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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION**

CASE NO: 17143/2011

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

In the matter between:

BENSON, Johan Marvin
(ID NO: 5.....)

1st Applicant

BENSON, GLORIA VALENTIA
(ID NO: 5.....)

2nd Applicant

And

THE STANDARD BANK OF SA LTD

1st Respondent

EX-SHERIFF JOHANNESBURG WEST:
H.M. BOTHA

2nd Respondent

THE REGISTRAR OF DEEDS:
JOHANNESBURG

3rd Respondent

GERT CORNELIUS DU PLESSIS
(ID NO: 6.....)

4th Respondent

JUDGMENT

WEINER J:

- 1) In this matter the Applicants (“the Bensons”) applied to rescind an order granted by Acting Judge Mia on 13 February 2013. In the application before Mia AJ, the Bensons applied for rescission of an earlier order which the Respondent (“Standard Bank”) had obtained. Mia AJ dismissed the application for rescission.
- 2) The Bensons seek to rescind the dismissal of the rescission application on the basis that such order or judgment was erroneously granted by Mia AJ. The Bensons submit that, they were at court to oppose the matter but, unfortunately they were in the wrong court. This is confirmed in a note in the file from Judge Boruchowitz who stated that the Bensons appeared in his court, although unbeknown to them, the matter had been allocated to Mia AJ. They were present in Boruchowitz’s court for most of the day, awaiting the hearing of the matter.
- 3) Standard Bank contends that the dismissal of the rescission application by Mia AJ is not capable of rescission. If there has been some sort of error it might be subject to appeal.
- 4) The question is whether or not the order of Mia AJ was

erroneously granted. The meaning of these words has been dealt with in the case of Bakoven Ltd v G J Howes (Pty) Ltd¹, where the judge stated the following:

“An order or a judgment is ‘erroneously granted’ when the Court commits an ‘error’ in the sense of a ‘mistake in a matter of law appearing on the proceedings of a Court or record’ (*The Shorter Oxford Dictionary*). It follows that a Court in deciding whether a judgment was ‘erroneously granted’ is, like a Court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 (2)(b) or under the common law, the applicant need not show ‘good cause’ in the sense of an explanation for his default and a *bona fide* defence... Once the Applicant can point to an error in the proceedings, he is without further ado entitled to rescission.”

- 5) In the case of Standard Credit Corporation v Marais², the respondent claimed that default judgment was erroneously granted in terms of rule 42 (1) (a) because the summons was expiable as it disclosed no cause of action. The applicant had failed to make an essential averment of an initial

¹ 1992 (2) SA 466 at 471 F-G

² 2002 (4) SA 892

payment having been made, in order for it to enforce a credit agreement upon which it relied. It was held by Coetzee J that “the word ‘erroneously’ in Rule 42(1)(a) covered the situation where, for want of an essential averment, there was no cause of action and thus nothing to sustain the judgment”³ as the summons lacked an essential averment, there was no cause of action and thus nothing to sustain the judgment. Accordingly the default judgment, that had been granted, was rescinded. It was clear that, on the papers before Coetzee J, no cause of action had been made out. Therefore, in terms of the test referred to in *Bakoven supra*, the judgment was erroneously granted.

- 6) Standard Bank referred to the case of *Francesco Pitelli v Everton Gardens Projects CC*⁴ which dealt with the corollary of whether an order, capable of being rescinded by a court below is appealable. In dealing with the issues Nugent JA, stated the following:

“...for an order to be appealable it must have as one of its features that the order is final in its effect, by which I mean that it is not susceptible

³ *Supre* at 893 E-F

⁴ 191/09/2010 ZASCA35 at [20]

to being revisited by the Court that granted it
(Zweni v Minister of Law and Order)⁵

7) The court below had refused to rescind the orders and such refusal is [according to Nugent JA] an order that would clearly be appealable because it would have brought the proceedings to completion in the court of first instance.

8) Nugent JA went on to state⁶:

“An order is not final, for the purposes of an appeal, merely because it takes effect unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable... It is not appealable because such an order is capable of being rescinded by the court that granted it and it is thus not final in effect.”

Nugent JA continued⁷:

“...the appealability of an order must be dependent on the nature of the order and not upon what the litigant chooses to make of it. An

⁵ 1993 (1) SA 523 (A) at 532 (J).

⁶ *Francesco Pitelli v Everton Gardens Projects CC* Supra at [27]

⁷ Supra at [31]

order made by default is by its nature not final in its effect because it is capable of being revisited, albeit that condonation might be required for the delay. It is true that once rescission has been refused, and an appeal against that order has been dismissed, the order is then not capable of being revisited.”

9) The issue in this case is whether or not this judgment was granted by default and is therefore capable of being rescinded. The analogous situation, in my view, is that which presents itself in a summary judgment application. In such an application, the defence has to put an affidavit before the Court to oppose the application for summary judgment.

10) As is set out in Erasmus Superior Court Practice⁸:

“Where pursuant to the sub-rule, the defendant files an affidavit in opposition to an application for summary judgment, the Court is not entitled to ignore such affidavit and it cannot be said that the defendant is in default because he or she or his or her counsel fails to appear when the application is heard.”

⁸ at B1-222

11) In this regard, reference was made to the case of Morris v Autoquip (Pty) Limited⁹. In my view, that is the situation in the present case. The Bensons' in this case had filed an application for rescission. Standard Bank filed its answer on 14 September 2012 and, therefore, the Bensons were entitled to file a reply thereto by the end of September 2012. They did not do so. They took the point that the fourth respondent only filed its answer late on 21 January 2013 and it would have been entitled to reply thereto within the requisite days. However, the matter was only set down by Standard Bank for 13 February 2013, by which time, the time period for filing the replying affidavit would have lapsed.

12) Accordingly all the papers that had been filed were before the court and the court made its judgment upon the record before it. On the papers before it, it was entitled to grant the judgment which it did and, therefore, the judgment was not erroneously granted. Nor, was it a default judgment because the Bensons had filed an

⁹ 1985 (4) SA 398 (W)

affidavit and the Court was obliged to have regard thereto.

13) If the Bensons are of the view that the Court erred in some way by refusing the rescission or for any other reason, they have their remedy in an application for leave to appeal and the subsequent appeal. It, however, does not have its remedy in a rescission as the application was not granted by default.

14) Accordingly, the application is dismissed with costs.

WEINER J

<i>Counsel for Applicant:</i>	H Motsemme
<i>Applicant's Attorneys:</i>	E.D Van Schalkwyk Attorneys
<i>Counsel for 1st Respondent:</i>	L Van tonder
<i>1st Respondent's Attorneys:</i>	Le Roux Vivier & Associates
<i>Counsel for 4th Respondent:</i>	F Bezuidenhout
<i>2nd Respondent's Attorneys:</i>	Hartzenberg Prokureurs/Attorneys
<i>Date of Hearing:</i>	13 October 2014
<i>Date of Judgment:</i>	14 October 2014