



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: 08/August/2024

SIGNATURE: [Redacted Signature]

Case No: 69840/2019

In the matter between:

MINISTER OF POLICE

APPLICANT

And

PHIRI, LYDIA MATSHIDISO

RESPONDENT

ACTING JUDGE KEKANA

Heard on: 02 May 2024

Delivered: MAY 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system.

JUDGMENT

KEKANA AJ

INTRODUCTION

- [1] This is an application to set aside a default judgment which was granted on 29 April 2021 in terms of the provisions of Rule 31(2)(a) of the Uniform Rules. The application is brought in terms of Rule 42(1)(a) of the Uniform Rules of Court on the basis that the judgment aforementioned was erroneously sought and/or erroneously granted in the absence of the Applicant.
- [2] Uniform Rule 42(1)(a) reads as follows:
- “The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
- (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby”
- [3] It has been held that an application for rescission under rule 42(1)(a) must satisfy four requirements namely:
- (a) that the applicant must be a party affected by the judgment;
- (b) that the judgment must have been granted in the absence of such party;
- (c) that the judgment must have been erroneously sought or granted; and
- (d) that should the above three criteria be met the applicant in such an application also satisfy the court that it should exercise its discretion in favour of granting rescission.”

- [4] It was pointed out by Khampepe J at para 53 in the case of ***Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others***¹ that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. One will have to find whether the requirements are met before exercising the discretion.
- [5] The applicant in his supplementary heads of arguments at para 2.2 put across a point which seeks to give the impression that requirement (a) and (b) are not in dispute. That he is a party affected by judgment and that the judgment was granted in his absence. The thrust of applicant's arguments before this Court is that the default judgment has rescindable errors and omissions susceptible to rescission in terms of rule 42 of the Uniform Rules of Court. It is against this background that the Applicant submits that judgment was erroneously sought or granted.
- [6] I wish to now deal with the absence of the applicant at the proceedings, here I will refer to the reasoning of Khampepe J at para 57 where she states that:
- ...when dealing with the "absence ground", the nuanced but important distinction between the two requirements of rule 42(1)(a) must be understood. A party must be absent, and an error must have been committed by the court. At times the party's absence may be what leads to the error being committed. Naturally, this might occur because the absent party will not be able to provide certain relevant information which would have an essential bearing on the court's decision and, without which, a court may reach a conclusion that it would not have made but for the absence of the information.
- [7] At para 60 Khampepe J goes on to state that:
- the extent to which...emphasise is placed on actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed, I accept this. I do not, however, accept that litigants can be allowed

¹ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28.

to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, *ipso facto* (by that same act), plead the “absent victim”. If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence).

[8] At para 61, Khampepe J goes onto say that our jurisprudence is clear:

where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia, into one erroneously granted.

[9] In the present case before me, the Applicant who is the defendant in the main action was properly served and notified timeously as per Uniform Rules of Court of the impending default judgment proceedings, this is not disputed by the Applicant. The Applicant still chose and elected not to be present at the proceedings. This to me is a clear case of ‘election’ as demonstrated in the case of *Zuma* (supra) at para 8 above. Because the matter had been properly enrolled and that all the Rules of the Court had been complied with, the [Respondent] was quite within its rights to press for judgment in terms of the rules (see ***Bakoven Ltd v G J Howes (Pty) Ltd***²). It is for this reason that the Applicant fails to meet the requirement of absence. Meaning the absence by the Applicant in the current matter does not fall within the scope of the requirement of rule 42(1)(a) as stated by Khampepe J in the *Zuma* case (supra).

[10] I now will proceed to deal with the other requirement, whether the judgment was erroneously sought or erroneously granted. An applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because “there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment.”³

² 1992 (2) SA 466 (E) at 472D).

³ *Nyingwa v Moolman N.O.* 1993 (2) SA 508 (TK) at 510D-G.

- [11] The applicant submits a list of aspects both procedural and substantive that the Judge was not aware of which had the Judge been aware thereof the default judgment would not have been granted. Applicant in its supplementary heads of arguments list a number of facts about what allegedly happened at the proceedings. It has been stated in *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*⁴ that:

“in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one”.

- [12] The applicant had an opportunity to present its defence or objection at the proceedings, it had an opportunity to assist the Court by putting forward those procedural and substantive irregularities it now seeks to advance but instead it elected not to do so, as such the applicant cannot now come before this Court and plead an innocent victim. The Applicant’s deliberate and willful absence contributed to the alleged error [if any] it now seeks to rescind.
- [13] Chief amongst the facts the Applicant wants to advance in showing that the judgment or order was erroneously granted is the issue of jurisdiction. The Applicant relies heavily on the notice in terms section 5(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 which states that legal proceedings must be issued in the court in whose area of jurisdiction the cause of action arose unless the Organ of State in writing consents to the institution of legal proceedings in a different jurisdiction. Since the cause of action arose in Hammanskraal which falls within the jurisdiction of the High Court of South Africa,

⁴ 2007 (6) SA 87 (SCA) para 27.

North-West Division, the applicant had to consent to the jurisdiction of this Court. Since there was no such consent obtained from the Applicant, this Court had no jurisdiction.

[14] Startlingly, the Applicant in its plea in the main action admitted paras 1, 2, and 3 of the Respondent particulars of claim. Para 3 of the (Respondent) Plaintiff's particulars of claim in the main action deals specifically with the Jurisdiction of this Court and the Applicant admitted thereto. The Applicant did not object then on the jurisdiction of this Court.

[15] Again, the Applicant argues that the Respondent was precluded from instituting an action against the Applicant including applying for default judgement, until such time as the Respondent has brought an application for condonation for her averred late filing of the section 3(2) notice as provided for in Act 42 of 2002 or until such time as the averred late filing of the section 3(2) notice is condoned by the Applicant. The case of ***Minister of Safety and Security v De Witt***⁵ clarifies any existing confusion on the interpretation of section 3(2). At para 10 read with para 11 it is said that:

... "if the organ of state makes no objection to the absence of a notice, or a valid notice, then no condonation is required". It follows that where no notice at all is given by the creditor, and the organ of state relies on the failure, the creditor can nonetheless apply for condonation. A fortiori, if the notice is sent out of time, condonation may be granted. The argument that the application for condonation must precede the issue and service of summons (and that if it does not the summons is ineffective) is unpersuasive.

[16] The Applicant's interpretation of the *De Witt's* case is incorrect. The Respondent still has the opportunity to seek and apply for condonation on the matter. It has been held that "the requirement of written notice as a precondition to the institution of legal proceedings would be an absolute bar to such proceedings and would constitute a real impediment to the claimant's access to court"⁶. The Applicant

⁵ 2009 (1) SA 457 SCA.

⁶ *De Witt* (supra) at para 11.

cannot therefore rely on the Respondent's non-compliance with section 3 of Act 40 of 2002 as the reason he elected not to participate when properly invited to the proceedings.

- [17] The Applicant also, advances certain irregularities that allegedly took place when the default judgment was granted. Unfortunately, from the evidence before me, there is no evidence presented either *viva voce* or by way of affidavit under oath of record of the proceedings by the Applicant to demonstrate and advance any argument(s) in relation to the alleged irregularities that took place at the proceedings. It is against this background that I can conclude that in this case the requirement that the judgment was erroneously sought has not being met.
- [18] Applicant goes on to further submits that Rule 42 does not prescribe a time period within which an application in terms of Rule 42 should be brought. The Applicant can therefore not be said to be in breach of any non-compliance with any time periods set out in the Rules of Court.
- [19] I agree with counsel for the Respondent and the authority he refers to that the very purpose of Uniform Rule of Court specifically Rule 42 is "to correct expeditiously an obviously wrong judgement or order".⁷ Assuming the requirements under Rule 42 are met, on proper exercise of the Court's discretion the Applicant must bring the application for rescission within reasonable time or show good cause why the application was not brought within reasonable time.
- [20] The Applicant became aware of the default judgment as of February 2022, but it was only in March 2023 that the Applicant started to initiate proceedings to launch a rescission application. In this case the Applicant brings an application for rescission a year later after it became aware of the default judgment, to my opinion this cannot be reasonable time. I can conclude that more than a reasonable time

⁷ *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 777F-G; *Theron NO v United Democratic Front (Western Cape Region)* 1984 (2) SA 532 (C) at 536G.

has elapsed since the Applicant became aware of the default judgement granted against it, to decide now to launch a rescission application.

- [21] The question that is before this Court in relation to lapsed time is whether there exists any good cause why the application for rescission is launched a year later. The Applicant does not even attempt to convince this Court of any such good cause for the late application nor advance any other reason to that effect for the Court to consider but rather chooses to remain silent on the matter. It was stated by Didcott J in ***Mohlomi v Minister of Defence***⁸ ...that: inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs.
- [22] Without good cause shown by the Applicant for the late application for the rescission of judgment, the conclusion is strong that the application by the Applicant cannot be said to be bona fide. And as such, this application cannot succeed.
- [23] For the reasons set out herein, I grant the following order:
1. The application for the rescission of default judgment is dismissed with costs as between attorney and client.



AJ KEKANA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

⁸ 1997 (1) SA 124 (CC).