

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 1691/2020

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

SPEAKER OF LIMPOPO PROVINCIAL LEGISLATURE

APPLICANT

And

ROBERT TOOLEY

RESPONDENT

JUDGEMENT

KGANYAGO J

[1] The respondent has instituted an action against the applicant claiming gratuity payment of R759 969.44 being in respect of the alleged two periods which the

respondent has served as a member of the Limpopo Provincial Legislature. According to the respondent, he was erroneously paid R723 191.98 which was for one term instead of R1 410 827.00. The applicant had defended the respondent's action. Pleadings were closed and the respondent applied for a trial date. The applicant was represented by the Office of the State Attorney. The matter was set down for the 20th to 21st February 2023. The set down was served at the Office of the State Attorney on 22nd February 2022. On the trial date the applicant and his legal representative failed to attend court and the respondent obtained a default order on 20th February 2023.

[2] The applicant launched his rescission application on 16th August 2023. The rescission application was brought in terms of rule 42 of the Uniform Rules of Court (Rules) and in terms of common law. In the founding affidavit the applicant alleges that he became aware of the default judgment on 30th June 2023 through an email sent to him. The applicant submits that even though the set down shows that it has been duly served, the State Attorney was not aware of the date of trial, as the set down was served during the time when the Covid 19 regulations were still in place. During the Covid 19 period, all documents at the State Attorney were served through the security personnel at the ground floor wherein they will be stamped and put in a box. The State Attorney's personnel will check documents in the box. That the set down of the 20th and 21st February 2023 might have been misfiled or not diarized properly or error in service. The State Attorney never notified the applicant about the trial date.

[3] After obtaining the default order, the respondent sent the court order to the Office of the State Attorney per their letter dated 31st March 2023. State Attorney only sent a letter to the applicant notifying him of the court order on 30th June 2023 after the respondent had sent a reminder to the State Attorney seeking swift action. The applicant decided to investigate the circumstances that led to the default order, and on 10th July 2023, the applicant decided to seek the services of an external attorneys. The external attorneys requested the documents of the matter from the respondent's attorneys. The external attorneys received the documents from the respondent's attorneys of 17th July

2023 and finalised drafting the rescission application on 10th February 2023 which was served and filed on 16th August 2023. The applicant submit that he was not in wilful default.

- [4] The applicant submit that he had a bona fide defence to the respondent's claim. According to the applicant, the respondent was a member of the Limpopo Provincial Legislature from 1994 until 2007 when he resigned. The gratuity payment for non-returning members was introduced after the 2009 elections which was published in the provincial gazette notice 1565, 2008, and it did not apply retrospectively for the period before 2008. The respondent returned to the Provincial Legislature and served the period from 6th May 2014 to 7th May 2019. The respondent was paid gratuity of R723 191.98 been for the period 6th May 2014 to 7th May 2019. The respondent is not entitled to gratuity payment for the period within which the government notice for payment of benefits was not in operation. Mphahlele Ramabu from the Office of the State Attorney had deposed a confirmatory affidavit confirming the applicant's founding affidavit where it relates to him.
- [5] The respondent is opposing the applicant's rescission application. In his answering affidavit the respondent has raised a point in *limine* that the applicant has failed to make a condonation application for late filing of his rescission application. The respondent had submitted that the default order was obtained on 20th February 2023, and brought to the attention of the applicant on 31st March 2023. The applicant was again served with the default order on 29th June 2023. It is the respondent's contention that the applicant had brought his rescission application outside the 20 days period without the consent of the respondent or condonation application.
- [6] On merits the respondent has submitted that the proper case which justified the default judgment was presented through oral evidence during the trial. According to the respondent he was entitled to gratuity payment for the period 27th April 1994 to 28th February 2007, and also for the period 6th May 2014 to 7th May 2019. The respondent denies that the default judgment of the 20th February 2023 was erroneously obtained. The notice of set down was

properly served of the applicant's legal representatives, and at all material times from the 22nd February 2022 the applicant was aware that the matter has been set down for hearing from 20th to 21st February 2023.

- [7] The applicant has committed a pure domestic negligence through his attorneys of record, and that the applicant is the author of his own misfortune. The State Attorney was served with an index and pagination for trial hearing on 16th February 2023. The index and pagination included the notice of set down. The 16th February 2023 was after the Covid-19 regulations were lifted. The warrant of execution against the property was served on the applicant on 8th August 2023, and the applicant brought his rescission application on 16th August 2023. The reasonable inference to be drawn is that the applicant only brought the rescission application after he was served with the warrant of execution.
- [8] The letter dated 9th July 2019 from the Office of The Secretary of the Limpopo Legislature state that the respondent be paid an amount of R723 191.98 for out of office gratuity for the two periods, being the 27th April 1994 to 28th February 2007, and 6th May 2014 to 7th May 2019. The applicant's submission that the provincial gazette does not cover the period below 2008 and that the respondent was only paid a gratuity for a term he assumed office from 6th May 2014 to 7th May 2019 in the sum of R723 191.98 is completely incorrect, and is meant to mislead the court.
- [9] In his replying affidavit, the applicant has stated that his rescission application is not been brought in terms of rule 31(2)(b) of the Rules, but in terms of rule 42 of the Rules and common law. The 20 days period is applicable if the application is brought in terms of rule 31(2)(b), but an application in terms of rule 42 and common law must be brought within a reasonable time.
- [10] For the applicant to succeed with a rescission of judgment under common law must show good cause, and generally the grounds for that include fraud, *justus* error, and in exceptional circumstances when new documents have been discovered. In terms of common law, a court has a discretion to grant

rescission of judgment where sufficient or good cause has been shown and the applicant must present a reasonable and acceptable explanation for his/her default. On the merits, under common law the applicant has to show a bona fide defence, which prima facie, carries some prospects of success. Rule 42(1) of the Rules provides that the High Court may in addition to any powers it may have, *mero motu* or upon application of any party affected, rescind or vary an order or judgment erroneously sought or granted in the absence of a party affected by that order. In terms of rule 42 of the Rules, the applicant has to show good cause, which includes giving a reasonable explanation for his/her default; that the application is brought bona fide; and that there is a bona fide defence or substantial defence against the claim grounding the impugned judgment. (See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*¹. In terms of rule 31(2) a party wishing to apply for rescission of judgment must do so within 20 days of acquiring knowledge of the judgment upon good cause shown.

[11] In *Chetty v Law Society, Transvaal*² Miller JA said:

“But it is clear that in principle and in the long standing practice of our Courts two essential elements of “sufficient cause” for rescission of a judgment by default are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on merits such a party has a bona fide defence, which prima facie carries some prospects of success”.

[12] The respondent has raised a point in *limine* arguing that the applicant’s rescission application is out of time, and that the applicant has failed to bring a condonation application. The respondent point in *limine* is based on rule 31(2)(b) which requires a party bringing a rescission application to do so within 20 days of acquiring knowledge of such judgment. However, the

¹ 2003 (6) SA 1 (SCA)

² 1985 (2) SA 756 (A) at 765B-C

applicant has brought his rescission application in terms of rule 42 of the Rules and common law which will require a party bringing such application to do so within a reasonable time of becoming aware of the default judgment. The respondent's point in *limine* is misplaced, has no merit and stands to fail.

[13] Throughout the proceedings before the default judgment, the applicant was represented by the Office of The State Attorney, Polokwane. It is not in dispute that the notice of set down was served at the Office of the State Attorney on 22nd February 2022 notifying them of the trial date which was for the 20th to 21st February 2023. From the applicant's founding affidavit which was confirmed by Mr Ramabu from the Office of the State Attorney, it is not clear as to what would have happened to the set down after it was served on them. It is alleged that there might have been a misfiling or failure to diarise properly or possible error in service process.

[14] The set down has been duly signed and stamped with the stamp from the Office of the State Attorney, and it can therefore not be said that there was any possible error in service. As it was still during the covid-19 period, service was done at the designated area hence the set down was duly signed and stamped. If the set down was not properly diarised, that could have been easily detected, as on perusal of the diary, Ramabu would have found the wrong date on which it was diarised. However, the applicant has failed to state the wrong date on which the matter was not properly diarised. With regard to misfiling, that is where there might be some challenges. However, even if there were some misfiling, not properly been diarised or error in service, the Office of the State Attorney on 16th February 2023 a week before the trial date was served with index and pagination for the trial date. That index and pagination contained the set down, and service for that was done long after the covid-19 regulations were relaxed. Even in his replying affidavit the applicant has failed to deal with the issue of the index and pagination containing the set down been served on them. Ramabu had read the applicant's founding affidavit and confirmed it despite the deficiencies I have pointed out. He agreed with the applicant's founding affidavit despite it showing that he might have acted negligently, and did not try and correct any

element that point to him acting negligently. Taking into consideration the circumstances surrounding this matter, the only conclusion to arrive at is that Ramabu who was assigned to handle the applicant's matter did not fulfil his professional responsibility and had handled this matter in a negligent manner.

[15] In *Webster and Another v Santam Insurance Co Ltd*³ Kotze JA said:

"A lay client, like each of the appellants, is ordinarily entitled to regard an attorney duly admitted to the practice of the law as a skilled professional practitioner. Ordinarily he places considerable reliance upon the competence, skill and knowledge of an attorney and he trusts that he will fulfil his professional responsibility. It is, of course, not unknown for an attorney or his firm to be negligent in carrying out professional duties, but that is not usual, and a *fortiori* to the lay client it would be a most unusual and unexpected occurrence. Consequently, in considering whether the neglect of an attorney constitute a special circumstances within the meaning of that phrase in sec. 24(2)(a) of the Act, the correct approach should always be to regard it as a relevant factor and to recognize that such neglect by an attorney may frequently be special circumstances on its own vis-à-vis his client. To hold without qualification ... that a client is bound by the negligent of his legal advisor is in my respectful view, wrong ... It may well be that to attribute to a client the negligence of his attorney would be justifiable in cases where he (client) is partly to blame through his supineness or otherwise for his attorney's dilatoriness".

[16] The applicant had entrusted the Office of the State Attorney to represent him in a professional way, and was relying on their competence, skill and knowledge of their profession. He expected the Office of the State Attorney to update him of the progress of his case timeously at all times. Since the Office of the State Attorney alleges that the notice of set down was not brought to the attention of the person who was assigned to the applicant's matter, it is clear that the applicant was at no stage notified of the date of hearing. Without

³ 1977 (2) SA 874 (A) at 883G-884A

been notified of the date of hearing, the applicant would not have known that his matter was proceeding on 20th and 21st February 2023. There is no evidence that the applicant was also partly to blame for his failure to attend court on the stipulated date. The applicant can therefore not be associated with manner in which the Office of The State Attorney has handled his matter which led to the respondent obtaining a default judgment and order.

[17] In *Occupiers, Berea v De Wet*⁴ Mojaelo JA said:

“...the High Court did not discharge its duty to enquire into all the relevant circumstances. This resulted in the Court being unaware of essential issues of fact when granting the order. The Court was for instance not aware that there were 180 occupants who were absent when it granted the eviction order. The Court was further not aware that those who purported to confirm the agreement on the side of the applicants have no mandate to bind the absent 180 applicants. The basis for granting the eviction order was that all the parties had consented thereto. The 180 absent applicants had however not consented thereto and were not bound by anybody present in court. The eviction order was thus erroneously granted in the absence of the 180 applicants.

[18] The basis upon which the default judgment and order was granted on 20th February 2023, was on the basis that there was a proper service of the set down on the applicant's attorneys, and also a letter dated 9th July 2019 from the Office of the Secretary of the Limpopo Legislature which state that the respondent's calculation of his gratuity was for the two periods from 27th April 1994 to 28th February 2007 and 6th May 2014 to 7th May 2019. The court was unaware that the applicant was at no stage notified of the trial date. The provincial gazette notice 1565 was not brought to the attention of the court. In terms of the gazette, the effective date for gratuity payment for non-returning members of the Provincial Legislature who have served a period of 5 years or

⁴ 2017 (5) SA 346 (CC) at 366F-367A

less was the 1st April 2008. There is no provision in the gazette that it was applying retrospectively.

[19] Generally, the gazette will supersede the letter of the 9th July 2019. The gazette shows that on merits the applicant has a bona fide defence which prima facie carries some prospects of success. Had the court been aware that the applicant was not notified of the trial, and also the effective date of payment of the gratuity to non-returning members of the Provincial Legislature, I doubt whether it would have granted the default judgment. The default judgment and order of the 20th February 2023 was thus erroneously granted in the absence of the applicant.

[20] In the result the following order is made:

20.1 The respondent's point in *limine* is dismissed.

20.2 The default judgment and order granted against the applicant on 20th February 2023 is hereby rescinded and set aside.

20.3 The matter is referred for trial.

20.4 The respondent to pay the applicant's costs.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the appellant

: Adv KJ Masutha

Instructed by

: Clarence Mangena Inc

Counsel for the respondent

: JM Manale

Instructed by

: Letsela Nkondo Associate Inc

Date heard : 3rd February 2025

Electronically circulated on : 26th February 2025

POLOKWANE HIGH COURT