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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No: 84205/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 20 September 2024

SIGNATURE:

In the application between:

MARTIN DZVITI

FIRST APPLICANT

RUTH DZVITI

SECOND APPLICANT

and

**WESTBROOK ESTATE HOMEOWNERS
ASSOCIATION NPC**

RESPONDENT

JUDGMENT

NHARMURAVATE AJ

Introduction

[1] This is an opposed rescission application wherein the Applicants seek the default judgement granted in favour of the Respondent under case number 84205/2019 on the 6th of December 2019 to be rescinded in terms of the common law requirements read together with the rule 42(1)(a) and rule 42(1)(b) of the uniform rules of court. In addition to that, the Applicants further seek condonation for the late filing of the rescission of judgement application and costs in the event of opposition.

[2] The issue that this court must determine is whether the Applicants have made out a case for condonation for the late filing of the rescission application. Secondly, whether the Applicants have made-out a case in terms of the common law alternatively the uniform rules of court specifically rule 42(1)(a) and(b) for the rescission sought.

Background facts

[3] The Applicants are the owners of two property situated within the Respondents estate that is Westbrook estate unit number 2[...] and unit number 2[...]. The Applicant alleges that on the 1st of May 2007 the Respondent and one of its contractors took occupation of one of their properties known as Erf 2[...]. This was done without their consent this contractor namely Bubesi occupied the property at least for a period of 30 months without paying rent to the Applicants.

[4] Upon an inquiry being made to one of the Respondents representatives who was the chairperson at the time Mr Chris Buyskes he assured them that the outstanding rental amount will be paid in due course. However, this never occurred as a result of the Respondents unauthorized occupancy at their property they suffered financial damage valued at R180,000.00 for the unpaid rentals of R 6000 / a period of 30 months.

[5] They then sought legal assistance through Viljoen and Swart Attorneys (Viljoen) on the 24th of November who then visited the property Erf 2[...] (this was amended by Counsel for the Applicant to read 2[...]) and confirmed that the Respondents confirmed occupancy of their contractor. Viljoen sent a letter to the Respondent demanding for the unpaid rentals. Despite the demand the Respondent failed to effect payment. Thereafter on the 11th of October 2012 a new legal representative was appointed Ehlers Fakude Incorporated to recover the said monies who then issued summons against the Respondents under case number 58840/12 which were later served on the Respondents on the 25th of October 2012. The said action remains pending.

[6] They then agreed with the Respondents Buykes that they will not pay levies for their property until such time that the amount owed to them were set off. This is part of the reason why they stayed the execution of the action proceedings under case number 58840/12. Buykes did not keep to the agreement as he victimized them in various ways and issued several court processes. Even under the new management of Trafalgar properties the victimization continued. The various court processes instituted by the Respondents led to them being financially drained in such a manner that they were not able to afford counsels fees to move the trial which they had instituted.

[7] Irrespective of the agreement they continued to pay the levies owed on their property as and when they could as they were of the view that their levies were deducted for the R180 000.00 owed.

[8] The Respondents then instituted an action for the payment of levies amounting to R41 273. The summons was served accordingly in December 2019. The matter went undefended. They sought legal assistance from Joubert Attorneys and instructed them to enter the appearance to defend the matter and to place their version before the court by filing the necessary plea and to make a counterclaim for R180 000.00. Joubert Attorneys accepted the mandate which they later did not execute.

[9] A default judgement was issued on the 6th of December 2019. They had no knowledge of the default being granted until October 2020. They were alerted by their relative who was residing at their property at the time that there was a judgement against them. When they tried to find their appointed Attorneys, they found that they were deregistered and that Mr Dan Joubert had been struck off the roll of practicing Attorneys.

[10] Despite this they continued to pay the levies as and when they could in some instances they paid in excess. On the 17th of April 2023 the Applicant was served with a sequestration Application. They have instructed an Attorney to vigorously oppose the application as they are not insolvent. The reason why rescission is sought is based on the existence of a counter claim of R180 000.00.

Law to Facts

[11] Rescission in terms of rule 42 of the Uniform Rules of Court provides that:

“Variation and rescission of orders

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

(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;”

....

[12] Ms Nggele for the Applicants argued that at the time there existed a fact/s which had the court been made aware of it would not have granted the default judgment. That was a debt of R180 000.00 which the Respondents allegedly had in favour of the Applicants. She argued that this amounts to a counter claim which

should have been deducted from the R180 000.00 the Respondents owe for rental as per the verbal agreement.

[13] It is my view that the R180,000.00 concerning the rental for 30 months is not a defense or a counter claim in this instance. There were already summons issued by the Applicants in that regard as far back as in 2012. It is not clear why this matter was not finalized before default judgement was granted against them which was seven years later. In this regard the amount of R180 000.00 is *lis pendense* before another court even if the court had been made aware it would have not entertained it and rightfully so.

[14] The amount ordered under the default judgment granted in December 2019 was for the payment of the levies in a different property unit 2[...].Miss Ngqele for the Applicants conceded that the debt was for levies which was concerning usage in a property the Applicants were occupying, these were not disputed and indeed they were owing the default judgement amount at the time when summons were issued and the matter was not defended at the time. It is therefore difficult to draw an inference where the court may have committed an error in relation to the order granted.

[15] The second factor highlighted by the Applicants was the existence of the oral agreement, which was reached by the parties herein, in that they would not pay for the levies due to the R180,000.00 which they were owed. The levies will be deducted from the R180,000.00 owed to them for a different property. Strangely this verbal agreement does not have a date, nor does it have a place, nor does it have a witness who can testify or confirm to the existence of this verbal agreement. This agreement is disputed by the Respondents.

[16] It is my view that the Applicant may have been of the view that there was a verbal agreement unilaterally. The Applicants own papers demonstrate that the Respondents continued with various legal processes and litigation against the Applicants which led them in instituting the action and the case number 58840/12. The conduct of the Respondents immediately thereafter was not in keeping with parties which had an oral agreement. Even the conduct of the Applicants thereafter

of continuing to pay the levies was not in keeping with a party who believed that there was a verbal agreement not to pay the same as they will be deducted from the R180 000.00 allegedly owed for rental.

[17] It is not clear what led the Applicants to believe that the amount for the levies charged on the property they were occupying would be deducted from the amount allegedly owed for rental without seeing it on the invoice which this court assumes were billed monthly. Surely, that would have made it clear that there was no verbal agreement as they were being charged monthly. This would have prompted the Applicants to attend to this issue sooner.

[18] In my view this was simply because there was no agreement between the parties in this regard. Reliance on a verbal agreement under such circumstances does not present a strong or arguable case for the Applicants for rescission purposes. It does not help the Applicants that they continued paying despite the verbal agreement. This demonstrates no verbal agreement between the parties perhaps same is used as a scapegoat to attempt to show the *bona fides* for the rescission sought.

[19] A party intending to rely on an oral agreement must plead and prove the facts from which a court can infer that actual and true consensus happened¹. When considering the existence of consensus between two parties one looks at their external manifestations to determine whether they were actually in agreement. If they were, there was an agreement. If not, was one party reasonably entitled to assume, from the words or actions of the other, that they were truly in agreement? If yes, agreement will be deemed to have been present. If not, there was no agreement.²

[20] In rebuttal Mr Louw for the Respondent argued that rule 42(1)(a) is procedural in nature, it is not based on the facts. The fact that the Applicant cannot point to an incorrect court procedure or mistake on record which was committed by the court at

¹ Sewpersadh v Dookie 2009 (6) SA 611 (SCA)

² See, *Christies Law of Contract in South Africa*, GB Bradfield, 7th Edition, paragraph 2.4.2 (c) and *Garden Cities Incorporated v Northpine Islamic Society* 1999 (2) SA 268 (C).

the time or the Respondents at the time, simply means that, the application had no merit. The court needs to simply dismiss it.

[21] In *Kgomo v Standard Bank of South Africa*³, Dodson J, held that the following principles govern rescission under Rule 42(1)(a):

“The rule caters for a mistake in the proceedings.

The mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment.

A judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;

The error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and....

[22] Mr Louw for the Respondents further pointed out that the Applicants have at the very least known about the existence of the default judgement order as early as January 2020. The Applicants were being disingenuous for arguing that they only had knowledge of the default judgment in October 2020 as that was not what was said in an affidavit written by one of the applicants (Ruth Dzviti) in January 16, 2020. This affidavit reads:

[23] *“I state that the goods attached to on 14 January 2019 under case number 84205/19 do not belong to me but to my brother... Again on the summons for this case there is no case against us that warrants’ an attachment of goods at 2[...]* Westbrook estate.

³ 2016(2) SA 184

[24] In my view, the Respondents are correct in stating that the Applicants have at the very least been aware of the attachment of their goods as early as the 16th of January 2020 this is not addressed on the papers. The Applicants in their reply deposed that they were not aware that the attachment was necessitated by a court order. In my view this argument is a paradox since the Applicants alleged, they had legal representation at the time, it is not clear why they did not seek legal advice regarding the attachment of the goods. Alternatively, this affidavit does not make reference to an Attorney whom they appointed to handle this summons. This affidavit only makes a reference to the ombudsman who is handling their dispute. This creates a doubt in this court, if indeed there were instructions issued to defend the summons issued in December 2019 timeously.

[25] The Applicants were aware of the existence of the summons served as early as December 2019 they elected to be idle. On the papers filed they seemed to have hooped around various legal representatives without taking this court into confidence why that was so except for Joubert Attorneys. The email dated the 6th of Feb 2020 also does not assist the Applicants who want this court to believe that they did not delay in bringing the rescission application and that they only become aware of the order in October 2020. This email is also not explained as the Second Respondent clearly states: *"Is this in connection with the Rescission you want to bring?"* This demonstrates knowledge about the order earlier than October 2020. The explanation on the delay is therefore not bona fide in my opinion.

[26] Ms Ngqele for the Applicants conceded that rule 42(1)(b) was not relevant under the circumstances therefore she did not persist in arguing same. Ms Ngqele also conceded that rule 31(2)(b) had no application in this matter as she had incorrectly presented that she can argue based on this rule simply because this matter is based on a judgement issued as far back as in 2019. Which the Applicants have been at least aware of since October 2020. Whereas the requirements of this rule impose a legal obligation that an applicant for rescission under this section must do so after a period of 20 days of becoming aware of the order which the Applicants are outside of at this stage.

[27] As an alternative to rule 42, the Applicants have also relied on the basis of common law, in terms of which an applicant is required to prove that there is “sufficient” or “good cause” to warrant rescission⁴. “Good cause” depends on whether the common law requirements for rescission are met, which requirements were espoused by the erstwhile Appellate Division in *Chetty*⁵, and affirmed in several cases, including by this Court, in *Fick*. In that matter, this Court expressed the common law requirements thus—

*“the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.”*⁶

[28] The common law test is simple: both requirements must be met. The Applicants must establish that they had a reasonable and satisfactory explanation for their failure to oppose the default judgement proceedings, and that they have a *bona fide* defense that carries some prospects of success on the merits. In my view I am not satisfied with the explanation given by the Applicants for their default in December 2019. The explanation is not reasonable in that on a dateless day a legal representative was appointed to defend the matter, after that they do nothing up until October 2020 when they became aware of the court order. Whereas they were aware of the summons served. A date in this instance is very relevant if not crucial as it would assist the court to establish if the instruction was issued timeously or not. In my opinion it seems that dates are concealed on purpose simply because the matter was not defended timeously.

⁴ *De Wet* id at 1033C and 1042G. See, for example, *Colyn* above n 19 at para 11 and *Naidoo* above n 20 at para 5.

⁵ *Chetty v Law Society, Transvaal 1985(2) SA 756 (A)* which sets out, at 765A-E, that good cause must be shown by the party seeking rescission.

⁶ *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (*Fick*) at para 85.

[29] What is also troublesome, is that there is also no explanation of what they did subsequent to instructing their Attorneys to follow up with the matter to ensure that the matter was defended timeously. It would seem they just instructed their Attorneys on a dateless day and left the matter as it was up until they received information that there had been a judgment which was taken against them sometime in October 2020. Therefore, by deduction the Applicants willingly did not defend the matter which was served on them as far back as December 2019. In my view the Applicants acted as unreasonable litigants knowing very well that they were due in court without doing a follow up with their Attorneys at the time if indeed he was timeously instructed to defend the matter.

[30] What is also weakens the Applicants argument further is the fact that they allege that they briefed Joubert attorneys to defend the matter, yet they have no documentary evidence to prove to this court that indeed they had instructed such an Attorney to assist them timeously so. The Applicants knew very well that they were proceedings against them which they should have defended at the time. My views are further fortified by the existence of the 16 of January 2020 affidavit completed by the Second Respondent herein where she alleges that this dispute is before an ombudsman there is no indication made of an Attorney who had been appointed as this court has been previously led to believe on a dateless day. This court then draws an inference that this matter was not timeously defended if at all.

[31] It is my view that the Applicants are flogging a dead horse the default judgment was granted rightfully so. In my view there is nothing precluding the Applicants from finalizing their action against the Respondents in line with the proceedings instituted for the payment of R180 000.00 they are allegedly owed by the Respondents.

[32] Tritely an applicant who cannot demonstrate 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. Alternatively, 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 merits⁷.”

[33] In the Zuma matter the constitutional court held that “*in the light of the finding that the appellant’s explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant’s prospects of success.*”⁸ The court herein highlighted the importance of explaining reasons for defaulting in court .In the absence of a reasonable explanation for the default, the court is not even obliged to consider the merits.

[34] The Applicants have also failed to prove their case under the common law as they do not fit the requirements. There is no good cause shown why there was a delay or default in defending the matter when they were rightfully served with the summons. Let alone having strong merits or even demonstrating why rescission is sort at such a late stage when they had knowledge about the judgement as far back as February 2020.

Conclusion

[35] The Applicants have failed to make out a case in terms of the notice of motion filed. I am not convinced that there were errors committed by the court which granted the default judgment in December 2019 in line with rule 42(1)(a). In my view the existence of a separate litigation regard being had to R180 000.00 has no relevance to the default judgement. The R180 000.00 is concerning rental and is further concerning a different property which they were in a process of selling to Bubesi. These facts in my view have no bearing on the default judgment granted.

[36] This matter was intentionally not defended timeously. The Applicants conceded that indeed they owed the levies which ultimately resulted in the default

⁷ Supra

⁸ Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021

judgment granted against them. There is no merit in a rescinding the default judgment granted in December 2019. Therefore, the costs should follow the results.

[37] I therefore make the following order :

1. The application for rescission of judgement granted in December 2019 is dismissed with costs in favour of the Respondents on scale B.

NHARMURAVATE, AJ
JUDGE OF THE HIGH
COURT GAUTENG DIVISION, PRETORIA

For the Applicant : Adv F Ngqele

Instructed by. : Chivizhe Katiyo Attorneys

For the Respondent : Adv NG Louw

Instructed by. : Beyers Incorporated

Date of Hearing : 10 September 2024

Date of Judgment : 20 September 2024