IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

27/2/15

CASE NUMBER: 59805 / 2012

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

27 / 02 /2015
DATE

SIGNATURE

In the matter between:

MINISTER OF DEFENCE AND MILITARY VETERANS **APPLICANT**

And

LB HUNTING SAFARI CC **RESPONDENT**

JUDGMENT

MAVUNDLA J;

[1] The applicant seeks an order in the following terms:

1.1 that the default judgment granted against the applicant on the 31 January 2013 under case number 59805 / 12 be set aside;

1.2 that the respondent under case number 59805/12 be ordered to file an answering affidavit within 15 days of the grant of this order in 1.1 above;

1.3 That the costs of this application be paid by the applicant, save in the event that the application is opposed, in which event the respondent be ordered to pay the costs;

1.4 Further and or alternative relief. (For purposes of clarity, I shall refer to the parties as follows; the applicant as "MD&MV" and the respondent as the "CC").

[2] The application is founded on the affidavit deposed to by Brigadier General T.E Mulaudzi. According to the General, MD&MV became aware of the existence of the order on 15 February 2013, the prescribed period within which the application ought to have been brought expired on 15 March 2013. The application is therefore brought six days late. Upon receipt of the letter informing the MD&MV of the existence of the Court order, the Brigadier General immediately instructed his subordinates to bring the matter to the attention of the MD&MV's legal department. Counsel was briefed on the 8 March 2013 to draft necessary papers for the application. Consultation with counsel took place on 10 March 2013. The Brigadier General further avers that reasonable steps were taken to bring the application as soon as it was possible, although there was a delay of 6 days but the Court should condone this delay.

[3] The genesis of this matter is that on the 23 October 2012, the CC brought by way of notice of motion under the present case number, seeking, *inter alia*, an order compelling the MD&MV to comply with the terms and conditions of tender agreements PQ/G/280/2011 and PQ/G/026/201/, alternatively an order directing the MD&MV to pay the CC a total amount of R412 000.00. The notice of motion was served on certain MP Melesi, a former employee of MD&MV on the 23 October 2012. The documents were never brought to the attention of MD&MV as it seems that they got lost en route to the latter's legal department. Melesi is no longer in the employ of MD&MV, as a result it cannot be ascertained what happened to the

documents. There was no notice of intention to defend filed on behalf of MD&MV thus resulting in a default judgment being granted against the latter on 13 January 2013.

[4] I am of the view that this application, which is being opposed, stands to be set aside for the reasons set out herein below.

[5] It is common cause that the judgment sought to be rescinded was granted by default in the absence of the applicant on the 31 January 2013. The application is brought in terms of Rule 31(2) (b) of the Uniform Rules of this Court, which demands that the application be brought within 20 days upon becoming aware of such default judgment.

[6] The applicant's application is founded on the affidavit deposed to by Brigadier General T.E Mulaudzi who stated, *inter alia*, that "the applicant became aware of the existence of the judgment for the first time on 15 February 2013 when same was faxed through to the applicant's Central Procurement office".

[7] In needs mentioning that there is no specific prayer for condonation sought. In so far as the allegation that the application was brought 6 days late to the prescribed period, there is no merit in this contention. The judgment came to the attention of the Brigadier General on the on the 15 February 2013. On 8 March 2013 counsel was briefed to draft papers necessary for this application. Consultation with counsel took place on 10 March 2013 to draft the papers. The application ought to have been filed within 20 days, which would have been not later than the 15 March 2013. The affidavit was only deposed to on the 26th March 2013, and was already 25 days late. The Notice of Motion was however issued on the 19th April 2013, which was 45

days after the judgment came to the attention of the applicant. There is no explanation regarding this inordinate delay.

[8] In an application for condonation the applicant must explain the cause of the delay and give a reasonable explanation for such delay, covering the entire period of the delay; the applicant must further satisfy the court that he has a reasonable prospects of success on the merits. 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 rescission is premised; *vide Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) at 477A-B et E-F; Immelman v Loubser* [1974] 4 ALL SA 89 (A) (1974 (3) SA 816 (AD).

[9] With regard to the prospects of success on the merits, it was held in the matter of *Harris v ABSA Bank Ltd t/a Volkskas* 2002[3] ALL SA 215 at 217, that the applicant must show sufficient cause which means that he must give an acceptable explanation of his default and this must coexists with evidence of reasonable prospects of success on the merits. If one of the essentials is lacking then the court will not come to his assistance. In the matter of *Mutebwa v Mutebwa and Another [2001] 1 ALL SA (2001 (2) SA 83 (200 (2) SA 193 (TK)* at 198 I Jafta J (as he then was) held that: "The terms 'sufficient cause' and 'good cause' means the same thing. The only difference is that Rule 31(2)(b) refers to 'good cause'. The requirements therefore are exactly identical. *In Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) the Appellate Division had occasion to consider the requirements of 'sufficient cause'. At 765A-C Miller JA said:

'The term "sufficient cause" (or "good cause" defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairns Executors v Gaarn* 1912 AD 181 at 186 per Innes JA.) But it is clear that in principle and in long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default is:

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

(ii) That on merits such party has a bona fide defence which, prima facie, carries some prospects of success...'

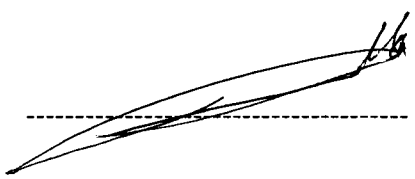
It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of default judgment against him, no matter how reasonable and convincing the explanation of his default is.

[10] Although the applicant contended in its papers that this application was brought 6 days late, this is incorrect. The 20 days upon which the application for rescission ought to have been brought expired on the 18 March 2013; regard being had to the fact that the 1 March 2013 was a public holiday which need not be taken into account for computation purposes. Although the founding affidavit was deposed to on the 26 March 2013, however, the application was only filed on the 19 April 2013.

[11] Whereas the delay of 6 days would not have been unreasonable, however, the application was only brought on the 19 April 2013 and there is no explanation for such inordinate delay. In the absence of a satisfactory explanation as to why the application was not brought within 20 days after the applicant became aware of the default judgment, there is no basis upon which this court can even consider exercising its discretion and condone the belated application. I deem it not necessary to interrogate whether there is a bona fide defence to the merits. I take note of the fact that the cause of dispute between the parties relate to a tender award going as far back as in November 2011, from which the MD&MV wants to renege. It is trite that a litigant, *in casu* the CC, is entitled to finality to the litigation. In my view, the interest of justice dictates that finality of litigation must be reached speedily. Granting condonation and rescission would, in my view, merely prolong the litigation much longer, to the prejudice of the CC.

[12] The applicant must satisfy the court that on the merits it has a *bona fide* explanation for the default. It is common cause that the notice of motion was served on the applicant's employee, a certain M. P. Melesi on the 23 October 2012. The applicant contended in its papers that the relevant notice was never brought to the attention of the applicant. The said Melesi is no longer in the employ of the applicant and as the result the applicant was unable to ascertain why the application was not brought to the attention of the applicant. The applicant, in my view, cannot hide behind the fact that an employee has resigned. There ought to be systems in place with regard to receipt of litigation documents in State organs, such as the applicant. Such systems cannot be dependent on the presence of a particular employee. When an employee resigns, the system must function. There ought to be an immediate takeover of the work which was done by the person who resigned. *In casu* there is no explanation when the said Melesi resigned and what steps were taken immediately after the resignation. In my view, the explanation advanced by the applicant for the failure to enter an appearance to defend is not satisfactory, to say the least.

[13] For the aforesaid reasons, therefore application is dismissed with costs.



N .M. MAVUNDLA

JUDGE OF THE COURT

HEARD ON THE	: 10 / 11/ 2014.	DATE OF JUDGEMENT: 27 /02 / 2015
APPLICANT'S ATT	: STATE ATTORNEY PRETORIA	
APPLICANT'S ADV	: ADV. H A MPSHE	
RESPONDENTS' ATT	: MESSRS D H MOSTERET ATTORNEYS	
RESPONDETS' ADV	: ADV L BADENHORST	