IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, MTHATHA

CASE NO. 3223/20

In the matter between:

NOZUKO JWACU	Applicant
and	
PATISWA NOBALINDI JWACU	Respondent

In re:

PATISWA NOBALINDI JWACU	Plaintiff
and	
NOZUKO JWACU (born VUNGWANA)	First Defendant
MASTER OF THE HIGH COURT, MTHATHA	Second Defendant

JUDGMENT

LAING J

[1] This is an application for the rescission of a default judgment granted against the applicant on 25 November 2020.[1] At the same time, the applicant has brought an application for the amendment of her notice of motion.

Background

[2] The parties are beneficiaries to the estate of the applicant's late husband, Mr Mzwandile Jwacu. The respondent is the applicant's step-daughter. Upon the winding up of the estate in 2014, the parties were awarded shares in the ownership of the property described as Erf 41, Bizana. There are four beneficiaries in total, each enjoying an equal share.

[3] The property had been leased to tenants but had not been maintained. This caused the applicant to take it upon herself to carry out renovations and to settle rates and service charges out of her own pocket.

[4] The parties had no contact with each other until mid-2020, when they met to discuss the management of the property and sharing of the rental income. Shortly afterwards, a fire swept through the property and destroyed the shops that had been located thereon. The property was not insured and the applicant was forced to fund additional repairs and renovations. The impact of the COVID-19 lockdown regulations created further financial strain for the applicant.

[5] On 18 September 2020, the respondent arranged for a summons to be issued against the applicant, claiming payment of R420,000, interest thereon at 25% per annum, and costs of suit. The summons was served on the applicant on 29 September 2020 and default judgment was granted on 25 November 2020. The first time that the

[1] The respondent has challenged the nature of the application, drawing a distinction between an application for rescission and an application to set aside the default judgment, as indicated in the notice of motion. For immediate purposes, the application will be described as the former.

applicant became aware of the judgment was on 14 December 2020, when the order to that effect was served on her.

[6] For her part, the respondent asserts that the property had generated an income of R70,000 per month when her father, the late Mr Jwacu, had still been alive. After his passing, it had been agreed by the beneficiaries that the property would continue to be leased and that each would receive 25% of the proceeds. It was further agreed that the applicant be responsible for such distribution.

[7] The respondent alleges that, since Mr Jwacu's passing on 12 June 2003, the applicant has failed to account for the income generated by the property and has not distributed any of the proceeds to the respondent. Her share of the proceeds forms the basis for her claim against the applicant.

Point *in limine*

[8] The respondent takes a point *in limine*, stating that it is not clear from the application what relief the applicant seeks. In her notice of motion, she seeks an order to set aside the default judgment of 25 November 2020, yet refers to a rescission application in her founding affidavit.[2]

[9] The applicant, in reply, emphasises that she has brought a rescission application. This much is apparent from her founding affidavit.

[10] Presumably to thwart an attempt by the respondent to drive home any advantage presented, the applicant gave notice of her intention to amend her notice of motion. The respondent objected, prompting the applicant to make application for the necessary relief. This will be addressed below.

[2] This becomes apparent when the second prayer of the notice of motion is compared with paragraph 6 of the founding affidavit.

Application to amend

[11] The applicant asserts that the application to amend was necessitated by the point *in limine*. She simply wishes to align the notice of motion with the pleadings contained in her founding affidavit.

[12] Surprisingly, the respondent has opposed the application. She argues that it fails to comply with the requirements of rule 6, establishing unreasonable timeframes for the filing of opposition and answering papers. Furthermore, the respondent contends that the amendment would convert the original application (not for rescission) into something else, which ought not to be tolerated at such a late stage in the proceedings.

[13] The application to amend is a classic example of an interlocutory application envisaged under sub-rule 6(11). The decision in *Gisman Mining and Engineering Co (Pty) Ltd (in liquidation) v LTA Earthworks (Pty) Ltd* 1977 (4) SA 25 (W), at 25F-H, is authority for the principle that the usual timeframes for the delivery of papers are not applicable to interlocutory applications. They should merely be delivered within a reasonable time.[3]

[14] Accordingly, there is no merit in the respondent's contentions. The abbreviated timeframes stipulated in the application to amend are permissible and not unreasonable. If the respondent had any difficulty in meeting the deadline, then an email or a telephone call to the applicant would surely have been all that was required to have allowed for more time.

[15] Similarly, there is no basis upon which to contend that the applicant has converted the original application into one based on a new cause of action. In her notice of motion, she states very clearly that she seeks an order condoning her failure

[3] See, too, *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO* 1981 (4) SA 329 (O) at 333C.

to launch a rescission application within the prescribed timeframe.[4] Such doubt as may have lingered thereafter would have been removed once the respondent had read paragraph 6 of the founding affidavit, where the applicant states unequivocally that she has brought a rescission application.

[16] The opposition to the application to amend was ill-advised. There is no reason why the application should not be granted.

Issues to be decided

[17] Turning to the main application, sub-rule 31(2)(b) permits a litigant such as the applicant in the present circumstances to apply to court to set aside a default judgment.[5] A court may do so upon good cause shown. The requirements were set out more fully in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), where the court stated, at 9E-F, that a litigant must: (a) furnish a reasonable explanation for his or her default; (b) demonstrate that his or her application is *bona fide* and not made with the intention of delaying the plaintiff's claim; and (c) indicate that he or she has a *bona fide* defence to the claim itself.[6]

[18] The above requirements are the issues to be decided in the present matter. These will be discussed in the paragraphs that follow.

Explanation for default

[19] The applicant has described the difficulties that she experienced in 2020 and has mentioned several reasons in particular for her default: the loss of close relatives,

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[4] The text to that effect appears in the first prayer to the notice of motion.

[5] The sub-rule refers to the setting aside of the default judgment. Elsewhere, reference is made to the rescission of the judgment, e.g. sub-rule 31(6). It is submitted that nothing turns on the distinction for immediate purposes; the intention of the rule is to create, *inter alia*, a mechanism by which a litigant may yet be afforded an opportunity to present his or her defence in circumstances where he or she was originally in default.

[6] See, too, *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O), at 476-7, and the line of cases that have followed, as discussed in DE van Loggerenberg *Erasmus's Superior Court Practice* 2 ed (2019) at D1-366.

the impact of the fire on the property, her having contracted COVID-19 (which was also contracted by her son), her understanding that an agreement had been reached with the respondent that all proceedings be placed on hold, and delays associated with obtaining legal assistance. The respondent has challenged the applicant's assertions, pointing out, *inter alia*, that she had only agreed to hold the matter in abeyance on condition that the applicant paid to her what was due.

[20] In *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A), Schreiner JA held, at 353A, 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.'

[21] Furthermore, there is authority to the effect that where an explanation appears clearly but has not been set out in so many words, this should not deprive the applicant of the relief sought.[7]

[22] Whereas the applicant has not included as much detail as may have been helpful to understand completely and in full why she was in default, her explanation is adequate nonetheless. It is common knowledge that the COVID-19 pandemic has caused considerable disruption in society, that the virus is highly contagious, and that it hampers an individual's capacity to function normally. To have had to deal with this, the loss of close relatives, and a fire that destroyed the shops on the property, is about as much as anyone could be expected to bear.

[23] To allege, as the respondent has done, that the applicant was in wilful default inasmuch as she deliberately ignored the action, would be difficult to accept. There is no evidence to that effect and no inferences can be drawn from the pleadings. Rather, it appears that, by reason of a combination of factors beyond her control, the applicant failed to defend the action. At best for the respondent, it could be held that the applicant

[7] See *Behncke v Winter* 1925 SWA 59, as mentioned in *Erasmus's Superior Court Practice*, at D1-367.

was mistaken in her interpretation of the exchange of communication between the parties, after summons had been issued, and that she was tardy in her efforts to secure legal services. This does not point towards wilful default, however.

***Bona fide* application**

[24] The applicant asserts that she is unable to determine the basis for the respondent's claim. How the amount of R420,000 was calculated is not apparent from the pleadings. There is no substantiation for it. Furthermore, she cannot understand why she should be liable for interest at the rate of 25% per annum. In answer, the respondent states that the amount was clearly set out in her particulars of claim, being the total for monthly rentals collected while the estate was being wound up, for which the applicant has not accounted. In addition, avers the respondent, the applicant has admitted that she owes an amount to the respondent and disputes only the sum claimed.

[25] With regard to what the applicant is alleged to have admitted, she states as follows in her founding affidavit:

> 'I am advised and verily believe that the Respondent is entitled to benefit from the estate of his [sic] late father but <u>at issue is the amount to which she is entitled</u>.'[8]

[26] The most reasonable interpretation of this is that the applicant does not deny that the respondent is entitled, as an equal beneficiary, to the proceeds of the estate. However, precisely how much is owed to the respondent is not at all clear from her particulars of claim.

[27] In that regard, the relevant portion is paragraph 11, which reads as follows:

[8] This appears from paragraph 29, at p 10 of the record. The emphasis was provided.

'The afore-mentioned estate late proceeds and or/ shares mainly included rental income collected from the property mentioned above (sub-paragraph 8.2 supra)[9] as the said estate late property generated income from:

a) Leased out business premises of the main shop used as a Hardware at R27,000.00 (Twenty Seven Thousand Rand) per month;
b) Further three (3) leased out offices for business purposes at R9,000.00 (Nine Thousand Rand) per month inclusive and;
c) Leased out rooms (four) (4) for residential purposes by tenants at R4,000.00 per month inclusive; [sic]'

[28] In terms of paragraph 16, the respondent pleads that the total amount owed by the applicant is R840,000. However, the respondent was 'amenable' to a reduced amount of R420,000 so as to take into account the renovations completed by the applicant, amounts owed to the South African Revenue Services (SARS), and rates and levies. The only other particularity supplied by the respondent, under sub-paragraph 17.1 of her particulars of claim, is that the amount claimed arose from the monthly rentals calculated from 3 February 2014.

[29] Quite how the respondent calculated the total amount of R840,000 remains a mystery. It is far from clear whether she took into account factors such as rental escalation, interest on arrears, deposit payments, and so forth. There is no indication whether all the shops, offices and rooms were occupied for all of the time and attracting maximum income. There is also no indication as to the extent to which occupancy was affected by the fire and COVID-19. The value of the renovations is not stated. The values of amounts possibly owed to SARS and the local municipality for rates and levies are not stated. Whether the respondent's entitlement was to have been calculated as a one-quarter share of the net income or as something else is not stated. And why the respondent is entitled to interest at 25% per annum, considerably higher than the legal rate, is also not stated.[10]

[9] The reference seems to contain a misnomer; sub-paragraph 8.2 is silent about the property, sub-paragraph 10.2 refers to Erf 41 Bizana.

[10] It is noteworthy, too, that the first and final liquidation and distribution account, annexed to the particulars of claim as 'PNJ3', stipulates that the income collected for Erf 41 Bizana, presumably for the period from the date of the late Mr Jwacu's death, 12 June 2003, until the date of winding up, 3 February 2014, was the sum of R9,184.43. This is significantly less than the monthly income of R70,000 postulated by the respondent.

[30] Very plainly, the applicant was in no position at all to determine what, if anything, was owed to the respondent. Accordingly, it would be difficult to hold that the present application was not *bona fide* and that it had simply been brought with the intention of delaying the respondent's claim.

***Bona fide* defence**

[31] The applicant, in argument, drew attention to sub-rule 18(10), which stipulates that a plaintiff suing for damages is required to set them out in such manner as will enable the defendant reasonably to assess the quantum thereof. A failure to do so would render his or her particulars of claim irregular and would entitle the defendant to invoke the remedies available under rule 30. Furthermore, sub-rule 31(2)(a) provides that, in relation to a claim that is not for a debt or liquidated demand, if a defendant is in default of delivery of a notice intention to defend or a plea, then the plaintiff may set the action down and a court may, after hearing evidence, grant judgment against the defendant.

[32] In the present matter, it cannot be denied that the respondent failed to comply with sub-rule 18(10). Her particulars of claim do not allow the applicant reasonably to assess the amount claimed. Moreover, it cannot be denied that the respondent's claim is for neither a debt or liquidated demand and it is common cause that no evidence was led prior to the granting of default judgment, as required by sub-rule 31(2)(a). At the very least, it can be argued that the applicant was entitled to have relied upon sub-rule 42(1)(a) for rescission of the judgment.[11] The fact that the applicant framed her application as one envisaged under sub-rule 31(2)(b) has the implication that the above irregularities are merely factors to be taken into consideration with regard to the determination of whether or not the applicant has a *bona fide* defence.

[11] In terms of sub-rule 42(1)(a), a court may rescind a judgment erroneously sought or granted in the absence of any party affected thereby. Upon the basis that the respondent failed to comply with sub-rule 18(10) and that no evidence was led in accordance with sub-rule 31(2)(a), it can be held that default judgment was erroneously granted in the present matter.

[33] Contrary to the respondent's assertions, the applicant has not admitted that she owes any amount to the respondent. The closest that she gets to an admission is a statement to the effect that the respondent is entitled to benefit from the estate of the late Mr Jwacu. This is a statement of principle more than an admission.[12]

[34] In *Hassim Hardware v Fab Tanks* (1129/2016) [2017] ZASCA 145 (13 October 2017), the court observed, at [12], that an applicant is not required to illustrate a probability of success but rather the existence of an issue fit for trial.[13] The court went on to state, at [28], that:

> 'It is trite law that an applicant in an application for rescission of judgment need only make out a *prima facie* defence in the sense of setting out averments which, if established at trial, would entitle her or him to the relief asked for. Such an applicant need not deal fully with the merits of the case and produce evidence that shows that the probabilities are in its favour. That is the business of the trial court. The object of rescinding a judgment is to restore the opportunity for a real dispute to be ventilated.'

[35] Here, the applicant's starting point is that she accepts that, in principle, the respondent is entitled to benefit from the estate. However, it is simply not clear from the respondent's particulars of claim what amount the latter is entitled to, if anything at all. The applicant also alleges that she has incurred expenses in relation to the property, intimating the possibility of a counter-claim.

[36] Once the above averments are coupled with the irregularities that beset the granting of the default judgment, the court is satisfied that the applicant has indicated that she has a *bona fide* defence to the respondent's claim.

[12] From her replying affidavit, it is apparent from paragraph 14 thereof, at p 71 of the record, that the applicant accepts that the respondent 'probably [has] a claim'. However, the language used is not such as to be construed as an outright admission that she owes any amount to the respondent.
[13] See, too, *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (W), at 575H-576A.

Relief to be granted

[37] The respondent's counsel argued, with reference to *Government of the Republic of Zimbabwe v Fick* 2013 (10) BCLR 1103 (CC), that an applicant's failure to satisfy any one of the requirements for the rescission of a default judgment may result in the dismissal of an application to that effect. Furthermore, counsel mentioned *Chetty v Law Society, Transvaal* 1985 (2) 756 (A), where the court held that a party who showed no prospects of success on the merits would fail in an application for rescission of a default judgment, no matter how reasonable and convincing the explanation of his or her default.

[38] Notwithstanding, there is nothing in the present matter upon which to assert that the applicant has failed to furnish a reasonable explanation of her default, demonstrate that her application is *bona fide*, and indicate that she has a *bona fide* defence to the claim itself. This court is prepared to determine the issues in her favour and to hold that she has satisfied the requirements for the rescission of the default judgment granted against her.

[39] As part of the relief that the applicant seeks, she has also sought an order that any execution of the default judgment be rescinded and set aside. Besides the fact that the correct approach would have been to seek an order staying the execution, rather than 'rescinding' it or having it 'set aside', no averments have been made in the applicant's pleadings to the effect that execution is imminent. Once the default judgment itself has been rescinded and set aside, it is axiomatic that the basis for any execution proceedings falls away.

[40] The only remaining issue is the question of costs. Whereas the applicant seeks payment thereof on an attorney-and-client scale, the matter is not one in which the conduct of the respondent attracts a punitive order, either with regard to the application to amend or the rescission application. The usual order must follow.

Order

[41] In the circumstances, the following order is made:

(a) the application to amend is granted as prayed, subject to the respondent's being ordered to pay the costs thereof on a party-and-party scale;

(b) with regard to the rescission application:

(i) the applicant's failure to bring the application within the prescribed timeframes is condoned;

(ii) the default judgment granted against the applicant on 25 November 2020 is rescinded and set aside;

(iii) the applicant is granted leave to deliver her plea or to take such other steps as she may be advised, within ten (10) days of the date hereof; and

(iv) the respondent is ordered to pay the costs of the application on a party-and-party scale.

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JGA LAING

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the applicant	:	Mr Mathanda
Instructed by	:	Keto Mathanda Inc.
		66 Stranford Terrace Street
		MTHATHA
On behalf of the respondent	:	Mr Xuza
Instructed by	:	Messrs Mgweshe Ngqeleni Inc
		7 Durrow Street
		Fortgale
		MTHATHA
Date of hearing	:	20 January 2022
Date of delivery of judgment	:	01 February 2022