

IN THE KWAZULU-NATAL, HIGH COURT PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Appeal Case No: AR 539/09

In the matter between:

DANIEL RULOFF JACOBS	FIRST APPELLANT
DINA ELIZABETH JACOBS	SECOND APPELLANT
and	
UPWARD SPIRAL 1196 CC	RESPONDENT

JUDGMENT

Delivered on

MNGUNI J

[1] This is an appeal against a judgment granted in favour of the respondent cancelling the lease agreement between itself and the appellants. The appellants were married to each other and rented a dwelling of the respondent situated on the remainder of Erf 151, Shelly Beach, Port Shepstone. In September 2007 the respondent issued summons against the appellants in the Port Shepstone Magistrate's Court seeking an order cancelling the lease agreement between the appellants and itself in respect of the said dwelling. For ease of reference, I shall refer to the parties to this appeal by their respective designations in the court *a quo*.

[2] The material averments in the particulars of claim provide:

The First and Second Defendants are married to each other, and are joint tenants of a dwelling on the Remainder of Erf 151, Shelly Beach.

5.

There is also a further person occupying a separate dwelling on the said premises, with the consent of the Plaintiff,

6.

On or about the first week of September 2007, the First Defendant damaged the property of the Plaintiff, being the bathroom of the dwelling which is occupied by the other person referred to above, in that the First Defendant demolished the bathroom to the extent that it could not be used by the said occupier.

7.

The First Defendant has therefore failed to use the premises in such a way that he does not interfere materially with the ordinary use and enjoyment of the premises occupied by other persons.

8.

The aforementioned conduct of the First Defendant is a breach of a contract of a material nature, and as such, the Plaintiff is entitled to cancel the agreement.

9.

Since the First and Second Defendant (sic) are married, and are joint tenants, cancellation of the agreement will (sic) effect both the First and Second Defendant (sic)."

[3] On 18 October 2007 the defendants entered an appearance to defend the action. Because the *dies* for the filing of the defendants plea had expired without them filing the same, the plaintiff, on 16 November 2007, delivered a notice in terms of Rule 12(1)(b)(i) of the Magistrates' Courts Rules of Court (Rules of Court) calling upon the defendants to deliver their plea within five (5) days of the delivery of the said notice, failing which the plaintiff intimated that it would lodge with the clerk of the court a written request for judgment in the same manner as when the defendants have failed to enter appearance to

defend.

[4] On 26 November 2007 the defendants filed their plea to the plaintiff's particulars of claim and pleaded as follows to paragraph 6 thereof:

"Save to admit that the First Defendant damaged a dilapidated structure which was used as a toilet and which was emitting an unbearable stench which the Plaintiff despite requests had failed and neglected to remove or renovate, the contents of the paragraph are denied and Plaintiff is put to the proof thereof."

[5] The defendants' plea galvanised the plaintiff into raising an exception on same averring that the same was a bare denial and did not disclose any defence to its action. The exception was argued before Magistrate Munillal who on 12 December 2007 ruled as follows:

"The court after a careful and thorough consideration of the papers and the vive (sic) voce arguments has decided to uphold the exception provisionally pending the filing of the original deed of lease. The recipients (sic) are ordered to pay the costs of the exception which costs are to include the costs of preparation."

[6] On 28 February 2008 Stephanus Esaias Terblanche, in his capacity as a member of the plaintiff, filed an affidavit setting out the reason why the original lease agreement could not be filed. On the same day of the filing of his affidavit, Magistrate Munillal confirmed his ruling with costs.

[7] On 7 March 2008 the defendants' legal representative filed a notice in terms of Rule 51(1) of the Rules of Court with the clerk of the court to which Magistrate Munillal replied on 12 March 2008. The defendants thereafter did

not pursue the matter and the plaintiff applied for default judgment against them. On 29 April 2008, the court *a quo* granted the default judgment cancelling the lease agreement between the parties and directed that the costs were to be taxed. On 29 May 2008, the defendants filed a notice notifying the plaintiff that they intended to amend their plea dated 9 November 2007. The said notice of intention to amend was filed after the default judgment in favour of the plaintiff had already been granted in the matter.

[8] Faced with that reality, the defendants brought an application in terms of Rule 49 of the Rules of Court accompanied by an application for condonation seeking an order to rescind the judgment granted in favour of the plaintiff on 29 April 2008. The plaintiff opposed the applications and on 2 September 2008 the matter came before the Magistrate Maharaj who dismissed both applications with costs. On 5 September 2008 the plaintiff filed a request for reasons for judgment in terms of Rule 51(1) of the Rules of Court and Magistrate Maharaj furnished her reply on 18 September 2008.

[9] The matter was then in limbo until 15 December 2008 when the defendants noted an appeal against the judgment of Magistrate Maharaj dismissing the applications for condonation and the rescission of the default judgment granted in favour of the plaintiff on the following grounds:

“1.

The Judgment is against the evidence and the weight of the evidence.

2.

The learned Magistrate erred in not granting the Application for Condonation for the

Rescission Application and the learned Magistrate further erred in not finding that there was merit in the Defendants' defence and that the Defendants' had a bona fide defence in law.

3.

The learned Magistrate erred in not taking into account that the delay in bringing the Application for Rescission and the Application to amend the Defendants' Plea was not due to the Defendants' actions but was due to the delays by the Defendants' Attorney and in the circumstances the Defendants' cannot be blamed for the delays on the part of the attorney.

4.

The learned Magistrate erred in not finding that the Defendants' had a good defence in law. The learned Magistrate erred in not taking into account the Defendants' amended plea which was served on the Plaintiff's Attorney on the 23 May 2008 and which was filed at Court on the 29 May 2008 prior to the Defendants' becoming aware of the Default Judgment being obtained in the matter. This amended plea fully set out the Defendants' defence which is a good defence in law."

[10] It would appear from the plaintiff's heads of argument and in the address before us by Mr *Crampton* for the plaintiff, that on 11 December 2009 the defendants served an amended notice of appeal dated 3 December 2009 on the plaintiff. The record of the proceedings in our possession does not contain such amended notice of appeal.

[11] On 15 December 2009 the defendants filed a second amended notice of appeal in terms of which they intimated that they intended to appeal not only against the judgment granted on 18 September 2008 but also against the ruling of Magistrate Munillal delivered on 28 February 2008 upholding the exception with costs and the default judgment he granted against the defendants on 29 April 2008. The first and second amended notices did not comply with Rule 55A of the Rules of Court. In each of the purported amended notices of appeal no application was made for the desired

amendment.

[12] In so far as the second amended notice of appeal is concerned, it is to be observed that the exception brought by the plaintiff was predicated on the ground that the defendants' plea was a bare denial of liability and did not disclose any defence to the plaintiff's action. That a decision upholding such an exception is not appealable has been authoritatively pronounced in *Trope & others v South African Reserve Bank* 1993 (3) SA 264 (A). Importantly, the defendants pursuant to the ruling upholding the exception, attempted to amend their plea which in my view, was a clear indication that they elected to abide the decision of the court *a quo*.

[13] It is common cause that the defendants brought an application to rescind the default judgment entered against them on 29 April 2008 which was subsequently dismissed with costs on 2 September 2008. The judgment of 2 September 2008 dismissing the application for the rescission of the default judgment is the subject matter of the notice of appeal dated 15 December 2008 and therefore, to deal with it separately would be superfluous. It therefore follows that the appeal falls to be decided on the basis of the notice of appeal dated 15 December 2008.

[14] The first issue which arises is whether the court *a quo* had jurisdiction to grant the order for cancellation of the lease agreement. Mr *Seedat*, for the defendants, contended that the order sought by the plaintiff is a claim for specific performance and that the plaintiff did not seek an alternative prayer

for damages. He submitted that the court *a quo* did not have jurisdiction to hear the matter in the first place as it was irregular *ab initio*. Not so, contended Mr *Crampton*. He argued that the order sought and granted in favour of the plaintiff is the very opposite of a claim for specific performance. There is, in my view, considerable substance in Mr *Crampton's* submission. It seems to me that the cancellation of the agreement is an election which the aggrieved party makes to either insist on performance as set out in the agreement or to cause the agreement to terminate. Watermeyer AJ in *Segal v Mazzur* 1920 CPD 634 at 644 made the following observation:

“Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so”.

Ordinarily an order of cancellation nullifies the duty to perform in terms of the contract and any resultant loss is usually dealt with by way of a claim for damages. Essentially, cancellation deprives the party of the option to claim specific performance. The court *a quo* had by virtue of S 29(1)(g) of the Magistrates Court Act 32 of 1944 a general jurisdiction in respect of actions where the value of the subject of the dispute is within the jurisdictional limit prescribed in the Government Gazette. I am unable to find any substance in Mr *Seedat's* contention on this issue and it is therefore unsustainable.

[15] The second issue raised by Mr *Seedat* was that because a request for default judgment filed by the plaintiff on 21 April 2008 contained a typographical error in that it read that ‘the plea was upheld whereas it ought to

have been stated that the exception was upheld,' the court *a quo* ought not to have entered default judgment against the defendants. I do not share the same sentiments as those expressed by Mr *Seedat* on the issue. I am in agreement with Mr *Crampton's* observation that the proper reading of the request by any lawyer would have enabled him to discern the real intention of the request. The error, therefore, does not constitute a material defect in the request. The third issue raised by Mr *Seedat* was that when Magistrate Munillal granted the ruling upholding the exception to the defendants plea on 28 February 2008, he did not specify the time period within which the defendants were required to file their amended plea. Generally when an exception is upheld, the unsuccessful party is granted leave to deliver an amended pleading within a stated period of time. *In casu*, the Magistrate did not do so and he also did not refuse such leave nor did he grant judgment in the action when upholding the exception.

[16] Mr *Crampton* argued, correctly in my view, that until 29 April 2008, when the default judgment was granted, it was open to the defendants to apply or even to give notice of their intention to amend their plea and the failure by the defendants to take any timeous steps to remedy the situation entitled the plaintiff to apply to court for judgment. He continued and argued that the appropriate and obligatory time for the defendants to have made such an application or to give such notice, was once the ruling was granted upholding the exception.

[17] On a perusal and consideration of the record, it is revealed that the

defendants ought to have taken steps to amend their plea on 12 December 2007, when the exception was upheld, or within a reasonable time thereafter. It is to be observed that by 29 April 2008, more than four months had passed since the date that the exception was upheld and more than a month had passed since the court *a quo* had supplied reasons for its ruling in terms of Rule 51(8). On a consideration of all of these circumstances, I am driven to conclude that the only plausible inference is that until 29 April 2008 the defendants did not intend to amend their plea and it was competent for the Court *a quo* to enter default judgment against the defendants on that date.

[18] The final issue raised was by Mr *Seedat* was that the court *a quo* erred in refusing the rescission of the default judgment granted against the defendants. It is common cause that it was open to the defendants to apply for the rescission of the default judgment granted against them provided that sufficient cause had been shown. Miller, JA defined the term ‘sufficient cause’ in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765 A-C

” The term “sufficient cause” (or “good cause”) defies precise or comprehensive definition, for many and various factors require to be consideredBut it is clear that in principle and in the long standing practice of our Courts two essential elements of “sufficient cause” for rescission of a judgment by default are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success”.

Fannin J in *Kajee & others v G & G Investment and Finance Corporation (Pty) Ltd* 1962 (1) SA 575 (D) at 577 E-G refined the principle as follows:

“It seems to me that what is required in a case such as this is that the applicant must explain his default. He cannot simply claim the Court’s indulgence without giving an explanation. The explanation must be reasonable in the sense that that phrase was used in *Naidoo’s* case and *Grant’s* case, *supra*, namely that it must not show that his

default was wilful or was due to gross negligence on his part. If explanation passes that test, then the Court will consider all the circumstances of the case, including the explanation, and will then decide whether it is a proper case for the grant of indulgence.”

[19] The defendants explained their default in paragraphs 4 and 5 of the first defendant’s affidavit in support of the application for rescission as follows:

“4.

On the 11th December 2007 the application for exception was heard and the Magistrate reserved his judgment. In his ruling dated 12th December 2007 the exception was provisionally upheld pending the filing of the original deed of lease. The Magistrate finally upheld the exception in his ruling dated 28th February 2008 in which he made reference to an affidavit pertaining to the original deed of lease having been filed on the 28th February 2008. No copy of the said affidavit was delivered on my attorneys. I was informed by my attorney that she was going to request reasons for the magistrate’s decision. On the 7th March 2008 my attorney filed a Request for reasons for Judgment. The Magistrate’s reasons dated 12th March 2008 were received.”

5.

No directions were received from the presiding officer as to what should be then happen in as far as the pleadings were concerned after the exception was upheld.”

[20] The court *a quo* considered and concluded as follows regarding the defendants’ explanation:

“The reasons are set out in paragraph 7 of the supporting affidavit. The applicants state that they were traumatized and that first defendant did not attend to the matter within the stipulated period as “I have been trying to spend as much time as possible with my wife while at the same time do a few piece jobs in order to bring in a little income for our survival. I have not had the opportunity to meet with my attorney and when I did manage to go to her office, I did not find her there”. This had become a matter of urgency but was not treated as such by either the applicants or their attorney. If they were traumatized this would have been a priority

and nothing would have been more important than having the judgment rescinded. It is so that the Court must look at the facts submitted by the applicants and the facts gleaned from the circumstances to see whether a satisfactory explanation is given. Clearly, in this instance, the reasons are far from satisfactory and are not satisfactory in terms of the rules. The applicants should have set out in detail why it was that they were unable to meet their attorney, how many times that they had gone to see her, whether they had left messages, etc.”

[21] I am unable to fault the reasoning and conclusion reached by the court *a quo* and can find no misdirection on the issue. It is so that even if one takes a benign view, the inadequacy of this explanation alone may well have justified a refusal of rescission, unless, perhaps, the weak explanation is cancelled out by the defendants being able to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success (see *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532 C-F). It was therefore apposite for the court *a quo* to determine whether the defendants’ explanation for being in default when finely balanced with the circumstances of their proposed defence carried a reasonable or good prospects of success on the merits which might have tipped the scale in their favour in the application for rescission. Brink J in *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 – 7 formulated the requirement as follows:

“It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.”

In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11 Jones AJA added the following:

“With that as the underlying approach the Courts generally expect an applicant to

show good cause(c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success."

[22] It therefore follows that the prospects of success of the defendants defence ought to have been measured against the above exposition of the law. The defendants' defence is set out in paragraph 9 of the first defendant's affidavit as follows:

"I believe that I have a bona fide defence in this matter. In the Plaintiff's Particulars of Claim it avers that there was a breach of contract of a material nature. However there no averments are made about the contract itself and who were the parties to it. Further there was no lease agreement between my wife and I on the one hand and the Plaintiff on the other. Further even if the court were to find that there was a breach on my part I will argue that the breach was not of such a nature that it constituted a material which would warrant the cancellation of the lease."

The court *a quo* reasoned and concluded on the proposed defendants defence as follows at pages 2-3:

"In paragraph 6 of the supporting affidavit, the applicants indicate that their attorney was waiting for directions from the presiding officer after he upheld the exception. That these were not forthcoming but that she nevertheless applied for an amendment to the plea. What he fails to set out is that the exception was upheld on 28.02.2008 and that she attempted to file the notice of amendment to the plea some three months later. This is not an excuse and only reflects the tardiness of the attorney. The onus was on her to acquaint herself with the rules and to ascertain what steps she had to take. No leave to amend was granted and she therefore had to make an application in terms of Rule 19 (19). She could have established this by approaching the presiding officer, by reading the rules, by approaching her colleagues, etc. She, however, did nothing.

A request for reasons was filed on 07.03.2008 and although the reasons were handed down on 12.03.2008, the matter was not taken further.

Applicants and their attorney state that approximately three months after the exception was

upheld, when the attorney attempted to file a notice to amend the plea, that it came to their notice that default judgment had been applied for and had been granted on 29.04.2008.

In keeping with the lax attitude shown throughout the proceedings, the attorney once again waited some two months before she filed the application for rescission of judgment. She was blatantly out of time and obviously had to file an application for condonation. This application had to set out substantial and satisfactory reasons for the delay.”

[23] The defendants’ plea contains an admission that the first defendant damaged the plaintiff’s bathroom. It was fair and reasonable for the court *a quo* to note that this tends to establish that the defendants committed the breach in question which entitled the plaintiff to cancel the lease agreement between the parties. The following observation of the court *a quo* at page 4 is pertinent in this regard:

“In casu, the first applicant admitted that he damaged the bathroom. This went to the root of the lease agreement. The Court was of the view that the defence raised was not justifiable or a bona fide defence and concluded that they did not have a prospect of success on the merits.”

[24] In my view, it was fair and reasonable for the Magistrate to conclude that the case for rescission was not strong and that, for the defendants to deserve condonation for the late filing of the rescission application, they had to set out substantial and satisfactory reasons for the delay. In this regard, the delay between 29 April 2008, when defendants became aware of the default judgment to 4 August 2008, when the founding affidavits were signed, is hardly explained.

[25] I am satisfied that the court *a quo*’s decision to refuse the condonation

and rescission applications was anchored on the second foundation. It is trite that when a magistrate grants or refuses condonation and/or grants an application for rescission he or she exercises a judicial discretion. A court of appeal can only interfere with the exercise of such discretion in circumstances where the magistrate committed a misdirection or where he made a decision that would not have been made by a reasonable decision maker. This is not such a case.

In the result, I propose that the appeal be dismissed with costs.

MNGUNI J,

I agree, it is so ordered

KOEN J

Date of Hearing : 26 February 2010

Date of Judgment : 27 February 2012

Counsel for the Applicants : Advocate A. S. Seedat

Instructed by : Shaheen Seedat & Company

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