IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO:34337/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	DATE: 30 JANUARY 2023
	SIGNATURE: ***ML SENYATSI***

In the matter between:

JACQUIRE FREDERICK JOHN Applicant

and

PRETORIUS JOHANNES STEFANUS Respondent

In re:

PRETORIUS JOHANNES STEFANUS Plaintiff

and

JACQUIRE FREDERICK JOHN Defendant

Delivered: *By transmission to the parties via email and uploading onto Case Lines*

the Judgment is deemed to be delivered. The date for hand-down is deemed to be 30 January 2023

REASONS

SENYATSI J:

[1] On 8 August 2022, I dismissed an application for rescission of the judgement which was granted on 3 January 2019 with costs.

[2] The reasons for the judgment are as set out below.

[3] In the application for rescission, the applicant sought to rescind and set aside the Court's judgment in terms of Rule 31 (2) (b), which was granted by default on 3 January 2019 because the applicant had failed to file his appearance to defend.

[4] The applicant also sought condonation of the late filing of the application. The judgment sought to be rescinded was for payment of R200,000.00 plus interest at the rate of 24% per annum a tempore morae to date of final payment as well as cost of suit.

[5] The issue for determination is whether or not good cause has been shown by the applicant for his condonation and rescission of the judgment.

[6] Rule 31 (2) (b) of the uniform Rules of Court states that a defendant may within 20 days after acquiring 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 fit.

[7] The application under this sub rule applies when the defendant had been in default of delivery of a notice of intention to defend or a plea.[1]

[8] It is compliant with the sub rule to file the notice within the prescribed period. In *Tladi v Guardian National Insurance Co Ltd*[2] it was held that the expressions such as "application shall be made" should be interpreted as meaning that the application must be filed with the registrar and served on the respondent within the prescribed period and that to hold otherwise would not only defeat the underlying purpose of the sub rule, but would also be harsh, unjust, unreasonable and absurd.

[9] With regards to good cause to be shown, it is required of the applicant to set out facts in his papers that for instance, he was not in wilful default as this is an essential factor to determine a good cause.[3]

[10] The wilful or negligent nature of the defendant's default is one of the considerations which the court takes into account in the exercise of its discretion to determine whether or not good cause is shown.[4] The absence of gross negligence is not an absolute criterion, nor an absolute prerequisite, for

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[1] See Harckroad (Pty) Ltd v Oribi Motors (Pty) Ltd 1977 (2) SA 576 (W) at 578 B; Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (E) at 468H; Nyingwa v Moolman NO 1993 (2) SA 508 (Tk) at 509 I -510D; Terrace Auto Service Centre (Pty) Ltd v First National Bank of South Africa Ltd 1996 (3) SA 209 (W)

[2] 1992 (1) SA 76 (T)

[3] See Harris v ABSA Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at 529E - F

[4] See De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) SA 705 (E) at 708 G; Scholtz v Merry-weather 2014 (6) SA 90 (WCC) at 94 F – 96C

the granting of relief - it is but a factor to be considered in the overall determination of whether or not good cause has been shown.[5]

[11] In *Silber v Ozen Wholesalers (Pty) Ltd*[6] it was held that the explanation for the default must be sufficiently full to enable the court to understand how it really came about, and to assess the applicant's conduct and motives.

[12] In *Checkburn v Barkett*[7] the court held with regards to wilfulness to enter appearance to defend and stated the test to be adopted is whether the personnel 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.

[13] Before a person can be said to be in wilful default the following elements must be shown:

(a) knowledge that 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.

[14] In this case, the applicant contends he only became aware of the default judgment on 6 April 2021. He contends furthermore, that he was not aware that the respondent/plaintiff had instituted an action against him, nor was he

[5] See Vincolette v Calvert 1974 (4) SA 275 (E) at 376H
[6] 1954 (2) SA 345 (A) at 353 A
[7] 1931 CPD 423

aware of the warrant of execution or the application to declare the immovable property especially executable.

[15] The facts as averred by the applicants are contradicted by the fact that upon his default in payment in terms of the second agreement, in terms of which the proceedings were initiated, a letter of demand was issued by the respondent's attorney on 15 December 2017. The letter was replied to by the applicant's erstwhile attorneys, namely LP Baartman on 20 December 2017.

[16] The summons was served on the addresses, two summonses to be precise, that the applicant had elected as domicilium addresses, which were reflected on the letter of demand, to which his erstwhile attorneys replied to. The summons was served on the domicilium addresses on 5 October 2018.

[17] Upon receipt of the warrant of execution, which was served to the applicant on the domicilium address, the applicant's representative forwarded correspondence to the respondent to address a reply to the warrant of execution which had been served.

[18] The applicant admits that he did not attend to the matter any further and the reason for that was he thought that the matter had been finalised. He only reacted when he realised that his immovable property was facing a sale in execution of the judgement.

[19] The applicant forwarded letters to the respondent in response to the warrants of execution which were dated 27 July 2020 and 10 August 2020. The applicant contends that the letters were written by a family friend and

accountant, Mr. Marius Geyser on behalf of his father. This cannot be so because the letters originated from the applicant himself and are addressed to Otto Krause and a copy is addressed to H. Hoogendoorn.

[20] Both letters refer to the subject matter as “reply to warrant of execution received - 3 March 2020”. In those letters, the applicant informs the respondents attorneys that “*various letters of execution have unofficially been received*” and he required he requests proof of receipt by himself of judgment documents and that he is not going to offer any settlement on the matter.

[21] From these facts, it is evident that the applicant became aware of the process, at least on 27 July 2020 notwithstanding proper service to him on 5 October 2018. The applicant fails to account to what steps he took from 27 July 2020 to 6 April 2021. His papers are completely silent on this period. I therefore draw an adverse inference that he has not only failed to show a good cause on this point, but he has also failed to provide me with a proper explanation for reason of his default to launch the rescission within the period prescribed by the Rules.

[22] In his attempt to show that he has a *bona fide* a defence, the applicant states that he has not received the financial statements required in terms of the first agreement. This cannot be the case, because the applicant was involved in the business as a floor manager in any event. In any event, the second agreement was relied on as it replaced the first agreement. There was no condition in the second agreement that the respondent had to provide the financials to the applicant. This is understandable because the applicant was now involved in the business and had access to information. I am therefore

not persuaded that the applicant has shown that he has a bona fide defence to the claim.

[23] Accordingly, I am of the view that the condonation application for late filing of the application cannot be granted. It follows that the application for rescission must fail.

[24] I therefore stand by the order I made.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 8 August 2022

DATE REASONS DELIVERED: 30 January 2023

APPEARANCES

Counsel for the Applicant:	Adv LJ Pretorius
Instructed by:	Trutter Crous & Wiggil Attorneys
Counsel for the Respondent:	Adv P Louw
Instructed by:	Otto Krause Inc