

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH)**

CASE NO.: 934/2010

In the matter between:

ANDREW CHARLES JORDAAN

Applicant

And

BLUE DOT PROPERTIES 310 (PTY) LTD

Respondent

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

BESHE J:

[1] This is an application for leave to appeal against an order I issued on the 28 October 2014 dismissing an application for the rescission of a default judgment granted against the applicant in favour of the respondent. The default judgment which was sought to be rescinded was granted by the Registrar on the 3 of June 2010 against the applicant who was the second defendant in the matter and two others.

[2] According to the applicant, Sapphire Dawn Trading 154 CC, first defendant in the matter has since been deregistered. He also avers that he is the sole trustee of the third defendant a trust against which default judgment was also granted. He further avers that the trust in question has never been active and had no assets or liabilities. This explains why applicant, who I indicated earlier, is the only one who applied for the rescission of the default judgment in question.

[3] The grounds upon which rescission of the default judgment was sought were that:

(i) The defendants' failure to enter an appearance to defend was not due to their negligence or neglect but was due to the fact that they were not aware that an action had been instituted against them – as the service of summons never came to their attention.

(ii) The defendants have a *bona fide* defence against plaintiff's claim – being that the suspensive conditions to which the sale agreement that is the subject of this matter, were not met by the plaintiff. Allied to this, is that, so applicant contends, plaintiff's particulars of claim are excipiable in that they did not disclose a cause of action as there is no allegation in them that the suspensive conditions were fulfilled.

[4] For the reasons provided in my judgment on the rescission application, I did not find any merit in both grounds. Having found that the defendants were aware of the institution of the action against them, and they did not show that they had a *bona fide* defence against the claim.

[5] The abovementioned decision is assailed on the grounds, *inter alia*, that I erred in not finding that applicant had established a *bona fide* defence to the claim by failing to find that applicant's defence of non-fulfilment of suspensive conditions was a complete defence to the plaintiff's claim. Further that I erred in not considering that the defendants have strong defence that mitigated any deficiencies in applicant's explanation for the default in entering an appearance to defend the action timeously.

[6] It is further contended on behalf of the applicant that I erred in finding that the default judgment was not erroneously sought and / or granted in the circumstances.

[7] It is trite that leave to appeal can only be granted where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or that there is some other compelling reasons why the appeal should be heard.¹

[8] Having heard *Mr Moorhouse* for the applicant whose argument concentrated on the submission that applicant has a *bona fide* defence against the claim and having heard *Mr Wagener* for the respondent, and for the reasons provided in the judgment sought to be appealed against – I am not persuaded that the appeal would have a reasonable prospect of success.

[9] I am mindful of the fact that applicant was not required to prove his defence or defendants' defence during the rescission application. All that was required was for the defendants to show that they have a *bona fide* defence. The respondent (plaintiff in the action) refuted the allegation that they had not fulfilled the suspensive conditions in their detailed answering affidavit. No replying affidavit was filed by the applicant to counter what the plaintiff stated in their answering affidavit in this regard.

[10] I am therefore still of the view that the applicant did not succeed in showing that he has a *bona fide* defence against respondents' claim and that therefore the appeal does not have any prospects of success.

¹ Section 17 (1) (a) of the Superior Courts Act No. 10 of 2013.

[11] Accordingly the application for leave to appeal is dismissed with costs.

**N G BESHE
JUDGE OF THE HIGH COURT**

APPEARANCES

For the Applicants	:	Adv: Moorhouse
Instructed by	:	KUBAN CHETTY INC. 2 nd Floor, FNB Building 582/6 Govan Mbeki Avenue North End PORT ELIZABETH Tel.: 041 – 484 2554 Ref.: K Chetty/ce/CJ48
For the Respondents	:	Adv: S D Wagener SC
Instructed by	:	BROWN BRAUDE & VLOK INC 317 Cape Road Newton Park PORT ELIZABETH Tel.: 041 – 365 3668 Ref.: VLOK/MS
Date Delivered	:	18 August 2016