Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 6825/2021

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

2 NOVEMBER 2022
.....
DATE
SIGNATURE

In the matter between:

ANA PAULA DE SOUSA NIMPUNO	Applicant
And	
ISMAIL AYOB AND PARTNERS	1ST Respondent
THE STANDARD BANK OF SOUTH AFRICA LIMITED	2ND Respondent
THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL	3RD Respondent
SHERIFF OF THE HIGH COURT: JOHANNESBURG NORTH	4TH Respondent
SHERIFF OF THE HIGH COURT: JOHANNESBURG CENTRAL	5TH Respondent
IN RE:	
ISMAIL AYOB AND PARTNERS	Plaintiff

And

ANA PAULA DE SOUSA NIMPUNO Defendant

JUDGMENT

MIA, J

[1] The applicant brings an application for rescission of the judgment granted by default on 14 June 2021, in terms of Rule 42(1)(a), in the alternative, the applicant relies on the common law. The applicant also requested the writ of execution issued pursuant to the grant of default judgment be set aside and any property attached pursuant to the writ be released. The first respondent opposes the application and raised several points resisting application for rescission.

[2] The background to the application is as follows. The first respondent was appointed to attend to the winding up of the applicant's deceased husband's estate. During the course of the winding up of the estate, the applicant raised a query regarding the account of the first respondent which led to a dispute. This dispute was referred by the applicant to the fee dispute resolution committee (the FDRC) of the third respondent to assess the fees charged by the first respondent.

[3] In response to the referral, the first respondent prepared an updated statement of account and emailed it to the FDRC. The FDRC met jointly with the applicant and the first respondent on 26 November 2020 and directed the parties to file submissions by 30 November 2020. Both parties filed their submissions and the third respondent acknowledged receipt thereof, on 9 December 2020. The applicant departed from South Africa on 17 December 2020. The third respondent had not determined the referred fee dispute when the

applicant left South Africa. In the interim, the applicant sold the residence at […] Drive, Saxonwold, Johannesburg (the Saxonwold address). The transfer of the property was registered to a third party on 5 February 2021.The first respondent issued summons against the applicant and served it at the Saxonwold address on 12 February 2021.

[4] The applicant having left for Portugal in December 2020, was not aware of the summons and its service on the Saxonwold address. She did not enter an appearance to defend the summons. The first respondent proceeded to request default judgment in the absence of the applicant's defence. The applicant became aware on 12 September 2021, that default judgment had been granted on 14 June 2021, through her attorneys of record. She gave an instruction to commence the present application for rescission of judgment. The affidavit deposed to by the applicant in support of the application for rescission of judgment was deposed to and authenticated in Portugal on 12 October 2021. The first respondent takes issue with the authentication of the applicant's affidavit.

[5] The issues for determination are:

5.1. whether default judgment was granted against the applicant erroneously as provided in Rule 42(1)(a), alternatively whether rescission of the default judgment could be granted based on common law principles.

5.2. whether the court should set aside any writs of execution pursuant to setting aside the default judgment and release all property attached to such writs.

5.3. whether there has been compliance with the applicable provisions of the Hague Convention, and specifically the prescribed formalities for the authentication of foreign documents.

5.4. whether it is necessary for the applicant to join SARS, the Master of the High Court and the South African Reserve Bank(SARS).

5.5. whether the applicant ought to have applied for condonation for the delay in filing the application three days late.

I propose to deal with the issues of condonation, joinder and compliance

of the Apostille Convention before dealing with the application for rescission of judgment.

CONDONATION

[6] The first respondent raised the point that the application was out of time as the affidavit was filed three days late. It was submitted that the applicant left the country on 17 December 2020 with a knowledge that she did not intend returning to the country. Moreover, the applicant did not disclose a forwarding or contact address and it is reasonable to assume that her conduct was wilful and deliberate and intended to hide her permanent departure. She also ignored all communication and it was thus reasonable to calculate the date of judgment of the debt from 14 June 2021. The first respondent relied on the unreported decision in *Minister of Public Works vs Roux Property Fund (Pty) Ltd* (779/2019) [202] ZASCA119(1October 2020) where the Court referring to the decision in *Madinda v Minister of Safety and Security*[1], held :

> "[18] The second requirement of 'good cause' involves an examination of 'all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice', and may include, depending on the circumstances, 'prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefor.'
>
> [19] The court held that good cause for the delay is not 'simply a mechanical matter of cause and effect' but involves the court in

[1] See also *Madinda v Minister of Safety and Security* 2008 (4) SA 312 SCA

> deciding 'whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously'; and in this process, strong merits may mitigate fault; no merits may render mitigation pointless"

[7] It is trite that condonation is not for the asking. Rule 27(3) requires the applicant to show good cause in a request for condonation and in doing so the applicant must make out a case for the relief requested furnishing an explanation that covers the entire period of the delay. This must enable the court to understand how the delay came about to assess the applicant's conduct and reasons[2]. The applicant's explanation that she was in a rural part of Portugal without ready access to legal services or an attorney addresses the short delay of three days adequately. The first respondent is not unduly prejudiced by the condonation. Without delving into the merits of the matter, it is evident that there was no proper service of the summons. The applicant was not afforded an opportunity to defend the matter before default judgment was obtained. In the circumstances, it is appropriate that condonation be granted.

NON JOINDER

[8] The first respondent submitted that the applicant failed to join SARS which is fatal to the application as SARS has a direct and substantial interest in the application. The first respondent's submission is based on it having obtained judgment against the applicant and having instructed the fifth respondent to attach the applicant's bank accounts. The first respondent does not bear knowledge of the applicant's ability to settle her debt. Neither the applicant's bank balance nor its disclosure to the first respondent is indicative of SARS having an interest in the applicant's application for rescission of the judgment.

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[2] *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus Curiae)* 2008 (2) SA 472(CC)

[9] There is no evidence to support the first respondent's contentions that SARS, the Master of the High Court or the Receiver of Revenue have an interest in the applicant in her personal capacity to the extent the first respondent is dealing with the winding up of the estate of the applicant's deceased husband's estate. What is due in terms of estate duty can only be determined once the estate is finally wound up. This issue was unresolved and the accounts were being debated when the applicant departed from South Africa. The matter is yet to be determined.

[10] The applicant conceded that she was appointed as the executor of the estate of a late husband. The estate has not been finalised and she has not been discharged as the executor. Her obligations in terms of the Administration of Estates Act continue and she remains an executor in South Africa. Notwithstanding that she is an executor, she maintains that the Master has no interest in the application for rescission for default judgment against her.

[11] There was no evidence tendered supporting the view that the Master of the High Court, SARS or the Receiver of Revenue have an interest in this application. If there was an interest, it would have been appropriate for the first respondent to join the parties mentioned. The only reasons they are not joined is because there is no cause to do so and unnecessary costs would be incurred. The first respondent's points on non-joinder are not supported by an evidence. Consequently, they cannot be upheld.

THE APOSTILLE CONVENTION

[12] The first respondent submitted that there was non-compliance with the provisions of the Apostille Convention. In pursuance of this ground, it was submitted that the founding affidavit signed before a lawyer who confirmed the identity of the applicant ought to have complied with the provisions of the Apostille Convention to "*certify the authenticity of the signature, the capacity in which the person signing the document has*

acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates."[3]

[13] The first respondent submitted that Article 4 of the Apostille Convention required that:

> "The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or on an "allonge"; it shall be in the form of the model annexed to the present Convention. It may, however, be drawn up in the official language of the authority which issues it. The standard terms appearing therein may be in a second language also. The title "Apostille (Convention de La Haye du 5 octobre 1961)" shall be in the French language."

[14] Article 1 of the Apostille Convention states:

> "The present Convention shall apply to public documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State.
>
> For the purposes of the present Convention, the following are deemed to be public documents:
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> a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server ("huissier de justice");
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> b) administrative documents;
>
> c) notarial acts;
>
> d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.
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> However, the present Convention shall not apply:
>
> a) to documents executed by diplomatic or consular agents;
>
> b) to administrative documents dealing directly with commercial or customs operations.

[3] Article 3 of the Apostille Convention

[15] The purpose of the Apostille Convention is to facilitate the production of documents rather than to encumber or pose restrictions. The Apostille Convention applies particularly to documents that usually emanate from a public prosecutor, a court clerk or a process server. The Apostille Convention holds that the law of the Contracting State determines whether or a document is a public document or not. It requires Contracting States to have a clear understanding of the types of documents which may require an Apostille to be issued (i.e., which may be apostillised).

[16] The Hague Conference on Private International Law (HCCH) issues a number of publications to assist member countries in the application of the Apostille Convention. The *ABCs of Apostilles*[4] being one publication that assists in the application of the Apostille Convention as does the Apostille Handbook[5] which assists in the practical operation of the Apostille Convention. The handbook on the application of the Apostille Convention provides that an Apostille may not be rejected on the basis that the underlying document is not considered to be a public document under the law of the state of destination, although that law may determine what legal effect to give to the underlying document. From the aforegoing, it is evident that Portugal as the country of origin determines the public nature of the document and the requirement to be apostillised. No authority has been placed before me which suggests that the affidavit is non- compliant in the country of origin, and no authority has been referred to suggesting that it should be rejected in this court as the country of destination. To the contrary the authorities referred to by the applicant[6] support recognition.

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[4] *ABCs of Apostilles*-How to ensure that your public documents will be recognised abroad https://www.hcch.net/en/publications-and-studies/details4/?pid=4967

[5] *The Apostille Handbook* A handbook on the practical application of the Apostille Convention https://www.hcch.net/en/publications-and-studies/details4/?pid=5888

[6] *Maschinen, Fromer GmbH & Co. KG v Trisave Engineering and Machinery Supplies (Pty)Ltd* (2003) (6) SA69(C); *Blanchard, Krasner & French v Evans* 2004(4) SA 427 (W)

[17] In considering the authorities relied upon by the applicant and Rule 63, it is evident that where the applicant relies on an affidavit executed outside of South Africa it should be authenticated. The applicant's affidavit has been authenticated and there is no suggestion that the affidavit is not genuine. The first respondent's submission that it be apostillised before acceptance does not accord with an ordinary interpretation of Rule 63 as it has been applied by South African authorities[7].

RESCISSION OF JUDGMENT

[18] The applicant relied on Rule 42(1)(a) which provides for the erroneous granting of a judgment. Counsel for the applicant referred to the decision in *Lodhi 2 Properties Investment CC and Another v Bondev Developments (Pty) Ltd*[8] where the Court explained that the phrase "erroneously granted" related to the procedure followed to obtain judgment in the absence of another party and not to the existence of a defence to the claim.[9] It was submitted that judgment was obtained against the applicant in error as it was granted in her absence. It was submitted that the first respondent was not procedurally entitled to obtain default judgment against the applicant as the summons was served on an address where the applicant no longer resided at. The return of service provided that service was effected in terms of Rule 4(1)(a) (v) by affixing a copy to the residence. The amended return of service records service as "affixing a copy upon the residence of the residence" in terms of Rule 4(2)(a)(ii) does not cure the defective service upon the residence. Counsel for the applicant submitted that service was not proper in terms of the rules and judgment was erroneously granted having regard to what the rule required in terms of Rule 42(1)(a).

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[7] ibid

[8] *Lodhi 2 Properties Investment CC and Another v Bondev Developments (Pty) Ltd* 2007(6)SA 87 SCA para 25-27

[9] See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills(Cape)* 2003(6) SA 1 SCA, para 6-9

[19] In an application for rescission in terms of Rule 42(1)(a), the applicant is not required to show good cause over and above the error for the rescission as contemplated in Rule 32(1)(b). The return of service was served upon an address which was not the applicant's residence and could not have come to her attention n order for her to defend the claim. It is apparent that there is a debate regarding the account due. The account of the applicant's husband's deceased estate and the applicant's debt in her personal capacity cannot be conflated without her being able to defend what is due by her. On the facts that the summons was served on an address at which the applicant did not reside and the return of service reflects that service was not effected in terms of the rules, the service effected by both returns of service is not sanctioned by the rules. It follows that the judgment granted by default on 14 June 2021 was granted erroneously in the absence of the applicant. The judgment is thus rescinded.

[20] In view of the rescission of the judgment granted erroneously on 14 June 2021 all the consequences that followed the erroneous granting of the judgment fall to be set aside, overturned, and withdrawn. This applies to the writ of execution and property attached.

[21] It is appropriate that the usual cost order follow where there has been an unsuccessful opposition.

ORDER

[22] For the reasons above I grant the following order:

1. The order granted by default on 14 June 2020 is hereby rescinded.
2. The writ of execution issued pursuant to the grant of the default judgment is set aside.
3. Any property attached as a consequence of such writ shall be released.
4. The first respondent shall pay the cost of the application.

S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appearances:

On behalf of the Applicant	: Adv V Olivier
Instructed by	: Harrington Johnson Wands Attorneys
On behalf of the Respondent	: In Person
Date of hearing	: 28 February 2022
Date of judgment	: 2 November 2022