


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: HCA06/2021

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
DATE <u>23/07/2022</u> SIGNATURE: 	

In the matter between:

KT ALUMINIMUM AND CONSTRUCTION (PTY) LTD

APPELLANT

and

STENELY KGANYELA MOLEFE

RESPONDENT

JUDGEMENT

MANGENA AJ

- [1] The respondent in this appeal instituted legal proceedings against the appellant in the Polokwane Magistrate's Court. The appellant defended the action and instituted a counter-claim. The matter was then set down for trial on 07 August 2019.
- [2] On 07 August 2019 at court the matter was by agreement between the legal representatives set down for trial on 05 February 2020. On the 24 January 2020 appellant served a notice of its intention to amend its plea. The notice was not in compliance with Rule 55A (1) of the Magistrates Court rules in that it did not call upon the respondent to object within a particular period stated in the Rules. The respondent, nonetheless served and filed an objection on 30th January 2020.
- [3] On the 5th February 2020, the date of the trial, respondent together with his attorneys attended court and the appellant together with its attorneys were in default. The respondent, who was the plaintiff obtained a default judgment confirming cancellation of the agreement, payment of the sum of R 157 521-00 together with interest at 9% and costs of suit.
- [4] Unhappy with the turn of events, appellant filed an application for rescission of judgment contending that it was not in wilful default as its attorneys had erroneously diarised the matter and had demonstrated intention to defend the claim as well as to institute a counter-claim. On the merits of the respondent's claim, he denied that it was indebted to the respondent.

client's case. Worse still, the respondent had objected to the amendment and in the absence of a filed application for amendment supported by an affidavit, the court a quo was enjoined to proceed with the trial.

[9] Even if one were to accept favourably for the appellant that the attorneys had misdiarised the trial date to be 5 March 2020, still that does not explain why the appellant was not in court on 05 February 2020. One would have expected the appellant to have been advised immediately after court what the new date for trial is. The deponent to the affidavit in the rescission application does not deal with this important aspect. The fact that her attorneys made an error cannot provide her with protection when the error is not sufficiently explained. Nether the appellant nor the attorneys provided compelling evidence regarding the error. One would have expected them to have attached copies of the diary and correspondences sent to the appellant indicating the 05th March 2020 as the date of the trial. In the absence of this, the learned magistrate cannot be faulted for rejecting the explanation.

[10] During oral submissions, counsel for the appellant, Adv Morton urged us to find that the finding by the learned magistrate that the appellant had a bona fide defence should have led her ineluctably to a rescission of the default judgment. I disagree.

[11] The principles governing rescission are well –established. In **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape), 2003 (6) SA 1 SCA**, the court explained the approach as follows:

“In order to succeed an applicant for rescission of a judgment taken against him by default must show good cause. The authorities emphasise that it is unwise to give a precise meaning to term “good cause”. As Smalberger J put it in HDS Construction (Pty) Ltd v Wait: when dealing with words such as ‘good cause’ and “sufficient cause” in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words. The court’s discretion must be exercised after a proper consideration of all the relevant circumstances.”

With that as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; (c) by showing that he has a bona fide defence to the plaintiff’s claim which prima facie has some prospects, of success.”

- [12] The learned magistrate considered the three requirements mentioned above including the existence or otherwise of a bona fide defence. She weight that against the other requirements and correctly, in my view, concluded that the existence of a bona fide defence alone is insufficient to justify rescission of a properly obtained judgment. The law does not

allow the court to grant rescission in the absence of a good cause shown by giving a reasonable explanation for his default. She cannot be faulted on this finding. The Supreme Court of Appeal has already found in **Lohdi 2 Properties Investments CC v Bonder Developments (Pty) Ltd 2007 (6) SA 87 (SCA)** that: A court which grants a judgment by default like the judgment we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence of a defence on the merits is an irrelevant consideration and if, subsequently disclosed, cannot transform a validity obtained judgment into an erroneous one" para 27.

- [13] It is trite that a bona fide defence and good prospects of success are not sufficient in the absence of a reasonable explanation for the default: Chetty v Law Society Transvaal 1985(2) SA 756 (A) at 765. This principle has been interpreted as follows by the Labour Appeal Court in NUM v Council Mineral Technology (1999) 3 BLLR 209 (LAC) at 211 G-H: There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

- [14] The Constitutional Court confirmed the correctness of the above approach in Government of the Republic of Zimbabwe v Fick, 2013 (5) SA 325 (CC) at para 85 when it said: the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospects of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.
- [15] In Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, [2021] ZACC 28 the court re-affirmed this position when it held that the existing common law test is simple: both requirements must be met. Mr Zuma must establish that he had a reasonable and satisfactory explanation for his failure to oppose the proceedings, and that he has a bona fide case that carries some prospects of success- Para 71 and 76.
- [16] In the premises, the appellant explanation for failing to attend trial on 05 February 2020 has been correctly found to be unsatisfactory and the existence of a bona fide defence cannot avail him in the light of the authorities cited above.
- [17] Consequently the following order is made.
1. Condonation for the late prosecution of appeal is granted.

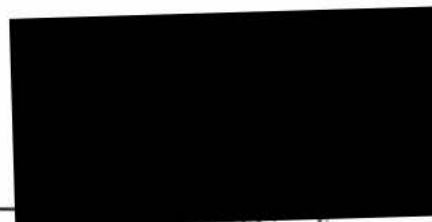
2. The appeal is dismissed with costs.



M.I. MANGENA

ACTING JUDGE OF THE HIGH COURT OF
LIMPOPO DIVISION, POLOKWANE

I agree and it is so ordered



E.M. MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

Counsel for the Appellant	:	Adv Morton
Instructed by	:	Corrie Nel & Kie Att
Counsel for the Respondent	:	Adv K. Mokwena
Instructed by	:	Director Makhafola Inc
Date of hearing	:	18 February 2022
Date of Judgment	:	23 FEBRUARY 2022