



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 2541/2019

In the matter between:

GREENWAY BURIAL SOCIETY CC

FIRST APPLICANT

ELIZABETH MAGDALENA KOEN

SECOND APPLICANT

and

SEARTEC TRADING (PTY) LTD

RESPONDENT

BEFORE: **CHESIWE, J**

HEARD ON: **17 JUNE 2022**

DELIVERED ON: **25 AUGUST 2022**

- [1] This is an application for a rescission of a default judgment granted by this court against the Applicant (Defendant in the main action) on 28 June 2018 under case number **2023/2018** on the grounds that the Respondent (Plaintiff in the main action) issued summons claiming for rental arrears amounting to R443 329.27. The Applicants seeks an order that the default judgment granted against it be rescinded and that the non-compliance with the rules be condoned.

- [2] The Applicants did not file a notice of intention to defend the action. As a consequence, thereof, the Respondent proceeded to obtain default judgment against the Applicants for the amount claimed.
- [3] The application is opposed by the Respondent. Prior to hearing the application, the Applicants proceeded with an application for condonation for the late filing of the rescission application, which the Respondent opposed.
- [4] It is well settled that in considering condonation applications, the Court has a discretion to be exercised judicially upon a consideration of all the facts and in essence it is a question of fairness for both sides. Condonation is not a mere formality and it is not to be had “merely for the asking”¹. The Court has to take into consideration the degree of lateness, the reasons for lateness, prospects of success and prejudice to the respondents ². The Applicant must show that it did not wilfully disregard the time frames provided for in the Rules of Court.
- [5] The First Applicant as indicated in the founding affidavit on page 8, has shown that she did not wilfully disregard the time frames provided for in the Rules of Court. The First Applicant is obliged to satisfy the Court that there is sufficient good cause for non-compliance of the rules. In **Ferreira v Ntshingila**,³ the court said:
- “Where non-observance of the Rules in a matter have been as flagrant and as gross, and application for condonation should not be granted, whatever the prospects of success might be.” ⁴
- [6] It is my overall impression, based on the facts and circumstances of the application, I should exercise my discretion in favour of the Applicants. I have

¹ Uitenhage Transitional Local Council v South African Revenue Service, 2004 (1) SA 292 (SCA) at para (6).

² Melanie v Santam Insurance Ltd 1962 (4) SA 531 (A) at 532 c-f; Dengentenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd [2013] 2 ALL SA 251 (SCA) at para [11].

³ 1990 (4) SA 271 (A) at 282 J – A.

⁴ See also Blumenthal and Another v Thomson NO and Another [1993] ZASCA 190; 1994 (2) SA 118 (A) at 121I-122B.

no reason to doubt that good cause exists. It would therefore be in the interests of justice that the Applicants be granted the relief sought.

- [7] The background on this matter briefly is as follows: The Second Applicant is a 71 years old female and is the sole director of the First Applicant. The First Applicant entered into two separate contracts with the Respondent. The Second Applicant signed as surety on behalf of the First Applicant. The contract entailed the rental of copier machines (**MX5110N and MX3114N**) and a cabinet (**AX0301**) with a monthly rental of R4 778,00 and R3 521,29 respectively. On or about December 2017, the First Applicant breached the contract. On 10 June 2019, the Respondent's legal representative proceeded to issue summons against the Applicants.
- [8] The Applicants filed a notice to defend, but did not file their plea, seemingly on advice of their legal representative. Consequently, a default judgment was granted by this court, followed by a warrant of execution, whereupon several goods were attached. On 2 September 2021, a further warrant of execution was issued to attached the bank account of the First Applicant.
- [9] The Applicants approached this court with an application to rescind and set aside the default judgment.
- [10] It is common cause between the parties that the **National Credit Act** ⁵ (NCA), is not applicable in their matter.
- [11] Counsel on behalf of the Applicants in oral argument and written Heads of Argument submitted that the application is of great importance for the Applicants and not merely an attempt to delay the matter or to frustrate the Respondent. Counsel submitted that the Applicants have a complete defence and that there are prospects of success. Counsel submitted that the default and warrant were issued by the Registrar, as currently these are now issued and granted in open court. Counsel further submitted that the goods were not returned to the

⁵ Act 34 of 2005

Applicants, nor was there a cancellation of the agreement. The Second Applicant is therefore not delaying the matter and only needs to present her case.

[12] Counsel on behalf of the Respondent submitted in oral argument that the Applicants knew that they were in arrears and owed the Respondent and that the Applicant's application is not *bona fide* as a Notice of Bar was served on the Applicants on the 25 July 2019. Counsel further submitted that the issue of judicial oversight was not pleaded in the papers and that the Applicants did not make out a case of a *bona fide* defence. Counsel further submitted that the **Conventional Penalties** ⁶ (CPA), in this instance is discretionary and therefore not applicable.

[13] It is trite that an application for rescission of judgment in terms of Rule 31 (2) (b) of the Uniform Rules of Court requirements are well established as stated in **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)**,⁷ that:

"The applicant must show cause why the remedy should not be granted. That entails (a) giving a reasonable explanation of the default; (b) showing that the application is made *bona fide*; (c) showing that there is a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success."

In addition, the application must be brought within 20 days after the defendant has obtained knowledge of the judgment.

[14] The law governing an application for rescission under Uniform Rule 42(1) (a) is trite. The applicant must show that the default judgment or order had been erroneously sought or erroneously granted. If the default judgment was erroneously sought or granted, a court should, without more, grant the order for rescission.⁸ It is not necessary for a party to show good cause under the subrule.⁹ Generally 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

⁶ Act 15 of 1962

⁷ 2003 (6) SA 1 (SCA), at para 11

⁸ National Pride Trading 452 v Media 24, 2010 (6) SA 587 (ECP) para 31.

⁹ Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (E) at 471G.

the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment.

[15] In order for an application of rescission order to succeed in terms of common law, the Applicants must give a reasonable (and obviously acceptable) explanation for the default; show that the application is made *bona fide* and show that she has a *bona fide* defence which *prima facie* carries some prospect of success.¹⁰

[16] It is appropriate to approach the application having regard to the requirements of Rule 27 and Rule 31 (2) (b) in an integrated manner. This entails the exercise by the Court of a wide discretion upon consideration of all the relevant circumstances.¹¹

[17] The first requirement to be met by the Applicants claiming rescission of judgment is the demonstration of good cause and that a notice to defend was not served. However, in this instance the Applicants served a notice to defend, but did not file their plea. The Second Applicant explained in the Founding Affidavit on page 10, paragraph 9.1 as follows:

“When a notice of bar was received. I was advised by my erstwhile attorney of record that filing a Plea would attract summary judgment proceedings and that I do not have reasonable prospects of success in opposing such an application and raising a defence and further, that litigation in the high Court would lead to additional costly expenses being incurred by myself and the CC for no good reason.”

[18] The Second Applicant goes further at paragraph 9.3 of the Founding Affidavit as follows:

“Notwithstanding my intention to defend the action, as a lay person, I accepted the legal advice of my erstwhile attorney of record and a plea was therefore never filed on behalf of myself and the CC.”

¹⁰ Chetty v Law Society, Transvaal 1985 (2) SA 756 (A)

¹¹ Silber v Wholesalers (Pty) Ltd 1954 (2) SA 354 (A) at 352

- [19] Furthermore, the Second Applicant explained that when the financial situation of the First Applicant was affected by the signing of a new lease agreement which added on more equipment, as a result, it affected the finances of the First Applicant. The Second Applicant then attempted to negotiate with the Respondent but was unsuccessful.
- [20] The Applicants' disputed the amount owed, but conceded that they do owe the Respondent. However, the amount owed constituted a penalty as defined in the CPA and that the amount is unreasonable and excessive under the circumstances.¹² I am inclined to agree with the Applicants, as the Respondent does not indicate if the goods were sold and if that amount was deducted from the amount claimed.¹³
- [21] This Court has no option, other than to be sympathetic towards the Second Applicant. Being a 71-year-old and obviously depended on the advice of her legal representative, she was bound to accept the advice that was given to her. She however later terminated the mandate of the said attorney. Even though, the Second Applicant was aware of the warrant of execution when she bought certain items at the auction, she explained that these items had sentimental value as it is items she inherited from her late brother. It is understandable that such items will have sentimental value and are not easy to let go off. The court will not fault her for having known about the warrant of execution nor filing the application to rescind at that stage. The Second Applicant obviously had the urgency at that stage to save her inheritance from being sold.
- [22] Even if, the Second Applicant's explanation was poor for her default, which in my view is not, she may still show that she has a *bona fide* defence. The Applicants raised a defence based on the CPA, Section 3(1) thereof as well as that there was no judicial oversight by this court. It is only recently that all defaults judgments and warrants of execution have to be done in open court. The

¹² Section 3 (1) prohibits the recovery of a penalty which is out of proportion to the prejudice suffered by the creditor and the court may in such instances, if the penalty is excessive, reduce it to such as extent as may be equitable in the circumstances.

¹³ Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance 2008 (3) SA 47 (C)

Applicants in this case raised the issue of judicial oversight, in my view the Courts are there to assist a litigant who makes the Court aware of any prejudice he or she will suffer if there was no judicial oversight in any matter that was before it.

[23] The Court is given a wide discretion in terms of Rule 31 (2) (b) when dealing with words such as good cause. The Court's discretion must be exercised after proper consideration of all the relevant circumstances. The Court may not come to the assistance of an Applicant/Defendant whose default was wilful or due to gross negligence.¹⁴ The Second Applicant clearly explained that she as a lay person relied on the advice of her legal representative. Indeed, the conduct of the Second Applicant's erstwhile representative clearly prejudiced the Applicants.

[24] The general approach of the Courts to an application for rescission was stated by Smalberger J, (as he then was) in the matter of **HDS Construction (Pty) Ltd v Wait**,¹⁵ the court made a determination in so far as that, "the judgment is not merely there for the taking. The applicant must prove that good cause exists to rescind the judgment before the court will grant a rescission order. The applicant must satisfy the principle of 'good cause'. In determining whether or not good cause has been shown, and whether the applicant has given reasonable explanation as to the reasons for his default in defending the matter, the Court is given a wide discretion."

[25] I am satisfied that the Applicants' defences are sufficient to establish a *bona fide* defence that *prima facie* carries some prospect of success and that the Applicants' reasons for defending the default judgment deserves an opportunity to be ventilated before Court.

¹⁴ Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)

¹⁵ 1979 (2) SA 298 (E) at 300 F – 301 C.

COSTS

[26] It is trite that the general rule in respect of costs is that costs order usually follows the successful party. The Respondent prayed for costs on an attorney client scale as provided for in the lease agreement.

[27] The basic rule is that costs are in the discretion of the court. This discretion is wide, though unfettered and must be exercised judicially upon a consideration of the facts of each case. I am of the view that the costs of the application shall be costs in the main action.

[28] I accordingly make the following order;

1. The default judgment granted by the Registrar of this court on **19 December 2019** is rescinded and set aside;
2. The writ of execution issued in pursuance of the said default judgment, granted by the Registrar of this Court on **6 February 2020** is rescinded and set aside;
3. The further writ of execution issued under Rule 45(8) and Rule 45(12) by the Registrar of this Court on **2 September 2021** is rescinded and set aside;
4. The Applicants are afforded leave to file their plea in the main action within ten (10) days from the date of this order;
5. The costs of this application shall be costs in the main action.

A handwritten signature in black ink, consisting of stylized, overlapping loops and curves, positioned above a horizontal line.

Chesuwe, J

On behalf of the Applicants: Adv R Bester
Instructed by: Horn & Van Rensburg Attorneys
BLOEMFONTEIN

On behalf of the Respondent: Adv TS Miller
Instructed by: C/o Maree & Partners
BLOEMFONTEIN