REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER : 11931/2018

DELETE WHICHEVER IS NOT APPLICABLE		
(1)	REPORTABLE	~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES	~~YES~~ / NO
(3)	REVISED	

5 May 2023

DATE SIGNATURE

In the matter between:

THE CITY OF TSHWANE LOCAL MUNICIPALITY **Applicant**

and

THEUNIS BRINK **First Respondent**

THE MEC OF ROADS AND TRANSPORT: GAUTENG **Second Respondent**

Summary: Rescission of Judgment in terms of Uniform Rule 31(2)(b).

O R D E R

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1. The application for rescission of judgment dated 24 February 2022 is dismissed with cost.

J U D G M E N T

VAN HEERDEN AJ

1. INTRODUCTION

2. In this application for rescission, brought in terms of Uniform Rule 31(2)(b), the applicant seeks condonation for the late launching thereof, as well as that the Order dated 2 October 2018, which found that default judgment is granted against the applicant, be rescinded. The Order reads as follows:

> *"The issues of merits and quantum are separated in terms of the provisions of Rule 33(4) with the aspect of quantum to be postponed sine die. The Second Defendant is liable to compensate the Plaintiff for 100% of its damages to be proven or agreed."* ("the Order")

3. The salient facts are that, notwithstanding the fact that the summons was properly served by way of Sheriff upon the applicant, it failed to file a Notice to defend the action.

4. The general approach to applications for rescission is that in order to show good cause, an applicant should comply with the following requirements:

4.1 It must give a reasonable explanation for its default;

4.2 The application must be made *bona fide*;

4.3 It must show that it has a *bona fide* defence.

CONDONATION

5. The current application for rescission was served on 28 November 2018 i.e. 38 days after the applicant became aware of the default judgment. The applicant alleged that it became aware of the default judgment in a newspaper article and therefore had no information regarding the judgment actually granted or for that matter, of the underlying application.

6. The applicant alleged that it took immediate steps to ascertain the detail of the default judgment but that the applicant only received a copy of the application for default judgment on 1 November 2018 (18 days prior to the launch of the application for rescission of judgment) and of the Court Order on 2 November 2018 (19 days prior to the launch of the application for rescission of judgment).

7. The applicant also seeks condonation, for the late filing of the replying affidavit, due to the country being placed under lockdown in March 2020 (7 days after the First Respondent served its answering affidavit).

8. In the main notice of motion, the applicant however failed to apply for condonation for the late filing of the rescission of judgment application. The applicant apparently only learned of the Order on 5 October 2018 when this matter initially came before Court, in May 2019, when the applicant was ordered to (re-) serve the rescission application by way of sheriff.

9. The application was nevertheless only served on 26 February 2020. This delay had not been explained by the applicant.

10. In this application, the applicant addressed the issue of good cause as follows:

10.1 it always intended defending the action;

10.2 the notice of intention to defend was not delivered as a result of a *bona fide* administrative oversight in the offices of the applicant's insurers and not due to any deliberate or intentional failure on its part;

10.3 after the summons was served on 8 March 2018, the applicant, on 9 March 2018, apparently forwarded the summons to its public liability insurers, AIG Insurance Company;

10.4 in terms of their insurance agreement, when a claim falls to be indemnified then the insurance takes over the entire litigation of the matter;

10.5 the insurance confirmed that they received the summons and that they incorrectly thought that the email related to another existing claim wherein the plaintiff was also a Mr Brink. The insurer thought that the email would be allocated to the other matter, however as there was no claim number in the subject line, the email was not allocated at all and the email did not come up again for attention. The insurer was apparently under the *bona fide* but mistaken belief that the email did not relate to a new claim which required immediate action and confirms that the summons was not dealt with as a result of this error which was entirely the insurer's, and not that of the applicant's;

10.6 that there was no foreseeable reason for the applicant to doubt that the insurers would enter an appearance to defend and deal with the claim as they always did;

10.7 the failure of the applicant to follow up with its insurers was entirely reasonable;

10.8 it should not be considered to be wilful or negligent on the part of the applicant that it relied on its insurance;

10.9 such onus of showing that the applicant was wilfully in default ultimately rests on the respondent and that the respondent has not demonstrate that the applicant deliberately and wilfully failed to enter an appearance to defend.

11. The first respondent however contended in the main action i.e. in the application for default judgment, that on 18 March 2017 he fell in a pothole close to the edge of the road on Veldkornet Roos Street, Wilmar, Pretoria North.

12. The applicant as part of its *"bona fide defence"*, allege that:

12.1 the applicant denies the existence of such a pothole;

12.2 the applicant furthermore denies that it was ever aware, alternatively could reasonably have been aware of such pothole;

12.3 any failure to repair such pothole was not wrongful;

12.4 the applicant was accordingly not negligent;

12.5 alternatively, the first respondent was contributorily negligent in relation to the alleged incident;

12.6 the existence of a pothole, if any, is not *per se* negligent and does not result in the applicant being liable to the first respondent;

12.7 the applicant utilises an electronic task management and information system which keeps record of *inter alia* all reported potholes and the status of them being repaired;

12.8 the applicant conducted a search of the electronic task management and information system for reports of a pothole on the

aforementioned street proceeding the alleged incident and found that only one report was made on 15 September 2016 which pothole was apparently repaired on 14 October 2016, five months prior to the alleged incident;

12.9 the applicant was therefore not aware of the existence of the alleged pothole and no such pothole was reported to it;

12.10 the fact that the applicant did not know of the pothole nor could it have reasonably detected the pothole is evidence that *prima facie* the alleged omission was not wrongful and that the applicant cannot have a legal duty to repair a pothole of which it does not know about and cannot be reasonably expected to know about;

12.11 the absence of wrongfulness in a delictual claim is dispositive of the matter and on that basis alone the applicant submits that it has shown a *bona fide* defence;

12.12 the first respondent was contributorily negligent and/or voluntarily consented to the risk of falling in circumstances where he knew or ought to have known of the existence of the pothole;

12.13 the first respondent failed to comply with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2001 in that the notice contemplated in section 3 of the Act was not delivered to the municipal manager within six months of the alleged incident;

12.14 also, that the application for default judgment was defective in that the notice of motion was issued on 3 July 2018 and the date for the applicant obtained and entered thereon however it is clear that the application was issued without a founding affidavit being attached as the founding affidavit was only deposed to on 21 September 2018.

2. LEGAL PRINCIPLES

13. Before a Court can even consider granting a rescission order, good or sufficient cause must be shown. In the matter of ***Harris v Absa Bank Ltd t/a Volkskas***[1] it was held that in an applicant for rescission of a default judgment was brought under the common law. The applicant must not merely allege good cause but it must prove it, according to the matter of ***Silber v Ozen Wholesalers (Pty) Ltd*** .[2]

14. Without the reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospect of success, no matter how good the explanation for the delay, an application for condonation should be refused.[3]

15. In the matter of ***Harris v Absa Bank Ltd t/a Volkskas***[4] the Court held that:

"Before an applicant in a rescission of judgment application can be said to be in wilful default he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such

[1] 2006 (4) SA 527 (T) at 529D
[2] 1954 (2) SA 345 (A) at 352G
[3] ***Chetty v Law Society, Transvaal*** 1985 (2) 756 (A) at 765A-C
[4] ***Supra***

an applicant must deliberately, being free to do so, fail or omit to take the steps which would avoid the default and must appreciate the legal consequences of his or her actions."

16. In the matter of ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills*** [5] it was held that the principles of presenting a reasonable and acceptable explanation for default, on the merits of the case, an applicant for rescission has to show a *bona fide* defence which, *prima facie*, carry some reasonable prospects of success. Sufficient cause must also be shown which means that, there must a reasonable explanation for the default; the applicant must show that the application was made *bona fide*; and the applicant must show he has a *bona fide* defence which *prima facie* has some prospects of success.

17. The Court however has a discretion, according to the matter of ***Tshivhase Royal Council v Tshivhase*** [6] and ***Cairns' Executors*** [7] to grant the relief sought that must be exercised judicially after considerations of all relevant circumstances.

18. Where an applicant was in wilful default or acted grossly negligent, the Court should not come to his aide.[8] This is not however an essential element for a rescission application to be refused, but it is an essential ingredient of good cause to be shown.[9] Negligence and/or wilful default on the part of the

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[5] 2003 (6) SA 1 (SCA) at 9C
[6] 1992 (4) SA 852 (A) at 862
[7] 1912 AD 181 at 186
[8] ***Grant v Plummers (Pty) Ltd*** 1994 (2) SA 470 (O) at 476-7, cited with approval in ***HDS Construction (Pty) Ltd v Whait*** 1979 (2) SA 298 (E) at 300F-301C
[9] ***Harris v Absa Bank Ltd t/a Volkskas (supra)*** at 529

Applicant is a ground that the Court must consider in exercising its discretion in deciding whether good cause had been shown.[10]

19. The Applicant must thus set out the reasons for the default and this explanation must be set out with sufficient particularity to enable the Court to understand how it really came about that the Applicant was in default and to assess the Applicant's conduct and motives.[11] Failure to set out these reasons are not proper and failure to set out such reasons with sufficient particularity should have consequences.

3. THE ORDER

20. The Order provide for the fact that the applicant will accordingly have the opportunity to contest the damages part which is still to be proven.

21. Similar to the facts of ***Silverstone and Another v Absa Bank Ltd*** [12] where the Court dismissed the application for rescission, citing *inter alia* that the attorney failed to do what they were retained to do, this must no doubt be extended to insurance companies, where a local government, well acquainted with litigation, failed to make the necessary follow-up with the insurance company. In the ***Silverstone case (supra)*** the Applicant, relying in the alternative on the common law Rule 42(1)(a) and Rule 31, applied for rescission of judgment, the Court held that where a judgment came about by virtue of:

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[10] ***De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance*** 1994 (4) SA 705 (E) at 708G
[11] ***Silber v Ozen Wholesalers (Pty) Ltd (supra)*** at 353A
[12] 66156/12 [2018] ZAGGPHC 321 (10 May 2018)

"The service of these notices it is said was for some inexplicable reason not brought to the attention of the attorneys by the correspondent attorney. The consequence is that their plea as well as their notice in terms of Rule 30(2)(b) was set aside. The application for default judgment in relation to the present application was served on 26 July 2016 and likewise not brought to the attention of their attorneys by the correspondent attorney."

22. The Court held that the explanation given in the ***Silverstone case (supra)*** is very much analogous to the one given in the matter of ***Colyn***.[13] In this matter the Court at paragraph 9 held that:

"The Defendant describes what happened as a filing error in the office of his Cape Town attorneys. That is not a mistake in the proceedings. However one describes what occurred at the Defendant's attorneys' office which resulted in the Defendant's failure to oppose summary judgment, it was not a procedural irregularity or mistake in respect of the issue of the order. It is not possible to conclude that the order was erroneously sought by the Plaintiff or erroneously granted by the Judge. In the absence of an opposing affidavit from the Defendant there was no good reason for Desai J not to order summary judgment against him."

23. At paragraph 12 of the ***Colyn*** judgment it was stated that:

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[13] ***Colyn v Tiger Food Industries Ltd (infra)***

"I have reservations about accepting that the Defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reasons why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorney as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a reasonable explanation. Where the courts are slow to penalise a litigant for his attorneys' inept conduct or litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorney (Saloojee and Another NNO v Minister of Community Development). Even is one takes a deny view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the Defendant being able to put other bona fide defence which has not merely some prospects, but a good prospect of success (Melane v Santam Insurance Co Ltd)."

24. It is apparent in the present matter, the Applicant simply did not explain why they did nothing since 2015 (the inception of this matter, as well as the fact that large time periods remain unexplained). There simply is no good cause shown.

25. In the matter of ***Superb Meat Supplies CC v Maritz*** [14] it was held that:

[14] 2004 25 ILJ 96 (LAC)

"It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise it would have a disastrous effect on the observance of the rules of this Court and set a dangerous precedent. It would invite or encourage laxity on the part of practitioners."

26. Also, in the matter of ***Hardrodt (SA) (Pty) Ltd v Behardien and Others*** [15] the Court held that:

"The catalogue of events reveals negligence, incompetence and gross dilatoriness by the Appellant's legal representatives. It is difficult to see how that constitutes a good cause condonation with convincing reasons as laid down in the Queenstown Fuel Distributors CC case."

27. It is significant that our Courts have accepted these judgments which hold that if the attorney, or as *in casu,* an insurance company who takes on a representative role displays *"gross ineptitude",* the Court cannot extend any indulgence to the Applicant.[16]

28. An Applicant cannot always escape liability for the default of the legal representative/ insurer chosen by him.[17] In the matter of ***Dairies v Sheriff Magistrate's Court, Wynberg and Another*** [18] the Court pointed out that condonation is not a mere formality and will not necessarily be granted even where the failure to comply with the Rules of Court is entirely attributable to a party's attorney. The Court held that:

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[15] 2002 23 ILJ 1229 (LAC), para 14
[16] ***Waverley Blankets Ltd v Ndima and Others*** 1999 20 ILG 2564 (LAC)
[17] ***Colyn v Tiger Food Industries Ltd (supra)***
[18] 1998 (3) SA 34 (SCA) at 401-41E

"An appellant should whenever he realises that he has not complied with the Rules of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where noncompliance was due entirely to the negligent of the appellant's attorney, condonation will be granted. In applications of this sort the appellant's prospect of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success may be."

29. Accordingly, when I consider the principles above and apply same to the current matter, it is clear that the applicant's insurance company were not only grossly negligent but also grossly inept. This however, does not absolve the applicant.

30. The applicant was also less than diligent in pursuing the matter from the inception of the notice in terms of Act 40 of 2002. The applicant was clearly disinterested in the matter and the limit has been reached beyond which the

applicant cannot escape the results of his representative's lack of diligence or the insufficiency of the explanation tendered.

4. THE REASONS FOR THE DEFAULT

31. I find that the reasons listed for the default is not reasonable and not acceptable under the circumstances. There is simply no explanation why the applicant failed and refused to make regular contact with the insurance company. If this was done, which is only prudent, the applicant would not have been in default.

32. There is also a duty on the applicant, an organ of State, to take steps in the litigation of the matter wherein it has been cited. The Applicant has fallen short of what is expected of a public administrator.

33. The indication that the applicant's insurance company is solely to blame does not absolve the applicant. The fact of the matter is that the applicant, from inception of the matter, failed to be proactive and the first respondent was compelled to apply for default judgment and to advance his case.

34. Had the applicant taken a proactive approach, and simply complied with the minimum steps and responded to the notice in terms of Act 40 of 2002, it should never have been a requirement to apply for default judgment.

35. For these reasons, the rescission of judgment application must fail.

5. ORDER

Accordingly, the following order is made:

36. The application is dismissed with cost.

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DJ VAN HEERDEN
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 16 November 2022

Date of judgment: 5 May 2023

APPEARANCES

For the applicant:

Adv N Marshall
Instructed by:
Prinsloo Whitehead Madalane Attorneys

For the respondents:

Adv BP Geach SC
With him Adv F Kehrhahn
Instructed by:
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