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

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 8637/2019

DATE: 2022-10-24

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED: NO.
DATE : 24/10/2022
SIGNATURE: SM MARITZ AJ

In the matter between:

M W M Applicant

and

M P J M First Respondent

THE STANDARD BANK OF
SOUTH AFRICA Second Respondent

THE SHERIFF OF ROODEPOORT
SOUTH (KAGISO) Third Respondent

EX TEMPORE J U D G M E N T

MARITZ AJ:

[1] In matter, number 8 on the roll, the matter of M W M v M P J M and two others, case number 8637/2019 the applicant brought an application for the recission of the judgment granted against him, dated 31 July 2019. It is not clear from the papers whether the application is brought in terms of Rule 42 or in terms of Rule 31(2)(b), alternatively in terms of the Common Law.

[2] I have read the papers and I have listened to arguments on behalf of both counsel and in my view, there is nothing in the application indicating that it was brought in terms of Rule 42, as no case was made out therefore neither were the requirements that the judgment was sought erroneously or granted erroneously met.

[3] Counsel for the first respondent in his heads of argument pointed out that even if the application is brought in terms of Rule 42, the Court still must consider the requirements in terms of Rule 31, alternatively the requirements in terms of the Common Law.

[4] The relevant background facts of this matter are as follows: during 1996 the applicant and respondent got married in community of property. On 23 February 2012 the marriage was dissolved by Court and the division of the joint estate was ordered.

[5] The main subject matter of the dispute is the party's immovable property situated at Erf number [...] Nandi Street [...], [...] 2 and the selling of the said immovable property by way of auction in execution of the judgment which provided for the division of the joint estate.

[6] No agreement to the division of the joint estate could be reached and the respondent (applicant in the main application) launched an application to Court to assist in this regard. That is the main application.

[7] The main application was duly served on the applicant (respondent in the main application) to which a notice of intention to defend was filed by the applicant. The applicant however failed to file an answering affidavit to the main application and the matter was set down on the unopposed motion roll.

[8] The notice of set down was served on the applicant's attorneys of record on 24 April 2019 and it was also served on the applicant via sheriff on 19 June 2019. The applicant failed to appear at the hearing of the main application and an order was granted on an unopposed basis on 31 July 2019 (default judgment).

[9] The applicant contended that his failure to appear at the hearing of the main application was caused by the fact that his then attorneys failed to notify him timeously. The applicant then launched this application for the recission of the court order granted in the main application on 31 July 2019.

[10] It is trite that Rule 31(2)(b) of the Uniform Rules of Court applies where a default judgment was granted due to the failure of a party to enter an appearance to defend or due to the failure to file a plea. In the main

application the applicant did enter an appearance to defend but he failed to appear.

[11] It is trite that an application for recission of default judgment brought in terms of Rule 31(2)(b) of the Uniform Rules of Court must be made within 20 days after the applicant had obtained knowledge of the judgment. It is generally accepted that the application must be issued, served, and filed within the stated period.

[12] To succeed with the application for recission the applicant must in terms of Rule 31(2)(b) show sufficient or good cause for the recission, show absence of wilfulness, give a reasonable explanation for the default, show that the application is *bona fide* and not made with the intention to delay the respondent's claim, and show that he has a *bona fide* defence to the respondent's claim that carries some prospects of success. In other words, set out sufficient facts that would constitute a defence at trial.

[13] Alternatively, if the application is brought in terms of the Common Law the applicant must bring the

application within a reasonable period after he or she obtained knowledge of the judgment and show sufficient cause which means there must be a reasonable explanation for the default. The applicant must show that the application was made *bona fide* and that he has a *bona fide* defence that carries some prospects of success.

[14] In this matter the applicant seeks an order that the judgment granted on 31 July 2019 be set aside with a punitive cost order. The first respondent seeks an order for the dismissal of the application with a punitive cost order to be paid from the applicant's proceeds of the sale of the immovable property.

[15] The applicant initially brought an urgent recission application on 20 October 2020 in which he amongst other relief sought the recission of the judgment granted against him on 31 July 2019.

[16] In respect of the application for condonation for the late filing of the recission application and the applicant's default of appearance during the hearing of the main application the following:

16.1 The applicant stated that on or about February 2019 he received a notice of motion. That is case number 58962/2017. From the papers it appears that it was an application for the appointment of a liquidator or receiver.

16.2 At the hearing of this application the Court was informed that the application for the appointment of a liquidator was subsequently withdrawn. Already at that stage the applicant should have been aware that for the division of the joint estate an application was brought for the appointed of a person/liquidator/receiver to assist with the division of the joint estate.

16.3 Then the applicant alleged in his papers that a litany of unprofessional and negligent conduct by his erstwhile attorney resulted in him not filing an answering affidavit in opposition to the main application and him being in default of appearance. He then explained the steps that he has taken to ascertain what the status of the matter was. The applicant alleged that he became aware of the default judgment granted against him for the first time on 7 October 2020.

16.4 In the applicant's founding affidavit, he stated that a notice of the sale in execution was served on him on 1 October 2020. In my view he knew, or he should have known of the judgment at that stage already.

16.5 He then stated that he was working nightshift and only managed to consult with his attorneys on 13 October 2020. The application for recission was filed on the 20 October 2020. From the documents it is clear that on 6 August 2019 the first respondent's attorneys of record send a letter to the applicant's then attorneys of record which included the court order. It follows that the Respondent was made aware of the court order as far back as the 6 August 2019.

[17] In considering whether I should condone the late filing of the recission application as well as the explanation given by the applicant for his default of appearance, I have considered the above facts.

[18] Furthermore, from the facts it is clear that on 12 February 2019 the main application was served personally on the applicant via sheriff.

[19] On the 20 February 2019 the applicant filed a notice of intention to oppose. On 19 March 2019 the respondent's attorneys of record filed a notice in terms Rule 30(A) on the applicant for his failure to file his answering affidavit. At that stage being 19 March 2019, the applicant was once again informed to file an answering affidavit.

[20] On 24 April 2019 a notice of enrolment was filed on the applicant's attorneys of record in which the prayers sought in the notion of motion in the main application were stated verbatim.

[21] Two days later the applicant's then attorneys served a notice of withdrawal as attorneys of record. On 19 June 2019 the first respondent's attorneys of record served a notice of enrolment together with the index to the main application via sheriff on the applicant by affixing same to the principal door of his residential address.

[22] It appears from the founding affidavit that the applicant is still residing at this residential property and therefore in my view the notice of enrolment and the set down of the main application should have been within his knowledge.

[23] On 10 July 2019 the applicant's attorney of record, which has withdrawn as attorneys of record came back on record and engaged in settlement negotiations with the first respondent's attorneys. From this it can be assumed that the applicant has instructed his then attorneys to attempt settlement negotiations.

[24] Even though the settlement negotiations were rejected the applicant did not file his answering affidavit. It is trite that if a matter is not settled and it is still opposed, the opposing party must file his/her opposing papers. It was not filed.

[25] On 22 July 2019 the court order was granted. It appears that the notice of motion in the main application clearly reflected the set down date. The notice of motion and founding affidavit were personally served on the applicant on 12 February

2019. Even though the applicant and his then attorney were aware of the set down none of them appear on the hearing date.

[26] On 23 July 2019 the applicant's then attorney indicated in a letter that they held instructions to launch an application to appoint a liquidator. Up and until that time the applicant's then attorneys were still executing his instructions even though the applicant averred in his founding affidavit that his attorneys failed to execute his instructions.

[27] In paragraph 84 of the applicant's founding affidavit, he states that he wishes to appoint a liquidator. That is in line with his instruction to his then attorney. It is apparently clearly from this that even at that stage he knew that the court order was granted. No application for the appointment of the liquidator was filed.

[28] And then on 6 August 2019 the first respondent's attorneys of record sent a letter to the applicant's erstwhile attorney of record to which a copy of the court order was attached. In that letter the first respondent's attorney of record specifically requested whether a copy of the court order should be served on

the applicant via sheriff, which request was declined by the applicant's then attorneys of record.

[29] It is clear from the facts that at that stage the applicant's erstwhile attorney was still mandated by him to act on his behalf. That was on 6 August 2019 and as such the service of the court order is competent and it can be regarded that the applicant had knowledge of the court order since 6 August 2019.

[30] The application before me was only brought on 20 October 2020. Various letters were sent to the applicant's erstwhile attorney in which a valuation of the property was requested to which no response was forthcoming. As a result of no response forthcoming the first respondent's attorneys informed the applicant on 13 November 2019 that the property would be sold in execution.

[31] Even if the applicant contends that he was not aware of the court order on 6 August 2019 he should have been aware of the court order on 13 November 2019. It is further worth mentioning is that on 7 February 2020 the writ of execution was served personally on

the applicant to which a copy of the court order was attached. The application was only brought on 20 October 2020.

[32] There is no doubt in my mind that the applicant was aware of the judgment and the court order. If he was not aware of the judgment on 6 August 2019, he should have been aware thereof on 13 November 2019, alternatively, on 7 February 2020.

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[33] For reasons stated above, I disregard the applicant's contention that he only became aware of the default judgment granted against him on 7 October 2020. I quote verbatim from his founding affidavit as stated in paragraph 57 thereof.

> "*This was the first time I became aware that there was a default judgment granted against me. I was made aware*
20 *on my first consultation with my current attorneys of record which was on the 7th of October*."

[34] From the facts stated above it is clear that it is not the truth. The applicant was aware of the judgment

and even if he says that he is a layman and he was not aware, well then, I do not believe it for the following reasons: there were a lot of indications that the property is going to be sold in execution, various notice of set downs was served, notice of motions were served and he also had an attorney at that stage.

[35] The applicant only launched his recission application, on 20 October 2020 which in my view is not within a reasonable time as required in terms of the Common Law, neither does it comply with the stipulated time period as set out in Rule 31(2)(b) of the Uniform Rules of Court.

[36] If the applicant was not aware of the judgment as contended then he should have been aware thereof on 6 October 2019, alternatively on 13 November 2019, further alternatively on 7 February 2020. Therefore, I am not satisfied with the explanation given for the late filing of the applicant's application.

[37] But even if I condone the late filing then the applicant still has to satisfy the requirements in terms of Rule

31, alternatively in terms of the Common Law to succeed with his recission application.

[38] I further disregard the applicant's contention that because of a litany of unprofessional conduct by his erstwhile attorneys he did not file his answering affidavit and was in default of appearance at the hearing. In my view the applicant knew he did not consult with his attorneys to draft an answering affidavit.

[39] It is trite that if a party files a notice of intention to oppose and there were settlement negotiations, and those settlement negotiations were not successful, and it is still opposed a party has to file his/her opposing affidavit. As stated above, the applicant in my view knew very well that he did not consult with his erstwhile attorneys to draft his answering affidavit.

[40] It is further trite that service of any process on a mandated attorney is regarded as competent service on that party. If the applicant was not satisfied with the services of his erstwhile attorneys, he could have

and should have terminated their mandate and appointed another attorney.

[41] In my view the applicant is to blame for his own misfortune and as a result thereof I am not satisfied with the explanation given by the applicant for his default of appearance at the hearing of the main application. This in my view should be the end of the matter.

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[42] I have though considered further submissions made by Mr Modise on behalf of the applicant during the hearing as well as in the papers. I have considered the fact that the said immovable property is the primary residence of the applicant.

[43] It appears from paragraph 84 of the applicant's founding affidavit that he is not against the division of the joint estate however, he requested more time and
20 the appointment of a liquidator/receiver.

[44] Furthermore, the applicant on his own version became aware of the decree of divorce which incorporated the division of the joint estate on or about 2013 which is

approximately seven years ago since the launching of this application.

[45] In paragraph 23 of the applicant's founding affidavit, he states that he saw the final decree of divorce during 2013. Which divorce also incorporated an order for the division of the joint estate. As a result of the failure to reach a settlement between the parties regarding division of the joint estate the first respondent brought the main application, a copy was which was personally served on the applicant as far back as 19 February 2019.

[46] For these reasons I find that the application was not *bona fide* and was brought purely to delay the finalisation of the matter and the division of the joint estate. In my view the application is *mala fide* and justifies a punitive cost order.

[47] It further appears that the applicant was not truthful during his consultation with his current attorneys prior to the drafting of the application for recission due to the reasons already stated.

[48] He further stated in paragraph 78 of his founding affidavit that the said immovable property was not the only asset of the joint estate and mentioned another immovable property situated in the Orchard which according to him form part of the joint estate. It appears that this property was a rental and as such not part of the joint estate.

[49] I also have considered Mr Modise's submissions that there should not be a piecemeal division of the joint estate, but I do not agree that it is a piecemeal division of the joint estate. From the papers before this Court, the movable property was already divided between the parties.

[50] In respect of the requirement that the applicant should show a *bona fide* defence that carries some prospects of success I find that no defence is disclosed or even exists. There is no defence whatsoever. This is purely a person that is dissatisfied with the fact that the said property is his primary residence and there is an order for the division of the joint estate and this property falls within that joint estate.

[51] Therefore the following order is made:

1. That the application for recission of judgment is dismissed.
2. That the applicant is ordered to pay the cost of the application on a scale as between attorney and client. Such cost to be paid from the applicant's share of the proceeds of the sale of the immovable property described as Erf [...] [...] Township Gauteng.

SIGNED ON THIS 24TH DAY OF OCTOBER 2022.

BY ORDER

SM MARITZ AJ

JUDGE OF THE HIGH COURT

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No appearance for Second & Third Respondents