REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 57562/13

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

In the matter between:- DATE: 12/6/2015

CARENET PROPERTIES (PTY) LTD Applicant

and

GUDRUN HANS BOSHOFF N.O. Respondent

JUDGMENT

KOOVERJIE AJ:

A. <u>NATURE OF THE APPLICATION</u>:-

1. This is an application for the rescission and setting aside of the default judgment granted by the Registrar against the Applicant on 3 December 2013. In addition the Applicant seeks condonation of the late filing of the application.

2. This application has been brought under Rule 42, *alternatively* the common law, *further alternatively* Rule 31 (2) (b) of the Uniform Rules of Court.

3. Although the Applicant launched the application, this matter was set down for hearing by the Respondent. No reasons were proferred by the Applicant why it failed to pursue the matter. Counsel for the Respondent reiterated that this application was just a ploy to delay the finalisation of this matter and particularly to finalise the deceased's estate.

B. <u>THE PARTIES</u>:-

4. The Applicant, Carenet Properties (Pty) Ltd will be referred to as ***"Carenet"***. The Respondent, Gudrun Hans Boshoff N.O. referred to as ***"the executor"***; and Ms H Hall, the deceased.

C. **<u>BACKGROUND</u>:-**

5. The dispute emanates from an agreement between Carenet and the deceased. On 9 September 2010, the Carenet and the deceased concluded a written agreement on the basis that the deceased was granted the right to occupy the property known as Unit 4, De Groenkloof in return for payment of a loan in an amount of R360 000,00 (referred to commonly as a ***"life right agreement"***).

6. The deceased's right to occupation would automatically terminate on the date of her death.

7. The deceased passed away on 20 November 2011.

8. On 3 September 2013 the executor furnished a notice of termination of the agreement in writing and demanded that Carenet makes payment in the amount of R360 000,00.

9. Summons was issued and granted against the Applicant.

D. **<u>THE DISPUTE ON THE MERITS</u>:-**

Without being required to go into detail regarding the merits in this matter, it is pertinent to highlight the salient issues which related to the interpretation of the agreement.

- **<u>Applicant's case</u>**

10. Essentially the Applicant submitted that the cause of action in the Respondent's particulars of claim cannot be sustained, hence the default judgment was therefore granted erroneously.

11. The wording of the agreement is Afrikaans. The parties however differ on the interpretation of the various clauses. The Applicant's version is as follows:

    11.1 Clause 10 of the agreement stipulates that Carenet shall repay the loan within 30 days of termination of the right of occupation provided that the deceased had <u>concluded a new agreement with a third party</u> in terms of which such third party is granted a right of occupation of the property against advancement of a new loan;

    11.2 If the <u>deceased's right of occupation of the property terminates within two years</u> after the date of the agreement, Carenet shall repay 93% of the loan amount to the deceased's estate;

    11.3 Clause 15 is only applicable if clause 1.18 has been complied with (which is a resolutive condition);

    11.4 In terms of clause 1.18 the dissolution of the agreement is conditional on the sale and transfer of the deceased's property at 4 Marmanet, Bergrivier, Kempton Park on or before 9 November 2010 (***"Marmanet property"***).

(my emphasis).

12. The deceased passed away on 20 November 2011, which was less than 2 years after the date of the conclusion of the agreement. The Marmanet property was only transferred on 11 November 2010. In other words the full effect of the sale and transfer had not occurred.

13. Furthermore the deceased's right of occupation was terminated on the date of the death of the deceased if one has regard to clause 2.5 of the agreement.

14. At no stage was the right to occupation to the unit sold to a third party, neither had Carenet received any new loan amount in respect of such sale.

15. In summaration, Carenet is therefore not required in terms of the contract to repay the original loan amount to the deceased's estate in that:

    15.1 The deceased's right of occupation ended on the day she passed away and the Respondent was only entitled to the repayment of the loan upon the resale of the life right of the unit to a third party (as envisaged in clause 10 of the agreement);

15.2 Clause 15 finds no application in this agreement. It would only be applicable if clause 1.18 was complied with;

15.3 It is common cause that the Marmanet property was not transferred by the 9th of November 2010.

- **The Respondent's case**

16. The Respondent's interpretation of the agreement is contrary to the Applicant's. The salient points of departure are:

16.1 It cannot be that clause 15 is only applicable if clause 1.18 has been fully complied with. All that clause 15 states is that the resolutive condition shall be applicable if clause 1.18 is in fact completed (***"filled in"***) in the agreement;

16.2 The Respondent's claim was premised on the following: Claim 1

- The deceased passed away on 30 November 2011, being less than two years after the date of the agreement;

- The right of occupation of the deceased had as a result automatically terminated;

- Carenet had concluded a new agreement with a third party in terms of which said party was granted a right of occupation of the property against the advancement of a ***"new"*** loan.

16.3 In the alternative: Claim 2

- Marmanet was not sold and transferred by 9 November 2010 and the deceased did not waive the resolutive condition;

- The Respondent had in terms of clause 15.3 of the agreement given notice to terminate the agreement and after cancellation to claim payment of the amount of R360 000,00;

- On 30 September 2013 the Respondent had in writing given notice of such termination.

17. On the papers before this Court the only other agreement is a MOU entered into with Aldem Healthcare (Pty) Ltd, C'EST LA Vie Trust and Carenet. Such agreement does not appear to be a third party agreement as envisaged in the agreement. This argument was raised by the Applicant. This in itself creates a dispute as to whether a third party agreement was in place.

18. It is therefore apparent that a dispute in respect of the interpretation of the agreement exists which deserves to be ventilated at a trial.

E. **CONDONATION**:-

19. In terms of Rule 31 (2) (b), an application for rescission must be served and filed within 20 days of obtaining knowledge thereof.

20. If such application is not brought timeously, then the Applicant can seek relief in terms of Rule 27 where the Court will exercise its discretion, upon good cause shown, to condone such non-compliance.

21. Having heard the parties, the Applicant demonstrated it was four days late and proferred a sufficient explanation to the effect that from 13 March 2014 to 17 April 2014 it had consulted with its attorney, attempted to locate the Court file, instructed counsel to draw the papers and eventually file same.

22. Counsel for the Respondent contended vehemently that good cause has not been shown, particularly in that the Applicant has failed to furnish a reasonable explanation and attempted to mislead the Court in that:

    22.1 the Applicant was aware of the default judgment already on 11 March 2014 by way of correspondence from its attorney;

    22.2 the application is a ploy to delay the Respondent's claim and thereafter finalise the deceased's estate.

23. Even if the Respondent's version is taken into account, then the Applicant was 6 days late in filing this application.

24. A further factor in not having knowledge of the action proceedings was that the summons was served at the old address which is set out in the agreement.

24.1 The Respondent contended that the summons was served in accordance with clause 1.1 and 14.6 of the agreement, at the chosen address;

24.2 The Applicant contended that the summons should have been served on the chosen *domicilium citandi et executandi* of the Applicant. This cannot be so as the agreement made provision that an address be listed whereby all notices would be served, which would have included the summons.

25. In any event, this takes the matter no further. It is accepted that the Respondent through its director, Nellie van Staden, only became aware of the matter after default judgment was granted. In light thereof, the Court accepts therefore that the Respondent could not have been in wilful default in failing to defend the matter.

26. The Court is satisfied that a valid and reasonable explanation was furnished as to why there was default on the Respondent's part. This is not such a case.

27. This Court appreciates that condonation is an indulgence which may be refused in cases of flagrant breaches of the Rules[1].

F. ***BONA FIDE* DEFENCE:-**

28. For the Applicant to make out a case that the defence is *bona fide* it must at least make out a *prima facie* case which, if established at the trial would entitle him to the relief sought.

29. In this application therefore, it is not expected of the Applicant to fully deal with the merits of the case and produce evidence that the probabilities are actually in its favour.

30. This Court is not expected to scrutinize too closely whether the defence is well founded. The essential enquiry is whether "*prima facie,* ***there are sufficient reasons for allowing the defendant to lay before Court facts he thinks necessary to meet the plaintiff's claim"***. Where the defendant had never acquiesced in the plaintiff's claim, but persisted in disputing it, the Court should be slow to refuse him an opportunity of having his defence heard.

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[1] ***Tshivhase Royal Council v Tshivhase*** **1992 (4) SA 852 (A) at 859 E-F**

31. The object of rescinding a judgment is ***"to restore a chance to air a real dispute"[2].***

32. This application for rescission was brought in terms of Rule 31 (2) (b) and in the alternative in terms of Rule 42 (1) and the common law respectively. This Court however has a discretion whether to grant a rescission in respect of either of the aforesaid provisions.

33. In the premises this Court finds that there is, particularly in respect of the interpretation of the agreement an issue. In light thereof it should be ventilated between the parties. There is a *prima facie* case made out on the papers.

G. COSTS:-

34. The Respondent particularly argued that a punitive cost order should be granted against the Applicant as this matter was launched for the sole purpose of delaying the finalisation of the deceased's estate and to frustrate the Respondent.

35. The Applicant's counsel contended that it has a justified defence and the delay was a mere 4 days. A reasonable explanation for the cause of the delay was furnished in that regard.

[2] ***Lazarus v ABSA Bank*** **1999 (2) SA 782 (W)**

36. The issue of costs are in the discretion of the Court which is a judicial discretion must be exercised on grounds upon which a reasonable person could have arrived at. In light thereof the Court is obliged to weigh various issues which may have a bearing on the question of costs and consequently make an order which is fair and just.

37. Having regard to the findings in respect of the delay and the probable prospects of success on the part of the Applicant, a fair cost order would warrant that each party should bear its own costs.

H. **<u>CONCLUSION</u>:-**

In the premises this application is rescinded and the condonation of the late filing of the application is granted.

I. **<u>ORDER</u>:-**

The following order is made:

(1) Condonation of the late filing of the application is granted;

(2) The default judgment granted against the Applicant on 3 December 2013 is rescinded;

(3) Each party to pay its own costs.

H K KOOVERJIE
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:	**8 June 2015**
JUDGMENT DELIVERED:	**12 June 2015**
FOR THE APPLICANT:	**Adv C J Welgemoed**
ATTORNEYS FOR THE APPLICANT:	**Carrim Attorneys**
FOR THE RESPONDENT:	**Adv N Breytenbach**
ATTORNEYS FOR THE RESPONDENT:	**Froneman Roux & Streicher**