

REPUBLIC OF SOUTH AFRICA



IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)

CASE NO: 8763/2013

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

Date:2014 _____
TL MOSIKATSANA

In the matter between

HENDRIK JOHANNES VAN NIEKERK	FIRST APPLICANT
JAQUES JANSE VAN RENSBURG	SECOND APPLICANT
SHERENE JANSE VAN RENSBURG	THIRD APPLICANT
JOHANN NICO JUNIUS	FOURTH APPLICANT
And	
ABSA BANK LIMITED	RESPONDENT

J U D G M E N T

MOSIKATSANA AJ:

Introduction

[1] This is an application for an order in the following terms:

[1.1] Rescinding and setting aside of the default judgment granted against the applicants under the above case number on 10 April, 2013;

[1.2] Granting the applicants leave to oppose the respondent's application for judgment, the applicants having to file a notice of intention to oppose the application within five (5) days from date of the setting aside of the judgment and thereafter to file their answering affidavits within fifteen (15) days after they have given notice of their intention to oppose the respondent's application;

[1.3] Costs of the application to be costs in the cause, unless the respondent unsuccessfully opposes the application, in which event, the respondent is to be ordered to pay the applicants' costs as a result of the opposition to this application, and further or alternative relief.

[2] The respondent first sought condonation, for the late filing of its answering affidavit, which was duly granted. The respondent notes, in its answering affidavit, that the applicants have not shown whether they are relying upon the uniform rules of court, or the common law, in support of their application for rescission. While acknowledging that the applicants' failure to plead, with such particularity, is not fatal to their cause, the respondent, nevertheless, emphasises that the applicants have failed, to make out a proper case for rescission, on any of the recognised grounds, and that the application for rescission, falls to be dismissed with costs.

Factual background

Common cause facts

[3] It is common cause that during 2010 the respondent brought an application against the applicants in the above honourable court, under case number 46514/2010, for payment of the sum of R981, 170.44 together with interest

and costs, and for an order declaring ERF 143 Norton Park Extension 7 Township, Registration Division IR, Province of Gauteng (situated at 143 villa Elefante, 14 Auret Road, Nortons Home Estate Benoni, Norton Park Extension 7 (the property) executable. Default Judgment was granted by the Honourable Victor J, in favour of the respondents on 29 March 2011.

- [4] The applicants sought rescission of the default judgment granted against them, and in favour of the respondent, on 29 March, 2011 on the basis that there was irregular service on the applicants.
- [5] On 25 October, 2011 the above honourable court, per Meyer J, granted an order, rescinding the default judgment, granted against the applicants, and in favour of the respondent, by Victor J on 29 March 2011. The respondent was ordered to pay the costs of the application. The applicants were ordered to file answering affidavits in that application, but the respondent elected to withdraw the application and tendered to pay costs.
- [6] On 19 February, 2013 the respondents brought a new application under the above case number, for judgment in the amount of R 1,176,352.48 plus interest at the rate of 6.95% per annum calculated and capitalised monthly in advance in terms of the mortgage bond, from 30 January, 2013 and for an order declaring the property specially executable for the said sum plus costs.
- [7] On 10 April, 2013 the honourable Mabesele J, granted default judgment against the applicants under the above case number. It is the default judgment granted by the Honourable Mabesele J, on 10 April, 2013 which is sought to be rescinded in the present application.

Disputed Facts

Applicants' submissions

- [8] The applicants claim that the default judgment granted by the Honourable Mabesele J, on 10 April, 2013 ought to be rescinded due to irregular service, in that the court documents in the main application for judgment, were served on a security guard at the main entrance to the gated community, in which the applicants own a plot, and not at the applicants' plot, which is their chosen domicilium citandi et executandi.
- [9] It is submitted on behalf of the applicants that on or about 16 June, 2006 the applicants concluded a written agreement with yellow flame properties (yellow flame), for the purchase and sale of an Erf referred to as Portion 12 in a property development known as Vila Elefante. The applicants also entered into a building contract with yellow flame.
- [10] The salient terms of the contract concluded between the applicants and yellow flame were as follows:
- [10.1] The vacant land on which a building was to be erected was described as Portion 12, Villa Elefante, Auret Road, Benoni (the immovable property);
- [10.2] The purchase price for the immoveable property was R400, 000.00;
- [10.3] yellow flame was to build a dwelling of approximately 183 square metres on the immovable property;
- [10.4] the building contract price was R766, 330.00 inclusive of interim interest in the amount of R100, 000.00 which yellow flame was not entitled to draw. The actual building contract price was therefore R666, 330.00

[10.5] The building contract price was payable to yellow flame by way of progress payments specified in Annexure "B" to the building contract in terms whereof:

[10.5.1] Yellow flame would be entitled to a first progress payment equivalent to 36% of the contract price upon completion of the stone work;

[10.5.2] a second progress payment equivalent to 34% of the contract building price would be payable upon completion of the plumbing and drainage;

[10.5.3] a third progress payment equivalent to 20% of the contract price would be payable upon completion of the painting and glasswork;

[10.5.4] upon completion of the building and having cleaned up, yellow flame would be entitled to draw the outstanding 10% which would be the final draw of the contract price.

[11] After conclusion of the building contract with yellow flame, the applicants obtained a loan from the respondent against a mortgage bond registered on the property, in the amount of R 1 166, 330.00 plus an additional amount of R 233, 266.00. The mortgage bond was registered over the property on or about 9 June, 2007. The principal amount recorded in the mortgage loan agreement represented the purchase price in respect of the property and the building contract price.

- [12] An amount of R766 330.00 was to be retained by the respondent and only paid out to yellow flame if the work had been performed to the satisfaction of the applicants.
- [13] Upon transfer of the property to the applicants, the respondent paid a purchase price of R400, 000.00 to yellow flame for the property. Applicants submit that respondent also paid in breach of its obligation, an additional R 581, 000.00 to yellow flame in respect of the building contract. It is alleged that the respondent's breach consists in the fact that the amount it paid for the building work was in excess of the work that was actually performed. It is alleged that the respondent was responsible for monitoring progress on the building work done before releasing funds to yellow flame. The applicants dispute the fact that the respondent exercised sufficient oversight before making progress payments to yellow flame.
- [14] Applicants contend that the value of the building work performed, amounts to R465, 498.00 and that the respondent paid an amount of R120, 000.00 in excess of the fair and reasonable value of the building works performed. The applicants contend that the respondent cannot claim performance from them under circumstances where the respondent acted in breach of the loan agreement. Accordingly, the applicants deny that they are indebted to the respondent in the amount of R 1 176, 352.48.

Respondent's submissions

- [15] In opposing the rescission application on the basis of the alleged irregular service, the respondent argues that service of process in the main application complied with the rules in that the court documents were served on a security

guard at the applicants' chosen *domicilium citandi et executandi* and that the court process served did not come to the applicants' attention because none of the applicants reside at the chosen *domicilium*. Accordingly, the respondents contend that there was proper service.

- [16] With respect to the allegations of contractual breach relating to the alleged irregular payments for work done in terms of the building contract, the respondent argues that it is not a party to the building contract between the applicant and yellow flame. Respondent contends that it is not liable for the assessments which may have been conducted on the property with reference to the construction of a dwelling thereon. The respondent contends that progress payments, were only made after requests for the release of funds were made by the applicants. Accordingly, the respondent contends that the defence raised on behalf of the applicants is unsustainable both in fact and in law.

Issues to be decided

- [17] The applicants in their founding affidavit and in their heads of argument have failed to plead their case with sufficient particularity. Sufficient particularity in pleadings is essential in facilitating a lucid, legal characterisation of the facts. However, as the respondent has acknowledged, such laxity in this instance is not fatal to the applicants' cause.
- [18] In order to facilitate a disciplined legal analysis and judicial determination of the facts with the objective of reaching fair and just practical outcomes, the facts may for convenience be characterised as follows:

Irregular service

[19] The applicants' claim that the default judgment obtained against them on 10 April, 2013 ought to be rescinded due to irregular service falls, in my view, within the rubric of uniform rule 42(1)(a)¹, in so far as it is implicitly alleged that the default judgment was erroneously sought or erroneously granted.

Common law

[20] The applicants' claim that the respondent has not complied with all the terms of the contract relating to the release of funds for completion of the building phase of the project, can be encompassed under the common law. In order to succeed under the common law, the applicants must demonstrate that:

[19.1] They are not in wilful default;

[19.2] the application is brought *bona fide*; and

[19.3] they have a *bona fide* defence which holds some prospect of success.

Legal determination of the issues

Irregular service

[21] As will appear below, there is a plethora of casuistic legal authority, which points incontrovertibly, to the fact that the giving of notice to the affected party, is an essential first step in an application on notice of motion. And, that an application on notice of motion, cannot be considered to have been made, if it had merely been issued, but not served, or if service was irregular.² This is largely, due to the fact that irregular service or non-service of court proceedings undermines due process.

¹ Uniform rule 42(1)(a) states:

'42 Variation and Rescission of Orders

(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby'

² Fishing Touch 163 v BHP Billiton Energy Coal SA Ltd 2013 (2) SA 204 (SCA).

[22] Courts, have consistently emphasised, the importance of proper and effective service of court proceedings, on affected parties. For instance, in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms)*

*Bpk*³ Rumpff JA expressed approval of this principle in the following terms:

'Hoewel `n dagvaarding eers deur die griffier uitgereik word voordat dit beteken word (Reël 17 (1) en (3)), word dit nie in die Reëls vereis dat `n kennisgewing van mosie deur die griffier uitgereik moet word of by hom ingelewer moet word voordat dit aan die respondent beteken kan word nie... Die doel van `n dagvaarding en kennisgewing van mosie is natuurlik om die verweerder of respondent by `n geding te betrek, en wat hom betref, word hy eers dan betrek wanneer `n betekening van die dagvaarding of kennisgewing van mosie plaasgevind het.'

[23] Similarly, in *First National Bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd and Others and First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd and Another*⁴ the court per Horn AJ, reaffirmed the hallowed principle that it is the cornerstone of our legal system, that an affected party is entitled to notice of legal proceedings against him or her, in the following terms:

'The issue of a summons is the initiation process of an action and has certain specific consequences, one of which is that *it must be served*. The methods of service are prescribed in the Rules. Mere "knowledge" of the issue of a summons is not service and a plaintiff is not relieved of his obligation to follow the prescribed Rules.'⁵ [Emphasis mine].

[24] Where judgment has been obtained pursuant to irregular service or non-service, the judgment is a nullity as it is erroneously sought or erroneously granted and it may be set aside pursuant to rule 42(1)(a) notwithstanding the absence of good cause.⁶ A more radical view was expressed in *Dada v Dada*⁷ where it was stated that when proceedings have begun without due notice to

³ 1972 (1) SA 773 (A) at 780 D-F.

⁴ 1998 (4) SA 565 (NCD).

⁵ *Id* at 589 B.

⁶ See *Fraind v Nothmann* 1991 (3) SA 837 (W) at 839H; *Topol And Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 648D-649F.

⁷ *Dada v Dada* 1977 (2) SA 287 (T) at 288C-E

the defendant, the subsequent proceedings are null and void, any judgment is of no force and effect and may be disregarded without the necessity of a formal order setting it aside.⁸

[25] The higher courts have discretion in matters of service, to determine on the facts, whether service was good. This discretion has to be exercised in a manner consistent with the Constitution. Acknowledging the courts' discretionary power in matters of service, Shongwe JA stated in *Arendsnies Sweefspoor CC v Botha*⁹ at para 13:

'it is trite that each case must be dealt with on its own particular facts and merits. There is no differentiation or exception. The court, if service is contested, must determine whether service was good and legally recognised or substantially compliant with the rules of service.'

The high courts' discretionary power to regulate its process including service, was recently affirmed in *ABSA Bank Limited v Lekuku*¹⁰

[26] In the present matter, according to the sheriff's return, service was effected by giving the court process to a security guard in attendance at the gate. Evidently, the security guard is at arm's-length with the applicants, not being an employee of the applicants, or a member of their family. On the well-established principle laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹¹ it is highly probable that the applicants did not receive the court process from the security guard. Accordingly, it is my finding that there was irregular service.

Common law

⁸ See *Dada supra* note 7 at 288 C-E and earlier authorities cited therein. See also *Todt v Ipser* 1993 (3) SA 577 (AD) at 588H-J;

⁹ 2013 (5) SA 399 (SCA).

¹⁰ [2014] ZAGPJHC 274 (14 October 2014) par 8.

¹¹ 1984 (3) SA 623 (A) at 634 H-I.

[27] Having determined that there was irregular service and that the applicants were not in wilful default, it is unnecessary to make a finding on whether the applicants would be entitled to claim rescission under the common law on the basis that they have a proper a defence.

ORDER:

[28] I Make the following order:

[28.1] The default judgment granted against the applicants under the above case number on 10 April, 2013 is hereby rescinded and set aside;

[28.2] The applicants are granted leave to oppose the respondent's application, the applicants to file notice of intention to oppose the application within five (5) days from the date of the setting aside of the default judgment and thereafter to file their answering affidavits, if any, within fifteen (15) days after they have so given notice of their intention to oppose the application;

[28.3] Costs reserved.

T L MOSIKATSANA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

COUNSEL FOR APPLICANTS

ADVOCATE: AP BRUWER

COUNSEL FOR THE RESPONDENT

ADVOCATE D VAN NIEKERK

DATE OF HEARING

25 MARCH 2014

DATE OF JUDGMENT

15 DECEMBER 2014

