



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~

(3) REVISED.

27/3/19

DATE

SIGNATURE *[Signature]*

CASE No : 92415/2016

In the matter between;

THE MEC FOR SOCIAL DEVELOPMENT  
GAUTENG PROVINCIAL GOVERNMENT

First Applicant

HEAD OF DR FABIAN AND FLORENCE  
RIBEIRO CENTRE

Second Applicant

and

Respondent

GORDON LESLIE

In re: the action between:

GORDON LESLIE BREDENKAMP

Plaintiff

And

THE MEC FOR SOCIAL DEVELOPMENT  
GAUTENG PROVINCIAL GOVERNMENT

First Defendant

THE HEAD OF DR FABIAN AND FLORENCE  
RIBEIRO CENTRE

Second Defendant

---

JUDGMENT

---

TOLMAY J:

- [1] This is an application for rescission of a judgment granted in favour of the Respondents on 15 May 2017 against the Applicants. The Applicants brought this application in terms of the provisions of Rule 31(2) (b), alternatively 42(a) further alternatively the common law. The Applicants also seek condonation for the non-compliance with the 20 days' time limit, within which an application needs to be brought in terms of Rule 31(2)(b).
- [2] The Respondent sued the Applicants for damages resulting from a veld fire, which the Respondent says originated on the grounds of the Dr Fabian and Florence Ribeiro Centre ("the Centre"). After the Applicants failed to file a notice of intention to defend, the Respondents enrolled a default judgment application and the Court granted an amount of R1 546 645-28 as damages.
- [3] The summons was served on the Applicants on 30 November 2016, together with three other summonses, one of which related to the same veld fire, which occurred on 16 September 2015 and two others, to a veld fire that occurred on 8 November 2015.
- [4] The Applicants were late in the filing of their replying affidavit and brought a condonation application. Respondent did not oppose this condonation application.
- [5] The Applicants filed this application for rescission of the default judgment on 4 July 2017.

## THE DEFAULT

- [6] It is common cause that the summons was served on the Applicants on 30 November 2016. It must be noted that at that point the Respondent was represented by Morajane and Du Plessis Attorneys. However Bredenkamp Attorneys represented Respondent in the rescission application, Mr Bredenkamp is the son of the Respondent. Mr Bredenkamp is also the deponent to the affidavit in the rescission application and not the Respondent himself. It appears from the file, which was in a rather sorry state, that the default application was filed by Bredenkamp attorneys, but I could find no notice of withdrawal from Marojane and Du Plessis Attorneys. The Respondents enrolled the matter and should have ensured that the file was properly prepared for the hearing.
- [7] On 1 December 2016 the summons together with the three summonses previously referred to, were emailed by Mr Bredenkamp, to Mr Nel, at the State Attorney, who in a previous similar matter, was the attorney of the Applicants. After Mr Nel did not respond to the email, an email was sent to him on 4 December 2016, by Mr Bredenkamp, informing him that the summonses were uploaded to a Dropbox. On 6 December 2016, Mr Nel requested that the summonses be emailed to him, as the Dropbox apparently took too long to open. The summonses were emailed to Mr Nel on the same day. On 11 January 2017 Mr Bredenkamp phoned Mr Nel and reminded him to enter appearance to defend. Mr Nel requested a week to do so. The time to enter appearance to defend expired on 14 December 2016. Subsequent to this the default judgment was granted on 15 May 2017. It is important to note that during the period before the default application, Mr Bredenkamp did not hold instructions from the Respondent. It is not clear at which point Mr Bredenkamp became the attorney of the Respondent and when Marojane Du Plessis Attorney withdrew as attorneys for the Respondent, if they ever did.

- [8] On 16 May 2017, a day after default judgment was granted an intention to defend was delivered. On 26 May 2017 an inspection *in loco* was arranged, but this was according to Mr Bredenkamp cancelled by Mr Nel. On 31 May 2017 Mr Bredenkamp, in an email enquired from Mr Nel whether he intended to conduct an inspection *in loco*. On 2 June 2017 an inspection *in loco* was conducted by Mr Nel and two advocates. Mr Bredenkamp stated that two eyewitnesses were made available for an interview. Mr Bredenkamp alleged that Mr Nel interviewed only one of them.
- [9] On 19 June 2017 Mr Nel requested copies of the court documents from Mr Bredenkamp, as he experienced difficulty in locating the court file. On 21 June 2017 Mr Bredenkamp in an email indicated his willingness to provide Mr Nel with the documents as requested. On 4 July 2017 the Respondent received the rescission application.
- [10] The Applicants explained that the intention was always to defend the action, but that they failed to deliver the notice of intention to defend for the following reasons:
1. The Second Applicant, who was the head of the two facilities at the centre forwarded the summons to the legal department of the First Applicant in order for them to deal with it.
  2. According to the director of legal services of First Applicant, a file was opened and the matter was allocated to one of the employees in the office, this employee resigned, on or about 15<sup>th</sup> January 2017. It is important to note that the employee was not identified. This employee apparently failed to file a notice of intention to defend. There was no indication on the papers of who took over the duties of this unnamed employee. The paucity of information from the Applicants points to a lackadaisical approach by officials in the legal department of the Applicants in dealing with their duties.

- [11] The legal department say they became aware of the default judgment on 15 May 2017, which is the day on which the default judgment was granted.
- [12] Mr Bredenkamp launched a scathing attack on Mr Nel personally and accused him of grossly negligent conduct and a dereliction of his duties. Mr Nel explained that the legal department of the Applicants initially had to deal with the summons, more specifically in filing a notice of intention to defend, or instructing an attorney to do so. No such instructions were given to him, before 17 May 2017. As a result he was not mandated to act on behalf of the Applicants in this matter.
- [13] Mr Nel had to get instructions from the Applicants before he could act. As he held no instruction prior to this date, there was no legal obligation on him to take any steps on behalf of the Applicants. It is however regrettable that Mr Nel did not at the very least inform Mr Bredenkamp of the fact that he did not have instructions from the Applicants and that his hands are tied.
- [14] As already stated Mr Bredenkamp was not the attorney for the Respondent, when the summons was issued, it is also unclear from which point he acted on behalf of the Respondent. It is not clear when he took over as attorney, nor why he deposed to the affidavit in the rescission application and not the Respondent himself. The fact that he is the son of the Respondent might have brought him too close to the fire. It is often not advisable for someone to act on behalf of a family member, as the lines between one's personal and professional duties could easily get blurred.
- [15] It was argued on behalf of the Applicants that Mr Bredenkamp was at all times aware of the fact that the Applicants were going to defend the action, as this was clear from his interaction with Mr Nel. Despite this Mr Bredenkamp from 11 January 2017 onwards never again communicated with Mr Nel and proceeded to take default judgment. Although it was not suggested that there was an obligation on Mr Bredenkamp to notify Mr Nel,

it was argued that in the light of their communication prior to this, one would have expected Mr Bredenkamp to have alerted Mr Nel to the fact that Respondent was going to proceed and obtain default judgment.

- [16] Although Mr Nel was forewarned and knew about the summons, the summons was not formally served on the office of the State Attorney. Mr Nel was also in the invidious position that he did not hold instructions at that point and only obtained instructions on 17 May 2017, after default judgment was granted. Although one could legitimately argue that Mr Nel could have made an effort to attend to the matter, he had no legal obligation to do so, as he did not receive instructions from the Applicants. The crux of the matter is that from a legal and procedural vantage point, two attorneys were communicating about a matter in which neither one held any instructions from the parties. Legally neither one of them was entitled to act on behalf of the litigants, when the summons was issued and served. In this regard I am of the view that both attorneys could and should have acted with more circumspection.
- [17] There is however no excuse for the blatant failure in Applicants' legal department. Unfortunately, this type of ineptitude has become rather common in matters concerning the state. To just blame an unnamed employee, who allegedly resigned, is to say the least, unsatisfactory and it does not bode well for the effective running of the legal department of the Applicants.
- [18] Whether the explanation for the default and the delay in bringing the application is reasonable, must be weighed in the broader context of the case and as a result one must look at the defences raised, before pronouncing on whether the explanation should be accepted.

#### THE DEFENCES RAISED

- [19] The Applicants raised several defences, but due to the conclusion that I reached I only deem it necessary to deal with the defence raised relating to the merits of the claim itself. The Applicants claim that the fire did not originate or re-ignite within the facility under the control of the Applicants. An affidavit is attached by a Mr Gous, who was an employee of Second Applicant and who was a member of the fire team at the centre. He was also, according to Applicants, an eyewitness to the fire.
- [20] He said that on 17 September 2015 he was at work at the mens' facility of the centre, when he was alerted to a fire approaching the womens' facility. Members of the fire team were then dispatched to the womens facility. While they were approaching, he could see that there was a fire to the northern side of the facility, spreading towards them, as the wind was blowing in their direction, which was in a southerly direction in relation to the fire.
- [21] After they arrived and positioned themselves, in order to prevent the fire from spreading, the wind changed direction and the fire started spreading in an easterly direction, to where the property of the Respondent is situated. He said that Tshwane municipality cut firebreaks at both the male and female facilities of Second Applicant approximately three months earlier, but he doubted whether any firebreak could have prevented the spreading of the fire, as the wind was very strong.
- [22] He said that, on his arrival at the women's facility, he saw that the fire was also on the adjacent property to the northern side. He categorically denied that the fire originated or re-ignited in the facility. He said that the fire undoubtedly came from the property adjacent to property 482 JR, from the northern side and then spread to the property of the Respondent.
- [23] Mr Bredenkamp took issue with Mr Gous's version, and attached Google images to the answering affidavit, on which the point, where he alleged the staff of the centre allegedly gathered and burned their refuse, and where

the fire originated, was indicated. A video clip, showing burning refuse at a staff residence at the centre, and taken by Mr Bredenkamp's brother on 13 September 2015, was attached. The fire that caused the damage occurred on 17 September 2015 and the video clip cannot prove conclusively that this resulted in the fire that occurred on 17 September 2017. Mr Bredenkamp also attached photographs taken by himself on 11 July 2017 to prove that the grass around the male and female facilities had not been cut.

- [24] He also attached emails to Mr Nel and the Applicants in which he complained about the Applicants lack of proper fire prevention and the hazard of potential fires spreading from Applicants' premises.
- [25] In this instance the Applicants have an eyewitness, who stated that the fire did not originate or re-ignite at the centre. From the above it is clear that the dispute can only be properly ventilated in open court, when evidence, is led and the witnesses, are subjected to cross-examination. No inferences regarding credibility can be drawn on the evidence presented on affidavit.
- [26] The Google images standing on their own cannot, without supporting evidence prove that the fire originated or re-ignited from within the facility on the relevant day, nor can the video clip, previously referred to.
- [27] The Applicants raised some other defences, *inter alia* their duty of care, statutory duty, whether the First Applicant was the owner and/or in occupation or control of the property and whether the *quantum* was properly proven, during the default judgment application. Due to the conclusion I reached I did not deem it necessary to deal with these defences and the court hearing the matter can deal with these defences if the Applicants persist with them.

#### APPLICATION OF THE FACTS TO THE LEGAL PRINCIPLES

- [28] The Applicants brought their application based on Rule 31(2)(b), alternatively Rule 42(a), further alternatively the common law. There exists no basis on which it could be argued that this application falls under Rule 42(a), as there is no evidence that the judgment was erroneously sought or granted in the absence of the Applicants. As a result only Rule 31(2)(b) and the common law principles are relevant.
- [29] Rule 31(2)(b) requires that a rescission application be brought within 20 days of the application coming to the knowledge of the Applicants, under the common law it should be brought within a reasonable time.
- [30] The application should accordingly have been brought on, or before 14 June 2017, but was only filed on 4 July 2017. Whether condonation should be granted must be considered, taking into account all the relevant facts and circumstances of the case.
- [31] In an application for rescission of judgment good cause must be shown, as well as a serious intention to proceed with the case<sup>1</sup>. It is trite that to show good cause, a reasonable explanation must be given for the default, be bona fide and must show that the Applicants have a *bona fide* defence to the claim<sup>2</sup>. However these requirements are not exhaustive and the Court has a very wide discretion<sup>3</sup>.

---

<sup>1</sup> Herbstein & Van Winsen: The Civil Practice of the High Court of South Africa, 5<sup>th</sup> ed; Cilliers, Loots & Nel p 715 (Herbstein & Van Winsen)

<sup>2</sup> Grant v Plumbers (Pty) Ltd 1949(2) SA 470 (O) at 476

<sup>3</sup> Herbstein & Van Winsen supra, p 715 vtnt 98

[32] While a Court may well decline to grant relief, where the default has been wilful or due to gross negligence, it cannot be accepted that the absence of wilful default and/or gross negligence in relation to the default is an essential criterion or an absolute prerequisite, for the granting of relief<sup>4</sup>.

[33] In **Silber v Owen Wholesalers (Pty) Ltd**<sup>5</sup> it was held that in order to establish that one was not in wilful default, all that is required is that the reasons for default are set out in a manner, which is sufficiently full to enable the Court to understand how it really came about and to assess the Applicants conduct and motives.

[34] In **De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd**<sup>6</sup>, the following was stated:

*"An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide. The magistrate's discretion to rescind the judgment of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties, bearing in mind the considerations referred to in Grant v Plumbers (Pty) Ltd (Ibid) and HDS Construction (Pty) Ltd v Wait (Ibid) and also any prejudice which might be occasioned by the outcome of the application. He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to*

---

4 Saravia Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd 1975(1) SA 612 D at 615. See also Zealand v Milborough 1991(4) SA 836 at 838 (E)

5 1954(2) SA 345 (A) at 353 (A)

6 1994 (4) A 705 (E) at 711E – I, See also Mnandi Property Development CC v Benmore Development CC 1999(4) SA 462 (W) at 465, Harris v Absa Banks Limited, t/a Volkskas 2006(4) SA 527 (T)

uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised or heard".

- [35] However, when the head of a government department, litigates, it should conduct itself in such a manner as to avoid unnecessary delays and cost orders. The Applicants in this matter failed abysmally in their duty to act with due diligence and by doing so wasted tax payers money, by causing unnecessary litigation. As already stated the Applicants employees' conduct is inexcusable.
- [36] It has been held in **Mnandi Property Development**<sup>7</sup> that the requirement of 'good cause' cannot be held to be satisfied unless there is evidence, not only of the existence of a substantial defence but, in addition, to a *bona fide* defence, a presently held desire, on the part of the Applicant to actually raise the defence concerned in the event of the judgment being rescinded. In this instance the notice of intention to defend was filed immediately after the default judgment was granted. An inspection *in loco* was held. There was a search for the court file and a request to Mr Bredenkamp to supply copies of the documents. Mr Nel obtained copies of the court documents from Mr Bredenkamp on 21 June 2017. On 4 July 2017 the application for rescission was filed. These are all indicators of a desire by the Applicants to raise the defence proffered by them.

---

<sup>7</sup> *Ibid* at 464H-I.

[37] An applicant in a rescission application need not show a probability of success on the merits, it suffices if it demonstrates a *prima facie* case in the sense of setting out averments which, if established at the trial, would entitle the Applicant to the relief asked for. The Applicant need not deal fully with the merits of the case.<sup>8</sup>

[38] In the matter of **RGS Properties (Pty) Ltd v Ethekweni Municipality**<sup>9</sup> the court stated that it is not seized with evaluating the merits of the alleged *bona fide* defence proffered by the applicant for rescission, but the nature of the defence advanced, must not be such that it *prima facie* amounts to nothing more than a delaying tactic on the part of the applicant.

[39] The affidavit filed by the eyewitness sets out a *bona fide* defence and it is not for this court to pronounce on the prospects of success of the Applicants at this stage, but it is clear that the Applicants demonstrated a *prima facie* case.

## **CONCLUSION**

[40] In the light of all the circumstances of the case I am of the view that despite the Applicants' gross negligence in dealing with this matter timeously, the rescission application should succeed and condonation should be granted for the failure to bring the application within the required 20 days as the requirements of Rule 31(2) (b) were met.

[41] When the delay is considered with due regard to the defence raised I am of the view that the judgment should be rescinded, but Applicant should pay the costs of the application.

---

<sup>8</sup> *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* [1980] 2 All SA 475 (W) at 477.

<sup>9</sup> 2010 (6) SA 572 (KZD) at 575H - 576D.

[42] The following order is made:

1. Condonation is granted for the late filing of the replying affidavit and the failure to launch the application within the time limits prescribed in Rule 31(2)(b).
2. The default judgment granted on 15 May 2017 under case number 92415/2016 is rescinded and set aside.
3. The Applicants are ordered to pay the costs of the Respondent jointly and severally, the one paying, the other to be absolved, which costs will include the costs of two counsel.

  
\_\_\_\_\_  
R G TOLMAY  
JUDGE OF THE HIGH COURT

|                   |           |
|-------------------|-----------|
| HEARD ON:         | 28-2-2019 |
| DATE OF ORDER:    | 28-3-2019 |
| DATE OF JUDGMENT: |           |

|                       |                      |
|-----------------------|----------------------|
| APPLICANT'S ATTORNEY: | STATE ATTORNEY       |
| APPLICANT'S COUNSEL:  | ADV MMW VAN ZYL (SC) |
|                       | ADV C SEVENSTER      |

|                        |                      |
|------------------------|----------------------|
| RESPONDENT'S ATTORNEY: | BREDENKAMP ATTORNEYS |
| RESPONDENT'S COUNSEL:  | ADV RM ROBINSON (SC) |
|                        | ADV B BROWN          |