



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>01 MARCH 2013</u>	
DATE	SIGNATURE

CASE NUMBER: 19597/2011

1/3/2013

In the matter between:

SMILIN' THRU CHALETS (PTY) LTD

APPLICANT

And

BRAKFORTEING GAME FARM (PTY) LTD

1ST RESPONDENT

THE SHERIFF FOR THE DISTRICT OF

POTCHEFSTROOM

2ND RESPONDENT

THE REGISTRAR OF DEEDS

3RD RESPONDENT

HIRCHIWOTZ FLIOIS ATTORNEYS

4TH RESPONDENT

In re:

BRAKFORTEIN GAME FARM (PTY) LTD

PLAINTIFF

And

SMILIN' THRU CHALETS (PTY) LTD

DEFENDANT

JUDGMENT

MAVUNDLA J

- [1] The applicant (defendant in the main action) brings an application for rescission of judgment granted against it by default on 29 November 2011 for payment of an amount of R8 756 814. 10 together with interest at the rate of 15.5% on the aforesaid amount a *tempore morae* to date of final payment in full with taxed costs of suit.

- [2] The application is also for a declaratory order setting aside the sale in execution of the immovable property known as

FARM 476 PORTION 10, situated at Portion 10 of the Farm Brakfontein, Foschiville, Registration Division I.Q. North-West Province, measuring 228, 0858 hectares, held under Title Deed T.17353/ 1996, sold by the second respondent to the first respondent.

- [3] The application is only opposed by the first respondent.

- [4] The applicant in its affidavit contended that the application is being brought in terms of Rule 31(2)(b) alternatively in terms of Rule 42. Indeed an application for rescission for a judgment granted in the absence of the other party may be brought in terms of either of the aforesaid rules and also under common law.

[5] Under Rule 31(2)(b) the applicant must¹:

- (a) give reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.
- (b) show that his application is *bona fide* and not made with the intention of merely delaying plaintiff's claim.
- (c) show that he has a bona fide defence to the plaintiff's claim. It suffices if he can make a *prima facie* defence by setting out facts, if established during the trial, would entitle him to his relief he seeks.

[6] Rule 42(1) provides that:²

"1 The court may, in addition to any other powers it may have, *mero motu* or upon application of any party affected, rescind or vary:

¹ Superior Court Practice at B1-202

² Superior Court Practice at B1-306.

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.”

[7] The application for rescission can also be brought under common law. The fact that the application for rescission is brought under any of the aforesaid mechanisms does not preclude the Court granting rescission under either of the other mechanisms provided the requirements of the relevant channel under which the relief is sought are met; vide *Mutebwa v Mutebwa and Another* 2001(2) SA 193 (Tk) at 198C-E.

[8] It is trite that the grant or refusal of an application for rescission is a matter within the Court’s discretion, with the proviso that the applicant, who bears the *onus*, must satisfy the Court that:

(i) "There was reasonably satisfactory explanation why the judgment was allowed to go by default" (good cause);

(ii) "On the merits there is a *bona fide* defence, which, *prima facie*, carries some issue which is triable and has some prospects of success".

[9] It is common cause that the summons *in casu*, was first served on 31 March 2011. The applicant being a company, the service was defective in that it merely provided that the summons was served personally, without providing the names of the person upon whom the service was effected, as required in terms of Rule 4 (1)(a)(v). Whereas the applicant in its papers had initially contended that, due to the defective service, the entire process flowing from such defective service was null and void *ab initio* and for that reason only the default judgment and the subsequent writ of execution should be set aside. This contention would have

been correct³ but for the very fact that the summons was subsequently properly served upon a Mr. Johnny Breedt, who is a local co-director of the applicant on 19 May 2011.⁴ A notice of intention to amend was served on Mrs Cyolola Makume at the applicant's address on 24 October 2011⁵. A warrant of execution was served upon Mrs Kauffelo at the applicant's address on 1 March 2012⁶. The applicant's counsel, wisely so in my view, did not rely on the argument of defective service of the summons, as was contended in the papers.

[10] The deponent, Mr. Edmund Marc De Run, to the affidavit of the applicant is one of the other two Malaysians directors of

³ *Vide Friand v Nothmann* 1991 (3) SA 837 (W) at 839H; *Topol v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 648-649F.

⁴ Annexure "PJV1" paginated page 141.

⁵ Annexure "PJV2" paginated page 142.

⁶ Annexure "PJV6" paginated page 146.

the applicant. He stated that the summons was neither brought to his nor the other Malaysian director's attention by Mr. Breedt. They only became aware of the sale in execution on or about 17 May 2012 as per email in annexure "SMR08" originating from Jonny Breedt, wherein the latter states that he heard a rumour of a sale (in execution I suppose) at the applicant's place and that he would not be in a position to attend because he was far away. It begs the question why Mr. Breedt would be talking about a rumour of a sale in execution and not mention the service of the summons upon him. ⁷

[11] In my view, there was a duty on Mr. Breedt, as one of the applicant's directors, to avert any potential economic loss to the applicant, as such he ought to have informed the Malaysian directors of the service of the summons, which it seems he failed to do.⁸

⁷ Vide annexure SMR11 at paginated 86, which is the Minutes of the Director's meeting of the applicant held on 21 MY 2012.

⁸ Vide annexure SMR 11 supra.

[12] I take note of the fact that the amounts claimed *in casu* run into several millions of rand. *In casu*, a local director Mr. Breedt did not, it would seem, lift a finger to avert a colossus claim being obtained by default against the company is, in my view, a circumstance which qualifies itself to be regarded as a good cause, for the Court to accept, when it being raised as such by the company to bring an application for rescission of the default of judgment. I am disinclined to be persuaded by the submission made on behalf of the first respondent that it should not be prejudiced by any remissness overtly or otherwise, if any, on the part of a director, as *in casu* and that the applicant must bring a damages claim against such a director. That route, in my view, would be too laborious and tortuous. Allowing the rescission, would serve a better purpose because all the relevant issues, including the conduct of Mr. Breedt, can be speedily interrogated during the trial *in casu*. I am therefore satisfied that the applicant has discharged the *onus* resting on it to show that there was good cause why the judgment was obtained against it by default.

[13] When the relief is sought under Rule 31(2)(b), the application must be brought within 20 days from the date the applicant became aware of the default judgment. According to Mr. De Run it was only on the 17 May 2012 that the warrant of execution was brought to his attention. His founding affidavit was deposed to on 26 June 2012. The respondent did not raise the issue of non-condonation. The application was brought just few days out of time, a delay which is very negligible and can be *mero motu* condoned by the Court, as I do. I am satisfied that the applicant has demonstrated that he has a *bona fide* defence, which, *prima facie*, carries some issue which is triable and has some prospects of success.

[14] The first respondent's claim arises from alleged undue enrichment of the applicant's immovable property as the result of amounts expended by the first respondent, as the successor *bona fide* possessor alternatively *bona fide* occupier of the resort situated on the property described as portion 10 of the farm

Brakfontein as from 4 December 2009, and by the predecessor in the amount of R599,843. 57 (annexure "BF2" and by Marley, Marley Investments 7 (Pty) Ltd, (Marley) the predecessor *bona fide* possessor alternatively *bona fide* occupier of the resort situated on the property described as portion 10 of the farm Brakfontein until before 4 December 2009 in the amount of R8, 156, 970. 53 (annexure "BF1"), both amounts totalling r8, 756,814.10.

[15] The applicant contended in its affidavit that ex facie the judgment of Goody AJ, the default judgment was granted without any evidence, and that regard being had to the cause of action evidence ought to have been heard, which was not and therefore it was erroneously granted.

[16] The applicant further disputes the amounts allegedly expended by the first respondent and Marley. With regard to the merits the applicant contended that there was a joint venture between itself and Marley that they would contribute towards development of the game farm and share in the profits of the

development. In terms of the joint venture agreement, whatever Marley expended towards the development would be repaid from the proceeds of the development. The amounts claimed by or on behalf Marley were not due and payable. Further, the amounts claimed are disputed, for various reasons, *inter alia*, were not incurred; Marley repudiated the joint venture by not performing.

[17] At this stage of the proceedings, this Court need not decide the veracity or otherwise of the defence raised. In my view, the applicant has disclosed defence which *prima facie*, carries some issue which is triable and has some prospects of success on trial.

[18] There mere fact that I have not specifically referred to the counterargument raised on behalf of the first respondent should not be construed to mean that I have not considered same. The point is that I have not been persuaded otherwise to the views I have expressed herein above.

[19] I am of the view that rescission of the default judgment should be granted. There is however a further relief sought, and that is the cancellation of the sale in execution. The first respondent is the purchaser of the relevant property involved *in casu*, measuring 228.0859 hectares for an amount of R3.5 million. The applicant contended that the fair market value for the said property was an amount of R5.5 million. It would seem that the property was undersold. There is a serious allegation of collusion made against and concerning Mr. Breedts, the local director, regarding none full disclosure to the other external directors and not acting in the best interest of the applicant. If these allegations are correct, and seen from the very fact that the first defendant is the very purchaser of vast tract of land at an undervalued price, it would be fair that these allegations be investigated during the trial in this matter. Granting the relief sought that the sale in execution be cancelled, would, in my view, not prejudice the first respondent because the property would simply revert to the applicant. Should on trial the applicant fail in its defence and the first respondent be successful with its claim, it would be at liberty to attach the relevant

property and liquidate it. I am therefore of the view that the further relief of cancellation of sale should be granted.

[20] With regard to costs, it is trite that the cost follow the event. The first respondent in the circumstances must bear the costs of this application as prayed for.

[21] In the result it is hereby ordered:

1. That the judgment granted in case number 19597/2011 on 29 November 2011 is hereby rescinded;
2. That the sale in execution by the second respondent, where the property known as FARM 476 PORTION 10, situated at Portion 10 of the Farm Brakfontein, Foschville, Registration Division I.Q. North West Province, measuring 228, 0858 hectares, held under Title Deed T.17353/ 1996, was sold to the First Respondent is hereby set aside;
3. That the First Respondent pays the party and party costs of this application under Part B.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING : 28 FEBRUARY 2013

DATE OF JUDGMENT : 01 MARCH 2013

APPLICANT'S ATT : EY STUART INC.

APPLICANT'S ADV : ADV. T.A.L.L. POTGIETER

1ST RESPONDENTS' ATT : HIRSCHOWITZ FLIONIS ATTORNEYS

1ST RESPONDENTS' ADV : ADV. R. MICHAU SC

with ADV. S MENTZ (Ms.)