

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appeal Case Number: A3057/2021

Magistrate's Case No: 19407/19

19403/19

19405/19

19406/19

19417/19

19419/19

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

13/9/2022.

DATE

SIGNATURE

In the matter between:

MOKHELE NORAH BASETSANA

MPHEKGWANA ALFRED MATOME

LUVUNO LINAH HOSHI

NGCAMEVA NOMVAKALISO FLORENCE

MOHLOKI HERMAN RAMOKGELE

LUKHELE WANG DANIEL

FIRST APPELLANT

SECOND APPELLANT

THIRD APPELANT

FOURTH APPELLANT

FIFTH APPELLANT

SIXTH APPELLANT

AND

JAN VAN DEN BOS N.O

SHERIFF OF JOHANNESBURG CENTRAL

A GRAF: ADDITIONAL MAGISTRATE

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on the 13th of September 2022.

OSTHUIZEN-SENEKAL AJ (DIPPENAAR J concurring)

Introduction

- [1] The appellants appeal against the judgment of Magistrate A. Graf ("the third respondent") handed down on 8 December 2020 in the Johannesburg Central Magistrate's Court. In terms of the judgment the appellants had unsuccessfully sought to rescind orders previously granted by the court *a quo*.
- [2] The magistrate handed down a judgment in case 19407/19. On commencement of the hearing before the magistrate it was agreed by the parties that the judgment in case 19407/19 will be applicable to the following cases;
1. 19403/19,
 2. 19405/19,
 3. 19406/19,
 4. 19417/19, and
 5. 19419/19.
- [3] The reason for the above agreement was because all the cases mentioned have their origins in virtually identical summonses sued out of the Johannesburg Central Magistrate's Court, and each summon contained the identical cause of action.
- [4] The appeal concerns Mr Jan van den Bos N.O ("the first respondent") and administrator of Panarama Place Body Corporate, issuing summons against the six-unit holders in the sectional title development known as Panarama Place. The appellants are all members and owners of the relevant units which forms part of Panarama Place run and controlled by the first respondent.

- [5] During 2007/2008 as a result of the Body Corporate experiencing financial difficulties and maladministration, the first respondent was appointed by the High Court as administrator of the body corporate.
- [6] In each of the actions instituted in the Magistrates' Court, and which are now subject of this appeal, the appointment of the first respondent was still extant, in that it was extended by the High Court in 2017 and 2019.

Background

- [7] The first respondent issued summonses in the court *a quo* against the appellants for outstanding levies and related charges owed to the Body Corporate. Each of the summonses was delivered to the respective appellants by handing it to the occupants/tenants of the units.
- [8] After being informed of the legal action being instituted against them, the appellants instructed legal counsel to oppose the summonses. Notice to oppose was delivered in some of the matters during December 2019.
- [9] Due to the failure of the appellants to file either notice to oppose or filing opposing affidavits, the first respondent approached the court *a quo*, and as a result summary judgments/default judgments were granted for the arrear levies and related charges as set out in the particulars of claims.
- [10] Subsequent to the judgments being granted the Sheriff of Johannesburg Central ("the second respondent") served writs of execution against the appellants' properties.
- [11] As a result the appellants approached the court *a quo* for an order to rescind the judgments obtained. The application was opposed by the first respondent.
- [12] After hearing argument on behalf of the parties, the magistrate handed down a written judgment wherein she dismissed the applications for rescission.
- [13] On 21 December 2020 the appellants requested reasons for the judgment delivered by the second respondent in terms of Rule 51(1) of the Magistrates' Act, Act 32 of 1944.

The second respondent replied to the request on 14 January 2021 wherein she referred the appellants to her written judgment delivered on 8 December 2020.

[14] However, on 23 February 2021 the appellants again requested reasons for the judgment, the second respondent responded to the request on 24 February 2021 and again referred the appellants to her judgment.

[15] On 31 May 2021 the appellants delivered their Notice of Appeal to the respondents.

Grounds of appeal

[16] The appellants assert that the court *a quo* erred in finding:

1. That the first to sixth appellants do not have *bona fide* defence by finding that the first appellant has occasionally made payment toward the levy account, thereby acknowledging the debt;
2. That the last payment by the first appellant applies to the second to sixth appellants, without considering when the aforesaid second to sixth appellants last paid their rates and taxes;
3. That prescription was interrupted, whilst no arguments or averments were contained in the papers support such a finding;
4. That prescription was interrupted, without taking into account that the payment which it was alleged had been made, was not made in respect of the reconciliation complied by Compurent, but on a statement which did not reflect the amount dating back to 2001,
5. That the Compurent reconciliation was accurate and reliable, while ignoring the fact that such reconciliation could not be produced in 2008 until 2017, when the First Respondent was still the Administrator of Panarama Sectional Title Scheme and that Compurent failed to hand in the books when ordered to do so by CSOS,
6. That in disregarding the facts, that Mr Zacharia Matsela ("**Matsela**") was never authorised to act on behalf of the appellants and therefore his affidavit cannot be relied on to show whether reasons for postponement were fully canvassed, and wilful default cannot be measured through Matsela's affidavit,
7. That the appellants make bald, unsubstantiated statements, while failing to consider that the payments which are claimed date back to 2001, while the first respondent was appointed as administrator in 2008 but only claimed the amount owed in 2019, being 18years later; and

8. That the rescission applications should be dismissed and ordering the Appellants to pay the costs of the applications, in circumstances where they have a bona fide defence.

Condonation for late filing of Appeal

- [17] Counsel on behalf of the first respondent argued for the dismissal of the appeal with costs. The argument is based on the fact that the application for leave to appeal was not brought within the time period as provided for in section 83¹ of the Magistrates' Act. Furthermore, that the appellants did not prosecute the appeal in accordance of Rule 51 of the Rules regulating procedures in the Magistrates' Court. ("the Rules")
- [18] The first respondent argued that in compounding their difficulties, the appellants failed to seek condonation for the late filing of the appeal.
- [19] Counsel for the appellants conceded that the noting of the appeal in the matter was filed late and therefore requested the court to condone the delay. The appellants argued that due to financial constraints experienced by them, which was further exacerbated by the Covid 19 pandemic, impacted on them in not delivering the Notice of Appeal timeously.
- [20] The appellants assert that if condonation is not granted in the matter they will be denied their Constitutional right to approach the court for recourse as they have a clear prospect of success if the appeal succeeds. Counsel therefore, argued that condonation should be granted.
- [21] In *Dengetenge Holdings*² Ponnai AJ held that factors relevant to the discretion to grant or refuse condonation include "the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice."

¹ Section 83 of the Magistrates' Court Act states that a party to any "civil suit or proceeding" in a Magistrates' Court may appeal to the division of the High Court having jurisdiction to hear the appeal against:

- a) a judgment of the nature described in section 48;
- b) a 'rule of order made in such suit or proceeding and having the effect of a final judgment'
- c) a decision over ruling an exception when,
 - i. ...
 - ii. ...
 - iii.

² [2013] ZASCA 5, [2013] 2 All SA 251 (SCA) at paragraph [11].

[22] Plewman JA in *Daries v Sheriff Magistrate's Court, Wynberg and Another*³ stated the following:

“Condonation of the non-observance of the rules of this court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting the appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a rule of court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellants’ attorney that condonation will be granted. In applications of this sort the applicants’ prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant’s prospects of success. But appellant’s prospect of success is but one of the factors relevant to the exercise of the court’s discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.”⁴

[23] The Constitutional Court in *Brummer v Gorfil Brothers Investments (Pty) Ltd*⁵ pointed out that an application for condonation should be granted if it is in the interests of justice and refused if it is not. It also held that the interests of justice must be determined by reference to all relevant factors as outlined in *Melane*,⁶ including the nature of the relief sought, the nature and cause of any other defect in respect of which condonation is sought, and the effect of the delay on the administration of justice.⁷

[24] The appellants did not file an application for condonation in the matter. The issue was canvassed during argument in court. A proper case must be made out for condonation. On an overall conspectus of all the facts, good cause has been shown for the granting of condonation and it would be in the interests of justice to grant condonation. It is evident in the matter that the appellants had the intention to appeal against the judgment of

³ [1998] ZASCA 18, 1998 (3) SA 34 (SCA) at 40H-41E.

⁴ *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A).

⁵ 2000 (2) SA 837 (CC)

⁶ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

⁷ [2000] ZACC 3, 2000 (5) BCLR 465, 2000 (2) SA 837 (CC) at paragraph [3]

Magistrate Graf as early as 21 December 2020. The reasons provided by the appellants for the delay are reasonable in the circumstances.

[25] Therefore, condonation for the late filing of the appeal is granted.

Evaluation

[26] The crux of the matter pertains to the question as to whether the court *a quo* erred in its application of the principles to rescind the judgments granted against the appellants.

[27] In order to succeed in rescinding a judgment, an applicant is required to show good and sufficient cause.⁸

[28] The requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for his default. Second, he must show on the merits he has a *bona fide* defence which *prima facie* carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.⁹

[29] However, it is not sufficient if only one of these two requirements is met, for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default.¹⁰

[30] In *Colyn*¹¹ the court held as follows:

“[12] ... Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of 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*).”

[31] Undoubtedly, the appellants failed to maintain contact with their previous attorney appointed to defend the summonses issued by the first respondent and served on them by

⁸ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA).

⁹ *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at paragraph [85].

¹⁰ *Chetty v Law Soc, Tvl* 1985 (2) SA 756 (A) at 765, 767J-768B.

¹¹ See footnote 8.

the second respondent during 2019. We are alive to case law in this regard. The case law is clear and in the *Superb Meat Supplies CC v Maritz*¹² said the following:

“In this court and the Supreme Court of Appeal there have been frequently repeated judicial warnings that there is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous precedent. It would invite and encourage laxity on the part of practitioners.”

- [32] Be that as it may, in this matter the appellants based their application squarely on the fact that the amounts set out in the levy statements provided by the first respondent on which the default judgments were granted are wrong. Counsel on their behalf submitted further that there was misconduct on part of the managing agent, the first respondent. The allegations of misconduct are a foundational consideration in this judgment.
- [33] The appellants further alleged that the first respondent since his appointment as administrator of the Body Corporate never demanded outstanding levies, such were only demanded in 2019 after his third appointment as administrator. The appellants assert the outstanding amounts were created to punish those who opposed his appointment.
- [34] The allegation that the first respondent appointed his own companies to run the affairs of the Body Corporate and therefore indicate a conflict of interest is of concern to this court.
- [35] Counsel for the appellants during argument referred the court to the judgment of Mia J in case number 30565/2020 where it was ordered that the first respondent’s conduct should be investigated.
- [36] During argument on behalf of the first respondent counsel conceded that the statements provided are lacking in detail with regard to the period wherein it was alleged that the appellants defaulted on their obligations. However, the first respondent argued that the appellants were under an obligation to clearly state on which dates or periods payments were made in order for the first respondent to supplement their papers. Therefore, the

¹² (2004) 25 ILJ 96 (LAC) at 100H.

first respondent asserts that the averment by the appellants is a bare denial which is unsubstantiated and unparticularised.

[37] This is not a trial court and it is therefore difficult to determine matters relating to outstanding amounts due to the first respondent. It must be noted, that the appellants have to establish that they have a potential or arguable defence on the merits of the matter.

[38] The overarching purpose of a rescission application is to allow triable issues with a prospect of success to be ventilated in action proceedings.¹³

[39] This court cannot find that the appellants defence is designed to or have the effect of unduly delaying the enforcement and final adjudication of the first respondent's claims. The amounts in arrear referred to in this appeal, in some cases, go back as far as 2003. Taking into consideration the extensive period alleged of accumulated amounts due, it is in the interests of justice that the appellants be afforded the opportunity to ventilate the issues in a trial, considering the defence of prescription raised.

[40] Furthermore, prescription was also raised by the appellants during the hearing in the court *a quo*. The first respondent as managing agent of the Body Corporate had all the means available to provide the appellants with the necessary statements in regard to their outstanding levies and related charges since 2003. This was not done and as such the question of prescription is relevant and can be ventilated during trial.

[41] Although the papers in the summary and default judgments are not before us, it is not without significance that the appellants filed notices to oppose the applications. The case presented by the appellants may, if successful, constitute a defence to the first respondent's claim against them.

Conclusion

[42] On balance, and while there is merit in the first respondent's submissions that the appellants defence is doubtful and has not been set forth with clarity that one would have expect, this Court is not inclined to shut the door on the appellants, given that their defence has some prospects of success.

¹³ *EH Hassim Hardware (Pty) Ltd v FAB Tanks CC* [2017] ZASCA 145 (13 October 2017) at paragraph [28].

[43] Due to the plethora of allegations made by the appellants this court is of the view that the appeal should be upheld.

[44] There is no reason to deviate from the normal principle that the costs follow the result.

[45] In the result the following order is made:

1. The appeal is upheld with costs.
2. The judgment of Magistrate A. Graf delivered on 8 December 2020 is set aside and substituted with the following order:
 - 2.1 Recission is granted.
 - 2.2 The appellants are granted leave to defend the summonses issued under the following case numbers;

1. 19407/19,
2. 19403/19,
3. 19405/19,
4. 19406/19,
5. 19417/19, and
6. 19419/19.



CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING:

30 August 2022

DATE JUDGMENT DELIVERED:

13 September 2022

APPEARANCES:

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