

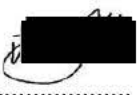
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 9978/2023

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED.
DATE 9 June 2025 SIGNATURE: 	

In the matter between:

**FANANG DIATLA BUSINESS ENTERPRISE &
CONSTRUCTION CC**

1ST APPLICANT

VICTORIA GALANE

2ND APPLICANT

-and-

MAKATSUKA CIVILS AND CONSTRUCTION CC

RESPONDENT

Delivered : 9 June 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **9 June 2025**.

Date heard : **3 June 2025**

Coram : **Bresler AJ**

JUDGMENT

BRESLER AJ:

Introduction:

- [1] The Applicants apply for an order for the rescission of the judgment granted by Makoti J on the 4th of February 2025 and in the absence of the Applicants. It is the Applicants' case that, at the time the matter was called on the unopposed roll, a Notice of Intention to Oppose was already delivered. It is common cause that the said notice was not contained in the Court file and the Applicants' represen.
- [2] The Application is launched on an urgent basis. The Applicant submits that the matter is urgent as the Taxation is enrolled for August 2025. There is no indication from the Respondents attorneys that they intend to suspend the execution should the matter be heard on the ordinary roll.

- [3] At the commencement of the proceedings this Court indicated that arguments in respect of urgency and merits will be heard simultaneously due to time constraints. The practitioners were not from Polokwane and rolling the matter over would consequently have a substantial cost implication.

Issues that require determination:

- [4] This Court is called upon to determine whether sufficient urgency has been shown to exist to warrant the hearing of the matter on the urgent roll. This Court must further consider if the judgment must be set aside having regard to the fact that the existence of the Notice to Oppose was not disclosed to the Court at the hearing of the Default Judgment.

Applicable Legal Principles:

Urgency:

- [5] In this Court's view, the matter is sufficiently urgent to have it entertained on the urgent roll. The test for urgency has often been stated. In the well-known case of ***East Rock Trading 7(Pty) Ltd v Eagle Valley Granite (Pty) Ltd***¹ the Court restated the well-known test as thus:

¹ 2011 JDR 1832 (GSJ)

In my view the delay in instituting proceedings is not, on its own, a ground for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.'

[6] Substantial redress will not be afforded as the Respondent clearly intends to proceed with the taxation and there is no indication on the papers before court that the execution of the order will be stayed pending the hearing of the rescission of judgment in due course. Counsel for the Respondent merely indicated during the hearing that execution would 'probably' be stayed. This is not sufficient to warrant a finding that the matter is not urgent.

[7] The matter is therefore found to be sufficiently urgent to warrant the hearing thereof on the urgent roll.

Rescission of judgment:

[8] The *crux* of the Respondent's opposition to the Application for Rescission of Judgment lies in the fact that the Applicants are to blame since their Notice to Oppose was delivered out of time and they did not ensure that it was contained in

the Court file. The Respondent furthermore states that there was no obligation on them to respond to the Answering affidavit as judgment was already granted at this stage.

[9] During the hearing, the Court enquired from the Respondent's attorney if he brought the Notice to Oppose to the knowledge of the presiding judge. He indicated that the said Notice to Oppose was not in his office file, so he was also not aware thereof.

[10] In this Court's view, the excuse rings hollow. If indeed he was not aware of the said notice, this should have been set out in the Answering affidavit. Once a document is served, it is assumed that it came to the knowledge of the recipient – such recipient carries the *onus* to prove otherwise.

[11] Moreover, it does not explain why he failed to immediately communicate with the Applicants' attorney regarding the default judgment that was granted. It appears that he elected to remain mum at the detriment of the Applicants.

[12] In the case of ***Mi-tax Ltd v National Printing & Publishing Trust (Pty) Ltd***² the following was said at [33] – [34]:

'[33] I prefer the reasoning in the cases cited to me by counsel for the plaintiff. I think the approach in Bakhoven is too narrow. Common to these cases is the notion that a court should be at large, in a proper case, to set

² 2010 JDR 0067 (GNP)

aside as erroneously sought or granted an order which would not have been made if all the relevant facts had been before it. In my view this approach emphasises the constitutional value of openness (transparency), promotes a value central to s 34 of the Constitution, ie that courts exist, as they have always existed, to resolve disputes wherever possible on their merits, and provides a valuable tool for promoting the interests of justice. As it has been said, the rules are for the court, not the court for the rules.

[34] For the same reasons, there is in my view a legal duty on a litigant who moves an application for default judgment to disclose to the court certain relevant information in the possession of the litigant but not available to the presiding judge if the disclosure of such information might reasonably lead the judge to refuse, postpone or stand down the application. If the content of such information, when disclosed after the judgment, is relevant to the decision under rule 42(1)(a), then it must follow that there is a duty to disclose it when the application for default judgment is moved. The precise ambit of this duty may be difficult to anticipate and I shall not try to do so but the practical difficulty of identifying circumstances which call for disclosure should not be over-emphasised. This duty of disclosure is honoured by counsel every day in the unopposed motion courts of this division and indeed these courts could not function properly if this were not so.'

- [13] It is thus this Court's view that the existence of the Notice to Oppose should have been brought to the attention of the presiding judge. Had this been the case, the

presiding judge would in all probability have declined to hear the matter. On this basis, the rescission must succeed.

Costs:

[14] There is no reason why the costs should not follow the outcome of the proceedings. The Applicant prays for costs *de bonis propriis* against the attorney of the Respondent. This Court is of the view that such an order is extremely harsh. There is no indication that the attorney was acting on a frolic of his own and there is thus no reason why the Respondent should not be held liable for the costs.

[15] Having regard to *inter alia* the nature of the proceedings and the importance thereof to the parties, costs to counsel on Scale B is warranted.

Order:

[16] **In the result the following order is made:**

16.1 The application is heard as an urgent application in terms of Rule 6(12) of the Uniform Rules of Court and the Court dispenses with the forms and services of the Rules of Court in the application;

16.2 The order granted by Makoti AJ on the 4th of February 2025 is hereby rescinded and set aside;

16.3 The Respondent is ordered to pay the costs including costs to counsel on Scale B.



M BRESLER AJ

**ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

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