



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

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

Date: **18th September 2018** Signature: _____

CASE NO: 2018/23203

In the matter between:

DREAMWORX PROP INVESTMENTS HOLDINGS CC

MORRIS, CHAD KAPLAN

MORRIS, KAPLAN

First Applicant

Second Applicant

Third Applicant

and

NYEMBA: TAPERA WILLIAM

KHAN, KABIR

KABIR KAHN ATTORNEYS

THE CITY OF JOHANNESBURG METROPOLITAN

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

JUDGMENT

ADAMS J:

[1]. This is an urgent application by the first, second and third respondents in terms of the provisions of Uniform Rule 6(12)(c) for reconsideration of an order granted by this Court (Makume J) on an urgent basis on the 4th September 2018.

[2]. In the original urgent application the applicants approached the court for an order rescinding the default judgment granted against them on the 20th August 2018, for an order staying the execution of a Writ dated the 22nd August 2018 and for an order setting aside that writ.

[3]. Having heard the application in the absence of the respondents, Makume J granted the following order:

- '2. The default judgment granted against the applicants by the Honourable Court, under case number 23203/2018, on 20th August 2018, is rescinded and set aside.
3. A stay of execution is ordered of the Writ dated the 22nd August 2018, pending the outcome of this application.
4. Directing that the Writ dated the 22nd August 2018 is rescinded and set aside.
5. The first respondent is to enrol the main application on the opposed roll
6. Cost on an attorney and client scale.'

[4]. When the matter came before me on the 14th September 2018, the respondents had by then filed their founding affidavit in support of this Rule

6(12)(c) application for reconsideration of the Court Order of the 4th of September 2018, which also doubled as the respondents' answering affidavit in the rescission application. I was therefore required to adjudicate this application in terms of Rule 6(12)(c), which in effect amounts to an adjudication of the rescission application of the applicants, on the basis of these two sets of affidavits.

[5]. Uniform Rule 6(12)(c) provides as follows:

'A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.'

[6]. In relation to Rule 6(12)(c) the Court (Farber AJ) in *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others*, 1996 (4) SA 484 (W) at 487B, had this to say:

'The framers of Rule 6(12)(c) have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence of the aggrieved party, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. So, too, will questions relating to whether an imbalance, oppression or injustice has resulted and, if so, the nature and extent thereof, and whether redress can be attained by virtue of the existence of other or alternative remedies. The convenience of the protagonists must inevitably enter the equation. These factors are by no means exhaustive. Each case will turn on its facts and the peculiarities inherent therein.'

[7]. I am in full agreement with this enunciation by Farber AJ of the principles relating to the application of the said rule.

[8]. In my assessment of the facts in this matter I have had regard to all of the affidavits filed by all of the parties involved in this matter. In that regard, I am guided by the dictum by Joffe J in the decision of *Rhino Hotel & Resort (Pty) Ltd v Forbes and Others*, 2000 (1) SA 1180 (W) at 1182B – E where he stated as follows:

'In terms of Rule 6(12)(c) of the Uniform Rules of Court, a party against whom an order was granted in his absence in an urgent application may, by notice, set the matter down for reconsideration of the order. The Rule envisages a redetermination of the matter. The Court that entertains the application in the absence of the respondent does not have the benefit and advantage of argument from the respondent. Accordingly, when the application is re-enrolled by the respondent for consideration, it is a redetermination with the benefit of argument from the respondent. . . . Where Rule 6(12)(c) is utilised, the original application is reconsidered on its own without reference to anything else.'

[9]. However, in *Oosthuizen v Mijs* 2009 (6) SA 266 (W) Wepener J adopted a different view and, after expressly dealing with Joffe's views, held (at 267E) that '(t)o hold that the court is confined only to the original application without reference to anything else is in conflict with various decisions on this point'. See in this regard *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others*, 1996 (4) SA 484 (W) ([1996] 4 All SA 58) at 486H – 487D); see also *National Director of Public Prosecutions v Braun and Another*, 2007 (1) SA 189 (C) (2007 (1) SACR 326; [2007] 1 All SA 211). Wepener J went on to state in the *Oosthuizen* case at 269I – J, that:

'I am of the view that a court that reconsiders any order should do so with the benefit not only of argument on behalf of the party absent during the granting of the original order but also with the benefit of the facts contained in affidavits filed in the matter.'

[10]. In *The Reclamation Group (Pty) Ltd v Smit and Others*, 2004 (1) SA 215 (SE) full sets of affidavits were delivered dealing with the facts upon which the reconsideration of the matter was done. Froneman J stated at 218D – F as follows:

'The result of all of this is that the reconsideration of the matter needs to be done on the basis of a set of circumstances quite different to that under which the original ex parte order was obtained. Reconsideration need not always take this form but Rule 6(12)(c) is widely formulated and in my view permits a reconsideration in this manner. . . .'

[11]. I am in agreement with the views expressed by Wepener J and I interpret his comments as authority for the proposition that the applicants are entitled to place additional facts and matter before the Court in the reconsideration application, which ought properly to have been placed before the court when the matter was originally presented. The Oosthuizen case *supra*, with which I agree, expressly supports the function and the purpose of rule 6(12)(c), which is the fundamental principle of natural justice — '*audi alteram partem*'. I place reliance on the Oosthuizen case as authority especially in view of the fact that the respondents, who were absent when an urgent order was granted, placed relevant factual matter on affidavit before the court reconsidering the previous order.

[12]. Also, when dealing with factual allegations which are not common cause between the parties I will follow the well – known approach to be taken in opposed motion proceedings where factual disputes arise as set out in *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984 (3) SA 623 (A) at 634. The question in that context is whether the facts averred in the respondents' affidavits which have been admitted by the applicants, together with the facts alleged by the applicants, justify the order sought. In other words, the court is bound by the facts in the respondents' affidavit that the applicants

admit, and the facts deposed to by applicants, unless they are so far – fetched or clearly untenable that the court is justified in rejecting them on the papers.

[13]. The first respondent is the registered owner of the property to which the main eviction application relates. The property is Portion 3 of Erf 3183, Bryanston Extension 7 Township, and is situated at 44 Old Kilcullen Road, Bryanston Extension 7 ('the property'). On the 20th August 2018 Wright J had granted an order evicting the applicants from the property. This is the order that was rescinded and set aside by Makume J on an urgent basis

[14]. An examination of the grounds provided by the applicants for the rescission of the judgment reveals that this application is not *bona fide*. The applicants have also failed to raise a *prima facie* defence to the claim by the first respondent, who is the owner of the property, which he had sold to the first applicant during 2015. The sale agreement was however cancelled during 2017 as a result of breaches of the agreement by the first respondent, who has to date hereof not come up with the purchase price agreed upon more than three years ago.

[15]. The claim by the applicants that they are still interested to purchase the property and that they are quite eager to clench the deal is not a defence to the eviction claim by the first respondent based on the fact that the respondents have no right to occupy the property, the sale agreement having been cancelled. If anything, this stance by the respondents confirms the first respondent's case that the applicants have no right to occupy his property.

[16]. The second 'defence' raised by the applicants to the claim by the first respondent is to the effect that they have a builder's lien over the property. The version of the applicants in that regard is so far – fetched that it can be rejected

on the papers before me. The details relating to the lien is at best for the applicants sketchy and totally lacking in the necessary detail.

[17]. In any event, in terms of the agreement for the purchase and sale of the property the first applicant would only have been entitled to invoke the clause relating the so – called ‘builder’s lien’ in the event of the transfer of the property not being effected pursuant to the said agreement not as a result of reasons caused by the first applicant. There can be no doubt that, in the circumstances of this matter, the cancellation of the agreement was due to the breach of material terms of the said agreement by the first applicant, who failed to make payment of the purchase price timeously or at all. The first applicant’s defence in that regard is therefore bad in law.

[18]. I am not persuaded that the applicants have demonstrated the existence of a *bona fide* defence on the substantive merits of the first respondent’s claim. In *Chetty v Law Society, Transvaal*, 1985 (2) SA 756 (A), Miller JA said the following about the two elementary requirements of the common law test of sufficient cause:

‘It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. ... and ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits’

[19]. Applying these principles *in casu*, I am satisfied that the applicants’ application for rescission of the order granted on 20th August 2018 should have

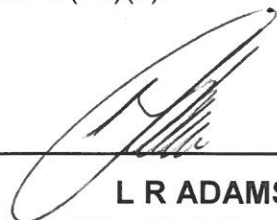
failed. The said application for rescission should therefore, in my judgment, have been refused by Makume J on the 4th of September 2018.

[20]. Accordingly, the urgent interim order granted by Makume J on the 4th September 2018 must be reconsidered and replaced with an order dismissing the rescission application. That order should be set aside.

Order

In the result, I make the following order:-

1. The Order of this Court of the 4th September 2018 by Makume J be and is hereby reconsidered in terms of Uniform Rule of Court 6(12)(c), set aside and replaced with the following order:-
 - '1. The urgent application of the first, second and third applicants for rescission be and is hereby dismissed
 2. The first, second and third applicants, jointly and severally, the one paying the other to be absolved, shall pay the cost of the first, second and third respondents relative to the rescission application'.
- 2 The first, second and third applicants, jointly and severally, the one paying the other to be absolved, shall pay the cost of the first, second and third respondents of this application in terms of rule 6(12)(c).



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON: 14th September 2018
JUDGMENT DATE: 18th September 2018
FOR THE APPLICANTS: Mr Jacques Brenkman
INSTRUCTED BY: FVS Attorneys
FOR THE RESPONDENT: Mr Kabir Khan
INSTRUCTED BY: Kabir Khan Attorneys