REPORTABLE

IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 5709/2011

In the matter between:

SCHALK WILLEM JACOBUS MOSTERT Applicant

and

NEDBANK LIMITED Respondent

JUDGMENT

GORVEN J

[1] This application is for the rescission of a default judgment granted against the applicant (Mr Mostert) on 3 August 2011. It is brought under Rule 41(2)(a), alternatively Rule 32(1)(b) of the Uniform Rules of Court (the Rules). The background to the granting of this judgment is as follows.

[2] On 20 March 2010 summons was served on Schalk Mostert Motors CC (the CC). Service was effected on one van den Heever, said in the Sheriff's return to be working for the CC, at 166 Piet Retief Street, Pongola (the disputed address). In the action, the respondent (Nedbank) claimed money and the return of goods purchased under instalment sale agreements concluded by the CC with Nedbank. An interim order was granted for return of the goods pursuant to cancellation of the agreements by respondent due to breach by the

CC. On 3 June 2010 respondent obtained default judgment against the CC for the return of the vehicles and further relief. The matter was set down for the final money judgment against the CC but the attorneys of the CC (who are now Mr Mostert's attorneys) pointed out that the CC had been deregistered. As a result, the action was not persisted in. The official documentation reflects that the final deregistration of the CC took place on 16 July 2010.

[3] On 3 August 2011, default judgment was taken against Mr Mostert for the money amounts due by the CC to Nedbank. The action was based on Mr Mostert having been the sole member of the CC. The CC had been deregistered under s 26 of the Close Corporations Act 69 of 1984. Mr Mostert thus became personally liable for the debts of the CC. Mr Mostert denied that service of the summons took place. He also denied that he has ever been personally indebted to Nedbank.

[4] Under Rule 42(1)(a), an application must be brought within a reasonable time without a specific time period being stipulated. In contrast, an application under Rule 31(2)(b) must be brought within 20 days after Mr Mostert became aware that judgment has been granted against him. Mr Mostert requests condonation, insofar as may be necessary, for the late launch of the application for rescission. It is clear that the application is out of time if brought under Rule 31(2)(b). It is therefore appropriate to first consider if the application was brought out of time under Rule 42(1)(a). If it was out of time under this Rule, consideration must then be given to whether Mr Mostert has made out a case for condonation under either of the Rules in question.

[5] As indicated, judgment was entered against Mr Mostert on 3 August 2011. The case made out in the founding papers is as follows. Mr Mostert stated that he first became aware of this judgment on or around 10

January 2013 when he received a Notice in terms of Section 65(1)(A) of the Magistrate's Court Act 32 of 1944 (the Act). He requested his attorney to obtain information about the judgment which gave rise to this Notice. Nedbank's attorneys furnished this to his attorney on 28 January 2013. Mr Mostert instructed his attorney to employ counsel to draft the rescission application. The application was launched on 29 April 2013. No further evidence was given bearing on when he became aware of judgment or on condonation.

[6] Mr Mostert's assertion that he received the notice in question on or around 10 January 2013 was challenged in answer by Nedbank. In reply Mr Mostert conceded that his averment in the founding affidavit had been incorrect. He stated that he became aware of the judgment during November 2012 when a Notice in terms of Section 65(2)(A) of the Act was served on him. His receipt of this Notice tallies with the evidence of Nedbank that a notice in terms of s 65A(2) and s 65J(2) of the Act dated 20 November 2012 was sent by registered post to Mr Mostert. This addressed him as the judgment debtor, referred to the judgment of 3 August 2011 and set out the parties, the case number, the court in which it had been granted and the judgment amount.

[7] The contention that this when he became aware of the judgment was challenged by Nedbank in argument on the following basis. Mr Mostert himself said that he has never incurred personal liability to Nedbank. The answering affidavit says that, on 22 November 2011, Mr Mostert's attorney directed a letter to Nedbank's attorneys. It was headed 'SWJ Mostert / Nedbank Beperk'. It enquired in what amount Mr Mostert was indebted to Nedbank, mentioning three policies which were said to have been sold and whose value was approximately R200 000.00. The letter said that Mr Mostert had become aware that he had been listed with a credit bureau for an amount

of approximately R310 000.00. These averments were not denied in the replying affidavit. A response was given to a number of paragraphs together and these averments were not dealt with. Nedbank submitted that this shows that Mr Mostert was aware of the debt at that stage in the light of this action being the only litigation with Mr Mostert personally. The date of the letter is approximately three months after the default judgment was obtained and one year before Mr Mostert says that he became aware of the judgment.

[8] Mr Mostert knew that he had been listed in respect of a debt to Nedbank. He said that he had incurred no personal liability to Nedbank. In the light of the undenied averment in the answering affidavit that his attorneys enquired about the debt due to Nedbank, and that this is the only matter between the parties, it must be held that he was aware of the judgment by 22 November 2011. At the very least, he had sufficient information to obtain all the details concerning the judgment. Even on his own version, Mr Mostert became aware of the judgment at the very latest during November 2012.

[9] Mr Mostert gave no evidence why no steps were taken by him between November 2011 and January 2013 concerning an application for rescission of the default judgment. He did not even deal with what was done between November 2012 and January 2013. In addition, apart from saying that he instructed his attorney to brief counsel to bring this application at the end of January 2013, he said nothing about why the application was only launched on 29 April 2013. There is therefore a period of more than three months after he received copies of the summons and the return of service from Nedbank's attorneys which is unaccounted for. The question is whether Mr Mostert has made out a case that the application has been brought within a reasonable time.

[10] Because of the finality of court orders, an approach must be made within a reasonable time.[1] The purpose of Rule 42(1)(a) is 'to correct expeditiously an obviously wrong judgment or order'.[2] The courts have refused to fix a specific period which would be reasonable. The difference between this Rule and Rule 31(2)(b) is that, under this Rule, a judgment should not have eventuated. It must either have been erroneously sought or erroneously granted. Under Rule 31(2)(b), the judgment granted is competent and the applicant has to show cause why it should be rescinded. This appears to be the underlying rationale for not fixing a specific time period under Rule 42(1)(a). A reasonable time depends on the circumstances of each matter and must be evaluated in the light of the evidence on a case by case basis.[3] It seems to me that a reasonable time, although also not specified in this Rule, should use as its starting point the 20 day period referred to in Rule 31(2)(b)[4] and evaluate whether any other factors should result in that period being extended.

[11] Other factors may be relevant because evidence, which may rely on sources other than the applicant, is more likely to be necessary for an application under Rule 42(1)(a). Thus, a party might have given an undertaking not to proceed against an applicant in the light of negotiations. If this undertaking was breached, this would result in the judgment having been erroneously sought. The person who performed negotiations on behalf of such an applicant would need to be traced for an affidavit to be procured. Where a judgment has been erroneously granted, it may be that the court file has been archived and it is not possible to examine a return of service or assess whether the summons discloses a cause of action. In other words, if there is evidence

[1] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) 306F-H. It should be noted that, in this matter, the application was not brought under Rule 42 but under the common law.
[2] *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E) 471E-F.
[3] *Roopnarain v Kamalapathy & another* 1971 (3) SA 387 (D) 391A-C.
[4] This approach also commended itself to the court in *Roopnarain* – see 391B-C.

which bears on an inability to have brought the application within 20 days, no condonation is needed under this Rule. This evidence is simply weighed in the scale as a whole to determine whether the application was brought within a reasonable time.

[12] In *Roopnarain*, it was held that the application had not been launched within a reasonable time under Rule 42 when the applicant became aware of the judgment on 6 October 1970 and only launched the application on 25 March 1971. In that matter, as in the present matter, one of the factors which weighed with the court was that the applicant took no steps to inform the judgment creditors that he wished to have the judgment set aside. He said that he had consulted his attorney within 4 days of becoming aware of the judgment and that he consulted twice with counsel. He blamed his legal representatives for the delay.

[13] What is clear is that, in the present matter, no evidence has been given bearing on why Mr Mostert only instructed his attorney to obtain particulars during or about 10 January 2013. When he conceded having become aware of the judgment in November 2012, he did not say that he took any steps at all at that stage. On his version, he allowed a period of over a month to elapse before he took any steps at all. In addition, because his case for the judgment having been erroneously sought is based on what he said was non-service of the summons, as soon as he viewed the return of service indicating personal service on him, he had all the information necessary to launch the application. His attorneys received this and the summons on 28 January 2013 but he did not deal at all with why the application was only launched three months later. Unlike *Roopnarain*, he did not even blame his legal representatives for the delay and in fact did not deal with any reasons for the delay beyond 28 January 2103.

[14] With this in mind, I am of the view that the application does not make out the case that it was launched within a reasonable time. The situation is, of course, even worse for Mr Mostert if it is held that he was aware of the judgment a year earlier, during November 2011.

[15] The next question is whether the late launch of the application should be condoned. The reason for the delay has been dealt with above. There is an entirely inadequate, indeed absent, explanation for the delay. This much was conceded by the counsel appearing on behalf of Mr Mostert at the hearing. Counsel submitted, however, that Mr Mostert's prospects of success should be weighed in the balance in arriving at a finding in this regard. The prospects of success differ depending on whether the application is brought under Rule 42(1)(a) or Rule 31(2)(b). I shall deal with each in turn.

[16] In order for an application to fall under Rule 42(1)(a), it must be shown that the judgment was erroneously sought or erroneously granted. Once this has been proved, a court does not look into whether or not Mr Mostert has a defence to the claim but is obliged, without more, to rescind the judgment.[5] The corollary to this is that, where an applicant does not show that the judgment was erroneously sought or granted, or one of the other jurisdictional facts in Rule 42(1), the application cannot succeed.[6] Where a written application is brought for rescission, a court is not confined to the record of the proceedings which were before the court which granted judgment.[7] In particular, if it can be shown that the summons was not served on Mr Mostert, it will be held that the judgment was erroneously granted even if, on the face of the papers at the time of judgment, it appeared that service had been

[5] *Naidoo v Somai* 2011 (1) SA 219 (KZP) para 5.
[6] *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T) 702H.
[7] *Lodhi Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) 93C-H.

effected.[8] This is precisely the case which Mr Mostert in the present matter attempted to make out. He contended that the summons which gave rise to the default judgment, which according to the return was served personally on him at the disputed address, was not served on him there or at all.

[17] Section 36(2) of the Supreme Court Act 59 of 1959 and s 43(2) of the Superior Courts Act 10 of 2013 are to the same effect, viz. 'The return of service of the sheriff or a deputy-sheriff of what has been done upon any process…shall be *prima facie* evidence of the matters therein stated'. This means that a person who disputes the content of a return of service bears an evidentiary burden to displace that *prima facie* position. In a criminal case, the evidentiary burden required is to produce 'evidence sufficient to give rise to a reasonable doubt to prevent conviction.'[9] This test does not differ materially from that in *S v Veldthuizen*[10] where the following was said:

'The words "*prima facie* evidence" … mean that the judicial officer will accept the evidence as *prima facie* proof of the issue and, in the absence of other credible evidence, that that *prima facie* proof will become conclusive proof… In deciding whether there is credible evidence which casts doubt on the *prima facie* evidence adduced the court must be satisfied on the evidence as a whole that the State has discharged the onus which rests on it of proving the guilt of the appellant.'

[18] In the present matter, Mr Mostert was confronted with an onus to prove that the judgment was erroneously granted in order to bring himself within the ambit of Rule 42(1)(a). An immediate hurdle in his path is the *prima facie* evidence of the return of service of the sheriff, which he contests. It seems to me that if he is unable to show that the return is incorrect, he will fail to discharge the onus of proof that the judgment was fact erroneously

[8] *Custom Credit Corporation (Pty) Ltd v Bruwer* 1969 (4) SA 564 (D); *Fraind v Nothmann* 1991 (3) SA 837 (W).
[9] Per O'Regan J in *Scagell v Attorney-General of the Western Cape* 1996 (2) SACR 579 (CC) para 12.
[10] 1982 (3) SA 413 (A) 416G-H.

granted. The hurdle is made somewhat higher by the fact that the sheriff deposed to an affidavit indicating that he knows Mr Mostert well and has previously served process on him on a number of occasions and that the service in this instance was personal service at the disputed address.

[19] Mr Mostert dealt with the return of service in various ways. In his founding affidavit he said the following, variously: 'I was not even aware of Summons being issued against me', 'I have no knowledge pertaining to a Summons being issued against me in my personal capacity', that he finds the return of service of personal service on him at the disputed address extremely strange as 'I never received the said Summons', 'I am not resident at 166 Piet Retief Street, Pongola, but at 239 Acacia Street, Pongola' 'The mentioned address is the offices of the auditors of Schalk Mostert Motors CC and is neither my residential address, nor my place of employment' and that 'my auditors did not receive a copy of the said Summons'. In his replying affidavit, he says, variously, 'The address 166 Piet Retief Street, Pongola, is the registered address of [the CC]; it is not the trading premises of [the CC], but the address of its auditors', 'I remain adamant that I have never seen the Summons issued against me in my personal capacity, until well after judgment was already obtained against me. All legal documents I receive, I immediately take to my attorney of record for advice purposes and to take the necessary steps. I would never just leave a legal document unattended', 'As mentioned previously, 166 Piet Retief Street, Pongola, is the address of [the CC's] auditors. I never attend the offices and cannot recall ever receiving any Summonses at this address. I confirm once again, that at no point in time did any person explained to me that summons was being issued against me in my personal capacity either', 'I reiterate that at no point in time did I receive the

summons, nor was I either made aware that Summons was issued against me in my personal capacity, or was it explained to me'.[11]

[20] Nedbank challenged Mr Mostert's denial of service of the summons on him at the disputed address. It put up a number of returns of service showing service on the CC at the disputed address. It also referred to a notice of set down for default judgment against the CC, served on 19 May 2010 by way of service on Mr Mostert himself at the disputed address. A copy of the return of service was put up. Mr Mostert remained silent in the face of this last averment. It must therefore be taken to be admitted.

[21] An identical averment was made by Nedbank in respect of a notice of set down of the action against the CC for final judgment, with the return of service on 24 November 2010 being annexed. Once again, Mr Mostert failed to deal with this averment which must also be taken to be admitted. Further evidence supports Nedbank's claim of service of this last mentioned process. Nedbank annexed a letter dated 1 December 2010 from Mr Mostert's attorneys to Nedbank's attorney advising that the CC had been deregistered. Significantly, the letter said that the notice of set down, served on 24 November 2010, had been referred by Mr Mostert to his attorneys. This means that Mr Mostert received that notice of set down. As already mentioned, according to the sheriff's return, it was served on Mr Mostert himself at the disputed address.

[22] In addition, Nedbank averred that shop number 16 at the disputed address is the registered address of the CC and put up a CIPRO report to that effect. Nedbank went on to point out that the affidavit of the accountant of the CC, filed in confirmation of the averments in the founding affidavit, gives its

[11] I have used the actual words appearing in the affidavits and have not corrected for grammar.

address as Office Number 3, Martin Street. Both of these averments were admitted by Mr Mostert in reply. This means that Mr Mostert's evidence that the disputed address was that of his auditors was shown to be incorrect.

[23] Mr Mostert's counsel argued the application on the papers. When final relief is sought on the papers in the face of factual disputes, Mr Mostert will only be entitled to relief 'if the facts as stated by respondents together with the admitted facts in applicant's affidavit justify such an order'.[12] To this has been added the rider that 'where the allegations or denials of respondent are so far-fetched or clearly untenable…the Court is justified in rejecting them merely on the papers'.[13] It is clear from the above that if the normal test relating to factual disputes is employed, Mr Mostert cannot succeed on the papers.

[24] When asked in argument what should be made of the factual dispute concerning service, counsel for Mr Mostert submitted that if Mr Mostert cannot succeed on the factual dispute, the matter should be referred for oral evidence on that discrete issue. For this, he relied on the provisions of Rule 6(5)(g). The salient parts of this Rule provide as follows:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact…or it may refer the matter to trial….'

[25] In *Law Society, Northern Provinces v Mogami,*[14]Harms DP held as follows:

---

[12] *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) 235E-G.
[13] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 635B-D.
[14] 2010 (1) SA 186 (SCA) 195C.

'An application for the hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers… The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should be main argument fail….'

This poses at least two difficulties for Mr Mostert. As I have mentioned, Mr Mostert did not deal with the matter *in limine* but waited until the Court raised the factual dispute in argument. No exceptional circumstances were mentioned warranting any such application being dealt with at that stage and in that manner. On the authority set out above, therefore, Mr Mostert cannot succeed in the application for a referral.

[26] In addition, the manner of approaching any such application was set out in *Kalil v Decotex (Pty) Ltd and Another*[15] in relation to a provisional order of winding up as follows:

'Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of the *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent.'

This has been accepted as applying to applications generally[16] and so applies to this matter.

[27] Even if the application was properly brought, the probabilities on the point do not favour Mr Mostert. Mr Mostert repeatedly attempted in his

[15] 1988 (1) SA 943 (A) 981H-I.
[16] *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) 587F-G.

affidavits to distance himself from the disputed address. However, when the official documents lodged by the CC of which Mr Mostert was the sole member were put up, they reflected shop 16 at the disputed address as the registered address of the CC rather than the address of the CC's auditors as Mr Mostert had claimed. This, in particular, flies in the face of his claim that the CC did not trade from the disputed address. It is also clear that service of the notice of set down on 24 November 2010 for final judgment against the CC took place on Mr Mostert at the disputed address. Whilst he did not say that he never attended the disputed address, he stated that the address was that of the auditors and that he never attended their offices. At best for Mr Mostert this is a disingenuous omission as to his attendance at shop 16 at the disputed address in relation to a direct dispute concerning service at that address. This applies also to his statement that the disputed address is the address of the CC's auditors and not his place of residence or employment. In the light of all of the facts, the probabilities favour Nedbank's version that the summons was served on Mr Mostert personally at the disputed address. I see no way in which oral evidence might disturb these probabilities. They are very strongly tilted against Mr Mostert.

[28] A further consideration against referring the matter for oral evidence is that, if this were allowed in present circumstances, a bare assertion by an applicant in the face of a return of service from a sheriff would be sufficient to further delay finality in a judgment. This cannot be in the public interest. Where a return of service clearly states that personal service has been effected and where an applicant such as the present one concedes having received many legal documents and that he invariably refers these to his attorneys, it cannot be that the already heavily burdened court rolls be further burdened by oral evidence on this sort of issue. Applications for rescission of default judgements would take longer and employ` court resources to an

untenable extent if such applications, based on a simple assertion, were allowed.

[29] The final submission made on behalf of Mr Mostert was that it should be taken into account that Mr Mostert has a substantive defence to the action brought against him. This applies only to an application under Rule 31(2)(b) because it is not a relevant consideration under Rule 42(1)(a) as I have said. All that Mr Mostert said about this in his founding papers was that he allowed the deregistration of the CC due to the CC having suffered major financial blows arising from a number of fires in the district at the time. As a result, the CC was unable to pay the annual membership fees to CIPRO. When, as a result of non-payment, the CC was deregistered, his legal representatives explained to him that the creditors of the CC would be unable to proceed against the CC. When he became aware of the judgment granted against him personally for the debts of the CC, he gave instructions to his auditors to reregister the CC. Because, at the time the rescission application was launched, the CC had been reregistered and was indicated as 'active' it is as if the CC was never deregistered. Accordingly, as matter stands at present, no action lies against him personally.

[30] Counsel representing Mr Mostert at the hearing, however, did not rely on this defence. He relied, instead, on Nedbank's concession that certain amounts, received in reduction of the indebtedness of the CC, must now be credited to Mr Mostert. This is because insurance policies of Mr Mostert have been realised in favour of Nedbank and also that goods recovered by Nedbank from the CC have subsequently been sold. This means, Nedbank indicated in its answering affidavit, that at present and bringing these amounts into account, Nedbank would only now be entitled to claim certain reduced amounts as compared to those for which judgment was given. Nedbank went

on in the answering affidavit to pertinently abandon the amounts claimed in the summons in excess of those now due as a consequence of those credits being passed. It was submitted on behalf of Mr Mostert that such abandonment can only take place by employing the provisions of Rule 41(2). Since this had not been done, Nedbank's own papers demonstrate that Mr Mostert has a defence to part of the claim. Rescission must be given if a defence is put up to part of a claim which has resulted in judgment[17] and, accordingly, it was submitted that Mr Mostert has a defence on the merits.

[31] Apart from the fact that this defence was not raised on the papers, I do not agree that such abandonment can only take place by employing Rule 41(2). It can also take place under the common law.[18] The abandonment took place on the application papers, openly and with notice to Mr Mostert. Such abandonment does not require acceptance on the part of Mr Mostert.

[32] It was submitted in supplementary argument that an abandonment of part of a judgment leaves the judgment intact and only affects the right to execute against the full judgment. Because of this, it was submitted, it is clear that there is a defence to that part of the amount abandoned but in respect of which judgment was granted and rescission must follow. It was submitted that this must have motivated the approach in *Kavasis*. I was not referred to any authority on the point. Section 83 of the Magistrate's Court Act 32 of 1944 sets out specifically that cause the clerk of the court must act on the abandonment by altering the judgment to reflect the result of the abandonment. There is no such provision in the High Court rule. There is an indication in an *obiter dictum* in *Scrooby v Engelbrecht*[19] that the common law

[17] *Kavasis* v *South African Bank of Athens Ltd* 1980 (3) SA 394 (D).
[18] *First Consolidated Holdings (Pty) Ltd v Templeton NO & another* 1984 (3) SA 225 (N) 231C-D.
[19] 1940 TPD 100.

abandonment does not have that effect. In that matter, the court held as follows:

'The effect of the magistrate's judgment in favour of the defendant is that the plaintiff is debarred from suing again; if he were to do so he could be met at once with an objection of *res judicata*. But there is no reason why the right to plead *res judicata* should not be waived.'

[33] The underlying reasoning was dealt with, albeit in a different context, in *Durban City Council v Kisten*.[20] Here, the respondent had been directed to furnish further particulars and awarded costs of the interlocutory application directing that these be furnished. The appellant took the costs order on appeal but the respondent abandoned the costs order. The court held that '[t]he only *lis* between the parties was the order for costs granted by the magistrate. That *lis* has been removed by the defendant's abandonment of the order is his favour relating to that *lis*.'[21] In the present matter, accordingly, it could be held that there is no *lis* between Mr Mostert and Nedbank in respect of the abandoned amounts.

[34] There is no final clarity as to the effect of abandonment at common law. Under Rule 31(2)(b) an applicant must show good cause for the rescission to be granted. For the purposes of condonation under this Rule, accordingly, the existence of a substantial defence is only one of the factors to take into account in determining whether good cause has been shown and that the applicant has prospects of success. Because the scales are so clearly tipped against Mr Mostert on all of the other matters, even if there is a defence that abandonment means that the judgment remains intact and only execution of the abandoned part is abandoned, I am not inclined to exercise my discretion in favour of condoning the failure of the applicant.

---

[20] 1972 (4) SA 465 (N).
[21] Ibid 470A-B.

[35] In summary, accordingly, the application was not launched within a reasonable time of the judgment coming to the knowledge of Mr Mostert. In addition, Mr Mostert has failed on the papers to discharge the onus that the judgment was erroneously granted on the basis that service on him of the summons did not take place. It is not appropriate to refer the issue of service of the summons for the hearing of oral evidence because the application for such hearing of oral evidence was not brought timeously and, in any event, even if it had been, the probabilities weigh heavily against Mr Mostert's version. Mr Mostert is not entitled to condonation for failing to bring the application timeously.

[36] In the result, the application is dismissed with costs.

DATE OF HEARING:	12 March 2014
DATE OF JUDGMENT:	31 March 2014
FOR THE APPLICANT:	AJ Boulle, instructed by STRAUSS ATTORNEYS, locally represented by HAY AND SCOTT.
FOR THE RESPONDENTS:	LE Combrink, instructed by MASON INCORPORATED.