

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 54791/2021

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

Date: 19 November 2024 E van der Schyff

In the matter between:

Kgalemo Construction CC

First Applicant

Wilhelmina Semeemee Aphane

Second Applicant

Lehumo Makgalemele Aphane

Third Applicant

and

Small Enterprise Finance Agency SOC Ltd

Respondent

JUDGMENT

Van der Schyff J

Introduction

- [1] The applicants seek the rescission of the default judgment granted against them on 15 May 2023 under the abovementioned case number.
- [2] The discerning feature of this application is that default judgment was granted after the applicants in this application, the defendants in the trial, were unsuccessful in obtaining a postponement. When the trial court dismissed the application for postponement, the applicants' legal representatives withdrew and left the courtroom. The matter proceeded on a default basis.
- [3] The presiding judge, Van Niekerk AJ, handed down a written judgment stating the reasons for dismissing the postponement application.
- [4] The applicants aver that they have not acted willfully, that there is a reasonable explanation for their default, that the application is made *bona fide* and not with the intention to delay the plaintiff's claim, and that they have a *bona fide* defence to the plaintiff's claim.
- [5] The applicants, peculiarly, chose not to pin the rescission application to a specific rule, statute, or common law provision when the papers were drafted. When the rescission application was heard, counsel submitted that the application is brought in terms of the common law.

Jurisdictional requirement for the rescission of an order

- [6] It is trite that a party may approach the court to rescind an order handed down in its absence. An application for rescission can be brought in terms of Rule 31(2)(b), Rule 42, or the common law.
- [7] Rule 31(2)(b) provides that a defendant may, within 20 days after acquiring knowledge of judgment being granted against it, apply to the court to set aside the judgment, and the court may, on good cause shown, set aside the default judgment.

Rule 42(1) provides that a court may rescind a judgment erroneously sought or erroneously granted in its absence. The latter clearly does not find application. The court may also be approached in terms of the common law.

- [8] The 'good cause' requirement inherent to Rule 31(2)(b) applications is the same as in applications under the common law. It, among others, requires an applicant to provide a reasonable and satisfactory explanation for his default.

Discussion

- [9] *In casu*, the applicants' absence from the proceedings was brought about by their legal representatives withdrawing from the matter. The same attorneys of record, coincidentally, noted their appearance on behalf of the applicant a mere month later.
- [10] The Constitutional Court reaffirmed in *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 even where a party has prospects of success on the merits, it cannot escape the obligation to adequately explain its default.²
- [11] *In casu*, the applicants do not explain their default except to confirm that their legal representatives withdrew when the postponement application was dismissed. The applicants were not ignorant of the proceedings instituted against them. The applicants' default was brought about by a conscious decision of their legal representatives, who were mandated to act on their behalf and restricted to conducting themselves within the scope of their instructions. In any event, the applicants do not aver that their legal representatives withdrew despite instructions to the contrary or without obtaining instructions on the issue. In these circumstances, it cannot be said that the applicants' have been prejudiced 'through no fault of their own.'³

¹ 2021 (11) BCLR 1263 (CC) (17 September 2021)

² *Supra*, ad para [74].

³ *Ibid.*

- [12] Since the applicants failed to explain their default adequately, it is not necessary to move on to the second leg of the good cause enquiry, namely to consider the applicants' prospects of success.⁴
- [13] However, on this score, the applicants did not succeed in making out a case that there are viable prospects of success. They first need to succeed with an application to amend their Plea, an aspect Van Niekerk AJ considered when he refused the postponement. The applicants' historic lackadaisical approach does not indicate a party actively pursuing to defend a matter. It needs to be mentioned that it was the respondent who enrolled this rescission application to obtain finality in the matter.
- [14] The applicants intentionally declined to participate in the proceedings once their postponement application was dismissed. The Constitutional Court in *Zuma, supra*, explained that the word 'absence' in Rule 42(1)(a) 'exist[s] to protect litigants whose presence was precluded, not those whose absence was elected.' The same can be extended to rescission applications in terms of the common law.
- [15] The applicants elected not to partake in the legal proceedings. They sought to outsmart the system. Parties are, however, not engaged in a tactical gamefare when courts are approached for relief. Without a reasonable explanation for their default, this court is not obliged to assess the applicants' prospects for success.
- [16] This court can but echo the Constitutional Court's sentiment: 'The truth is that [the applicants have] failed to provide a plausible or acceptable explanation for [their] default. This being so, [they] cannot hope to succeed on the merits, for ultimately "an unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits".⁵ The rescission application thus stands to be dismissed.
- [17] Counsel for the applicants submits that the interest of justice warrants this court to consider their prospect of success if the order is set aside. The interest of justice is a double-edged sword. It is not in the interest of justice to allow litigants to foil the

⁴ *Supra*, ad para [76].

⁵ *Ibid.*

consequence of a postponement application being dismissed through legal representatives merely withdrawing from a matter once things do not go their way, even more so where it is not stated that the legal representatives acted of their own accord and without instructions.

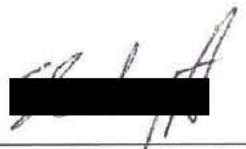
Costs

[18] This rescission application constitutes, in my view, further abuse of process. The punitive costs order sought is justified.

ORDER

In the result, the following order is granted:

- 1. The late filing of the replying affidavit is condoned.**
- 2. The rescission application is dismissed with costs on attorney and client scale.**



E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the first to third applicants:

Adv. J. H. Sullivan

Instructed by:

Waldick Incorporated

For the respondent:

Adv. J. Van der Merwe

Instructed by:

Tim du Toit & Co incorporated

Date of the hearing:

18 November 2024

Date of judgment:

19 November 2024