Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates	NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG

CASE NUMBER: RAF33/2017

In the matter between:-

ROAD ACCIDENT FUND Applicant

and

LEGODI BONOLO BOIPELO BRIDGETT 1st Respondent

THE SHERIFF OF THE HIGH COURT, PRETORIA EAST 2nd Respondent

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be 14h00 on **20 March 2024.**

ORDER

i) The application for condonation is dismissed.

ii) *The application for rescission is dismissed.*

iii) *The applicant shall pay the costs of both applications including the reserved costs of 20 December 2021.*

JUDGMENT

MFENYANA J

FACTUAL MATRIX

[1] In this application, the applicant who is the defendant in the main action, seeks an order rescinding and setting aside an order granted on 5 March 2021 by Gura J. The order sought to be rescinded forms part of a judgment by Gura J.

[2] The judgment was a sequel to a delictual claim instituted by the respondent, as plaintiff, for damages arising from a motor

vehicle accident. When the matter was heard, the applicant was in default, despite having filed a plea, as well as expert reports.

[3] The applicant also seeks condonation for the late filing of the application.

[4] Both the rescission and condonation applications are opposed by the respondent.

[5] The basis for this application is that the applicant has a *bona fide* defence to the respondent’s claim. That defence is embedded in the applicant’s contention that had it been present when the matter was heard, it would have made submissions in respect of contingencies, and advanced reasons why the order should not be granted. The applicant further avers that as no evidence was led on behalf of the defendant, the court only confined itself to the plaintiff’s case. Thus, it contends that the court ought not to have arrived at the order that it did.

[6] Regarding the reasons for its default, the applicant laments the breakdown of the relationship between itself and its panel of attorneys, which led to it not being able to secure a

representative to attend court on the day of the hearing, and not being able to arrange expert witnesses. It further attributes its lapse to the effects of Covid-19, which it says, created a backlog for the applicant. In so saying, the applicant avers that it was not in wilful default.

[7] As to the delay in bringing the application, the applicant submits that despite the inordinate delay, the application should be granted in the interests of justice. The application for rescission was brought nine months after the applicant became aware of the judgment.

[8] Mr Mukasi argued on behalf of the applicant that the applicant had demonstrated its willingness to come to the aid of the respondent when it made an interim payment in an effort to alleviate prejudice to the respondent. He further argued that the balance of the amount represents what the parties could not agree on. In this regard, it is worth mentioning that the merits of the matter were previously settled between the parties. The only outstanding issue is loss of earnings. The applicant submitted that its interest was clearly to defend the balance of the claim and have the

matter determined by the court.

[9] In opposing the application, the respondent avers that the applicant has mischaracterised the application and followed an incorrect approach as the applicant seeks to re- argue the matter. The respondent argues that such intention to revisit the judgment of the court in the manner followed by the applicant, should be discouraged. He avers that the applicant has followed an incorrect pathway and should have lodged an appeal as opposed to an application for rescission. In driving this point home, the respondent contends that an appeal would have been the appropriate route to take in the circumstances, as there is no basis to reargue the matter.

[10] According to the respondent the applicant failed to show good cause and set out a proper basis for the application. It further failed to demonstrate that it was not in wilful default and has provided a generalised explanation for its non-compliance. All this, the respondent contends, is not consistent with an applicant who is *bona fide*.

[11] The respondent disputes the applicant's version that only the

respondent’s case was considered by the court, stating that the court also considered the applicant’s reports, and exercised its discretion in arriving at its decision.

[12] With regard to condonation, Mr Moja argued that the respondent was made to believe that the applicant was in the process of making payment. However, this did not materialise. He stated that this conduct, once again demonstrates a lack of *bona fides* on the part of the applicant. He prayed for the dismissal of the application with costs, including the costs of the urgent application which were reserved.

[13] In reply, while stating that the explanation offered by the applicant, is not a ‘perfect explanation’, Mr Mukasi disputed that an appeal was the route to follow in the circumstances of this case. With regard to costs, he submitted that costs should follow the result.

LEGAL FRAMEWORK

[14] Implicit from the application is that the applicant seeks to rely

on Rule 42 of the Uniform Rules of Court. Rule 42 provides in relevant part:

> *" (1) The court may, in addition to any other powers it may have, mero motu or upon the application of any part affected, rescind or vary:*
>
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;…"*

[15] It is apposite to first consider whether the applicant has made out a case for condonation.

[16] The trite legal position is that condonation is not a mere formality and is not to be had merely for the asking[1]. In *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* the Supreme Court of Appeal (SCA) explained this position thus:

> *"What is required is an explanation not only of the delay in the timeous bringing of an application but also the delay in seeking condonation for non-compliance*[2].

[1] *Uitenhage Transitional Local Council v South African Revenue Service* 2004(1) SA 292 (SCA), para 6.

[2] 2017(6) SA 90 (SCA), para 26.

[17] The appellant must show that he did not willfully disregard the time frames provided for in the Rules of Court by giving a full account of the circumstances leading to the delay in bringing the application, as well as in seeking condonation.

[18] Rule 27(1) and (2) of the Uniform Rules of Court which deal *inter alia* with condonation provide that in the absence of express agreement between the parties the court may on good cause, grant condonation for non- compliance with the rules of court as the court may deem fit.

[19] Good cause entails the exercise of a discretion ‘to be exercised judicially upon a consideration of all the facts’ and, in seeking fairness to both parties. In addition, the court may consider prospects of success. However, if the other factors taken in totality, render the application for condonation ‘obviously unworthy of consideration’, the court is not bound to consider prospects of success. “This will be the case in instances where there have been flagrant breaches of the rules, and especially where there is no acceptable explanation for the breach.

[20] In *United Plant Hire (Pty) Ltd v Hills and Others*[3] the court stated as follows in this regard:

> *"It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success…, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive. … These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong."*[4]

[21] In the present application, the applicant states that it received the 'order' on 10 or 21 March 2021. I have already stated that the order was contained in a judgment. From March to August 2021 the explanation is very sparse regarding the steps the applicant took to remedy its non- compliance.

[3] 1979(1) SA 717 (A).

[4] Paragraph 720E–G; In this regard, see also: *Academic and Professional Staff Association v Pretorius NO and Others.*

Essentially, the explanation provided by the applicant is that the applicant did not have its administrative processes aligned and needed to get its house in order. From failures to attend to memoranda, misplacing of documents, high volumes of work, staff turnover, and the absence of its panel attorneys, it is not clear from the applicant's explanation what the applicant was doing for a period of six months, fully aware at the time that the respondent had obtained a judgment against it.

[22] The applicant further provides no account for a further period of two months from September to November 2021.

[23] It was only eight months later, in November 2021 when the respondent obtained a writ of execution against the applicant's assets, that the applicant took steps in the matter, and engaged the respondent's attorneys in a bid to stay the execution against its property. That application for the stay of the writ was subsequently filed on 2 December 2021, and heard on 20 December 2021. The applicant sought to stay the execution pending the institution and final determination of a rescission application. The present application was

brought on 20 January 2022.

[24] As to the condonation application, which was brought simultaneously with the rescission application, the applicant provides no explanation at all. It has failed to show that good cause exists for the court to condone its non- compliance which spans several months. The administrative anomalies in the processes of the applicant, cannot be something that the respondent should be burdened with.

[25] It seems to be the case that the applicant adopted a nonchalant attitude in dealing with the matter despite being aware of it as long ago as in March 2021. This in my view shows a brazen disregard of the rules of court, and little or no regard for the finalisation of the matter and the prejudice to the respondent. At the heart of it all, lies the administration of justice.

[26] The fact that according to the applicant the order has an adverse effect on the fiscus is no reason for this Court to deviate from established legal principles at will. The applicant has made its bed, it must lie in it. In my view the application for condonation falls to be dismissed.

[27] The law is settled that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects, no matter how good the explanation for the delay, an application for condonation should be refused.

[28] Whilst it is not necessary to deal with the merits of the rescission application, having found that the applicant has not made out a proper case for condonation, I however deem it prudent to deal with the merits of the rescission application.

[29] In my view, the application is without merit. The applicant has not proved that the order was erroneously sought and erroneously granted. It may be worthwhile to state upfront that the judgment was not erroneously sought. As I understand the applicant's case, its complaint is that the case was wrongly decided by the Court, owing to a misapplication of the facts before it. In my view, the order cannot be detached from its *ratio decidendi.* A reading of the judgment of Gura J, indicates that the issue of contingencies was dealt with by the court, and applied to the extent the court deemed appropriate, in the exercise of its discretion. To

find otherwise, would result in this Court arrogating unto itself, the powers assigned to a court of appeal. In the premises the rescission application must fail.

COSTS

[30] When the matter was heard on 20 December 2021, the court reserved costs. The general rule in respect of costs is that costs follow the result. In the circumstances of the present application, I cannot find any reason to upset this established principle and order otherwise.

ORDER

[31] In the result I make the following order:

i) The application for condonation is dismissed.

ii) The application for rescission is dismissed.

iii) The applicant shall pay the costs of both applications including the reserved costs of 20 December 2021.

S MFENYANA
JUDGE OF THE HIGH COURT
NORTHWEST DIVISION, MAHIKENG

APPEARANCES

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Date reserved: 25 May 2023

Date of judgment: 20 March 2024