Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: M 503/2017

In the matter between:

ENGEN PETROLEUM LTD		Applicant
and		
PAARGEN ERF 116 (PTY) LTD t/a IMPALA MOTORS		1st Respondent
MBT PETROLEUM (PTY) LTD		2nd Respondent
DATE OF HEARING	:	31 MAY 2018
DATE OF JUDGMENT	:	07 JUNE 2018
FOR THE APPLICANT	:	ADV. DE VILLIERS
FOR THE 1ST RESPONDENT	:	ADV. VAN DER SPUY
FOR THE 2ND RESPONDENT	:	MR. ZIETSMAN

JUDGMENT

HENDRICKS J

Introduction

[1] Engen Petroleum Limited (first respondent) applied for an interdict against Paargen Erf (Pty) Ltd 116 t/a Impala Motors (applicant) and MBT Petroleum (Pty) Ltd (second respondent). On 14th December 2017 the Court *per* Djaje J granted default judgment in favour of the first respondent. The order came to the attention of the applicant. There was an exchange of correspondence between the applicant and the first respondent. The first respondent refused to concede to an abandonment of the order/judgment granted by default on 14th December 2017. This prompted the launch of this rescission application.

[2] The rescission application was issued and served on 17th January 2018 and set down on the unopposed motion court roll of 08th February 2018. The first respondent filed and served a notice of intention to opposed on 25th February 2018 whilst the second respondent filed and served its notice of intention to opposed on 07th February 2018. Because the matter became opposed, it needed to be postponed to the opposed roll. The matter was therefore postponed until the 31st May 2018 for hearing on the opposed motion court roll.

[3] On 19th March 2018 the second respondent filed and served a notice to abide accompanied by a supporting affidavit. The first respondent

filed and served an answering affidavit on the 24th April 2018. This affidavit should have been filed on or before 28th February 2018. No application for condonation was made. The applicant raised *in limine* the fact that the answering affidavit of the first respondent is not properly before this Court because of the lack of an application for condonation. The legal advisor in the employ of the first respondent deposed to the answering affidavit and did not set out the cause for the delay in serving and filing the answering affidavit.

[4] It is incumbent upon the party to explain the cause of the delay in great detail in an application for condonation for the non-observing of the Rules of Court. Failure to do so may result in the affidavit not been accepted by the court. Condonation is not for the mere asking. A substantive application must be made for condonation for non-compliance with the Rules of Court. It is contended in the heads of argument filed on behalf of the first respondent that there is in any event no prejudice suffered by the applicant as a result of the late filing and service of the answering affidavit. I do not agree. This casual approach to the issue of condonation is indeed prejudicial to the applicant and display a don't care attitude at which this Court should frown at. The Rules of Court should not be disregarded at whim.

[5] The legal adviser of the first respondent is not a layman. He should have known better or should have been better advised by the first

respondent's legal team (attorney and advocate). There is a point beyond, which a litigant cannot escape liability for inactions and blame his attorney. In this instance the litigant (first respondent) not only has an in-house legal advisor but also a legal team consisting of an attorney and an advocate.

In **Saloojee & Another NNO v Minister of Community Development** 1965 (2) SA 135 (A) the following is stated:

> *"I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. 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 this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."*

In **Van Wyk v Unitas Hospital & Another** 2008 (2) SA 472 (cc) the following appears:

"[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing. It amounts to this. During the entire period of approximately eleven months she was considering whether or not to appeal the decision of the Supreme Court of Appeal. During this period she sought advice from a number of individuals whom she has not disclosed. In addition she alleges that she does not have unlimited funds although she admits that this is not a compelling reason for the delay. She has not furnished any explanation as to why it took approximately eleven months for her to decide whether or not to appeal. Nor has she furnished any explanation how she overcame her funding difficulty."

In **Premier Western Cape v Lakay** 2012 (2) SA (SCA) the following is stated.

"[17] The second question on which a court must be satisfied is that 'good cause' exists for the failure by the creditor to give the notice. The minimum requirement is that the applicant for condonation must furnish an explanation of the default sufficiently full to enable the court to understand how it really came about, and to assess his/her conduct and motives: Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352H-353A, quoted in the context of the 2002 Act in Madinda's case.11 Beyond that, each case must

depend on its own facts. As Innes CJ said in Cohen Brothers v Samuels 1906 TS 221 at 224 (in the context of an application for leave to prosecute a lapsed appeal, but the remarks are equally appropriate to s 3(4)(b)(ii) of the 2002 Act):

> *'In the nature of things it is hardly possible, and certainly undesirable, for the Court to attempt to [define good cause]. No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits, and decide in each case whether good cause has been shown.'"*

The answering affidavit should therefore be disregarded by this Court.

[6] The applicant applied that the order granted by default on 14th December 2017 be rescinded. It is quite apparent that the application was not served on the applicant. The applicant's registered address is situated at 14 Vaalbos Avenue, Protea Park, Rustenburg and the application was served by the Sheriff on Suite 4, Magaliesburg Country Park, Rustenburg, which is a totally different address. The application for rescission of the said default judgment of 14th December 2017 is made in terms of Rule 42 (1) (a) of the Rules of Court.

[7] Rule 42 (1) (a) of the Rules of Court provides:

> *"The court may, in addition to any other powers it may have, mero moto or upon the application of any party affected, rescind or vary an order or judgment erroneously granted in the absence of any party affected thereby;"*

The first respondent, on the 14th December 2017, incorrectly held out to the court (*per* Djaje J) that the application was properly served on the applicant, whereas infact it was not the case. The court was misled and the default judgment/order was therefore erroneously granted in the absence of the applicant. This order (of 14th December 2017) should therefore be rescinded.

[8] There is a dispute with regard to the costs of this application for rescission. Correspondence proves that the applicant's attorneys requested the attorneys of record for the first respondent (the applicant in the application for default judgment of 14th December 2017) to abandon its judgment. This they failed to do. They contended that abandonment of the judgment in terms of Rule 41 (2) would amount to their claim being *res judicata*.

[9] Counsel for the first respondent referred this Court to the matter of **Body Corporate of 22 West Road South v Ergold Property**

Number 8 CC 2014 JDR 2258 (GJ). Boruchowitz J states the following:

"It is common cause that on 18 October 2010 default judgment was granted in favour of the applicant against the respondent for payment of the sum of R123 101.60, together with interest and costs. Relying on that judgment, the plaintiff issued a warrant of execution and attached a Porche Cayenne motor vehicle. An application was thereafter launched to interdict the plaintiff from levying execution. It appears from that application that the default judgment had been erroneously granted without a notice of bar having been served on the defendant.

The plaintiff's attorney elected to abandon the judgment and invoked the provisions of Rule 41(2). That Rule reads:

> *'2. Any party in whose favour any decision or judgment has been given may abandon such decision or judgment either in whole or in part by giving notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment. The provision of sub-rule (1) relating to costs shall mutatis mutandis apply In the case of a notice delivered in terms of this sub-rule.'*

Counsel for the plaintiff sought relief principally on two arguments. The first is that the judgment is a nullity and as such could not support the defence of res judicata. Reliance in this regard was placed upon two decisions, the decision The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others

2012 (3) SA 325 (SCA) and Baloyi NO v Schoeman NO and Others [2003] 4 All SA 261 (NC).

The second proposition contended for was that the plaintiff's Invocation of the provisions of Rule 41(2) had the effect of setting aside or rescinding the judgment. It was argued that once the provisions of Rule 41 were invoked the judgment no longer had any legal effect and therefore could not sustain a plea of res judicata.

In the Motala decision the Supreme Court of Appeal reaffirmed that all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. Reference was made to the case of Lewis and Marks v Middel 1904 (2S) 291 in which it was held that where an order was null and void a court may, upon proof of such invalidity, disregard the judgment without the necessity of a formal order setting it aside.

In Motala the court below granted an order interdicting the Master from appointing a particular person or persons as a judicial manager. It was held on appeal that the court below was not empowered to issue such an order, as the power to appoint a judicial manager had been expressly left to the Master in terms of the Companies Act. The order granted was thus a nullity (see para 14 of the Motala judgment).

In Baloyi, judgment was granted for the outstanding balance of a purchase price where the underlying contract did not contain an acceleration clause. Judgment was thus granted on a non-existent cause of action. Such summons was held to constitute a nullity. In Baloyi there had also been an abandonment of the judgment, and it was emphasised that the abandoned judgment was a nullity and

therefore could not sustain a plea of res judicata (see Baloyi paras 22 to 25).

Unlike the facts in Motala and Baloyi, the judgment in the present instance is not null and void. The legal basis for the default judgment in the resent instance is distinguishable from those in the Motala and Baloyi cases. Here, judgment was obtained without service upon the defendant of a notice of bar as required in terms of Rule 31. Such failure constituted an irregularity and did not render the judgment a nullity. There is a clear distinction in our law between juristic acts that constitute a nullity and those constituting an irregularity. When an irregular step has been taken the opposite party may have to avail itself of the provisions of Rule 30 and apply to set that step aside as an irregular proceeding. The first contention advanced on behalf of the plaintiff is therefore rejected.

(my underlining)

I do not agree with the plaintiffs second contention that the invocation of Rule 41(2) had the effect of setting aside or rescinding the judgment and therefore such judgment could not sustain a plea of res judicata. It is settled law that parties to a judgment cannot unilaterally or by consent cancel a judgment. A judgment stands until either rescinded or set aside by a court of appeal.

The grant of a judgment, whether by default or otherwise, has important legal consequences. It stands until set aside by a court of competent jurisdiction, and until that is done it must be obeyed even if the court order was incorrectly granted (see Clipsal Australia (Pty) Limited v GAP Distributors 2010 (2) SA 289 (SCA) pares 21 and 22 and the reference therein to the decisions of Kotze v Kotze 1953 (2) SA 184 (C) at 187f-g; Culverwell V Beira 1992 (4) SA 490 (W) at

494a-e; Bezhuidenhout v Patensie Citrus Beherend Bpk 2001 (2) SA 224 (E) at 228f to 230 a. See also in this regard Motala supra.

The act of abandonment is of a unilateral nature and operates ex nunc and not ex tunc. It precludes the party who has abandoned its rights under the judgment from enforcing the judgment but the judgment still remains in existence with all its intended legal consequences. The opposite party need not accept such abandonment. It was open to the defendant to accept the abandonment, which it did not do in the present case. Had the defendant accepted the abandonment it would have been precluded from raising a plea of res judicata.

On my reading of the rules they do not equate an abandonment with a rescission or setting aside of the judgment. Rule 41 must be juxtaposed with Rule 42. The latter rule deals with rescissions, which are conceptually different.

(my underlining)

Of relevance in this regard is the case of Prudenza and Co v Prince 1917 (TPD) 140. There Gregorowski J, writing for the Full Court, held that parties could not by consent cancel the judgment of a magistrate. The following dicta at 143 in Prudenza are relevant.

> *"There is no doubt that the attitude taken up by the appellants in this matter is correct. The parties could not by consent cancel the judgment given by the magistrate, and get the case put back in the position in which it was before the magistrate gave the judgment appealed against. This could only be effected by an order of this Court made on appeal and therefore it was necessary to have the appeal heard, and to formally have the magistrate's judgment set aside. This Court could set aside the*

judgment and remit the case of the magistrate, with such order as to the further proceedings as this Court may deem fit but the parties could not by consent place the suit In the magistrate's Court in the status quo ante, and arrange for proceedings before the magistrate by consent. This clearly follows from the judgment given in the case of du Plessis v. du Preez (1916 T.P.D. p. 125), but the respondent relies on a passage in the Judgment of Mason, J. in Kensington Steam Bakery v Dogan pp. 19 & 20 of T.P.D. 1916, but if the whole of the judgment dealing with this point is read, there was nothing to warrant the conclusion contended for. It is there pointed out that if a plaintiff recovers a judgment for a certain sum (as in that case for £4 19s. 9d.) there was nothing to prevent the plaintiff, if the magistrate ought only to have given judgment for 19s. 9d., waiving or abandoning the £4 prior to the appeal and thus rendering the appeal unnecessary In giving the defendant as appellant all that he could possibly gain by appeal. The remarks about a magistrate setting aside his judgment do not refer to a case like this, but to a case where the magistrate's Court is approached by proper proceedings as pointed out in Richards v. Meyers (1909 T.S. 159) or as suggested in Viljoen v. van Staden (1915 T.P.D. p. 380). The Court held in Kensington Steam Bakers v. Dogan that if a wrong judgment were waived, the appellant should not merely on technical grounds pile up costs of appeal and nothing substantial was to be gained by so doing, and where the only effect of the appeal was to secure something which the respondent was prepared to abandon. It is quite a different matter where the judgment has to be cancelled and the proceedings have to be reinstated where they were prior to the judgment, and then the case to be proceeded with as if there had been no judgment."

It was argued on behalf of the plaintiff that not to interpret Rule 41(2) or equate it to a rescission would negate the purpose of the law. I do

not agree with that proposition. The waiver is a mechanism whereby a party can limit costs or distance himself from a particular judgment but it certainly, as I have already indicated above, cannot be equated to a rescission or setting side of the judgment on appeal.

Consequently, I hold that despite the service upon the defendant of the notice of abandonment in terms of Rule 41(2) the judgment, although unenforceable by the plaintiff, still stands and is capable of sustaining a plea of res judicata. A default judgment stands as a final judgment until set aside. See Jacobson v Havenga t/a as Havengas 2001 (2) SA 177 (T), where it was held that even though a judgment was voidable ab origine and ought to have been set aside or rescinded, this did not detract from the fact that the judgment was binding. The judgment stood and constituted res judicata until set aside. For these reasons I would uphold the first special plea."

[10] I find the dicta of Boruchowitz J in the **Body Corporate** matter quite apposite in this case. It was therefore proper for the first respondent not to abandon its judgment/order otherwise a special plea of *res judicata* could be raised by the applicant in the main application. The proper rule that apply is Rule 42 (1) (a). An application for rescission of the judgment/order had to be made.

[11] The first respondent filed a notice of intention to oppose the application for rescission of judgment on 05th February 2018. This had the effect that the application became opposed. An abortive answering affidavit was filed and served on the 24th April 2018. The

application for rescission was therefore opposed and needed to be enrolled on the opposed motion court roll. That is why the matter was postponed to the 31st May 2018. To simply contend that the rescission application is unopposed and should have been treated as such, is incorrect.

[12] Similarly, is the contention that the first respondent conceded to the rescission and such an order for rescission could have been obtained granted on an unopposed basis on 08th February 2018 incorrect. The date of 08th February 2018 is the date stipulated in the notice of motion for the rescission application. The notice of intention to oppose was served and filed on 05th February 2018, three (3) days before the date of hearing of the rescission application. Had the first respondent rather than to oppose the rescission application consented thereto on the 05th February 2018 or at any time before 08th February 2018, it would have been understandable that the first respondent should not be held accountable for the costs. Due to the actions of the first respondent, the applicant was forced to embark on this application for rescission, which was opposed.

[13] The first respondent contended that the parties agreed that costs should be reserved. This is incorrect. In reply to the applicants request to abandon its order granted by default on 14th December 2017, the first respondent in a letter dated 12th January 2018 states:

"Our client is not agreeable to set aside the order in the circumstances and your client is invited to launch the rescission application."

I am of the view that the costs of the rescission application should follow the result and be awarded in favour of the applicant.

Order

[14] Consequently, the following order is made:

(i) The default judgment/order granted on the 14th December 2017 by **Djaje J** is rescinded and set aside.

(ii) The first respondent (Engen Petroleum Ltd) is ordered to pay the costs of the rescission application.

R D HENDRICKS
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG