. Interest on the sum of R545 189,69 at the rate of 10 % per annum *a tempore morae.*
3. Costs of suit on the scale as between attorney and client.

Claim 2

1. Payment of the sum of R255 532,98.
2. Interest on the sum of R255 532,98 at the rate of 10 % per annum *a tempore morae*.
3. Costs of suit on the scale as between attorney and client.

Claim 3

1. Payment of the sum of R138 436,58 being for legal costs and costs and expenses incurred by the plaintiff up to 26 September 2017.
2. Interest on the sum of R138 436,58 at the rate of 10 % per annum *a tempore morae*.
3. Costs of suit on the scale as between attorney and client.

The applicant disputed the authority of Tim du Toit Attorneys to act on behalf of Oupa Daniel Sepeng and served a Rule 7 (1) notice.

[3] A warrant of execution was issued against the movable property of respondent. The respondent's personal bank accounts were frozen resulting in him

applying for the rescission of the default judgment. The relief sought by the applicant *inter alia* include condonation and rescission of judgment. Condonation is sought as the applicant's application was filed seventeen months after the summary judgment application was instituted.

AD CONDONATION

The applicant failed to oppose summary judgment application served on his attorneys on the 13 March 2018. During 15 May 2018 summary judgment was granted against the applicant. According to the applicant, he became aware of an order for summary judgment against him, when the Sheriff attempted to execute a warrant of execution against the applicant's movable property during October 2018. The application for rescission of judgment was instituted by the respondent on the 28 October 2019 which application became opposed.

The grounds for condonation are premised on the following grounds:

a) That the respondent became extremely depressed when he became aware of the summary judgment order against him, as he believed that the amount owed was correctly calculated by the curator of his legal practice. The outstanding amount owed to the trust according to the applicant was the sum of R30 357.11 and not as reflected in the summary judgment order.

b) That the notice for summary judgment served did not contain a court date.

c) The respondent has no *locus standi* to institute legal action against the applicant.

The applicant submitted that if summary judgment is not rescinded, it will unjustly enrich the respondent and impoverish the applicant and the Attorneys Fidelity Fund. According to the applicant, he has a constitutional right to state his case as he has *bona fide* defence with prospects of success.

The respondent's view is that the applicant has being dilatory and delaying in launching the application for rescission. It took the applicant a period of seventeen

months to institute the rescission which timeframe, the respondent submitted is unreasonable. It was further submitted that the application failed to identify what condonation is sought, in respect of which error nor does it identify the judgment in respect of which rescission is based on. The respondent's contention is that the relief sought by the applicant is unworkable and that the application for condonation be dismissed with costs.

An application for condonation for the late filing of respondent's answering affidavit was launched by the respondent. The respondent avers that the non – compliance of the rules was occasioned by the following reasons: -

That the respondent delayed in obtaining and compiling the requisite information to be able to fully respond to the applicant's averments. The late filing of the answering affidavit is not prejudicial to the applicant and that the respondent will be greatly disadvantaged if the late filing of the answering affidavit is not condoned. It is contended that the *audi alteram partem* rule obviates that the interest of justice demands that the condonation be granted in this matter. The condonation application by the respondent is not opposed.

A Court may condone non – compliance of the rules where an applicant demonstrates that a valid and justifiable reason exists why non – compliance should be condoned.

The Court held in ***Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie*** **1969 (3) SA 360 (A**) at 362 F – H that:

> *"In considering petitions for condonation under Rule 13, the factors usually weighed by the Court include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice …"*

It is indeed so that there are instances when both the applicant and respondent failed to comply with the rules of Court with no sufficient and reasonable explanation provided. An applicant is to provide an explanation of his default sufficiently fully to enable the Court to understand how it really came about and to access his conduct

and motive. The burden lies with the applicant to prove good cause for the relief he seeks.

I am of the view that it is both in the interest of the parties and more importantly in the interest of justice that the rescission and condonation applications by both parties be entertained holistically as piecemeal approach is not appropriate under the circumstances.

Our Courts have confirmed that the standard for considering an application for condonation is in the interest of justice. See ***Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*** **2000 (2) SA 837 CC par [3];** ***Grootboom v National Prosecuting Authority and Another*** **2014 (2) SA 68 CC par [22] and [23]**. It was held in ***Byron v Duke Inc*** **2002 (5) SA 483 (SCA)** that the non – compliance with the rules were not so flagrant and gross that merely because of them the application for condonation should be dismissed.

I therefore find that both the applicant and respondent will suffer no prejudice as there has to be clarity on the issues contended by both parties in this application. The non – compliance of the rules is not so flagrant and gross to warrant the dismissal of the condonation applications.

In the premises I make the following order: -

a) That applicant's condonation application is granted.

b) The late filing of the respondent's answering affidavit is condoned.

c) No order as to costs.

Respondent's Rule 30 Application

The respondent contended that the applicant failed to serve its replying affidavit. Reference to the said replying affidavit only surfaced in the applicant's heads of argument. The respondent brought it to the attention of the applicant that no replying affidavit was ever served. The applicant did however deliver its replying affidavit through an email address, stoffberg@timdutoit.co.za on the 22 September 2020 and not on the 22 September 2021 as alleged by the applicant. The respondent

submitted that its email address is kstoffberg@timdutoit.co.za and not as indicated in the applicant's email purportedly sent to the respondent.

It is contended that the mistakes highlighted above constitute irregular step and since the applicant failed to apply for condonation and withdrew the replying affidavit, it should be struck out. Rule 30 (1) of the Uniform Rules provides that any party which an irregular or improper step has been taken may apply to Court to set it aside.

The application in terms of Rule 30 may be sought if the applicant by written notice afforded its opponent an opportunity to remove the cause of complaint within 10 days and thereafter delivers an application at the expiry date of those 10 days. Since the application to set aside an irregular proceeding or step is an interlocutory application, Rule 6 (11) finds application. It is telling that the respondent did not request the applicant in the form of notice to comply with Rue 30 (2) and Rule 30A (1). In any event the applicant on own accord realising that its replying affidavit did not reach the intended recipient, rectified the situation by sending its affidavit to the respondent.

In my view the irregularities complained of are mere technicalities and at best amount to typographical errors which are of no consequence to the issues at hand in this matter.

The purpose of the Rules of Court is to ensure a fair hearing and to seek inexpensive and expeditious finalisation of matters before the Court. In ***Eke v Parsons* 2016 (3) SA 37 (CC)** at par 39 the Court held that rules exist for the courts and not the courts for the rules and that rules should not be observed for their own sake.

The court in ***PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA CC** held that:

> *"Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from*

what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules."

The Court may in any event condone such an omission by the applicant under the present circumstances.

I find that it is in the interest of justice that the late filing of the replying affidavit and non – compliance of the rules be condoned.

Consequently, I make the following order: -

That the non – compliance of the rules and the late filing of the replying affidavit is condoned.

[4] The issues to be determined are whether the applicant has satisfied the requirements for an order for rescission in terms of Rule 42. In the alternative whether the requirements as per the common law have been met by the applicant.

Applicable legal principles

[5] The applicant avers that the default judgment was erroneously sought and granted as he has good defences to the respondent's claim.

Rule 42 of the Rules of Court

[6] Rule 42(1) provides as follows: -

"The court may in addition to any other powers it may have, mero motu or upon 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;

(b) An order or judgment in which there is an ambiguity or a patent error or omission but only to the effect of such ambiguity, error or omission;

(c) An order or judgment granted as a result of a mistake common to the parties."

In ***Monama and Another v Nedbank Limited* 41092/16 [2020] ZAGPPHC 70** at 18 and 19 the Court referred to Rule 42 (1) (a) as follows:

> *"Generally speaking a judgment is erroneously granted if there existed at the time of its issue, a fact of which the Court was unaware, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment. An order is also erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the Court to have made such order."* See also ***Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (ECD) at 471 E – 1**.

In terms of Rule 42(1) the applicant needs not show good cause. It is expected of the applicant to show that the order or judgment was erroneously sought or erroneously granted to persuade the court to vary or rescind the particular order.

Common law

[7] The application for rescission of judgment in terms of the common law may be brought on the following grounds: -

(1) fraud;

(2) *iustus* error;

(3) discovery of new documents only in exceptional circumstances;

(4) in the instance where default judgment was granted by default.

All what the applicant has to show for the judgment or order to be set aside is that: -

(1) There must be a reasonable explanation for the default;

(2) The applicant must show that the application was made *bona fide; and*

(3) The applicant must show that he has a *bona fide* defence which *prima facie* has some prospect of success. See ***Chetty v Law Society, Transvaal* 1985 (2) SA 756 at 764 I – 765 E**.

Applicant's contentions

[8] The applicant argues that he was not served with the dated notice of set-down of the summary judgment application i.e. the notice did not indicate the date of hearing in contravention of Rule 32 (2). The applicant submitted that the respondent did not dispute that an undated notice of service of set-down for the summary judgment was initially served.

The applicant's view is that the power of attorney filed by the respondent is defective in the following respects: -

(i) That the power of attorney was signed after the issuing of the summons;

(ii) It is not supported by a minuted resolution of the trust;

(iii) That the power of attorney fails to state the identity of the applicant and the course of action to be pursued against him;

(iv) The power of attorney does not state that the signatory has authority to sign documents on behalf of the trust.

It is contended that since the defects existed before the summons was issued the said summons is accordingly a nullity. According to the applicant, the respondent failed to comply with the requirements of the trust deed:

i) In that no resolution was passed by the trustee authorising the respondent to act on behalf of the trust.

ii) That the respondent neglected to appoint co – trustees to enable the trust to have legal capacity to be able to pass a resolution to institute legal action.

iii) In the absence of a minuted resolution reached by unanimity of three trustees, the respondent as a sole trustee cannot institute any legal action on behalf of the trust.

The applicant contends that the power of attorney filed by the respondent, in support of the summary judgment and the answering affidavits be declared null and void as the respondent had no authority to represent the trust.

It is submitted that the defective power of attorney nullifies the summons and affidavits attested to by the respondent. In the alternative, applicant contends that his application for rescission is based on common law in that he has a *bona fide* defence to claims instituted by the respondent.

The amounts as claimed by the respondent are disputed. The applicant stated that he effected payment to the trust in the sum of R579 523.93 from the capital amount of R982 855.00. That he is entitled to deduct his attorney and client costs in the amount of R373 004.96. The amount due and payable to the trust is therefore R30 357.12 and not as stipulated in the particulars of claim. It is contended that the summary judgment granted be rescinded and alternatively be varied for the sum of R30 357.12.

Respondent's Argument

[9] It is argued by the respondent that the applicant was supposed to have filed his opposing affidavit on receipt of the notice for summary judgment that did not contain the date of hearing and not simply do nothing to resist the summary judgment application. In an instance of an irregularity, as averred by the applicant that the notice for summary judgment was undated, he was expected to invoke the provisions of Rule 30 which the applicant failed to do.

The respondent contended that the grounds raised by the applicant in his argument that the power of attorney filed by the respondent is defective are meritless. That the power of attorney was subsequently dated after summons was issued, is of no consequence. The respondent submitted that when the applicant challenged the respondent's *locus standi*, the respondent had the requisite authority.

The respondent further argued that the law does not require a power of attorney to be supported by a minuted resolution by Oupa Daniel Sepeng's Trust. In any event, the respondent averred that in its heading, the said power of attorney does identify the applicant and refers to the action to be pursued against the applicant.

It is argued by the respondent that the applicant failed to satisfy the requirement for setting aside an order or judgment in terms of common law. According to the

respondent, the application does not disclose a reasonable and acceptable explanation for failure to file the opposing affidavit. That he failed to take appropriate steps to protect his interests when a notice for summary judgment was served. The respondent submitted that the explanation by the applicant is vague and does not explain why it took seventeen months to apply for rescission of judgment. It is the respondent's view that the application is meritless and should be dismissed.

Analysis

[10] The applicant avers that the order it seeks to rescind was granted erroneously. It is contended by the applicant that the Court erred in not considering that the summary judgment application served on the applicant did not contain a date for hearing.

What the applicant does not dispute is that indeed he was made aware of the summary judgment order against him during October 2018. Instead of taking appropriate steps to attack the summary judgment, applicant simply ignored the order as he allegedly became extremely despondent and depressed. There is nothing before the Court to support the said averment.

The applicant is a qualified attorney well versed with the rules of Court. Despite a warrant of execution issued against him during 21 March 2019 he blatantly ignored it and failed to protect his interests. It was only during April to July 2019 when the applicant's personal bank accounts were frozen that he decided to launch a rescission application. The unsubstantiated allegation that he become helpless and suffered depression is not sustainable.

All what the respondent had to do at the very least on receipt of the summary judgment application, was to depose to an affidavit in resisting the summary application including a Rule 30 application as it is alleged that the summary judgment application with no date of hearing amounted to an irregularity.

In his heads of argument, applicant referred to several court decisions in support of his contention that the court erroneously granted the order under the circumstances where the applicant was not served with the notice of the hearing and that the application was irregular. Cases referred to amongst others, are **T*opol and Others v LS Group Management Services. (Pty) Ltd* 1988 (1) SA 639 (W); *De Beers N.O***

***v North Central Local Council and Others (Umhlatuzana Civic Association Intervening*) 2002 SA 429 CC**.

In my view the cited cases and the present matter are distinguishable. For instance, in ***Topol and Others*** *(supra)* the defaulting parties were not aware of the proceedings against them as no notice was served on them. In *casu* the reality is that the applicant was served with the summary judgment application and failed to oppose it.

For the applicant to allege irregularities contained in the summary judgment only in his heads of argument is of no moment. It is indeed so that it is not incumbent upon the applicants to show good cause or sufficient cause. The rescission of judgment or order is not there for the taking. It is not enough for the applicant to simply allege that the judgment was erroneously granted without complying with the requisite Rule 42 or the threshold for common law requirements.

I find that the applicant was aware of the summary judgment application as it was served upon him and the steps required of him to avoid the default. The applicant deliberately failed and omitted to take the necessary steps to resist the summary judgment while aware of the legal consequences if he fails to oppose the application.

The applicant contended that the respondent filed a defective power of attorney and took the following points among others, that the power of attorney was signed after the summons was issued and that it is not supported by a minuted resolution of the trust. That the power of attorney does not state the party to be sued and the course of action to be pursued. The applicant's view is that the summons is null and void.

It is noteworthy that the Rule 7 was served on the respondent during the 8 March 2018 disputing the authority of the respondent's legal representatives to act on behalf of the respondent. The respondent duly complied with the request and filed a power of attorney on the 12 March 2018.

Suffice to quote the provisions of Rule 7.1: -

> *"Subject to the provisions of sub - rules 2 and 3 a power of attorney need not be filed, but the authority of anyone acting on behalf of a party may within 10 days after it has come to the notice of a party that such a person is so acting,*

or with the leave of the Court or good cause shown at any time before judgment be disputed, whereafter, such a person may no longer act unless he satisfies the Court that he is authorised so to act, and to enable him to do so the Court may postpone the hearing of the action or the application."

In ***Johannesburg City Council v Elesander Investments (Pty) Ltd*** **1979 (3) SA 1273 (T)** the court held that:

"the concept of representation within the rules involves no more than an investigation into the state of affairs relating to authority as at the time when the challenged attorney seeks to satisfy the Court on that score."

The Court held further that no investigation into the validity of past acts in the context of authority to act was required. The Court in approving the decision in the Johannesburg City Council supra, held in ***Marais v City of Cape Town*** **1997 (3) SA CPD 1097 at 1099 A – D** as follows: -

"the rule is concerned with the representation of the parties and with nothing else. It was designed to dispense with the necessity of an attorney obtaining a power of attorney to act, and to provide for a procedure whereby an attorney can be challenged to satisfy the Court that he is authorised to act for the party. The rule contemplates that a challenge of authority can be met by proof of such authority (which need not be in a form of a power of attorney). And all that is required is that the Court must be satisfied that the authority exists at the time when proof of it is proffered. We can find nothing in the rule to suggest that a magistrate is obliged or even entitled, to investigate the validity of past acts in the context of the authority to act. When an attorney's authority is challenged, he may not act further until he satisfies the Court that he is authorised to do so, but the effect of the Rule does not go beyond that, the Rule does not require him either expressly or by implication, to satisfy the Court that he had authority at any particular point of time in the past. The concept of representation as dealt with in the Rules involves no more than an investigation into the state of affairs relating to authority as at the time when the challenged attorney seeks to satisfy the Court on that score."

Realising after being notified of the unsigned power of attorney, the respondent rectified the omission within four days and a properly signed power of attorney was duly served on the applicant.

When the applicant challenged the irregularity on the power of attorney, such an irregularity had been rectified. According to the authorities in ***Johannesburg City Council and Marais v City of Cape Town***, the Court had to be satisfied that the authority exists at the time when a challenge is invoked. The respondent is therefore not required to satisfy the Court that he had authority at any particular point in time in the past. The argument that the irregularity preceded the issuing of the summons has no basis in law and fact. The applicant repeatedly argues that the respondent papers are irregular but failed to take appropriate remedies available to him in terms of Rule 30. It is not sufficient for the applicant to only pay lip service to irregularity allegedly committed by the respondent without taking necessary steps in terms of the Rule 30.

With respect ***Carlkim (Pty) Ltd and Others v Shaffer and Others*** **1986 (3) SA 619 N** relied upon by the applicant in support of applicant's averment that a defective power of attorney will nullify the summons is quoted out of context and is of no assistance to the applicant. In ***Carlkim (Pty) Ltd and Others*** the defendants resorted to Rule 30 proceedings as the power of attorney omitted to state the parties to be sued and the cause of action to be pursued.

The power of attorney was duly amended and the defect was cured. *In casu* the applicant failed to institute Rule 30 proceedings and by the time he challenged the defective power of attorney, it was already rectified.

Careful reading of the respondent's power of attorney reveals who the applicant is and disclosed the cause of action to be pursued. See ***Firstrand Bank Ltd v Louis Johannes Coetzee and 10 Others*** **Case No 82452/2019**. The contention that the power of attorney has to be supported by a minuted resolution by the trust and further that the authority to sign documents has not been obtained, has no factual and legal basis as it is not a requirement in law.

I find that the contentions by the applicant aforementioned cannot be justified. I am of the view that the irregularities as alleged cannot be regarded as having the

consequences of setting aside the summary judgment order granted. The contention that the respondent lacked *locus standi* as he was not authorised to act on behalf of the trust as alleged and that the he failed to comply with the trusts deed, cannot be supported. The respondent was issued with a letter of authority by the Master of the High Court to represent and act on behalf of Oupa Daniel Sepeng *inter vivos* trust. I find that he had the necessary *locus standi* to institute legal proceedings on behalf of the trust.

Compliance with Rule 42 (1) and common law requirements

[11] In terms of Rule 42 (1) the Court may in addition to any other powers it may have*, mero motu* upon application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

Contrary to the applicant's averment that the summary judgment was granted erroneously in his absence as he had no knowledge of when the application was to be heard, is rejected. Although the judgment was granted in the absence of the applicant, he was notified of the summary judgment application against him. I hold that the default by the applicant was rather wilful and of his own choices. Despite the applicant realising that the summary judgment was irregular, he deliberately failed to institute Rule 30 proceedings, resist the summary judgment and avoid the order to be granted in his absence.

My view is that the applicant failed to disclose any ground to suggest that the order was erroneously sought or erroneously granted in compliance with Rule 42 (1).

Rescission under common law

[12] The first requirement is that there must be a reasonable explanation for the default. The applicant's explanation that when he became aware of the order he "felt helpless, despondent and depressed" is not reasonable under the circumstances. The applicant had full knowledge of the summary judgment order and it took seventeen months for him to launch a rescission application.

It is indeed so that Rule 42 (1) and common law do not prescribe a timeframe within which an application for rescission should be brought. What is expected of the applicant seeking relief to rescind an order is that it should be sought within a reasonable time after the order was granted.

In ***Cipla Medpro Pty Ltd v H Lundbeck A/S and Another*** **Case Number 89/5576** (unreported) the Court held that the delays of eighteen months and thirteen months were sufficient to dismiss the rescission application concerned on the basis of delay.

There is no reasonable explanation clarifying what actually transpired within the seventeen months taken to launch the rescission application. I am not satisfied that the application was instituted within a reasonable time.

The applicant had to show that the application was made *bona fide*. It is apparent from the reading of the applicant's papers, that there was no attempt to address the aforementioned requirement. Accordingly, the applicant falls short in showing that the application is made *bona fide.* The only inference to be drawn under the circumstances is that the application was brought with the intention to delay the conclusion of the matter.

The final requirement is that the applicant must show that he has a *bona fide* defence which *prima facie* has some prospect of success. See ***Nadioo and Another v Matlala NO and Others*** **2012 (1) SA 145 GNP** at 152 H – I.

According to the applicant the amount due and payable to the trust is the sum of R30 357.12 and not as contained in the particulars of claim. He averred that the amount claimed by the respondent are erroneously calculated. However, in his replying affidavit the applicant contends that he actually owes the respondent an additional R334 143.76.

The facts as alleged by the applicant do not support a cause of action for a common law rescission. The probabilities do not favour the applicant in attempting to give a reasonable and acceptable explanation for its default. in the circumstances the applicant did not succeed in establishing a *bona fide* defence with a prospect of success.

I find that the summary judgment granted is legally competent and that there are no irregularities in the proceedings which could have precluded the Court granting the judgment. Consequently, the Court did not erroneously grant the summary judgment order.

Costs

[13] The respondent has requested a cost order against the applicant based on his application in terms of Rule 42 (1) and alternatively the common law.

The issue whether to award costs is primarily based on the basic rules namely:

i) The award of costs is a matter of judicial discretion by the Court;
ii) That the successful party should as a general rule, be awarded costs.

The Court in ***Ferreira v Levin Vryenhoek v Powell* 1996 (2) SA 621 CC** at 624 said the following:

> *"The award of costs unless expressly otherwise enacted, is in the discretion of the Court. The facts of each and every case are to be considered by the Court when exercising its discretion and has to be fair and just to all the parties."*

Considering the facts in this application, the costs in favour of the respondent are therefore warranted.

ORDER:

(a) The application for rescission of judgment is dismissed.
(b) The applicant is ordered to pay the costs of this application on the scale as between party and party.

S.S. MADIBA
ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON	**:** 7 MARCH 2022
FOR THE APPLICANT	**:** MR. V. MABE
INSTRUCTED BY	**:** VICTOR MABE INC. ATTORNEYS
FOR THE RESPONDENT	: ADV. C.P. WESLEY
INSTRUCTED BY	**:** TIM DU TOIT & CO INCORPORATED
DATE OF JUDGMENT	**:** 29 APRIL 2022