IN THE HIGH COURT OF SOUTH AFRICA

(FREE STATE DIVISION, BLOEMFONTEIN)

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

Case no. **3692/2020**

In the matter between:

JOHANNES JACOBUS ERASMUS N.O.	1st Applicant/Defendant
[In his capacity as Trustee of the **WHITELINEN LAUNDRY TRUST – IT 437/2012**]	
GERHARD ALBERTUS VAN RHYN N.O.	2nd Applicant/Defendant
[In his capacity as Trustee of the **WHITELINEN LAUNDRY TRUST – IT 437/2012**]	
JOHANNES JACOBUS ERASMUS	3rd Applicant/Defendant
[Identity number: **580605 5160 08 6**]	
GERHARD ALBERTUS VAN RHYN	4th Applicant/Defendant
[Identity number: **550717 5064 08 7**]	

and

1st Respondent/Plaintiff

STEFANUS JOHANNES NELL VAN RENSBURG N.O.
[In his capacity as Trustee of the **LOURIELLA TRUST – IT 288/1998**]

2nd Respondent/Plaintiff

MARGARETHA ALETTA NOTLEY N.O.
[In her capacity as Trustee of the **LOURIELLA TRUST – IT 288/1998**]

3rd Respondent/Plaintiff

ZANIA HARTMAN N.O.
[In her capacity as Trustee of the **LOURIELLA TRUST – IT 288/1998**]

HEARD ON: **21 APRIL 2022**

JUDGMENT BY: **DE KOCK, AJ**

DELIVERED: **28 APRIL 2022**

INTRODUCTION:

[1] The Applicants move for the rescission of a judgment granted by this Court on the 15th of July 2021 in favour of the Respondents ("the judgement") and for condonation if the Court finds it is necessary to seek condonation for late filing of the application for rescission of judgment. The Applicants' application was served on the Respondents' attorney of record on the 20th of December 2021.

[2] First it stands to be adjudicated whether the application for rescission of judgment was brought timeously in terms of the provisions of Uniform Rule 31(2)(b).

[3] It is averred in the Applicants' founding affidavit that the Applicants became aware of the judgment on the 23rd of November 2021 when Mr Johannes Jacobus Erasmus ("Mr. Erasmus") who is the First Applicant in his representative capacity of the Whitelinen Laundry Trust – IT 437/2011 ("the Whitelinen Laundry Trust") and the Third Applicant in his personal capacity was informed of the judgment by the current attorney of record Mrs S van Biljon. It is stated that the latter attorney corresponded with the Respondents attorney regarding the matter. It is stated that Mr Erasmus on the 23rd of November 2021, which was also the date for a Court case where the Whitelinen Laundry Trust was the Plaintiff in the matter in the Magistrate's Court, Bloemfontein, was shown a copy of the judgement by the Applicants' attorney of record. It is then averred that even though the Respondents attorneys knew that the Applicants have already vacated the leased premises during or about June 2019 the summons was served at the *domicilium* address being 53 East Burger Street, Bloemfontein. From the Returns of Service annexed to the Applicants' founding affidavit it is apparent that service of the combined summons and particulars of claim together with annexures was effected by affixing a copy to the main entrance of the *domicilium* address. It further appears from the Returns of Services that Bond Inx-Hair Salon is at the address chosen as the *domicilium citandi et executandi* being 53 East Burger Street. It is then averred that although Mr Erasmus was telephonically informed on or about 14 November 2021 by Mr Hennie Bergh ("Mr. Bergh") of a possible judgment against the Applicants that it was still believed that it was impossible as no summons was ever received. Annexed to the Applicants' founding affidavit is an e-mail dated the 17th of November 2021 addressed by the Respondents' attorneys of record. In the aforestated e-mail it was stated:

> "*Bovermelde aangeleentheid verwys sowel as u skrywe gedateer 10 November 2021 ... vanselfsprekend sal hierdie tydsverloop in ag geneem word met die kondonasie en sal julle vanselfsprekend daarmee handel en ons kliënt die geleentheid hê om daarop te reageer by die opponering van*

die dreigende tersydestelling van vonnis aansoek. Geliewe hierby aangeheg te vind 'n afskrif van die dagvaarding, relaas van betekening en vonnis ..."

[4] In the Respondents' opposing affidavit it is stated that the Applicants failed to deal with the aspects pertaining to when the judgment sought to be rescinded came to the Applicants' attorney's knowledge, and why the Applicants' attorney waited until the 23rd of November 2021 to inform the Applicants of the judgment which has been granted against them. It is further stated in the Respondents' answering affidavit that the Applicants asserted no evidence of having tried to ascertain the veracity of such information of why Mr Bergh was not believed.

[5] In argument on behalf of the Applicants it was persisted that the Applicants obtained knowledge of the judgment on the 23rd of November 2021. It was further submitted that if there is any condonation that must be sought it is for the time period between the 17th of November 2021 to the 23rd of November 2021. It was submitted and emphasized that actual knowledge of the judgment is required, in this regard reference was made to the matter of **Basson v Bester 1952 (3) SA 578 (C)**.

[6] It was submitted on behalf of the Respondents that Mr Erasmus avered that he received a phone call from Mr Hennie Bergh on 14 November 2021 who informed Mr Erasmus about "*a possible judgment*" which had been granted against the Applicants. The Court was referred to an annexure to the Applicants' founding affidavit dated the 2nd of November 2021 addressed to Mr Bergh in terms of which it was stated:

"*Vonnis is bekom vir die totale bedrag van R271,211.48*."

[7] It was then submitted that Mr Bergh had knowledge that the judgment was indeed granted and not as averred by the Applicants that the judgment was

"*possibly*" granted. It was also submitted on behalf of the Respondents that in terms of High Court Rule 31 that what is required is that a party has knowledge of such a judgment and that actual possession of a copy of the judgment is not a requirement. It was submitted that the requirements to obtain condonation has not been met and that there is no explanation before Court. It was submitted that the Applicants' evidence in respect of when they acquired knowledge of the default judgment is contradictory to the annexures attached to the founding affidavit and that it has been crafted to create the impression that the Applicants' application is not filed out of time but by attempting to mould the evidence to fit the requirements for an application for rescission of judgment. It is submitted in the Respondents' Heads of Argument that the Applicants have proffered evidence which is clearly fictitious and so farfetched and untenable that it can confidently be said on the papers alone that it is demonstrably and clearly unworthy of credence. It was then therefore submitted that the Applicants have not set forth a set of facts for a satisfactory explanation and that the application lacks *bona fides* and that the application for condonation on these grounds alone stands to be dismissed with costs.

[8] To the Court it is clear from the papers that the summons was not served on the Applicants or the Applicants' attorney of record. Even if the Court accepts that Mr Bergh informed Mr. Erasmus that a judgement was in fact granted, the Applicants' explanation that the Applicants still believed that it was impossible that judgment was granted as no summons was ever received is reasonable to the Court. The e-mail of 17 November 2021, to which copies of the summons, returns of services and judgement was provided, was provided in answer to an e-mail of the Applicants' attorneys of record letter of 10 November 2021. The Court agrees with the submission that actual knowledge of the judgment is required. There is no evidence before Court that the Applicants' attorney obtained actual knowledge of the judgment prior to the 17th of November 2021, or that the Applicants did not obtain actual knowledge of the judgment on the 23rd of November 2021. A reasonable explanation has

been advanced as to why the information Mr Bergh was not believed. Although actual possession of a copy of the judgment is not a requirement in terms of Uniform Rule 31, the Court finds that in this particular matter actual knowledge of the judgement was obtained when a copy of the judgement was shown to Mr Erasmus by the Applicants' attorney of record The Court therefore finds that it is necessary for the Applicants to obtain condonation, but condonation needs to be obtained for the time period between the 17th of November 2021 to the 23rd of November 2021.

[9] It is apposite to refer to the matter of **Grootboom v National Prosecuting Authority and Another (2014) 35 ILJ 121 (CC)**. It was held that:

> "*Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation. The interest of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, whether the delay is unacceptable excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, explanation is non-existent and granting condonation will prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interest of justice.*"

[10] The correct inquiry said the Court in **Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd) (2011) 32 ILJ 2206 (LC)**, is whether the Applicants would succeed in the main action if the facts pleaded by them in their condonation application were established at trial.

[11] In **Grant v Plumbers (Pty) Ltd 1949 (2) SA (O)**, Brink J, at **476 – 477** said that:

> "*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 trial would entitle him to 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.*"

[12] On the papers it appears that the Applicants attorney elected to inform the Applicants when Mr Erasmus who resides in Riebeeckstad visited Bloemfontein for another Court case in which the Whitelinen Trust was involved. The explanation for the delay between the time of 17 November 2021 to the 23rd of November 2021 is poor. No explanation is set forth as why neither of the Applicants were contacted telephonically or the judgement send via e-mail to the Applicants.

[13] The next inquiry is whether the Applicants have a *bona fide* defence to the Respondents' claim.

[14] Counsel for the Applicants correctly conceded that numerous of the purported defences raised in the founding affidavit do not raise *bona fide* defences. The Applicants however, persisted with the defences following. The first defence that the Applicants raise is that in paragraph 7.9 of the lease agreement it was agreed that if the lessor was required to pay any amounts in respect of water and electricity then the lessee (the current Applicants) shall refund the amount in question to the lessor on demand upon proof of payment by the lessor of same. The Applicants state that proof of payment is required, that was the agreement between the parties and no proof of payment was attached. The second defence the Applicants submit is that in terms of the Deeds of Sale occupation of the premises would be given to the purchaser on date of registration, and in terms of the Deed of Sale the lease agreement was not

ceded to the Respondents.

[15] The Court finds that the first defence raised does not constitute a *bona fide* defence. Paragraph 7.9 of the lease agreement determines:

> "*The lessee: shall pay for all water, electricity, sanitary, sewerage, refuse removal and other local authority charges whatsoever in respect of the leased premises in each case to the authority or entity concerned and provide proof of payment thereof to the lessor on a monthly basis provided that should the lessor be required to pay any of these amounts, then the lessee shall refund the amount in question to the lessor on demand and if required the lessee, upon proof of payment by the lessor of the same.*"

[16] It is evident from the above stated clause that the Applicants as the lessees in the lease agreement were responsible to pay water and electricity directly to the relevant authority and that it was not agreed from the onset that the Lessor is required to make payment to the relevant authorities as alleged. There is thus no obligation to provide any proof of payment to the relevant authority as is insisted upon by the Applicants.

[17] Regarding the second defence, it was submitted on behalf of the Applicants that the provisions of the sale agreement do not create a valid cession. It was submitted on behalf of the Respondents in opposition that it is pleaded in paragraph 1 of the particulars of claim that the property in question was sold as a going concern to the Respondents and that the Applicants were the tenants on date of registration of the property into the Respondents' name and subsequently the Respondents became the landlord. It is not the Applicant's defence that the property was not sold as a going concern but that the sale agreement does not contain a cession clause and that the lease agreement as such was not ceded to Respondents. As the property was sold as a going concern, the Respondents substituted the previous owners as Landlord.

[18] It was further in opposition submitted on behalf of the Respondents that Mr Jose Carlos Da Crus Nunes represented the seller in the sale agreement of the property and evenly represented the Carlos Nunes CC and Me Barendse as lessor in the lease agreement. This is in accordance with clause 4.4 of the sale agreement which determines that: "…. the purchaser's representative acknowledges himself to be fully acquainted with the terms of the Agreement of Lease." The latter facilitated the Respondents in becoming the Landlord. The Court finds that the Applicants averment that the lease agreement was not ceded to the Respondents does not constitute a *bona fide* defence.

[19] The Applicants further stated that outstanding amounts for water, electricity and rates and taxes was to be settled by the seller in terms of the deed of sale to obtain a clearance certificate before transfer. The Applicants then stated that it is not alleged in the particulars of claim that the Respondents had to pay any of the aforesaid services at the municipality and it is not alleged that any of the amounts for which summons was issued was ceded to the Respondents. This does not constitute a *bona fide* defence. The property was sold to the Respondents during or about 2016. The Respondents stated in their answering that the amount claimed from the Applicants in the summons constitute an amount for usage after date of transfer.

[20] Taking into consideration the poor explanation proffered, the absence of a *bona fide* defence and the prejudice which the Respondents stands so suffer if condonation is granted in the absence of *bona fide* defence, the Court finds that the Respondents application for condonation stands to be dismissed with cost. It follows that the Respondents application for rescission of the judgement stands to be dismissed as well.

[21] In regard to cost the Court finds that the that the requirements of law and fairness dictates that the Applicants as unsuccessful parties must pay the costs of this application.

[22] In the result the following orders are granted:

1. The First to Fourth Applicants' application for condonation and application for rescission of the judgment granted by this Court on 15 July 2021 is dismissed.

2. The First and Second Applicants (the Whitelinen Laundry Trust – IT 437/2012) and the Third and Fourth Applicants are ordered jointly and severally to pay the First to Third Respondents (the Louriella Trust – IT 288/1998) costs.

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DE KOCK, A.J.

APPEARANCES

Counsel on behalf of the Plaintiff	Adv C Hendriks
Instructed by:	J G Kriek & Cloete Attorney **Bloemfontein**
Counsel on behalf of the Plaintiff	Adv R Van der Merwe
Instructed by:	Kramer Weihmann Incorporated **Bloemfontein**