

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(MPUMALANGA DIVISION, MBOMBELA)

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

Zakwe AJ .

14/03 /2025.

CASE NUMBER: 3747/2020

In the matter between:

LAZARUS MNDIJANA MBETHE

APPLICANT

AND

EMALAHLENI LOCAL MUNICIPALITY

RESPONDENT

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JUDGEMENT

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***Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail. The date and time of hand-down is deemed to be on 14 March 2025 at 11h00.***

**ZAKWE AJ**

## **INTRODUCTION**

- [1] The applicant has filed a rescission application in which he seeks the following relief as set out in the notice of motion:
- "(a) The late delivery of the application for rescission of judgment in the matter and is hereby condoned.*
  - (b) The default judgment granted against the Applicant in this matter on 03 May 2021 and is hereby rescinded.*
  - (c) The costs of this application if unopposed shall be the costs in the cause of the main action.*
  - (d) Further and/or alternative relief"*
- [2] The respondent is opposed to the application. The respondent issued summons on 03 December 2020 against the applicant seeking payment of R 1 336 851,94 plus interest for the non - payment of the services rendered to the applicant's business property consisting of supply of sewerage, refusal removal, vatable sundries, municipal rates and supply for water and electricity.
- [3] The applicant did not defend the action despite the summons having been served at his business property in respect of which the respondent had rendered the services.
- [4] On 05 May 2021, the respondent was granted a default judgment by Mankge J.

## **RELEVANT FACTUAL BACKGROUND**

- [5] On 11 May 2022 the applicant received a telephone call from the deputy sheriff advising him that, he was in possession of a *writ* of execution that had been issued against him.
- [6] On the same day, 11 May 2022, he asked his son to investigate the matter and also contacted his attorney Mr Ian Bailie ('Bailie')
- [7] On 30 May 2022, Bailie obtained the copy of the warrant of execution from the deputy sheriff and also obtained the copy of the summons through the offices of another attorney based in Middelburg. Bailie advised the applicant on 07 June 2022 that he had obtained the copy of the summons.
- [8] The summons was served on 07 December 2020 on one Maggy Mbethe according to the sheriff's return of service.
- [9] On 09 June 2022, the applicant requested one Vincent Makama ("Makama") to consult with Bailie about the matter. Makama was his brother in law to whom he had entrusted with the responsibility of his business property in 1994 when he relocated to Nelspruit.
- [10] This Makama had seemingly leased some parts of the business premises to third parties and was also operating his own business on the same business property.
- [11] The applicant had a telephonic consultation with Bailie on 27 June 2022 concerning the summons and the writ of execution. Following such consultation in which Bailie advised him that, he had a good defence to the respondent's claim, he instructed Bailie to file a rescission application. Bailie asked for the deposit and he only paid it on 09 September 2022 after Bailie had reminded him about it in August 2022.
- [12] The applicant states further that, he became aware of the judgment on 07 June 2022, he was however, unaware that, the application for the rescission of judgment had to be filed within 20 days from the date of becoming aware of it.

[13] In September 2022, when Bailie was preparing the rescission application, he realized that he did not have the court order (apparently granted by Mankge J on 05 May 2021). Bailie engaged other law firms based in Middelburg to assist him to obtain the content of the High Court file so that he could obtain the court order in particular, and proceed with the preparation of the rescission application. Bailie struggled to obtain the file because it was missing in the Registrar's office.

[14] Ultimately, on 15 June 2023 Bailie wrote to the respondent's attorneys asking for the copy of the judgment granted by Mankge J and he was given a copy on 03 July 2023.

#### **Applicant's grounds for rescission**

[15] The applicant's grounds for rescission are *inter alia* that:

[15.1] He only became aware of the judgment against him on 07 June 2022.

[15.2] He instructed his attorneys to file a rescission application on 27 June 2022.

[15.3] He has a good defence against the respondent's substantial portion of the claim which had prescribed.

[15.4] The delay in filing the rescission application was caused by the unavailability of the court file and as a result of the delay, he seeks condonation of the of rescission application.

[15.5] He also did not know that the rescission application had to be filed within 20 days from the date of becoming aware of the default judgment.

#### **Respondent's grounds for opposition to the application for condonation and rescission application**

[16] The respondent is opposed to the application on the following grounds:

- [16.1] That both the summons and the court order were properly served in compliance with Rule 4 of the Uniform Rules of the Court.
- [16.2] The applicant delayed for 15 months to file the rescission application, which ought to have been filed within 20 days from date the applicant became aware of the default judgment on 07 June 2022 or at least on 27 June 2022 when he gave instructions to his attorneys to file the rescission application. This conduct is in contravention of Rule 31 (2) (b) of the Uniform Rules of the Court.
- [16.3] The grounds advanced by the applicant for late filing of the condonation are materially flawed and unsatisfactory.
- [16.4] In the event that, condonation is granted, the rescission application is effective due to:
- [16.4.1] The applicant has no *bona fide* defence to the claim.
- [16.4.2] The applicant left his business property to Makama without informing the respondent and therefore his negligence or wilfulness caused him not to oppose the legal proceedings.
- [16.4.3] The applicant had failed to establish his right to debate an account which requires a fiduciary duty.
- [16.4.4] The defence of prescription cannot stand because the municipal rates and taxes and allied charges do not expire in 3 years.
- [16.4.5] The applicant's explanation for late filing of the condonation is neither full nor frank and is also not reasonable.

## **THE RELEVANT LEGAL FRAMEWORK AND PRINCIPLES**

- [17] It is common cause that, this rescission application falls within the ambit of Rule 31 (2) (b) of the Uniform Rules of the court. This rule provides that:

*"A defendant may within 20 days after he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."*

- [18] Furthermore, in the event that a party seeking to rescind a default judgment, is out of time, namely, the prescribed 20-day period, he/she must file for condonation application for such delay.

- [19] In order for a party seeking condonation to succeed, he/she must show good cause. The courts have clarified several times on what constitutes good cause.

- [20] In the case of **Grant v Plumbers (PTY) Ltd 1949 (SA 470 (O) 476-477**, the court stated as follows concerning the concept of good cause:

*"Having regard to the decisions referred to above, I am of the opinion that an applicant who claims relief under Rule 43 should comply with the following requirements:*

- (a) He must provide a reasonable explanation of his default. If it appears that his default was wilful or that it was due to his gross negligence, the court should not come to his assistance.*
- (b) His application must be bona fide and not made with the intention of merely delaying the plaintiff.*
- (c) He must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."*

- [21] In the case of **Mathie v Ruijter Stevens Properties (PTY) Ltd (AR352/14) [2015] ZAKZPHC 30**, the court stated that:

*“wilful default or gross negligence will often preclude a finding of good cause. Good cause also includes but is not limited to the existence of a substantial defence”*

- [22] It has also been held in past that, a party seeking condonation must upon learning of the requirement to do so, do so without delay.
- [23] Prospects of success is one of the factors in deciding whether to grant or refuse condonation.
- [24] The consideration by court whether to grant or refuse condonation, largely depends on the discretion of the court, such discretion must always be exercised judiciously. **See Federated Employers Fire and General Insurance Co Ltd v Mckenzie 1969 (SA) 360 (A)**

#### **EVALUATION OF THE FACTS AND APPLICATION OF THE LEGAL PRINCIPLES**

- [25] The applicant on his own version, was in possession of the writ of execution and the copy of the summons on 07 June 2022. The perusal of both documents clearly shows that they contained all material information concerning the respondent's claim, namely, the factual basis of the claim, the amount due and payable and the date on which the default judgment had been granted by Mankge J.
- [26] However, despite being in possession of the above-mentioned documents, the applicant or Bailie felt that they required the copy of the actual court file and/or the court order itself in order to prepare the rescission application.
- [27] Neither the applicant nor Bailie provided any explanation as to why they could not use the information already in their possession to prepare and file a rescission application promptly.

[28] Bailie filed a very general confirmatory affidavit and he did not explain the following pertinent aspects:

[28.1] Whether or not he advised the applicant that, the court rules required that, the rescission application must be filed within 20 days from the date of becoming aware of the default judgment. One would have generally expected that a legal practitioner such as Bailie, who advised the applicant that he had a good defence, to have also told him about the applicable legal requirements, in particular about the 20 - day time period.

[28.2] Why he did not promptly request the copy of the court order from the respondent's attorneys if the unavailability thereof precluded him from preparing and filing the rescission application. In this matter, Bailie only requested the court order from the respondent's attorneys about a year later.

[28.3] Why he regarded the information already in his possession inadequate for the purposes of preparing and filing a rescission application.

[29] The role of confirmatory affidavits in legal proceedings particularly the motion proceedings, is as important as the founding affidavit itself. Accordingly, it has to be evaluated properly and be given proper evidential weight. It is not enough for a deponent in a confirmatory affidavit to simply state that *"I have read the founding affidavit of the applicant and I confirm the content thereof in so far as it relates to me"*.

[30] Makama also deposed to a similarly general or vague confirmatory affidavit. He was the person entrusted by the applicant with the responsibility of his business property. He appears to have been in contact with the applicant and the respondent's offices. He does not provide an explanation at all, as to who Maggy Mbethe is, who received the summons from the sheriff. And yet was in charge of business property and on probabilities, he is reasonably expected to

have known generally all the tenants or people permitted to be in the business property at any given time.

- [31] The applicant does not deny that he is liable for payment of the services rendered by the respondent but he seems to be disputing the *quantum* on the basis of prescription.
- [32] The applicant simply relied on prescription, without providing adequate factual or legal basis which gives rise to a *prima facie* defence for his assertion that, the common three-year prescription is applicable to municipal debts claimed by the respondent as opposed to the 30 - year prescription as argued by the respondent.

### **CONCLUSION**

- [33] The applicant's explanation that he did not know that the rescission application had to be filed within 20 days, is on a balance of probabilities not plausible, in the absence of any explanation by Bailie. His attorney had advised him that, he had a good defence to the respondent's claim. On probabilities, such advice would not have been given without consideration of the requirements for a rescission in terms of Rule 31 (2) (b) of the Uniform Rules of the Court.
- [34] The applicant and Bailie had enough information or material facts in their possession as at 07 June 2022 or latest 27 June 2022 based on the contents of the summons and the writ of execution, to prepare and file a rescission application within the prescribed 20 - day period.
- [35] The applicant's explanation that, Bailie "*considered it prudent to obtain and examine all the documents in the court file*" is not reasonable in the absence of any explanation particularly by Bailie why he considered that prudent.
- [36] There is no proper and cogent explanation by the applicant or Makama, why the summons served at the applicant's property never reached Makama and/or the applicant. It is mind boggling and /or unconvincing as to why Maggy Mbethe

who is unknown to the applicant would have been served or received the summons instead of Makama or any other person acting on the latter's behalf.

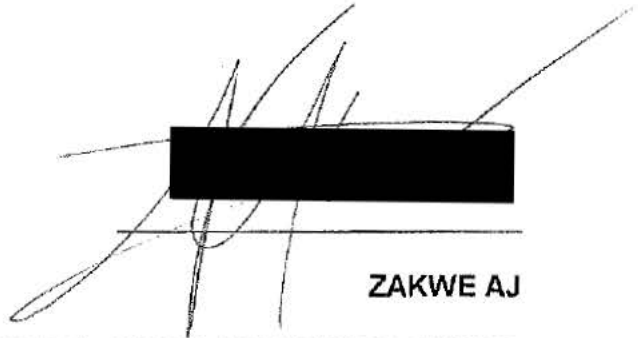
[37] The applicant was negligent or wilful in handling the proposed rescission application since he had the necessary or material facts to prepare the application. His explanation for the delay in filing the condonation application, is inadequate and therefore not reasonable.

[38] Although in principle, he admits being liable or indebted to the respondent, he has not demonstrated any *bona fide* defence to the respondent's claim that suggests that if proven at the trial he could succeed.

[39] The court finds that the applicant has failed to show good cause for the late filing of the condonation application.

**IT IS ORDERED THAT:**

1. The application is dismissed with costs

  
[REDACTED]  
ZAKWE AJ  
ACTING JUDGE OF THE HIGH COURT  
MPUMALANGA DIVISION, MBOMBELA

**APPEARANCES:**

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