**IN THE HIGH COURT OF SOUTH AFRICA**

**FREE STATE DIVISION, BLOEMFONTEIN**

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

Case no: 2252/2022

In the matter between:

**SEBABATSO JEREMIA RADEBE** **APPLICANT**

and

**THE LEGAL PRACTICE COUNCIL** **RESPONDENT**

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**CORAM:** **VAN RHYN, J *et* BUYS, AJ**

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**HEARD ON**: **08 FEBRUARY 2024**

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**DELIVERED ON: 13 FEBRUARY 2024**

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**JUDGMENT BY: BUYS, AJ**

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[1] This is a judgment in the opposed application by the applicant to set aside the court order issued on 8 September 2022 in terms of which the applicant's name was struck off the roll of attorneys.

[2] Over and above the relief sought referred to *supra*, the applicant seeks leave that the respondent's application be heard "on the opposed Court's roll" and leave be granted to the applicant to file an opposing affidavit in the said application. It is evident from the papers that reference to the "respondent's application" *supra*, refers to the application lodged by the respondent under case number 2252/2022 to strike the applicant's name off the roll of attorneys of the Free State High Court. The above application was heard as an unopposed application on 8 September 2023, whereafter the court order referred to *supra* was issued. I will refer to the said application as the main application *infra*.

[3] It is common cause that the main application was personally served on the applicant. It is evident from the Sheriff's return of service dated 25 August 2022 that the court order dated 12 August 2022, in terms of which the main application was postponed to 8 September 2022, was personally served on the applicant on 25 August 2022.

[4] In his explanation for failing to oppose the main application, the applicant tendered the following reasons:

[4.1] He was incarcerated at the Kroonstad Correctional Centre from 12 February 2021 until 16 October 2023.

[4.2] For the period he was incarcerated, the applicant had no "movements" and financial means to secure a consultation with an attorney to oppose the main application. According to the applicant, access to telephonic communication was restricted to five minutes only on some weekends.

[4.3] Because of his incarceration, it was impossible for the applicant to comply with the directives issued by the respondent in the main application relating to the filing of a notice of intention to oppose and the subsequent answering affidavit.

[5] The applicant states further in his founding affidavit that the failure to oppose the main application is not wilful or intentional, and the application to set aside the court order of 8 September 2022 is not an abuse of judicial process or to waste this Court's time.

[6] The explanations tendered by the applicant dealing with the various convictions which resulted in the respondent lodging the main application are summarised as follows:

[6.1] The applicant acknowledges the complaint by Busisiwe Sheila Madlala. However, he downplays the misconduct as a mere "serious blunder" and that he was not convicted of theft, but of contravening the "Attorneys Act".

[6.2] Dealing with the convictions of theft, he denies that he committed the offences and that the complainants were his clients. The applicant also attempts to downplay the convictions of theft by relying on explanations that he was inexperienced and young at the time when he "transferred monies to the wrong beneficiary". It should be mentioned that the offences of theft on which the applicant was convicted relate to monies in a deceased's estate.

[7] The respondent opposed the applicant's application for rescission of judgment. I will refer to the grounds of opposition *infra* when I discuss and analyse the applicant's case.

[8] The applicant seeks in paragraph 1 of the notice of motion that the court order of 8 September 2022 "be set aside". It is evident, when considering the application as a whole, that the applicant in fact seeks an order to rescind the court order of 8 September 2022.

[9] It is not clear from the application if the application is lodged in terms of the common law or in terms of Rule 31(2)(b) of the Uniform Rules of Court ("the Rules") or in terms of Rule 42 of the Rules. However, it is evident from the facts that the applicant attempts to make out a case for rescission either based on the common law or Rule 31(2)(b).

[10] The approach adopted by courts in deciding on an application for rescission has been described in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd*[1] as follows:

[1]1994 (4) SA 705 (E) at 711E-G.

> "An application for rescission is never simply an enquiry whether or not to penalise a party for its failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence, and that the application for rescission is not *bona fide*. The magistrate's discretion to rescind the judgment of his court is therefore primarily designed to enable him to do justice between the parties."

[11] It is tried, in applications for rescission of judgment of this nature, the applicant:[2]

[11.1] Must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance.

[11.2] Must be *bona fide* without the intention to delay the relief sought by the respondent.

[11.3] Must show that he has a *bona fide* defence to the relief sought by the respondent. 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.

[12] "*Good cause*" includes, but is not limited to, the existence of a substantial defence. The party applying for the judgment to be rescinded must at least furnish an explanation of his/her default sufficiently full to enable the court to

[2]See Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476-477 and De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd *supra* at 708H-709D.

understand how it really came about, and to assess his/her conduct and motives.[3]

[13] The applicant needs not show a probability of success on the merits, it suffices if he shows a *prima facie* case in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. The grounds of the defence must be set forth with sufficient detail to enable the court to conclude that there is a *bona fide* defence, and the application is not merely for purpose of harassing the respondent.[4]

[14] Over and above what is required from an applicant referred to *supra*, applications of this nature, if not lodged within the time period prescribed in Rule 31(2)(b) of the Rules, alternatively, within a reasonable time in terms of the common law or Rule 42 of the Rules, an applicant is required to approach the court on application to condone the late filing of the application for rescission of judgment.

[15] No application for condonation for the late filing of the rescission of judgment application is before this Court, nor is any facts placed before this Court showing that the respondent consented to such condonation. For this reason alone, the application for rescission of judgment should not succeed.

[16] In the applicant's explanation as to why he did not oppose the main application he proffered the excuse that, although he was aware of the main application, he was not able to oppose the said application because of him being incarcerated at the time. During argument before this Court, the

[3]See Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352G-353A.
[4]See Brown v Chapman 1928 TPD 320 at 328; Grant v Plumbers (Pty) Ltd *supra* at 476-477 and Silber

Ozen Wholesalers (Pty) Ltd *supra.*

applicant indicated that he is married and has three children (only one is still in school), but his wife and children never visited him while he was incarcerated. The applicant also conceded during argument that he did receive visits from relatives during the time he was incarcerated and furthermore that he still has friends in the legal profession. However, the applicant submitted that his relatives did not have money at the time to assist him and his friends in the legal profession would have insisted on payment if they were requested by the applicant to assist him. It should be noted, these aspects submitted in argument have not been canvassed by the applicant in his founding affidavit.

[17] The respondent, in opposition of the application for rescission of judgment, denies the applicant's alleged inability to have obtained legal representation and to attend the court proceedings on 8 September 2022 while being incarcerated. I agree with the respondent's contention and I find it difficult to believe that the applicant would not have been afforded an opportunity by Correctional Services to contact an attorney or Legal Aid SA for assistance and furthermore to attend the court proceedings on 8 September 2022.

[18] The applicant furthermore did not take this Court into his confidence by providing full and sufficient particulars regarding the steps he took to request Correctional Services to contact an attorney and/or Legal Aid SA and to attend the hearing of the application on 8 September 2022. The applicant in argument conceded that representatives of Legal Aid SA visited the Correctional Services facilities in Kroonstad on a regular basis. Even with this knowledge, the applicant failed to approach the representatives for assistance and guidance.

[19] In an attempt to show that he has a *bona fide* defence to the relief sought by the respondent, the applicant stated as follows:

[19.1] Regarding the Busisiwe Sheila Madlala-complaint and conviction to which he pleaded guilty for contravening the provisions of s 84 of the Attorneys Act,[5] namely that he misappropriated trust funds, the applicant attribute his actions to a "*serious blund*er" on his side. However, during argument, the applicant submitted that he did not refund the misappropriated money and he only became aware of the misappropriation of trust funds when criminal charges were instituted against him.

[19.2] Regarding the conviction on the four charges of theft and consequent sentence on 12 February 2021 to six years imprisonment, the applicant persists that he is not guilty and that the so-called "clients" referred to were never his clients. It is the applicant's case that he was approached by one "Mr Pitso" to help him with a deceased's estate. In argument, the applicant confirmed that Mr Pitso was in fact his client. The applicant admitted that he did receive the monies referred to in the charges, but, according to him, he paid the monies to a "wrong beneficiary". However, in argument the applicant acknowledged that the monies were paid to Mr Pitso. The applicant furthermore blames his young age and inexperience as an attorney, including his inexperience in estate matters, as the reason why the monies were paid to the wrong person. The fifth charge[6] which the applicant was convicted on, relates to the charges of theft referred *supra*, and although the applicant did not refer specifically to this conviction in his founding affidavit, it is accepted that his explanation on the charges of theft is similarly applicable to the fifth charge.

[5]Act 53 of 1979.
[6]Contravention of s 102(1)(f), read with s 35(12) and s 102(1)(l)(iii) of the Administration of Estates Act 66 of 1965.

[19.3] In argument, the applicant made mention of his intention to appeal the convictions of theft and consequent sentence of imprisonment. However, no reference of such intention, the grounds therefor and the progress of the intended appeal have been referred to by the applicant in his founding affidavit.

[19.4] The applicant did not deal with the conviction of the sixth charge, namely defeating or obstructing the course of justice in that he failed to comply with a court order directing him to hand over an estate file to the executor of the said estate. The applicant was sentenced to twelve months direct imprisonment for this offence.

[20] I am not satisfied that the applicant showed good cause why the judgment dated 8 September 2022 should be rescinded. The applicant failed to give a reasonable explanation of his default and he failed to show a *bona fide* defence. The offences committed by the applicant are criminal offences and serious in nature. Mr Phalatsi on behalf of the respondent correctly submitted that a higher standard of conduct is expected from an attorney and the applicant should be judged based on this higher standard. For the above reasons, the application should not succeed.

[21] Mr Phalatsi on behalf of the respondent argued that the respondent is entitled to a cost order in its favour on an attorney client scale. Mr Phalatsi substantiated his contention in argument that the respondent, being a statutory body overseeing the conduct by legal professionals, should not be out of pocket when defending applications of this nature. I agree with the submissions made by Mr Phalatsi. The respondent exercised its statutory duty in opposing this application and the general rule is that the respondent is entitled to costs, and the appropriate scale should be on an attorney client scale.[7]

[7]See Law Society, Northern Provinces v Mogami and Others 2010 (1) SA 186 (SCA) at par [31].

[22] Accordingly I propose the following order:

The application is dismissed with costs on the scale as between attorney client.

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**J J BUYS, AJ**

I concur

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**I VAN RHYN J**

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| On behalf of the Applicant: | Mr. S.J. Radebe<br>C/o Ponoane Attorneys<br>Bloemfontein |
| On behalf of the Respondent: | Mr. N.W. Phalatsi<br>NW Phalatsi & Partners<br>Bloemfontein |