



IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

NOT REPORTABLE

OF INTEREST TO OTHER JUDGES

CASE NO: 56990/07

DATE: 2009-02-16

**In the matter between
TOPIGS SA (EDMS) BPK and
BAPSFONTEIN BOERDERY BK**

JUDGMENT

RAULINGA, J: The respondent in this matter obtained judgment by default after summons was issued. The applicant brings an application to this court for rescission of the said judgment in terms of rule 31(2)(b).

The requirements which must be met when a party
applies for

rescission of judgment are clear and it would appear that there is no clear challenge as to the requirements which have been raised by the applicant, to which that applicant must give a reasonable explanation of his default and that the application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim. And also the applicant must show that he has a *bona fide* defence to plaintiff's claim and that it is only sufficient if he makes out a *prima facie* defence.

The applicant and respondent had entered into a written agreement with a nonvariation clause and later a verbal agreement was entered into.

10 Initially the respondent were to sell pigs of between 8 and 10 weeks weighing approximately 24 kg to the applicant at a certain fixed price. Later, when there were problems, the chief executive officer of the respondent approached the applicant with a view that the applicant should accept pigs of less than 16 kg and for a period between January and June that particular year the parties continued to deal in these pigs and the applicant was paying R150 for the purchase of pigs weighing less than 16 kg. In July the

respondent then turned around and wanted to rely on the written contract and that the applicant had to pay a higher price. The applicant objected to this and that is the reason we have this matter before us today.

- 20 I think what is important is that the requirements in terms of section 31(2) should actually be met in as far as the rescission for judgment is concerned. However, the issue of a *bona fide* defence becomes very, very important and one will have to look into whether the parties complied with the agreement as well as the verbal agreement and as to what should happen to the nonvariation clause which is referred to as the Chevron clause.

I need only refer to the fact that when the respondent's chief executive officer approached the applicants he knew very well that already they were continuing for 6 months to pay a lesser price for pigs weighing less than 16 kg. However, he had intended that a higher price should be enforced without disclosing this to the applicants. .

Indeed, without going into the issue of estoppel and only relying on the issue of fraud, on that issue alone, the applicants would actually suffer prejudice.

They would suffer even more prejudice if rescission for judgment were to be refused.

I would not like to go into the issue of how the court should actually use its discretion and whether there is a need to strike out certain paragraphs as referred to by the respondent, neither would I like to only refer to the authorities which were mentioned because the facts in this particular case are different from the authorities cited, although those authorities bind this court.

ORDER

In the circumstances I am of the view that the applicant has met the requirement as stated in rule 31 of the rules of this court and that the application should succeed with costs.

Therefore, rescission for judgment is granted with costs.

MR ROUX: As the court pleases.

MR FERREIRA: As the court pleases.

COURT ADJOURNS