

SOUTH AFRICA / JUDGMENT

Mokasule v Botha N.O and Others (Reasons) (MG105/2019) [2025] ZANWHC 146 (19 May 2025)

[2025] ZANWHC 146

COURT

North West High Court, Mafikeng

BEFORE

J T Maodi

CASE / FILE NUMBER

MG105/2019

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Case No: MG105/2019

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

THOMAS PATRICK MOKASULE

APPLICANT

and

DEON MARIUS BOTHA N.O

FIRST RESPONDENT

MOTSWANE MERRIAM KUTUMELA N.O

SECOND RESPONDENT

TRANS TV CC

THIRD RESPONDENT

Date judgment delivered: 21 February 2025

Date for reasons: 19 May 2025

REASONS

FOR JUDGMENT

MAODI AJ:

Introduction

- [1] On the 21 February 2025 I made an order refusing postponement, dismissing an application for rescission of judgment together with some ancillary orders. The applicant has requested reasons for such order. This is therefore the reasons for the order.

Background

- [2] The matter first came before me on the 31 January 2025 for hearing. The applicant was represented by Advocate Nyoka while the respondents were represented by Advocate J Walker. The applicant had launched an application for rescission of judgment which was opposed. Advocate Nyoka informed me that he had just been briefed a day or two before the date of hearing. Further that he had full instructions to proceed with the matter to finality, however, needed time to prepare properly and as such sought a postponement. Despite my displeasure with the applicant and the manner in which this matter has been handled by the applicant, I granted postponement to the applicant with a return date of the 21 February 2025. Advocate Nyoka undertook that the applicant

will be ready and he will personally present the matter for the applicant on the said return date.

- [3] On the 21 February 2025, to my surprise and without any practice note having been filed, Advocate T. J. Mnisi appeared for the applicant. Advocate Mnisi informed me that he had just been briefed a few days before the date of hearing and was not aware of anything relating to Advocate Nyoka or any undertaking previously made. Advocate Mnisi

informed me that he only had mandate to seek postponement of the matter and not to argue the matter as he had no mandate to argue the matter. No submissions for the reasons of postponement was made by Advocate Mnisi. The postponement was again opposed by the respondent. Postponement is not be granted upon the mere asking thereof by a party. Case flow management remains the prerogative of the court. I then refused postponement, whereafter Advocate Mnisi withdrew from record. The matter proceeded.

- [4] At this stage it is important to deal with the replying affidavit which was filed by the applicant on the 10 February 2025. The replying affidavit was filed very late and the respondent has filed an application to strike it out. There is no condonation for the late filing of the replying affidavit and it raises new issues which were not contained in the founding affidavit and the answering affidavits. The replying affidavit is therefore struck out and cannot be accepted

for purposes of this application.

- [5] The notice of motion was issued on the 30 September 2019 and served on the respondent on the 4 October 2021 with the following relief being sought:

- (1) That the final order granted against and sequestrating the applicant on the 5 December 2019 in case number M105/2019 be rescinded and set aside, alternatively be declared invalid and unenforceable against the applicant.
 - (2) That the joint liquidators are relieved of their duties and are hereby removed as Trustees in the estate of T.P. Mokasule (Master's reference 80/2019).
 - (3) That the applicant file and serve its answering affidavit, if any, 20 (twenty) days after date of judgment of this application.
 - (4) Condonation for the late filing of this application be granted, insofar as it is necessary.
 - (5) That the respondents, should they oppose, be ordered to pay the costs of this application on an attorney and client scale jointly and severally, the one paying the other to be absolved.
 - (6) Further and/or alternative relief.
- [6] The deponent to the founding affidavit is Thomas Patrick Mokasule who states that he is an adult male businessman duly authorised to bring this application. He personally represented himself in the transaction with the third respondent (Trans TV CC). The first and second respondents are insolvency practitioners and joint Trustees in the estate of the applicant. The third respondent is a close corporation.
- [7] The applicant's case is that, on the 20 July 2012, he concluded a written agreement with the third respondent wherein he applied for credit with the third respondent through his close corporation (Mokasule and Sons). The credit limit was R 2 million. He and his wife were bound as co-debtors to the third respondent. Pursuant to this, he introduced his business associates to the third respondent to see if similar arrangements could be made for them. He only allowed Mr Thabang Theiso, (one of his business associates), to utilise his credit facility held with the third respondent, but was surprised that other people were allowed to utilise the said credit facility. The third respondent obtained judgment against him for payment of the amount of R 5 087 766, 67 at the Gauteng Division of the High Court held in Pretoria (North Gauteng High Court). He is only liable for the balance of the judgment debt and not the whole amount.

[8] The applicant states that he instructed Baloyi Attorneys (Baloyi) who had to defend the matter at the North Gauteng High Court. Baloyi filed a notice to defend. When he later enquired, he found that default judgment was granted against him at the North Gauteng High Court. The correspondence attached shows that this took place from 18 September 2018 to 27 September 2018 as per annexures “FA16 to FA18”. He had a fallout with his attorneys who did not execute his mandate properly. At this stage the third respondent had served him with the application for sequestration. He knew that application

was being brought against him as it was served on him personally. He confirmed that he was served personally as per paragraph 11.20 of his founding affidavit.

[9] He then instructed Tiro Attorneys (Tiro) around December 2019 to defend the sequestration matter. In January 2020 he was under the impression that Tiro was opposing the sequestration application, only to be surprised in February 2020 by the Sheriff coming to attach his property. The Sheriff informed him that he had been sequestered. He then instructed Dintwa Attorneys (Dintwa) who set up consultation with counsel in Johannesburg. Dintwa requested the file from Tiro as

per annexure “TPM4”. TPM4 shows that it was written on 2 December 2019 and makes no mention of a writ by the Sheriff, but opposition of sequestration. This is two months before the date alleged by the applicant.

[10] The applicant got the files from Tiro himself and made sure that they are sent to Johannesburg but it was the beginning of lockdown due to the covid 19 pandemic.

Analysis and reasons for judgment:

[11] Section 149 (2) of the Insolvency Act 24 of 1936 provides that “The court may rescind or vary any order made by it under the provisions of this Act”. The information before me is that the applicant’s attorneys withdrew from record on the day that the sequestration order was granted.

[12] Some of the factors to consider in applications of this nature are: that there must be unusual or exceptional circumstances or a change in circumstances to justify the relief sought. The delay in bringing the application and the extent to which the winding-up has progressed. Scott JA stated the following in the case of *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 181:

"There is nothing in the section to suggest that the Court's discretionary power to set aside a winding-up order is confined to the common-law grounds for rescission. However, in the *Herbst* case *supra*, Eloff J expressed the view (at 109F--G) that no less would be expected of an applicant under the section than of an applicant who seeks to have a judgment set aside at common law. I think this must be correct. The object of the section is not to provide for a rehearing of the winding-up proceedings or for the Court to sit in appeal upon the merits of the judgment in respect of those proceedings. To construe the section otherwise would be to render virtually redundant the facilities available to interested parties to oppose winding-up proceedings and to

appeal against the granting of a final order. It would also make a mockery of the principle of *ut sit finis litium*'. (Abdurahman v Estate Abdurahman (supra at 875G--H).) it follows that an applicant under the section must not only show that there are special or exceptional circumstances which justify the setting aside of the winding-up order; he or she is ordinarily required to furnish, in addition, a satisfactory explanation for not having opposed the granting of a final order or appealed against the order. Other relevant considerations would include the delay in bringing the application and the extent to which the winding-up had progressed."

[13] It is clear that the notice of application for rescission of judgment was served twenty-four

(24) months after it was issued. The explanation by the applicant on condonation goes as far as March 2020 which is about five

(5) months after application was issued. Nothing is said about the eighteen (18) months after. The rescission application must be sought within a reasonable period of time. The law is settled that issuing process does not interrupt prescription. If a litigant issues summons but does not serve same, prescription is not interrupted. The same approach finds relevance in application proceedings when it comes to an applicant taking further steps, especially given the requirements on a party seeking condonation.

[14] Even if one takes cognisance of the covid pandemic in 2020, the period of default by the applicant is too long to be justified. More so since there is no proper explanation placed before the court as to the applicant's absence.

[15] The applicant also blames his attorneys for not having represented him properly. The law is settled that not in all cases will a litigant hide behind his attorneys. There is a remedy for professional negligence by attorneys which is found in suing the attorney. Practitioners are not absolved from professional negligence.

[16] The issue of attorney negligence and implications thereof was stated by Hendricks JP in the case of Ngaka Modiri Molema District Municipality v Qauntibuild (Proprietary) Limited (CIV APP FB12/2022; 3352/2019)

[2024] ZANWHC 101 (12 April 2024) at paragraphs 11 and 12 as follows:

"(11) The lackadaisical approach of the Municipalities' attorneys is striking. The attorneys were negligent in the prosecution of the appeal. They did not file a power of attorney; provide security for costs; and file a complete and compliant record of appeal. This cannot be countenanced. It is expected of attorneys to prosecute an appeal, on the instructions of client, diligently, professionally,

and promptly. The Municipalities' attorneys failed to execute their mandate. This Court will mark its disquiet with an appropriate

costs order. It is telling that with Quantibuild having filed its application to declare the appeal lapsed on 27 January 2023, the attorneys for the Municipality only on 2 March 2023, belatedly, provided security for costs, filed a complete appeal record, and applied for a date for the hearing of the appeal. This is inexcusable.

(12) In similar scenario to the present, a Full Court of this Division in *Harrys Tyres (Pty) Limited v Symes and Others* (CIV APP FB10/2023) [2024] ZANWHC 75 (13 March 2024), marked its disapproval with the conduct of the attorneys for the appellant who failed to timeously prosecute an appeal. The following was said in that regard:

“[9] Harry’s, through Pienaar has not heeded the warning of the SCA that:

“A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to

understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”

See: *Uitenhage Transitional Local Council v South African Revenue Service* 2004

(1) SA 292 (SCA) at paragraph [6]).

[10] In the absence of any cogent explanation, it can be accepted that nothing was done by Harry’s attorneys of record and the correspondent attorney during the aforesaid time periods; clearly showing a lack of diligence and culpable remissness on their part. Pienaar and the correspondent remained supine during the relevant time. The director of Harry’s also does not depose to an affidavit setting forth any enquiries Harry’s itself may have made with its attorneys on the status and prosecution of the appeal. It is trite that even Harry’s cannot hide behind the remissness of its attorneys.

...

[15] In addition, the application for condonation has also not been brought without delay. The need for condonation was present in the mind of Pienaar since 7 November 2022, yet the application was only brought on 9 January 2023. No explanation is proffered for this delay.

[16] Harry’s delay in diligently and properly prosecuting its appeal results in prejudice to the liquidators’ and body of creditors’, not only financially but also their interest in the finality of the judgment, which could not be executed upon. There must be finality in litigation. Harry’s delay has clearly prejudiced the liquidators and body of creditors’ rights and interest in the judgment and the finality thereof.

- [17] The authorities are clear that in cases of flagrant breaches of the Rules, especially where there is no acceptable or satisfactory explanation advanced therefore, as in casu, it is unnecessary for the court to assess the prospects of success and condonation should not be granted, whatever the merits of the appeal might be. This applies even where the blame lies solely with the attorney.”
- [17] I therefore found that no case for condonation has been made out.
- [18] With regard to the issue of bona fide defence, the applicant only states that the respondent has not disclosed information to various courts, but does not state which information he is referring to. In the contrary, the applicant admits at paragraph 18.3 of his founding affidavit that he is indebted to the third respondent. He does not state whether the debt has been satisfied or whether he has sufficient means to satisfy the debt. Further, the applicant has not set out any unusual, exceptional circumstances or a change in circumstances since the order of sequestration, which change in circumstances warrants rescission of the sequestration order.
- [19] The applicant has failed to put any information before me which supports the removal of Trustees from office. It is the duty of Trustees to investigate and realise all assets and liabilities of an insolvent or sequestrated person.
- [20] The meetings of creditors in the applicant’s estate have been held and claims to the approximate value of Seven Million Rands (R 7 000 000, 00) have been proved. Claims to the value of Two Million Rands (R 2 000 000, 00) have been received by the liquidators. There is a further anticipated claim, by the municipality and based on enquiries by the liquidators, estimated at One Hundred Million Rands (R 100 000 000, 00). Therefore, given the extent to which the winding-up process has gone, the lack of unusual or exceptional circumstances or a change in the applicant’s circumstances, I found that no bona fide defence, good cause or exceptional circumstances have been established by the applicant
- [21] The costs order was made based on the complexity of the matter, the value involved in this matter and the fact that the respondents were fully successful.
- [22] These are my reasons for the order of 21 February 2025.

J. T. MAODI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

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