



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 29669/2020

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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SIGNATURE

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DATE

In the matter between

SUPERDRIVE INVESTMENT

Applicant

and

SHILILO ADOLF MOLAUDZI

Respondent

JUDGEMENT

L COETZEE, AJ:

Background facts:

- [1] This is an application for the rescission of a default judgment granted on the 23rd of December 2020 ('the default order'). The default order was granted for the cancellation of an instalment sale agreement ('the agreement'), the return of the goods being a 2015 BMW X5 M50d ('the vehicle'), with the

quantification of damages being postponed *sine die*, pending the return of the vehicle.

[2] The rescission application was set down for hearing on the opposed motion roll of 17th of October 2022, for hearing during the week of 17 to 21 October 2022. The matter was enrolled by the First Respondent due to the Applicant's failure to take the necessary steps to bring the matter to finality. To obtain this date on the opposed motion roll, the First Respondent had to launch an interlocutory application to compel the Applicant to file heads of argument. The Applicant filed such heads of argument but only after service of the application and before the matter was heard on the unopposed motion roll of 5 August 2022. The costs of such application were reserved.

[3] The rescission application was specifically allocated for hearing on the 18th of October 2022. Despite the allocation, counsel for the Applicant, Ms. Senyatsi, appeared at roll call on the 17th of October 2022 and requested for the matter to be postponed *sine die*. The request was done in the absence of the First Respondent's counsel and without a letter from the First Respondent confirming the postponement. Both counsels for the Applicant and the First Respondent appeared before me in the afternoon on 17 of October 2022 at which stage it became apparent that the Applicant's request for a postponement was made without the knowledge or consent of the First Respondent. Ms. Senyatsi contended from the bar that the reason for the postponement was due to the unavailability of counsel who was initially briefed by the Applicant to attend to the rescission application. The First Respondent opposed the postponement of the application. I directed the Applicant to file a formal application for the postponement and the matter stood down for hearing to the 21st of October 2022.

The application for postponement:

[4] The reason submitted by the Applicant in the formal application for postponement was not due to the unavailability of counsel, as previously indicated. The reason advanced for the postponement is that Applicant has made payments towards his indebtedness towards the First Respondent after

the date of the default order on the 23rd of December 2020 and for that reason he now seeks an opportunity to engage with the First Respondent in settlement negotiations regarding the remainder of the outstanding debt. The Applicant has requested that the application for rescission be postponed *sine die*, until such time as the Applicant and the First Respondent “reach an agreement on the status of the monies paid.” The Applicant seems to be of the mistaken belief that any monies paid after the date of the default order, would not be deducted from his outstanding debt. The default order states in paragraph 3 thereof: *“That judgment for the amount of damages that the Plaintiff may have suffered, together with interest thereof, be postponed sine die, pending the return of the vehicle to the Plaintiff, the subsequent valuation and sale thereof and the calculation of the amount to which the Plaintiff is entitled.”* The First Respondent has cancelled the agreement, but, to date, the Applicant has remained in undisturbed occupation of the vehicle.

[5] On the 21st of October 2022, after considering the formal application for postponement and after hearing argument on behalf of both the Applicant and the First Respondent, I refused the postponement, with costs on a scale as between attorney and client, indicating that my reasons for doing so would be filed in due course. The reasons for this order are included herein.

[6] The principles applicable in an application for postponement are trite and there is no need to restate them in great particularity. It is an established principle of law that a postponement of legal proceeding is not for the mere asking. In *Persadh v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE), Plasket J formulated the following principles applicable when a party seeks a postponement of an application:

‘First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent’s procedural right to proceed and with the general interest of justice in having the matter finalized; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant’s inability to proceed as (sic) been fully explained; where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her

case; fourthly, the prejudice that the parties may or may not suffer must be considered; and fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.'

[7] The reasons advanced by the Applicant for the postponement and the argument for the rescission application are inextricably linked. Considering the content of both the application for postponement and the application for rescission, it is common cause that the Applicant is in breach of his contractual obligations towards the First Respondent. He has failed to make the necessary payment towards his monthly installments, as he was contractually obliged to do. He was in arrears on the date of the default order, and, to date, he remains in arrears with his payments.

[8] In this case the Applicant has failed to establish prejudice sufficient to justify a postponement. He has advanced no *bona fide* case. The First Respondent would further be prejudiced if a postponement was granted in that it would mean that it must incur further costs again to finalize the matter. Considering the above there is not reason why the First Respondent should be out of pocket. For this reason, I dismissed the application for postponement and ordered the Applicant to pay the costs of the application on a scale as between attorney and client. The agreement between the parties, in paragraph 14.2 thereof, also makes provision for costs to be awarded on this scale.

[9] After I dismissed the application for postponement, both counsels for the Applicant and the First Respondent addressed the court on the rescission application.

Condonation:

[10] The Applicant brought an application for rescission of this judgment during or about 6 June 2021, after he allegedly became aware of the judgment on the 12th of May 2021. The Applicant requested for condonation to be granted on the basis that the application was not brought within 20 days, after he had allegedly required knowledge of the judgment.

- [11] The First Respondent also requested condonation for the late filing of the answering affidavit. It is unknown when the Applicant issued and served the application for rescission upon the First Respondent's previous attorney of record, but the parties were continually engaged in *bona fide* settlement discussions. After numerous failed attempts to settle the matter, the First Respondent filed a notice of intention to oppose the application on the 6th of July 2021 and filed an answering affidavit on the 14th of February 2022.
- [12] In the absence of agreement¹ between the parties, the court may upon application on notice and on good cause shown make an order extending or abridging any time prescribed by the rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceeding of any nature whatsoever upon whatsoever upon whatever terms seem meet.²
- [13] The requirements are, first, that the party should at least tender an explanation for its default to enable the Court to understand how it occurred (*Silber v Ozen Wholesalers (Pty) Ltd* 1954 SA 345 (A) at 353 (A)). Secondly, it is for the applicant to satisfy the Court that its explanation is *bona fide* and not patently unfounded. It has been held that the court's power to abridge prescribed times and accelerate the hearing of matters should be exercised with judicial discretion and upon sufficient satisfactory grounds being shown by the applicants, the major considerations being the prejudice that the applicant might suffer if the matter proceeded in the ordinary course, the prejudice that the respondent might suffer as a result of the abridgment of the prescribed times and the prejudice that other litigants might suffer in the event of the matter being given preference.³

¹ In *Pilcher & Conwys (Pty) Ltd v Van Heerden* 1964 (1) SA 179 (O) at 1828-C it was held that the courts will recognise an agreement between parties granting an extension of time to file a reply or answer as required by the rules.

² Rule 27(1) of the Uniform Rules of Court.

³ *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C) at 112 H-113A.

[14] In the present circumstances, sufficient reasons have been given for the late filing of the respective documents. The delay on both sides is neither extreme nor can it be said that any party stands to be prejudiced thereby. Further, it is in the interest of justice that all parties be afforded the opportunity to ventilate the issues and for the matter to be finalized.

The rescission application:

[15] The Applicant's application for rescission of the default order does not state whether it is brought in terms of Rule 42 or Rule 31(5)(d) of the Uniform Rules of Court, alternatively, in terms of the common law. The Applicant's counsel conceded during argument that the application was defective or flawed in this regard. The Applicant also failed to file a replying affidavit. Even if one assumes that the application is brought in terms of Rule 31(5)(d) or the common law, the Applicant must still provide a reasonable and acceptable explanation for the default and that he has a *bona fide* case which, *prima facie*, carries some prospect or probability of success⁴.

[16] The Applicant's grounds for the rescission were firstly, that he did not receive the summons as it was served by means of affixing it to the door. The summons was served at the correct chosen *domicile* address by means of affixing to the outer principal door. The Applicant did not explain why he contends that the service was incorrect or defective. He also did not dispute the address at which the Sheriff effected the service. The Applicant elected the physical address given in the agreement as the address where he would accept service of all legal process. The Applicant even made a manuscript change of the typed number of the nominated street address and initialed next to the amendment. In the matter of *Shepard v Emmerich* 2015 3 SA 309 (GJ) at 310 I-J it was held that where a specific method of effecting service is contractually agreed, that method should be strictly complied with.

[17] In the second ground for the rescission, the Applicant questioned the authenticity of the court order. He stated that the order was "dodgy and unacceptable" because the court file did not have any written notes confirming

⁴ *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).

that the order was granted. The registrar of the High Court has authority to grant default judgment in circumstances prescribed in the rules⁵. Whenever a defendant is in default of delivery of notice of intention to defend, the plaintiff, if he wishes to obtain judgment by default, must where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against Defendant.⁶ The registrar may grant judgment as requested, grant judgment for part of the claim only or on amended terms, refuse judgment wholly or in part, postpone the application for judgment on such terms as he may consider just, request or receive oral or written submissions, or require that the matter be set down for hearing in open court.⁷ Any party dissatisfied with a judgment granted or direction given by the registrar, may, within twenty days after acquiring knowledge of the judgment or direction, set the matter down for reconsideration by the court.⁸ The First Respondent made an application to the registrar in terms of Rule 31(5)(a) of the Uniform Rules of Court to obtain the default order. The Applicant failed to indicate any proper grounds to indicate that the First Respondent obtained the order in an improper manner. The Applicant also failed to indicate that the registrar erred in granting the order. The court order stands, until it is set aside.

- [18] Lastly, the Applicant indicated that the covid lockdown restrictions caused several restrictions on his business, with resultant financial struggles. The Applicant attempts to make out a case that the account fell into arrears because of the pandemic, but he fails to advance reasons why the account was in arrears for a substantive period prior to the pandemic. The Applicant did not provide a *bona fide* defence to the action. In fact, he confirms that he is indebted to the First Respondent. The Applicant also loses sight of the fact that the terms of the agreement lapsed on the 3rd of September 2020, when the last instalment of the residual amount was due. The agreement was already cancelled when summons was issued and confirmed by the default order. The agreement can therefore not be revived by further settlement negotiations, as requested by the Applicant.

⁵ Section 27A of the Supreme Court Act 59 of 1959.

⁶ Rule 31(5)(a).

⁷ Rule 31(5)(b).

⁸ Rule 31(5)(d)

[17] In light of the above, the Applicant did not may out a case for rescission.

[18] In the result the following order is made:

1. The Applicant is granted condonation for the late filing of the application for rescission, with no order as to costs.
2. The First Respondent is granted condonation for the late filing of the answering affidavit, in respect of the application for rescission, with no order as to costs.
3. The application for rescission is dismissed with costs on a scale as between attorney and client, including the reserved costs of the 5th of August 2022.

**ACTING JUDGE L. COETZEE
JUDGE OF THE HIGH COURT GAUTENG
DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be October 2022.

Appearances:

Applicant: Adv. D. Senyatsi

Instructed by T E Ramovha Attorneys

First Respondent: Adv. S.F. Fisher-Klein

Instructed by Velile Tinto Inc. Attorneys