16/4/2010

FMT

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED ✓
16-4-2010
DATE
SIGNATURE

CASE NO: 16497/07

In the matter between

OCKERT JOHANNES LODEWICKUS BRITS	**1ST APPLICANT**
LEONORA NELLY BRITS	**2ND APPLICANT**

And

NEDBANK LTD	**1ST RESPONDENT**
JOHANNES WOUTER NEL	**2ND RESPONDENT**
MARIA ALETTA NEL	**3RD RESPONDENT**

In re:

NEDBANK LTD	**PLAINTIFF**

And

JOHANNES WOUTER NEL	**1ST DEFENDANT**
MARIA ALETTA NEL	**2ND DEFENDANT**

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] The Applicant in this application seeks an order in the following terms:

"1. Dat die vonnis onder saaknommer 16497/2008 toegestaan op die 22 Junie 2007 teen die Tweede en Derde Respondent tersyde gestel word;

2. Geen bevel ten aansien van koste teen die Eerste Respondent, behalwe indien geopponeer;

3. Bevel ten aansien van koste teen die Tweede en Derde Respondente toegestan word;

4. Verdere en/of alternatiewe regshulp."

BACKGROUND FACTS

[2] The Applicants' case is that they and the second and the third Respondents concluded a sale agreement in terms of which a portion of their immovable property, viz Wonderboomstraat 741 Wolmer, Pretoria Noord beter bekend as Gedeelte 1 van Erf 198 Wolmer ("the property") would be sold to the two Respondents. The

first Applicant had been declared medical unfit. An offer to purchase ("the agreement") prepared by Koale Properties was signed by the parties. Clause 15 of the agreement had as a condition the following:

"1. Aanvaarding van offer is onderheuwig aan dat Koper verantwoodelik is vir onderverdeling".

The second and the third Respondents were to see to the subdivision of the immovable property as according to the Applicants, a portion thereof, after the subdivision, would be sold to the two Respondents. The Applicants allege that the transferring attorney was duly informed by them that they were illiterate and that the two Respondents had to attend to the subdivision of the property. The Applicants laboured under the impression that the property had been subdivided when they signed the necessary documents transferring the property to the Respondents. In the mean time the two Respondents had a bond registered over the whole property as security for the money that the first Respondent had lent to them for payment of the purchase price. The transferring attorneys, according to the Applicants, transferred the whole of the property and not a portion thereof despite their assurance that the right thing would be done. The two respondents defaulted with their bond repayment. This resulted in the first Respondent, in terms of Rule 31 (2) (a), taking judgement against the two Respondents. The Applicants did not know this and consequently did not oppose the granting of the judgement. They aver in their papers that they would have opposed the application for default Judgement had they known of the launching of the application. They further contend that it was never their intention that the property be sold without the subdivision. The above necessitated this application which is opposed by the first Respondent which became a party in terms of Rule 6 (5) (d) (iii).

<u>THE LAW</u>

[3] A person who cannot bring a case for setting aside a judgment under rule 31 or rule 42 may nevertheless be entitled to have the judgment set aside at common law. (see *Hardroad (Pty) Ltd v Oribi Motors (Pty) LTD 1977(2) SA 576 (W) at 579 and De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 at 1039).*

Rule 42 (1) (a) provides:

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

(a) An order or judgment <u>erroneously sought or erroneously granted in the absence of any party affected thereby;</u>" (my emphasis)

The Rule was introduced to cater for mistakes. The Rule is procedural in nature and is meant to expeditiously correct an obviously wrong judgment or order (see *Kili and Others v Msindwana in re:*

Msindwana v kili and Others [2001] 1 All SA 339 (Tk) at 345.)

Courts come to the assistance of an applicant, who through no personal fault of his, is not afforded an opportunity to oppose the order granted once it is established that he expeditiously took steps to have the position rectified. The Applicant, to establish *Locus standi,* has to show that he has a sufficiently direct and substantial interest in the subject matter of the judgment or order sufficiently direct and substantial to entitle him to have intervened and to be able to participate in the original application upon which the judgment was given or order granted. (See F*raind v Nothmann 1991 (3) SA 837 (W).*

The existence at the time of the granting of the judgment, of a fact which the judge was not aware of, which would have precluded the granting of the judgment and which would have induced the judge if aware of it, not to grant the judgment seems to constitute an error for the purposes of the Rule 42 (see

Nyingwa v Moolman No 1993 (2) SA 508 (TK GD) at 510).

In deciding whether the judgment was erroneously granted courts are not confined to the record of the proceedings. The rule also applies to instances where judgments are erroneously sought. This, of necessity, requires facts to be placed before the court to enable it to determine if judgment was erroneously sought. (*See Stander and Another v ABSA Bank 1997 (4) SA 873 (ECD) at 882 C - G, Mutebwa v Mantebwa 2001 (2) SA 193 (TKHC) at 201 A - H and Smith and Others v Van Heerden and Others (2002) 4 All SA 461 (C) at 467 f - g*). Once it is established that an order or judgment was erroneously granted in the absence of any party affected thereby, the court, without any further enquiry should rescind the order on the application of such party. (See *Tshabalala and Another v Peer 1979 (4) SA 27 (T) at 30, De Wet v Western Bank Ltd (supra) and Mutebwa v Mtebwa (supra*)

[4] Rule 42 (1) (a) requires that;

1. Judgment must have been erroneously sought and granted;
2. in the absence of the applicant;
3. who is affected by the granting thereof which in turn means that the party must have substantial interest in the granting thereof. (See *Mutembwa v Mutembwa (supra)*)

A judgment which is erroneously granted includes:

1. a judgment granted while the proceedings preceding the granting thereof have an irregularity, or
2. a judgment granted when the court granting it was not legally competent to grant it, or
3. a judgment granted when the judge was unaware at the time of such granting of the judgment of a fact which would have precluded the granting thereof by such judge had he or she been aware of such facts which would have induced him not to grant the judgment.

[5] According to counsel for the Applicants the facts of the case clearly show that:

1. It was important for the Applicants to oppose the granting of the judgment. Indeed, they did not know that such an application had been launched. They could not attend and place their facts before the court.
2. Had the court that granted the judgment been aware of the facts of the case, judgment would not have been granted against the second and the third Respondents.
3. The error referred to above could not have been apparent from the papers before the court. That necessitated the placing of additional relevant, facts before the court
4. The Applicants have, obviously, been affected by the granting of the judgment in their absence.

[6] Once the court is satisfied that judgment was erroneously granted in the absence of the Applicants who have a substantial interest in the matter the

rescission of the judgment should be granted. It is clearly common cause that the judgment was granted in the absence of the Applicants. The submission in the above instances has merit.

[7] The Applicants are still residing on the property in question and the refusal of the application involves untold prejudice on their part.

[8] Considerations of fairness and justice seems to persuade the court to rescind the judgment that was granted against the second and third Respondents in the circumstances of this matter.

[9] It was submitted on behalf of the first Respondent that to succeed the Applicants have to prove that:

1. a prior personal right against the holder of a real right exists;
2. that the personal right is being infringed by the subsequent acquirer of the real right which real

right was acquired after the establishment of the personal right;

3. The acquirer of the real right has knowledge of the existence of a prior personal right.

It is noteworthy that the condition of sale reads:

"(1) aanvaarding van offer is onderhewig aan dat koper verantwandelik is ver onderverdeling"

The first Respondent must have read this condition. If it did, surely it would have wanted to know what the subdivision was all about. The first Respondent was advancing a lot of money for the purchase of the property. It is inconceivable that the first Respondent would have simply provided the money without wanting to know if the subdivision referred to in clause 15 of the offer to purchase did not affect it. Clearly clause 15 was not without significance. If the first Respondent had no regard thereto then and in that event the first Respondent was negligent to say the least and only had itself to blame for such attitude.

The first Respondent then took the risk of advancing money without doing what it should have done in the first instance. It is highly improbable that the first Respondent would not have known why clause 15 formed part of the offer to purchase. This negates the submission proffered on behalf of the first Respondent, namely that the Applicants had to prove that the first Respondent was aware of the alleged subdivision and that only a portion of the property was offered for sale. The above demonstrates that the first Respondent, the second Respondent and the third Respondent could not have been *bona fide* when they dealt with one another.

[10] The facts that the Applicants have now placed before the court demonstrate that the error could not have been apparent from the record. The court needed to know and be aware of the circumstances of this matter. It is doubtful, if the court, with these facts would have granted the judgment against the second and the third Respondents. It was submitted on behalf

of the Applicants that they, indeed, have a *bona fide* defence against the first Respondent. The submission seems to have substance.

[11] The Applicants applied for the condonation of the late filing of the rescission application as well as the late filing of the Applicant's heads of Argument. The explanation and the reasons proffered by the Applicants, in my view, are understandable and acceptable. Nothing has been shown to persuade me not to grant such condonation which is hereby granted.

[12] The Applicants, in my view, have made out a proper case for the relief that they seek. The application, therefore, ought to succeed.

[13] The order I make, in the result, is as follows:

1. That the judgment under case number 16497/2007 granted on 22 June 2007 against

the second and the third Respondent be rescinded and set aside.

2. That the first, second and the third Respondents be ordered to pay the costs of the application.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT

Heard on: 06 November 2009
For the Applicant: Adv. W. J. Saaiman
Instructed by: Henn Ingelyf
For the 1st Respondent: Adv. E. B. Clavier
Instructed by: Weavind & Weavind