


## REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 1437/2019

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
DATE 28/01/20 SIGNATURE: 	

In the matter between:

M.M MOSEAMEDI

P.S MABE

FIRST APPLICANT

SECOND APPLICANT

And

MAPELA TASK TEAM

RESPONDENT

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JUDGEMENT

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KGANYAGO J

- [1] On the 7<sup>th</sup> March 2019 the respondent instituted an interdict application against the applicants. On receipt of the respondent's application, the applicants acting in person served the respondent with an unusual notice of intention to oppose. The applicants' notice of intention to oppose was unusual in that it contained the applicants' answer to the respondent's founding affidavit even though it was not under oath.
- [2] The applicants have brought an application seeking an order rescinding the default judgment that was granted on the 21<sup>st</sup> May 2019 by Ledwaba AJ. The applicants are alleging in their founding affidavit that the respondent's notice of motion has stated that if they failed to serve them with the notice of intention to oppose the application will be made on the 21<sup>st</sup> May 2019. The applicants further alleges that they have served the respondent with their notice of intention to oppose on the 8<sup>th</sup> April 2019 and filed same with the Registrar of this court on the 09<sup>th</sup> April 2019. It is the applicants' contention that since they have served and filed the notice of intention to oppose, the respondent was supposed to have removed the matter from the unopposed roll of the 21<sup>st</sup> May 2019. The applicants submit that the respondent has misled the court in believing that the matter was unopposed. The applicants have also made an application for condonation for the late filing of their rescission application.

- [3] The respondent in its answering affidavit has stated that the applicants on the 8<sup>th</sup> April 2019 whilst acting on their own did not understand motion procedures and therefore did not have any grounds to rescind the order of the 21<sup>st</sup> May 2019. It is the respondent's contention that it has obtained the order on unopposed basis as the applicants have failed to file their answering affidavit. The respondent is further stating that the applicants' notice of intention to oppose was defective in that they have failed to appoint an address in terms of the rules and also failed to explain their failure to comply with the rules in their founding affidavit. The respondent has submitted that the applicants were supposed to bring a substantive application for condonation which should have been brought on notice of motion.
- [4] It is trite that in an application for condonation for late filing of any document, the factors which the court will consider are the degree of lateness, explanation for the delay, prospects of success and any prejudice which the affected party might suffer.
- [5] The applicants in their founding affidavit have stated that they became aware of the default order on the 25 May 2019. On receipt of the order they started making financial arrangements in order to get the services of a legal representative and that they did not know what steps to take as they were representing themselves in the main application. On the 7<sup>th</sup>



June 2019 they approached their attorney who advised them that they will have to bring a rescission application. Their attorney first wrote a letter to respondent's attorney requesting that it consent to the rescission application. After the respondent's attorney has refused to give consent, that is when they brought the rescission application.

[6] In my view, the applicants have adequately addressed the factors necessary for granting of a condonation application. It was not necessary for the applicants to have brought a separate application on notice of motion. By incorporating the condonation application in their answering affidavit was sufficient.

[7] Rule 42(1) of the Uniform Rules of Court (the Rules) provides that the High Court may, in addition to any other powers it may have, *mero motu* or upon application by any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any affected party. (See **Colyn v Tiger Food Industries LTD t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)**).

[8] In **Chetty v Law Society Transvaal 1985 (2) SA 756 (A)** at 765 B-D Miller JA said:

"But it is clear that in principle and in long –standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are: (i) that the party seeking relief present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospects of success.

It is not sufficient if only one of these two requirements is met, for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default."

[9] The applicants on receipt of the respondent's application have served and filed their notice of intention to oppose the respondent's application. The respondent's notice of motion state that if no notice of intention to oppose is given, the application will be made on the 21<sup>st</sup> May 2019. In simple layman's language, for the applicants to avoid the application being made on the 21<sup>st</sup> May 2019, what was required of them do, was to simply file a notice of intention to oppose and the application will not proceed on the 21<sup>st</sup> May 2019.

[10] The respondent's notice of motion state that the applicant is required to file their answering affidavit within 15 days of filing of their notice of

intention to oppose. However, the manner in which the next paragraph has been drafted, creates the impression that the applicants were only required to file their notice of intention to oppose in order avoid the application been proceeded with on the 21<sup>st</sup> May 2019. Since the applicants were representing themselves, they cannot be blamed for not attending court on the 21<sup>st</sup> May 2019 as they were under the impression that they have complied with the respondent's condition for the application not to proceed on the 21<sup>st</sup> May 2019. In view, on this point alone the default judgment of the 21 May 2019 was erroneously granted in the absentia of the applicants.

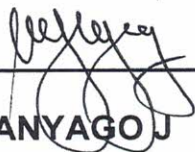
[11] If I am wrong on this point, the second issue is that the applicants' notice of intention to oppose contain an answer to the respondent's founding affidavit even though it was not done under oath. It does not seem that counsel for the respondent has brought it to the attention of the court that the applicants were representing themselves and that they have filed an unusual notice of intention to oppose which contain an answer to the respondent's founding affidavit. Had that been brought to the attention of the court, I doubt whether Ledwaba AJ would have proceeded to grant the default judgment in the absentia of the applicants. On this point also, the default judgment of the 21<sup>st</sup> May 2019 was erroneously granted in the absentia of the applicant.

[12] In the result I make the following order:

12.1 Condonation for late filing of the applicants' rescission application is granted.

12.2 The default judgment granted against the applicants on the 21<sup>st</sup> May 2019 is hereby rescinded

12.3 The respondent to pay the applicants costs on party and party scale.

  
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**MF. KGANYAGO J**  
**JUDGE OF THE HIGH COURT OF SOUTH**  
**AFRICA, LIMPOPO DIVISION, POLOKWANE**

**APPEARANCE:**

**For the Applicant** : Adv. K. S. D Mohoto  
**Instructed by** Raphesu JL Attorneys  
52 Landros Mare Street

**For the Defendant** : Adv. S.J Phaladi  
Molefe Attorneys  
58 Market Street

**Date of hearing** : 05 DECEMBER 2019

**Date of Judgment** : 28<sup>th</sup> January 2020