REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 7531/2019

(1) REPORTABLE: YES/N0
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

In the matter between:

SAND SAVERS (PTY) LTD **FIRST APPLICANT**

JACOB KHUMBULANI NKUNA **SECOND RESPONDENT**

And

THE STANDARD BANK OF SA LTD **RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] The respondent had issued combined summons against the applicants. The summons was served on the applicants by the sheriff of court by way of affixing on the principal door of the premises. The applicants failed to enter an appearance to defend, and the respondent proceeded to obtain a default judgment against the applicants on 19th May 2020.

[2] The applicants have brought a rescission application in terms of Rule 42(1) of the Uniform Rules of Court (Rules) seeking an order to rescind the default judgment granted against them. The applicants' founding affidavit has been deposed by the second applicant in his capacity as the director of the first applicant. The applicants in their rescission application have also included a condonation application. The applicants' application was served on the respondent on 9th October 2020. The respondent is opposing the applicants' condonation and rescission application. The second applicant in the main action has been joined to the proceedings in his capacity as a surety to the first applicant.

[3] On condonation application, the second applicant avers that on 19th May 2020 he was in court even though he did not file any opposing papers, and that he had knowledge of the default judgment on 19th May 2020. It is the applicants' contention that because of the strict lockdown regulations, they could not give proper instructions to their legal representatives to launch their rescission application. The second applicant submit that he only managed to consult his legal representatives on 15th July 2020.

[4] On prospects of success the applicants have stated that the agreement between them and the respondent was specific. That the respondent had loaned them money for the purchase of an earth moving vehicle for use in their business, and that they were supposed to pay back the loan from the proceeds generated from the said vehicle. According to the applicants, they fell into arrears regarding payment of the loan when the vehicle broke down, and as a result of that they could not generate income. That they have telephonically notified the

respondent about their situation. The applicants concluded by stating that they have made a good case for the default order of 19th May 2020 to be rescinded.

[5] The respondent in its answering affidavit has stated that the applicants have filed their rescission application five months after the order was granted. That the basis upon which the applicants are seeking condonation for late filing of their rescission application have no merit.

[6] On the merits of the application, the respondent has submitted that the applicants through their attorneys have written a letter to the respondents' attorneys acknowledging that they are in breach of the agreement and that the first applicant had made the last payment during September 2019; that they were aware that a default order has been granted against the applicants; that they were aware that the agreement has been cancelled and it does not exist any longer; and that the applicants have acknowledged that they owe the respondent money and wanted to enter into a new payment arrangement plan.

[7] It is the respondent's contention that it has followed the due processes, and that the court was satisfied that a proper case has been made for the granting of the default order. The respondent submit that the last payment made by the applicants was during September 2019, and as at 27th May 2020 the arrears amounted to R297 678.00 which kept on increasing every month by R17 000.00 due to non-payment of the monthly instalments by the applicants.

[8] The default order of 19th May 2020 was granted in the presence of the second applicant. Even though the second applicant was present in court when the order was granted, that order remained a default order as it was granted on the basis that the applicants did not file any opposing papers and the respondent's

action remained undefended. (See *Crockery Gladstone Farm v Rainbow Farms (Pty) Ltd*[1]).

[9] The applicants have been aware of the default order since 19th May 2020, however, they only brought their rescission application five months later, hence an application for condonation for late filing of their rescission application. The factors which the court must consider when exercising its discretion whether to grant condonation includes the degree of lateness, the explanation for the delay, prospects of success, degree of non-compliance with the rules, the importance of the case, the respondent's interest in finality of the judgment of the Court below, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice. (See *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*[2]).

[10] In *Uitenhage Transitional Local Council v SA Revenue Services*[3] Hefer JA said:

> "…Condonation is not to be had merely for the asking; a full, detailed and accurate account of the cause of delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

[11] The applicants in their founding affidavit have stated that they were unable to timeously consult with their legal representatives due to the strict covid-19 regulations and that they were able to do so on 15th July 2020. On 16th July 2020 the applicants attorneys wrote a letter to the respondent's attorneys

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[1] [2019] ZASCA 61 (20 May 2019)
[2] [2013] 2 All SA 251 (SCA) at para 11
[3] 2004 (1) SA 292 (SCA) at 297I-J

acknowledging the debt and seeking a settlement of the matter and giving the respondent's attorneys sixty days within which to reply to their letter. In that letter the applicant's attorneys did not request the respondent's attorneys to consent to the late filing of their rescission application in case their offer to settle the matter was unacceptable. In that letter the applicants' attorney has clearly stated that they were aware of the default order granted against the applicants.

[12] The sixty days time period given to the respondent lapsed without the respondent replying to the applicant's letter. On 2nd September 2020 the applicant's attorney drafted a notice of motion for the rescission of judgment. However, the founding affidavit was only signed and commissioned on 8th October 2020 without explaining why it took them more than a month before they signed the founding affidavit. When the applicants' attorney wrote a letter of the 16th July 2020, it did not seem that their intention was to bring an application for rescission of the order of 19th May 2020, but their intention was to settle as they have acknowledged the debt. It was only after the sixty days period had lapsed that the applicants decided to bring the rescission application. There is no explanation furnished why they decided to abruptly change from negotiating a settlement agreement, to a rescission of the judgment. In my view, the applicants' explanation for the delay is criptic and has no full details.

[13] In the letter of the 16th July 2020, the applicants attorneys are acknowledging that their last payment towards the reduction of the loan was during September 2019, that they are in arrears as stated by the respondent and that the agreement it had with the respondent had been cancelled. This is an unconditional acknowledgment of debt. In their founding affidavit, there is no

valid defence which has been raised by the applicants to the respondent's claim. What the applicants allege to be their defence to the respondent's claim are their submissions that when the respondent lent them money to purchase the earth moving vehicle, the agreement was that the loan will be paid back from the proceeds generated by the said vehicle, and that since the vehicle has broken they are not in a position to generate income. This in my view, will not amount to valid and sustainable defence in law.

[14] Even if condonation for late filing of their rescission application is granted, the applicants have no prospects of success in their rescission application. The applicants' condonation application stand to fail on the basis that the explanation for the delay is not adequate and further that they do not have prospects of success in their rescission application. There is no need for me to deal with the merits of the applicants' rescission application.

[15] In the result I make the following order

15.1 The applicants' condonation application is dismissed with costs on party and party scale

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the applicants	**: M Moitsi**
Instructed by	**: SC Mdhluli Attorneys**
For the respondent	**: Adv C Barreiro**
Instructed by	**: Tim du Toit & Co Inc**
Date heard	**: 5th August 2021**
Electronically delivered on	**: 16th August 2021**