

SOUTH AFRICA / JUDGMENT

Yablonek v Thomson (10968/2021) [2025] ZAWCHC 261 (20 June 2025)

[2025] ZAWCHC 261

COURT

Western Cape High Court, Cape Town

BEFORE

Sipunzi

CASE / FILE NUMBER

10968/2021

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IN THE HIGH COURT OF

SOUTH AFRICA

WESTERN CAPE DIVISION,

CAPE TOWN

Case No: 10968/2021

In

the matter between:

RAN

YABLONEK

Applicant

and

BRIDGET

THOMSON

Respondent

JUDGMENT

SIPUNZI AJ

Introduction

- [1] This is an opposed application for rescission of the judgment of this Court that was handed down on 7 March 2024. The Court had granted the judgment in terms of which the co-ownership of the property described as Erf 2[...] Langebaan, held under Title Deed T53518/2019, situated at 3[...] N[...] M[...] Street, Langebaan, Western Cape (hereinafter “the property”) was terminated. The sole ownership of the property was assigned to the respondent and the interests of the applicant in the property, being fifty percent, was offset against the claim of the respondent for her contribution to the purchase price, associated transfer costs and taxes levied in respect of the acquisition of the property. Accordingly, no sum was payable to the applicant. The respondent was ordered to bear the costs of transfer and all things necessary thereto. The applicant’s claim in reconvention was dismissed with costs.
- [2] This application is opposed on the contention that the applicant made a conscious decision not to participate in the trial proceedings and that he had no valid claim against the respondent.

Brief

background

- [3] During 2019, the parties were in a romantic relationship. They acquired joint ownership of the property, which later became the subject of their dispute. Their ownership was subject to an agreement in terms of which the respondent paid an amount of R4.2 million, being the purchase price and the transfer costs, on condition that the applicant would refund her an amount of R2.1 million, being an equal share in the funding of the purchase price. The applicant would also refund the respondent R500 000 00, being an equal dividend of tax liability incurred in the process of acquiring the property. In the event that their property was sold before the applicant performed in terms of the agreement, the amount owing to the respondent would be deducted from and set off against the applicant’s share of the proceeds of the sale. The respondent duly performed according to their agreement and they became the residents at the property.
- [4] In September 2020 the parties’ partnership was terminated. The applicant had not paid the amount that was due in terms of their agreement. The applicant would not terminate the joint ownership of the property. On 30 June 2021, the respondent instituted a claim in demand of the payment of R2. 600 000.00, with interest and the termination of their joint ownership.

- [5] The applicant defended the claim and filed a plea and a claim in reconvention. Both parties were legally represented during the litigation process, and as the exchange of pleadings and the related processes unfolded. A

pretrial conference was held on 22 April 2022 and the minute of such proceedings was signed by both legal representatives.[1] This was followed by another process of discoveries, which preceded a pre-trial conference that was held on 31 October 2022. The matter was declared trial ready on 05 December 2022. The notice of set down for the trial hearing on 5 March 2024, dated 19 January 2023 was issued and it was served on the legal representatives of the applicant.

- [6] The legal representatives of the applicant withdrew from record in terms of the notice dated 20 February 2024. On 5 March 2024, the trial proceedings served before this Court. The applicant was absent during the proceedings, he was not legally represented, either. On 7 March 2024, judgment was granted in favour of the respondent. The applicant's claim in reconvention was dismissed with costs.

- [7] On 18 April 2024, and during an attempt to give effect to the Court order, the applicant became aware that there was a judgment that was issued in his absence. He refused to sign the transfer documents that were presented for his signature. On 3 June 2024, he was served with the notice of taxation, as the cost order was in favour of the respondent. On 27 June 2024, the share of the applicant to the property was transferred in terms of the judgment of 7 March

2024. The respondent became the sole registered owner of the property.

- [8] In August 2024, the applicant secured legal representation by another firm of attorneys and on 2 October 2024, an application for the rescission of the 7 March 2024 judgment was issued. His legal representatives filed a notice of withdrawal on 28 May 2025. He was appearing in person when his application was argued. With the leave of the court the applicant also handed in his heads of arguments.

Issue

- [9] There are two main questions to be answered from the factual matrix above, namely:
- (a) whether there was an undue delay in the late filing of the rescission application; and
 - (b) whether the applicant was in wilful default on 5 March 2024 and if he has established factors to suggest that he has a defence to the claim.

Submissions

- [10] The applicant averred that on 20 February 2024, he became aware that his legal representatives no longer wished to represent him. Subsequent thereto, on 28 February 2024, the supplementary discovery affidavit of the respondent was served on him, on his email. He did not understand or appreciate the significance of that service. He was not aware that the trial was set down for hearing on 5 March 2024. Notwithstanding that the

legal representatives of the respondent had his contact details, they also did not inform him of the date. According to him, his erstwhile attorneys had not informed him of the trial date.

[11] The applicant contended that if he had been notified, he would have attended or caused someone to represent him during the proceedings. He became aware on 18 April 2024 and on 3 June 2024 when the conveyancing attorneys sought to give effect to the judgment of 7 March 2024. When the transfer documents were presented to him, he refused to sign and he did not cooperate. This is all he could do. He also denied that he had accepted the judgment issued on 7 March 2024. He submitted that he had no business to delay the progress of the respondent or frustrate her claim.

[12] From 4 June to August 2024, he sought legal representation. Various law firms that he approached were not able to accept his instruction. On 26 August 2024, he managed to instruct a law firm. These practitioners were in continuous

communication with the legal representatives of the respondent. They sought the papers that related to the trial proceedings and the judgment that was issued on 7 March 2024. They were able to secure the relevant documents on 9 September 2024. On 2 October 2024 he issued the rescission application. The applicant further contended that his counterclaim against that of the respondent ought to have been successful. He emphasised that he should be afforded the opportunity to pursue his claim in reconvention and he denied that he was in wilful default during the trial.

[13] The respondent rejected the plaintiff's assertion that he was not aware that the trial was set down for hearing on 5 March 2024. According to the respondent during March until June 2023 there were discussions between their respective legal representatives to have the matter settled, initiated by the legal representatives of the applicant. In preparation for the trial, on 4 March 2024, the bundle of documents that were set to be utilised during trial were sent to the applicant via email. This was the same email address that was utilised during the exchange and service of papers since the legal representatives of the applicant withdrew from the matter. For these reasons, the applicant was aware of the trial date and had made a conscious selection not to attend the proceedings. Mr Sievers SC, submitted that although it could not be said with certainty that the applicant was aware of the 5 March 2024 as the trial date, it should be inferred that he was aware. He based this on his knowledge of the applicant's previous attorneys, whom he described as experienced and of impeccable character.

[14] The respondents also emphasised that in all likelihood the applicant made a calculated choice not to attend court on 5 March 2025. Pointed out that the conduct of the applicant during the litigation developed an obstructive pattern which frustrated the progress in the respondent's claim. These included that the applicant failed to discover, even after he was compelled to do so. He also made the point that the withdrawal of his legal representatives on 20 February 2024, shortly before the trial and on 28 May 2025, shortly before this application were also suspicious.

[15] The respondent denied categorically that the applicant was owed any money, either from their business operations,

or from the costs of renovations, maintenance and running costs of their household.

Furthermore, the respondent contended that due to the time lapse since the applicant became aware of the judgment there was undue delay. The respondent had spent substantial amount of money in the transfer and registration of the property, in line with the judgment of 7 March 2024. According to Mr Sievers SC, for the respondent, the efforts of the applicant were an abuse of process. He also argued that due to the unreasonable delay to issue this application, he should be regarded as having accepted the judgment and it should not be permissible for him to reopen the litigation.

The applicable legal principles

[16] The discussion above calls for the application of various legal principles, namely;

Rule 42 (1) (a) of the Uniform Rules, upon which this application is founded provides that:

“(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary: (a) any order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.”

[17] In relation to absence of the applicant during trial, in *Mutebwa v Mutebwa* 2001 (2) SA 193 (Tkh) para [17], it was held that;

“Although the language used in Rule 42(1) indicates that the Court has a discretion to grant relief, such discretion is narrowly circumscribed. The use of the word ‘may’ in the opening of the paragraph of the Rule turns to indicate circumstances under which the Court will consider a rescission or variation of the judgment, namely that it may act mero muto or upon application by an affected party. It seems to me that the Rulemaker (sic) could not have intended to confer upon the Court a power to refuse rescission in spite of being clearly established that the judgment was erroneously granted. The rule should, therefore, be construed to mean that once it is established that the judgment was erroneously granted in the absence of a party affected thereby, a rescission of the judgment should be granted.”

[18] The guiding principle on considering whether good cause has been shown was set out in *National Union of Mineworkers v Council for Mineral Technology*[2] “The approach 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 thereof, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all facts. A slight delay and good explanation may help to compensate for the prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be

refused.”

Evaluation

Absence

- [19] At this point it is imperative to restate that, “The words “granted in the absence of any party affected thereby”, as they exist in Rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent.”[3]
- [20] In relation to the applicant’s situation, it is common cause that the notice of set down for the trial on 5 March 2024 had been properly served on his erstwhile attorneys. Consideration of whether the applicant was notified of the trial date must be in the context that; “it has long been established in our law that service in strict compliance with rules of service is not the test for effective service. That approach is formulaic and mechanical and has been rejected by our courts. The test is rather, despite non-compliance with the rules of service, whether the other party received notice. This gives effect to the purpose of the rules of service which is
- that a person who is being sued must receive notice. Provided that this purpose is achieved, there will be proper service, even though not in strict compliance with the rules.”[4] The applicant insisted that he was not notified of the trial date even before his legal representative withdrew their services. There has been no evidence to gainsay this statement or any factors to suggest the untruthfulness thereof.
- [21] Inasmuch as logic would dictate that he may have been told, Mr Sievers SC also conceded that it can only be inferred, by virtue of his knowledge of the character of the erstwhile attorneys that they notified the applicant. In the absence of any tangible factual basis, it would be a dangerous approach to infer that he was aware of the trial date, when one is faced with unchallenged evidence of the applicant that he was unaware, hence his absence from the trial. Particularly if such inference was based on the character of the legal representatives as described by Mr Sievers SC, who appeared to have personal knowledge of one of them.
- [22] In the absence of reliable information or detail of how the applicant would have received the notice of the trial date, it would be at odds with the objectives of Rule 42(1)(a) to conclude that his absence from court was deliberate. It remains trite that a judgment has been erroneously given within the meaning of Rule 42(1)(a) of the Uniform Rules where it was found that the reason why the applicant had not been represented at the application hearing was that they had

been unaware that the matter had been set down. The withdrawal from the record by legal representatives and the timing of their withdrawals in relation to the Court dates turned on nothing. Any suspicion about their motivation would be speculative and unwarranted in the absence of any evidence that they had any connection to the progress or lack thereof in the claims of both parties and whether they had appraised the applicant about the date of the trial.

[23] Furthermore, the applicant persisted to pursue his case or defence and refused to cooperate with the process of the transfer of ownership, when he became aware of the judgment on 18 April 2024. The applicant also insisted that he had a valid claim against the respondent, he sought legal representation and produced some documents (albeit with no compliance to the rules) in support of his claim. In my view his conduct and efforts to have the application issued were not consistent with the conduct of someone who took a considered view to be absent or not to participate in the trial.[5] In my view, the applicant has provided a satisfactory explanation for his default on 5 March 2024 has been within the scope of Rule 42(1)(a) and therefore, satisfactory.

The delay

[24] Coming to the timing of the application and the time lapse from 18 April 2024 when he became aware of the

judgment

until 2 October 2024 when he issued this application. These factors are relevant in the determination of the degree of lateness and the explanation given by the applicant for the delay. As the applicant put it, he was still expecting to be notified of the trial date and his refusal to sign the papers was his expression of protest to the transfer of his share of the ownership of the property. It is common cause that the applicant became aware of the judgment when the papers for the transfer of ownership of the property were presented to him for his signature.

[25] After he refused to cooperate, there was no activity on his part until 03 June 2024, when he was served with the notice of taxation. He then began to seek legal representation on 4 June 2024. The applicant's explanation of the efforts he made to secure legal representation and the processes followed in preparation for the institution of this application are undeniable evidence that there was no undue delay, bearing in mind that most of it was solely not in his control of the processes that had to unfold from the time he had to find legal representative, retrieve the record of the trial proceedings, taking of instructions

and ultimate issuing of the application. In opposition, it was argued on behalf of the respondent that she eventually had the property

registered in her name in line with the judgment of 7 March 2024, and without the cooperation of the applicant. This complaint has to be evaluated with due regard to the objective conspectus of all the facts.[6] It will be punitive to impute fault on the applicant on the basis that the respondent disbursed her own resources for this process, which is not justified in the circumstances.

[26] The enquiry goes further into whether the applicant has any prospects as such may tend to compensate for a long delay. There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.’[7] In my view, the period of six months from the time he became aware of the judgment and the institution of the application was indeed a delay, however, the facts must still be considered in order to reach a conclusion whether the said delay was to be undue or unreasonable.

This brings one to the applicant’s claim in reconvention after he had delivered his plea to the respondent’s claim. The applicant set out his claim into ‘claim A’, which was the outline of their Universal partnership in relation to the purchase of their home and claim B, which he set out his claim of ownership of some movable property that he alleged were in the possession of the respondent.

[27] It remained common cause that when the initial litigation for the respondent’s claim, the parties had been in an intimate relationship and that they had been living together, until there was a breakdown in their relationship. On behalf of the respondent it was argued that the claims in reconvention lacked substance and stood no chance even if the applicant had participated in the trial. It was submitted that the applicant failed to demonstrate that he had positive prospects in his claim in convention.

[28] Without getting into the merits and demerits of the substance of the claims of the applicant, I hold a prima facie view that, the consideration of prospects of success also informs whether the delay was unreasonable. If the applicant demonstrated that he had a strong case, which in turn such would compensate for a long delay. Needless to say that the counterclaim and factors that are common cause between the parties provide a fair view to assert that the applicant has strong prospects of success, if the rescission application was granted.[8] In the case of the applicant, the delay of six months has been sufficiently explained and also found not to be unreasonable.

[29] Therefore on an objective conspectus of all facts, the applicant demonstrated that his absence was not intentional or deliberate, he has shown that on a balance of probabilities he was not notified of the trial date. He proffered a satisfactory

explanation for the delay and accordingly satisfied the Rule 42(1)(a) requirements. The applicant is entitled to the order rescinding the judgment of this Court, handed down on 7 March 2024.

Costs

[30] Mr Sievers SC, for the respondent, argued for punitive costs on the basis that the conduct of the applicant had been to drag the matter and make life difficult for the respondent. The applicant appeared in person, he submitted that he was genuine in his pursuit and he believed that he had a valid claim. In the exercise of the discretion at this stage, one appreciates that the delays and the untimely withdrawal of legal representatives of the applicant could have been a source of frustration for the respondent. However, I am not persuaded that the conduct of the applicant warranted punitive

costs. I am also of the respectful view that the applicant should bear the costs of this application.

Order

[31] Consequently, the following order is made:

1. The Judgment of this Court dated 7 March 2024 is hereby rescinded;
2. The applicant is to pay the costs of this application, including the costs of counsel where one was so employed.

Acting Judge of the High Court

Appearances

Counsel for the applicant: The applicant appeared in person.

Counsel for the respondent: Adv Sievers SC

Adv Guan Potgieter

Instructed by:

STBB Attorneys

Date of Hearing:

12 June 2025

Date of Judgment:

20 June 2025

This judgment was handed down electronically by circulation to the parties' representatives by email.

[1] Application for rescission of judgment bundle, page 23

[2] National Union of Mineworkers v Council for Mineral Technology 1998 ZALAC 22, paragraph 10

[3] Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector

including Organs of State and Others [2021] ZACC 28; 2021 (11) BCLR 1263; 2021 JDR 2069 CC paragraph 56

- [4] Obiang v Janse van Rensburg & Others (714/2023) [2025] ZASCA 30 (31 March 2025) , paragraph 28
- [5] Freedom stationery Pty LTD and Others v Hassam and Others (921/2017) 2018 ZASCA 170; 2019 (4) SA 459 SCA (30 November 2018)
- [6] National Union of Mineworkers v Council for Mineral Technology 1998 ZALAC 22, paragraph 10
- [7] National Union of Mineworkers v Council for Mineral Technology 1998 ZALAC 22, paragraph 10
- [8] National Union of Mineworkers v Council for Mineral Technology 1998 ZALAC 22, paragraph 10

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