

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, HIGH COURT PRETORIA)

CASE NO: 39828/2008

23/10/2009

In the matter between:

SONTAGA ROBERT MOKWENA

APPLICANT

And

BOSCHPLAATS BOERDERY (PTY) LIMITED

FIRST APPLICANT

THE SHERIFF FOR DISTRICT OF
LETHABA

SECOND APPLICANT

JUDGMENT

MAVUNDLA. J.

[1] This is an apposed application for rescission of a summary judgment granted by Ledwaba J on 23 June 2008, in terms of which, the present applicant, as the respondent then, was evicted from two farms known as Portion 2 of the farm Kranskop 417, Registration Division L.T. Limpopo Province and Portion of farm Boschhoek 415, Registration Division K.T. Limpopo Province.

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/ NO .	
(2) OF INTEREST TO OTHER JUDGES: YES/ NO .	
(3) REVISED.	
<i>2009-10-23</i> DATE	 SIGNATURE

[2] On 22 August 2008, Hartzenberg J interdicted the present first respondent and the second respondent from giving effect of the aforesaid order of J Ledwaba pending the outcome of the present application.

[3] Before dealing with the merits of this matter, I need to remind myself of what the authorities state with regard to an application for rescission of a judgement. There are three ways in which a judgment taken in the absence of one of the parties may be set aside, namely in terms of:

- (i) Rule 31(2) (a);¹
- (ii) rule 42 (1)(a)²;
- (iii) Common law.

[5] *In casu*, both counsel for the applicant and for the first respondent are *ad idem* that this application is being brought in terms of common law. Under common law the Court has discretion

¹ Rule 31(2)(a) of the Uniform Rules of the High Court.

² Rule 42(1) (2) of the Uniform Rules of the High Court.

to grant rescission of judgment where sufficient or good cause has been shown.³ For the applicant to succeed, he must show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success, vide *Colyn v Tiger Food Industries Ltd/ t/a Meadow Feed Mills (Cape)*.⁴

[6] Although in the matter of *Chetty v Law Society, Transvaal*⁵ the Appellate Division Court said that:

“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, the 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.”

3 *Promedia Drukkers & Uitgewers (EDMS) Bpk v Kaimowitz and Others* 1996 (4) SA 411 at 417J

4 2003 (6) SA 1(SCA) at 7F-8G the Supreme Court of Appeal at page 9 para[11].

5 1985 (2) SA 746 (AD) at 765D-E.

[7] Notwithstanding what has been said in the Chetty matter, I must nonetheless bear in mind the qualification by the Supreme Court of Appeal in the Colyn v Tiger Foods Industries matter⁶ that: “Even if one takes a benign view, the inadequacy of his explanation may well justify a refusal on that account unless, perhaps, the weak explanation is cancelled out by the Defendant being able to put a *bona fide* defence which has not merely some prospect, but a good prospect of success (*Melanev Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C-F).”

[8] The first respondent issued summons against the applicant under case number 19518/08 and alleged that it was the owner of immovable properties portion 2 of farm Kranskop and farm Boschhoek 415 both situated in the Province of Limpopo and sought the eviction of the applicant on the basis that the latter is in illegal occupation of the said farms.

⁶ At para [12] (*supra*).

[9] It is common cause that summons were issued on 17 April 2008 and duly served upon the applicant, who entered an appearance to defend through K. P. Seabi Attorney. An application for summary judgment was served on K. P. Seabi and Associates on 29 May 2008 and enrolled for 23 June 2009.

[10] In casu, the applicant's erstwhile attorney of record, KP Seabi Attorneys, withdrew as attorneys of record, by serving notice of withdrawal as attorneys of record on 5 June 2008 and filing same with the registrar on 6 June 2008. Appellant attached to his founding papers a letter from Seabi wherein Seabi states that he had a consultation with the applicant on 27 May 2008 and informed him of the financial difficulties in regard to this case and that he, Seabi, would not be in a position to brief counsel further in this matter. The applicant paid Seabi a cheque of R8 000. 00 which cheque was dishonoured by the bank.⁷

⁷ Annexure E2. is the letter of Seabi dated 11 July 2008. In the said letter addressed to the applicant's present attorneys of record, it is stated that "On 28 May 2008 after receiving the summary judgment application Seabi telephoned the applicant advising him of the summary judgment application.

[11] The applicant has explained that the cheque of R8000. 00 he gave to Seabi was post dated, but the latter pre-maturely deposited the said cheque and as the result it was dishonoured. It would seem that the applicant had by the 27 May 2008 paid Seabi a sum total of R24 000. 00⁸.

[12] The applicant further states that he became aware of the granting of the summary judgment on 1 July 2008 during a meeting at the offices of the Department of Land Affairs in Tzaneen when one Van Zyl from the respondent's offices informed him that summary judgment was granted on 28 June 2008.

[13] Applicant avers that Seabi did not tell him of the date of the application for the summary judgment. After Seabi withdrew as attorney of record, the applicant says that he approached other attorneys but could not get immediate help. He approached Mr. Rathelele of Tzaneen on 6 June 2008.

⁸ Vide paginated page 15 para4.20, namely R20 000; R2500; R1500=R2400.00.

[14] According to the applicant concedes that Seabi telephoned informed him telephonically that there was an application for summary judgment, but did not tell him when is such application enrolled for. He says that he is a lay person, does not know what the summary judgment process entail and that had he known he would have informed Rathelele during a consultation that Seabi had mentioned in a telephonic discussion summary judgment.

[15] Without repeating every averment he has made, it suffices to point out that, the application for rescission was not immediately launched until on 22 August 2008. It would seem that this delay was as the result of the fact that counsel was consulted during June 2008 and required that he be furnished with complete documentation relating to this matter. The counsel was in Pretoria, Rathele was based in Tzaneen. These factors eventually necessitated giving instructions to a correspondent attorneys based in Pretoria, the present attorneys of record Sambo-Mlahleki Attorneys. It is further

averred by the applicant that Sambo had difficulty in obtaining, *inter alia*, documents relating to one of the cases under case number 24706/2006, whose court file was found empty, and further documents in possession of Seabi, who it would seem that he was only prepared to have these released against tender of further payment, and only presented his bill of costs towards his fees in August 2008⁹.

- [16] The documents pertaining to the aforesaid case number were subsequently obtained from his erstwhile attorneys Smit and Marais during about 6 August 2008. Armed with all necessary documentation counsel was consulted about 19 August 2008, who subsequently prepared this application for rescission. It needs mention that the application was in two parts, firstly Part A in the form of urgent interdict, restraining the implementation of the eviction order of the Ledwaba J, pending finalization of this rescission application under Part B.

⁹ Vide paginated page 19 paragraph 4.26 of the founding affidavit of the applicant.

[17] It is contended by Mr. Terblanche that the applicant has no explanation for his default other than to blame his former attorney, Mr. Seabi who withdrew on 23 June 2008. The applicant's new attorneys M C Rathele only came on record on 28 June 2008, two days after the grant of the summary judgment. The application for rescission was only launched on 28 August 2008 after the founding affidavit was deposed to on 21 August 2008.

[18] Mr. Terblanche further submits that the alleged negligence of his former attorney does not avail the applicant, in this regard he relies on the following cases: *Bristow v Hill* 1975 (2) SA 505 (N); *De Wet v Western Bank Ltd* 1979 92) SA 1031 (a); *Tshabalala v Peter* 1979 (4) SA 27 (T); *De Souza v Kerr* 1978 (3) SA 635 (W); *Topol v LS Group Management Services (Pty) Ltd* 1988 (1) 639) W).

[19] What I need to decide, is whether the applicant was in wilful default. His erstwhile attorney withdrew as attorney of record on 5 June 2008. Seabi informed the applicant per fax of his

withdrawal as attorney of record. However, Saebi did not inform the applicant that there is an application for summary judgment set down on 23 June 2008. Saebi did not inform the applicant that there was an application for summary judgment.

[20] In the matter of *Reinecke v Incorporated General Insurance Ltd*¹⁰ Wessels JA pointed out that the Court is “loath to penalise a blameless litigant on account of his attorney’s negligence.”

[21] Before the Court can visit an applicant with the remissness of his attorney, the applicant must show that none of such remissness has anything to do with him, vide *Mbuthuma v Xhosa Development Corporation Ltd*¹¹.

[22] *In casu*, Seabi withdrew from the matter because of non-payment by the applicant of his fees. It is a well known fact that attorneys cannot brief counsel without having been placed in funds. However, the applicant’s explanation that Seabi

¹⁰101074 (2) SA 84 (AD) at 92 F.

¹¹1979 (1) SA 681 (A.D.) at 685 F-G.

prematurely deposited the post dated cheque of R8000, 00, seems to be the reason why Seabi ended up withdrawing. In my view, the applicant cannot be blamed for the withdrawal of his attorney under those circumstances. Further the applicant states that Seabi did not inform him of the date of the summary judgment application. I am of the view that the applicant's explanation for his absence is satisfactory and I therefore accept it; *vide Rose and Another v Alpha Secretaries Ltd.*¹²

[23] Indeed, the application was only brought in 28 August 2008 whereas the judgment was granted 28 June 2008. The applicant's new attorneys of record, Rathele, only came on record on 28 June 2008, few days after Seabi withdrew as attorney of record. In my view, the applicant did not delay in giving instructions to another attorney after Seabi withdrew. The subsequent delay in bringing the application much earlier has

¹² 1947 (4) SA 511 (A.D.) at p519: Tindall, J.A., said:

"It seems to me undesirable to attempt to frame a comprehensive test as to the effect of an attorney's negligence on his client's prospects of obtaining relief under sub-rule (2), or to lay down that a certain degree of negligence will debar the client and another degree will not. It is preferable to say that the court will consider all the circumstances of a particular case in deciding whether the applicant has shown something which justifies the court in holding in the exercise of its wide discretion that sufficient cause for granting relief has been shown."

been fully explained. This subsequent delay was occasioned by the fact that Rathele did not immediately get the applicant's file contents much sooner from Seabi, so as to prepare the relevant application.

[24] In my view, in casu, the delay in bringing the application for rescission much earlier than August 2008 cannot be ascribed to any remissness on the part of the applicant. Neither can it be said that his present attorneys of record were remiss in not bringing the application much earlier. There seems to have been logistical problems as well as factors beyond their control, the difficulty in obtaining all the documents much earlier, and the inflexibility on the part of Seabi in not being prepared to release documents to his colleagues until all his fees have been paid as well as the dispute around his fees.¹³

[25] In the matter **of** *Cavalinias v Claude Neon Lights S.A. Ltd*¹⁴ the Court referring to the matter of *Silber v Ozen Wholesalers (Pty) Ltd*¹⁵ said:

¹³ Vide paginated page 20 of the founding affidavit.

¹⁴ 1965 (2) SA 649 (TPD) at 651C.

¹⁵ 1954 (2) SA 345 (AD).

“In the judgment of the Court Shreiner, J.A., said that “good cause” was not confined to disclosing of a substantial defence (p352): that “good cause” should not be further defined (p353); that to show good cause “the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives”.

[26] In my view the explanation advanced by the applicant for the delay in bringing the application, and the circumstances resulting in the granting of the summary judgment against him, needs to be measured against the presence or otherwise of a bona fide defence, for me to decide whether or not to exercise my discretion and condone the delay and accept the explanation¹⁶.

[27] It is generally stated that a weak explanation can be off set by a strong presence of a *bona fide* defence. The defence need not be set out in full detail and be proven on the standard as is required during trial, but it would suffice if a *prima facie* defence is made, if proven during trial would succeed, vide *Sanderson*

16Colyn v Tiger Food Industries Ltd/ t/a Meadow Feed Mills (Cape) (supra) at 7F-8G; vide Rose and Another v Alpha Secretaries Ltd (supra).

*Technitool (Pty) Ltd v Intermenua (Pty) Ltd*¹⁷; *Standard Bank of SA Limited v EL-Naddaf and Another*.¹⁸

[28] It is submitted on behalf of the applicant that the respondent has failed to comply with the PIE in that the relevant municipality had not been joined when the application for his eviction was brought. For this submission, reliance is made on the matter of *The Occupiers of Shorts Retreat v Daisy Dear Investments*.¹⁹

[29] On behalf of the respondents it is contended that because the applicant uses the relevant land for commercial farming, PIE does not apply. It is further contended that in the event I find that PIE does apply, this is not a defence for purposes of an application for rescission, but a procedural related aspect. It is further contended as an alternative that, in the event I find that PIE does apply but Extension of Security of Tenure Act 62 of 1997 (ESTA) does. Further it is further contended that should I

¹⁷ 1980 (4) SA 573 (W) at 575H-576A.

¹⁸ 1999(4) SA 779 (W) at 784.

¹⁹ 9255/2008) [2009] ZA SCA 8- (3 July 2009).

find that PIE applies, this does not afford applicant with a defence to the merits, for purposes of a rescission application. It is further contended that should I find that PIE does apply, such application should be restricted to only the land where the applicant has shown that he resides thereon and that in respect of the other land, I should find that PIE does not apply and the applicant should not be permitted to continue with his commercial farming. It is further contended that there is a dispute of fact as to whether the applicant resides on the property and that therefore; on the application of the Plascon-Evans rule²⁰ the application should be dismissed.

[30] It brooks no argument that PIE is mandatory, *vide The Occupiers of Short's Retreat v Daisy Dear Investments* (supra) et *P.E Municipality v Various Occupiers*.²¹ In *Ndlovu v Ngcobo*²² it was decided that the *onus* rests on the owner to show that the right of the occupier, in the case of an occupier of more than 6

20 *Plasco-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 93) SA 623 (A) ; *Reddy v Siemens* 2007 (2) SA 486 (SCA).

21 2005 (1) SA 217 (CC) par. 4.5.

22 2003 (1) SA 113 (SCA).

months, to occupy the property has lapsed. He must also show that he served on the relevant municipality in terms of s7 of the Act. *Vide* also the other cases therein cited.

[31] In *Cashbuild (South Africa) Pty v Scott and Others*²³ Poswa J dealt with the right to housing and the protection of this right and the legislative imperatives on the State provide by s25 and the s26 of the Bill of Rights. Poswa J further pointed out, correctly so, in my view, that the Legislature through s26 wanted to ensure that the right to housing was made meaningful. Masipa J, in the *Blue Moonlight Properties* case (*supra*),²⁴ *Moonlight Properties v Occupiers of Saratoga Ave.*²⁵

[32] It might be so that PIE, in casu raises only a procedural issue as it is contended on behalf of the respondent. The eviction of the applicant impacts on the right to property, the right to

23 2007 (1) SA 332 (TPD) at 340 para [28]-[32].

24 *Vide* page 480 paragraph [37]- [38] and page 480E et paragraph [51].

25 2009 (1) SA 470 (WLD) at 478G where Masipa J stated that:

"[40] Of significance also is that the occupiers are relatively settled in that they have made the property their home. A court generally should be reluctant to grant an eviction order against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme (See *Port Elizabeth Municipality v Various Occupiers*."

housing, which rights are constitutionally enshrined. Furthermore, the applicant avers in his replying affidavit that his brother, Johannes, lives in Bellville, Stand 290 Block 12. which is his home, and his mother lives on the land opposite to his brother's home and that he and his wife and children live on the property, from which he is sought to be evicted. It can further be accepted that all the aforesaid people have been residing on the respective places for more than six months, and that therefore PIE is applicable. In the light of the *Cashbuild (South Africa) Pty v Scott and Others* and *Blue Moonlight Properties case (supra)*,²⁶ in my view, it is imperative that before eviction can be granted, even the procedural aspects must be complied with. I am of the view that the defence of PIE raised by the applicant, for purposes of granting rescission, is a *bona fide* and good defence. I am consequently of the view that in the exercise of my discretion, the explanation proffered by the applicant for the granting of the summary judgment in his absence, the delay in bring the application are satisfactory and coupled with the defence herein mentioned, justify the granting

26 Vide page 480 paragraph [37]- [38] and page 480E et paragraph [51].

of condonation and the rescission, as I intend to do herein below.

[33] In casu, the applicant has raised various other defences, *inter alia*, that he purchased the property from one Lizamore and only in 1992 was a deed of sale entered between himself and Lizamore,²⁷ and that when the respondent purchased the property from Lizamore, it was and or its representatives were aware of the existing contract between the applicant and Lizamore²⁸ and that therefore the applicant is entitled to seek the setting aside of the transfer of the property in to the name of the respondent and have the property registered in applicant's name.²⁹

[34] I have been referred to the matter of Bowring NO v Vrededorp Properties CC and Another³⁰ where it is stated that the first purchaser of land is entitled to claim transfer of property directly from subsequent purchaser who acquired the property with the

27 Paginated page 30 paragraph 9.4

28 Paginated page 35 paragraph 9.13 etc.

29 Paginated page 47 paragraph 14.

30 2007 (5) SA 391 (SCA) at 391 F-G.

knowledge of the first sale. This defence raised by the applicant, in my view, has good prospects of success.³¹ In my view, the applicant has established a *prima facie* and *bona fide* defence. In the result I am of the view that the rescission should be granted.

[35] The respondent has raised a conditional counter claim, that in the event I grant rescission, I should interdict the applicant from continuing to conducting commercial farming on the property pending finalization of the action. This counterclaim is premised on the fact that the relevant property is now registered in the name of the respondent and that the applicant as a *retentor* over the property has only the right to retain the property and not for purposes of exercising his *lien* and for purposes of holding security and not to utilise the property for any other purpose. From this counterclaim sought, it can be accepted that the respondent concedes that the applicant is conducting commercial business on the farm³².

31 Vide *Cussons en Andere v Kroon* 2001 (4) SA 833 (CC) at 839C-H.

32 At paginated page 214 under para49.2 the respondent states inter alia: "Applicant must be however be evicted immediately, and his business activities and farming operations terminated."

[36] In my view, it is not only the applicant's right to lien that is involved, but also his constitutionally enshrined rights, *inter alia*, in terms of s22 to conduct business and trade, in terms of s25 to use and exploit the land in issue, *vide Reddy v Siemens Telecommunications (Pty) Ltd*³³. Not only are these aforesaid rights involved but his right to dignity also. Through the exercise of his right to business and trade, the exploiting of the land through farming, the applicant, I assume, will seek a meaningful living through which his right to dignity will be realised.

[37] In my view, what the respondent seeks in his *counterclaim* is to limit, *inter alia*, the applicant's fundamental rights, to earn a living, which rights imbue him with dignity. Where there is a tension between the applicant's fundamental rights and the respondent's common law right, I need to make a value judgment³⁴. In my view, where the tension of these rights arise

33 2007 (4) SA 486 (SCA) at 497 A-B.

34 *vide Reddy case (supra)* at 496 para [15].

in circumstances where there is a dispute over the relevant land, as *in casu*, the singular right of the respondent must yield to the fundamental rights of the applicant³⁵. In the result I am disinclined to grant the respondent the restrain interdict, pending the finalization of the main action and I shall therefore have to dismiss this counterclaim.

[38] With regard to costs the applicant prays that the costs of this application should be costs in the cause. The respondent in his counterclaim also sought that the costs should be reserved to be determined in the main trail. Although the applicant is the successful party in both the application for rescission and the counterclaim, he would be entitled to costs on the principle that the costs follow the event. However, since the parties are seemingly *ad idem* that the costs should be costs in the vent, I shall make such an order as to costs.

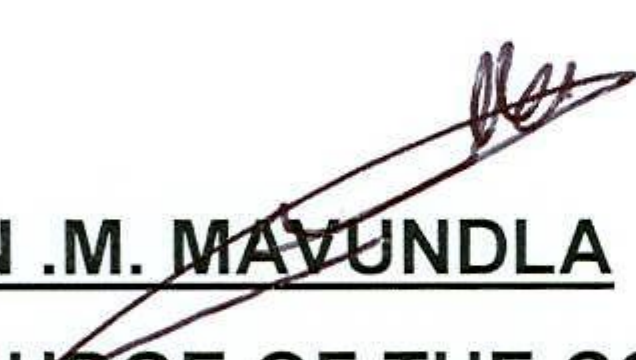
[39] It needs mention, however, that both parties employed the services of senior counsel. In my view, having regard to the

³⁵ Vide Silberberg and Schoeman's The Law of Property, 5th Edition at page 582.

issues raised in the matter, the parties were justified in employing the services of senior counsel. I mention this so that when the costs are determined in the main matter, there would be no dispute in regard to this aspect.

[40] In the result I make the following order:

1. That the summary judgment granted by Ledwaba J on 23 June 2008 is rescinded;
2. That both the costs of this application and the costs of the conditional counterclaim shall be costs in the cause.


N.M. MAYUNDLA
JUDGE OF THE COURT

HEARD ON THE	: 01/09/09
DATE OF JUDGEMENT	: 23 /10/2009
APPLICANT'S ATT	: SAMBO-MLAHLEKI ATTORNEYS
APPLICANT'S ADV	: S K HASSIM
RESPONDENTS' ATT	: ROTH WESSELS MALULEKE ATTYORNEYS
RESPONDETS' ADV	: MR. F.H TERBLANCHE SC