



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 18998/2016

1. REPORTABLE:
2. OF INTEREST TO OTHER JUDGES:
3. REVISED.

26 MAY 2022

DATE


SIGNATURE

In the matter between:

ESTIA PARTNERSHIP

Applicant

And

HERMAN JACOBS

Respondent

JUDGMENT

MBONGWE J:

INTRODUCTION

- [1] This is an application for rescission of the judgement dated 21 August 2019 in terms of which the court found in favour of the respondent's counterclaim and ordered payment of the amount of R639 992.93, by the applicant to the respondent. At the same hearing, the court dismissed the applicant's claim against the respondent in the absence of the applicant.
- [2] The applicant had initially brought an urgent application seeking an order in Part A, for the stay of the execution of the order of 28 October 2019 in terms of rule 45A, pending the determination of the its application for the rescission of the judgement in Part B, the present hearing. The urgent application was precipitated by the attachment by the sheriff of the movable property belonging to the father of the deponent to the founding affidavit who, together with the deponent, were in partnership with others in the applicant. The attachment occurred on 29 March 2021.

FACTS

- [3] The dispute between the parties emanates from the conclusion of a building contract in terms of which the respondent was to be the project manager in the construction of four units on a site ostensibly belonging to the applicant. Amongst his responsibilities, the respondent was to engage a building contractor and to have the project completed within six months.

- [4] The respondent allegedly failed to complete the project on time or at all, resulting in the applicant instituting a claim against him. The respondent instituted a counterclaim seeking payments due and payable to him.
- [5] Meanwhile the applicant had a second thought about its claim and advised its attorneys that it did not intend to pursue the claim against the respondent. The attorney closed the file and reminded the applicant of the date of hearing of the matter, being 18 October 2019, a date that had been obtained by the applicant's attorneys.
- [6] The applicant was not present at court on the date of the hearing. The respondent proceeded on its counterclaim, including seeking the dismissal of the applicant's claim. Both orders sought were granted by the court on 18 October 2019. The applicant became aware of the judgement on 3 December 2019. On becoming aware of the judgement, the applicant had contacted the respondent's attorney who was then on holiday, but undertook to obtain instructions from the respondent later in January 2020.
- [7] There appears to be nothing of substance that occurred subsequently until 29 March 2021 when sheriff, at the behest of the respondent, attached certain movable property, as earlier stated, on the 29 March 2021. This attachment had prompted the applicant to then lodge the urgent application and bring the application for the rescission of the judgement on 13 May 2021.

REQUIREMENTS

- [8] It is trite that an Applicant seeking an order for the rescission of a judgement has

to satisfy certain laid down requirements in order to succeed. Hereunder I deal with the requirements.

- [9] In terms of rule 31(2) (b) of the rules of the court, an applicant must bring an application for rescission of judgement within twenty days of gaining knowledge of the judgement sought to be rescinded. The applicant in the present matter became aware of the judgement of 18 October 2019 on 3 December 2019.
- [10] The only time the applicant, on its own version, took steps regarding the default judgement was in April 2021 when it consulted with counsel and brought the application for rescission of judgement on 13 May 2021-some 17 months from the date gaining knowledge of the default judgement.
- [11] Notably, despite bringing this application well out of time in terms of the rules, the applicant has not filed the requisite substantive application for the condonation of the late launching of the application for rescission of judgement. It is worth stating again that the judgement sought to be rescinded is dated 18 October 2019; the applicant became aware of it on 3 December 2019 and brought a rescission application on 13 May 2021. The applicant was required in this regard to give full details (good cause), not only of its failure to be present at the hearing of the matter on 18 October 2019, but also details of facts relating to the delay from 3 December 2019 to 13 May 2021, to bring the present application. More poignant to this matter is the explanation of what good cause entails in an applicant's explanation. In *Mathie v Ruijter Stevens Properties (Pty) Ltd* (AR352/14) [2015] ZAKZPHC 30, the court stated the following:

“wilful default or gross negligence will often preclude a finding of good

cause. Good cause also includes but is not limited to the existence of a substantial defence”

[12] There are two aspects in the applicant’s case that this principle aptly addresses, namely, the applicant had ostensibly relied on its decision not to pursue its claim against the respondent for the excuse or failure to attend court. This suggest a deliberate absence from the proceedings. In the second instance, the applicant raises no substantial defence to the respondent’s counterclaim, save to query the basis of the calculations of the amount and an alleged failure by the respondent to deduct money that had already been paid. Essentially, there is no defence raised and the applicant had by its absence from court, deprived itself of an opportunity to counter the explanation by the respondent disproving the applicant’s queries. In any event, the respondent has sufficiently clarified and refuted the applicant’s allegations/query.

[13] It is worth quoting the extensive obligations of an applicant in a condonation application as aptly stated by Plewman AJ in *Darries v Sheriff, Magistrate’s court, Wynberg and Another* 1998 (3) SA 35 SCA:

“I will content myself with referring, for present purposes, only to factors which the circumstances of this case suggest should be repeated. Condonation of the non-observance of the Rules of this Court is not a mere formality (see Meintjies v H O Combrinck (Edms) Bpk 1961 (1) SA 262 (A) at 263H--264B; Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 138E--F). In all cases some acceptable explanation, not only of, for example, the delay in

noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. See *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449F--H; *Meintjies's case supra* at 2648; *Saloojee's case supra* at 138H. Nor should it simply be assumed that, where noncompliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. See *Saloojee's case supra* at 141B--G. In applications of this sort the appellant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. See *Meintjies's case supra* at 265C-- E; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131E-F; *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 10E. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be. See *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281J--282A; *Moraliswani v Mamili (supra* at 10F); *Rennie v Kamby Farms (Pty) Ltd (supra* at 131H); *Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) at 1211-- 122B."

[14] Stemming from this outlay of the law, it is inescapable to conclude, bearing in mind the facts of this case, that the applicant proves wanting in every step of the way to an entitlement to an order, not only condoning the late filing of its application for the rescission sought, but that of the rescission itself. Not even the court, using its discretionary powers, could come to the aid of the applicant in this state of hopelessness of its case. The discretion of the court has to be exercised judicially with all the relevant circumstances and facts of the case considered [see *Federated Employers Fire and General Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A)].

[15] I fail to understand the basis of the applicant's contention in paragraph 2 of the founding affidavit in part B that the default judgement was sought and granted erroneously-this without any substantiation of the alleged error. The purported basis for this contention are the provisions of rule 42(1) in terms of which a court may mero muto or on application, rescind or vary:

- a) *"An order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby;*
- b) *An order or judgement in which there is an ambiguity, error or omission;*
- c) *An order or judgement granted as a result of a mistake to the parties".*

[16] None of the facts and circumstances in the present matter, fall within any of categories (a-c) of rule 42 (1). The provisions of Rule 42 (1) find applications in circumstances where a fact that has not been known/disclosed to the court becomes known subsequent to the granting of an order and such fact, had it been known, would have been preclusive to the granting of the order. The

relevant factors relating to the applicability of the provisions of rule 42(1) were set out in *Bakoven Ltd v GJ (Pty) Ltd* 1990 (2) 446 in the following terms:

"Rule 42(1)(a), it seems to me, is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of a 'mistake in a matter of law (or fact) appearing on the proceedings of a Court of record'. It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 (2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence (Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd (supra at 578FG); De Wet (2) at 777F-G; Tshabalala and Another v Peer 1979 (4) SA 27 (T) at 30C-D). Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission. It is only when he cannot rely on an 'error' that he has to fall back on Rule 31(2)(b) (where he was in default of delivery of a notice of intention to defend or of a plea) or on the common law (in all other cases). In both latter instances he must show 'good cause'. This pattern emerges from the decided cases."

CONCLUSION

[17] As shown in this judgement, the applicant has not met any of the requirements that could entitle it, to an order condoning the late filing of the application

rescission and secondly, the applicant has no bona fide defence to the respondents counter-claim. The application(s) must consequently fail.


COSTS

[18] The general principle that costs follow the outcome applies in this matter.

ORDER

[19] Consequent to the findings and conclusion in this matter, the following order is made:

1. The application for condonation is dismissed.
2. The application for rescission of the judgment of 18 October 2019 is dismissed.
3. The applicant is ordered to pay the costs.



M. MBONGWE, J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, GAUTENG
DIVISION, PRETORIA.

APPEARANCES

For the Applicant: ADV D A THEART
Instructed by: RAMSAY WESSELS BALOYI INC

For the Respondent: ADV A COERTZE
Instructed by: JPA VENTER ATTORNEYS

JUDGMENT ELECTRONICALLY ON