REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 42379/2012

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

SIGNATURE 30/5/16 DATE

In the matter between:

GRAHAME ALLEN JESSOP	Appellant
and	
INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LTD	First Respondent
ECC PROPERTIES (PTY) LTD	Second Respondent

JUDGMENT

REYNEKE AJ

[1] The first respondent is opposing this application in terms of the common law for the rescission of a judgment, dated 12 June 2013. The first issue is whether the said judgment may be rescinded or whether it is a final judgment.

[2] On Thursday, 6 June 2013, the first respondent gave notice to the registrar, the applicant and the second respondent that the application (the "main application") was to be enrolled for Monday, 11 June 2013. There was no appearance on behalf of the applicant or the second respondent. A courtesy call was made to the applicant's attorney's, whereby they were informed about the matter.

[3] The transcribed record of the proceedings dated 12 June 2013 shows the following: Adv. Swanepoel appeared on behalf of the applicant requesting a postponement of the main application. This application for postponement was opposed by the first respondent. Claasen J instructed the parties to argue the application for postponement. (Page 2, line 16). Adv. Swanepoel presented his argument and thereafter Adv. Du Plessis stated that he is opposing the application for postponement mainly on the basis that the notice was properly served.

[4] I think it is necessary to quote the rest of his argument in order to show the whole picture. See page 2, line 14:

"My Lord this application is one that has been issued, I think in 2012, it is a new application but it has been preceded by three other applications, so this matter has a long history. What the applicant wants in this matter my Lord is a declaratory order firstly that a mortgage bond which was registered by the first respondent over an immovable property is null and void.

The facts my Lord, are this, insofar as the facts are relevant for the moment, the applicant only bought the property after the mortgage bond was already registered, so he does not have *locus standi* to bring the application my Lord, and that point I think, they cannot [indistinct.] ... It disposes of the matter ... he only entered into the agreement after that ... I would ask for the application to be dismissed with costs."

[5] The applicant had no reply. The Court stated that the judgment is concerned with an application by counsel for the applicant to postpone the matter and proceeded to give reasons for its judgment. The application for postponement was refused. Thereafter the Court enquired from adv. Swanepoel whether he was withdrawing as he was only briefed to argue the application for postponement. Adv. Swanepoel stated twice that he was withdrawing.

[6] The Court enquired from counsel for the first respondent what he wanted to do. (p 2 line 21). The request for dismissal was simply repeated. The main application was dismissed with costs without further ado.

[7] In the matter before me counsel for the first respondent submitted that the application was dismissed, not because of the default of the applicant, but on the merits, rendering the judgment final, thus appealable.

[8] The transcribed record in context shows that the merits where to counsel for the first respondent had referred briefly in his opposition of the application for postponement were submitted as a consideration why the postponement should not be granted.

[9] The record reflects clearly that adv. Swanepoel had no brief in regards to the main application and that was the reason why he had chosen to withdraw. If he had remained in court after the dismissal of his application for postponement that can never be construed as him presenting the applicant. He was not on record anymore with the result that the applicant was in default.

[10] I have no doubt that the judgment granted is one by default.

[11] At common law a judgment by default of appearance, on sufficient cause shown, may be set aside as it is not a final judgment. *(De Wet and Others v Western Bank Ltd 1979 (2) 1031 at 1042F.)*

[12] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) the common law position was summarized in par 4 as follow:

'The guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the Judge who delivered it. He becomes *functus officio* and may not ordinarily vary or rescind his own judgment *(Firestone SA (Pty) Ltd v Genticuro AG).* That is the function of a Court of appeal. There are exceptions. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, *justus error.* Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause.'

[13] The phrases 'sufficient cause' and 'good cause' are synonymous and interchangeable. (Silber v Ozen Wholesaler (Pty) Ltd 1954 (2) SA 345 (A) at 352H-353A.) The applicant bears the onus of establishing "sufficient cause". *(Harris v ABSA Bank Ltd t/a Volkskas 2006 (4) SA 527 at 528 par 4.)*

[14] It is trite that good cause is shown by giving a reasonable explanation for how the default came about, by showing that the application is made bona fide and lastly, by showing there is a prima facie prospect of success. (*PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A); Smith NO v Brummer*1954 (3) SA 352 (O) at 357 – 8, *De Wet, supra* at 1042.)

[15] The absence of "willful default" does not appear to be an express requirement under Rule 31(2)(b) or under the common law, but the long-standing practice of our Courts requires that the party seeking relief must present a reasonable and acceptable explanation for his default.

[16] The facts for the applicant in relation to this matter are the following: The applicant is the sole member of Zimtile CC. Zimtile and the second respondent entered in to a written agreement of sale in terms whereof the second respondent sold one half portion of an undivided property, Portion 1,

Erf 492, to Zimtile. The amount payable only became due after the approval of the subdivision of Portion 1, Erf 492. The conditions were fulfilled and the applicant became entitled to delivery of the applicable portion of the property. There was only on title deed in respect of Erf 492 and the adjacent Erf 291. The second respondent requested the uplifting of the original title deed from the transferring attorneys, with explanation that a bond will be registered over Erf 291. Portion 1 of Erf 492 would be registered simultaneously into the name of Zimtile. The bond was indeed registered over Erf 491, but due to some confusion also over Erf 492 in the favour of the first respondent.

[17] The first respondent informed the applicant that it would release the Erf 492 from the bond against payment of R16 521 889,79 plus interest. The applicant decided to rather have the property transferred to him instead of Zimtile. Consequently he entered into an agreement with the second respondent in terms of which the first agreement was cancelled. Another agreement was entered into in terms whereof the applicant purchased the property from the second respondent. This agreement was backdated to the same date upon which the first agreement (which was now cancelled) was entered into.

[18] The transfer of the property could not take place because of the mortgage bond in favour of the first respondent. This resulted in the applicant bringing the main application for, *inter alia,* an order declaring the registration of the said bond null and void. The second respondent enrolled the matter and it was this application that was dismissed on 12 June 2013.

[19] It is common cause that the notice of set down for 11 June 2013 was served on the Document Exchange which is the correct address provided for service. The notice of set down shows that the applicant received only two days' notice. The respondent's reply in this regards is that the setting down of the matter was in terms of the rules and the practice directives. There is no indication in the transcribed court record that the short service was drawn to the attention of the Court who had granted the judgment.

[20] The first respondent has an issue with the *locus standi* of the applicant on the basis that the first agreement of sale was cancelled, that the first mortgage bond had already been registered in favour of the first respondent at the time the applicant entered into the sale agreement and that the applicant therefore has no rights against the first respondent. The applicant's argument in this respect is, *inter alia*, that he is the sole member of the closed corporation, with a substantial interest in the matter.

[21] The applicant needs not to deal fully with the merits of the case and needs not to produce evidence that the probabilities are in his favour. *(Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O).)*

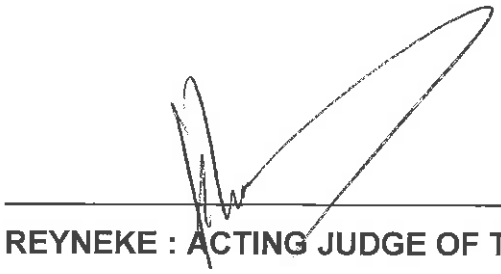
[22] The history of this matter indicates that the applicant at all times was eager to have the matter solved by a court. In the light of the explanation and the short notice I find that the applicant was not in wilful default.

[23] Something went wrong when the bond was registered. Many court applications followed, albeit successful or futile, in an attempt to correct the problem. I will not close the door in the face of the applicant without affording him the chance to have the dispute properly ventilated in a court. I think that the applicant has a reasonable prospect of success and that he had shown good cause to have the judgment rescinded.

ORDER

(a) The application for the rescission of the judgment dated 12 June 2013 is granted.

(b) Costs to follow the costs in the main application.



REYNEKE : ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Applicant: AB Rossouw SC
Instructed by: McLoughlin Porter Inc,
C/o JA Pieters & Associates,
20 Duiker Street
Sunward Park
Boksburg

Counsel for the First Respondent: DT v R du Plessis SC
Instructed by: Cliffe Dekker Hofmeyer Inc
1 Protea Place
Sandton

Date of Hearing: 20 May 2014

Date of Judgment: 30 May 2014