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**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 11908/2020

REPORTABLE: NO.

OF INTEREST TO OTHER JUDGES: NO

REVISED.

2 MARCH 2023

In the matter between:

MATLAKALA SALOME NDHLOVU

Plaintiff

and

MATOME ELIAS PHOSHOKO

Defendant

Summary: *during the course of a hard-fought procedural battle and in an attempt to recover damages caused by the collapse of a boundary wall between the plaintiff's property and that of a neighbour situated on higher ground, the defence on the merits was struck out and, after leading evidence, the plaintiff obtained a finding in respect of liability in her favour. The issue of the quantum of damages, previously separated, was postponed sine die.*

ORDER IN RESPECT OF THE RESCISSION APPLICATION

The application for rescission is refused, with costs.

ORDER IN RESPECT OF MERITS

1. The Defendant is found liable for the damages caused by the collapse of the boundary wall between the properties of the Plaintiff and the Defendant on 21 February 2017.
2. The Defendant is ordered to pay the costs in respect of the merits portion of the action.
3. The issue of the quantum of damages is postponed sine die.
4. The Plaintiff shall pay the Defendant's costs in respect of the default judgment application on 21 February 2023, which costs had previously been reserved.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] In the early hours of 21 February 2017, the boundary wall (the wall) erected by the defendant between his property and that of his neighbor, the plaintiff, collapsed, causing extensive damage to her house and property. Although she suffered no bodily injuries, she had to be rescued by emergency services and she has instituted action for the recovery of the balance of damages suffered, after having received an ex gratia payment from the City of Tshwane Metropolitan Municipality's insurers. This judgment deals with the merits portion of her action.

The pleadings

[2] The plaintiff's cause of action was formulated in her particulars of claim with averments to the effect that the defendant had erected the wall without regard to its

structural deficiencies, rendering it unsafe. The plaintiff further pleaded that she had, prior to the collapse “on numerous occasions” requested the defendant to tear down the wall as it remained unsafe, encroached onto the plaintiff’s property and had been built without the necessary foundations and not according to prescribed building standards. The defendant had refused to do so. In acting in this fashion, the plaintiff pleaded that the defendant had acted negligently and had breached his duty of care.

[3] It is common cause on the papers that the defendant is the owner of no [...] M [...] Street, Atteridgeville, Pretoria and that the plaintiff is the owner of the adjacent stand at no [...] M [...] Street. There is also no dispute about the fact that the two stands are situated on a slope of a steep hill, with the defendant’s property occupying the higher ground. The collapse of the wall is also not in dispute.

[4] In his plea, the allegations of deficiencies in the wall were denied by the defendant as well as the issue of liability. In addition, the defendant accused the plaintiff of having inserted metal rods into the top of the wall which resulted in water ingress weakening the wall. The plaintiff is also accused of having refused draining holes to be made in the wall. After heavy rains, the combination of these two factors caused the wall to collapse.

Case management

[5] The plaintiffs attorneys’ mandate has previously been terminated, resulting in the plaintiff acting in person and the defendant being represented by subsequently appointed attorneys. Although very adept with pleadings and the upload of documents, the virtual court file became flooded with bundles of documents and numerous photographs, uploaded sometimes in a somewhat haphazard fashion by the plaintiff. At her request the matter was referred to case management prior to the hearing thereof.

[6] At a first case management meeting held on 15 February 2022, the plaintiff was directed to make formal discovery in addition to the documents already discovered by her on 10 March 2021. The initial discovery comprised of a large volume of documents, including particulars of complaints laid by the plaintiff at the

office of the Public Protector in terms of section 6(1)(a) of the Public Protector Act 23 of 1994 relating to the failures by the City of Tshwane Metropolitan Municipality (CTMM) to inspect the boundary wall and its foundations, the encroachment on the plaintiff's property and backfilling conducted by the defendant up to a retaining wall erected by the plaintiff on her property, all to no avail. A supplementary discovery, to be made by 11 March 2021, related to a forensic investigation conducted by CTMM's insurers which both parties wanted to rely on but a copy of which the plaintiff struggled to obtain. The issues of quantum and merits were formally separated and directives were made regarding the delivery of a structural engineer's report. The defendant was directed to make discovery by 25 February 2022.

[7] It transpired that the plaintiff encountered insurmountable difficulties in obtaining a structural engineer's report. At a subsequent case management meeting of 1 November 2022 she was given a further opportunity to obtain an expert report but otherwise the parties were content to rely the contents of the report from the CTMM's insurers. I interpose to indicate that the report is a substantive document, spanning 21 finely typed pages, excluding annexures thereto. At that meeting the defendant agreed (and was consequently directed) to make discovery by 20 November 2022.

The striking out proceedings

[8] The defendant failed to honour his undertaking and failed to comply with the directive to make discovery by 20 November 2022.

[9] In terms of Rule 30A "*... where a party fails to comply with ... a direction made in a judicial case management process ... any other party may notify the defaulting party that he or she intends, after the lapse of 10 days ... to apply for an order ... (b) that the claim or defence be struck out*".

[10] Upon the defendant's failure to make discovery as directed, the plaintiff delivered a notice in terms of Rule 30A, informing the defendant that, should he not make discovery within 10 days from date of the notice, she will apply to have his defence struck out.

[11] When the defendant failed to react to the Rule 30A notice, the plaintiff on 13 February 2013 obtained an order from Du Plessis AJ whereby the defendant's defence was struck out. Before this court, the plaintiff confirmed that, as far as she was concerned and understood, in view of the separation of issues, this striking out only pertains to the defence on the merits. In the plaintiff's subsequent evidence (dealt with hereinlater), she confirmed that she had various discussions with the defendant personally about her application to strike his defence, in the week prior to the hearing of the application, to no avail. She appeared at the hearing of the matter herself and argued the application in open court, relying on written heads of argument, uploaded prior to the hearing. She not only obtained the relief claimed, but received compliments from other practitioners present about how she had conducted her matter.

The rescission application

[12] Upon being served with the striking-out order, the defendant launched a rescission application on 23 February 2023. The application was made in terms of rule 42 (1)(a). In terms of this Rule a court “... *may ... 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 ...*”.

[13] The defendant claims that his absence at the hearing of the striking-out application was occasioned by protest action which had taken place outside court on 13 February 2023 which had prevented his attorney from timeously arriving at court. The attorney by the time he got to court, “... *could not locate where the matter was allocated and to which judge. He attempted to locate the court file and the court room but in vain*”. There is no confirmatory affidavit by the attorney uploaded.

[14] In his affidavit filed in support of the application for rescission, the defendant erroneously claimed that no notice in terms of Rule 30A had been delivered. The absence of such a notice was his basis for alleging that the order had erroneously been sought and obtained.

[15] At the subsequent commencement of the trial, having been set down for hearing on dates agreed to at the Case Management Meeting of 1 November 2022 and subsequently allocated by the Deputy Judge President, the attorney for the defendant indicated that counsel had advised that the rescission application should be set down on a separate roll and that its hearing would preclude the trial from proceeding. After some debate about this issue and after having the matter stand down, Adv Tema appeared for the defendant after the tea adjournment. He was only briefed the previous week and requested the matter to stand down to the next day in order for him to consider the opposition to the rescission application and for the possible delivery of a replying affidavit.

[16] At the resumption of proceedings the next day, Adv Tema indicated that no replying affidavit would be forthcoming. The rescission application then proceeded and was heard as an opposed application.

[17] From the argument and from the papers, it transpired that the defendant had been requested by way of a notice delivered by the plaintiff in terms of Rule 35(5) as long ago as 10 March 2021 to make discovery of *“documents/certificates of ground inspection and testing, proving your backyard ground/surface and soil were strong enough to build on ... documents or structural engineers’ building report with specifications and regulations giving you guidance/instructions of how to build in a mountainous/slope area ... reports saying that your wall collapsed because it was drilled with chisel and hammer to install/erect razor wire ... building inspectors’ certificates approving the foundation, documents giving you permission to continue building as well as step by step inspection certificates ... also an approved building plan...”*.

[18] In addition, the defendant had been directed to make discovery on 25 February 2022 in terms of the first case management meeting and on the agreed date of 20 November 2022 in terms of the second case management meeting. This last meeting, incidentally followed on a postponed meeting in September 2022 when the defendant requested time to peruse the CTMM insurer’s report.

[19] It was common cause that, at the time that the striking-out application had been heard and even up to actual trial date, the defendant had not made discovery.

[20] It must follow that the plaintiff had been well within her rights to have proceeded as she did and that the striking-out order had neither been erroneously sought nor erroneously been granted. The rescission application should therefore fail for this reason alone.

[21] In considering the rescission application and, despite the lack of compliance with the requirements of Rule 42(1)(a), one must bear in mind that the striking of a defence is a “drastic remedy”. In granting such an order, a court should consider all relevant factors such as the reasons for non-compliance, whether the defaulting party was in reckless disregard of his obligations and whether his case (or defence) appears to be hopeless¹. To this I might add: whether the defaulting party has since remedied his non-compliance or attempted to do so. The issue of prejudice for any party, either way, will also be a relevant factor.

[22] In considering the rescission application, this court does not sit as a court of appeal in respect of the order of Du Plessis, AJ but exercises an independent discretion, to be judicially exercised. Admittedly, should the rescission application be refused, it would close the door on the defendant’s case on the merits. This would result in prejudice which would ordinarily be a weighty consideration. However, in this case, apart from the defendant’s mere say-so contained in his plea, there were no indications in any other document, photograph or report which confirmed his version. If he had been serious about those allegations or wished to fashion a defence based thereon, one would have expected him to take every opportunity to place any relevant document pertaining thereto before a court. Not only has he failed to do so in terms of the rules, he has persistently failed to do so in the face of directions by this court. He had at no stage attempted to cure his non-compliance and has failed to place any evidence before this court which might have compelled the court to come to his assistance or to exercise its discretion in his favour.

¹ Van Loggerenberg, *Erasmus Superior Court Practice*, 2nd Ed, Vol 2, D1 – 359 and the cases quoted at footnote 4.

[23] Not only is the application for rescission without merits, but the defendant is the author of the misfortune which followed as a result of the striking out order. Accordingly the rescission application was refused at the commencement of the trial, with costs.

The trial on the merits

[24] Prior to the commencement of the trial, the plaintiff had, on 21 February 2023, unsuccessfully attempted to obtain default judgment against the defendant. I shall deal with those proceedings later in relation to the issue of costs.

[25] Whether by way of the application for default judgment, removed by Mngqibisa-Thusi J on 21 February 2023, or as a consequence of a refusal of the rescission application, the plaintiff became entitled to proceed in respect of the merits portion of the action, on the date the trial had been set down. For this purpose, I directed that the matter proceed by way of oral evidence.

[26] The evidence of the plaintiff took some time as, despite attempts to move matters along, she was determined to paint a complete picture of her interaction with her neighbor since the beginning of their relationship. I shall endeavour to summarise the most relevant aspects of her evidence hereunder and exclude unsubstantiated hearsay portions and evidence not directly relevant, even if it formed part of the history.

[27] The first relevant fact, was the fact that the defendant, being a male government employee, had, according to the plaintiff, more access to funds and subsidies than she had. She accordingly had to scrounge around to afford earthworks and to complete the construction on her property. As a result of her being owner-builder, she was on site much more than the defendant and also interacted with his contractors. She was therefore able to testified that initially, the water flowing from the defendant's higher lying property was directed to the street and otherwise by way of "furrows" or channels alongside her property and between the portion where she had commenced her construction and yet another neighbor. Concrete weirs constructed on the defendant's property also directed water sideways. Water

flow was therefore properly catered for, even when flowing over or alongside the plaintiff's property.

[28] After the defendant had built the house on his property, he started back-filling soil and rubble on the portion adjacent to the plaintiff's property. This, she noticed when it was not yet fully completed. The backfilling by her neighbor caused dust, subsidence and mud flowing towards the plaintiff's property. Her complaints to him and to CTMM fell on deaf ears.

[29] The plaintiff obtained the particulars of structural engineers from the CTMM which it had used in the area and, at a huge cost to herself, she contracted an engineering company often subcontracted by civil engineering giant Stocks 'n Stocks, together with a storemason to construct a retaining wall on her property, on the side bordering the defendant. The retaining wall was not very high (approx. 1,2 m) but wide and descending deep into the earth, sufficiently so to prevent any subsidence of the slope. The retaining wall was built completely on the plaintiff's property, approximately 1-2m from the boundary with the defendant. This was pursuant to him refusing any joint costs or appointment of a structural engineer.

[30] Over time, the defendant continued with back-filling on his property, even filling up the space up to the plaintiff's retaining wall, thereby encroaching on her property. The back-filling was with various rocks and rubble and never compacted. As a result thereof, the previously orderly provision for stormwater was disrupted, causing rainwater to directly spill into the plaintiffs property and even into her carpeted house.

[31] Various and repeated visits by the plaintiff to the local block representative, the South African Police Services and the local municipality office produced no intervention by the CTMM. The CTMM's persistent failure to act, to inspect or to enforce building regulations are well documented in its insurer's report and formed the basis for the ex gratia payment of R 228 708,07 referred to earlier.

[32] The lack of building oversight and approval resulted in the defendant building his boundary wall without foundations or plans, on uncompacted back-filling and

without retaining support. The top of the plaintiff's retaining wall, which she had subsequently extended in length, was plastered and it appears that, over time, the defendant's boundary wall had even encroached and migrated onto the retaining wall. This, and the lack of foundations, were obvious when it rained and water, which was no longer properly reticulated, pooled on the defendant's side of the wall. The water would then seep below the wall, over the retaining wall and spill into and onto the plaintiff's property.

[33] On 21 February 2017 the seasonal rains proved too much for the boundary wall and it collapsed onto the plaintiff's house and into her property. She woke with the sounds and tremors likened to an earthquake. She could not open her kitchen windows (facing the wall) as it was blocked by debris. She was fearful of the structural integrity of her house and did not open the damaged doors. Electrical wiring dislodged by the impact caused sparks and flames in various rooms and only subsided when emergency response teams and a disaster management unit called to the scene cut the power. The plaintiff produced various photographs depicting the damage, the rubble, the collapsed wall and the remainder of the backfilling beyond the retaining wall, *sans* any foundations.

[34] There was damage caused as a result of the collapse of the defendant's wall to the plaintiff's house in numerous listed aspects, ranging from doors, cupboards, walls, roof, plumbing, electrical installation and the like. Movables such as furniture, Persian carpets, a huge TV-set and various books and manuscripts (the plaintiff is also an author) were also damaged. The specific items and the reasonable costs of repair or replacement form part of the damages portion of the trial, which the plaintiff claims, after deduction of the ex gratia amount, to be R 1 219 503, 10. Attempts by her at reaching a settlement with the defendant have so far been unsuccessful.

[35] After hearing the plaintiff's evidence, I granted the orders set out in the heading of this judgment, indicating that the reasons for doing so, as well as for refusing the rescission application, would be dealt with later. This judgment contains those reasons.

[36] Paragraph 4 of the order was added at the time of this judgment. The basis for that paragraph, is the following: On 21 February 2023 the plaintiff applied for default judgment. This she could only have initiated after the defence had been struck out. The defence had only been struck out on 13 February and any steps taken before that would have been premature. Any steps taken subsequent to 13 February could never by any stretch of the imagination have complied with the provisions of this court's practice directives by having a matter on the roll a mere six court days later. The matter was rightly removed from the roll by Mngqibisa-Thusi J, who reserved the question of costs. Adv Tema had on that day appeared for the defendant and correctly, in my view, contended that the matter was improperly before court. The plaintiff is a lay person, but conducts herself procedurally and in court as well as any legal practitioner. She clearly also knows the Rules of this court. I can find no explanation for her undue haste, while she had herself, by way of a notice of set down, confirmed that this matter had been set down for trial the following week, commencing 27 February 2023. The proceedings on the 21st February 2023 constituted an unnecessary and improper application and she should bear the costs incurred thereby.

[37] For the sake of completeness, the order is hereby repeated as follows:

The order in respect of rescission application

The application for rescission is refused with costs.

The order in respect of merits

1. The defendant is found liable for the damages caused by the collapse of the boundary wall between the properties of the Plaintiff and the Defendant on 21 February 2017.
2. The Defendant is ordered to pay the costs in respect of the merits portion of the action.
3. The issue of the quantum of damages is postponed sine die.

4. The Plaintiff shall pay the Defendant's costs in respect of the default judgment application on 21 February 2023, which costs had previously been reserved.

N DAVIS

Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 27 and 28 February 2023

Judgment delivered: 2 March 2023.

APPEARANCES:

For the Plaintiff: In person

For the Defendant: Adv A Tema

Attorney for the Respondent: Mashike Attorneys, Pretoria