REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 22233/22

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

30/8/2024 [redacted]
DATE SIGNATURE

In the matter between:

MAHLUBANDILE MADIKIZA APPLICANT

and

JUGWANTH ATTORNEYS INC RESPONDENT

JUDGMENT

NEMUTANDANI AJ

INTRODUCTION

[1] This is an application for rescission of default judgment which was granted on 10 November 2022. The said judgment was against the applicant in favour of the respondent herein. The genesis of the default judgment was consequent to legal fees owed flowing from professional legal services rendered to the

applicant by the respondent.

BACKGROUND

[2] The applicant contends that on 25 August 2020 he approached the respondent for legal assistance. The applicant's mandate was in relation to legal advice on various employment issues. The issues were including but not limited to referral of a constructive dismissal claim against Mobile Telecommunications Network "MTN", his employer at the time. Advise on the consequences of the restraint of trade clause in his contract of employment with MTN, outstanding partial remuneration, outstanding commission payments, share options and possible forfeiture of other benefits in the event of the intended resignation.

[3] A Client Mandate Fee Agreement "mandate agreement" was concluded between the parties. The applicant was furnished with projected costs for the referral of a constructive dismissal at 30 hours at a rate of R 2 200.00 per hour excluding disbursements. Applicant was also informed to factor in a further 10 hours plus refresher fee of about R 5 000.00. Consequent to the mandate agreement, consultations were held between the applicant and Mr Jugwanth, a director of the respondent. Invoices were sent to the applicant and some payments were effected to the respondent. Particularities of the said payments are irrelevant for the purposes of this application.

[4] The applicant contends that on the advice of the respondent, at the end of September 2020 he tendered his resignation with MTN. On 5 October 2020 the applicant commenced employment at Dimension Data as a Sales Manager.

[5] On 30 October 2020, MTN brought an urgent application for the enforcement of a restraint of trade clause in his contract of employment. The application for restraint of trade was upheld with costs of two Counsel.

[6] MTN's costs after taxation were in the region of R 250 000.00. The respondent had also roped in three Counsel and the applicant was requested to entrust the respondent with R 250 000.00 for Counsel Fees. An additional

request for an amount of R 300 000.00 was made to the applicant for legal costs.

[7] A demand was then made to the applicant for payment of legal costs emanating from consultations and opposing the restraint of trade application. The respondent issued summons against the applicant for payment of amounts owed for the said legal services.

[8] The summons were served on the applicant on 5 July 2022. On 10 November 2022, the respondent obtained default judgment against the applicant in the amount of R 1 540 249.85

[9] Dissatisfied with the judgment by default, the applicant filed an application for rescission of the default judgment on 12 June 2023.

APPLICATION FOR A POSTPONEMENT

[10] On the morning of the hearing, the 27 May 2024, the applicant filed an application for a postponement[1] of the rescission application hearing. The application was for a postponement to a date to be determined by the court alternatively sine die with the applicant tendering the wasted costs occasioned by the postponement.

[11] The said application for a postponement also contained a prayer to the effect that the respondent should be ordered to deliver the bill of costs used in support of their application for default judgment.

[12] The application for a postponement was opposed by the respondent. Having read the papers filed on record and having heard the parties' submissions on the postponement application, I made an order refusing the postponement with costs to be costs in the rescission application. I further informed the parties that reasons will be provided with judgment on the rescission application.

[13] Before setting out the reasons for the refusal of the postponement, I refer to the well-established principles applicable to a request for a postponement.

[1] Caselines 19-1

[14] In National Police Service Union and Others[2] the court held that:

> *"…the question is whether it is in the interests of justice for a postponement to be granted by court. A postponement cannot be claimed as of right. The party applying for postponement must therefore show good cause that one should be granted."*

[15] The matter of Lekolwane[3] is authoritative and I consider it binding on this court. In that matter, the constitutional court held as follows:

> *"An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes into account a number of factors…"*

[16] The applicant's reasons for the request for a postponement are to supplement the rescission application in two respects. Firstly, the intended supplementation is in relation to the effect that default judgment was erroneously granted owing to the fact that the respondent's bill of costs was not taxed when default judgment was obtained.

[17] It was further submitted that the second reason is to enable the applicant to file an expert report in relation to his state of mind at the time the summons were served on him.

[18] This case is centred on legal costs. In refusing the postponement, I was mindful of the costs implications involved in the postponement. I also considered potential prejudice to the respondent and I concluded that it will also not be in the interest of justice to grant the postponement. For these reasons, I refused the application for a postponement.

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[2] 2000 (4) SA 1110 (CC); Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (NM)
[3] 2007 (3) BCLR 280 (CC) AT PARA [17]

APPLICANT'S CASE

[19] The applicant contends that he has an acceptable explanation on why he failed to oppose or defend the action proceedings. It was submitted that he has various *bona fide* defences to the action. Firstly, he contends that the summons served on him where defective and in contravention of Rule (3) c) of the Supreme Court Act 59 of 1959. Secondly, he alleges that when the summons where served on him, he was not in a good mental state of mind. At the time of service he lacked the necessary mental capacity to litigate or stand trial. Thirdly, He denies that the legal costs due to the respondent amounts to R 1 540 249.00 as alleged.

[20] The applicant contends that following his resignation at MTN on the advice of the respondent, he lost share option in excess of R 1 800 000.00. Consequent to the restraint order, he was off work for 11 months. He contends that he was held liable for MTN's costs in excess of R 250 000.00.

WILFUL DEFAULT

[21] The applicant contends further that as a result of paying MTN's legal costs, his loss of share option and being unemployed, drowning in debts coupled with cancellation of medical aid and life policies, he fell into depression in February 2022. He contends that he was not in a mental position to seek professional legal help. The depression became severe in August 2022 and he was eventually hospitalised and underwent psychiatric evaluation for two weeks. He contends further that at the time of service of the summons, he was not himself and did not possess the mental requisite to litigate in court. He was suffering from depression, his world was crushing on him and he was suicidal. For the above reasons, it was submitted that he was not in wilful default.

BONA FIDE DEFENCE

[23] The applicant contends that the legal fees for consultations and appearance for opposition of a restraint of trade application in the amount of R

1 693 696.85 are grossly excessive and irregular. He contends that it would have been illogical for him to agree to paying such fees when the effect of him restraining for six month would have only costed him R 420 000.00 for loss of earnings.

[23] To his knowledge, the estimated costs were about R 300 00.00 and the final invoice is an amount in excess of R 1 300 000.00. The applicant seeks to challenge the authenticity of the invoice on items, hourly rate tariffs, disbursements and a number of other reasons including duplications.

[24] He contends that the invoice had not been taxed and/or verified following contestation. The applicant's view is that the amounts charged should also be ventilated and reviewed by the Legal Practice Council.

RESPONDENT'S CASE

[25] The respondent contends that Mr Jugwanth diligently advised the applicant and conducted extensive research on the Restraint of Trade application and put together a substantive argument with reference to case law.

[26] In the respondent's view, the applicant was fully aware of Counsel who were to be roped in for the restraint of trade opposition. Following the restraint order, Counsel requested payments from the respondent. After being reported to the Bar Counsel in March 2021 for non-payment, the respondent contends that it had to pay and in fact paid Counsel's fees as agreed partly from the R 100 000.00 which was held in trust for the applicant and the balance from the respondent's own funds.

[27] Between August 2021 and February 2022 engagements and demands were made to the applicant for payment and/or settlement of the invoice. The respondent contends that the applicant categorically refused to pay the invoices citing exorbitance and suggested that he wanted to consult regarding its acceptability and reasonableness.

[28] When no response was forthcoming, on 5 July 2022 Summons were served on the applicant. Consequent to the default judgment order and a *nulla bona* return, Section 65 Enquiry proceedings ensued on 16 May 2023. On 12 June

2023 the Rescission application was filed and on 13 June 2023 applicant filed a complaint with the Legal Practice Council.

[29] The respondent contends that the applicant was aware of the summons as far back as July 2022 and elected to do anything until he was forced to attend Section 65 Inquiry.

[30] The respondent contends that in terms of the Client Mandate and Fee Agreement signed by the parties, clause 2.10 thereof provides that if the applicant did not object in writing to an account rendered to him within 48 hours of receipt of the account from the attorney, he will be deemed to have accepted the attorneys account as fair and reasonable. It was submitted that the applicant did not object to the invoices rendered and that made the invoice liquidated.

[31] The respondent submitted that having regard to the applicant's medical certificate completed by Dr Mogotlane, a Psychiatrist, the applicant should have been fit on or about the 3 September 2022. It was further submitted that there is no explanation on why he did not defend the matter as soon as he was fit.

ISSUES FOR DETERMINATION

[32] The issue for determination is whether or not the applicant has met the jurisdictional requirements applicable to rescission of judgments under the common law.

LAW

Legal Framework

[33] As indicated earlier, the applicant contends that he is entitled to rescission of the order in terms of the Common law. The test for a rescission under Common law is trite, namely that good cause must be shown.

[34] In order to establish good cause, an applicant must set forth a reasonable explanation for the default and a *bona fide* defence/s. Regarding the issue of 'good cause shown' in an application for rescission, the following dictum in the matter of *Chetty v Law Society, Transvaal*[4], is apposite:

> "The Appellant's claim for rescission of judgment confirming the *rule nisi* cannot be brought under Rule 31 (2) or Rule 42 (1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefore has been shown. (See *De Wet and Others v Western Bank* 1979 (2) SA 1031 (A) at 1042 and *Childerly Estate Stores v Standard Bank SA Ltd* 1924 OPD 163.)
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> The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors are required to be considered (See *Cairn's Executors v Gaarn* 1912 AD 181 at 186 per Innes JA), but it is clear that in principle and in the long-standing practice of our courts two essential elements "sufficient cause" "for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success (*De Wet's* case supra at 1042; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 799 (A); *Smith N O v Brummer N O and Another; Smith N O v Brummer* 1954 (3) SA 352 (O) at 357-8)."

[35] In 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*[5], the Constitutional Court restated the two requirements for the granting of an application for rescission that need to be satisfied under the common law as being the following:

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[4] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) 1985 (2) SA 746J to 765 C;
[5] [2021] ZACC 28;

"First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that it has a bona fide defence which prima facie carries some prospect of success on the merits. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.'

[36] *Silber v Ozen Wholesalers*[6] remains authority for the proposition that an applicant's explanation must be sufficiently full to enable the court to understand how the default came about and assess the applicant's conduct.

[37] An element of the explanation for the default is that the applicant must show that he was not in wilful default. If the case the applicant makes out on wilful default is not persuasive, that is not the end of the enquiry – the applicant's case may be rescued if a *bona fide* defence is demonstrated.[7]

[38] The defences raised must not only be decided against the backdrop of the full context of the case but must also be *bona fide* and the nature of the grounds of the defence and the material facts relied upon must be fully disclosed.[8]

ANALYSIS

[39] In De Wet v Western Bank Limited[9] , the court held that the onus rests upon the applicant to show good cause or sufficient cause. The onus is in respect of presenting a reasonable explanation for default and demonstration of a bona fide defence which, prima facie, carries some prospects of success.

[40] The applicant's contention and ground that the served Summons were defective need not detain this court. The said argument lacks merit and is rejected by this court.

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[6] *Silber v Ozen Wholesalers* 1954 (2) SA 345 (A) at 353;
[7] *Harris v ABSA Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at [8] – [10], *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F;
[8] *Standard Bank of SA Ltd v EI-Naddaf* 1999 (4) SA 779 (W) at 784 D-F;
[9] 1979 (2) SA 1031 (A) at 1042 H

[41] The applicant contends that he was not in willful default because he was suffering from depression owing to a number of reasons including being unemployed, losing out on share options, losing the restraint of trade opposition, costs implications of his own attorney coupled with costs orders in respect of MTN. He contends that from February 2022 to August 2022 he was suffering from depression until he was admitted in hospital in August 2022 for mental evaluation. In proving hospitalization, the applicant has attached a medical certificate confirming that he was indeed hospitalized on 22 August to 2 September 2022[10].

[42] It is evident from the documents filed on record that Summons was served on the 5 July 2022**.** A month later, the applicant was admitted into a facility for psychiatric evaluation. The period of the service of the summons falls within the period of February and August 2022 when he was undergoing depression.

[43] What immediately becomes apposite is whether or not it is probable that an applicant who was faced with the challenges as those that the applicant was facing was in a mental state to defend the matter and whether he was indeed suffering from depression. To this end, I am persuaded that at the time of service of Summons, the applicant could not have been in a state to deal with his defence.

[44] It was correctly submitted that the applicant was not in a state to defend the matter having lost employment and having been faced with a legal bill of R 1 800 000.00 flowing from consultations and opposing the restraint of trade application. Can it also be said that the plaintiff who was battling depression consequent to legal fees dispute was in a position to secure legal representation in opposition of action proceedings in the circumstances of this matter? I do not think so.

[45] In considering whether the applicant was in wilful default I bear in mind what was said in *Harris v ABSA Bank Ltd Volkskas*[11] that:

[10] Caselines 03-80

[11] *Harris v ABSA Bank Ltd Volkskas* 2006 (4) SA 527 (T);

> '[8] Before an applicant in a rescission of judgment application can be said to be in "wilful default'' he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions. A decision freely taken to reform from filing a notice to defend or a plea or from appearing would ordinarily weigh heavily against an Applicant required to establish sufficient cause.'

[46] To this end, I am persuaded that the applicant was not in willful default in the circumstances of this case. I find that the applicant's explanation for default is both acceptable and reasonable.

BONA FIDE DEFENCE

[47] The second stage of the inquiry is whether the applicant have raised a *bona fide* defence to the respondent's claim against him. In the *Harris* decision supra, Moseneke J stated thus:

> '[10] A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation.
> "Instead, the explanation, be it good, bad or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole".'

[48] The applicant submitted that he has a good and *bona fide* defence which carries with it prospects of success and that he is entitled to a rescission of the judgment in terms of the Common law. The applicant learned on the morning of trial that the bill of costs or invoice relied upon by the respondent has not been taxed. The import of same is that the reasonableness or otherwise of the invoice has not been ventilated or determined by anyone.

[49] This ventilation is rather necessary having regard to the applicant's contestation of reasonableness and exorbitance of the amounts allegedly owed. It cannot be correct that contestation of fees is only subject to clause 2.10 of the Client Fee Mandate Agreement.

[50] Another consideration which needs proper ventilation is whether or not the applicant was furnished with costs estimate in respect of the restraint of trade opposition. The only *fora* where same can be properly ventilated are at the trial.

[51] I am satisfied that the applicant has demonstrated an existence of a substantial defence and not necessarily a probability of success. The applicant has shown a *prima facie* case which raises triable issues. The applicant in this matter has fully and sufficiently explained his defence.

[52] I accordingly find that the applicant herein has a reasonable explanation for default. I further find that the application for rescission of judgment was brought within a reasonable time. The applicant does not appear to be grossly negligent and it will not be in the interest of justice that he should not be assisted. In this instance, I am bound to assist the applicant and not lock his doors for his day in court and have the dispute between the parties properly ventilated.

COSTS

[53] The purpose of an award of costs to a successful litigant is to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate, defend or oppose litigation.

[54] The general rule is that costs follow the outcome. However, the court hearing a matter has discretion to determine which party is to be awarded them. The said discretion must be exercised judicially.

[55] In this case, I see no reason why costs of the rescission should not be costs in the main application.

CONCLUSION

[56] In the circumstances, I find the existence of both the absence of wilful default in defending the matter and the presence of *bona fide* defence which has prospects of success.

ORDER

[57] In the result, the following order is made: -

1. The default judgment granted against the defendant in favour of the plaintiff on **10 November 2022** be and is hereby rescinded;
2. The defendant shall deliver his plea within twenty days from date of the granting of this order, being **30 August 2024.**
3. The costs of the defendant's application for rescission of judgment shall be in the course of the main action.

F.S NEMUTANDANI
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: *This judgment was handed down electronically by circulation to the parties' and/or parties' legal representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 14:00 on 30 August 2024*

APPEARANCES:

For the APPLICANT	:	ADV F KUZWAYO
Instructed by	:	WMN ATTORNEYS

		BRYSTON REF: M Dlamini/001/2023 TEL: 010 300 0928 EMAIL: Sthembile@wmnattorneys.com
For the DEFENDANT	:	MR JUGWANTH
Instructed by	:	SCHEFFLER ATTORNEYS OAKDENE REF: JUG/003/E SCHEFFLER TEL: 011 867 0884 E-MAIL: estell@scheffler-attorneys.co.za
Matter heard on	:	27 MAY 2024
Judgment Delivered on	:	30 AUGUST 2024