

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 1375/2006

In the matter between:-

KEVIN COLEBY

Applicant

and

JACOBUS GIDEON LOUW VAN WYK

Respondent

HEARD ON: 17 AUGUST 2006

JUDGMENT BY: RAMPAL J

DELIVERED ON: 26 OCTOBER 2006

- [1] The applicant seeks rescission of a judgment and court orders handed down by H. M. Musi J on 2 October 2003. The matter came by way of motion proceedings. At stake is the sum of R104 020,00 excluding accrued interests and the costs incurred. The applicant avers in his founding affidavit that his dilemma was occasioned by the remissness of his attorneys.
- [2] The motion is opposed. In the answering affidavit the respondent's deponent avers that the applicant's own

remissive attitude led to the granting of the aforesaid judgment and orders against him; that by 10 June 2004 the applicant became aware of the aforesaid judgment and orders; that the applicant only launched this application for rescission on 31 March 2006; that the applicant has no defence to the respondent's claims and that he has given no reasonable and acceptable explanation for his default.

[3] In his replying affidavit the applicant reiterates that he was let down by his previous lawyers; that he and the respondent had settled the matter before 2 October 2003; that he telephonically advised the respondent's attorney accordingly on 16 September 2003; that before the court sheriff served the writ on him on 10 June 2004 he was unaware of the judgment and the orders; that he subsequently instructed Messrs. Botha Willemse Wilkinson to settle the matter in accordance with their letter of 10 June 2005 addressed to Messrs. Vermaak & Dennis; that the settlement negotiations collapsed; that on 15 November 2005 his attorneys informed the respondent's attorneys of his decision to bring an application for rescission and that such an application was launched on 31 March 2006. He repeatedly stated that he has a *bona fide* defence and that he was not to blame for the delays and the omissions.

[4] It is trite that a judgment or a court order can only be rescinded on one of the following basis: On appeal, or in

terms of rule 31(2)(b), or in terms of rule 42(1) or on common law grounds. **BEZUIDENHOUT v PATENSIE SITRUS BEHEREND BPK** 2001 (2) SA 224 (ECD) at 229 B – D and Erasmus: **Superior Court Practice**, B1-306.

Obviously this matter did not come to court by way of an appeal. Therefore the judgment and the court orders concerned are not attacked on this front. A judgment or a court order may be rescinded in terms of rule 31(2)(b) where the applicant had either failed to deliver the requisite notice of intention to defend or where the applicant has done so but failed to deliver the requisite plea. Therefore the judgment and the court orders concerned cannot be attacked on this basis. **DE SOUSA v KERR** 1978 (3) SA 635 (WLD) at 637 D – E and Herbstein & Van Winsen: **The Civil Practice of Superior Courts of South Africa**, 4th edition, p. 539.

- [5] Similarly an order or judgment may only be rescinded in terms of rule 42(1) where such order was erroneously sought or erroneously granted in the absence of the party thereby aggrieved. **MUTEBWA v MUTEBWA AND ANOTHER** 2001 (2) SA 193 (TkHC) at par. 15 and further at par. 17 – 23 per Jafta J as he then was. It follows therefore that this rule too does not regulate the situation at hand. In the instant case, the parties are *ad idem* that the

court order sought to be set aside was granted by way of the applicant's failure to discover. If regard is had to the principles prevailing on this sphere of our law and if regard is had to the papers before me as well, it must be accepted that the only basis on which the judgment and the court orders by H. M. Musi J can be rescinded is under common law. **BAKOVEN LTD v G J HOWES (PTY) LTD** 1992 (2) SA 466 (ECD) at 468 H per Erasmus J.

- [6] Under common law rescission will only be granted where sufficient or good cause has been shown. It is a long standing practice of our courts that the concept of sufficient or good cause has two elements. Firstly, that a party seeking recessionary relief must present a reasonable and acceptable explanation for his default which gave rise to the court order or judgment; secondly, that such a party has to establish that on the merits he has a *bona fide* defence which *prima facie*, carries some prospects of success. **CHETTY v LAW SOCIETY, TRANSVAAL** 1985 (2) SA 756 (AD) at 765 A – C.

- [7] In the same case, **CHETTY v LAW SOCIETY, TRANSVAAL**, *supra* at 765 C Miller JA observed:

“It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission

of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”

[8] I deal first with the requirement of a *bona fide* defence. I want to sum up the versions of the parties in this regard. The version of the respondent is that the applicant owed him the sum of R104 020,00 in respect of money lent and advanced by way of four separate loans. He avers that he sued the applicant on 14 November 2001 under case no. 3964/2001. The amount of the first claim was R65 000,00; the second claim R31 500,00; the third claim R7 000,00 and the fourth claim R520,00. The applicant duly notified his intention to defend.

[9] Subsequently the applicant delivered the customary plea and simultaneously his counterclaim. In the defendant’s plea the applicant denied he was indebted to the respondent. In the counterclaim the applicant alleged that the respondent was indebted to the applicant in the sum of R200 000,00 in respect of certain consultancy services he had rendered for and on behalf of the respondent in accordance with an oral agreement. In the plaintiff’s plea the respondent denied the alleged consultancy agreement and consequently any debt arising from such alleged agreement.

[10] The applicant’s version may be summarised as follows. He and the respondent were friends. Somewhere and

somehow there was this broken glider. Together they decided to repair it. To do so they ventured into the world of business. They then entered into an oral agreement on 31 August 1998.

[11] Pursuant to such an agreement a business enterprise called CCC Plane Sale CC was formed. The objective of the enterprise was to repair with the view to selling the glider. The enterprise had no running capital. Therefore they had to advance money and services to the close corporation out of their own pockets. Each of the two members had a loan account in the books of the close corporation. Such personal loans were paid into the coffers of the close corporation. It was agreed that the close corporation would repay such loans free of interest in due course. The loans would be repaid before 31 December 1998 from the proceeds of the anticipated sale of the glider. The anticipated sale price was approximately R120 000,00. The nett profit would be equally shared with an outsider who was to be brought in so that he could assist to repair the glider.

[12] After they had repaired the glider to a certain extent the close corporation took it to Johannesburg for some specialised repairs that were beyond their field of expertise. He cannot recall precisely where in Johannesburg the glider was taken. Meanwhile the close corporation ceased trading. This happened before 31 December 1998. The respondent's summons was false. The respondent never lent and advanced any money to him in his personal capacity. Instead the respondent made certain loans to the close corporation. It was untrue that he made any undertaking to repay the respondent's loans.

[13] On the one hand, Mr. Daffue, counsel for the applicant, submitted that as far as the merits were concerned the version put forward by the applicant was sufficient to make out a *prima facie* defence in the sense that it establishes the existence of a triable issue. **BROWN v CHAPMAN**

1938 (TPD) 320 on 325, **GRANT v PLUMBERS (PTY), LTD** 1949 (2) SA 470 (OPD) on p. 475 – 477 and **KOULIGAS & SPANOUDIS PROPERTIES (PTY) LTD v BOLAND BANK BPK** 1987 (2) SA 414 (OPD) at 417 C – D.

[14] On the other hand Mr. Fischer, counsel for the respondent, submitted that, as regards the merits, the circumstances of this case show that the applicant does not have a *bona fide* defence which carries some prospects of success. **CHETTY v LAW SOCIETY, TRANSVAAL** 1985 (2) SA 756 (AD) at 765 A - C.

[15] I now proceed to examine the facts in order to test the above submissions. The respondent's *causa* is a composite claim of R104 020,00 which consists of four separate causes of action. As regards the first leg thereof the applicant denies that the respondent ever gave him a loan alternatively that he ever undertook to repay the loan of R65 000,00 to the applicant on behalf of the close corporation. It is essentially his case that the respondent in fact lent and advanced the money to the close corporation.

[16] As regards the second leg thereof the applicant avers that the claim of R31 500,00 relates to the sale of a certain Iveco motor vehicle. The vehicle belonged to a certain

Matthee who was the respondent's customer. The gentleman was emigrating from this country to Australia and wanted to have his movables sold. Among the movables was an Iveco motor vehicle. He, the applicant, sold the motor vehicle to Kimberley Diamond Express. He was commissioned by the respondent to sell Matthee's assets. The respondent reneged from the agency agreement, refused to pay him the commission he earned but only reimbursed him in respect of the expenses he incurred. He puts up a defence that the proceeds of the sale of the motor vehicle were paid directly to the respondent and not to him by the buyer.

[17] As regards the third leg thereof, the applicant denies that he owes the amount of R7 000,00 to the respondent. He identifies no particular legal transaction preceding this specific claim. However, he speculates that it possibly relates to an expense which he may have incurred in the course of executing his mandate relating to the respondent's customer, Matthee, as more fully set out above. The figure of R7 000,00 probably represents a sum total of all the various disbursements he incurred in respect of travelling and accommodation expenses which expenses were refunded to him by the respondent.

[18] As regards the fourth leg of the respondent's composite claim the applicant also denies that he is lawfully and truly

indebted to the respondent in the amount of R520,00. His defence is substantially the same as his defence in respect of the third leg as set out above.

[19] Apart from those defences the applicant contends that he has a counterclaim in excess of R200 000,00 against the respondent. The basis of this is consultancy work.

[20] The above defences as raised in the founding affidavit and the counterclaim must be considered against the following backdrop. The defences as raised in the applicant's original plea to the same claims boiled down to nothing more than bare denials. The applicant's defences, as now raised in his founding affidavit, are still lamentably terse. Their lack of particularity is disturbingly alarming.

[21] Subsequent to the dismissal of his aforesaid deficient plea and the granting of judgment in favour of the respondent the applicant made abortive attempts to settle all disputes between him and the respondent by paying a global sum of R230 000,00. Notwithstanding requests by the respondent, the applicant failed to give a detailed breakdown, facts or figures as to how the settlement figure he offered was made up and calculated or to say on what basis the legal costs incurred by the respondent relating to that main litigation should not be borne and paid by him, the applicant.

[22] Above all this critique I have levelled against the applicant's founding affidavit, nothing militates more against the applicant's contention than the fact that not only in his original plea but also in all subsequent settlement negotiations, as evidenced by the letters annexed to the

respondent's answering papers, did the applicant ever implicated CCC Plane Sale CC as the party indebted to the respondent. This omission casts very serious doubt as to the veracity of the applicant's version in this case. Indeed it imperils the applicant's *bona fides* and rocks the very foundation of his alleged defences. His exculpatory explanation in his replying affidavit, that he had no input in the drafting of his plea, fails to impress. He cannot now in his replying affidavit distance himself from his defences as earlier pleaded in his plea. Besides, he made no such allegation in his founding affidavit.

[23] In his replying affidavit the applicant conceded that his defences were poorly pleaded in his plea. In paragraph 4.3 thereof he states that he has *bona fide* defences and that he will attend to the amendment of his original plea in order to incorporate the facts as set out in his founding affidavit. I have already indicated that the applicant's new defences as contained in the founding affidavit are based on shaky factual foundation. Amending the applicant's plea by bringing it in line with his founding affidavit will, in my view, be an exercise in futility. This is so because the facts set out in the founding affidavit itself are so materially inadequate that they are unlikely to sustain the alleged defences on trial.

[24] Two important things emerge from the applicant's intention

to amend his defences. The first is that such an intention boils down to an acknowledgement by the applicant that his four defences as originally pleaded are substantively so poor that they fail to make out a *prima facie* case which carries some prospects of success. The second is that the applicant did not express such an intention to amend in his founding affidavit. He did so for the first time in his replying affidavit. His belated and forced curative plan impacts adversely on the applicant's *bona fides*.

[25] It makes no sense to me why the respondent who, as the applicant alleges, refused to pay him the agreed commission in connection with the second claim, would willingly have paid him back the disbursements in connection with the third and the fourth claims, only to turn back later and falsely claim that such genuine refunds were loans. It seems to me more probable than not that if the respondent was an unscrupulous person, as the applicant makes him out to be, he would have cheated the applicant quite simply by refusing to reimburse him instead of paying him and then claiming the same money under false pretext. After all he had already refused to pay him the commission in respect of the second claim.

[26] In the light of the foregoing considerations I have come to the conclusion that the applicant's contention that he has *bona fide* defences, in the sense that his version

establishes a *prima facie* case issue which deserves adjudication by trial is one which I cannot uphold. His application for rescission fails on its own demerits. No *bona fide* defence in his plea, which *prima facie*, carries some prospects of success on the merits, has been shown. **CHETTY v LAW SOCIETY, TRANSVAAL**, *supra* at 765 D – E per Miller JA.

[27] As regards the applicant's contention that he has a counterclaim of over R200 000,00 against the respondent, I am not so persuaded. According to his own pleadings, his counterclaim is based on an oral agreement concluded. I do not know exactly where but apparently somewhere in Guateng Province during or about October 1998. His counterclaim was filed on 31 October 2002, some four years after the agreement was entered into. The counterclaim appears to have already prescribed by the time it was filed. It also appears that at no time material to the settlement negotiations following the court orders of 2 October 2003 was mentioned ever made of the counterclaim by the applicant against the respondent through his lawyers. It must therefore be accepted that there are strong indicators which point that *prima facie* the applicant's counterclaim, if it ever existed, has already prescribed.

[28] In case I am wrong in reaching the above conclusion in

respect of the first dimension of the legal concept of sufficient or good cause, I proceed to examine the facts in connection with the second dimension. The enquiry revolves around the question whether or not the applicant has presented a reasonable and acceptable explanation of his default.

- [29] The applicant's explanation for his default is premised on the following: He was represented by a certain Mr. Phillip Barnard, an attorney practicing in Pretoria, at all material times. For the sake of completeness I point out that the relative action proceedings were initiated on 14 November 2001. Notice of the applicant's intention to defend was filed on 14 January 2002. The court orders now under attack or the judgment was given on 2 October 2003. According to the applicant's founding affidavit the matter was enrolled for hearing on 2 October 2003. A day before the hearing he received a telephone call from Mr. Barnard who informed him about the hearing. He was living in Cape Town at the time and therefore could not attend a trial set down for hearing in Bloemfontein. He could not get a flight since the available flights were apparently fully booked. If only he was advised in good time he could have attended the hearing. All the same he gave Mr. Barnard specific instructions to settle the matter but Mr. Barnard failed to do so. Apparently Mr. Barnard did not even go to Bloemfontein. As a result of all this judgment was given

against him in his absence.

[30] He found out about the judgment granted against him when the sheriff served the writ upon him. We now know that the writ was served on 10 June 2004. Immediately thereafter, so says the appellant, he instructed Messrs. Schuld Incorporated attorneys in Cape Town to assist him with an application for rescission. They too failed to carry out his instructions.

[31] Next he appointed Messrs. Botha Willemse Wilkinson of Pretoria to see to it that the default judgment was rescinded. However, the rescission application was held back pending the outcome of their attempts to settle the matter. When it became evident that the respondent was not really interested in having the matter settled, he instructed his attorney, Mr. Botha, to proceed with the necessary steps for the rescission of judgment. This synopsis completes the sum total of the applicant's explanation of the circumstances pertaining to his default.

[32] The general rule of motion proceedings which has been laid down decades ago and since then repeatedly stressed by our courts, is that an applicant must stand or fall by his founding affidavit and the facts alleged therein as those are the allegations of fact that the respondent is called upon to either affirm or deny. **POUNTAS' TRUSTEE v LAHANAS** 1924 (WLD) 67 on p. 68.

[33] It is, furthermore, incumbent upon an applicant to make out a *prima facie* case in his founding affidavit. **POSEIDON SHIPS AGENCIES (PTY) LTD v AFRICAN COALING AND EXPORTING CO (DURBAN) (PTY) LTD AND ANOTHER** 1980 (1) SA 313 (DLD) on 316.

[34] Mr. Daffue contended that the applicant was an innocent litigant, a poor soul who relied on his appointed attorneys which attorney either did not properly communicate with him or failed to carry out his instructions properly. He submitted that the applicant has shown such substantial defence which should override his possibly poor explanation for his default. He urged me not to punish this litigant for the remissness of his attorney which led to the granting of the judgment and the orders already referred to.

[35] The said submission is, in the context of this case, flawed. However good a defendant's defence may be, it cannot alone be a decisive fact which serves as a rescue vessel to salvage a bad explanation.

“And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”

Miller JA in **CHETTY v LAW SOCIETY, TRANSVAAL**, *supra* at 765 E. Moreover, in the instant case, I have already found that the applicant's defences were devoid of any substantive merits.

[36] According to the founding affidavit some three years after the judgment the applicant was still unaware that the matter was not enrolled for trial on 2 October 2003 but that in fact it was set down on account of his failure to discover. He lived in Cape Town. His chosen attorney at the time practised in Pretoria. Notwithstanding this fact, he stated that he was

unaware of the true state of affairs. In par. 4.4 of the answering affidavit the respondent's deponent averred that the customary discovery notices in terms of Rule 35 were served on the applicant's attorney on 7 March 2003. The applicant admitted this averment in par. 4.8 of the replying affidavit. But in par. 4.9 of the same replying affidavit he avers that he was not aware that discovery was requested. This is how he puts it:

“4.9 AD PARAGRAPH 4.6

I was not aware of the fact that discovery was requested, neither that a discovery affidavit needed to be filed. Should I have been aware that discovery was requested, I would have ensured that a discovery affidavit would be filed and that the discovered documents were delivered.

4.9.1 I had no knowledge that the respondent launched an application to compel delivery of a discovery affidavit.

4.9.2 Should I have been aware of the order granted on 21 August 2003 I would have made sure that the discovery affidavit be filed.

4.9.3 Phillip Barnard attorneys did not inform that such an application was brought, neither that a Court Order was given, compelling me to deliver an discovery affidavit.”

[37] He avers in his founding affidavit that he only became aware of the judgment for the very first time when the sheriff served

the writ upon him. However, he glosses over this important issue. He hardly mentions the date on which the writ was served upon him.

[38] His first attorney, Mr. Barnard, did not service him well. So he claims. But he does not say precisely what the problem was, besides saying that Mr. Barnard was practising in Pretoria and that he was living in Cape Town. Again he does not say when he moved from Pretoria to Cape Town.

[39] He avers that when he discovered that the respondent has obtained judgment against him, he immediately engaged the services of another attorney. His second attorney was Mr. Schuld who practised in Cape Town. This attorney too disappointed him. He hardly received any papers from this attorney pertaining to his instructions for the rescission of the judgment. But he fails to say when he instructed Mr. Schuld and when he terminated his mandate.

[40] In the third place he avers, still in his founding affidavit, that he appointed a third attorney, Mr. Botha. The latter practises law in Pretoria. He instructed his third attorney to apply for rescission when it became evident the respondent was not keen to settle. Again his founding affidavit is silent on a number of important aspects. For instance, he does not say when he appointed Mr. Botha.

[41] Mr. Botha advised the respondent's attorney, Mr. De Lange, on 15 November 2005 that the applicant contemplated

applying for the rescission of the judgment. The applicant's founding affidavit in support of his application for rescission was only deposed to on 6 March 2006, in other words, some fifteen long weeks afterwards. Again there is nothing in the founding affidavit to explain this considerable delay.

[42] In his replying affidavit the applicant was clearly rattled by the massive details of the answering affidavit. He conceded that he did not have all the facts about the history of the matter at his disposal when he made the founding affidavit. Besides blaming his first two attorneys, Mr. Barnard and Mr. Schuld, he also shifted the blame to Mr. De Lange, the respondent's attorney, for his ignorance; for his acts of omission and his acts of delays. He suggests that Mr. Schuld's attempts to prepare the application for rescission were frustrated by Mr. De Lange.

[43] He complains that the latter failed to provide his second attorney with copies of the pleadings despite his undertaking to do so. He says he tried unsuccessfully to obtain copies of the pleadings in case no. 3964/01 before this application for rescission was launched. His attorney, Mr. Schuld, also failed. If only if he had had such copies he would have extensively dealt with the pleadings. I understand him to mean that he would have thoroughly dealt with the material issues in his founding affidavit. This is an admission by the applicant himself that his founding affidavit was materially

defective.

[44] But the complaint has no substance. Mr. De Lange was not obliged to furnish him with copies of the pleadings. His first appointed attorney, Mr. Barnard, had the pleadings. Messrs. McIntyre & Van der Post, his Bloemfontein attorneys, also had the pleadings. The Registrar of this court had the original pleadings. Once more the applicant fails to say why he could not obtain copies from all these people.

[45] He admits that his plea and counterclaim lack sufficient averments and clarity. But he shifts responsibility for the serious defect. He claims that he had no input on the drafting of these pleadings. He indirectly puts the blame on his first attorney. What is worse, he does this in a replying affidavit and not in his founding affidavit.

[46] He avers that he did not receive the court order issued by Ebrahim J on 23 August 2005 whereby he was compelled to file his discovery affidavit and warned of the consequences of his failure. He cannot recall when he terminated Mr. Barnard's mandate. But then he admits that he was assured by his previous attorney, and that could only have been Mr. Barnard, that he would attend the court hearing on 2 October 2003 to settle the matter.

[47] He admits that on 16 September 2003, two weeks before the

crucial setdown of 2 October 2003, he had a telephone conversation with the respondent's attorney. He avers that during the conversation he advised Mr. De Lange that he and the respondent had settled their differences. In addition to such advice he also advised the lawyer that the respondent had confirmed with him that he would not be proceeding any further with the applications on 2 October 2003 or the action itself. Mr. De Lange undertook to canvass these facts with the respondent. Notwithstanding such an undertaking Mr. De Lange proceeded on 2 October 2003. Firstly, he had his counterclaim dismissed. Secondly, he had his plea also dismissed. Thirdly, he had judgment granted in favour of the respondent against him.

[48] The applicant insinuates that the respondent's attorney ambushed him. I do not think so. He claims that the respondent's applications should not have been proceeded with on 2 October 2003 because he and the respondent had directly settled the dispute. The deficiencies of these averments are obvious. He fails to say where, when and how the dispute was settled? What were the terms of the settlement? Was the settlement written or verbal? There are simply no answers to these and many more questions.

[49] During the conversation the applicant certainly realised that Mr. De Lange knew nothing about the alleged direct settlement. Certainly he also must have realised that time

was running out for him to stop the drastic applications which were looming on the horizon. Realising all these a seriously litigant in the shoes of the applicant would have acted differently. He would have taken a swift action. He would have been pro-active. He would have stood up and attended to the matter himself. He would not have sat back and expected his adversary's lawyer to take further instructions. He would have fetched his adversary and taken him to his lawyer so that the adversary's lawyer could hear the settlement story directly from the horse's mouth. Better still, he would have provided the adversary's lawyer with a written proof of the settlement.

[50] Needless to say in this case the applicant sat back and relaxed. He expected someone, his opponent's lawyer at that, to solve the problem for him. A week came and went by after the conversation but there was no word from Mr. De Lange to the applicant. Weeks became days, days became hours, but the applicant remained passive and unconcerned. He did nothing to enquire from Mr. De Lange whether he had since received further instructions from the respondent confirming that the dispute had indeed been settled. He did nothing to ensure that the respondent confirmed the settlement with his lawyer.

[51] It appears to me that there was no such direct settlement. During the same conversation, Mr. De Lange advised him to

appoint another attorney because he had learned that Mr. Barnard no longer acted for him. The applicant admits this averment. Then he says the following at par. 4.16 of the replying affidavit:

“4.16 **AD PARAGRAPH 4.13**

4.16.1 I recall the telephonic conversation between De Lange and myself and advised him that I will appoint an attorney to represent me as soon as I have received copies of all the pleadings. I must stipulate to the Honourable Court I did not entirely understand the process at that stage and only now understand the process subsequent to my attorney having explained same.

4.16.2 Should I have understood the urgency, importance and consequences of the application of the application and should I have had copies of the pleadings, I would have made sure that the discovery affidavit has been delivered prior to the respondent having brought the application.

4.16.3 I am English speaking and therefore do not fully understand the contents of De Lange's letter. Argument in this regard will be presented at the hearing of this matter.”

Now, if the matter had been settled, as he claims it was, why was it still necessary for him to receive copies of the pleadings so that he could appoint a new attorney?

[52] The applications were precipitated by the applicant's failure

to discover. The fate of the applicant as a result of such omission was to be determined on 2 October 2003. During the telephone conversation of 16 September 2003 Mr. De Lange explained the discovery process to him. He, on the same day, faxed the relative court orders by Ebrahim J and Wessels AJ to the applicant. But he says he did not entirely understand the discovery process and that if he did, he would have discovered. In general ordinary people involved in litigation do not understand legal processes. There are exceptions of course. I accept that the applicant was not an exception. I also accept that he might not have entirely understood the explanation of the discovery process as given by Mr. De Lange. But his excuse is belated. It is contained in the replying affidavit. It was never his case in the founding affidavit.

[53] However, having accepted all that, I hasten to say I do not accept that he did not understand that something had to be done and done quite urgently. If he were to avoid the adverse consequences of the applications which were set down for final adjudication just over two weeks ahead, on 2 October 2003, he had to act pretty fast. The fact that he did not entirely understand the process on 16 September 2003 serves as no excuse for his failure to do anything in the meantime. He had seventeen days to do something. His lack of understanding was so much the reason why he had to consult a lawyer at once. However, he did nothing for

seventeen days.

[54] We know now that on 1 October 2003, a day before he was punished for disobeying the rules of procedure, he received a telephone call from his first attorney, Mr. Barnard. He claims in his founding affidavit that prior to such call, he was not advised of the setdown. As a result of the failure of his first attorney to inform him about the date allocated for the “hearing” he was not in a position to attend the hearing. Whether or not Mr. Barnard had advised him, is debatable. What is not debatable is the fact that Mr. De Lange did advise him about the setdown seventeen days beforehand. He had ample time to book the flight or to make other suitable arrangements in order to attend court particularly because he understood that the matter had been enrolled for hearing.

[55] There are amazing features of his conversation with Mr. Barnard. In the first place, it suggested that he was still in touch with Mr. Barnard, despite the termination of his mandate. In the second place and this is very important, he did not inform Mr. Barnard that there was no need for him to attend the trial in Bloemfontein because the matter would no longer proceed in view of the direct settlement reached. In the third place, he did not call Mr. De Lange to make doubly sure that the respondent had confirmed the settlement and that the settlement would be made an order of court or that

the matter would simply be removed from the roll. Instead of doing any of these things, he quickly tried to book a flight to Bloemfontein. What for?

[56] In an attempt to explain the paucity of his averments, in his founding affidavit, the applicant makes the following averments in his replying affidavit:

“4.40 AD PARAGRAPH 11

I have made a case for condonation to be granted. Extensively explanations with regards to the filing of pleadings, correspondence and communication between both the respective parties and the attorneys, were given. De Lange, on the version presented on behalf of the respondent, pave the way for the applicant to explain with precision why it took so long to file the application for rescission of judgement.

Not only have I given substantial explanation as to why condonation should be granted, but have I also explained to the Honourable Court why it should be just and equitable to grant me the opportunity to have this matter to proceed to trial.”

[57] At par. 4.42 of the replying affidavit the applicant avers:

4.42 ADPARAGRAPH 13

4.24.1 I have already explained as to why I was misguided about the enrollment of the application for delivery of the discovery affidavit. I was always under the impression that the matter was enrolled for hearing on 2 October 2003. I was not

previously aware of the fact that the matter was enrolled for 20 January 2004.”

It must be accepted that on the applicant’s own version he was aware or to use his expression, he was under the impression that the matter had been enrolled for trial on 2 October 2003. But Mr. Barnard, as an attorney, certainly knew that the matter was supposed to be tried or heard on 20 January 2004 and that all the applicant had to do to get out of trouble, was to make and file his discovery affidavit on 2 October 2003 at the very latest.

[58] It is also not quite clear to me as to where Mr. Barnard suddenly came from at the eleventh hour. It will be recalled that sixteen days earlier the applicant had told Mr. De Lange that he would appoint a new attorney. The impression made was that Mr. Barnard’s mandate had already been terminated by then. The matter becomes even more puzzling in his replying affidavit when the applicant says the following at par. 4.18:

“4.18.1 I was under the impression that the matter was enrolled for hearing on 2 October 2003.

4.18.2 I was not aware of the fact that the application would be granted and that the result would be fatal.

4.18.3 I was assured by my previous attorney that they would attend to the matter and therefore left it in what I thought was their capable hands.”

[59] Indeed leaving the matter, he did. The question is in whose hands and for how long? We know that from 2 October

2003, when the court orders were made, until 10 June 2004, when the writ was served, the applicant was still in the dark as to what had transpired in Bloemfontein. In my view, it was incumbent upon him to contact his attorney, in whose capable hands he had placed the matter, to ascertain what had transpired the day before. This he failed to do. He did not care to find out a day after the hearing. Nine months afterwards he still did not care to know. It appears to me he would not have bothered to know had the sheriff not served the writ upon him over nine months later. Even then he apparently made no attempt whatsoever to seek any explanation from his previous attorney who had assured him that he would travel to Bloemfontein to sort out the problem on his behalf.

[60] He claims in his founding affidavit that, after receiving the writ, which we now know was on 10 June 2004, he immediately instructed Messrs. Schuld Inc. to have the judgment rescinded. Notwithstanding his immediate action it appears that the first letter from his new attorneys, Messrs. Schuld Inc. to Messrs. Vermaak & Dennis, the respondent's attorney, was written on 16 November 2004. Again the applicant makes no attempt to explain such a long delay of over five months.

[61] It is impermissible for a litigant in motion proceedings to raise new grounds in a replying affidavit in order to make out a

case which he failed to make out in his founding affidavit. The weak and fleshless skeleton in the founding affidavit cannot be fortified by adding fat flesh, strong muscles and fresh blood by way of belated supplies in the replying affidavit. **DIRECTOR OF HOSPITAL SERVICES v MISTRY** 1979 (1) SA 626 (NPD) at 635 H – 636 B.

- [62] The applicant's version is fraught with acts of omission. Yet he blames his first attorney for his omissions immediately prior to the judgment. He wants me to believe that he is in a dilemma and that his dilemma is due to the remissness of his first two attorneys. But I thoroughly dissected his own version and I am not persuaded. Our courts are slow to penalise a litigant on account of his attorney's remissness. **R v CHETTY** 1943 (AD) 321 and **REINECKE v INCORPORATED GENERAL INSURANCES LTD** 1974 (2) SA 84 (AD) at 92 F. In this case, however, the record shows that the applicant's acts of omission depict him as a grossly, careless and exceptionally negligent litigant.
- [63] The discursiveness of his founding affidavit is alarming. The vagueness of his replying affidavit and its contradictions are disturbingly amazing. The discord between the two is incredible. His elaborate and accusative narrative suggests that he lacked an honest zeal to resist the case against him. His gross acts of omission, both prior to the judgment and subsequent thereto, move me to say that whatever

remissness there might have been on the part of his previous attorneys, was totally eclipsed by his own gross carelessness or indifference as far as this litigation is concerned. His explanation fails on its own demerits.

[64] The applicant blames all the lawyers for his disdainful violation of the rules. His first attorney, Mr. Barnard, did not involve him when he drafted his plea and counterclaim; did not make him understand the discovery process; did not advise him to be in Bloemfontein on 2 October 2003 for hearing; did not attend the court in Bloemfontein on the same day despite saying he would and did not advise him what transpired afterwards. The respondent's attorney, Mr. De Lange, undertook to furnish him and his second attorney, Mr. Schuld, with copies of the pleadings. He failed to do so despite his undertaking and proceeded to take judgment against him. Mr. Schuld failed to find alternative means of obtaining copies of the pleadings. His third attorney, Mr. Botha, drafted his founding affidavit without the pleadings which is why his founding affidavit is so imprecise. He did not launch this application timeously because he first tried to settle the dispute.

[65] Mr. Daffue argued that the applicant default was brought about by lack of communication. The blame for the lack of communication had to be placed on the shoulders of the remissive first attorney. But Mr. Fischer submitted that the

applicant had presented no reasonable and acceptable explanation for his default. In the circumstances I am persuaded by Mr. Fischer. I am also persuaded by Mr. Fischer's final submission that the most probable reason as to why this application was launched almost two and a half years after the judgment sought to be rescinded is to be found in the applicant's own replying affidavit namely that he owns an undivided half share in a fixed property which the respondent has now caused to be judicially attached which share he reckons to be much more than the value of the respondent's claim. Therefore, as regards the second requirement, as well, of the legal concept of sufficient and good cause I find against the applicant.

[66] Seeing that the applicant has failed to prove sufficient and good cause for the relief of rescission it follows that his application should fail and the judgment should stand.

[67] The general rule of cost should apply. No reason was advanced as to why it should not. I can find no reason either.

[68] Before I pen off, let me make brief comments about two things relative to this application. The first comment relates to the applicant's application for condonation. Strictly speaking there were no good grounds to condone the late filing of the application. All the same I condoned the

applicant's lateness. I did so not on the merits but out of pure desire, to put this long dispute to rest by considering its substance.

[69] The second comment relates to the point raised *in limine* by the applicant. I considered the point. I then decided to rule in favour of the respondent. I did not sustain the objection for two reasons. In my view, Mr. De Lange, as an agent of the respondent, was not precluded from deposing of an answering affidavit on behalf of his client. He was, after all, more familiar than the respondent with the applicant's acts of omissions in particular and the history of the matter in general. Moreover, the applicant's replying affidavit was substantially informed by the very answering affidavit he wanted struck off. Striking the answering affidavit off, would have completely left the replying affidavit as an empty shell. The applicant cannot eat his cake and still have it. Even if no answering affidavit was filed, the application would still have failed for the reasons already advanced elsewhere in the course of my judgment. There were simply no adequate material allegations of fact to sustain it.

[70] In the circumstances I have no choice but to strike out the averments contained in the following paragraphs of the replying affidavit: 4.4.1 and 4.4.2 on p. 78 of the record as well as 4.15 and 4.16 on p. 84 of the record. A replying affidavit is not like an intensive care unit at a hospital where every effort has to be made to resuscitate even the terminally ill or the fatally wounded.

[71] Accordingly I make the following order:

71.1 The applicant's application for condonation is granted.

71.2 There shall be no order of costs relating to such an application.

71.3 The applicant's application for the rescission of the judgment and the orders granted against him on 2 October 2003 under case no. 3964/2001 is dismissed.

71.4 The applicant is ordered to pay the costs of the respondent's pertaining to the opposition of the application for rescission.

M.H. RAMPAL, J

On behalf of the applicant:

Adv. J. P. Daffue
Instructed by:
Israel Sackstein Matsepe Inc.
BLOEMFONTEIN
and
Botha Willemse & Wilkinson
PRETORIA

On behalf of the respondent:

Adv. P.U. Fischer
Instructed by:
Vermaak & Dennis Inc.
BLOEMFONTEIN