

SOUTH AFRICA / JUDGMENT

Spear and Others v BMO Food Services (Pty) Ltd (28256/2015)

[2015] ZAGPPHC 575 (5 August 2015)

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COURT

North Gauteng High Court, Pretoria

BEFORE

Mavundla

CASE / FILE NUMBER

28256/2015

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IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 28256/2015

DATE: 05 AUGUST 2015

In the matter between:

SPEAR LESLIE PATRACIA SPEAR.....FIRST APPLICANT

JEFFREY SPEAR.....FIRST APPLICANT

CANDICE SPEAR.....FIRSTTHIRD APPLICANT

AND

BMO FOOD SERVICES (PTY) LTD.....RESPONDENT PLAINTIFF

MAVUNDLA. J,

[1] The applicants approached this Court seeking condonation for the late filing of the application for rescission as well as the late filing of their replying affidavit. This Court dismissed the application with costs. . The reasons for the said dismissal are therefore set out herein below.

[2] The application was originally for the rescission of the judgment:

2.1 granted against of Buttonwood Trading 42 CC on 12 June 2008 under case number 14689 /08, for payments of the sum of R481 444.30;

2.2 granted against the applicants on 3 September 2009 under case number 3105 /2009, for payments of the sum of R481 444.30.

- [3] This application was founded on the affidavit deposed to by the first applicant on the 11 May 2010. The first default judgment was against the CC. The second default judgment was against the three applicants in their personal capacity as members of the CC.
- [4] The second application is for the condonation of the late filing of the application for rescission of the default judgment granted against the CC and the applicants as well as for the late filing of the replying affidavit of the applicants. This application is premised on the affidavit deposed to by the second applicant on the 2 April 2014.

The other two applicants have also deposed to their verifying affidavit. Nothing much turns around this.

BACKGROUND

FACTS

- [5] The salient points and facts which are not in dispute are:

5.1 the default judgment against the CC was granted 12 June 2008. The CC was de-registered on the 12 December

2009. Default judgment was granted against the applicants in their personal capacity as members of the CC on the against the applicants on 3 September 2009;

5.2 According to the applicants they only became aware of the fact that default judgment was granted against them, when the sheriff attended at their residence with a warrant of execution during about January 2010;

5.3 The application for rescission was brought and served on the respondent's attorneys of record on the 25 May 2010.

5.4 The application for rescission was brought four (4) months after the applicants became aware of the default judgments; nineteen

- (19) months after judgment was granted against the CC; four (4) months after judgment was granted against the individual members of the CC.

5.5 The respondent filed an answering affidavit on the 3 June 2010. The matter was initially on the unopposed roll of the 23 July 2010 but had to be removed from the roll due to the fact that the application had become opposed. The application was thereafter placed on the roll for the 29 November 2010 but subsequently removed from the roll due to the fact there were no papers in the Court file;

5.6 The applicants then brought the second application, seeking inter alia, condonation for the late filing of their replaying affidavit.

[6] In an application for both condonation the court will have regard to the following:[1]

(i) Is it in the interest of justice that condonation should be granted; in deciding the question of interest of justice, regard must be had to the following factors:

(a) The cause of the delay;

(b) The explanation and reasonableness of the delay, covering the entire period of the delay;

(c) The nature and defect causing the delay;

(d) The effect of the delay in the administration of justice;

(e) The prejudice to be suffered by any of the other parties;

(f) condonation is sought;

(ii) The existence of a reasonable defence.

[7] Where an application for condonation is sought, the court must first make a factual finding whether the application has been brought within the prescribed time frames. In casu it is common cause that it has been brought outside the prescribed time frame. The second consideration is to determine whether the application has been brought within reasonable time. In this regard the court makes a value judgment. "The majority judgment of Miller JA in *Wolgroeirs Afslaer (Edms) Bpk v Munipaliteit van Kaapstad*[2] sets out the proper approach to the question of undue delay; first a court must decide whether the proceedings were brought within a reasonable time and, secondly if not, it must decide whether unreasonable delay ought to be condoned, in which event it must

exercise a discretion taking into account all relevant factors including, but not limited to, prejudice to the respondent.

[8] With regard to condonation, the greater the degree of delay is, the less are the prospects of success regardless of the strength of the grounds upon which the appeal is premised; vide *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*[3]; *Immelman v Loubse*.r[4] The explanation for the delay must cover the entire spectrum of the delay.

[9] Where there has been a reckless disregard to the rules and it appears to the Court that the applicant has not been serious in prosecuting the action, condonation will be refused; vide *Smith N. O. Brummer N.O.* 1954 (3) 352(0) at 358 A; *Zulu Land*

Elictrical & Engeering Wholesalers (Pty) Ltd 1975 (1) SA 612 (D) at 615A-B; *Burton v Barlorand Limited* 1978 (4) SA 794 (T) at 797D.

[10]I now proceed to consider whether the explanation proffered for the delay is satisfactory and whether the delay is reasonable. The second applicant stated that during September / October 2011 he approached his then attorney at ODBB attorneys in order to ascertain what the position would be regarding the rescission application. He was advised to simply leave it alone as the respondent had not executed the judgment. In the matter of Chetty v Law Society, Transvaal 1985

(2) SA 756 (A) the Appellate Division held that the remissness of an attorney might in certain circumstances not be an excuse. In my view,

the applicant was ill advised to let sleeping dogs lie and was also content with this advice.

[11]In February 2012 the applicant was advised by another attorney not to leave the matter alone. At this stage he had not been advised of the ramification that a default judgment could have. He also had no money to appoint other attorneys because the relationship with his erstwhile attorneys had soured. I must hasten to state that there is no explanation as to what steps the applicant took between January 2010 on becoming aware of the default judgment, and the 25 May when they brought the application for rescission. This delay remains unexplained and as a result weighs very heavily against granting condonation.

[12]The deponent to the founding affidavit averred that the respondents had raised a point in limine that the CC was deregistered. They were then advised by their erstwhile attorneys that because the CC was deregistered for failing to file its returns, they were therefore obliged to re-register the CC before they can further proceed with the matter. However, because of financial constraints they could not instruct attorneys. In my view, impecuniosity is no defence, having regard to the fact that the judgments were obtained for a huge amount, and as far back as in 2008 and 2009. They have also not satisfied this Court as to why their replying affidavit was not filed between the period July 2010 and November 2010 on both instances when the matter was on the roll.

[13]It will be recalled that the first application was removed from the roll on the 29 November 2010 due to the fact there were no papers in the Court file. The applicants fail to explain why they did not seek from the respondent's attorneys copies of the papers and re-enrol the matter. They were prepared to content themselves with the advice that they should let the matter alone because the default judgment was not being executed. In my view, they were reckless to say the least. This type of attitude towards litigation does not sway this Court to exercise its discretion in their favour.

[14]It is this Court's considered view that the applicants have not proffered a reasonable and satisfactory explanation for the entire period of the delay, referred to herein above. The delay is in my view, unreasonable and inexcusable as it is to the prejudice of the respondent who is entitled to a speedy finalization of the litigation. Therefore the application cannot succeed and had to be dismissed with costs.

[15] In the premises for the aforesaid reasons the application is dismissed with costs.

N.M MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 05 AUGUST 2015

APPLICANT'S ATT : KISSONDUTH ATTORNEYS APPLICANT S ADV : ADV. S McTURK

RESPONDENTS'ATT : WEAVID & WEAVID ATTORNEYS

RESPONDENTS' ADV : ADV. A. J. VENTER

[1] Vide e Thekwini Municipality v Ingonyama Trust 2014 (3) SA 240 (CC) at 246 para [24].

[2] 1978 (1) SA 13 (A) 39-42D

[3]

[2007] ZACC 24; 2008 (2) SA 472 (CC) at 477A-B.

[4] 1974 (3) SA 816 at 824B-C.

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