



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

(1)	REPORTABLE: YES / ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES / ☒ NO
(3)	REVISIT D.
16/02/2023	
DATE	SIGNATURE

Case Number: 75680/18

In the matter between:

MINISTER OF HOME AFFAIRS

1st Applicant

DIRECTOR – GENERAL

DEPARTMENT OF HOME AFFAIRS
and

2nd Applicant

KONGO, LILY BILONGO

1st Respondent

THE SHERIFF, PRETORIA NORTH EAST

2nd Respondent

In Re:

KONGO, LILY BILONGO

Plaintiff

And

MINISTER OF HOME AFFAIRS

Defendant

JUDGEMENT

MNYOVU A.J:

INTRODUCTION

- [1] This is an application in terms of Rule 42 (1) (a) wherein the applicants apply to this court to rescind judgement which was erroneously sought against first applicant, in its absence, the order was granted in favour of the first respondent on 12 May 2020. To the extent necessary, whether the second applicant, the Director – General of the Department of Home Affairs (“D G”) should be granted leave to intervene as a second defendant in the main action, and the writ of execution issued by the second respondent on 17 August 2020 in execution of the default judgement should be set aside.

BACKGROUND

- [2] On 17 July 2017 at 05:30 am, the first respondent attended applicants premises, at Marabastad Refugee Office, Pretoria, and was queuing in the area designated by the employees of the applicant to renew her asylum papers. The first respondent alleged that on her founding affidavit, she was pushed by an officer of Home Affairs causing her to fall to the ground whereupon she was trampled by the crowd in a stampede inside the applicant’s premises, in consequence whereof she sustained severe bodily injuries.
- [3] The first respondent suffered the following injuries: a fracture of the neck of the left femur; fracture of the left hip; injuries to the left knee and left ankle, abrasions and contusions. The first respondent was then taken to Tswane Hospital by the ambulance, that was called by the police vehicle patrolling the area in the assistance of the applicants’ employee.
- [4] On 15 October 2018 the first respondent issued summons against the first applicant. On 06 November 2018 the sheriff served the combined summons to the Applicant’s premises, according to the return of service, it was served in accordance with Rule

4(1)(a)(v) at the applicant's principal place of business, upon Mrs Kabini (Legal Clerk) of the applicant. On 04 December 2018 the applicant's time limit prescribed to file its notice to defend expired, and the first respondent proceeded to obtain a default judgement against the first applicant on 12 May 2020.

- [5] On the summons, particulars of claim disclose cause of action as the negligence of applicant/and or its employees, the first respondent was at applicant's premises when she was pushed on the designated que by the applicant, fell, trampled by the crowd, as a result she suffered severe injuries and severe damages to the amount of R 1 252 875.00 (one million two hundred fifty-two eight hundred seventy-five rand).
- [6] On 15 January 2021 the first and second applicants served and filed its notice of motion application to rescind judgement of the 15 May 2020 not 12 May 2020, without an application to condone late filing of the rescission of judgement. The first respondent opposes the Rescission of judgement of the applicants and put to this court that there was no default judgement granted on the 15 May 2020 as alleged in the applicants notice of motion, the default judgement was granted on the 12 May 2020.

ISSUES NOT IN DISPUTE

- [7] The common cause issues are:
- (a) That the first respondent instituted delictual action against the applicant by way of combined summons;
 - (b) That the first applicant did not enter an appearance to defend within the prescribed time limit.
 - (c) That the first respondent obtained default judgement against the applicant on the 12 May 2020.

ISSUES IN DISPUTE

[8] The issues in dispute are whether the

- (a) default judgement granted in the absence of the first applicant is erroneous sought;

CONDONATION

[9] The court took into consideration that the applicants file application late, out of time and did not apply for condonation. The application for rescission of judgement requires that a rescission application for default judgement must be brought within 20 days after the defendant acquired knowledge of the judgement, there is also no application for condonation for non-compliance with Court Order dated 12 May 2020, and the late filing of heads of arguments by the applicants. Instead, the applicants took upon it to address this court on its founding, replying affidavits and on its arguments the reasons for delay to file this application late and being non-compliant with Court Order.

Law

[10] It is trite that an application for condonation should be in writing, (See *Mahomed v Mahomed* 1999(1) SA 1150 (E) at 1152. It may be granted in the absence of a substantive application. In terms of Rule 27 (1) provides as follows::

“27 *Extension of Time and Condonation*

- (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by any an order or fixed by an order extending or abridging any time for doing any act or taking any

step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet¹

[11] Applicants for condonation are required to meet two requisites of good cause shown before they can succeed in such an application. The first entails establishing a reasonable and acceptable explanation for the non-compliance with the rule(s) in question and secondly satisfying the court that there are reasonable prospects of success on merits of the case, that the applicant must show that his *bona fide* defence is not patently unfounded and that it is based upon facts proved, if proved, would constitute a defence, and the grant sought must not prejudice other litigants as a result of the non-compliance, last but not least, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. The application must be lodged without delay, and must provide a full detailed and accurate explanation for it²

[12] In terms of Rule 27(3) a Court may on good cause shown, condone any non-compliance with the rules. The determining factor is whether the breach of rule renders the application a nullity, and also what prejudice did the respondent suffer. In *Nampak Products Ltd v Sweetcorn (PTY) Ltd* 1981(4) SA 919 (T) at 922 Ackerman J said:

“In *Kruger v Minister of Police* 1981 (1) SA 765 (T) at 768, a case relied on by Mr Berg, it was held that where what has been done amounts to a nullity it cannot be condoned in terms of Rule 27(3) but where there is a proceedings or step albeit an irregular or improper one it is capable of being condoned regardless of whether the Rule which has not been complied with is directory or mandatory and whether there has been substantial compliance or not”.

¹ *Du Plooy v Anwes Motors (Edms)Bpk* 1983 (4) SA 212 (O) at 216 H to 217A

² *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at para 5

- [13] In terms of Rule 42 (1)(a), this rule applies to urgent applications where a party is absent, when the order was granted on summons that did not disclose a cause of action, it was legally incompetent for the court to make the order, a judgement to which a plaintiff is procedurally entitled in the absence of the defendant, cannot be said to have been granted erroneously, in light of subsequent disclosed defence³
- [14] Once it is shown that the order was erroneously granted sought or erroneously granted, the court will usually rescind or vary the order. A party need not show good cause, this rule may be invoked in circumstances where material facts were withheld from, or deliberately misrepresented to the court or where an order was sought without notice to the interested party⁴

Issues for determination for this application

- [15] Whether the default judgement granted in favour of the plaintiff on 12 May 2020 was erroneously sought and/or granted and therefore ought to be rescinded and set aside.
- [16] If the Honourable Court finds in favour of the applicant, then the relief to set aside the writ of execution, follows, as matter of course and law, and
- [17] Whether the relief sought by the DG for the leave to intervene in these proceedings is granted or not.

³*Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty)Ltd* 2007 (6) 87

⁴*Naidoo and Another v Mahlala No and Others* 2012 (1) SA 143

Analysis And Reasoning

- [18] It is common cause that the default judgement granted in favour of the first respondent came to the attention of the first applicant on 20 July 2020 when the employee of the applicant, namely, Director: Ms Seotlela acquires knowledge by receiving an email from the first respondent's attorneys and on 19 September 2020 when the writ was executed by the Sheriff. It is further common cause that the application for the rescission of judgement was due to be filed on or before 17 August 2020 whereas it was only filed on 15 January 2021. The application was thus filed 5 months later.
- [19] In the present case, the applicants are required to file an application for condonation for the late filing of the rescission application. The court will only grant such an application on good cause shown for the delay. The applicants did not apply to this court for condonation of late filing and non-compliance of court order 12 May 2020, no request made to this court for extension of time limit, though it has noticed that it has filed this application (5) five months after knowledge of the judgement. Be as it may, the applicants provided this court with the reasons for delay, in its application in terms Rule 42(1) (a).

Applicant's Reasons for delay

- [20] The applicants contended on its founding affidavit the reasons for delay to launch the rescission of judgement application, there is no contention on its founding affidavit about request to condone the late filing as to why the rescission was launched late to enable the court to grant the condonation or not. The Counsel for the applicants submitted that on her heads of arguments on 6 November 2018, the first applicant received the summons and were allocated to its Director: Ms Seotlela in its Litigation department, Ms Seotlela left the Department after her promotion and the matter was

allocated to Mr Zanecebo Menze where the matter was not attended until when Ms Seotlela return back to the Department and she acquired knowledge of the judgement on 20 July 2020 from the email she received from the first respondent's attorneys. The matter was allocated to Mr Zanecebo Menze again, it was left unattended again due to level 3 lockdown restrictions, the matter again came to attention of Ms Seotlela on 16 September 2020. after the Sheriff of North East Pretoria executed the writ and first respondent's attorneys were demanding payment of the judgement debt.

- [21] The counsel for the applicants further submitted that it was at this stage this matter received attention, state attorney was given instructions to obtain copies of all papers that were filed in Court for the purposes of obtaining judgement and briefed Counsel. The whole process of investigation, however, due to holidays the application could only be finalised at the beginning of January 2021.

Response by first respondent on the applicant's reasons for delay

- [22] The first responded contended on her answering affidavit that the applicants regardless that their application for rescission of judgement was out of prescribed time limit, they did not apply for condonation. Their application in terms of Rule 42(1) (a) cannot be on an urgent basis, after they did not take steps to defend the matter. The first respondent opposed the reasonable delay and contended that on 14 December 2017 she instructed her attorneys to institute legal action against the applicant, where in terms of Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 a letter of demand was prepared and sent by registered post, mail and hand delivered to the first applicant and there was no response forthcoming from the applicant. On 12 February 2018 the same letter of demand was sent to the first applicant and no response was received by her attorneys of record.

- [23] The first respondent further contended that after summons were served to the applicants, eight notices were given to the applicants informing of the default judgment, including the set downs for hearing the default judgement, nothing was being done by the first applicant until the sheriff attached its assets. The counsel representing first respondent argued that the court should not lose sight on the time frame pleaded by the first respondent and the applicant did nothing, all the excuses alleged by the applicants are not valid in law. The late filing of the rescission was approximately 7 (seven) months after acquiring the knowledge of the judgement on 17 May 2020 not 20 July 2020. There were no reasonable steps taken to defend this matter immediately, this application stands to be dismissed.
- [24] As alluded in paragraph 10 and 11, it would be noted that condonation is sought on notice, as soon first applicant acquired knowledge of the first respondent's court order, it would have been expected that reasonable steps should have been taken by the first applicant, in its legal department with the first respondent's attorneys prior launching the application to rescind the judgement, and comply with the rules of the court, the parties could have agree on how to proceed with the condonation, in the circumstances, but nothing was done, applicant bluntly disregarded the court rules, no condonation for late filing of its application to this court. There is no good cause shown to this court to grant the applicants to proceed with the merits of the application to rescind the judgement in terms of rule 42 (1) (a)
- [25] As alluded in paragraph 14 the court may condone any non-compliance with the Rules, and not just the Rules relating to time limits, unless the non-compliance is severe that the litigation will amount to a nullity. This discretion must be exercised judicially on consideration of facts of each case and subject to the requirements that the applicant

shows good cause for the default (*See Federated Employers Fire and General Insurance Co Ltd v Mckenzie* 1969 (3) SA 360 (A) at 362-363

- [26] In this matter the first respondent has filed its answering affidavit and contended that no condonation was filed by the applicants, the counsel for the first respondent submitted that the first respondent is in wilful default and does not have *bona fide* defence, as such the applicants did not made a proper case in terms of Rule 42(1) of the court rules, the first applicant disregarded her summons on the particulars of claims, the cause of action is disclosed, no material facts were left out from the particulars of claims, and they were served with two notices of set downs by first respondents attorneys of record, informing them about hearing of default judgement, on that note they put themselves on wilful default, they should have launched an appeal, not Rule 42(1) (a) . The first respondent has made many errors in its founding affidavit with regard to the order which it is rescinding, and error in its notice of motion, despite that the applicants indicated in his replying affidavit that it will file an amendment, thus was not done. Therefore, the relief the applicants seek is in inconsistent with the facts of this case.
- [27] The counsel for the first responded has conceded that the first respondent has suffered prejudiced as a result of time periods, delays since 19 May 2020 when the applicant's attorneys sent email informing them about the judgement. The applicants have failed to take action in the matter, it indeed reckless and intentionally disregarding the court's rule as such the first respondent has been left destitute and unemployable as result of her injuries has had to wait an inordinate of time to receive compensation for her injuries, which has further delayed unnecessarily by this application which was devoid of all merit.

[28] I am encouraged by the case of *Dengetenge Holdings (PTY) (Ltd) v Southern Sphere Mining and Development Company Ltd and Others* 2013 (2) All SA 251 (SCA), in a case where aspect of prospecting rights its appeal lapsed for failure on the appellant to prosecute the appeal timeously.at paragraph 13, the following is stated :

“what calls for some acceptable explanation is not only delay in the filing of the heads argument, but also the delay in seeking condonation. An appellant should, whenever it realises that it has not complied with a rule of court, apply for condonation without delay (see *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449 G-H.

[29] The first thing to be noted is that the applicant did not formally make an application for condonation, the best that can be gleaned from the applicant’s delay in failing to apply for condonation in reasonably good time, in particular, the delay for the lapse of time, this long delay cries out for an adequate explanation. The applicant’s explanation is unacceptable in its founding, replying affidavits, and heads of arguments, it is not compliant with court’s rule. During the hearing of an application for rescission of judgement in terms of Rule 42(1) (a), the application for condonation was not brought, the counsel led evidence in support of the Rule 42(1)(a).

[30] It is my view that, the proper exercise of a judicial discretion requires that the applicant should have applied to this court for condonation of late filing of the application and condonation of non-compliance of the Court Order 12 May 2020 and satisfy this court with all the requirements as alluded above paragraph 25 of this judgement. This application for the rescission of judgement, stands to fail on the basis of inadequacy explanation of the applicant’s failure to request condonation for the late filing of application for rescission of judgement from 17 May 2020 to 15 January 2021, there is

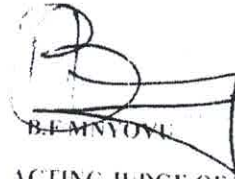
no need for this court to deal with the merits of the applicant's rescission application in terms of Rule 42(1) (a). The breach of the rule renders this application a nullity, it cannot be condoned in terms of Rule 27(3).

CONCLUSION

[31] In the result, I make the following order:

31.1 The applicant's application for rescission of judgement in terms of Rule 42(1)(a) is dismissed.

31.2 The Applicant to pay first respondent's costs on attorney and client scale.



B.E. MNYOVI

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant	:	Adv MPD CHABEDI
Instructed by	:	N MASHABELA
	:	State Attorney
 Counsel on behalf of Respondent	:	 Adv T LIPSHITZ
Instructed by	:	Swartz Attorneys
 Date heard	:	 13 October 2022
Date of Judgement	:	16 February 2023