



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION: PRETORIA)**

Case number: 15396/14

In the matter between:-

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

DATE: 06th December 2022

SIGNATURE: _____

ZD INVESTMENT CC

1ST APPLICANT

ZODWA DLAMINI

2ND APPLICANT

AND

COUNCIL FOR GEOSCIENCE

1ST RESPONDENT

SHERIFF PTA SOUTH EAST

2ND RSPONDENT

JUDGMENT

KHWINANA AJ
INTRODUCTION

[1] The applicant is applying for rescission of summary judgment of 12 September

2014 obtained by consent in a summary judgment application.

[2] The applicant is approaching this court for condonation and in terms of Rule 42(1) of the Uniform Court Rules and costs.

[3] I am ceased with the application on condonation and rescission of judgment.

BACKGROUND

[4] The applicant instructed Mpoyana Ledwaba Attorneys in this matter who defended the action and the summary judgment application. On the 12th day of September 2014, the matter was in court for hearing and the first applicant says she had travelled having given her erstwhile attorneys instructions to oppose the application for summary judgment. She says she deposed to the opposing affidavit on the 03rd of June 2014 and the matter has initially been set down for the 04th June 2014 and was removed from the roll as it had become opposed. There is an allegation that a counsel whom cannot be identified appeared on behalf of the applicants and entered into a settlement agreement whereas he did not have the mandate to do so. An affidavit has been submitted with notes of the late Mr Phasha which is not clear.

[5] The first applicant says she learned about the execution in 2017 and believed that Mr Ledwaba was going to handle the matter as he was also dealing with her acrimonious divorce. She says she had to wait for funds and only in 29th day of January 2019 she caused that the application for rescission of judgment be served and filed to the respondents. The matter was only opposed on the 13th day of June 2019 and on the 18th day of June 2019 the opposing papers were filed.

LEGAL MATRIX

[6] Rule 42 (1) of the Uniform Rules states as follows:

1. The court may, in addition to 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.

[7] In terms of Rule 27 (3) The court may on good cause shown, condone any non-compliance with these rules.

ANALYSIS

[8] Non-compliance with the rules comes from time immemorial. However, the party asking for condonation must show sufficient cause why his failure to comply must be condoned. This court has a wide discretion in considering condonation. This court will not look at the reasons furnished only but will also consider the merits of this matter.¹

[9] *In casu* the applicants became aware of execution only in 2017 despite that summary judgment had been obtained by consent in 2014. There is no explanation why the order was not served sooner on the applicants. There is no history as to attempts to execute sooner.

¹ Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) 212(o) at 216H-217D and Gumede v RAF 2007 (6) SA 304 (c) at 307C-308A

[10] The applicants say their instructions were to oppose the summary judgment thus the matter was removed from the unopposed roll on the 04th day of June 2014. It is further imperative to note that the second applicant deposed to an affidavit which was in opposition of the said summary judgment application. According to the applicants their instructions were clear and concise they were to oppose.

[11] The applicants were not met with a decision after they matter was ventilated in court based on their opposition of the matter. It was however based on a settlement agreement which was not discussed with them. The applicants did not give instructions to have the matter settled. It is so that the summary judgment was granted based on a settlement agreement. This has not been disputed by the respondent in this matter. No legal representative must act outside their instructions.

[12] The legal practitioners are creatures of instructions and cannot act ultra vires. *In casu* it would seem that the legal practitioners that were acting on behalf of the applicants in court on the day in question that is the 12th day of September 2014 acted outside the scope of their mandate. It will be unfair to expect the applicants to be held liable for a settlement that they did not authorize. The legal practitioners must act in good faith and in the best interest of their client².

ORDER

[13] It is therefore on that basis that I grant the order of condonation of the late filing of the application for rescission of judgment and I rescind the order granted against the applicants with costs.

² MEC FOR ECONOMIC AFFAIRS, ENVIRONMENT & TOURISM V KRUIZEBERG (169/2009) ZASCA 58

**ENB KHWINANA
ACTING JUDGE OF NORTH GAUTENG
HIGH COURT, PRETORIA**

APPEARANCES:

APPEARANCES For the Applicants: Advocate AE Malange

Instructed by: GW MASHELE

For the Respondents: Advocate PJ Coetsee

Instructed: STEGMANN'S INC

Date of Hearing 06 September 2022

Date of Judgment 05 December 2022