



IN THE LAND COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC83/2023

Before: Honourable Ncube J

Head on: 11 November 2024

Delivered on: 17 February 2025

DELETE WHICHEVER IS NOT APPLICABLE

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

SIGNATURE

DATE:

17/02/2025

In the matter between:

DON ANDREW WATT

Applicant

and

GEORGE FANYANA MALOBOLA AND FAMILY

First Respondent

ESTATE LATE ISAAC HENRY GOBEY

Second Respondent

CATHERINE ELIZABETH GOBEY

Third Respondent

ORDER

1. The Application for Condonation for the late delivery of the Application for Rescission is granted.
2. The confirmed *Rule Nisi* granted on 31 July 2023 is discharged.
3. The Applicant is granted leave to file his Answering Papers to the First Respondent's Founding Affidavit within Fifteen (15) days in the urgent Application, LCC83/2023 from the date on which he becomes aware of this order.
4. There is no order as to costs.

Heard:

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

JUDGMENT

Ncube J

Introduction

[1] This is an opposed application for a rescission of the Judgement and order of this court granted on 31 July 2023. In terms of the Rules of this court, an application for rescission of the court order should be brought within fifteen (15) days from the date on which a party become aware of the Judgement or order to be rescinded. The present application was filed and delivered to the First Respondent on 20 September 2023, which is twenty-six (26) days from the date on which the Applicant became aware of the order granted against him. For this reason, the applicant has simultaneously, with this application, filed the application for the condonation of the late filing of the Rescission Application. I shall deal with the application for condonation first. However, before I deal with the application for condonation, it is necessary to first look at the background facts of the case.

Background

[2] On 29 June 2023, this court received an urgent application launched by one George Fanyane Malobola (*"Applicant"*) against Don Watt (*"First Respondent"*), Estate Late Isaac Henry Gobey (*"Second Respondent"*) and Catherine Marie Gobey (*"Third Respondent"*). Case no LCC83/2023 was allocated to the case. This court condoned non-compliance with the rules relating to service and time limits. The court issued directives with regard to service of the application and further documents to the

Respondents. The court issued a *Rule Nisi* returnable on 31 July 2023. In terms of paragraph 4 of the directives, the Applicant was directed to serve the papers on the Respondents by no later than Monday 3 July 2023.

- [3] On 17 October 2023, the Deputy Sheriff Mr Wellen van Der Walt filed with the Registrar of this court a return of service indicating that on 30 June 2023 at 15h00 he served on Mr Don Watt personally a copy of Notice of Motion and the directions issued on 29 June 2023 in, case LCC83/2023 and nature and content of those documents were explained to him.
- [4] On the return date for the *Rule Nisi*, the Applicant Mr Don Watt did not appear in court, but sent his Attorney Mr Thinane to attend court on his behalf and apply for the postponement of the matter. In his Founding Affidavit Mr Watt states that he never received the court papers until 28 July 2023 when he received the papers handed to him by his brother George Watt. Despite getting the papers on 28 June 2023, Mr Watt never attended court but went on his business trip. Mr Thinane's application for a postponement was refused and the *Rule Nisi* was confirmed. Mr Watt now applies for the recession of that order which was granted against him on 31 July 2023 in his absence but in the presence of his Attorney Mr Thinane. With that background I now turn to deal with the application for condonation.

Condonation

- [5] As stated earlier in this Judgement, the application for rescission in this case was filed way out of time. There is a contradiction between the parties as to which Rule is applicable. Mr Ngoepe, attorney for the First Respondent submits that Rule 64 is applicable. Miss Das Neves, Attorney for the Applicant, is of the view that Rule 58(6) and (7) is applicable. I agree that Rule 64 is not applicable, but Rule 58(6) and 7 apply.

Rule 64 deals with an application for a rescission or variation in the circumstances where there is ambiguity or error or omission in the Judgement or order. The application for a rescission in terms of Rule 64 must be brought within ten (10) days from the date on which the applicant became aware of the judgement or order. Rule 58(7) deals with an application for a rescission of the judgement or order which was granted against a party who was in default. The application in terms of Rule 58(6) must be brought within twenty (20) days from the date on which the said party become aware of such judgement or order. The anomaly in this case is that although the Applicant was absent in court, his legal representative was present. For the sake of convenience, I shall give the applicant the benefit of doubt and take his explanation that the order was granted in his absence.

Requirements of Condonation

[6] In ***Grootboom v National Prosecuting Authority***¹ the Constitutional Court Held:

"It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the courts indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court directions. Of great significance, the explanation must be reasonable enough to excuse the default"

¹ 2014(2) SA 68 (CC) Para 22

- [7] In ***Von Abo v President of the Republic of South Africa***² Moseneke DCJ expressed himself in the following terms:

"In Van Wyk v Unitas Hospital this court warned that in an application for condonation the explanation of the delay must be full and frank and must demonstrate that the case of the applicant bears some prospects of success"

- [8] In an application for condonation, in the constitutional democracy, the emphasis is now on the interest of justice. In ***Van Wyk v Unitas Hospital and Another***³ the Constitutional Court held:

"This Court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay in the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success"

- [9] I turn now to look at the degree of lateness and the explanation for the delay tendered by the Applicant. The Applicant had to bring the application within 20 days of him becoming aware of the order granted against him on 31 July 2023. The applicant submits that he signed the papers for rescission on 4 September 2023 but that his erstwhile attorney only delivered the application on 20 September 2023. The applicant has no knowledge why his application was delivered on 20 September 2023, he trusted

² 2009 (5) SA 345 (CC) Para 19.

³ 2008 (2) SA 472 (CC) para 20

his attorney and never knew that he was not going to immediately deliver the papers. As things stand, the application was late by twenty six (26) days.

[10] The Applicant also submits that he is hardly on the farm as he is always on business trips, between South Africa, Zimbabwe and Nigeria. Apart from this, the Applicant contends that he did not even get the papers to attend court on 31 July 2023. Even the letter of demand was served on his brother George Watt. The Applicant got papers to attend court only on 28 July 2023. He got those papers from his brother George Watt. He then asked his erstwhile attorney to go to court on 31 July 2023 and ask for the postponement of the case which postponement was refused.

[11] The applicant submits that he has good prospects of success as he was not on the farm during the period mentioned by the Respondent as being the period during which the alleged atrocities were committed. Further, the First Respondent was using the farm for commercial purposes, the applicant alleges. He further alleges that the First Respondent in different court papers describes himself as both the occupier and the labour tenant.

Discussion

[12] The application for rescission was delayed by twenty-six (26) days, through no fault of the applicant. It is probable that the Notice of Motion and Court directives were left with the applicant's brother George Watt. Although according to the return of service, the applicant was served personally, the applicant disputes that there was personal service. In the absence of any other evidence, I must accept that there was no personal service. It is also not denied by the First Respondent that the applicant got the court papers from his brother on 28 July 2023. It is also important for the case to be properly ventilated

with the First Respondent clarifying his status whether he is a labour tenant or occupier and whether he was using the farm for commercial purposes. I find therefore, that it is in the best interest of justice to grant the application for condonation.

Application For Rescission

[13] This part of the judgement should not detain me for a long time since principles applicable to condonation are *mutatis mutandis* applicable to rescission. The starting point of exercise is Rule 58 (6) which provides as follows:

"6. A party may apply to this court to rescind or vary any judgement or order granted in his or her absence, provided the application is filed within twenty days after he or she became aware of the judgement or order.

7. An application in terms of subrule (6) may be granted only if the applicant shows good cause for such rescission or variation"

[14] As mentioned earlier in this judgement, this application was brought 26 days after the date on which the applicant became aware of the order against him. However, I have found that it will be in the interest of justice to condone the late filing of this application. Therefore, I need not deal with that issue any further herein. The Applicant must give a reasonable explanation for his or his default. Secondly he must show that on the merits he has a *bona fide* defence which *prima facie* carries some prospects of success.

[15] In ***Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of state and Others***⁴ the Constitutional Court elaborated on the onus resting upon the applicant and the requirements which the applicant must prove. The court held:

“ Requirements for rescission of a default judgement are two fold. First, applicant must furnish a reasonable and satisfactory explanation for its default. Second it must show that on the merits it has a bona fide defence which prima facie carries some prospects of success. Proof of these requirements is taken as showing that there is a sufficient cause for an order to be rescinded. A failure to meet one of them may result in the refusal of the request to rescission”

[16] As stated earlier in this judgement, the explanation provided by the Applicant is reasonable and satisfactory. Considering the loopholes in the version of the First Respondent, the Applicant has a bona fide defence to and good prospects of success to the allegations levelled by the First Respondent against him. It is not necessary to repeat herein the explanation tendered by the applicant as being the reason why he was in default. That explanation is dealt with under condonation. I am therefore satisfied that the order granted against the applicant on 31 July 2023, in his absence, should be rescinded.

Costs

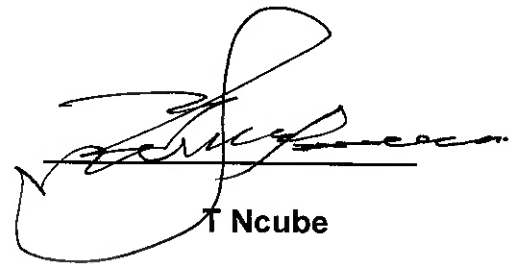
[17] Counsel for the Applicant has asked for costs against First Respondent. The practice in this court, is not to award costs unless there are exceptional circumstances justifying an award of costs. There are no such circumstance in this case.

⁴ 2021(11) BCLR 1263 (CC) para 71

Order

[18] In the circumstances, I make the following order.

1. The Application for Condonation for the late delivery of the Application for Rescission is granted.
2. The confirmed *Rule Nisi* granted on 31 July 2023 is discharged.
3. The Applicant is granted leave to file his Answering Papers to the First Respondent's Founding Affidavit within Fifteen (15) days in the urgent application, LCC83/2023 from the date on which he becomes aware of this order.
4. There is no order as to costs



T Ncube

Judge of the Land Court

Date of hearing: 11 November 2024

Date of judgment: 17 February 2025

Appearances

For the Applicant: M. B Das Neves
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Boksburg North

For First Respondent: L. Ngoepe
LG Ngoepe
Attorneys INC