✓✓ 7/12/2017

Original

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

07 Dec 2017
DATE

SIGNATURE

CASE NUMBER: 17364/2010

APPEAL CASE NUMBER: A920/2015

In the matter between:

MOUNTAIN VIEW INVESTMENTS (PTY) LTD — Appellant

and

SAREL JACOB JANSE VAN RENSBURG
T/A ALFA LOODGIETERS — Respondent

In re:

SAREL JACOB JANSE VAN RENSBURG
T/A ALFA LOODGIETERS — Plaintiff

and

MOUNTAIN VIEW INVESTMENTS (PTY) LTD — Defendant

JUDGMENT: FULL COURT

MOKOENA AJ, RABIE ET MOTHLE JJ CONURRING

INTRODUCTION

[1] This is an appeal against the judgment handed down on 25 June 2015 by Matojane J wherein the court *a quo* dismissed the appellant's application for rescission of an order granted by Claasen J on 3 February 2014.

[2] This matter is not without its own unique history:

[3] On 25 March 2010 the respondent instituted action proceedings against the appellant.[1]

[4] On 11 April 2010, the respondent served its summons to the appellant.

[5] On 24 June 2010 the appellant entered appearance to defend.[2]

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[1] Appeal record, Vol. 7, respondent's summons and declaration, p. 4 - p. 18.
[2] Appeal record, Vol. 4, respondent's answering affidavit, p. 149, para 9; **see also** Vol. 8, notice of intention to defend, p. 3.

[6] On 8 July 2010 the respondent launched a summary judgment application.

[7] On 11 September 2010 the respondent obtained a default judgment against the appellant.

[8] On 16 August 2011 the appellant initiated a rescission application to set aside the default judgment granted against it on 11 September 2010.

[9] On 20 September 2011 the appellant obtained an order, on an unopposed basis, wherein the default judgment granted against it on 11 September 2010, was set aside.

[10] On 25 January 2012 the appellant delivered its plea.[3]

[11] On 6 July 2012 the respondent set down the action proceedings to be heard on 14 March 2013.

[12] On 14 March 2013 Sithole AJ dismissed the appellant's application for postponement and proceeded to grant default judgment against the appellant.[4]

[13] On 18 July 2013 the appellant launched an application for rescission wherein it sought to set aside the default judgment granted on 14 March 2013.[5]

[14] On 8 August 2013 the respondent served a notice of intention to oppose the second rescission application.

[15] On 30 August 2013 the respondent delivered its opposing papers to the appellant's rescission application.

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[3] Appeal record, Vol. 7, appellant's plea, p. 19 – p. 32.
[4] Appeal record, Vol. 3, default judgment order, p. 26.
[5] Appeal record, Vol. 3, appellant's second rescission application, p. 1 – p. 75.

[16] On 24 October 2013 the respondent, when realising that the appellant was failing to deliver its replying affidavit, decided to deliver its heads of argument and practice note and applied for the set down of the matter. The matter was set down for 3 February 2014.

[17] On 3 February 2014 the rescission application came before Claasen J. There was no appearance on behalf of the appellant. The appellant's application for rescission was dismissed with costs on an attorney and client scale.[6]

[18] On 1 July 2014 the appellant initiated a further rescission application wherein it sought the following order:-

"1. That the failure by the applicant to bring this application within the period prescribed by Rule 31(2)(b) be condoned;

2. That the judgment by default granted against the applicant on 3 February 2014 in the application under case number 17364/10 be set aside;

3. That the warrant issued under case number 17364/10 be set aside;

4. That the writ of attachment under case number 17364/10 be set aside;

4A. In the event of the honourable court granting an order setting aside the judgment by default granted against the applicant on 3 February 2014 and the ancillary relief thereto as set out in prayers 1 to 4 above, then in that event:

4A(i) The applicant's motion dated 18 July 2013 under case

[6] Appeal record, Vol. 4, Claasen J's order, p. 120.

number 17364/10, in which the setting aside of the default judgment granted in the action on 14 March 2013 together with ancillary relief is sought, be adjudicated therewith immediately thereafter;

4A(ii) The founding affidavit dated April 2014 and the replying affidavit dated 30 May 2014 both deposed to by Frederick Coenraad Daniel, be considered in support thereof;

5. That the respondent be ordered to pay the costs of this application in the event he elects to oppose same;"[7]

[19] The respondent opposed the appellant's further rescission application and filed its opposing papers.[8]

[20] The rescission application was set down and heard before Matojane J on 9 February 2015, wherein he dismissed the appellant's application for rescission, of which judgment is the subject matter of this appeal.

APPLICABLE LEGAL PRINCIPLES

[21] Rule 31(2)(b) of the Uniform Rules of Court provides that:-

"A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

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[7] Appeal record, Vol. 4, appellant's notice of motion, p. 107, paras 1 – 5; **see also** the supporting affidavit, p. 108 – p. 145.

[22] The appellant in its notice of motion also seeks condonation for its failure to initiate its application as envisaged in Rule 31(2)(b) within the prescribed time periods.

[23] The court has a wide discretion in evaluating '*good cause*' in order to ensure that justice is done.[9]

[24] For this reason, the courts have refrained from attempting to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of an indulgence, for any attempt to do so would hamper the exercise of the discretion.[10]

[25] The requirements for an application for rescission under this subrule have been stated to be as follows:[11]

> *"(a) He (i. e., the applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.*
>
> *(b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.*
>
> *(c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief*

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[8] Appeal record, Vol. 4, respondent's answering affidavit, p. 147 – p. 170.
[9] *Wahl v Prinswil Beleggings (Edms) Bpk* 1984 (1) SA 457 (T).
[10] *Cairns' Executors v Gaarn* 1912 AD 181 at 186; *Abraham v City of Cape Town* 1995 (2) SA 319 (C) at 321I–J.
[11] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9F.

asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."

[26] When considering what constitutes willful default, this subrule does not require that the conduct of the applicant for rescission of a default judgment be not wilful, but it has been held that it is clearly an ingredient of the good cause to be shown that the element of wilfulness is absent.[12]

[27] While wilful default on the part of the applicant is not a substantive or compulsory ground for refusal of an application for rescission, the reasons for the applicant's default remain an essential ingredient of the good cause to be shown.[13]

[28] The wilful or negligent nature of the defendant's default is one of the considerations which the court takes into account in the exercise of its discretion to determine whether or not good cause is shown.[14]

[29] While the court may well decline to grant relief where the default has been wilful or due to gross negligence, the absence of gross negligence is not an absolute criterion, nor an absolute prerequisite, for the granting of relief, it is but a factor to be considered in the overall determination of whether or not good cause has been shown.[15]

[30] The reasons for the applicant's absence or default must, therefore, be set out because it is relevant to the question whether or not his default was wilful.[16]

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[12] *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 803J.
[13] *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 529E–F.
[14] *Scholtz v Merryweather* 2014 (6) SA 90 (WCC) at 94F–96C.
[15] *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 709A–E.
[16] *Brown v Chapman* 1928 TPD 320 at 328.

[31] In **Silber v Ozen Wholesalers (Pty) Ltd**[17], it has been held that the explanation for the default must be sufficiently full to enable the court to understand how it really came about, and to assess the applicant's conduct and motives. An application which fails to set out these reasons is not proper,[18] but where the reasons appear clearly, the fact that they are not set out in so many words will not disentitle the applicant to the relief sought.[19]

[32] Before a person can be said to be in wilful default, the following elements must be shown:

32.1 knowledge that the action is being brought against him;

32.2 a deliberate refraining from entering appearance, though free to do so; and

32.3 a certain mental attitude towards the consequences of the default.

[33] The courts have had some difficulty in defining the third requirement. At one stage, it was held to be a *willingness that judgment should go against him, because of a knowledge or belief that he has no defence.*[20]

[34] In **Hainard v Estate Dewes**[21], the test of willingness was retained (although the court expressed the opinion[22] that *unconcern* or *insouciance* would be more appropriate terms), but without the qualification that the willingness must be because of a knowledge or belief that there was no defence.

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[17] 1954 (2) SA 345 (A) at 353A.
[18] *Marais v Mdowen* 1919 OPD 34.
[19] Cf *Behncke v Winter* 1925 SWA 59.
[20] *Hitchcock v Raaff* 1920 TPD 366.
[21] 1930 OPD 119.
[22] At 124.

[35] In **Checkburn v Barkett**[23], the court followed this suggestion, and the test adopted was whether the person alleged to be in wilful default, '*knows what he is doing, intends what he is doing, and is a free agent, and is indifferent as to what the consequences of his default may be*'.[24]

[36] This latter test has been followed in a number of later cases[25] but it has been suggested that this test, too, is not conclusive and that the true test is whether the default is a deliberate one, i. e., when a defendant with full knowledge of the circumstances and of the risks attendant on his default freely takes a decision to refrain from taking action.[26]

[37] All three elements must be established before the party can be said to have been in wilful default. The onus of proof rests ultimately on the respondent.

APPLYING THE LEGAL PRINCIPLES TO THE FACTS

Judgment of the court *a quo*

[38] The court *a quo* when determining the dispute between the parties, held as follows:-

> *"[9] Rule 31(2)(b) of the uniform rules of court provides that a defendant may within 20 days after he has knowledge of a judgment against him by default apply to court upon notice to the plaintiff to set aside such judgment, and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.*

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[23] 1931 CPD 423.
[24] At 423 (emphasis added).
[25] *Mangalelwe v Van Niekerk* 1941 EDL 229.
[26] *Morkel v Absa Bank Bpk* 1996 (1) SA 899 (C) at 905C–D.

[10] It is clear that Rule 31(2)(b) applies in the case of a judgment granted against a defendant when he is in default of appearance, in the present matter, applicant was represented by the current attorneys who are on record and counsel was in court on brief to argue a postponement. It follows that reference to a default judgment in the draft order that was made an order of court must be an error. Rule 31(2)(b) would not be the appropriate procedure to rescind the judgment because that order was not a judgment by default in terms of rule 31.

[11] Furthermore, the appellant cannot rely on the provisions of Rule 42(1)(a), which empowers a court to set aside a judgment erroneously sought or erroneously granted in the absence of a party. The order was not granted in the absence of the appellant: his attorney and counsel represented him in that application. Also, rescission was neither erroneously sought nor erroneously granted.

[12] The only possible basis for rescission is an application at common law. For an application for rescission under common law to be successful the applicant must show good cause. As a rule, the courts consider that there is good and sufficient cause if an applicant for rescission is able to give a reasonable explanation for this default, if he is able to show that his application is bona fide, and if he is able to show that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success.

[13] The applicant's explanation for non-preparedness for trial is that its only director and deponent to all affidavits filed on behalf of the applicant was unable to attend to consulting with his then attorney Tanner and counsel on 6 February 2013 due to a severe infection of the colon and flu, to the extent that he lost

consciousness from time to time as a result of medication and was unable to travel to Pretoria.

[14] Applicant alleges that Tanner informed him on 8 February 2013 that he was going to withdraw as an attorney of record due to commitments he had in lecturing law at Wits and that Tanner only delivered the files on 30 April 2013 more than a month after the hearing.

[15] The explanation advanced by applicant does not measure up as a reasonable and bona fide explanation for the defendant's default. Firstly, in his letter of the 8 February 2013 addressed to respondent's attorneys, Tanner explains that he had scheduled a meeting with applicant's representative and counsel and the representative contracted him on his way to the meeting and advised him that he would not be attending. No mention is made of the representative's ill health.

[16] Secondly, in their letter of the 12 March 2013 requesting postponement, the current attorneys of the applicant do not make any reference to the health of the applicant's representative.

[17] Finally, no mention was made of the alleged ill-health of applicant's representative during counsel's application for postponement.

[18] Applicant explains that his attorneys were furnished with the respondent's heads of argument and practice note which was forwarded to the applicant and its counsel under an email stating that the matter was set down to be heard on 3 February 2013. The email did not reach either applicant or its counsel as the scanning machine malfunctioned. The matter was diarized in its attorneys

electronic diary and the offices were broken into and computers stolen during December holidays. The office only became operational again and the computers restored on 22 January 2014. Its attorney was involved as a witness in another matter heard during the week of 3 February 2014 as a result Counsel could only first be consulted on 13 February 2014. Counsel then went on leave.

[19] ...

[20] In this matter the appellant raises what appears to be a prima facie good defense in the replying affidavit. The allegations of misrepresentation is not made in the founding affidavit, this on its own in this matter is insufficient to warrant the relief sought, the question arises as to whether a reasonable explanation for the inability to proceed with the trial has been furnished.

[21] The applicant has failed to give a reasonable explanation why it failed to remain in communication with its attorney as to the progress of the case, the applicant cannot divest itself of its responsibilities to ensure that its attorneys give adequate attention to the matter. This all in my view, falls to demonstrate "good cause" for rescission, nor is there "good reason" to do so demonstrated.

[22] The court has no discretion to grant a rescission in the absence of good cause being shown or there being good reason to do so.

[23] In the result, the requirements applicable to rescission of default judgments are not satisfied in this matter and such rescission falls to be refused. The application is dismissed with costs, which shall include the costs of the

postponement of 15 February 2007."[27]

[39] The above quoted paragraphs of the judgment of the court *a quo*, must be considered in the light with what the court *a quo* found in paragraph 1 thereof:-

"[1] This is an application to rescind the judgment, granted by this court at the trial action brought by the respondent against the applicant, which was heard on 14 March 2013. The application was launched on 16 July 2013, four months after judgment was granted."[28]

[40] What was before Matojane J was not only an application to rescind the judgment granted by Sithole AJ on 14 March 2013 but also, fundamentally, the court *a quo* had to consider and determine the default judgment granted by Claasen J.

[41] It is evident from the Appellant's amended notice of motion that the Appellant sought both these default judgments to be considered by Matojane J.[29]

[42] This expectation was shared also by the respondent, more so, having regard to the respondent's answering affidavit, wherein the following is stated:

"On 29 April 2014, the fourth application was postponed to 1 July 2014 but, hopefully, the third and fourth applications would be heard and finalised simultaneously."[30]

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[27] Appeal record, Vol. 1, judgment of the court *a quo* (Matojane J), p. 34, para 9 – p. 38, para 23.
[28] Appeal record, Vol. 1, judgment of the court *a quo* (Matojane J), p. 32, para 1.
[29] Appeal record, Vol. 4, appellant's notice of motion, p. 107, paras 1 – 5.
[30] Appeal record, Vol. 4, respondent's answering affidavit, p. 154, para 35.

[43] Despite the court *a quo* having confined its judgment to be dealing with the default judgment granted on 14 March 2013 (as stated in paragraph 1 of the judgment),

the court a quo, in paragraph 18 of its judgment, appears to be considering averments by the appellant in relation to the default judgment granted against the appellant by Claasen J on 3 February 2014.[31]

[44] This mischaracterisation of what issues or applications were supposed to be determined by the court *a quo* led to the court *a quo* not giving due weight to or considering the explanation proffered by the appellant pertaining to its failure to appear when the matter was set down before Claasen J on 3 February 2014.

[45] The court *a quo* also found that Rule 31(2)(b) was not available to the appellant and proceeded in its judgment on the premise that there was no default judgment granted against the appellant and that "*it follows that reference to a default judgment in the draft order that was made an order of court must be an error*".[32]

[46] The court *a quo*, when making this finding failed to appreciate and to give due consideration to the appellant's explanation as contained in its papers where it stated that the services of a new attorney and counsel were engaged a few days before the set down, counsel was briefed only to pursue and argue a postponement application.

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[31] Appeal record, Vol. 1, judgment of the court *a quo*, p. 36, para 18.
[32] Appeal record, Vol. 1, judgement of the court *a quo*, p. 34, para 10.

[47] The mere fact that counsel and/or appellant's attorney remained in attendance after the postponement application was refused does not in itself mean that the appellant was present in court and ready to deal with the merits of the trial. It follows that the judgment made by Sithole AJ was indeed a default judgment.

Explanation proffered by the appellant in relation to defaults

[48] The appellant as an applicant in a rescission application must give a reasonable explanation pertaining to its default. In addition, the appellant's application must be *bona fide* and not made with the intention of merely delaying the respondent's (plaintiff's) claim.

[49] As apparent from the record, there were three default judgments granted against the appellant.

[50] Firstly, on 16 August 2011, the appellant launched an application to set aside the first default judgment which application was not opposed by the respondent and which was granted on 20 September 2011 by Kollapen J.

[51] This default judgment is not the subject matter of this appeal, as it appears that it was erroneously granted in circumstances where there was a pending summary judgment application.[33]

[52] Subsequent to the first rescission application, and on 6 July 2012, the respondent served a notice of set down for 14 March 2013. The appellant failed to attend on the set down date and the second default judgment was granted by Sithole AJ. The appellant in its founding affidavit explains in detail the reasons for its failure to

appear when the matter was set down on 14 March 2013. It is apparent from this explanation that the appellant was not in wilful default premised on the reasonable grounds furnished in its affidavit.[34]

[53] Thirdly, the matter was set down on 3 February 2014 before Claasen J. The appellant failed to appear on the set down date. The respondent obtained the dismissal of the application for rescission by default.

[54] The appellant, at length, provides a reasonable explanation pertaining to its failure to appear on 3 February 2014. The sole director of the appellant deposed to an affidavit which discloses a reasonable and a *bona fide* explanation of the appellant's failure to appear on 3 February 2013.[35]

[55] In addition, in proffering a reasonable explanation of its default, the appellant relies on the affidavit of its attorney of record, Mr Bosman, explaining the appellant's failure to appear on 3 February 2013.[36]

[56] Apparent from the affidavits referred to above, the appellant explained in sufficient detail its failure to appear before Sithole AJ and Claasen J, respectively.

[57] The court *a quo*, in the light of the explanation provided by the appellant in its various affidavits referred to above, ought to have found that the explanations were reasonable that it and cannot be said that the appellant's default was willful in respect of either of the occasions.

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[33] Appeal record, Vol. 3, appellant's founding affidavit (dated 15 July 2013), p. 15, para 21 – p. 17, para 35.
[34] Appeal record, Vol. 3, appellant's founding affidavit, p. 17, para 42 – p. 22, para 65. **NB! Grounds demonstrating that the appellant was not in wilful default for its failure to attend the set down of 14 March 2013.**
[35] Appeal record, Vol. 4, appellant's founding affidavit, p. 111, para 4.1 – p. 115, para 4.15.
[36] Appeal record, Vol. 8, Mr Bosman's supporting affidavit, p. 133, para 2.1 – p. 135, para 2.15.

Defences raised by the appellant

[58] As one of the requirements in relation to an application for rescission, the appellant must show that he has a *bona fide* defence to the respondent's claim. It is sufficient for the appellant if he makes out a *prima facie* defence in the sense of setting out averments, which, if established at the trial, would entitle him to the relief asked for.

[59] Matojane J, in the court *a quo* makes the following finding "*In this matter the appellant raises what appears to be a prima facie good defense in the replying affidavit. The allegations of misrepresentation is not made in the founding affidavit, this on its own in this matter is insufficient to warrant the relief sought, the question arises as to whether a reasonable explanation for the inability to proceed with the trial has been furnished*".[37]

[60] Indeed, consistent with the finding of the court *a quo* as alluded to above, the appellant in its founding papers and not replying affidavit (as stated in the judgment of the court *a quo*), discloses the following *prima facie* good defence:

> *"23. During March 2009, after the applicant approved both quotations in writing, the respondents started to install the storm water and water pipes at the applicant's premises.*
>
> *24. The applicant denies the validity of the invoice attached as annexure A to the summons as the invoice contains amounts or work done and materials supplied that were never approved by the applicant.*

[37] Appeal Record, Vol. 1, judgment of the court *a quo*, p. 38, para 20.

25. *This matter must be evaluated against the background that during 2008 to 2010, the Cradle of Life group invested heavily in infrastructure to create various facilities and infrastructure to the tune of R 60 million. Therefore, the procurement of supplies and services posed a challenge and was open to abuse by unscrupulous employees, suppliers and contractors.*

26. *It came to light that there was collusion between the project's then Site Manager Mr J.P. Fourie and his girlfriend Ena who abused the system and process by levelling commission on orders from contractors and suppliers. Their untoward conduct included, inter alia, renting out accommodation, unlawful use of company plant and equipment, fuel, material and equipment theft, bogus invoices that were generated, and subsequently unlawfully paid. In this regard the applicant has obtained statements under oath from a number of contractors and staff who confirmed the scheme.*

27. *Mr Fourie was summoned to appear before a disciplinary inquiry to answer aforesaid allegations but resigned shortly before the hearing. The investigation into the irregularities is on going.*

28. *In this matter, the respondent was paid in accordance with his quotations. It has been discovered that there were various irregularities regarding accommodation, fuel and the use of the plant and equipment as well as the subsequent invoices that were issued not in accordance with the respondent's quote that are in dispute. The respondent's subsequent invoices form part of an ongoing investigation, the result of which will only be properly ventilated at a trial of the matter.*

29. *Furthermore, the work performed by the respondent was not carried out as agreed in that the respondent supplied incorrect Kerb stones more suitable for industrial sites and storm water outlets that he has since left at the premises, despite requests to remove them. The applicant had to purchase the correct kerbstones additional cost."*[38]

[61] Despite the court *a quo* (Matojane J) having found that "*the appellant raises what appears to be a prima facie good defence...*", the court *a quo* in paragraph 23 of its judgment finds that "*the requirements applicable to rescission of default judgments are not satisfied*".

[62] The court *a quo* ought to have found that the appellant has furnished a reasonable explanation for its default and that the Appellant has disclosed a *prima facie* defence in its affidavit. In this regard, the court *a quo* ought to have found that the appellant was not in wilful default. I am thus of the view that the appeal mus succeed and the decision of the court a quo set aside.

Costs

[63] In considering the issue of costs, it is important to have regard to the conduct of the parties, in particular, the conduct of the appellant throughout these proceedings.

[64] On the appellant's own version, the appellant states that it was served with the summons on 11 April 2010 at its registered address. For reasons not explained, the deponent alleges that he only became aware of the summons during June

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[38] Appeal record, Vol. 3, appellant's founding affidavit deposed to by Frederick Coenraad Daniel, p. 1, para 23 – p. 14, para 29.

2010. In essence, a period of approximately two (2) months lapsed without the matter receiving attention.[39]

[65] On 6 July 2012, the respondent served a notice of set down for 14 March 2013 to the appellant. This afforded the appellant approximately seven (7) months to prepare for its matter.[40]

[66] On 21 January 2013, the appellant received the discovered documentation from the respondent. The appellant chose to brief counsel only on 6 February 2013 almost a month later.[41]

[67] Mr Daniel became ill and was unable to attend a consultation with counsel scheduled for 6 February 2013. The respondent cannot bear the responsibility of these events.

[68] The appellant' was not able to appear on 14 March 2013 for the reasons proffered in its affidavit and not as a result of any fault from the respondent.

[69] The appellant's current attorneys of record were the appellant's attorneys when the default judgment was granted on 14 March 2013. Yet, the rescission application was only initiated by the appellant on 18 July 2013 (approximately four (4) months after the default judgment was granted to the knowledge of the appellant and its attorney of record).[42]

[70] On 30 August 2013, the respondent filed its answering affidavit opposing the

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[39] Appeal record, Vol. 3, appellant's founding affidavit, p. 15, paras 21 – 24.
[40] Appeal record, Vol. 3, appellant's founding affidavit, p. 17, para 41.
[41] Appeal record, Vol. 3, appellant's founding affidavit, p. 17, para 42 – p. 18, para 43.
[42] Appeal record, Vol. 3, respondent's answering affidavit, p. 80, para 16 – p. 81, para 20.

rescission application.[43] The appellant had to deliver its replying affidavit on 13 September 2013, but failed to do so. The respondent, correctly so, paginated and indexed the papers and duly served the index on the appellant on 19 September 2013.

[71] The appellant's attorney only on 21 October 2013 (almost one month after the respondent having filed its answering affidavit) instruct correspondent attorneys to obtain a transcript in order to file a replying affidavit. No explanation is proffered for this delay.[44]

[72] The appellant became aware of Claasen J's default judgment on 10 February 2014.[45] Yet, the application for rescission was only initiated on 1 July 2014. No explanation is proffered. In other words, the rescission application was initiated almost five (5) months after the appellant became aware of the judgment.[46]

[73] On 13 February 2014, a consultation is arranged with counsel. A month passes by and only on 12 March 2014, does counsel on behalf of the appellant request further information for the purpose of finalising the founding affidavit.[47]

[74] Even though the appellant was able to furnish a reasonable explanation pertaining to its failure to appear before the proceedings which were set down before Sithole AJ and Claasen J, respectively, there are delays and conduct which remain unexplained flowing from the appellant's conduct.

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[43] Appeal record, Vol. 4, respondent's answering affidavit, p. 151, para 19.
[44] Appeal record, Vol. 4, appellant's founding affidavit, p. 113, para 4.5.
[45] Appeal record, Vol. 4, appellant's founding affidavit, p. 115, para 4.14 and para 5.2.
[46] Appeal record, Vol. 4, appellant's notice of motion, p. 107A (court stamp dated 1 July 2014).
[47] Appeal record, Vol. 4, appellant's founding affidavit, p. 116, para 5.3.

[75] The respondent's opposition in respect of all applications was not frivolous or *mala fide*. The respondent as the plaintiff in the main action and being a party that is *dominus litis* was desirous in ensuring that its claim against the appellant is prosecuted expeditiously and within reasonable time.

[76] It is trite that the successful party should not be ordered to pay the costs of the unsuccessful party except where the conduct of the successful party has been the cause of the costs of the proceedings.[48]

[77] This is a matter which warrants the appellant as a successful party on appeal to be deprived of its cost having regard to its conduct as alluded to above. The respondent's opposition was frivolous. The appellant has through his counsel, tendered the costs of the appeal.

ORDER

[78] In the circumstances, we make the following order:

78.1 The appellant's appeal succeeds;

78.2 The order of Matojane J dated 25 June 2015 is set aside and replaced with the following:

78.2.1. The judgement by default granted against the applicant on 3 February 2014 (before Claassen J) is set aside.

78.2.2. The applicant is ordered to pay the costs of the application for rescission of 3 February 2014.

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[48] *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (C) at 370C-372C; **see also** *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at 323I-324A; *Kalil NO v Mangaung Metropolitan Municipality* 2014 (5) SA 123 (SCA) at 135E-137G.

78.2.3. The judgement by defaulted granted against the applicant on 14 March 2013 (before Sithole AJ) is set aside.

78.2.4. The applicant is ordered to pay the costs of the application for postponement on 14 March 2013 which costs shall include the wasted costs of the trial relating to the appearance on 14 March 2013.

78.2.5. The applicant is ordered to pay the costs of the application for rescission (before Matojane J on 25 June 2015).

79. The costs of this appeal shall be paid by the appellant.

80. The action proceedings in case with number 17364/10 shall proceed further in terms of Rules of Court.

MOKOENA AJ
ACTING JUDGE OF THE HIGH COURT

I agree

RABIE J
JUDGE OF THE HIGH COURT

I agree

MOTHLE J
JUDGE OF THE HIGH COURT