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IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 61478/09

DATE: 20 MAY 2010

In the matter between:

K K HARDWARE	First Applicant
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H C NDOU	Second Applicant
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J B SPARES	Third Applicant
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and

SIZANE AGENCIES (PTY) LTD	First Respondent
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CITY OF TSHWANE	Second Respondent
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JUDGMENT

Ismail AJ :

[1] This is an application wherein the first and second applicants seek an order in the following term:

(1) Rescission and setting aside of a judgment granted by default and in error by this court on the 23 March 2009, in terms whereof the first applicant is ordered to be evicted from his legal erf [...]. Block [...] S[...] [...] Extension 4 township, Pretoria.

(2) The applicants seek condonation for the late filing of their application.

(3) Costs of the application

(4) that the Respondents be ordered to file a plea within 15 days of receipt of the notice of motion.

[2] The applicants (first and second applicants) brings this application in terms of Rule 31 (2) (b) and Rule 42 (1) (a) and (b) of the Uniform Rules.

[3] The first applicant in the founding papers is described as a juristic person duly registered in terms of the laws of South Africa. During argument before me it was submitted that the first applicant was a sole proprietor owned by the second applicant.

Background to the application

[4] The first applicant submits that the order of the 23 March 2009 was erroneously obtained.

The order reads :

“1 THAT the first respondent or any other person or legal entity, occupying the property on behalf of the first respondent is evicted from Erf [...]. S[...] - [...] Ext 4 Township. ”

[5] On behalf of the applicant it was submitted that the order is erroneous in that no person or legal entity who occupied the property should legally have been evicted. For that reason the court was incompetent to make such an order against a person who legally occupied the land.

[6] The applicant also submitted that papers were served on Mrs Ngwenya on the 8 July 2008. Mrs Ngwenya is the wife of the owner of the third applicant. Second respondent was not served with the notice of motion on the 8 July 2008.

[7] Mr Roux acting on behalf of the respondents raised several points in limine The first being that the order of the 23 March 2009 was only granted against the first applicant and as such the judgment can only be rescinded against the first applicant. Secondly it is unclear why the respondents should file their plea within fifteen days. Thirdly the applicants failed to disclose

against which respondent they seek a costs order.

[8] The first applicant avered that it became aware of the court order of 23 March 2009 on the 2 September 2009, and that it received no notice of the eviction application or the court order relating thereto.

The respondent on the other hand submitted that this statement was incorrect and that it is a deliberately prevarication, since the first applicant was served with the eviction application on the 8 July 2008. [see annexure LAH 5, page 136 of the indexed pages].

[9] The respondent submitted that a notice of intention to oppose the application was served and filed by the first and third applicants attorneys Baartman du Plessis on the 9 July 2008. [See annexure LAH 6 page 137 of the indexed pages]

[10] It appears that the first applicant had to depose to a confirmatory affidavit to that of the third applicant, which the first applicant failed to do notwithstanding numerous request by its attorney, Mr Du Plessis, to do so.

[11] At the hearing of the application on the 23 March 2009, Mr Du Plessis instructed his counsel to withdraw on behalf of the first applicant, due to the confirmatory affidavit not having been signed.

[12] Mr Molobedi acting for the applicant submitted that the court should set aside the application and should rescind the judgment. Mr Roux acting for the respondent submitted that the applicant had not made out a case for condonation in that the application was brought several months after the applicant became aware of the judgment against it and not within the twenty days stipulated by rule 32.

Condonation

[13] Mr Molobedi submitted that in paragraphs 20 to 26 of the founding papers he dealt with the issue of condonation. It would be prudent to repeat what the applicant stated in this regard.

“ 20 On the 2nd September 2009 when I opened my letters I found court order dated 23rd

March 2009. I did not know or (sic) aware of the pending eviction as I am a legal occupant of these premises.

[14] The respondents in their answering affidavit at paragraph 18.1 stated:

“ On the 30 April 2009. the first respondent's attorneys of record hand delivered a letter to the first applicant (this was received by him as is evident from the acknowledgement of receipt at the top thereof), informing the first applicant of of the court order and the contents thereof.

18.2 A copy of the letter is annexed hereto . marked ' LAH 8' ”

[15] The letter annexed as LAH 8 appears at page 143 of the papers and it reveals that the letter is dated 30 April 2009 and that the letter informs the first applicant of the court order.

A copy of the order was attached thereto. The letter is acknowledged by the first applicant and also has the stamp of the first applicant on it.

[16] The letter referred to clearly contradicts the second applicant's version that he only became aware of the judgment on the 20 September 2009. The first and second applicants were already apprised of the judgment on the 30 April 2009. more than 4 months prior to the date the second applicant alleges.

The second applicant in this regard had not been candid with the court.

[17] In *Tshivhase & another v Tshivhase & another* 1992 (4) SA 852 (A) at 859 E-F Nestadt JA stated:

" This court has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are this applies even where the blame lies solely with the attorney (see for example P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 at 799D-H)

[18] The first and second applicants did not tender any explanation nor have they denied the allegation made by the respondents regarding the letter of the 30th April 2009 informing the first applicant of the judgment. The allegations which the respondents made regarding the first applicant's attorney withdrawing at the hearing of the application alluded to at paragraph [9] to [11] hereof was also not disputed by the second applicant.

[19] Rule 27(3) stipulates that “ *The court may on good cause shown condone any non-compliance with these rules* ”

Patel AJ in *Nedcor Bank Ltd v Visser NO* 2002 (4) SA 588 (T) at 591 stated:

“ Rule 27(3) requires good cause' to be shown by the plaintiff.

This gives the Court wide discretion. *C Du Plooy v Anwes Motors Bpk* 1983 (4) SA 212 (0) at 216H-217A). The requirements are: first that the plaintiff should at least tender an explanation for its default to enable the Court to understand how it occurred. (*Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A. Secondly, it is for the plaintiff to satisfy the Court that its explanation is *bona fide* and not patently unfounded" See also *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others* 2000 (3) SA 87 at 93 at para [12] where Vorster AJ referred to *Silber v Ozin Wholesalers (Pty) Ltd* 1954 (2) SA 345 at 353A Schreiner JA stated:

“ It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about. and to assess his conduct and motives”

[20] in *Malene v Santam Insurance Co Ltd* 1962 (4) SA at 532 C-F mentioned various factors usually relevant to the granting of condonation. Holmes JA stated:

“ Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion save of course if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a

flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for the prospect of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest must not be overlooked''

[21] The second applicant's explanation relating to when he became aware of the judgment against him is patently false. He failed to give any explanation which depicts 'good cause' and his explanation is neither not *bona fide*. I am of the considered view that prospect of success on the merits are minimal at the very best.

[22] For the reasons set out hereinbefore I am of the view that the application should be dismissed with costs.

Ismail AJ

For the Applicants: Adv Molobedi instructed by Ntimane

Attorneys c/o Mkhonto Attorneys,Pretoria.

For the Respondent: Adv J Roux instructed by Delport van den

Berg attorneys , Pretoria

Date of Hearing: 29 April 2010

Judgment delivered on: 20 May 2010.