

**IN THE LABOUR COURT OF SOUTH AFRICA  
(HELD AT CAPE TOWN)**

**CASE NO: C 128/99**

In the matter between:

**MEDICAL SUPPLIES INTERNATIONAL**

Applicant

and

**B PEARCE  
M FOX**

First Respondent  
Second Respondent

**J U D G M E N T**

**BASSON, J:**

[1] This is an application for the rescission of a default judgment granted by the Labour Court under case number 128/99 whereby it was ordered that the dismissals of the first and second applicants in the main matter were procedurally unfair; that the respondent was to pay compensation to the first applicant in the amount of R48 000 within 14 days of the date of the order; and that the respondent was to pay compensation to the second applicant in the amount of R48 000 within 14 days of the date of the order. The judgment was delivered on 10 August 1999.

[2] It was argued on behalf of the respondents that there was an unreasonable delay in bringing the application for rescission.

[3] In terms of the common law there are no time periods or prescriptive

periods within which such application must be brought provided that it must be brought within a reasonable time, taking into account the prejudice caused to the respondents.

[4] Rule 31(2)(b) of the High Court Rules states the following:

"The defendant may within 20 days after he or she 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 it deems meet."

[5] A reasonable period in terms of these Rules is accordingly 20 court days, within which to bring an application to rescind a judgment by default.

[6] In casu, the application for rescission was lodged only on 12 October 1999.

[7] The respondents did not raise the point of the necessity for an application for condonation in their papers and I allowed the applicant an opportunity to address me on the issue of an application for condonation from the Bar.

[8] The applicant's representative pointed out that there was an explanation offered for the delay in the period between 10 August 1999 and 12 October 1999. In this regard I was referred to paragraph 15 at page 9 of the papers where the applicant stated the following:

"At all times I was under the impression and was advised that the matter had been postponed and it appears from the correspondence that passed between Messrs Buchanan Boyes and Messrs Bagraim & Associates that discussions were certainly held regarding the possibility of the matter being postponed, but it again appears that Messrs Buchanan Boyes and Messrs Bagraim & Associates differ as

to whether the appropriate tender of costs was made or not."

[9] I will return to the matter of a tender of costs below.

[10] At paragraph 17 the applicant continued:

"On 16 August 1999, Messrs Buchanan Boyes addressed a letter to J Ackerman (who is the attorney of the applicant in Johannesburg) in terms of which Buchanan Boyes denied the allegation made by Bagraim & Associates that no tender for costs was made regarding the postponement of this matter. On 6 September 1999 Ackerman requested that attorney to file an affidavit to be used in support of the application for the rescission of the judgment. On 13 September 1999 the estate of Daryl Ackerman was provisionally sequestered and a copy of the Court order sequestering the estate is annexed hereto as Annexure H. As a result of the sequestration of attorney Ackerman, the file in this matter has been handed to attorneys Hurwitz & Pashett of Johannesburg who have now assumed control of the matter. I was overseas and during the week of 13 September 1999 my secretary Barbara Marais telephoned me in Brazil and notified me of the fact that the Sheriff of the Court had attended at the applicant's premises with a warrant of execution for payment of a sum of approximately R96 000. I immediately instructed Barbara Marais to communicate with Daryl Ackerman to enquire of him what had happened regarding this matter and Daryl Ackerman referred Mrs Marais to Martin Hurwitz of attorneys Hurwitz & Pashett. Numerous calls were made by her to Buchanan Boyes and the Sheriff of the Court, and instructions were given as a matter of urgency to Buchanan Boyes to launch an urgent application to stay the warrant of execution pending the application for rescission to be launched in the above Honourable Court. A copy of the notice of motion and founding affidavit prepared is annexed hereto as Annexure I. In this regard I further annex a copy of the affidavit from Barbara Marais confirming and corroborating the contents of this affidavit insofar as they relate to her."

[11] In the event, there is some explanation offered for the delay in that the client himself appeared not to have been informed of the default judgment until the moment that execution of the order was taken against his estate on 13 September 1999. Taking into consideration the period of delay between 13 September 1999 and 12 October 1999, this falls within the period (of 20 days) prescribed by Rule 31(2)(b) of the High Court Rules (quoted above at paragraph [4]).

[12] As far as the period between 10 August 1999 and 6 September 1999 is concerned, it would appear that there also is an explanation for this delay in that 6 September 1999 would have fallen within the said time period as prescribed by Rule 31(2)(b) (above) and the fact is that it appears that matters went awry after the estate of the Johannesburg attorney was provisionally sequestrated.

[13] At the very least, there is an explanation offered and the time period, which must be a reasonable time period within which to lodge an application for rescission of a default judgment in order to prevent prejudice to the respondents, appears to me not to be in the circumstances an unreasonable period of delay. Further an explanation is given for the delay.

[14] The principles which apply in matters such as the present where there is an application to the Court for the rescission of a default judgment is that the applicant must show good cause. In other words, the applicant must give a reasonable explanation for its default. If it appears that the default was wilful or that it was due to gross negligence on the applicant's part, the Court should not come to the applicant's assistance. This is the first principle to be applied. See the discussion in the book by Erasmus *Superior Court Practice* Juta (also for the other principles under discussion here).

[15] The second principle that is identified in this regard is that the application must be *bona fide* and not made with the intention of merely delaying the plaintiff's (the respondent's) claim.

[16] The third principle is that the applicant must show a *bona fide* defence to the plaintiff's (the respondent's) claim. It is sufficient if the applicant makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle the applicant to the relief asked for. The applicant need not deal fully with the merits of the case or produce evidence that the probabilities are actually in the applicant's favour.

[17] The explanation offered by the applicant for his non-appearance at the default judgment hearing is contained at paragraph 9 (at page 7 of the papers). It also appears from the attached letters (at page 23 of the papers). The letter written by the attorneys of the applicant to the attorneys of the respondents stated the following:

"On 2 August 1999 I telephoned your Mr Bagraim and informed him that our client would tender and pay any wasted costs arising out of the postponement. Mr Bagraim advised me that he would take instructions and revert to me. This he never did and I assumed that the tender had been accepted and that the matter was going to be postponed."

[18] In terms of the founding affidavit, this communication followed a previous communication between Mr Bagraim (at paragraph 9 thereof):

"Mr Bagraim advised Mr Chase that he (Bagraim) did not foresee a problem with the postponement provided the applicant tendered to pay his client's wasted costs. Chase immediately telephoned Ackerman and Ackerman instructed Chase of attorneys Buchanan Boyes to tender the wasted costs arising out of the aforesaid

postponement. On or about 2 August 1999 Chase telephoned Bagraim and informed Bagraim that the applicant had agreed to tender the wasted costs arising out of the postponement. Bagraim undertook to take instructions from his client and to revert to Chase. Chase did not hear from Bagraim prior to the hearing of 4 August 1999 and therefore assumed that the postponement that had been requested, coupled with the appropriate tender for costs, had been accepted by the respondents' attorneys".

[19] On the applicant's version, there was neither wilful default nor gross negligence in that an undertaking had been given by the respondents' attorney to postpone the matter on the basis that there would be a tender to pay any wasted costs. The attorney for the applicant accordingly assumed that the tender had been accepted, especially because Mr Bagraim had previously advised him that he did not foresee a problem with the postponement, provided his clients' wasted costs were paid. This appears to be an assumption that does not amount to gross negligence in the circumstances as explained by the applicant.

[20] However, the respondents put up a completely different version of the tender and whether the tender as to costs had been accepted or not. This version appeared from the letter of the respondents' attorneys (at page 24 of the papers) which stated the following:

"We did receive a phone call on 28 July 1999 from yourselves requesting a postponement of the matter. You spoke to our Mr Bagraim who advised you that Mr Brevic was dealing with the matter but in fact did foresee a problem with a postponement, but requested that your Mr Chase come back to Mr Brevic in order to debate a possible postponement and a tender of wasted costs. You stated that you had no instructions with regard to the wasted costs but would revert to us. At no stage was any tender made of any wasted costs and nor did we agree to any postponement".

[21] Erasmus (*op cit* at page B1-202) sets out the applicable legal principles as follows:

"The reasons for the applicant's absence or default must therefore be set out because it is relevant to the question whether or not his default was wilful. An application which fails to set out these reasons is not proper, but where the reasons appear clearly, the fact that they are not set out in so many words will not disentitle the applicant to his relief. Before a person can be said to be in wilful default the following elements must be shown:

- (a) Knowledge that the action is being brought against him;
- (b) A deliberate refraining from entering appearance, though free to do so; and
- (c) A certain mental attitude towards the consequences of the default.

The Courts have had some difficulty in defining the third requirement (“(c)” above). At one stage it was held to be a willingness that judgment should go against him because of a knowledge or belief that he had no defence. In *Hainard v Estate Dewes* (1930 OPD 119) the test of willingness was retained (although the Court expressed the opinion that unconcern or insouciance would be more appropriate terms), but without the qualification that the willingness must be because of a knowledge or belief that there was no defence.

In *Checkburn v Barkett* (1932 CPD 423) the Court followed this suggestion and the test adopted was whether the person alleged to be in wilful default knows what he is doing, intends what he is doing and is a free agent and is indifferent to what the consequences of his default may be. This latter test has been followed in a number of later cases but it has been suggested this test too is not conclusive and that the true test is whether the default is a deliberate one, that is, whether the defendant with full knowledge of the circumstances and the risks attendant on his default freely takes the decision to refrain from taking action.

All three elements must be established before the party can be said to be in wilful default. The *onus* of proof rests ultimately on the respondent. In some cases he will be able to show these elements by direct evidence but if he cannot do so, they can be shown by inference. An applicant will therefore be held not to be in wilful default if he acted in the *bona fide* but mistaken belief, or where his default is due to a mistake or non-compliance with the Rules on his own part or of his attorney, or where the summons has not been properly served”.

[22] In view of the above, it appears that the *onus* rested upon the respondents in the present matter to show that there had been wilful default on the part of the applicant's attorneys in not appearing at the default hearing in this matter, and that a certain mental attitude towards the consequences of the default had been shown on the part of the applicant.

[23] In view of the above disputes of fact, I am not persuaded that the respondent had shown that there had been such intention on the part of the applicant in this matter. It was common cause that there was a request for postponement and that the applicant's attorneys were persisting in defending the matter and thus requested a postponement of the default judgment. The only outstanding question was whether they would tender the wasted costs.

[24] I am accordingly not persuaded, given the applicant's version on the papers, that there had been a wilful default or even gross negligence on the part of the applicant's attorneys and certainly not on the part of the applicant in the present matter. There might have been a misunderstanding or a mistake but not wilful default or even gross negligence.

[25] In the event, the only issue that remains for me to decide in exercising my discretion is whether the applicant has a *bona fide* defence to the respondents'

claim. In this regard I was referred to two separate defences. The one defence concerned the fact that the respondents had agreed to be retrenched. This allegation was made at paragraph 27 of the papers at page 14):

"During January 1999 a meeting was held between myself and the respondents at which meeting the level of performance of the respondents was discussed. The aforesaid meeting lasted for a period of three hours and during the course of the aforesaid meeting, both the first and the second respondents agreed to leave the employ of the applicant and on the morning following the holding of such meeting, the first and second respondents were handed copies of the letters annexed hereto as Annexure L and Annexure M."

[26] It has to be pointed out that Annexure L and Annexure M (at pages 50 and 52 of the papers) respectively contain no indication that there was such agreement on the previous day. In fact, it creates the impression that the two respondents were retrenched by the applicant in the absence of any agreement, but after a consultative process.

[27] However, the test that I must apply is not a test where I deal fully with the merits of the case, or decide that the probabilities are actually in favour of the applicant. It is sufficient if the applicant has made out a *prima facie* defence, in the sense of setting out averments which, if established at the trial, would entitle the applicant in the application for rescission to the relief asked for (see the legal principles discussed above).

[28] In view of this lighter test, there is at least a possibility of putting forward such defence and the discrepancies between the letters and the defence of the applicant may then be fully explained at the trial.

[29] The second defence of the applicant related to letters written (at pages 55

and 56 of the papers) stating:

"Re retrenchment: Enclosed please find your cheque in full and final settlement of the above."

and then refers to certain notice period pay, severance pay and the like.

[30] The respondents' legal representative argued that the fact that the cheques were accepted in terms of these letters did not mean that it was in full and final settlement of the unfair dismissal dispute.

[31] I need not decide the cogency of the applicant's defence or whether it is a good defence, I merely have to decide the fact whether it would be a *bona fide* defence which can be decided at the trial stage.

[32] It would appear that the letters are open to interpretation and therefore they could cogently form the basis of a *bona fide* defence at the trial.

[33] I have to weigh up all the circumstances in granting an order to rescind a default judgment, bearing in mind the prejudice that the respondents are clearly suffering as a result of this, and weighing it up against the prejudice that the applicant would suffer if it is not placed in a position to put its case during trial proceedings.

[34] I believe that the applicant has shown good cause in the sense that the applicant has given a reasonable explanation for its default in the founding affidavit. Although there are disputes of fact on the papers, I am still not persuaded that the applicant was in wilful default when the applicant failed to appear at the hearing for judgment by default. On the facts before me it would not appear that there was gross negligence on the part of the applicant. The applicant

also has a *bona fide* defence which the applicant intends to raise at the trial.

[35] In regard to an order as to costs I believe that it would be fair in the circumstances of this matter to order that costs are to be costs in the cause.

[36] In the event I make the following order:

The default judgment granted in this matter is rescinded. Costs are to be costs in the cause.

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**BASSON, J**

DATE OF HEARING: 3/12/1999

DATE OF JUDGMENT: 3/12/1999