

SOUTH AFRICA / JUDGMENT

Robertet South Africa Aromatics (PTY) Ltd v Munsolve CC (2040/2018) [2022] ZANWHC 3 (24 February 2022) [2022] ZANWHC 3

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

2040/2018

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IN THE NORTH WEST HIGH

COURT, MAFIKENG

CASE NO: 2040/2018

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Magistrates: YES / NO

In the matter between: ROBERTET SOUTH AFRICA
AROMATICS
(PTY) LTD
Applicant
and
MUNSOLVE
CC
Respondent
DATE
OF HEARING
:
17 FEBRUARY 2022
DATE
OF JUDGMENT
:
24 FEBRUARY 2022
FOR
THE PLAINTIFF
:
MR. CLEMENTE
FOR
THE DEFENDANT
:
ADV. RILEY

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 24 February 2022.

ORDER

- (i) Condonation for the late prosecution of the application for rescission of the default judgment/order is refused.
- (ii) The application for rescission of the default judgment/order granted by Chwaro AJ on 13 September 2018 is dismissed.
- (iii) The applicant is ordered to pay the costs of the application for rescission of the default judgment/order on the scale as between party-and-party.

HENDRICKS DJP

[1] On the 13th September 2018, Chwaro AJ granted default judgment against the applicant (defendant in the action) in the amount of R860 335.20 plus interest and costs. On 21st January 2021 the applicant launched an application for rescission of the default judgment premised on Rule 42 (1) (a) alternatively on Rule 31 (2) (b) of the Uniform Rules of Court or the common law. Coupled with this application for rescission is also an application

for condonation for the late prosecution of the application for rescission of the default judgment/ order. During oral submissions at the hearing of the rescission application on 17th February 2022, Mr. Clemente on behalf of the applicant abandoned the Rule 42

(1) (a) submissions made in the affidavits and heads of argument and premised the rescission application only on Rule 31 (1) (b).

[2] Rule 31 states that:

“31 Judgment on Confession and by Default

(1) (a) ...

(b) ...

(c) ...

(2) (a) ...

(b) A defendant may within 20 days after he 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.

(emphasis added)

[3] Adv. Riley on behalf of the respondent submitted that the summons was indeed properly served at the applicant’s (defendant’s) principal place of business at [...] Street, Rustenburg. It is common cause that this address is indeed the registered address of the applicant.

[4] Service on the registered address is proper service. Rule 4 of the Uniform Rules of court states:

“4 Service

(1)

(a) Service of any process of the court directed to the sheriff shall be effected by the sheriff in one or other of the following manners:

(i)

- (iv)

- (v) in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the courts jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law;”

(emphasis added)

- [5] In *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd* (AR 450/08) [2010] ZAKZPHC 66; 2011 (3) SA 477 (KZP) (28 September 2010) at par 15 the Court held:

“[15] Service at the registered office of a company, in the absence of a responsible employee thereof, by delivery of the document to be served to a person at such address (not being an employee of the company) willing to accept such service, has been recognised as good and proper service which is preferable to merely attaching the process, for instance, to the outer principal door of the premises (see: Chris Mulder Genote v Louis Meintjies Konstruksie (Edms) Beperk 1988

- (2) SA 433 (T)).”

- [6] The above reasoning was also confirmed by the Supreme Court of Appeal SCA in *Arendsnies Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) at paragraph 14:

“[14] In Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd 2011 (3) SA 477 at 481 (KZP) Van Zyl J, (writing for the full court) in para [15] said:

‘Service at the registered office of a company, in the absence of a responsible employee thereof, by delivery of the document to be served to a person at such address (not being an employee of the company) willing to accept such service, has been recognised as a good and proper service which is preferable to merely attaching the process, for instance, to the outer principal door of the premises’, Van Zyl J also referred with approval to *Chris Mulder Gonote Ing v Louis Meintjies Konstruksio (Edms) Bpk 1988 (2) SA 433 (T)*. *Brangus* is the most recent high court judgement which, in my view, is authority for the proposition that effectiveness of the service of a court process or substantial compliance should trump the form. In other words by reason of the fact that a copy of the summons was served at the registered office of the defendant there had been substantial compliance with the requirement of Rule 4(1)(a)(v). Even though the service did not strictly comply with the Rule. I was unable to unearth any decision of this court dealing specifically with Rule 4(1)(a)(v).

- [15] It would not be a proper exercise of a court's discretion to uphold the special plea in circumstances where there was substantial compliance with the rules. In this case the defendant had not changed its registered office with the Registrar of companies.. where else could the plaintiff have served the summons? *De Waal JP in Geldenhuis Deep Ltd v Superior Trading Co (Pty) Limited* 1934 WLD 117 at 119 said:

‘Until notification of change of address is given to the Registrar of companies, the office as originally registered remains the registered office of the company for practical purposes. ‘(see also *Hardroad (Pty) Ltd v Oribi Onctors (Pty) Ltd* 1977 (2) SA 576 (W)at 578H-579G.

[16] In *Dawson & Fraser v Havonga Construction* 1993 (3) SA 397 (BGD) at 401 B-C, Hendler J said: 'The failure of Dawson & Fraser (Bophuthatswana) to change the address of the registered office can in no way be a factor which could be construed prejudicial to it'.

I agree in this regard with the reasoning of the court a quo where it reasoned that corporations should not be permitted to register an office address where it has no purpose or business and by so doing, frustrate services of summons and other court process upon it.

[20] In the circumstances I conclude that the approach adopted by the KwaZulu Natal High Court in the *Brangus* case (*supra*) is correct..."

[7] Service is therefore not in issue but what is in issue according to Mr. Clemente is the fact that service of the summons did not come to the attention of the applicant. It was effected on a different company at the registered address of the applicant. The applicant only subsequently became aware of the fact that default judgment was granted against it. Therefore the attack premised on Rule 31 (2) (b).

[8] In terms of Rule 31

(2) (b) the applicant is required to show good cause for the relief sought which entails that the applicant must show (a) that a reasonable and acceptable explanation exist for its default; and (b) that it has a bona fide defence that has some prospect of success.

[9] The test whether 'sufficient cause' has been shown by a party seeking relief, is dual in nature, it is conjunctive and not disjunctive. An acceptable explanation of the default must co-exist with evidence of reasonable prospects of success on the merits. Rule 31(2)(b) of the Uniform Rules of Court requires 'good cause' to be established before the rescission of a default judgment may be granted. The phrases 'good cause' and 'sufficient cause' are synonymous and interchangeable.

See: *Harris v ABSA Bank t/a Volkskas* 2006 (4) SA 527 (T)

[10] It has been held that 'good cause' includes, but is not limited to, the existence of a substantial defence. Furthermore, that 'the defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives.'

See: *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 275 (O)

[11] Insofar as condonation for the late prosecution of the rescission application is concerned, the following timeframes are important. Summons commencing action was served on 21st June 2018. The default judgment/order was granted on 13th September 2018. The applicant became aware of the default judgment/order on 20th February 2019. On 13th March 2019 it consulted its erstwhile attorneys of record. A copy of the agreement was obtained in 01st August 2019. It was advised during January 2020 that a resolution is required, which resolution was acquired on 16 March 2020. During October/November 2020 the mandate of

the erstwhile attorneys of record was terminated. The current attorneys of record was instructed on 27th November 2020. The application for rescission was prepared, finalised and launched on 21 January 2021.

- [12] Adv. Riley contended that the delay is inordinately long and not sufficiently explained in minute detail. Certain periods in the delay is unexplained. For example, it took the applicant almost a month to consult its erstwhile attorneys of record after it became aware of the default judgment/order being granted. It took more than four (4) months to obtain a copy of the agreement. Furthermore, after the passage of four (4) months was it realised that a resolution needed to be obtained and a further two (2) months to obtain same. Mr. Clemente said during his oral submissions that he work hard for eleven (11) months of the year and need to take holiday with his family during December, which was indeed the case in 2020. Thereafter, was the application launched.
- [13] Condonation is not for the mere asking. It is incumbent upon an applicant in an application for condonation to show that it was not as a result of a lack of enthusiasm on his/her/its part that the application was not brought as soon thereafter as he/she/it became aware of the default judgment/order.

Adv. Riley submitted that this is exactly the case in this matter. The application was not brought soon after the applicant became aware that default judgment/order was granted against it. After a passage of almost two (2) years was the application for rescission of the default judgment/order launched. This is without any stretch of the imagination an inordinately long delay. Furthermore, I am in full agreement with Adv. Riley's submission that the period of the delay is also not in full detail explained. There are months that passed by that is unexplained.

- [14] In *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Limited* 2010 (4) SA 109 (SCA) the following is stated:

"[35] In general terms the interests of justice play an important role in condonation applications. An applicant for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable."

- [39] Condonation must be applied for as soon as the party concerned realises that it is required. The onus to satisfy the court that all the requirements under s 4(b) of the Act have been met, is on an applicant, although a court would be hesitant 'to assume prejudice for which (a) respondent itself does not lay a basis'."

- [15] Based on the Rance judgment supra, Adv. Riley contended that:

- (1). Condonation must be applied for as soon as the party as soon as the party concerned realises that it is required and delays in applying for condonation are not acceptable.
- (2). The Applicant is required to set out fully the explanation for the delay. The explanation for the delay must be reasonable.

- (3). The explanation for the delay must cover the entire period of the delay.
- (4). It would be pointless to grant condonation if the prospects of success on the merits are poor.
- (5). It is imperative that an applicant for condonation does, in his explanation for the delay in order to demonstrate good cause, advance an acceptable explanation to cover the entire period of delay.
- (6). The granting of condonation is an indulgence in the discretion of the court and is not a mere formality for the taking.
- (7). The Court will refuse to grant an application for an indulgence where there has been a reckless or intentional disregard of the Rules of Court.

I am in full agreement with the aforementioned.

[16] Mr. Clemente contended that the applicant cannot be punished for the inapt or lackadaisical approach adopted by its erstwhile attorneys of record in prosecuting the application for rescission timeously. There is a limit beyond which a litigant cannot hide behind the lack of diligence of his/her/its attorney in prosecuting his/her/its matter to finality. It is incumbent upon the litigant to ensure that the attorney diligently attend to his/her/its case. All the blame with regard to the delay cannot solely be attributed to the erstwhile attorney. The applicant as litigant is also to blame for the delay. Likewise is its current attorney Mr. Clemente also not free of any blame as he went on what he term a much needed holiday during December when the application for rescission was not yet finalised. The behaviour of the applicant and his attorneys of record contributed to the inordinately long delay of almost two (2) years to bring the application for rescission. This is to say the least unacceptable. A proper case is not made out for the requisite condonation to be granted.

[17] In *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) the following stated:

“There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of the Appellate Division. Considerations ad misericordiam should not be allowed to become an invitation to laxity.

The Court refused condonation in the absence of an acceptable explanation not only of the delay in noting an appeal and in lodging the record timeously, but also of the delay in seeking condonation, where there were no strong prospects of success on appeal.”

- [18] Mr. Clemente submitted that the prospects of success favours the granting of condonation and the rescission of the default judgment/order. The applicant has a bona fide defence. His contention is based on the fact that there is a dispute with regard to whether the services were rendered by the respondent, which forms the basis of the indebtedness of the applicant. To this extend it was submitted that the contract was validly terminated by the applicant on 10 June
2016. No services were rendered. So too is it important to note that the date on the invoices preceded the dates of the rendering of the services and it cannot therefore be correct. In addition, the amount that is sought to be recovered by the respondent from the applicant is in excess of the 10% agreed upon by the parties.
- [19] Adv. Riley contended that it is quite apparent that there was an agreement that was entered into between the applicant and the respondent. This agreement was not terminated by mutual consent between the parties. The agreement that was terminated relate to a different company to wit Munwath. The agreement between the applicant and the respondent remained valid and on the version of the respondent, services were rendered which entitles it to the amounts claimed. I am unconvinced that the applicant has good prospects of success. The application for rescission should therefore fail.

Order

[20] Consequently, the following order is made:

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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