



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.
<u>08/03/2023</u>	
DATE	SIGNATURE

CASE NO: 34308/2016

In the matter between:

PHIWANGUBANI AGRINETH SONDHLANE N.O.

First Applicant

PHIWANGUBANI AGRINETH SONDHLANE

Second Applicant

and

AZABON TRADING ENTERPRISES CC

Respondent

In re:

AZABON TRADING ENTERPRISES CC

Plaintiff

and

JOHN MNGONI SONDHLANE

Defendant

JUDGMENT

MBONGWE J:

INTRODUCTION:

- [1] The applicant, who acts herein in both her representative and personal capacities, has approached the court in terms of Rule 42(1)(a) or Rule 42(1)(b) of the Uniform Rules of Court or, alternatively, the common law, seeking the rescission of the default judgment that was granted by the Registrar of this court against her deceased husband in favour of the respondent / plaintiff on the 23 August 2016. The applicant further seeks an order authorising her to sell an agricultural holding forming part of the joint estate between her and her deceased husband. In this regard the applicant, in her representative capacity, states that she intends to sell the immovable property to settle the deceased's debts and, in her personal capacity, asserts her right of ownership of one half share of the balance in the joint estate. The application is opposed by the respondent.

FACTUAL MATRIX

- [2] The respondent had issued summons against the deceased claiming payment of an amount of R422 000-00, being an alleged monetary portion of a R2m incentive the deceased had required to be paid in advance for the respondent to participate in a government house building scheme in Kwa Zulu-Natal. Owing to a failure of progress, the respondent had demanded the repayment of the money. According to the Sheriff's return of service the summons were served on the deceased's wife.
- [3] The applicant alleges that although still married to the deceased at the time of his death, she and the deceased had separated in 2009 and no longer living together. She denied that she was the alleged wife of the deceased on whom the summons were served.
- [4] The deceased did not enter appearance to defend the action against him resulting in the respondent applying for and being granted default judgment by the Registrar of this court on 23 August 2016. The deceased passed away on 15 July 2016, just over a month prior to the default judgment being granted.
- [5] Having become aware, following a property deeds search, that the deceased owned the immovable property sought to be sold by the applicant, the respondent sought to recover the amount owing from the estate of the deceased.
- [6] The applicant was issued with Letters of Authority on 28 November 2017 to administer the estate of the deceased and *'...to pay the debts and to transfer the residue of the estate to the heir/heirs entitled thereto by law.'*

- [7] Following unsuccessful negotiations between the applicant and the respondent to resolve the issue of the repayment of the money that was paid to the deceased, the applicant commenced the present proceedings seeking, in her representative capacity, a rescission of the default judgment and, in her personal capacity, a declaratory that she is entitled to sell and transfer the immovable property so as to pay the creditors of her late husband. The applicant also asserts her rights to one half of the estate by virtue of her marriage to the deceased in community of property.

RESCISSION

- [8] The applicant disputes that the respondent was entitled to the repayment of the amount in respect of which the default judgment against her late husband was granted. She acknowledged, however, that the amount concerned was indeed deposited into the banking account of the deceased. The applicant further stated that only a portion of that amount, R100 000-00, went to the deceased, the rest having been a bribe 'paid over' by the deceased to the (government) official(s) who participated in the alleged unlawful activity. She particularly mentions the name of one Mr Motala as such official.
- [9] It is noted that the applicant has attached copies of alleged newspaper articles relating to the said Mr Motala, but no proof of the alleged payment of the rest of the money to him by the deceased has been attached. Instead, the applicant has attached a copy of an affidavit that was deposed to by the deceased and in which the deceased acknowledged his indebtedness to Mr Lamula (the respondent) in the amount of R100 000-00. The affidavit reads thus:

"I hereby declare that the advance payment of R100 000,00 was paid to me by A. Lamula which I am liable for payment which I have no problem to settle. That R300 000 00 was paid to Motala Account R200 000,00 and R100 000,00 cash cows"

PURPORTED DEFENCE TO RESPONDENT'S CLAIM

- [10] The applicant alleges to have uncovered information indicating that the deceased and the respondent had been involved in unlawful activities and that the deceased had received the amount claimed in his role as a conduit between the respondent and Mr Motala and that the payment to Motala was in fact a bribe. She contends further that the respondent is not entitled to a repayment as the entire transaction was unlawful. The applicant submitted on this basis that the default judgment ought not to have been granted in the circumstances.
- [11] Furthermore, the applicant challenged the authority of the deponent to the answering affidavit, Mr A. Z. Lamola, to depose thereto in opposition to this application on the ground that he is not a member of the respondent and had not been authorised by its members to oppose the application. She further alleges in the replying affidavit that the payment itself was not made by the respondent, but by a Mr Nox to allegedly hide the identity of the respondent.

OPPOSITION

POINTS IN LIMINE

- [12] In its opposition of the applicant's rescission application, the respondent has, inter alia, raised points *in limine* which include procedural defects in the applicant's approach to the court. These include;

- 12.1 the failure of the applicant to properly introduce herself as a party in the proceedings both in her representative and personal capacities as required by Rule 15(2) of the Uniform Rules of Court;
- 12.2 that the applicant was issued with Letters of Authority and not appointed as the executrix of the estate of the deceased. To this end the respondent submitted that the applicant had no legal standing to bring this application as a representative of the deceased estate.
- 12.3 the applicant has failed to bring an application for the condonation of the delayed launching of the rescission application despite the lapse of a period of over five years since the granting of the default judgment on 23 August 2016. The rescission application was launched on 21 May 2021.
- 12.4 that with her limited authority in terms of the Letters of Authority the applicant did not have the capacity to deal with a claim of more than R250 000 against the estate.
- 12.5 the rescission application does not fall within the parameters of the provisions of Rules 42(1)(a) and 42(1)(b) or the common law.

THE LAW

JOINDER

- [13] In terms of Rule 15(1), no proceedings shall terminate solely as a result of change of status occasioned by the death, marriage or any other similar occurrences. Rule 15(2) provides that whenever by

reason of any occurrence referred to in sub-rule (1) it becomes necessary or proper to introduce a further person as a party in such proceedings (whether in addition to or in substitution for the party to whom the proceedings relate) any party thereto may forthwith by notice to such further person, to every other party and the registrar, add or substitute such further person as a party to the proceedings concerned.

[14] The applicant has not complied with the provisions of Rule 15(2) in that she failed to served the relevant notices of her joining in the proceedings as a substitution of the deceased representing his estate nor herself as a party representing her own interests. The applicant simply added her names on the papers in both capacities. It is noted that the respondent has not raised this irregularity per se in his papers. The objection is, however, a point of law that the respondent is entitled to raise and argue and may even be raised by the court *mero motu*. The principle is that where a point of law is apparent from the papers, but the common approach of the parties is to proceed on a wrong perception of what the law is, a court is not only entitled, but obliged to *mero motu* raise the point of law and call on the parties to address the issue so as to avert a decision premised on an incorrect application of the law and an infringement of the principle of legality (see *CUSA v Tao Ying Metal Industries & Others* (2008) ZACC para 67 and *Alexkor Ltd & Another v Richtersveld Community & Others* (2003) ZACC; 2004(5) SA 460 CC; 2003(12) BCLR 13118 par 44).

[15] By their non-compliance with the provisions of Rules 15(1) and 15(2), the applicants are not properly before the court and their application ought not be entertained by it.

LIMITED AUTHORITY

- [16] The respondent's queried the *locus standi* of the applicant to bring this application when she has only been issued with the Letter of Authority entitling her to administer the estate of the deceased not exceeding R250 000-00, according to the inventory submitted to the Master, pay the debts of the deceased and distribute the residue of the estate to the lawful heirs of the deceased. The respondent contended that the applicant had no authority to deal with a litigated debt in excess of the amount of R250 000; - the respondent's claim is for R422 000-00.
- [17] The applicant explained that she had requested the Master of the High Court, in light of this case, to appoint her as the executrix of the estate and was awaiting her appointment when instituting the application. She was duly appointed the executrix of the estate of the deceased on 28 July 2021 thus her *locus standi* rectified prior to this hearing. The respondent's objection has consequently become academic.

RESCISSION

- [18] Rule 42(1)(a) provides for the rescission of a judgment that was erroneously sought or erroneously granted and in the absence of the party seeking the rescission (own emphasis). Both the error and absence of the applicant have to be demonstrated to have existed (see *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* (2021) ZACC 28; 2021(11) BCLR 12639 (CC) para 54. The court went further in that matter at para 62 to clarify the meaning of the words '*granted in the absence of any party affected thereby*' contained in the rule. It stated that the rule is not confined to

physical absent from court and that the rule exists “*to protect litigants whose presence was precluded, not those whose absence was elected.*”

[19] The summons were served on a person who described herself as the deceased's wife. The deceased's allegations in the affidavit attached to the founding affidavit address the respondent's claim against him. This was indicative of the deceased's awareness of the respondent's claim. That he deposed to the affidavit admitting liability, albeit partial, instead of defending the action is an indication that his non-participation in the proceedings or absence in the matter had been elected and not precluded. The respondent was well within its rights to seek and correctly sought default judgment in the circumstances. Rescission of the judgment cannot, therefore, be sought premised on the provisions of Rules 42(1)(a) and 42(1)(b).

[20] In terms of the provisions of Rules 42 the application for rescission has to be brought within a reasonable time. The applicant brought this application approximately five years after the default judgment was granted. It is trite that a party who for whatever reason has failed to comply with the time frames provided for in the rules, a court order or directive is obliged to seek the indulgence of the court in an application for condonation setting out the reasons for the delay.

REQUIREMENTS FOR CONDONATION

[21] To succeed the applicant has to explain the delay. The applicant must demonstrate good cause for the delay. The period of delay must be explained in detail. In respect of a delayed appeal the prospect of success of the appeal itself are considered. The absence of prejudice

to the other party is also amongst the factors the court considers in determining whether to grant condonation. These principles were laid down in the matters referred to hereunder.

- [22] An application for condonation must set out justifiable reasons for non-compliance with the time frame set out in the rules for filling of a court process or with an order of the court or directive. In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at C-F, Holmes JA state the applicable principle thus:

"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the fact and, in essence, is a matter of fairness to both sides. Among the fact usually relevant are the degree of lateness, the explanation thereof, the prospect of success, and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion..."

- [23] In *Foster v Stewart Scott Inc.* (1997) n18 ILJ 367 (LAC) at para 369, Froneman J stated the principle in the following terms:

"It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the fact. Relevant considerations may include the degree of non-compliance with rules, the explanation thereof, the prospect of success on appeal, the importance of the case, the respondent's

interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other. A slight delay and a good explanation for the delay may help to compensate for prospect of success which are not strong. Conversely, very good prospect of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay. See, in general, Erasmus Superior Court Practice at 360-399A."

- [24] It follows from the above principles that while inter-related, a reasonable explanation for the delay coupled with a good prospect of success on appeal enhance the chances of the success of the application for condonation. A weak explanation, but good prospect of success and / or the importance of the case will allow for the granting of an application for condonation. The court is clothed with wide discretionary powers which it exercises judicially in the valuation of the relevant factors in the particular matter. The interests of justice underpin the court's exercise of its discretionary powers. The reasonableness of an explanation of the delay and good prospect of success of the matter. A good explanation without prospect of success on the merits warrants a refusal of condonation.
- [25] The court may grant condonation despite a poor explanation of the delay where doing so will be in the interests of justice. This will be the situation where an appellant seeks an erroneous judgment and order to be set aside, but had failed to comply with the time frames

provided for the lodging and prosecution of the appeal. The interests of justice will necessitate the granting of the condonation in order for the court to set aside the impugned judgment and orders.

- [26] The absence of prejudice on the other party is also a factor to considered, particularly where the prejudice may not be cured by an order of costs. In *National Union of Mine Workers v Council for Mineral Technology* [1998] ZALAC at 211 D- 212 at para 10, the court stated the legal position thus:

“The approach is that the court has a discretion, to be exercised judicially upon a consideration of all the fact, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospect of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospect of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for delay, the prospects of success are immaterial, and without prospect of success, no matter how good the explanation for the delay, an application for condonation should be refused.”

CONCLUSION

- [27] The second applicant was issued with the Letters of Authority on 28 November 2017. It brought this application in May 2021, that is, five years after the default judgment had been granted. Despite this inordinate delay in bringing the application for condonation, the applicant has not brought an application for condonation. The applicant appears to have spent an undisclosed period of time seeking the hearsay evidence relating to the Mr Motale it alleges greater part of the amount that was deposited in the deceased's account was paid. The applicant furnishes no proof of such payment having been made by the deceased. Instead, the applicant makes unsubstantiated allegations that the payments of R422 000 - 00, which it acknowledges, into the deceased's banking account was a bribe and, therefore, an unlawful activity and ought not to be repaid to the respondent and that default judgment ought not to have been granted as a result. This hearsay evidence offers no defence to the respondent's claim. There are consequently no prospects of a successful defence even if the rescission sought were to be granted. The application for rescission has to fail in these circumstances.

COSTS

- [28] The general principle that costs follow the outcome of the matter holds good and applies in this case.

ORDER

- [29] Consequent to the findings in this judgment the following order is made:
1. The application for rescission is dismissed.

2. The applicant is ordered to pay the costs.



M P N MBONGWE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

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