

SOUTH AFRICA / JUDGMENT

Mountain View Investments v Altfund (Pty) Ltd (39167/2015) [2017] ZAGPPHC 943 (15 December 2017) [2017] ZAGPPHC 943

COURT

North Gauteng High Court, Pretoria

BEFORE

M J Mosopa

CASE / FILE NUMBER

39167/2015

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HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE

NO: 39167/2015

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED.

DATE: 15/12/2017
In

the matter between: MOUNTAIN
VIEW
INVESTMENTS Applicant
And
ALTFUND
(PTY)
LTD Respondent

JUDGMENT

MOSOPA, AJ

Introduction

- [1] This is an application in terms of Rule 31(2) (b) of the Uniform Rules of Court to rescind the order granted on 21 April 2016 under the above case number. The applicant further seeks a relief to condone the late filing of the application as the application was launched out of time.
- [2] The applicant further seeks an order to set aside the writ of execution issued pursuant to the order and also the notice of

attachment dated 23 May 2016 be set aside. Lastly that the applicants' claim and the defence be reinstated.

- [3] The applicants replying affidavit was out of time with a period of approximately eight months and application to condone the late filing of the applicant's replying affidavit was refused.

Factual Matrix

- [4] The applicant also is the plaintiff in the main action instituted against the defendant on the 21 May 2015 for the recovery of damages arising from the loan agreement.
- [5] The matter was defended by the respondent and a plea to plaintiff's claim and counter claim were duly delivered by the respondent on the 31st of July 2015. Which was followed by the applicant's plea on the 3rd September 2015. It was for that purpose that the pleadings were deemed to be closed.
- [6] The respondent applied for a trial date which was set down for hearing on the 4 August 2016 and the applicant was duly notified of such a set down by notice on the 14th October 2015.
- [7] The respondent served the applicant with notice in terms of Rule 35(1), (6),
- (8) and (10) on the 23rd September 2015 which the applicant failed to respond to and prompted the respondent to obtain an order on the 14th December 2015 ordering the applicant to respond to the respondent's notice in terms of Rule 35(1), (6), (8) and (10) within ten days after service of the application. Even though under a court order the applicant failed to make discovery despite the fact that the applicant was duly notified of such court order on the 18th December 2015.
- [8] On the 15th March 2016 the respondent launched an application for default judgment on counter claim and striking out of plaintiff's

claim which was duly served on the applicant on the 16th March 2017 to be heard on the 21st April 2016.

[9] The default application was not opposed by the applicant and the default judgment was eventually granted in favour of the respondent

on the 21st April 2016 for the payment of the amount of R807 188. 40 plus interest, order declaring the property of the applicant

specially executable, issuing of the writ of execution against the immovable property and costs.

Rescission Application of Default Judgment

[10] Default judgment obtained in the absence of the party can be rescinded in three different way in terms of:

10.1 Rule 31(2)(b);

10.2 Rule 42 (1)(a);

10.3 common law.

[11] The applicant in its notice of motion seeks an order condoning a rescission of default judgment in terms of Rule 31(2)(b). In its affidavit the applicant avers that it approaches the Honourable Court under the provisions of Rule 31(2)(b) alternatively Rule 42 of the Uniform Rules of Court.

[12] Rule 31(2)(b) provides as follows: "A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

[13] According to the applicant the default judgment obtained on the 21st April 2016 only came to his attention on the 19th May

2016. Despite such default judgment being brought to his attention on the 19th May 2016, the rescission application of the default judgement was served on the respondent on the 21 July 2016. The applicant concedes to the fact that the rescission application was instituted out of time and it was approximately 44 days late.

[14] In such circumstances for the application to succeed with condonation of such late filing of the application the applicant must show good cause. It is trite that an application for condonation must give a full explanation covering the entire period of the delay, and what is more, the explanation given must be reasonable. See *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC) at 477.

[15] The applicant's explanation as to why its rescission application was out of time can be succinctly described as follows:

15.1 That he informed his correspondent attorneys of record immediately when it obtained knowledge of default judgment;

15.2 The letter was addressed to its correspondent attorneys of record and a draft of the application was transmitted to them and they never received instructions from its correspondent attorneys. The mandate of its correspondent attorneys has since been terminated.

15.3 The reply addressed from its correspondent attorneys was only received on the 1st June 2016. The attorney did not furnish it with the copy of the default judgment order of the 21st April 2016 and it has to secure it itself.

[16] Following the principle as laid down in Van Wyk (Supra) it is clear that the applicant was supposed to explain in his affidavit the reasons for the entire period of delay but it failed to explain the reasons for the entire period of delay. I am therefore not satisfied that the applicant showed good cause for the delay.

[17] The requirements for an application for rescission under this subrule have been stated to be as follows:

17.1 The applicant must give a reasonable explanation of his default. If it appears that his default was willful or that it was due to gross negligence the court should not come to his assistance;

17.2 That his application is bona fide and not made with the intention of merely delaying plaintiff's claim;

17.3 That he has bona fide defence to plaintiff's claim.

[18] The reason for the application's default remain as essential ingredient of the good cause to be shown. The reasons for the

applicants' absence or default must, therefore, be set out because it is relevant to question whether or not his default was willful.

[19] In Silber v Ozen Wholesalers (Pty) Ltd 1954

(2) SA 345 (A) at 353 (A) it has been held that the explanation for the default must be sufficiently full to enable the court to understand how it really came about, and to assess the applicants' conduct and motives. An application which fails to set out these

reasons

is not proper, but where the reasons appear clearly, the fact that they are not set out in so many words will not disentitle to

applicant to the relief sought.

- [20] The applicant had knowledge that the respondent was bringing an application for default judgment on a counter claim and striking out of applicants' claim as it was served on its attorneys. The applicant deliberately refrained from defending such application as it proceeded on unopposed bases despite being notified of such application. The applicant had a certain mental attitude towards the consequences of the default.
- [21] The explanation of the applicant is not satisfactory as he admits that the default judgment was duly served at its attorney's office on the 16 March 2016 but page two of such application was missing. The address and the contract details of the respondents' attorneys were given in such application but the applicant failed to bring it to the attention of the respondents' attorneys of such missing page. Moreover the applicant's attorney gives an unreasonable explanation that the importance of the document could not be gleaned (sic) and they could not apprehend what relief the respondent was seeking.
- [22] The fact that the applicants' attorneys were away for some period of time outside the country can also not serve as justification. However the most important issue is that after receiving the application the respondent did nothing to defend such application.
- [23] The applicant failed to set forth with sufficient detail the grounds of its defence in its founding affidavit to enable the court to conclude that there is a bonafide defence and the counsel for the applicant correctly conceded that the affidavit does not set out a bonafide defence. I am satisfied that the applicant failed to satisfy me that he has a bonafide defence to the Respondents claim. As a consequence the application was made with the intention to merely delay respondent's claim.
- [24] The applicant averred in its founding affidavit that the application is brought alternatively under Rule 42 of the Uniform Rules of Court. Rule 42 provides as follows:
- "42.1 The court may, in addition to any other powers it may have, mero muto or upon the application of any party affected, rescind or vary;
- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
 - (b) An order or judgment in which there is an ambiguity, or patent error or omission, but only to the extent of such ambiguity, error or omission;
 - (c) An order or judgment granted as a result of a mistake common to the parties."
- [25] The applicant failed to satisfy me that it can succeed in terms of one of the grounds laid in Rule 42 and more especially none of such grounds was adequately dealt with by the applicant in its affidavit.

Counsel Contentions

- [26] It was contended on behalf of the applicant that the application is only 44 days and such delay is not an inordinate delay. The delay was caused by changing of attorneys and there was tremendous amount of confusion faced by the applicant due to the number of matters the applicant had to face. Further that this is the complex matter. I cannot agree with this contentions as inordinate delay is not the only requirement, what is important is for the applicant to explain the reasons for the delay.
- [27] It was further contended on behalf of the applicant that the misconduct is not so grave that section 36 constitution rights are to be denied and close the door for the applicant, but rather the court should penalize the applicant with costs. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003
- (6) SA 1 (SCA) the following was said: "Courts are slow to penalize litigants for an inept conduct of litigation by attorneys but there comes a point where there is no other alternative but to make the client bear the consequences of the negligence of his attorney."
- [28] On behalf of the respondent it was contended that the applicant as a *litis dominus* had a total disregard of the rules of court in any step it took in this matter. The respondent had to apply for date of trial and the applicant failed to do so. They are late in bringing this application also late in bringing their written submissions.
- [29] I tend to agree with Mr van Rensburg on behalf of the respondent. The applicant demonstrated a total disregard for the rules of court despite being *litis dominus*.

Conclusion

- [30] The applicant failed to show the reasons for their delay in bringing this application.
- [31] The applicant failed to show good cause of the willfulness and that they have a bona fide defence.

Order

- [32] I therefore make the following order:
1. The applicant's application for the condonation of the late filing of the rescission of default judgment is dismissed;
 2. The application for rescission of default judgment is dismissed;
 3. The applicant is ordered to pay the respondents costs, such cost to include costs of the 21 November 2017.

M J Mosopa

Acting Judge of the High Court

APPEARANCES:

For the Applicants: Adv J.T. H Berdou

Instructed by: Brazington & McConnell Attorneys, Pretoria

For the Defendant: Adv S. J Van Rensburg

Instructed by: Tintingers Inc., Pretoria

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Prepared on 9 October 2026 · Esheria