REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

15/6/2017 .....
DATE SIGNATURE

CASE NO: 36490/2010

In the matter between:

NORTHERN WHOLESALE TILES CC	Respondent/Plaintiff
and	
K WARMBACK t/a BUILDING MANAGEMENT & SERVICES	Applicant/Defendant

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J U D G M E N T

FISHER J:

[1] This is an application for rescission of a judgment taken by default by the plaintiff against the defendant on 18 March 2014. The defendant brings the application on two bases:

[1.1] In terms of rule 42(1)(a);

[1.2] In terms of the common law.

[2] The application is brought a year after the defendant acquired knowledge of the judgment. He thus seeks condonation for the late bringing of the application.

[3] In relation to the application under rule 42, it is common cause that the plaintiff instituted a previous action in respect of the same cause of action against the defendant. This action has not been withdrawn. The existence of this *lis pendens* was not brought to the attention of the Court when it granted the judgment in issue. The defendant contends that had it known of the existence of the other action, the Court would not have granted the judgment.

[4] In relation to the common law basis, the defendant raises two defences (in addition to that of *lis pendens)* being:

[4.1] that he concluded the contract on which the claim is based as an employee of the firm, Building Management & Services (BMS) which is actually his wife Glenda Warmback's business;

[4.2] that his wife, Glenda trading as BMS had paid the amount claimed.

[5] it must be said in relation to the defences raised, that it appears that they have little prospect of success should they come to trial. The *lis pendens* defence is only dilatory. In relation to the defence that the business is not his but his wife's, this aspect was not raised in his plea filed in the matter. Nothwithstanding that this plea was drawn by him personally; it appears improbable that such an obvious defence would not specifically have been raised if it had any veracity. It is also of concern that, in the previous action on the same cause, a contradictory version in relation to who carried on the business is given under oath by the defendant in the affidabit filed in opposition to an application for summary judgment in that matter. The explanation given as to the reason for this conflicting version is as follows:

> " *At this juncture, I must explain to this Honourable Court that Glenda had been trading as ...BMS. Around the same time as the signing of the aforementioned affidavit [* a reference to the affididavit filed in opposition to the summary judgment*], Glenda had mentioned a desire to incorportate the business of BMS under the banner of Kew Condstruction (Pty) Ltd, a company of which she was a director. I was under the mistaken impression that such incorportaion had taken place and it was in accordance with this mistaken belief that I instructed SNI* [the defendant's then attorneys*] to make such allegation in the said affidavit. Glenda has correctly pointed out that such incorportation never actually took place and that she continued to personally trade as BMS and remained the sole proprietor thereof until it ceased trading in 2012."*

[6] This explanation is difficult to understand on the face of it. The reference to an "*incorporation*" of an existing business under the "*banner*" of an existing company is anomalous.This is particularly so given the close association of the defendant with the conduct of the business. In all the circumstances, this problematic explanation under oath of a conflicting version

on the same facts cannot but have a negative impact on the prospects of the defendant succeding in this defence.

[7] The second defence of payment is equally fraught with difficulties for the defendant. Again this defence was not raised in defence of the first action. Futhermore it was not pleaded in this action. In fact, this defence is raised for the first time in this rescission application. Given that the defence is of a nature which one would think would naturally occur to the defendant, it is somewhat inexplicable that it was not raised earlier. Again this affects the prospects of success of this defence.

[8] The defendant only brought this application for rescission a year after the judgment coming to his attention. The defendant explains this substantial delay on the basis that he did not have the financial means to bring the application. The assertions made in this regard are vague and uncompelling. He seeks to suggest also that there were delays in his current attorney locating the court file in the first action. Again the reasons for these delays are not set out in any detail. Furthermore it appears clear that it was not strictly necessary for this file to be obtained in order to launch the appication.

[9] The need to proceed rapidly to correct an order mistakenly granted was referred to by Trollip JA in *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306H:

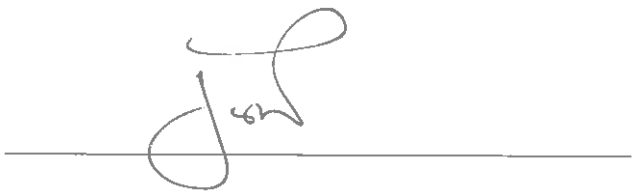
'Thus, provided the Court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases . . .'

[10] The standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised and the prospects of success. (See *S v Mercer* **[2003] ZACC 22**; **2004 (2) SA 598** (CC); **2004 (2) BCLR 109** (CC) at para 4; *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and Others* **[2003] ZACC 15**; **2003 (11) BCLR 1212** (CC) at para 11 and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* **[2000] ZACC 3**; **2000 (2) SA 837** (CC); **2000 (5) BCLR 465** (CC) at para 3.)

[11] The consideration of these aspects, especially the length of time, the poor explanation for the delay, and the fact that there are limited prospects of success, leads me to the view that this is a proper matter where condonation should be refused in the interests of justice.

In the circumstances I make the following order:

1. The application for condonation is refused;
2. The applicant/defendant is to pay the costs of this application.



D FISHER

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 31 May 2017

Judgment Delivered: 15 June 2017

APPEARANCES:

For the Applicant: Adv M Maschwitz instructed by J Tarica Attorneys.

For the Respondent: Adv A McKenzie instructed by Natalie Lubbe & Associates