

SOUTH AFRICA / JUDGMENT

Anton Killian Inc and Another v Rodel Financial Services (Pty) Ltd (18252 /2011) [2013] ZAGPJHC 56 (21 February 2013)

[2013] ZAGPJHC 56**COURT**

South Gauteng High Court, Johannesburg

BEFORE

S Mia

CASE / FILE NUMBER

18252 /2011

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Source record**NOT REPORTABLE****REPUBLIC OF SOUTH AFRICA****SOUTH GAUTENG HIGH****COURT, JOHANNESBURG****CASE NO: 18252 /2011****DATE:21/02/2013****In**

the matter between:

Anton
Killian Inc.

.....First

Applicant
Potgieter,
Mignon

.....Second

Applicant
and
RodelFinancial Services (Pty)
Ltd.....Respondent

JUDGMENT

Mia AJ:

- [1] The applicants approached this Court for an order rescinding a default judgment granted in favour of the respondent on 31 July 2012, when the applicant's defence was struck out and judgment granted due to the applicant's failure to comply with an order to compel discovery. The applicants also apply for condonation in terms of Rule 31(2) of the Uniform Rules of Court as the application for rescission is brought out of time. The respondent opposed the application for condonation and rescission.

BACKGROUND FACTS

- [2] The respondent issued summons for the payment of monies paid to the applicant's trust account. The funds appear to have been paid in terms of an application for bridging finance or a discounting agreement; there is a lack of clarity in this regard. What is clear is that there is a receipt reflecting that the funds were paid into an account in the name of the first applicant. The respondent obtained an order compelling discovery and when there was non-compliance, a notice of bar was served on the correspondent attorney.

ISSUES

- [3] The issues to be determined are whether the applicants are entitled to condonation and rescission of the order granted by default.

LEGAL POSITION

- [4] Rule 27 of the Uniform Rules of court deals with condonation and provides that a court may on 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. This rule affords the court a wide discretion to grant condonation. Two requirements have to be met for a favourable exercise of this discretion. The first is that the applicant should file an affidavit which satisfactorily explains the delay fully to enable the court to understand how the default came about. The applicant must also satisfy the court that the application is made bona fide and that there is no intention to delay the other party's claim. The second requirement is that the applicant must show a bona fide defence. In this regard the applicant is required to show that the defence is based on facts which if proved would constitute a defence.

SUBMISSIONS

- [5] At the outset Ms Morgan appearing on behalf of the applicants indicated that she agreed with Mr Suttner appearing on behalf of the respondent on the law applicable. She concedes that on the papers there was no explanation for the delay in bringing the application outside of the time period and the only inference Ms Morgan could point to was that in view of the delay being only nineteen days the applicants possibly believed that the relatively short time would inevitably result in condonation and did not feel the need to explain the delay.
- [6] On the requirement that the applicants have not been in wilful default Ms Morgan again conceded that more was required to satisfy the court and the only fact placed before this court is that the notice of bar was not brought to his attention and if it had he would have instructed counsel to address the matter. His affidavit is silent further on the aspect of wilful default and there is no explanation why the first applicant did not adhere to the order compelling discovery. It was submitted that it can only be inferred that the first applicant had no idea that the matter was proceeding by default.
- [7] In regard to the requirement of a bona fide defence, Ms Morgan conceded once again that the papers were brief and that the application does not set out in detail the defence as is required. In attempting to show a bona fide defence the application refers to the affidavit resisting summary judgment where the first applicant states that he did not sign the documents referred to, that the funds were not deposited into his account and further he denies having received monies from the respondent. The second applicant merely confirms the affidavit of the first applicant to the extent it relates to her and says nothing more. Ms Morgan conceded that more was required of the second applicant as well and that the statement of the respondent

stands uncontradicted. She requested this Court to find that the delay was not unreasonable and requested that this Court exercise the wide discretion it had to grant condonation as well as the application for rescission.

- [8] Mr Suttner submitted on behalf of the respondent that the application did not make out a case for condonation or rescission. The default judgment was granted because the applicant failed to make discovery which was followed by an application to strike out his defence. The application does not address the reasons for the applicant's failure to comply with the rules. There is no explanation why discovery was not made. Whilst there is an indication that it was served on the correspondent attorney and forwarded to the first applicant there is no explanation why it did not come to his attention. Further Mr Suttner submitted that irrespective of the short duration of the time period it was necessary to explain the reason for the delay in lodging the application. There was not a single allegation in the affidavit addressing this aspect and the applicant appears to regard condonation as an entitlement.
- [9] On the issue of the requirements for rescission, Mr Suttner submitted that none of the requirements for rescission are met. After receiving the notice to compel discovery nothing was done to address the matter. An order followed and there is no explanation to show that

the applicant was not in wilful default. If the problem was a breakdown of communication between the first applicant and his correspondent attorney, there is no explanation on the papers and no confirmatory affidavit supporting this. There is also no satisfactory explanation on the papers indicating a bona fide defence before the court. The reference to the affidavit resisting summary judgment filed eighteen months ago does not address the matter. The first applicant had eighteen months to investigate the matter and to explain to the court what the result of his investigation had brought to light. He has not done so and persists in merely denying what the respondent placed before this Court. The receipt reflects monies paid into an account in the first applicant's name. He denies receiving the monies and after having sight of the transfer receipt still furnishes no explanation after having had sufficient time to ascertain what occurred.

- [10] In view of the application not providing any explanation which addresses the delay in support of the request for condonation I am not able to come to the conclusion that the applicants have shown good cause to condone the non-compliance with the rules. The affidavit filed does not explain fully why the applicants were not in wilful default and specifically why there was non-compliance with the notice to compel discovery or the court order compelling discovery. It is not clear what the circumstances were resulting in the notices not being brought to the first applicant's attention. There is no affidavit from the correspondent attorney either explaining what problems were experienced in forwarding notices timeously to the first applicant. The second applicant merely files an affidavit confirming the first applicant's affidavit and takes the matter no further.
- [11] In light of the above there is no reasonable explanation for the default. I am unable to take a favourable view in relation to the applicant's conduct in the absence of a full explanation. There is no explanation setting out a clear bona fide defence. The first applicant has had eighteen months to complete his investigation since filing the affidavit resisting summary judgment. He has not placed facts before this Court which support his reliance on a bona fide defence and that the application is not brought to delay the respondent's claim. The papers evidence a bare denial to the prima facie proof of the transfer of the monies into an account in the name of the applicant. Having regard to all of the above I am not persuaded that the applicant has met the requirements for condonation or rescission.

- [12] For the above reasons the following order is made:

The application for condonation is dismissed.

The application for rescission of judgment is dismissed.

The applicants are ordered to pay the costs.

S Mia

Acting Judge of the South

Gauteng High Court, JHB

Counsel for the applicant: Adv. JA Morgan

Instructed by: Snipelisky and Killian Attorneys

Counsel for the respondent: Adv. D Suttner

Instructed by: Norman Berger and Partners

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Prepared on 10 October 2026 · Esheria