



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

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

Case number: 2023/2018

In the matter between:

FREE STATE BRICKS (PTY) LTD
(REG NO: 2009/013894/07)

APPLICANT

And

MARUNIC TRADING (PTY) LTD
(REG. NO: 2006/035636/07)

RESPONDENT

In Re:

MARUNIC TRADING (PTY) LTD
(REG. NO: 2006/035636/07)

PLAINTIFF

And

FREE STATE BRICKS (PTY) LTD

DEFENDANT

JUDGMENT BY: **CHESIWE, J**

HEARD ON: **06 JUNE 2019**

DELIVERED ON: **10 OCTOBER 2019**

- [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 the 28 June 2018 under case number 2023/2018 on the grounds that the respondent (plaintiff in the main action) issued summons which were served on a Mrs Koekemoer, and that the applicant did not file a notice of intention to defend the action. As a consequence thereof, respondent proceeded to obtain default judgment against the applicant for the amount claimed. The application is opposed by the respondent. Prior to hearing of the application, the applicant requested condonation for the late filing of the application, which the respondent opposed.
- [2] The applicant seeks an order that the default judgment granted against it be rescinded and that the non-compliance with the rules be condoned.
- [3] The background on this matter is briefly as follows: The applicant manufactures bricks to be used in construction and building. The process of manufacturing the bricks entails that a mixture of clay and coal dust/charcoal/slurry (slurry) is made in batches. Sometime in April 2017 the applicant was approached by Mr. Cole on behalf of the respondent to purchase coal from the respondent.

The respondent delivered the first batch of slurry in June 2017. The applicant did a quality test on the bricks and found that the slurry was of substandard. Mr Cole on behalf of the respondent undertook to remove the substandard slurry and provide credit by way of the replacement of the slurry and proper coal and this did not materialized. The respondent now claimed for payment for slurry that was delivered to the applicant.

[4] The parties signed an acknowledgment of debt (AOD), which is in dispute as the applicant averred that a Mrs Fouche, secretary of the applicant had no authority to sign the AOD. However, based on the AOD, the respondent proceeded to obtain the default judgement against the applicant.

[5] The respondent issued summons against the applicant for an amount of R398 833, 09 with interest in terms of the AOD on the 20 April 2018. The default judgment was granted against the applicant on the 28 June 2018 as no notice to defend was filed. On the 7 September 2018 a Writ of Execution was served to attach some assets of the applicant. A second Writ was served on the 14 December 2018, in which the Sheriff issued a *Nulla Bona* return of service. On the 10 December 2018 the applicant

lodged the application for rescission of judgment. On the 14 December 2018 the respondent filed a notice to oppose and on 25 January 2019 the respondent filed its opposing affidavit to which the applicant filed a replying affidavit of 26 February 2019.

[6] The applicant filed an application for condonation for the late filing of the rescission application and it was opposed by the respondent. The applicant's contention is that the application could not be filed on time due to the unavailability of the preferred Counsel of the applicant. The applicant further mentioned that there is prospects of success. The respondent's contention is that the applicant had taken four months to deliver its application and that application is not bona fide. The applicant further raised an issue that that the Acknowledgement of Debt was not signed by the applicant.

[7] Counsel on behalf of the applicant in oral argument and written Heads of Argument submitted that the applicant dispute that the money is due and payable. And indicated that the applicant has a complete defence and that there is prospects of success. Counsel submitted that the Acknowledgement of Debt signed by a Mrs Fouche should be disregarded, as Mrs Fouche had no

authority to sign the AOD. As a result of her conduct disciplinary action was taken against Mrs. Fouche. Counsel submitted that the applicant's application for condonation be granted in order for the applicant to defend the action.

- [8] Counsel on behalf of the respondent in oral argument and written Heads of Argument submitted that the application for condonation should be dismissed by the court as the applicant gave no clear and detail explanation for the delay. Counsel submitted that during August 2018 the Sheriff to attached assets of the applicant, the applicant took no action after the Sheriff's attachment. The applicant only consulted on 3 October with Counsel and on 8 October obtain the documents from the court file and still took no steps to file the rescission application. Nor does the applicant explain to this court what happened in November 2018. Counsel submitted that the application of the applicant is therefore not *bona fide*.

- [9] In terms of Rule 27 of the Uniform Rules of Court, the Court may, on good cause shown condone any non-compliance. In the matter of **Federated Employers Fire and General Insurance Co**

Ltd And Another v McKenzie,¹ where the court listed the following grounds to be considered in an application for condonation: "...the factors usually weighed by the court include the degree of non-compliance, the explanation of the delay, importance of the case, the prospects of success, the nature of the relief, the other party's interest in finality, prejudice to the other side, convenience of the court, the avoidance of unnecessary delay in the administration of justice and the degree of negligence of the persons responsible for the non-compliance."

[10] A condonation application is not merely a formality and nor is it merely for the taking. What is required is an explanation not only of the delay in the timeous seeking of the condonation for non-compliance, but a full and reasonable explanation which covers the entire period of delay must be given.² If there has been a long delay, the court requires the party in default to satisfy it of the relief sought. The court will refuse to grant the application where there has been reckless or intentional disregard of the rules of court or the court will grant the application if it is convinced that the applicant has a bona fide defence.

¹ [1969] 3 All SA 424 (A).

² Van Wyk V Unitas Hospital 2008 (2) SA 472 (CC) at 477E-G

[11] The summons against the applicant were issued on the 20 April 2018, and was served on a Mrs Koekemoer on the 8 June 2018, to which the applicant averred that the summons were misplaced by Ms Koekemoer. The question is when the applicant was informed that the summons were issued and thereafter misplaced, what steps the applicant take to ensure immediately that a copy of the summons is obtained. The applicant only requested a copy from the court file in October 2018. That is nearly four month later. The applicant lodged the application for rescission only on the 10 December 2018.

[12] The applicant in the founding affidavit mentioned that Counsel that was briefed was not available as Counsel was involved in other matters in the Labour Court in Johannesburg. In **Maharajh v Mabaso**,³ where the applicant blamed the attorney for the delay in the proceedings. The court state that: “I might add that although there was clearly inexcusable dilatoriness on the part of the applicant’s attorney, the applicant himself was not entirely blameless.”

[13] The founding affidavit of the applicant paragraph 29 reads as follows: “I received knowledge of the judgement entered into during August

³ 1997 JOL 1285 (SE).

2018 when the Sheriff of the above Honourable court attached certain assets of the applicant. I consulted with my attorney of record. We had follow-up consultations and eventually consulted Counsel in Bloemfontein on the 3 October 2018. Counsel requested certain documents pertaining to the delivery notes and emails exchanged between the applicant and specifically Mrs. Fouche and the respondents' representatives."

[14] The applicant does not explain in detail what was the delay after the two Writ of executions were served on the office on the 7 September 2018 and 14 December 2018, except to say that the documents were not available as well as Counsel was not available. The last two weeks of September 2018 are also not explained as consultation took place only on the 3 October 2018. Nor does the applicant explain in detail what the delay was in November 2018.

[15] An application for rescission should be brought without delay and as soon as possible once an applicant realises that there is non-compliance of the rules of court. The applicant must show that he did not wilfully disregard the time frames provided for in the rules of court. The applicant is obliged to satisfy court that there is sufficient good cause for non-compliance of the rules. In **Ferreira v**

Ntshingila,⁴ the court said: “Where non-observance of the Rules in a matter have been flagrant and gross, and application for condonation should not be granted, whatever the prospects of success might be.”⁵

[16] On the applicant’s own version as stated in the Founding Affidavit, the applicant became aware of the Judgement in August 2018. Thus the applicant’s failure to lodge the application timeously and not give a detailed explanation of the timeline delay, in my view, the applicant has shown good cause for the delay, nor took reasonable steps to lodge the application timeously.

[17] The Rules of courts serve as a necessary purpose. Their primary aim is to ensure that the courts are run effectively and efficiently, which in turn will bring about expeditious disposal of cases. Thus the reasons advanced for the condonation application are not in any way bona fide or sufficient for the court to grant the condonation application.

RESCISSION OF JUDGEMENT

[18] It is trite that an application for rescission of judgment in terms of Rule 31 (2) (b) requirements are well established as stated in **Colyn v**

⁴ 1990 (4) SA (A) at 281J-282A.

⁵ See also *Blumenthal and Another v Thomson NO and Another* [1993] ZASCA 190; 1994 (2) SA 118 (A) at 121I-122B.

Tiger Food Industries Ltd T/A Meadow Feed Mills (Cape),⁶ 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 become prospectus success. In addition, the application must be brought within 20 days after the defendant has obtained knowledge of the judgment.”

- [19] 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.⁷ It is not necessary for a party to show good cause under the subrule.⁸ 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 the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment. I doubt if any such error existed when the default judgment was granted. The court in granting the default judgment was indeed satisfied that the respondent be granted the relief it sought.

⁶ 2003 (6) SA (SCA) 2 ALL SA 113, at para 11

⁷ National Pride Training 452 v Media 24 Ltd 2010 (6) SA 587 ECP para 31.

⁸ Bakoven Ltd v GJ Howes Pty Ltd 1992 (2) SA 466 (E) at 471G.

[20] In order for a rescission order to succeed in terms of common law, the applicant must give a reasonable (and obviously acceptable) explanation for his default; show that the application is made bona fide and show that he has a bona fide defence which prima facie carries some prospect of success.⁹

[21] Mr Johannes Machiel Barnard, a director of the applicant stated in the Founding Affidavit that: "In terms of the return of service that my attorney has shown me, summons was served on the 8 June 2018. It was served on one Mrs Koekemoer who is an employee of the applicant. Summons was served on a Friday. Mrs Koekemoer placed the summons in the office as I was not present at site at that stage. It seems during the course of the weekend, we do work shifts over the weekend, the summons was misplaced, I accordingly did not receive any notice."

[22] The Sheriff in the return of service does confirm that on the 8 June 2018 at 10:51 the summons and particulars of claim was served on Mrs Koekemoer at the *domicilium citandi et executandi* of the applicant. The applicant in the Founding Affidavit mentioned that the summons were served but were misplaced by Mrs Koekemoer. However, the applicant failed to attach the Confirmatory Affidavit of

⁹ Chetty v Law Society, Transvaal 1985 (2) SA 756.

Mrs Koekemoer which should have confirmed that after receiving the summons, she misplaced the summons in the office of the applicant. It is therefore difficult to accept that version of the applicant.

[23] The party's signed an Acknowledgment of Debt, to which the applicant denied that it was signed by an authorised staff member. The applicant's Founding Affidavit in respect of Mrs Fouche reads as follows: "She was harassed and manipulated into signing the acknowledgment of debt to the extent that she had the assurance from Mr Cole that he will see to the removal of the substandard product and the provision of the credit and as such thought it would be an opportune time to sign the agreement."

[24] Mrs Fouche's Confirmatory Affidavit does not deal in detail with the issue of her signature, but she rather confirms the contents of the Founding Affidavit of Mr Johannes Machiel Barnard. According to the respondent the signature of Mrs Fouche on the AOD is that of a person who signed as a witness. I am not a writing expert, but on the face of it, the signature on the Confirmatory Affidavit of Mrs Fouche, as well as the signature on the amended AOD where the signature appears on witness 1, the signatures do look similar. The applicant raised various versions that Mrs Fouche signed the AOD because she was harassed and manipulated by the representative of the respondent; that she signed the agreement due to the promises

made by Mr Cole that the slurry will be removed and also that she was not authorized to sign the AOD; this makes it difficult for the court to accept as to which version is the correct one. I am inclined to agree with the respondent that Mrs Fouche signed as a witness and not on the signatory section.

[25] Annexures “EVL2” and “EVL3” attached to the application showed that the applicant acknowledged the debt was owing and thus agreed to the arrangements made between the parties. I am convinced that Mrs Fouche therefore signed as a witness on the amended AOD. And indeed there was an acknowledgement of debt between the parties.

[26] The applicant in the Opposing Affidavit further indicated after testing the slurry, it was discovered that the slurry was of substandard and the respondent was informed about the standard of the slurry. The respondent on the other hand denied the slurry was of substandard, and explained that it was arranged that whatever product was left, will be collected by the respondent, but the respondent discovered that applicant had used up of most of the product and was already in arrears by then. The respondent elected to minimise costs and no longer provided the applicant with the product until the parties agreed

to enter into an AOD. The respondent mentioned in the Opposing Affidavit that when the applicant realised that it was in arrears then applicant raised the issue of the substandard slurry. The respondent could obviously not test or check this slurry as the applicant had already made use of the product. That defence of the applicant that the slurry was of substandard cannot stand as it was only raised after the issue of the arrears was brought to the attention of the applicant and by then the product was used up by the applicant.

- [27] The applicant raised a counterclaim that the respondent owed the applicant an amount of R2 000 000. 00, due to the damage suffered of the substandard bricks. Indeed it is quite a substantial amount to be owed. The alleged counterclaim of the applicant is raised only after the two Writ of Executions was served on the applicant. It is difficult to accept that if a person or a company is owed such a huge amount of money, would just keep quiet and only made an issue about it counterclaim when there is a default judgment. For such a huge amount of money, one would have expected that the applicant should have issued summons even before the respondent issued its summons as the amount claimed by the respondent is very minimal compared to the counterclaim amount of the applicant.

[28] 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**,¹⁰ the court said that: “the judgment is not merely 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 good cause has been shown, the applicant must give reasonable explanation as to the reasons for his default in defending the matter.”

[29] 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.¹¹ The applicant was served summons to which it failed to react, though the applicant acknowledged that the default judgment came to its attention when the Sheriff came to serve the first Writ of Execution, the applicant only consulted with the legal representative on the 3 October 2018, which still makes the application for rescission to be way out of the required time period.

¹⁰ 1979 (2) SA (E) at 3000F – 301 C.

¹¹ Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)

[30] The reasons proffered by the applicant that the summons were misplaced and that Counsel was occupied with other matters, as well as the documents were lifted from the court file only in October 2018, are insufficient. I am not satisfied that the applicant has a bona fide defence, nor has the applicant any shown good cause.

[31] In my view, I am satisfied that the applicant has failed to defend the default judgement and therefore should not be granted condonation. Nor has the applicant met the requirements to succeed with a Rescission of the Default Judgment. Therefore the relief sought in the Notice of Motion cannot be granted.

COSTS

[32] 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 due to the fact that the applicant has brought the application mala fide and has not raised a proper defence nor a proper explanation.

[33] 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. Bearing in mind that

such an order as to costs should be fair and just between the parties.¹² The attorney and client scale as prayed for by the respondent is a form of punishment for the losing party. In some cases the court will grant such an order to show its disapproval to the conduct of the losing party. However, such an award will not be granted lightly by the courts as it punishes a person who has exercised his right to obtain a judicial decision. There is thus no justification to penalize the applicant with a cost order on attorney client scale.

[34] I accordingly make the following order;

1. The Application for Rescission of Judgment is dismissed with costs on a party and party scale.

S. CHESIWE, J

On behalf of applicant: Adv. LA Roux
Instructed By: EG Cooper Majiedt Inc.
BLOEMFONTEIN

¹² Fripp v Gibbon & Co 1913 AD 354 at 363.

On behalf of respondent: Adv. PC Ploos Van Amstel
Instructed By: Blair by Blair
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