



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 76930/ 2015

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

28 / 02 / 2018
DATE

SIGNATURE

28/2/18

In the matter between:

NOLUTHO DIKO

1ST APPLICANT

NOLUTHO DIKO N.O.

2ND APPLICANT

And

NEDBANK LIMITED

1ST RESPONDENT

MASTER OF THE HIGH COURT

2ND RESPONDENT

THE SHERIFF OF THE HIGH COURT

3RD RESPONDENT

JUDGMENT

MAVUNDLA, J.

[1] The applicant approached this court seeking an order in the following terms:

- "1. That condonation is granted to the applicant, to the extent necessary, for the bringing of the application herein when it has been brought;
2. That the default Judgment Order issued by the ... Court on the 17 February 2016 be and is rescinded and set aside;
3. That the applicant be afforded a period of 10 days within which to enter an appearance to defend the action whereafter the ordinary rules pertaining to such proceedings shall apply;
4. That the respondent be ordered to pay the costs hereof in the event of the respondent opposing the application herein, failing which costs hereof shall be costs in the divorce action."

[2] The reference to the divorce action, must have been a mistake because the action brought by the respondent, in respect of which default judgment was obtained against the present applicants was for payment of the sum of R1 806 765. 40 with interest and the special executability of the mortgaged immovable property of the applicants. I will accept therefore that what was intended was that the costs should be costs in the main action.

[3] It is trite that the grant of condonation is a matter of the discretion of the Court. The party seeking condonation bears the *onus*, to advance a satisfactory and reasonable explanation for the delay. In considering whether it should exercise its discretion in favour of the applicant, the Court will have regard to the following:

- (a) the cause of the delay;
- (b) a reasonable explanation which covers the entire period of the delay;
- (c) the nature and defect causing the delay;
- (d) the effect of the delay in the administration of justice;

(e) the prejudice to be suffered by any of the other parties. The list is not exhaustive; *vide eThekweni Municipality v Ingonyama Trust*¹; *Van Wyk v Unitas Hospital*²; and *Gumede v Road Accident Fund*³; *Immelman v Loubser en Ander*.⁴

- [4] *In casu* the first respondent, as plaintiff, issued summons against the applicants, as defendants, which summons was served at the chosen domicile by affixing to the principal gate at 2 Pirow Road, Piere Van Ryneveld Ext 2 on 29 September 2015. The summons was preceded by a registered letter in terms of s129 remitted to the same address mentioned herein above.
- [5] The first applicant in her founding affidavit specifically stated that default judgment was granted on 27 February 2016 and in this regard, attached annexure "A" which is the copy of the alleged order. Examination of the said annexure "A" reveals that the default judgment was granted by Strydom AJ on the 25 November 2015, although it bears the registrar's date stamp of the 17-02-16.
- [6] The affidavit of the applicants was deposed to on 13 June 2016, almost 6 (six) months and two weeks after judgment was granted.
- [7] The first applicant was appointed the executrix of the estate of the second defendant who is now deceased. She contended in her affidavit that the first respondent issued summons against them on the similar facts under case number 45992 / 2012 which action was never withdrawn as such she submits that the action under case number 768309 / 2015 is *lis pendent* and she reserves her right to plead the defence of *res judicata* against the last mentioned action.
- [8] She further alleged that the respondent took default judgment while she was paying her bond as re-arranged.

¹ 2014 (3) SA 240 (CC) at 246- 247 paras [24]-[28] respectively.

² 2008 (2) SA 472 (CC) at 477E.

³ 2007 (6) SA 304 CPD) at 307 at para[7].

⁴ 1974 (3) SA 816 (AD) at 820E-H.

- [9] She further contended that the Letter of Authority issued by the Master appointing her as the executrix authorised her to deal with only two standard bank accounts, as such she had no authority to deal with the immovable property.
- [10] She further contends that the immovable property in issue is her primary residence with her minor children and she would have nowhere to go were she to be evicted from this house.
- [11] The application for rescission was served on the respondent's attorneys on 13 June 2016. The first respondent filed its notice of intention to oppose the rescission application on the 23 June 2016. The application was subsequently set down on the unopposed motion roll on 16 November but subsequently removed from the roll on the 21 October 2016 after the first respondent had filed its answering affidavit on the 17 October 2016. The first respondent on the 9 December 2016 then filed its notice of application for extension of time in terms of rule 27.
- [12] With the notice of intention to oppose having been filed on the 23 June 2016, the answering affidavit should have been filed within 15 days in terms of rule 6(5)(b), which would have been on 14 July 2016. The answering affidavit was filed on the 21 October 2016, 3 (three) months later. The explanation proffered by the first respondent for the delay is that it first had to establish what happened in the action instituted under case number 45992 / 2012. It was only on 6 October 2016 that a final confirmation was received as to what happened from Hack Stupel and Ross who handled that particular matter. According to the latter attorneys, they were instructed on 15 April 2014 to close their file as the arrears had been settled.
- [13] In the matter of *Wolgroei's Afslae (Edms) Bpk v Munisipaliteit van Kaapstad*⁵ the Appellate Division sets out the proper approach to the question of undue delay: first a court must decide whether the proceedings were brought within a reasonable time; and, secondly if not, it must decide whether the unreasonable delay ought to be

⁵ 1978 (1) SA 13 (A) 39-42D.

condoned, in which event it must exercise a discretion taking into account all relevant factors including, but not limited to, prejudice to the respondent.

- [14] The first respondent's answering affidavit was three months late. Its attorneys had to source information from the previous attorneys who had closed their file as far back as in 2014. It is understandable that attorneys would commission their closed files to storage. It would take some time to retrieve such files. In my view a delay of three months to file the answering affidavit in those circumstances is not unreasonable and accordingly should be condoned.
- [15] On the other hand, the applicant was more than six months late in bringing the application for rescission. In paragraph 11 of her founding affidavit she stated that after receiving summons she went to the first respondent's offices and arranged for payment of the arrears and she commenced payments accordingly but the first respondent took judgment behind her back. She does not take the court into confidence as she does not disclose when and how she became aware of the default judgment. She deliberately tried to mislead the Court by stating that the default judgment was granted on 27 February 2016⁶, whereas it was granted on 25 November 2015. She has truncated the period of her delay in bring the rescission application with 3 (three) months thus reducing her delay to just about 4 (four) months, which period otherwise would not necessarily be unreasonable.
- [16] The applicant failed to place facts upon which this Court could have relied upon to determine whether her delay was reasonable or excusable. Obviously six month's delay is unreasonable, especially in the absence of an explanation for such delay, coupled with her misstating of facts. She did not file a replying affidavit in which at least she could have explained the inconsistency regarding the dates of the default judgment already referred to herein above.

⁶ Para 4 at paginated page 6 of her founding affidavit.

[17] The first respondent has explained that the previous action was withdrawn due to the fact that the arrears were settled. Therefore the contention of the applicant that the matter is *lis pendent* falls flat because there was a new cause of action.

[18] I deem it not necessary to interrogate the rest of her defences raised because the applicant has not acquitted herself in respect of the *onus* resting on her in respect of condonation, vide paragraph [13] *supra*.

[19] In the result the application for condonation and the application for rescission are refused with costs of the opposition.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 28 /02 / 2018

APPLICANT'S COUNSEL : ADV. N. ERASMUS

INSTRUCTED BY : SHAPIRO & LEDWABA INC

1ST RESPONDENT'S COUNSEL: ADV. R. RAUBENHEIMER

INSTRUCTED BY : VEZI & DE BEER INCORPORATED