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 DIVISION, JOHANNESBURG

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

....
DATE
SIGNATURE

Case no.: 2022/3341

In the matter between:

GWATEMBA CONSTRUCTION CC FIRST APPLICANT
(Registration number: […]**)**

GIDEON JOHNSON NDLOVU SECOND APPLICANT
(Identity number: […])

And

KIT FORMWORK AND SCAFFOLDING (PROPRIETARY) LIMITED RESPONDENT
(Registration number: […])

Coram: Dlamini J

Date of hearing: 30 August 2023

Delivered: 27 September 2023

JUDGMENT

DLAMINI J

INTRODUCTION

[1] The applicants have launched this application seeking the rescission of the default judgment that was granted against them on 6 September 2022.

[2] The principle regarding the requirements for an application for rescission is trite and has been pronounced upon in numerous Court decisions. The applicant must give a reasonable explanation of his default. The application must be *bona fide* and not made to merely delay the plaintiff"s claim, and the applicant must show that he has a *bona fide* defence to the plaintiff's claim

[3] It appears that after the respondent had served the summons on the applicants, the applicants engaged the services of Cele ZN Attorneys for legal assistance. The parties then entered into settlement negotiations. Seemingly, the negotiations did not bear fruit and collapsed. The respondent then applied for default judgment and same was granted by the court on 17 August 2022.

[4] The applicant's main contention is that they were under the impression that Cele ZN attorneys had seen to all the legal necessities, which the applicants assumed were in place.

REASONABLE EXPLANATION FOR DEFAULT

[5] The high water mark of the applicant's explanation is that the applicants were under the impression that the litigation has been suspended pending the finalisation of the settlement negotiations and further that the applicants were under the impression that their erstwhile attorney Cele ZN had seen to the necessary in so far as the main action is concerned.

[6] I have several difficulties, with the applicant's pleaded version. Firstly, when the settlement negotiations collapsed, the applicants were advised by the respondent in writing in a letter dated 19 May 2022, quoting *" In absence of a signed settlement agreement by close of business on Monday litigation proceedings will resume".* Despite this knowledge, the applicants asked for a further extension of 24 hours on 23 May 2022 to allow them to engage with HBC. When the negotiations between the applicants and HBC failed, the applicants were fully aware that the respondent would proceed with litigation and obtain judgment.

[7] Second, the applicant's reliance on the allegation that they relied on their legal representative to attend to the case has no merit. In *Salooje & Another v Minister of Community Development*[1] at 141 D-F " *if as here , the stage is reached where it must be become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or inquiry to his attorney and expect to be exonerated of all blame; and if, as here the explanation offered to this Court is patently insufficient, he cannot be heared to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his*

[1] 1965 (2) SA 135 (A)

attorney. If he relies upon the ineptitude or remises of his attorney, he should at least explain that none of it is to be imputed to himself.

[8] As in this case, the applicants have not provided any evidence of any steps they have taken to ensure that their attorney was timeously and efficiently attending to their matter. The applicants have not pleaded with any particularity evidence that showed they had a genuine interest in the matter in the form of emails, telephone calls, and requests for consultation made to Cele ZN attorneys enquiring about progress in their matter.

***BONA FIDE* DEFENCE**

[9] The essence of the applicant's defence is that the applicants are not responsible for payment towards the respondent and that the applicants merely acted as a conduit between the respondent and a third party, that is HBC Construction. This the applicants refer to it as *a "conduit"* defence. This third-party/conduit defence is according to the applicants evidenced from various email correspondence which shows that when emails, accounts, and invoices were sent to the applicants, the third-party HBC Construction was also copied into such emails and correspondence.

[10] In my view, the applicants voluntarily allowed HBC to use the first applicant's accounts held at the respondent. Therefore there is no *lis* between the respondent and HBC. The applicant's submission of the exitance of the so-called "conduit defence" is meritless and must be dismissed. This is so because such a defence or principle does not exist in our law. At the hearing of the matter, I requested Counsel for the applicants to provide this Court with authority where this principle was applied, needless to say, Counsel for the applicants conceded that such authority is non-existent.

RULE 42(1)

[11] The submission by the applicants in this regard is the order that was granted by the Court was granted in error and should thus be set aside. The

applicants avers that the summons was served on the applicants on 28 January 2022 and 14 February 2022 respectilvley. The request for default judgment was isuued on 17 August 2022 and the request for default judgment was granted on 6 September 2022. Therefore insists, the applicants that the respondent has failed to comply with paragraphs 9.20 of the Practice Manual, by failing to serve the notice of set down of the application for default judgment on the applicants.

[12] It is correct that in terms of parargraph 9.20 of the Practice Manual, the respondent was required to make an application for default judgment on or before 28 July 2022 and 14 August 2022 without being required to serve a set down. However, in light of the facts before me, it appears that the respondent's application against the first applicant fell short by approximately 3 weeks and only 3 days as against the second applicant. In light of the relatively short periods of service, the fact that the parties were engaged in settlement discussions and in any event service of the set down would have no material effect on the outcome of the proceedings, such short period is condoned by this Court.

FURTHER AFFIDAVIT

[13] The contention by the applicants in this regard is that the respondent has filed the Further Affidavit without any application for leave to file same and therefore the Further Affidavit ought to be regarded as *pro non scripto.*

[14] The respondent submit that the due to the fact that the applicants in their replying affidavit rasied new facts, accordingly the were entitled to reply and address these new facts.

[15] It is a trite and well-established principle of our law is that an applicant in motion proceedings has to make out their case in his founding affidavit and not in the replying affidavit, this is so because the applicant stands or falls by his founding affidavit. Depending on the circumstances and particulars of the new fatcs, the Court has a discretion to decide whether to allow the further

affidavit. In this case, in terms of the *audi alteram partem* principle the further affidavit is admitted.

[16] In light of the above, it is my view that the applicants have failed to discharge the onus that rested on their shoulders to prove that they are entitled to be granted the rescission sought. The applicants have no *bona fide* defence to the claim brought against them and there is no triable issue in this case.

ORDER

1. The application for rescission is dismissed with costs.

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DLAMINI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	30 August 2023
Delivered:	27 September 2023
For the Applicants:	Adv. BC Bester ben@lawcircle.co.za
Instructed by:	SKV Attorneys cfisher@skvattonrey.co.za
For the Respondent:	Adv. WC Carstens
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