

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: **23514/2020**

(1) REPORTABLE: YES/**NO**

(2) OF INTEREST TO OTHERS JUDGES: YES/**NO**

(3) REVISED

DATE: 3/6/2024

SIGNATURE:

In the matter of:

GLANCINAH SHASHA MODINGWANA

Applicant

and

THE BODY CORPORATE AMBER HILL

Respondent

JUDGMENT

DE BEER AJ

Introduction

1. This is a rescission of the judgment application. This matter was enrolled for hearing on the opposed motion roll for the week commencing 4 March 2024. It was allocated for hearing and adjudication on Wednesday, 6 March 2024.
2. Subsequent to argument presented on behalf of the parties, the court granted and handed down an *ex tempore* judgment from the bench

3. The order was granted subsequent to a reasoned judgment handed down by this court *ex tempore*, this court having considered the papers and argument presented.
4. For ease of reference, the order granted that followed the judgment is quoted herein *verbatim*, which reads as follows:

“Having read the papers and hearing Counsel/representatives for the parties, the following order is made:

1. That the rescission application is dismissed with costs.”

5. The court was requested to prepare a written judgment in this matter notwithstanding the *ex tempore* judgment. If a court/judicial officer delivers an *ex tempore* judgment and then prepares a revised version of it which supplements or explains the original judgment without affecting the substance of it, the revised judgment will be considered to be the judgment of the court.¹ In the interest of justice,² the written reasons detailed herein will, therefore, be confirmed on the date that same is handed down.

Representation on behalf of the parties

6. The joint practice note³ provided the details of the parties and their representatives. However, it incorrectly recorded that the applicant acts in person.
7. The applicant is Glancinah Shasha Modingwana (ID No: 7[...]). As recorded in the practice note, Mr Sydney Thihe Modingwana (ID No: 7[...]), the brother of the applicant, advanced argument on his sister’s behalf. The applicant was therefore represented by her brother.

¹ S v Welsh 1990 (1) SA 816 (A) at 819G - 820H; see also Herbstein and Van Winsen, the Civil Practice of the High Courts of South Africa, 5th edition, Vol 1, page 929.

² Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment 2012 (4) SA 551 (SCA).

³ CaseLines p S5 to pS8.

8. The document titled “*General Power of Attorney*”⁴ dated 19 December 2017 and bears a stamp of the South African Police Services dated 20 December 2017 is attached to the papers. The power of attorney to represent the applicant in this matter may suffer deficiencies on scrutiny. The court allowed representation on behalf of the applicant, not as a result of the power of attorney, but in the interest of justice and more importantly, due to the Constitutional right of every citizen to have access to courts and their choice of representation.
9. The respondent, as indicated in the practice note, was represented by Adv CJS Kock.

Application for recusal

10. At the commencement of the hearing, Mr Modingwana applied for my recusal. The court invited Mr Modingwana to state the reasons for the recusal, as there was no previous indication of such an application nor was it addressed or dealt with in the joint practice note or heads of argument delivered and uploaded on behalf of the parties.
11. Mr Modingwana indicated that an internet search of my name (J de Beer) revealed that an individual with the same details is employed with the respondent’s attorney of record, Pretorius Le Roux Inc. Attorneys.
12. I indicated to Mr Modingwana that I am not employed with or at Pretorius Le Roux Inc., nor am I related to the individual apparently referred to. I stated for the record that I am a practicing advocate in private practice and a member of the PSA and PABASA.
13. Mr Modingwana accepted that I am not the individual in the employment of the respondent’s attorney. Mr Modingwana subsequently withdrew the application for my recusal made from the bar. The court, therefore, does not

⁴ CaseLines p N16 to N17.

need to consider the recusal application. Hereafter Mr Modingwana advanced arguments on the applicant's behalf regarding the merits of the rescission application.

Rescission application/Main application

14. The rescission application concerns a judgment granted by default against the applicant (as defendant) on 4 June 2021 regarding alleged outstanding and/or arrear levy account with the respondent (as plaintiff).
15. It is trite that a rescission of judgment application may be instituted under the auspices of Rule 31(2)(b), Rule 42 and/or the common law.⁵ The current application for rescission was seemingly instituted in terms of Rule 31(2)(b), not in terms of Rule 42. Reference is made to the allegations contained in paragraph 9 of the founding affidavit.⁶
16. Therein, the deponent to the founding affidavit, Mr Modingwana (not the applicant), states that the rescission application should address the issues regarding a reasonable explanation for the default, set out a *bona fide* defence, and consider prospects of success. These are the requirements of Rule 31(2)(b), not Rule 42 (Rule 42 deals with the rescission of judgments erroneously granted, i.e., due to an irregularity in the proceedings or if the court was not legally competent to make such an order. Rule 42 does not cover orders wrongly granted).⁷
17. In terms of Rule 31(2)(b) an application for rescission should be instituted within twenty days after acquiring knowledge of such judgment.
18. On the available evidence, no facts are provided under oath to state when the applicant acquired knowledge of the judgment granted on 4 June 2021. Be that as it may, a period of twenty days after the judgment was granted expired on 3 July 2021. This application was instituted on 24 February 2023,

⁵ Freedom Stationary (Pty) Ltd v Hassam 2019 (4) SA 459 (SCA) at 465 E-F.

⁶ CaseLines page N5.

⁷ Seale v Van Rooyen N.O.; Provincial Government, North West Province v Van Rooyen N.O. 2008 (4) SA 43 (SCA) at 52B-C.

therefore a period of approximately twenty months after the twenty-day period expired subsequent to the default judgment granted.

19. In the founding affidavit the deponent states that he could not attend the court proceedings *“due to having no knowledge of the date of either hearing, no notification was received from the Body Corporate. I was made aware of the judgments (sic) after the hearings (sic) were concluded, the applications both happened in my absence.”*⁸
20. Therefore, the applicant’s brother states that he was not made aware of the judgments. There is no reference to a date when he became aware thereof.
21. No evidence is provided by the applicant herself as to when she became aware of *“the judgments...after the hearings were concluded”*.
22. The applicant fails to prove why she should not be time-barred from instituting the current rescission application as no facts have been submitted and proven into evidence on what date she became aware of the default judgment granted.
23. It is also not explained what the relevance is of the fact that *“the applications both happened in my absence”*, referring to the deponent, the applicant’s brother, and not the applicant. The applicant’s brother does not explain whether he was requested to appear in the main action on his sister’s behalf.
24. There is furthermore no evidence provided under oath why the applicant was not present and absent when the default judgment was granted.
25. The respondent deals with this aspect in paragraphs 8.1 to 8.4 of the answering affidavit.⁹ The respondent’s deponent states under oath that the applicant did not attend the hearing of the default judgment on either 7 August 2020 or 4 June 2021. The respondent deals with the notice of set down of the default judgments that were served on the applicant and states

⁸ CaseLines page N4, paragraph 8.

⁹ CaseLines pages P14 and P15.

that the judgments (plural, as referred to in paragraph 8 of the founding affidavit) were obtained through the normal course of litigation after the applicant failed to defend the said actions.

26. The respondent continues to indicate that the applicant participated in the litigation and entered an appearance to oppose applications instituted against her under the auspices of Rule 46 and in paragraphs 4.2 and 4.3 of the answering affidavit refer to attached pleadings and notices of the applicant which constitutes a notice of intention to oppose and “*WRITTEN SUBMISSIONS (RESPONDENT’S PLEA)*”.
27. On behalf of the respondent, it is therefore contended that the applicant was aware of both judgments granted (although this application only concerns the default judgment granted on 4 June 2021 as per the notice of motion) and that there is, therefore, non-compliance with Rule 31(2)(b).
28. The respondent therefore submitted (as recorded in the answering affidavit and thereafter in the heads of argument) that the applicant was duty-bound to seek condonation alternatively an extension of the time provided in Rule 31(2)(b), in accordance with the provisions of Rule 27 seeking an extension of time to extend or abridge any time prescribed by the Rules.
29. The applicant seemingly addressed condonation for the late institution of this rescission application. However, under the heading in the founding affidavit “CONDONATION FOR LATE APPLICATION”,¹⁰ the deponent does not deal with any facts upon which this court can grant condonation. In this regard, reference is made to the only three paragraphs dealing with condonation, i.e., paragraphs 7, 8 and 9. These paragraphs are devoid of any particulars upon which the court can make an assessment as to whether condonation should be granted, if any. The authorities regarding condonation is rather trite as well as the legal principles involved. The applicant’s heads of

¹⁰ CaseLines page N4.

argument fail entirely to address condonation or the extension of time provided in Rule 31(2)(b).

30. Rule 27(1) of the Uniform Rules of Court states the following:

“In the absence of an agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.”

31. It is trite that granting condonation remains in the court’s discretion which must be exercised with consideration of the merits of the matter as a whole,¹¹ and for the court to be put in a position where it can exercise its discretion and consider the merits of the case, good cause must be shown by the applicant.¹²
32. In order to satisfy the “*good cause*” requirement, the applicant must satisfactorily explain the “*delay*” in complying with the times set in the Rules and, would further have to satisfy the court that a “*bona fide defence*” exists.¹³
33. In the matter of *Van Wyk v Unitas Hospital and Another*,¹⁴ the Constitutional Court stated that: “*an applicant for condonation must give a full 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.*”

¹¹ See *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 216H – 217A. See also *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307A – 308A.

¹² *Du Plooy v Anwes Motors* at 216H – 217D.

¹³ See Erasmus: Superior Court Practice RS 20, 2022, D1-323 and the Authorities cited therein.

¹⁴ (CCT 12/07) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (6 December 2007) at paragraph 22.

34. Furthermore, in *Grootboom v National Prosecuting Authority*,¹⁵ the Apex Court, emphasising the legal position of condonation, held that: *“it is axiomatic that condoning a party’s non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation. It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court’s directions. Of great significance, the explanation must be reasonable enough to excuse the default...”*
35. In *Darries v Sheriff, Magistrate’s Court, Wynberg & Another*,¹⁶ the SCA stated the following in respect of the considerations: *“Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting an appeal, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant’s attorney, condonation will be granted. In applications of this sort, the applicant’s prospects of success are in general an important though not decisive consideration. When application is made for condonation, it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant’s prospects of success. But appellant’s prospect of success is but one of the relevant factors relevant to the exercise of the Court’s discretion unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.”*

¹⁵ 2014 (2) SA 68 (CC) at 75F–H, 76C–D and 78B–79C.

¹⁶ 1998 (3) SA 34 (SCA) at 40H – 40E.

36. In determining whether the requirement of a “*bona fide*” defence has been met, the Supreme Court of Appeal in *Ingosstrakh v Global Aviation Investments (Pty) Ltd*,¹⁷ held that the applicant must show that his/her defence is not patently unfounded and that it is based upon facts (which must be set out in outline) which, if proved, would constitute a defence.
37. In the matter of *Robson v Wax Works (Pty) Ltd & Others*,¹⁸ though the court therein was dealing with an insolvency law matter, it had to determine what is a *bona fide* defence, and it held that the one alleging that they have a *bona fide* defence, need to allege facts which if proved, would constitute a good defence to the claim.

The law applied to the facts

38. In this case the applicant was bound by the Rule to apply for condonation. No facts have been presented upon which a considered adjudication can be made as to whether the time period should be extended within which to institute this application.
39. Be that as it may, the application also lacks particularity in respect of a *bona fide* defence. According to the deponent, the representatives of the respondent (Body Corporate) are guilty of “*offenses we can prove are specifically related to money laundering by parties administering the affairs of the said levy account.*”
40. Further to this, the deponent under the heading of “PROSPECTS OF SUCCESS”¹⁹ states although he lacks knowledge of court processes, he possesses knowledge of “*Anti-money laundering and counter-terrorist financing legislation*” in order to defend “*the application*” (seemingly referring to the main action).

¹⁷ 2021 (6) SA 352 (SCA).

¹⁸ 2001 (3) SA 1117 (C) 1122.

¹⁹ CaseLines page N8, paragraphs 23 to 26.

41. The various allegations of money laundering conclude with the deponent stating that he will prove that the applicant *“does not owe the Body Corporate Amber Hill, the Body Corporate Amber Hill owes Ms Modingwana instead”*. Duly interpreted the defence regarding criminal activities of the respondent is based thereon that the respondent owes the applicant monies, as contended.
42. No facts have been presented to support these submissions, and no criminal investigation seems to have been pursued against the respondent. These serious allegations have not been pursued with the relevant prosecuting authority. It, therefore, lacks factual basis and seems to be unmeritorious.
43. Further allegations are made of an abuse of process, again without any evidence.
44. Although this court cannot find that condonation should be granted for the late institution of the application, and is not duty-bound to proceed beyond such an investigation, the court is furthermore unconvinced that the founding papers provide any facts submitted and proved in evidence to prove the existence of a prospect of success in the main action.
45. There are no underlying facts to prove any allegation that the respondent, in fact, owes the applicant any money. The applicant has failed to institute an action or indeed prove any fact that, should this court rescind the default judgment, a counterclaim will have any success. No underlying facts have been alleged as to when the applicant's claim would have arisen and/or any facts to prove any indebtedness or the quantum. It is for the applicant to prove such facts once alleged which the court can consider sustaining the relief sought. In this matter, no such facts have been provided and/or proven on a proper analogy of the pleadings.

Motion proceedings

46. The basic principle in motion proceedings is that the affidavits define the issues between the parties and the affidavits embody evidence. An applicant

who seeks relief from a court must make out a case in its notice of motion and founding affidavit.²⁰

47. In *Betlane v Shelly Court CC*,²¹ the Constitutional Court stated that it is trite that an applicant ought to stand and fall by its notice of motion and the averments made in its founding affidavit.
48. In *National Council of Societies for the Prevention of Cruelty to Animals v Open Shore*,²² the SCA referred with approval to *Shakot Investments (Pty) Ltd v Town Council of Borough of Stanger*²³ where Muller J said: *“In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such fact as would, if true, justified the relief sought ...”*.
49. Because motion proceedings are concerned with the resolution of legal issues based on common cause facts, where there are disputes of fact in proceedings in which final relief is sought, those disputes are to be determined in accordance with the Plascon Evans rule.²⁴
50. The accepted approach to deciding factual disputes in motion proceedings requires that subject to “robust” elimination of denials and “fictitious” disputes, the court must decide the matter on the facts stated by the respondent, together with those the applicant avers, and the respondent does not deny. On the accepted test for fact-finding in motion proceedings, where disputes of fact arise, it is the respondent’s version that will prevail.²⁵
51. It is also trite that annexures to affidavits do not, by their mere attachment to affidavits, constitute part of the pleading and evidence.

²⁰ *Molusi and Others v Voges N.O. and Others* 2016 (3) SA 370 (CC) at [27].

²¹ 2011 (1) SA 388 (CC) at 2; see also *Brayton Carlswald (Pty) Ltd and Another v Brews* 2017 (5) SA 498 (SCA) at [29].

²² 2008 (5) SA 339 (SCA) at [29] to [30].

²³ 1976 (2) SA 701 (D) at 704F-G.

²⁴ *National Director of Public Prosecutions v Zuma* 2009 (1) SA 277 (SCA) at [26].

²⁵ *Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at p634E - 635J; *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at [63] to [64]; *Snyders v De Jager and Others* 2017 (3) SA 545 (CC) at 565, [71].

52. Where a party relies on documents annexed to the affidavit, it is not open to the party to merely annex documents to its affidavit and to assume that the courts will have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made on the strength thereof, in the affidavit. The other party must know what case it must meet and respond to.
53. As Harms J pointed out in *National Director of Public Prosecutions v Zuma*,²⁶ a party cannot be expected to trawl through annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained.

Conclusion

54. I have dealt with the respondent's version pertaining to the applicant's probable knowledge of the judgment above. The respondent also deals with the failure to provide a reasonable explanation for the late bringing of this application, i.e., the failure to provide facts upon which condonation can be adjudicated and sought. The respondent deals with the basis upon which the default judgment was sought, due to the applicant's failure to pay the levy account of the respondent, a Homeowners' Association. The respondent provides details of the levy statement and provides detailed reasons to support the same. Any allegations pertaining to money laundering are denied, and the respondent states under oath that its management agent has maintained the levy account lawfully.
55. The applicant filed two affidavits referred to as "*supplementary affidavit*", also deposed to by the applicant's brother and not by the applicant herself. The first of these were deposed to on 24 April 2023²⁷ (thereafter the answering affidavit was deposed to on 17 May 2023²⁸) and the second on 28 August 2023.²⁹ The supplementary affidavits constitute further affidavits, no reasons have been provided why such a further affidavit should be accepted. Be that

²⁶ 2009 (2) SA 277 (SCA) at [50].

²⁷ CaseLines p N59.

²⁸ CaseLines p P34.

²⁹ CaseLines p N63.

as it may, the respondent responded to the first answering affidavit. Nothing much turns on the contents of those affidavits (which seem similar, although deposed to on different dates) and do not advance the rescission application. These affidavits do not constitute a replying affidavit.

56. The applicant had the opportunity to address and respond to the version presented on behalf of the respondent in its answering affidavit and in a replying affidavit in terms of the Rules. The applicant failed to file a replying affidavit; the court must, therefore, assess the evidence presented in the founding and answering affidavits. The version of the respondent has not been attacked, whereas the applicant's version in the founding affidavit has been denied. The respondent's denial cannot be rejected and is therefore accepted.
57. In doing so, the applicant did not institute the application for rescission in terms of Rule 31(2)(b) within the time provided; she provided no facts when she acquired knowledge of such judgment. According to the respondent, the applicant was aware of the default judgment granted against her. The court cannot find any reason why the respondent's version should be rejected in this regard; the court, therefore, accepts that the application was not instituted within the time provided.
58. This court also accepts the respondent's version denying a *bona fide* defence or that there exists any prospect of success should the initial action that culminated in a default judgment be resuscitated by way of a rescission as sought.

Order

59. For the reasons detailed above, the order granted after the *ex tempore* judgment was granted is herein confirmed, and there is no reason why the court should deviate from the normal position as to costs; costs should follow the event. The order granted on 5 March 2024 is therefore confirmed and the rescission application is dismissed with costs.

DE BEER AJ

Acting Judge of the High Court

Gauteng Division

Date of hearing:	6 March 2024
Judgment delivered:	3 June 2024
For the applicant:	Mr ST Modingwana Cell: 082-294-2854 Email: sydneymodingwana@gmail.com
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