

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT, PRETORIA

11/9/12

CASE NO: 12972/10

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED
11 September 2012	
DATE	SIGNATURE

In the matter between:

MAVIS BABA KOK

Applicant

and

THE BODY CORPORATE OF NORDEY HEIGHTS	1 st Respondent
E Y STUART INC.	2 nd Respondent
BUREAU TRUST LIQUIDATORS	3 rd Respondent
THE MASTER OF THE HIGH COURT	4 th Respondent
REGISTRAR OF DEEDS	5 th Respondent
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	6 th Respondent
SHERIFF PRETORIA NORTH-EAST	7 th Respondent
SHERIFF PRETORIA CENTRAL	8 th Respondent

J U D G M E N T

MSIMEKI, J

INTRODUCTION

[1] The Applicant seeks an order –

1.1. rescinding the order of Tlhapi J under case number 12972/2010 authorising substituted service granted on 9 April 2010.

1.2. rescinding the judgment (sequestration) order granted on 24 May 2010 under case number 1297/2010, and

1.3. for costs. The application seems to be based on Rule 31 (2) (b) of the Uniform Rules of Court.

Rule 31 (2) (b) provides:

"(b) A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

BRIEF FACTS

[2] The Applicant was finally sequestered on 24 May 2010. she became aware of that, on her version, on 28 June 2011. This application was launched on 12 March 2012 more than 8 months late. The Applicant, from the reading of paragraph 5 of the

founding affidavit, was clearly aware that the application should have been launched within 20 days after the Applicant obtained knowledge of the judgment or order granted against her. The Applicant averred that she had made out a proper case for the order that she seeks while the submission on behalf of the Respondent is that the point *in limine* raised should be upheld in that the Applicant failed to present any explanation for the delay in bringing the rescission application. Mr Vorster, for First the Respondent, submitted that the founding affidavit does not even attempt to present such an explanation and that the request for condonation should be refused and the application dismissed with costs.

- [3] Mr Mojamabu, for the Applicant, submitted that condonation was within the discretion of the court. That is correct. The discretion, however, is exercised after a consideration of the facts of the case by the court. The court considers the evidence which is presented by the parties by way of affidavits. Mr Mojamabu further submitted that no one, according to the constitution, should be denied the right to be heard due to absence of financial muscle. This was based on what the Applicant raised in her reply which is not enough to assist her. It is noteworthy that the court, in the absence of relevant evidence, cannot be expected to simply rule in the Applicant's favour. Mr Mojamabu implored the court to dismiss the point *in limine* arguing that the

court had to hear the entire application. This cannot be correct where the founding affidavit lacks the necessary evidence to entitle the Applicant to the condonation sought. This is the case in the current matter.

The court in *Vn Wyk V Unitas Hospital* 2008 (2) SA 422 (CC) at 477 [22] said:

“An Applicant for condonation must give explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.”

This the Applicant failed to do.

- [4] Mr Mojamabu submitted that the Applicant, when her attorneys addressed their letter dated 22 June 2011 to the First Respondent's attorneys, had hoped that a settlement would be reached. Mr Vorster, for the First Respondent, submitted that such hope must have been removed by the First Respondent's attorneys response of 23 June 2011, annexure MK 6 on page 20 of the paginated papers, which informed the Applicant's attorneys that the Applicant had “been placed under final sequestration on 24 May 2010 and that Messrs Bureau Trust, the Third Respondent in the matter, had been appointed as liquidators.

- [5] Mr Vorster submitted that the Applicant would have had no problems with condonation had she complied with the

requirements referred to in the Van Wyk matter. This according to him, she dismally failed to do. He submitted further that no one, here, was arbitrarily deprived of the right to housing, as Mr Mojamabu submitted. A valid sequestration order, according to Mr Vorster, had been granted. I agree.

- [6] Mr Vorster submitted, correctly in my view, that a defective case in the founding affidavit could not be built and rectified by the replying affidavit. (See **Triomf Kunsmis (EDMS) BPK V EA & CI BPK en Andere 1984 (2) 261 (W)** and **Tumisi and Others v African National Congress 1997 (2) 741 (O)**).
- [7] The Applicant, indeed, failed to comply with the requirements set out in the Van Wyk matter. The inordinate delay was indeed, not accounted for. As Mr Vorster correctly submitted, the requested condonation should be refused and the application dismissed with costs on an attorney and client scale in terms of **Regulation 31 (5) of Annexure 8 to the Sectional Titles Act 1986** which entitles a body corporate to collect its attorney and client legal costs from members when it litigates to collect levies or to enforce rules. I again agree.
- [8] **in the result the following order is made**
- 1. condonation is refused**

2. the application is dismissed with costs on the attorney and client scale.



MSIMEKI J
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT

Counsel for applicant: Advocate Mojamabu

Counsel for respondent: Advocate Vorster

Attorneys for applicant: Selahle Attorneys

Attorneys for 1st & 2nd respondents: EY Stuart Inc.

Date heard: 10 September 2012

Date of judgment: