

SOUTH AFRICA / JUDGMENT

Mohlamme and Others v Mohlamme and Others (70015/11) [2014]

ZAGPPHC 46 (28 February 2014)

[2014] ZAGPPHC 46

COURT

North Gauteng High Court, Pretoria

BEFORE

KGANYAGO

CASE / FILE NUMBER

70015/11

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IN THE HIGH COURT
OF SOUTH AFRICA
(NORTH GAUTENG,
PRETORIA)
CASE
NO: 70015/11

DATE:

28/2/2014

In the matter

between:

PINKY MOHLAMME
PRISCILLA obo
MOLEBOGENG
DOTOTHY MASHEO MOHLAMME.....1st
APPLICANT
TSHEPO TOMELO
MOHLAMME.....2ND
APPLICANT
LERATO MARTHA
CONSTANCE MOHLAMME.....3RD
APPLICANT
KEAGILE DANIEL
RICHARD
MOHLAMME.....4TH
APPLICANT
MR. GONTSE
MOHLAMME.....5TH
APPLICANT
And

YVONE MATSHIDISO
MOHLAMME.....1ST
RESPONDENT
LEHLOGONOLO
ELIZABETH
TSOTETSO.....2ND
RESPONDENT
THE MASTER OF THE
HIGH
COURT.....3RD
RESPONDENT

JUDGMENT

KGANYAGO AJ

[1] The applicant's brought an application against the respondent for relief as set out in the notice of motion which reads as follows:

1.1 Condoning the applicant's late filing of this application;

1.2 Rescinding the default judgement which was granted by the Honourable Judge Ledwaba AJ in toto;

1.3 That the costs of this application be paid by any party who opposes this application;

1.4 Further and alternative relief.

[2] On the 8th April 2013, the first and second respondents obtained a default judgement against the applicants. In terms of the order obtained by the first and second respondents, the third respondent was directed in terms of Section 2 (3) of the Wills Act, 7 of 1953 to accept the last will and testament of Pule Cecil Mohlamme. The applicants were further ordered to pay the costs of the application, alternatively the costs of the application was to be paid by the estate of PCJ Mohlamme.

[3] The applicants application for rescission of judgement was brought outside the prescribed 20 days period as prescribed by Rule 31 (2) (b) of the Uniform Rules.

[4] The applicants' condonation application reads as follows:

4.1. I became aware of the default judgement when I appointed my attorney of record to pursue this matter after realising my former attorney were not assisting at all;

4.2. My attorney of record then went to court to check and make copies of the court's file. My attorney of record then informed me that there was a default judgement which was obtained against me and I was surprised because I thought my former attorney would have assisted;

4.3. It is submitted that I was not in wilful default and that I have acted within a reasonable time in that I have given my attorney of record instruction to bring this application;

4.4. It is submitted that I became aware of the judgment after 20 days has lapsed and consequently I could not have brought this application before 20 days because I was not aware that judgment had been taken against me;

4.5. It is submitted that condonation of the late filing of this application should be granted.”

[5] In *Melane v Santam Insurance Co. Ltd* 1962 (4) AD at page 532 B – C, the court said the following:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case.”

[6] The applicants in their application for condonation has failed to state when they became aware of the default judgment. In their founding affidavit on the merits, they state that they became aware of the default judgment on the 15 May 2013. In their replying affidavit, the applicants state that they became aware of the default judgment on the 16 April 2013. It is not clear when the applicants became aware of the default

judgment.

[7] The affidavit initiating the application for rescission was deposed by the deponent on the 06 June 2013. The applicants does not give an explanation of what caused the delay from the 16 April 2013 or 15 May 2013 to the 06 June 2013. When arguing of this application, counsel of the applicants was making submissions which were not stated in their founding affidavit. In the cause of *Wightman t/a JW Construction v Head four (Pty) Ltd and another* (66/2007) [2008] ZASCA 6 at paragraph 13 the court said the following:

“But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter”

[8] The applicants’ application is very scanty. The applicants did not deal with the degree of lateness. They merely state that they become aware of the default judgment when they appointed their new attorneys. They don’t state when was their new attorneys appointed. Even on their application on merits, they gave two different dates of when they became aware of the default judgement.

[9] The applicants failed to explain what caused the delay from the date they became aware of the default judgment.

[10] The applicants have also failed to deal with the prospects of success in their application for condonation. Strong prospects of success tend to compensate for a long delay. If there are no prospects of success, there would be no point in granting condonation.

[11] In deciding whether sufficient cause has been shown, the court has a discretion which must be exercised judicially taking into consideration all the facts presented. In my view, the applicants did not show sufficient cause warranting the exercise of the court's discretion in condoning the late filing of the application for rescission.

[12] In the result, I make the following order:

12.1 The applicants' application for condonation is refused with -costs.

M F KGANYAGO

ACTING JUDGE OF THE HIGH COURT

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