

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 303/2007

In the case between:

JG DORMEHL

1st Applicant

ME MAKLEIN 2nd Applicant

JG VAN ES 3rd Applicant

and

FIRSTRAND BANK BEPERK

Respondent

JUDGMENT:

MILTON, AJ

HEARD ON:

26 APRIL 2007

DELIVERED ON:

10 MAY 2007

[1] **INTRODUCTION**

1.1 The first applicant, an 84 year old male is neither a qualified attorney or advocate, has brought an application for the rescission of judgment by default granted in case nr. 3089/06 by the registrar on the 15th of November 2006, together with the request for other relief. The first applicant was not a party to case

3089/06 in which he seeks rescission of judgment.

1.2 First applicant brings the application on behalf of the second applicant since it is his contention that he is the “partner” of Mrs. Zwane, who was appointed as executrix of the estate of the late Mr. Maklein, who in turn appointed the first applicant to assist her. This was done with a signed power of attorney.

1.3 Third applicant was second defendant in the judgement by default. Third applicant a practicing attorney sited as the newly appointed executor of the estate of the late Mr. Maklein, being duly appointed by the Master of the High Court on the 20th of October 2004, a copy thereof being attached to the judgement by default.

1.4 The respondent, Firststrand Bank, is the plaintiff in case 3089/06 wherein judgement by default was granted for payment of the sum of R737 758,30 plus 11% interest

thereon from the 14th July 2007, being the outstanding amount due and owing on the mortgage bond registered on the property of the second applicant and her late husband with whom she was married in community of property. The parties were in breach of payment in terms of the bond, and further in breach by allowing, a third party to occupy the property without the respondent's consent.

- 1.5 From the application documents submitted by the first applicant it appears that during the time that he supposedly represented Mr. Zwane, the first executrix, he failed to submit a claim against the deceased estate for payment of the outstanding bond at that time. The first applicant relies on the fact that the claim of the respondent was not submitted through the Master's office in that there was a life policy which should have been called up by the respondents which would have paid the outstanding amount of due and owing by the respondents since the respondent had it own insurance.

1.6 It is the first applicant's contention that the judgment was deceitfully obtained, in the High Court since the respondent had already issued a summons in the Welkom Magistrate's Court for payment of the outstanding amount in terms of the mortgage bond. No documents were attached, save a notice in terms of Rule 55A whereby the present first and second applicant request an amendment to add a counterclaim in their capacity as defendants. These pleadings are not before the court and I do not deem it necessary to elaborate the details. The only reason for making mention thereof is since the first applicant clearly does not understand the civil procedure rules and basis his argument for rescission of the High Court judgment on case 3089/06 on the fact that there is already a judgment in the magistrate's court. From the arguments put forward by the respondent it transpired that no judgment was actually taken in the magistrate's court and respondent's action (Firststrand Bank) were dismissed in terms of Rule 27(5) of the Magistrate's

Court Rules.

- 1.7 Attached to the applicant's application is a affidavit whereby the third applicant confirms that the summons in case 3089/06 was not served on him at his business address.
- 1.8 Neither the second or the third applicant lodged confirmatory affidavits whereby it can be deduced that they are in accordance with the first applicant's application. Confusingly though, Messrs Stander, Venter and Kleynhans lodge a notice of accession on behalf of the second and third applicants to establish an address for service and only later they lodge a notice of acquiescence to the court's decision. A letter was also handed up by the respondent's council that was addressed to respondent's attorney whereby they inform that the first applicant has no *locus standi* to bring the application on their behalf and they now distantiate themselves from the proceedings.

[2] **RELIEF SOUGHT**

The first applicant requests the court to give the following order that:

- 2.1 Johan Georg Dormehl, first applicant be cited first defendant (seemingly in case 3089/06).
- 2.2 That judgment by default dated 15 November 2006 in case 3089/06 be rescinded.
- 2.3 Judgment in favour of first and second applicants be given in the Welkom Magistrate Court be confirmed as the same cause of action as case 3089/06.
- 2.4 That the respondent be barred from bringing any further process in the present matter (case 3089/06) until the Welkom judgment is settled in full.

[3] **LEGAL POSITION**

- 3.1 An applicant, for an order setting aside (or varying) a judgment or order of court must show, in order to establish *locus standi*, that he has an interest in the subject matter of the judgment or order sufficiently direct and substantial to entitle him to intervene in the original application upon which the judgment was given

or an order granted.

See **UNITED WATCH & DIAMOND CO (PTY) LTD
AND OTHERS v DISA HOTELS LTD AND ANOTHER**
1972 (4) SA 409 C on 415 D.

- 3.2 What constitutes a direct and substantial interest has been referred to and adopted in a number of decisions and is accepted that what is required is a legal interest in the subject matter of the action and which could be prejudicially affected by the judgment of the court.

See **HENRI VILJOEN (PTY) LTD v AWERBUCH
BROTHERS** 1953 (2) SA 151 on 167 G – H and
**ABRAHAMSE & OTHERS v CAPE TOWN CITY
COUNCIL** 1953 (3) SA 855 (C).

- 3.3 In **Erasmus Superior Court Practice** on B1 – 126A, the requirements for *locus standi in judicio* are expanded as follows:

3.3.1 the plaintiff/applicant for relief must have an

adequate interest in the subject-matter of the litigation, which is not a technical concept but is usually described as a direct interest in the relief sought;

3.3.2 the interest must not be too far removed;

3.3.3 the interest must be actual, not abstract or academic;

3.3.4 the interest must be a current interest and not a hypothetical one.

The duty to allege and prove *locus standi in judicio* rests on the party instituting proceedings.

3.4 Before the merits of the application were dealt with, the point taken *in limine* by the respondent's attorney was that the *locus standi* of the first applicant must first be considered. If the first applicant has no *locus standi* the merits are then academic.

3.5 According to the first applicant, Mrs. M. A. Zwane was appointed as executrix of the estate of her late father,

Mr. L. J. Maklein on the 11th of August 2002.

3.6 However on the 14th of May 2002, 4 months prior to this, Mrs. Zwane signed a special power of attorney appointing first applicant as her substitute and agent to perform all the duties of the executrix. The court fails to fathom how this power could be bestowed on the first applicant when she herself had not yet been appointed as the executrix. No power of attorney was attached to the application and during arguments on the court's request, the first applicant could also not produce such a document.

3.7 Although it is common cause that Mr. Van Es was appointed as executor on the 2 September 2004 thereby replacing the previous executor (Mrs. Zwane) who was relieved of her duties, the first applicant is still insistent that he is the "co-executor" and he is rightfully entitled to bring this application.

3.8 It is trite in our law that any such authority must exist at the time an act is performed on behalf of an undisclosed principal, i.e. at the time of the institution

of the action. There can be no ratification. See **DURITY ALPHA (PTY) LTD v VAGG** 1991 (2) SA 840 (A) AT 843 A and also **GRAVETT NO v VAN DER MERWE** 1996 (1) SA 531 (D & CLD) on 537 H.

3.9 At the time of the instituting the application for rescission of the judgment in case 3089/06, Mr. Dormehl was definitely not an authorised agent, not only because he cannot produce a written power of attorney but since the previous executor had been replaced by Mr. Van Es and he had no such authority at the time of instituting the application.

3.10 Secondly, even if the first applicant could prove *locus standi* with a power of attorney, he would not succeed to bring an application in terms of Rule 31(2)(b) since first applicant is not a defendant in that action and has therefore no substantial legal interest.

3.11 I agree with the respondent's council that it is not clear if the application is brought in terms of Rule 42 in

which case, first applicant would have to prove that judgment was granted erroneously and that he has a direct interest and is prejudicially affected thereby.

There are no such averments in his papers.

3.12 The only possibility would then be that he brings this application in terms of the common law in which case he must prove that:

3.12.1 The successful litigant was a party to the fraud
(First Rand Bank).

3.12.2 That the evidence was in fact correct.

3.12.3 That it was made fraudulently and with the intent to mislead.

3.12.4 It diverged to such extent from the true facts, that if the true facts had been placed before the court, the court would have given a judgment other than that which it was induced to do by the incorrect evidence.

See **Erasmus: “Superior Court Practice”** B1 – 307.

3.13 It is the first applicant's contention that the respondent was not entitled to bring an application in the High Court since they had already issued summons in the magistrate's court which was dismissed and this was deceitful. He does not understand the procedural turn the matter in the

magistrate's court took and that the Rule 27(5) application dismissed the applicant's action since the court date was not requested within the prescribed time period. It is therefore clear that the respondent's matter was dismissed on a technicality and not on the merits and that the respondent thereafter proceeded to issue summons in the High Court.

3.14.1 As the first applicant further avers that the respondent served the summons on the address of the property this being the address of the chosen domicile address, which is incorrect as he argued, since Mr. Van Es, the third respondent, has an office whereupon this should have been served.

3.14.2 On the supposition that first appellant could succeed in proving that the judgment was incorrectly granted in the case 3089/06, (which is doubtful) the first applicant must first convince this court that he has *locus standi* to

bring such an application. If he fails on the first hurdle, the merits become irrelevant.

[4] **FINDING**

4.1 I therefore find that the first applicant had no *locus standi* to bring an application in his capacity as first applicant for the following reasons:

4.1.1 He was not a party to the pleadings on case 3089/06 where judgment by default was taken.

4.1.2 He could not produce a valid power of attorney.

4.1.3 Even if he could produce a valid power of attorney, it is clear that the erstwhile while executor whom he professes to represent, had in the meantime been replaced.

4.1.4 In terms of the common law the first applicant bears the onus to prove that he has a legal interest, an interest based on the issues of law.

4.2 Finally regarding the representation of the second and third applicant, by the first appellant it is clear that the first appellant, who is neither a qualified attorney nor advocate and cannot therefore, represent another person in a court of law, appeared and signed court

proceedings in direct conflict to the Right of Appearance Act, nr. 62 of 1995 and the Supreme Court Act nr. 59 of 1959.

4.3 Secondly, no confirmatory affidavits were attached to his application whereby the second and third applicants associate themselves as being part of the application.

4.4 A letter was handed into court whereby the respondent's attorneys were informed by the second and third applicant's attorneys that they distantiate themselves from this application for obvious reasons.

5. The following order is therefore made:

5.1 The application is dismissed.

5.2 First applicant to pay the costs.

D. MILTON, AJ

On behalf of the 1st Applicant: J. G. Dormehl
BLOEMFONTEIN

On behalf of the 2nd and 3rd
Applicants: H. J. Stander
Instructed by:
Stander, Venter & Kleynhans
BLOEMFONTEIN

On behalf of the Respondents: J. E. Smit
Instructed by:
Hill, McHardy & Herbst
BLOEMFONTEIN

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