THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 846/19

In the matter between:

MELISSA VAN HEERDEN **APPELLANT**

and

ANNALISE BRONKHORST **RESPONDENT**

Neutral citation: *Van Heerden v Bronkhorst* (Case no 846/19) [2020] ZASCA 147 (13 November 2020)

Coram: SALDULKER and MOLEMELA JJA and EKSTEEN AJJA

Heard: 28 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 13 November 2020.

Summary: Rescission of judgment – rule 42(1)*(a)* – notice of motion a hybrid between form 2 and form 2(a) – form condoned – no prejudice to any affected party – notice of hearing delivered to electronic address provided by

respondent, but not received – not constituting procedural error – judgment not erroneously sought or erroneously granted.

Rescission in terms of common law – good cause – must allege facts which, if proved, would constitute a defence valid in law, with some prospect of success – bona fide defence not made out.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Msibi AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Eksteen AJA (Saldulker JA concurring)

[1] This appeal is against the dismissal of an application for rescission of an order in the High Court, Mbombela (the high court) authorising the Master of the high court to accept an unsigned draft will of Willem Jacobus Bronkhorst (the deceased) for purposes of the administration of his estate. Two issues arise, firstly, whether the order ought to have been rescinded in terms of rule 42(1)*(a)* and, secondly, whether the appellant had shown sufficient cause for rescission under the common law.

[2] I shall consider first the application of rule 42(1)*(a)*. The facts leading to the application for rescission are as follows. Ms Van Heerden (the appellant) was the third respondent in an application issued by Ms Bronkhorst (the respondent), as applicant, for the relief set out above. I shall refer herein,

for convenience, to the appellant as the third respondent and the respondent as the applicant.

[3] The applicant was married to the deceased in August 1993 and the marriage subsisted until his death on 30 August 2014. The third respondent is the daughter of the deceased from a previous marriage. The applicant alleged that she and the deceased had executed a joint will during August 1998 in the terms set out in the draft will. When the deceased died the original signed will could not be found. However, the unsigned draft was found amongst the documents in his office. Hence the main application.

[4] The notice of motion in the main application, which was issued on 18 June 2018, recorded in the opening paragraph:

'Take notice that the Applicant will make application to the above Honourable Court on 30/07/2018 at 10h00 or as soon thereafter as counsel for the Applicant may be heard for an order in the following terms:

1. . . .'

[5] After setting out the relief which the applicant sought, the notice of motion followed closely the wording of form 2(a) annexed to the Uniform Rules of Court (the rules), save that the final paragraph recorded: 'The application is set down and will be made on 30/07/2018 at the above Honourable Court.'[1] The date for the hearing was, on a reading of the notice of motion, predetermined.

[1] Form 2(a) concludes with: 'If no such notice of intention to oppose be given, the application will be made on …… (date) at ….. (time).'

[6] Upon receipt of the application the third respondent, through her attorney, notified the applicant on 29 June 2018 of her intention to oppose the application. The notice of intention to oppose did not comply with the provisions of rule 6(5)*(d)* in that it failed to set out an address within 15 km of the office of the registrar[2] where the third respondent would accept service of documents, but it did reflect an electronic mail address at 'email: esme@steenkampatt.co.za'. Thereafter the third respondent failed to serve or file opposing papers. The applicant's attorneys therefore addressed a letter to the third respondent's attorneys, which was transmitted electronically to the address provided in the notice of intention to oppose, on 25 July 2018, in the following terms:

'We note that you filed a Notice of Intention to Oppose the above application.

You will note from the notice of motion that the matter has been set down on the unopposed roll on 30 July 2018 and that you were required in terms of the rule to file your opposing affidavit within 15 days after the date of service of the Notice of Intention to Oppose. You have failed to file an opposing affidavit and the matter remains unopposed.

Unless we receive your opposing affidavit before closing of business today, together with an application for condonation, we will proceed to index the Court file and prepare for argument of the matter on the unopposed roll of Monday, 30 July 2018.'

The letter elicited no response and the matter was therefore dealt with on the unopposed roll. The order set out in para 1 above was granted accordingly.

[7] The third respondent explained in the rescission application that the letter of 25 July 2018 was not received by her attorneys as the address provided in the notice of intention to oppose was that of a secretary, Esme,

[2] Rule 6(5)*(d)*(i) provides that: 'Any person opposing the grant of an order sought in the notice of motion must within the time stated in the said notice, give applicant notice in writing, that he or she intends to oppose the application and in such notice appoint an address within 15 km of the office of the registrar, at which such person will accept notice and service of all documents, as well as such persons postal, facsimile or electronic mail address where available.'

who had unexpectedly resigned from her employment with third respondent's attorneys early in July 2018. In her founding papers in the rescission application two procedural issues relevant to rule 42(1)*(a)* were raised. The first was that the court's practice directive does not provide for a mechanism for a party to set down an opposed application on the unopposed roll. The second was that the applicant had failed to serve any set down. During argument of the appeal, however, the third respondent's main contention relating to the set down was focused on the form of the notice of motion which she contended was irregular as it did not comply with form 2(a) annexed to the rules. It was, so the argument went, an unauthorised hybrid between form 2 and 2(a).[3] The point in respect of the form of the notice of motion was not raised in the founding papers.

[8] On behalf of the third respondent it was argued that the predetermined date of set down reflected in the notice of motion constituted an irregularity as the rules of court require an application to be made to the registrar to allocate a date of hearing where no opposing papers are filed.[4]

[9] In *Colyn v Tiger Foods Industries Ltd t/a Meadow Feeds Mills (Cape)* 2003 (6) SA 1 (SCA) (*Colyn*) this court considered the application of rule 42(1). It held:

'[4] . . . The guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the Judge who delivered it. He becomes *functus officio* and may not ordinarily vary or rescind his own

[3] Rule 6(5)*(a)* provides that every application, other than one brought *ex parte*, must be brought on notice of motion as near as may be in accordance with form 2(a) of the first schedule . . .'

[4] Rule 6(5)*(f)*(i) provides: '[w]here no answering affidavit, or notice in terms of subparagraph (iii) of para (d) is delivered within the period referred to in subparagraph (ii) of paragraph (d) the applicant may within 5 days of the expiry thereof apply to the registrar to allocate a date for the hearing of the application.'

judgment . . . . That is the function of a Court of appeal. There are exceptions. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, *justus error*. Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause. . . .

[5] It is against this common-law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. The rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The Rule gives the courts a discretion to order it, which must be exercised judicially . . . .

[6] Not every mistake or irregularity may be corrected in terms of the rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law. That is why the common law is the proper context for its interpretation. Because it is a rule of court its ambit is entirely procedural.'[5]

[10] Generally 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.[6]

[11] What emerges from the aforesaid, as I understand the authorities, is that not every procedural violation of the rules results in an order 'erroneously sought and erroneously granted'. It has often been stated that the rules exist for the court not the court for the rules.[7] Rule 27(3) provides for a court to

[5] See also *Kili and Others v Msindwana In Re: Msindwana v Kili and Others* [2001] 1 All SA 339 (TK) at 345 where it was stated that the rule is a 'procedural step designed to correct expeditiously an obviously wrong judgment or order'.

[6] *Nyingwa v Moolman NO* 1993 (2) SA 508 (TK) at 510D-G; *Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 (GNP) at 153C; *Rossitter v Nedbank Limited* (unreported, SCA case number 96/2014 dated 1 December 2015) para 16; *Thomani and Another v Sobeka NO and Others* 2017 (1) SA 51 (GP) at 58C-E; *Occupiers, Berea v De Wet NO and Another* 2017 (5) SA 346 (CC) at 366E-367A.

[7] See for example *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783A.

condone non-compliance with the rules. It has been held that rule 6(5)*(a)*, which requires a notice of motion to be 'as near as may be in accordance with form 2(a) of the first schedule', is peremptory.[8] Similarly, it has been held that rule 6(5)*(f)*(i) and (ii), (which requires an application to the registrar for the allocation of a date where form 2(a) has been used) is peremptory.[9] However, even peremptory provisions of the rules may, in appropriate circumstances, be condoned.[10] The test, it seems to me, is whether any potential prejudice results to a party affected.

[12] I turn to consider the form of the notice of motion. In *Simross Vintners (Pty) Ltd v Vermeulen; VRG Africa (Pty) Ltd v Walters t/a Trend Litho; Consolidated Credit Cooperation (Pty) Ltd v Van der Westhuizen* 1978 (1) SA 779 (T), Coetzee J considered the consequence of using form 2 instead of form 2(a). He pointed out[11] that form 2(a) (unlike form 2) contains a description of the procedural rights of a respondent after service of the notice of motion. These rights, it was said, are considerable and substantial. He concluded, accordingly, that the use of form 2 where form 2(a) was prescribed rendered the notice of motion a nullity.[12] The position in the present matter, however, is different. The notice of motion is, as I have said, a hybrid between form 2 and 2(a). It gave unequivocal notice of the date upon which the matter would be heard, whether opposing papers were filed or not. All the procedural

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[8] *Gallagher v Normans Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) at 502E.
[9] *Nordberg Inc and Another v AQTN Services CC and Another and Several Other Matters* 1998 (3) SA 531.
[10] See *Motloung and Another v The Sheriff, Pretoria East and Others* [2020] ZASCA 25 (SCA) para 29, where Govern AJA considered a failure by the registrar to sign a summons and held: 'In my view, the present clearly falls within the ambit of a peremptory requirement which breach can be condoned under Rule 27(3). Despite not complying with a peremptory provision of Rule 17(3)*(c)* it is not visited with nullity. It can be condoned.'
[11] At 784.
[12] A contrary view was expressed in *Mynhardt v Mynhardt* 1986 (1) SA 456 (T); *Gouws v Scholtz* 1989 (4) SA 315 (NC) at 320I.

rights provided for in form 2(a) were included in the notice of motion and it allowed sufficient time for all those rights to be exercised. It recorded that the matter had been set down. The notice of motion and the notice of intention to oppose were placed before the presiding judge in the high court. He approved of it, as he was entitled to do, and made the order sought. It cannot be said that it was a mistake or that it was clearly wrong. I can conceive of no prejudice which could arise from the condonation of the form of the notice of motion.

[13] The gravamen of the third respondent's complaint was that no notice of set down was given. This court has repeatedly held that the failure to give notice of proceedings where such notice was required constitutes an irregularity which justifies rescission of the order granted.[13]

[14] In *Lodhi*[14] this court remarked:

'Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some other reason not been service of the document. In such a case the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned judgment is granted erroneously.'

In such circumstances service, as is required, did not occur at all.

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[13] *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA) para 24; See fn 6 *Rossitter* para 16; *Top Trailers (Pty) Ltd and Another v Kotzé* (1006/2018) [2019] ZASCA 141.

[14] Id *Lodhi* para 24.

[15] In *Top Trailers*[15] a notice of motion in accordance with form 2*(a)* had been duly issued. No opposing papers were filed. The applicant therefore proceeded to set the matter down on the unopposed roll and obtained judgment without further notice to the respondent. In an application for rescission he contended that he was procedurally entitled to the judgment. He denied that the appellants were not aware of the date of set down and contended that his notice of motion had informed the appellants of the steps that they were required to take if they intended to oppose the application. The appellants, so the argument went, failed to comply with the time limits specified in the notice of motion.

[16] *Top Trailers* related to a judgment of the Gauteng North Division of the high court. This court held that para 13.10 of the Gauteng: Pretoria Practice Manual regulated the enrolment of applications in that court where a notice of intention to oppose had been filed, but no opposing papers. It provided for the application to be set down and stipulated:

'The notice of set down of such an application must be served on the respondents' attorneys of record.'

The prescribed procedure requiring delivery of a notice of set down had not been complied with and no notice had been given to alert the respondent that the matter would be heard. This court therefore rescinded the order.

[17] In this case, however, there is no corresponding rule of practice in Mpumalanga. The notice of motion recorded the fact that the matter had been set down to be heard on 30 July 2018. I am not persuaded that further notice was required, however, by virtue of the conclusion to which I have come it is

[15] See fn 13.

not necessary for purposes of this judgment to make a final pronouncement in that regard.

[18] As recorded earlier, the third respondent failed to comply with the provisions of rule 6(5)*(d)* and no address was provided in the notice of intention to oppose within 15 km of the court. An electronic address was, however, provided. Rule 4A provides that service of all documents not falling under rule 4(1)*(a)*[16] may be affected by electronic mail to the address provided by a party under rule 6(5)*(d)*(i). The letter of 25 July 2018, which unequivocally gives notice that the matter had been set down and would be heard on 30 July 2018, was transmitted in accordance with rule 4A to the address so nominated. Notice was accordingly delivered in terms of the rules. The explanation for the non-receipt thereof is set out earlier. It relates to the internal affairs of the third respondent's attorneys. That is not a mistake in the proceedings and is not a procedural irregularity, nor an error in respect of the issue of the order.[17] At the time of the issue of the order there was no fact of which the court was unaware, which would have precluded the granting of the order. In the circumstances I consider that the respondent was procedurally entitled to the relief which she obtained. In the result the order was not erroneously sought and erroneously granted.

[19] That brings me to relief under the common law. An applicant for rescission of judgment taken by default against him is required to show good cause.[18] Whilst the courts have consistently refrained from circumscribing a

[16] Rule 4(1)*(a)* relates to documents initiating legal proceedings.
[17] See *Colyn* para 9.
[18] *De Wet and Others v Western Bank Ltd* 1977 (2) SA 1033 (W) at 1042F-1043C; *Colyn* para 11.

precise meaning of the term 'good cause',[19] generally courts expect an applicant to show 'good cause' (a) by giving a reasonable explanation of his default; (b) by showing that his application is *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which, *prima facie*, has some prospect of success.[20]

[20] The third respondent provided no explanation at all for her failure to file answering affidavits within the time period provided, save that she was 'busy preparing the opposing affidavit and gathering information from her father's friends and other family members'. The explanation for her default of appearance at the hearing of the matter is set out earlier. It is that her attorneys did not receive the letter of 25 July 2018 which gave notice of the hearing on 30 July 2018. There is no explanation for the failure to have complied with rule 6(5)*(d)*(i) in providing an address within 15 km from the seat of the court at which service of documents would be received. As I have said, the letter of 25 July was delivered to the address provided. No explanation is provided for the failure to provide an alternative address for service when the secretary in the offices of her attorney had resigned.[21] I accordingly have my reservations about the reasonableness of the explanation. In *Colyn* this court noted, at para 12, that:

'While courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point when there is no alternative but to make the client bear the consequences of the negligence of his attorneys (*Saloojee and Another NNO v Minister of Community Development*). Even if one takes a benign view, the inadequacy of the explanation may well justify the refusal of

[19] *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300-301B.
[20] *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476; *HDS Construction* at 300F-301C; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764I-765F.
[21] Rule 4A(2) provides that an address for service, or electronic address mentioned in sub-rule (1) may be changed by a delivery of notice of a new address and thereafter service may be affected as provided for in that sub-rule as such new address.

rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success (*Melane v Santam Insurance Co. Ltd*).'[22]

[21] I turn therefore to consider the defence raised by the third respondent. In order to do so it is necessary to have regard briefly to the applicant's case as set out in the main application. She alleged that the deceased resigned from his employment with the Department of Finance during 1998 and received a significant package. He accordingly approached his broker at Bankcorptrust Limited[23] for advice in respect of the investment of the money. His broker advised, amongst other things, that a new will should be drawn. It is common cause that at that time the previous will executed by the deceased had been in 1992, before his marriage to the applicant. On the instructions of the deceased and the applicant a joint will was prepared by Bankcorptrust in which it was nominated as the executor of the joint will.

[22] Mr Jacques Pierre Rossouw, currently employed as a manager at Absa Trust Limited in its National Will Drafting Service in Pretoria, deposed to an affidavit in support of the main application. He said that he had been provided with the unsigned draft will and a copy of the deceased's identity document. He investigated the origins of the unsigned draft will which reflects a bar code at the top right-hand side of each page. Mr Rossouw verified that the document originated with Bankcorptrust Limited. He was able to establish this from the barcode and inscription on the top right-hand corner of each page, which was commonly used within the Wills Division of the bank at the

[22] Citations omitted.
[23] The predecessor to Absa Trust Limited.

time. From the records of Bankcorptrust he was able to link the barcode with the identity number of the deceased. The inscription below the barcode reflects the date 19 August 1998, which Rossouw states was the date of its preparation.

[23] Shortly after the preparation of the joint will, the applicant alleged, it was signed at their home. Their broker, she stated, delivered the document to their home and left shortly thereafter. The deceased, the applicant and two family friends, Mr and Mrs Havenga were present. Mr and Mrs Havenga signed as witnesses to the will while they were seated in the kitchen. During these events, she alleged, her daughter from a previous marriage, Cyzelle Fincham, arrived at the home and enquired as to the events occurring there. Mr and Mrs Havenga and Mrs Fincham all deposed to supporting affidavits confirming these events.

[24] The applicant alleged further that the deceased advised that he would deliver the document to Absa Bank. She bears no knowledge as to the events thereafter, however, as recorded earlier, upon his death the original document could not be found. The unsigned draft will, being a copy of the original, was however located.

[25] In the rescission application two defences to the applicant's case were raised. The first is a factual issue whilst the second is a matter of law. In respect of the first, the third respondent denied that the signature of the document ever occurred. In respect of the second, she contended that the relief granted was incompetent as the jurisdictional requirements of s 2(3) of the

Wills Act 7 of 1953, had not been established. I shall consider each of these defences below.

[26] A *bona fide* defence needed to be established *prima facie* only.[24] It was accordingly not necessary to deal fully with the merits of the case in order to prove the case. It would be sufficient to set out facts, which if established at the trial, would constitute a defence valid in law.[25] The facts alleged, as in any other application, must be primary facts. As Harms explained: 'Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Secondary facts, in the absence of primary facts on which they are based, are nothing more than the deponents own conclusions.'[26]

[27] It is against this background that the factual defence raised should be measured. The third respondent alleged that the applicant has 'made up a fictitious "coffee meeting" story' about how, apparently in 1998, the deceased signed 'some sort of document'. She said that she is gathering affidavits from her grandmother, her aunt and from her husband to 'put to bed any notion' that the original of the draft will 'would ever have been signed' by the deceased. Hence, she contended that there would be a dispute of fact which would have to proceed to oral evidence.

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[24] *Standard Bank of SA Ltd v El-Naddaf and Another* 1999 (4) SA 779 (W) at 784; *Trapel Farms CC and Others v Rodel Financial Services (Pty) Ltd* [2013] JOL 29822 (KZP) para 19; *Ferris v Firstrand Bank Ltd* [2013] ZACC 46; 2014 (3) SA 39 (CC).

[25] *PLJ van Rensburg en Vennote v Den Dulk* 1971 (1) SA 112 (W); *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (W).

[26] LTC Harms *Civil Procedure in the Supreme Court* (1990) at B6.25. See *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* [2003] 1 All SA 164 (CC) para 28.

[28] The resignation of the deceased from his employment in 1998 and the payment of a package was not challenged in any manner at all. There was no dispute about the evidence of Mr Rossouw, which goes a long way to establishing that the document was prepared at the instance of the deceased. The third respondent did not disclose what would emerge from the affidavits of her grandmother, her aunt or her husband, which, if established in the main application, would constitute a defence. Her assertion that the events deposed to by the applicant and her witnesses are fictitious can at best be described as a secondary fact unsupported by any primary facts. There was nothing in the rescission application which could foreshadow a *bona fide* dispute of fact in the main application such as to require a reference to evidence.[27]

[29] I accept that there may be cases in application proceedings where a respondent makes an averment which, if proved, would constitute a defence to the applicant's claim, but is unable to produce an affidavit that contains allegations which *prima facie* establishes that defence. Hence, in *Plascon-Evans Paints* this court stated:

'In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)*(g)* of the Uniform Rules of Court . . . the Court . . . may proceed on the basis of the correctness thereof . . .'[28]

[27] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634G-635A.
[28] *Plascon-Evans* at 634J-635A.

[30] However, in *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others*[29] this Court commented on the invocation of the provisions of rule 6(5)*(g)* in such circumstances. It stated:

'It would be essential in the situation postulated for the deponent to the respondent's answering affidavit to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicant's deponents or other persons he proposes to subpoena) and explain why the evidence is not available. Most importantly, and this requirement deserves particular emphasis, the deponent would have to satisfy the court that there are reasonable grounds for believing that the defence would be established. Such cases would be rare, and a court should be astute to prevent an abuse of its process by an unscrupulous litigant intent only on delay or a litigant only intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one.'

As I have said, in the rescission application the third respondent did not raise anything which could create a bona fide dispute of fact in the main application, nor were there averments which could satisfy a court that there are reasonable grounds to believe that her denial of the signature of the document would be established. In the circumstances, if I have reference to all the information placed before this Court the third respondent's case was insufficiently made to establish good cause.

[31] The legal defence raised, which is set out earlier, may be briefly dealt with. In the notice of motion in the main application the applicant sought the order which was ultimately granted and is set out earlier. In the alternative, she sought an order 'that the draft will annexed . . . to the applicant's founding affidavit be accepted as a validly executed will in terms of s 2(3) of the Wills

[29] *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) para 56.

Act 7 of 1953'. The relief granted did not relate to the provisions of s 2(3) of the Wills Act. It is an order based on the reconstruction of the original will. This may be done by proving that a valid will was in fact executed and what its terms were. Upon such proof the court may under the common law powers, direct that the estate be administered in accordance with such terms.[30] The order which was made was in terms of the common law. There is accordingly no merit in the legal defence raised and it is not necessary to have regard to the jurisdictional requirements of s 2(3) of the Wills Act.

[32] In the result, the appeal is dismissed with costs.

J W EKSTEEN
ACTING JUDGE OF APPEAL

Molemela JA (Dissenting)

[33] I have read the judgment of my brother Eksteen AJA (the first judgment). For the reasons that follow, I am unable to agree with the first judgment's reasoning and conclusion.

[30] See for example *Nell v Talbot NO* 1972 (1) SA 207 (D) at 209H-210E; *Ex Parte Porter and Another* 2010 (5) SA 546 (WCC) para 12.

[34] This is a matter in which both parties did not, in one way or the other, strictly comply with the Uniform Rules of Court. The extent of their non-compliance has already been canvassed in the first judgment and need not be repeated here. The first judgment found that the letter dated 25 July 2018 indeed served to give notice that the matter had been set down and would be heard on 30 July 2018.[31] That seems to me to be an acceptance that the applicant indeed had to notify the respondent about the hearing. In any event, as far as I am aware, it has never been the practice of our courts to simply ignore a Notice of Intention to Oppose merely because an Answering Affidavit had not been filed. It is therefore quite significant that counsel for the applicant indicated, during the hearing of the appeal, that he represented the applicant in the proceedings of the main application before Engelbrecht AJ and that he duly advised the learned Judge that the respondent had been notified by e-mail dated 25 July 2018 about the fact that the application would be heard on 30 July 2018. That being the case, what Engelbrecht AJ was apprised of takes centre stage and the parties' non-compliance with the Uniform Rules fades into the background.

[35] As mentioned earlier, Engelbrecht AJ was apprised that the respondent was advised of the hearing via the e-mail dated 25 July 2018. For her part, the respondent averred that her attorney of record did not receive the e-mail in question. Her attorney has deposed to an affidavit confirming that he indeed did not receive the e-mail and explaining that the reason for the non-receipt thereof was that the e-mail address furnished in the Notice of Opposition was

[31] See para 18 of the first judgment.

that of his secretary, who had unexpectedly left the employ of his firm before 25 July 2018.

[36] As I see it, the crisp question is whether that specific e-mail reached the intended recipient (the respondent's attorney) and whether, the facts on which the respondent relies give rise to any sort of error that may entitle the respondent to a rescission of the order on the basis that it was erroneously granted within the contemplation of Rule 42(1)*(a)* or in terms of the common law.

[37] It is quite telling that notwithstanding that the respondent mentioned why her attorney did not receive the e-mail dated 25 July 2018 and also filed a confirmatory affidavit deposed to by the attorney, the court a quo simply found that the respondent 'has not given a satisfactory explanation why [she] did not respond to the [applicant's] letter'. Purporting to rely on a dictum in *Bakoven Ltd v GJ Howes (Pty) Ltd (Bakoven)*,[32] the court a quo found that the respondent was not justified in complaining that the order was erroneously granted because she had not given a satisfactory explanation why (she) did not respond to the applicant's e-mail and had merely 'folded her hands'. It seems to me that the court quo was unaware that the *Bakoven* dictum it relied upon was overruled in *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd (Lodhi)*,[33] where this Court stated as follows:

'I agree that Erasmus J in *Bakoven* adopted too narrow an interpretation of the words "erroneously granted". Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been

[32] *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 446 at 471E-I.
[33] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA).

given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has *for some or other reason not been service of the document*. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously.'[34] (Own emphasis.)

For reasons set out hereunder, I am of the view that the present case is one such as envisaged in this dictum.

[38] My understanding of that dictum (the *Lodhi* dictum) is that a judgment is erroneously granted if there existed at the time of its issue a fact which the court was unaware of, 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. There is no closed list of what these facts might or ought to be. Under this rubric, what is crucial is the established non-receipt of the required notice. I am therefore not persuaded that the non-receipt of the notice on account of "internal affairs"[35] of an attorney can, without more, fall outside the purview of the category of circumstances envisaged in the *Lodhi* dictum. As Engelbrecht AJ was specifically advised by the applicant's counsel during the hearing that a notification had been sent via e-mail dated 25 July 2018 and was unaware of the fact that the e-mail in question had not been successfully transmitted to the respondent's attorney, she granted the order labouring under

[34] *Lodhi* para 24. That dictum was re-affirmed by this Court in *Rossitter v Nedbank Limited* (unreported, SCA case number 96/2014 dated 1 December 2015) para 16 and in *Top Trailers (Pty) and Another v Kotze* [2019] ZASCA 141 para 17. Notably, no attempt was made to qualify that dictum in any way.
[35] See the first judgment, para 18.

the erroneous impression that service had been effected on the respondent. Her order was therefore erroneously granted as envisaged in Rule 42(1)*(a)* of the Uniform Rules of Court. The respondent was therefore entitled to have the judgment rescinded. On that ground alone the appeal ought to succeed.

[39] As the respondent had indicated that her application for rescission was also brought in terms of the common law, the court a quo considered whether the requirements of an application grounded on the common law had been met. It is to that aspect that I now turn. The applicable common-law principles have been correctly set out in the first judgment and need not be repeated in this part of the judgment. I consider next whether the applicable principles were correctly applied by the court a quo. It should be pointed out from the outset that there is nothing in the papers that suggests that the respondent's application for rescission of judgment is not bona fide. The application was launched soon after she had been advised about Engelbrecht AJ's order.

[40] In its consideration whether good cause was shown, the court a quo failed to adequately interrogate the reasons advanced for the non-receipt of the e-mail of 25 July 2018. It paid no regard to the fact that it was not disputed that the e-mail address furnished in the notice of opposition indeed bore the first name of the secretary as a username and that it was undisputed that the secretary in question had resigned unexpectedly before the e-mail notification was dispatched to her e-mail address. Without interrogating the reasons for non-delivery of the e-mail dated 25 July 2018, the court a quo remarked that the respondent had not provided a satisfactory explanation for not responding to the e-mail dated 25 July 2018 and that she had merely 'folded her arms'. Logic dictates that the e-mail in question could not have been responded to, if

it had not been received. It is clear that the court a quo did not properly apply its mind to the explanation proffered by the respondent for the default. The wrong premise from which it considered the explanation unfortunately permeated its weighing of whether 'good cause' had been shown for the default in filing the answering affidavit.

[41] I know of no general rule that precludes a court from accepting an attorney's unsatisfactory 'internal affairs' as a reasonable explanation for defaulting in filing the necessary pleadings or processes on behalf of its client.[36] At the end of the day, each case must be considered on its own facts. This Court in *Colyn v Tiger Foods Industries Ltd t/a Meadow Feeds Mills (Cape)*[37] observed that courts are slow to penalise a litigant for his attorney's inept conduct of litigation but warned that there comes a point when there is no alternative but to make the client bear the consequences of the negligence of his attorneys. I do not believe that the present case falls into the latter category.

[42] The first judgment found that the respondent 'provided no explanation at all' for her failure to file an answering affidavit within the stipulated time period. No matter how weak the respondent's explanation that she was busy gathering information from her father's friends and other family members may be considered to be, it cannot, in my view, be equated to having given no explanation at all. To the extent that the respondent's explanation may be considered weak, it is 'cancelled out' by the bona fide defence she has raised.[38]

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[36] *Hassim v Fab Tanks* [2017] ZASCA 145; *Ferris and Another v FirstRand Bank Ltd* [2013] ZACC 46; 2014 (3) SA 39 (CC) para 25.
[37] *Colyn v Tiger Foods Industries Ltd t/a Meadow Feeds Mills (Cape)* 2003 (6) SA 1 (SCA).
[38] Ibid para 12.

[43] The first judgment addressed itself to the applicant's case and concluded that the respondent had not raised a bona fide defence. I am not persuaded that that is the case. What follows hereunder are important aspects that were not taken into consideration by the court a quo when it considered the application. First, the applicant in her founding affidavit disclosed that she knew that the respondent disputed her version regarding the deceased's wishes and about the deceased having executed and signed the Will attached to the applicant's application. This is a relevant consideration when determining whether the respondent's version raises a genuine dispute of fact. The following remarks by this Court ring true: 'There will . . . be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him'.[39]

[44] Second, although the broker who allegedly advised the deceased to make the Will, prepared it and had it delivered at the applicant's home and subsequently took the signed will to the bank for safe-keeping was still alive, namely Mr Arnold Hugo, this independent witness' affidavit giving his account of events was not attached to the application and no reason was advanced for not doing so. The applicant merely mentioned that her current broker had advised her that Mr Hugo had stated that due to the long lapse of time, he could not recall the facts as he had dealt with many wills.

[45] The applicant's version is that after Mr Hugo's departure, she and the deceased signed the Will and their friends, the Havengas, signed as witnesses, whereupon the deceased undertook to give the Will to Mr Hugo for

[39] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 13.

safekeeping. What seems rather odd is for Mr Hugo to have taken the trouble of personally delivering the Will at the applicant's home after hours, only to leave it there without seeing to it that the applicant and the deceased had signed it, whereas he knew he would have to personally deliver the signed Will to the bank for safe-keeping. I state this only to illustrate the importance of Mr Hugo's affidavit and how its absence has a bearing on the context in which the respondent's averments must be considered.

[46] In my view, the first judgment's criticism that the applicant did not disclose any facts which may emerge from the affidavits of her relatives fails to take into account that the respondent averred that the deceased had personally told her that he would not appoint the applicant as a beneficiary in terms of a Will because he had already made provision for her by way of policies. The respondent had thus set out the import of the defence she proposed to rely on. She did not have to deal fully with the merits of the case and produce evidence showing that the probabilities were in her favour.[40]

[47] Significantly, the respondent's assertion about the existence of policies that benefitted the applicant, an aspect vehemently denied by the applicant in her answering affidavit, is borne out by a print-out attached to the replying affidavit, which mentions three policies in addition to the Momentum investment policy that the applicant had alluded to. Despite this, the court a quo found that the respondent's version was unsubstantiated.

[40] Compare *Hassim v Fab Tanks* [2017] ZASCA 145 para 28.

[48] In relation to the respondent's 'legal defence' alluded to in the first judgment, sight must not be lost of the fact that the respondent's assertion that the applicant had not fulfilled the requirements of s 2(3) of the Wills Act emanated from the fact that the applicant's Notice of Motion stated that she was relying on s 2(3) of the Wills Act in relation to the alternative order she was seeking. As correctly pointed out in the first judgment, an applicant seeking the reconstruction of a Will based on common law principles would have to show that the valid will was executed by the deceased.[41] The difficulty for the applicant is the unexplained absence of a confirmatory affidavit from Mr Hugo, who on the basis of having prepared the Will on behalf of the deceased, delivered it for signature and bore the responsibility of delivering the signed Will to the bank, is a key independent witness in relation to whether or not the deceased had indeed signed the Will.[42] I therefore cannot agree with the first judgment's conclusion that the 'legal defence' raised by the respondent has no merit.

[49] Against the background sketched in the foregoing paragraphs, I am of the view that the respondent's averments constituted a bona defence to the applicant's claim. In considering the assertions made by a respondent in order to meet an applicant's case, courts are expected to be mindful of the fact that an applicant for rescission of judgment is not required to illustrate a probability of success but rather the existence of an issue fit for trial.[43] The court a quo, in its judgment, seems to have inexplicably attempted to raise that

[41] See para 31 of the first judgment and the authorities quoted therein.
[42] The applicant averred that the deceased had informed her that he would give the signed Will to Mr Hugo.
[43] Compare *Hassim v Fab Tanks* [2017] ZASCA 145 para 12; *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 29 (SCA) at 34E-F.

threshold instead of properly addressing itself to whether the respondent had raised a triable issue.

[50] It must be borne in mind that a court's discretion whether or not to grant rescission of judgment must be influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case.[44] Regrettably, the judgment of the court a quo does not demonstrate that it followed that approach. I am mindful of the fact that a court considering whether to rescind a judgment exercises a discretion. Although the scope for a court of appeal to set aside an order made by a lower court in the process of exercising a discretion is limited, the court of appeal is entitled to interfere with the order of the lower court where that court was influenced by wrong principles or a misdirection of the facts; in other words, where its discretion was not judicially exercised.[45]

[51] I have already canvassed the facts and circumstances that have led me to conclude that the respondent has shown sufficient cause and thus met the requirements for an order rescinding the judgment in terms of the common law.[46] I have also advanced reasons why I believe that the court a quo's discretion was moved by wrong principles of law and an incorrect appreciation of the facts. This means that its discretion was not judicially exercised, thus leaving this Court at large to tamper with its decision. For all

[44] *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) 1042H.
[45] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another* [2015] ZASCA 22; 2015 (5) SA 245 (CC) para 88; *Ferris and Another v FirstRand Bank Ltd* [2013] ZACC 46; 2014 (3) SA 39 (CC) para 28 and 29.
[46] See *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764I–765 E.

the reasons stated above, I would uphold the appeal and replace the order of the court a quo with one rescinding the judgment.

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M B MOLEMELA

JUDGE OF APPEAL

Appearances

For appellants:	L van Gass
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