REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 15263/2017

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

8 September 2022

In the matter between:

SEKGOBELA, JOHN PHETOLA	**Applicant**
and	
THAMAGA, NOKO ALBERT	**1st Respondent**
THAMAGA, KOLOBE FRANCINHA	**2nd Respondent**
THE REGISTRAR OF DEEDS	**3rd Respondent**

JUDGMENT

Mdalana-Mayisela J

1. This is an application for rescission of a default judgment granted by La Grange AJ against the applicant in favour of the first and second respondents on 3 December 2018. The application is brought in terms of rule 31(2)(b) *alternatively* rule 42(1)(a) of the Uniform Rules of Court *further alternatively* common law. The applicant also applies for condonation for the late filing of the rescission application.

2. The first and second respondents are opposing the rescission and condonation applications. They are also applying for condonation for the late filing of the notice of intention to oppose and opposing affidavit. The condonation application is not opposed by the applicant.

Applicant's condonation application

3. The applicant states that on 21 January 2019, his attorneys informed him about a default judgment granted against him by La Grange AJ. He deposed to the founding affidavit in support of the rescission application on 18 February 2019. He filed a supporting affidavit of his attorney, Amos Petros Ngubeni explaining the delay in bringing a rescission application.

4. Amos Ngubeni states that he approached the registrar of the unopposed motion court to allocate a date on the unopposed roll for the rescission application. The registrar informed him that the file was misplaced. He made attempts to locate the file on 28 February 2019, 8 March 2019, 9 March 2019, 4 April 2019, 12 April 2019, and 30 April 2019. On 23 May 2019 he deposed to an affidavit to open a duplicate file. On 24 May 2019, the registrar informed him that the file had been located. The rescission application was then filed with the registrar on 24 May 2019 and served on the respondents on 28 May 2019. He submits that the delay was caused by the misplacement of the file.

5. Rule 31(2)(b) provides that the application to set aside a default judgment shall be made within 20 days after acquiring knowledge of such judgment. In my view rule 31(2)(b) is not applicable in this matter for the reason to be stated hereunder. In terms of rule 42(1) and common law the rescission

application shall be brought within a reasonable time. The rescission application was brought about four months after the default judgment was granted.

6. Rule 27 of the Uniform Rules of Court gives a discretion to the court to condone non-compliance with the rules where good cause has been shown and the other party would not suffer prejudice. This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends upon 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, the effect of the delay on 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 prospects of success (*Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) at 477A-B*).

7. I accept the explanation for the delay given by the applicant in his substantive application for condonation. The applicant signed his founding affidavit supporting the rescission application four weeks after acquiring knowledge of default judgment. The misplacement of the file in the registrar's office could not be used against the applicant. In considering the extent and cause of the delay, the reasonableness of the explanation for the delay, and the importance of the issues to be ventilated in court if the rescission application is granted, I find that it is in the interest of justice that the condonation application be granted.

1st and 2nd Respondents' condonation application

8. The first and second respondents ("the respondents") are applying for condonation for the late delivery of the notice of intention to oppose and the opposing affidavit. The notice of intention to oppose was served on 20 June 2019. It was filed six days out of time. The respondents state that the delay was caused by a delayed confirmation of cover from the second respondent's

legal insurance company, Scorpion Legal Protection. The cover confirmation was requested on 28 May 2019 and received on 12 June 2019.

9. The opposing affidavit was commissioned on 14 July 2019. It is not clear when it was delivered, but the replying affidavit was delivered on 29 July 2019. The respondents allege that the delay in delivering the opposing affidavit was caused by the miscommunication between counsel, who was instructed to prepare the opposing affidavit and applicant's attorney of record.

10. The application for condonation is not opposed by the applicant. The explanation given by the respondents for delay in delivering the notice of intention to oppose and opposing affidavit is reasonable. The delay is not lengthy. I find that it is in the interest of justice that condonation application be granted.

Rescission application

11. The first and second respondents ("the respondents") are married under civil law. The third respondent is joined in this application in compliance with section 97(1) of the Deeds Registry Act.

12. On 4 May 2017 the respondents brought an application ("the main application") to set aside the Deed of Transfer in applicant's favour over Erf 2934 South Germiston Extension 9 Township ("the immovable property"). The applicant instructed the attorneys to oppose the application and a notice of intention to oppose was delivered on 30 May 2017. An opposing affidavit was served on the respondents on 12 June 2017 and filed with the registrar on 13 June 2017.

13. Briefly, in the opposing affidavit the applicant contended that in 2015 the second respondent donated her immovable property to him freely and voluntarily. She signed the transfer papers at the attorneys' office, and the immovable property was registered into his name. The applicant paid for rates

clearance and transfer costs. He also paid R25 000.00 to the second respondent as a form of gratitude.

14. On 18 July 2016 the applicant brought the application to evict Herold Rapheaga and unlawful occupants from the immovable property. He alleges that the eviction application triggered the main application.

15. The main application was heard on 3 December 2018 in the absence of the applicant. La Grange AJ granted a default judgment against the applicant setting aside the Deed of Transfer in respect of the immovable property; reinstating the Deed of Transfer T21805/1999 in favour of the second respondent in respect of the immovable property; declaring all documents used in the transfer of the immovable property in favour of the applicant to be null and void; declaring the respondents to be the lawful owners of the immovable property; and costs.

16. The applicant seeks to rescind the default judgment in terms of rule 31(2)(b) *alternatively* rule 42(1)(a) *further alternatively* common law. In my view rule 31(2)(b) is not applicable because the applicant filed a notice of intention to oppose and opposing affidavit. Rule 31(2)(b) applies where the default judgment was obtained as a result of a failure to file a notice of intention to defend or a plea.

17. Rule 42(1)(a) provides as follows.

> *(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."*

18. The court has a discretion whether or not to grant an application for rescission under this subrule. The applicant must show that he has a legal interest in the subject-matter of the application which could be prejudicially affected by the judgment of the court *(United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd 1972 (4) SA 409 (C*)).

19. The explanation given by the applicant for his default is that, beginning of 2018 he was enlisted for skills development program with his employer, Laserfab (Pty) Ltd, for the duration of the whole year, and relocated to Limpopo. During this time, he was facing financial difficulties, as his salary was reduced to a stipend salary of R800.00. He could not afford to pay legal fees. He failed to inform his attorneys about the change in his circumstances. He admits that it was an error of judgment. He completed the program on 14 December 2018 and came back to Gauteng.

20. He immediately contacted his attorneys, who informed him that they withdrew from the matter because they could not get hold of him, and also did not have funds to brief counsel to argue the main application. They showed him a letter dated 2 August 2018 sent to him, which was asking him to contact his attorneys to make arrangements to come to the office. He states that he did not receive that letter because he was in Limpopo at that time. His attorneys also informed him that the main application was set down for 3 December 2018.

21. He submits that the notice of set down for the main application did not come to his attention. He was not aware that the main application was going to be heard on 3 December 2018. He was also not aware that his attorneys had withdrawn. Had he known about the date of hearing he would have appeared in person and addressed the court.

22. The respondents contend that a notice of set down on the main application was sent to the applicant's attorneys before their withdrawal, however, no proof of such service is attached to the opposing papers. There is no evidence before me that the applicant's attorneys brought such notice to his attention. The respondents were served with the applicant attorneys' withdrawal notice on 24 October 2018, more than a month before a hearing date. There is no evidence before me that the respondents tried to make the applicant aware of the date of hearing after they received the withdrawal notice before the hearing date. The respondents are not disputing that the applicant was not aware of a hearing date.

23. There is also no evidence before me supporting the contention by the respondents that the applicant abandoned his defence in the main application. The applicant disputes this contention, and states that it was due to lack of knowledge that he did not appear in court. The applicant filed a notice of intention to oppose and the opposing affidavit. He stated that had he known about a hearing date, in the absence of his attorneys, he was going to appear in person and address the court. This is an indication that he always had intention to oppose the main application.

24. It is common cause that the order of La Grange AJ was granted in the absence of the applicant and he is affected by it. The default judgment was erroneously sought and granted because La Grange AJ was not aware that the notice of set down did not come to the attention of the applicant, an unrepresented litigant.

25. The applicant seeking rescission in terms of rule 42(1)(a) is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b) (*Kgomo v Standard Bank of South Africa 2016 (2) SA 184 (GP)*). Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission (*Mutebwa v Mutebwa & Another 2001 (2) SA 193 Tk HC at page 198 F*).

26. I am satisfied that the applicant has made out a case for a rescission of the default judgment in terms of rule 42(1)(a) so that the main application can be adjudicated properly with all the parties present. Accordingly, I find it unnecessary to consider whether he is entitled to a rescission under common law.

27. The applicant has submitted that the main application should be referred to oral evidence as there is a dispute of fact. I do not think it would be proper for this court to make such determination. The court hearing the main application will make such determination.

28. I now turn to the issue of costs. The third respondent is not opposing this application, and no cost order is sought against it. The costs follow the event, and I find no reason why the first and second respondents should not be ordered to pay the costs of the rescission application.

29. Accordingly, the following order is made:

1. The late filing of the rescission application is condoned.
2. The late filing of the notice of intention to oppose and opposing affidavit is condoned.
3. The whole default judgment granted by La Grange AJ against the applicant on 3 December 2018 is hereby rescinded and set aside.
4. The first and second respondents are ordered to pay the costs of the rescission application, jointly and severally, the one paying the other to be absolved.

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MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(**Digitally submitted by uploading on Caselines and emailing to the parties)**

Date of delivery: 8 September 2022

Appearances:

On behalf of the Applicant:	Adv N Gaffoor
Instructed by:	Nozondo Kunene Mosea Attorneys
On behalf of the 1st and 2nd respondents:	Adv E Liebenberg
Instructed by:	C F Van Coller Attorneys