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

CASE NO: 2009/31144

In the rescission of judgment application between:

BERNARD RIDGE	Applicant
and	
NEDBANK LIMITED	Respondent

In re the action between:

NEDBANK LIMITED	Plaintiff
and	
BERNARD RIDGE	Defendant

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
DATE DELIVERED: 25/10/2018

JUDGMENT

MASELLE AJ:

[1] On 22 September 2009 the respondent, a banking institution ("the plaintiff"), obtained an order for summary judgment ("the order") against the applicant, an individual ("the defendant") for payment of R3 635 555,04 plus interest and

costs as well as an order declaring the defendant's immovable property executable.

[2] The order was granted by default in the absence of the defendant under the following circumstances. After the defendant delivered a notice of intention to defend, the plaintiff timeously launched and delivered an application for summary judgment. The defendant did not deliver an affidavit and at the hearing when the order was granted, the defendant was not represented by counsel.

[3] Some 8 (eight) years after the order was granted, the defendant launched this application for a rescission of the order.

[4] The defendant relies on the provisions of rule 42(1)(a) of the uniform rules of court or failing that, the common law in support of his application. There are numerous decisions which set out the factors to be considered by a court when faced with a rescission of judgment based on rule 42(1)(a) or the common law (See for example Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) para 11; Chetty v Law Society, Transvaal 1985 (2) SA 756 (A): dictum at 764I - 765F; De Wet v Western Bank Ltd 1979 (2) SA 1031 (A) and the cases cited therein).

[5] In summary: -

[5.1] The pleaded claim of the plaintiff is founded on the defendant having failed to make payments to it, in terms of 6 (six) covering mortgage bonds. The plaintiff does not rely on any underlying

written loan agreement for its cause of action. The defendant contends that there was no claim for him to meet and upon which summary judgment could have been granted. In this regard, the defendant claims, inter alia, that the *causa debiti* relative to the amount claimed is not set out in the particulars of claim.

[5.2] The plaintiff denies that it failed to disclose a cause of action. It submits that the mortgage bonds are themselves acknowledgments of the defendant's indebtedness to it. The focal point of the plaintiff's opposition to the rescission is that the defendant's delay in seeking a rescission is inordinate and unreasonable and, on this basis, alone the application for rescission should fail.

[6] When deliberating whether to rescind an order either in terms of the common law or rule 42, a court exercises its discretion (See the SCA unreported decision of Mosalasuping & others v NC Housing & others (903/2016) [2017] ZASCA 121 (22 September 2017) para [14]). However, given the reasons for my decision as set out below, it is not necessary to consider whether (a) the order was either erroneously sought or granted or (b) the defendant has shown a *bona fide* defence for it to be rescinded.

[7] I am of the view that that the rescission should be refused because the defendant's delay in seeking a rescission is inordinate and unreasonable. Moreover, the facts have an extended history, all of which lead to the inexorable conclusion that the defendant has acquiesced in the order and that

the order should not be rescinded. For understanding purposes, I deal first with peremption and the facts and thereafter the unacceptable excessive delay in seeking a rescission.

Peremption

[8] In Dabner v South African Railways and Harbours 1920 AD 583 at 594, the Appellate Division expressed the rule of peremption as follows: -

> *"The rule with regard to peremption is well settled, and has been enunciated on several occasions by this court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it."*

[9] In Tswelopele Non-Profit Organisation v City of Tshwane MM 2007 (6) SA 511 (SCA) the SCA dealt with whether an appeal had been perempted. Cameron JA, articulated peremption as follows as para [10]: -

> *"[10] Peremption of the right to challenge a judicial decision occurs when the losing litigant acquiesces in an adverse judgment. But before this can happen, the Court must be satisfied that the loser has acquiesced unequivocally in the judgment. The losing party's conduct must 'point indubitably and necessarily to the conclusion that he does not intend to attack the judgment': so the conduct relied on must be 'unequivocal*

and must be inconsistent with any intention to appeal' (Dabner v South African Railways and Harbours 1920 AD 583 at 594, per Innes CJ)."

[10] The rule of peremption has its origins in appeals. This rule has been extended to applications for rescission of a judgment taken by default. (See Hlatshwayo v Mare and Deas 1912 AD 242; Sparks v David Polliack & Co (Pty) Ltd 1963 (2) SA 491 (T) at 496D – F; and Nkata v FirstRand Bank Ltd and Others 2014 (2) SA 412 (WCC) paras [30] – [31])

[11] In Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another 2016 (1) SA 78 (GJ), at para [25], Peter AJ summarized the law in relation to peremption. He observed that: -

".....An unsuccessful litigant who has acquiesced in a judgment cannot appeal against it. The onus of proof rests on the person alleging acquiescence and in doubtful cases it must be held not to be proven. Although peremption has its origin in policy considerations similar to those of waiver and estoppel, the question of acquiescence does not involve an enquiry into the subjective state of mind of the person alleged to have acquiesced in the judgment. Rather it involves a consideration of the objective conduct of such person and the conclusion to be drawn therefrom (Dabner v South African Railways and Harbours 1920 AD 583 at 594; Standard Bank v Estate Van Rhyn 1925 AD 266 at 268; Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) (1971 BIP 58) at 600A – D; Natal Rugby Union v Gould 1999 (1) SA 432 (SCA) ([1998] 4 All SA 258; [1998] ZASCA 62) at 443F – G; Samancor Group Pension Fund v Samancor Chrome and

Others 2010 (4) SA 540 (SCA) para 25; and Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others 2013 (3) SA 315 (SCA) ([2012] ZASCA 166) para 3)."

[12] In SARS v CCMA 2017 (1) SA 549 (CC) at paras [26] to [28], the constitutionality of the rule of peremption was discussed and considered regarding whether there are overriding constitutional considerations that justify the appealability or the non-enforcement of peremption. It was held, inter alia, that: -

[12.1] *"Peremption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self-resignation to the unfavourable order that could otherwise be appealed against."*

[12.2] *"The onus to establish peremption would be discharged only when the conduct or communication relied on does 'point indubitably and necessarily to the conclusion' that there has been an abandonment of the right to appeal and a resignation to the unfavourable judgment or order."*

[12.3] *"The broader policy considerations that would establish peremption are that those litigants who have unreservedly jettisoned their right of appeal must for the sake of finality be held to their choice in the interests of the parties and of justice. But, where the enforcement of that choice would not advance the interests of justice, then that overriding constitutional*

standard for appealability would have to be accorded its force by purposefully departing from the abundantly clear decision not to appeal."

[13] When considering the facts relating to peremption, I am obliged to consider the objective conduct of the defendant. In his founding affidavit, the defendant sets out facts and events which span a number of years. I have considered only the facts particularized by the defendant.

[14] The facts are as follows: -

[14.1] The defendant was unaware of the order until the plaintiff issued a writ of attachment against his property on or about 15 February 2010. He states that he *"took exception to this high handed conduct and went to see [the plaintiff] to glean an explanation from them when none was forthcoming".* The defendant persisted and this resulted in meeting with a representative of the plaintiff which occurred on or about 25 March 2010. At this meeting, the plaintiff *"agreed to what they call an "assisted sale process" to extract the maximum value from the property. [The plaintiff] agreed to freeze interest on any losses incurred during the sale process, which would be born 50/50 by the parties. This was encapsulated in a written signed agreement."* The defendant states that he could not locate his copy of the agreement but *"[the plaintiff] then appointed an estate agent to market the property. The estate agent then recommended to [the plaintiff] that they wait for the sectional title development to be registered first before proceeding further which advice [the plaintiff] accepted"* and he was advised

accordingly. In this regard, the defendant says, *inter alia,* that the parties had agreed prior to the granting of the order that a sectional title development would be opened in respect of the property.

[14.2] Thereafter and on or about 16 August 2010 *"a further agreement was concluded at the premises of [the plaintiff] when [the defendant] concluded an agreement with [the plaintiff] and Toby and Kirsty Rumble".* According to the defendant *"this agreement in which both [the defendant] and [the plaintiff] would participate to the benefit of both. [The plaintiff] would receive payment in full of any amount which it may prove due to it and [the defendant] a healthy surplus. This agreement constitutes an abandonment of the judgment taken against [the defendant] on 22 September 2009 as a new agreement having its own terms was now in place."* The defendant emphasizes that the sectional title development would be proceeded with and that a unit would be sold for R500,000.00 and such amount less anything owed to the municipality would be paid to the plaintiff. I pause here to point out that, if the defendant was of the view that the summary judgment order was abandoned then, on his own version, he would not need a rescission of the order which he seeks.

[14.3] According to the defendant, the plaintiff breached the agreement concluded in August 2010. The defendant proclaims that the plaintiff put up the property for sale because the sectional title registration process was taking too long. He points out that he *"approached [the plaintiff] and remonstrated with them"* whereafter the sale in execution was cancelled.

[14.6] Subsequently, the defendant was unable to maintain the instalments. The plaintiff thereafter caused the property to be put up for sale by the sheriff on 16 October 2013. On 14 October 2013, the defendant launched an urgent application against the plaintiff in terms whereof he sought that the attachment of the property and the writ of execution be set aside. The defendant did not seek a rescission of the order. In the founding affidavit the defendant did not raise any complaint about the order having been incorrectly granted or that it should be rescinded. By this time, the order had been in force and effect for some 4 (four) years. The application was *"dismissed for lack of urgency"*.

[14.7] Afterwards, the property was sold by the sheriff in execution on 16 October 2013 and the defendant's attorney advised him that there was nothing more that he could do for him. The defendant says that he vacated the property during March 2014 and after having done so he consulted with various people regarding his *"prospects receiving conflicting points of view"*. It was only after communicating with his current attorneys during the latter part of 2015 that the defendant decided to "pursue the matter". Moreover, it was only after May 2016 that the defendant's current attorney told him that his remedy was *"to bring an application for rescission"* which the defendant states is the first occasion he became aware a rescission of the order was a step available to him.

[11] For some 8 (eight) years, the defendant took no steps to rescind the order. He never reserved his rights or made any payment to the plaintiff under protest. His conduct displays an unequivocal intention to adhere to the order and work

with the plaintiff to reduce his indebtedness to it and to avoid the sale in execution of his property. It was only after this lengthy period that the defendant had a change of heart regarding the order. This occurred when he was advised by his current attorneys that he could seek a rescission of judgment. He professes that he did not know that he could seek a rescission prior to him being told by his new attorneys. This alleged late knowledge does not help the defendant. His conduct throughout displayed a clear and unmistakable intention to comply with the order. I am of no doubt at all that peremption is applicable to the facts and the defendant abandoned any right to rescind the order.

[12] I am fortified in my conclusion when having regard to the unreported decision of Kisten N.O. and Others v Absa Bank Limited and Others (AR179/15) [2016] ZAKZPHC 72 (23 August 2016). It was concluded that the Appellants (who were the defendants in the court a quo and who had sought a rescission of judgment which had been refused) had acquiesced in the granting of the default judgment. The Court dealt with the facts as follows: -

> *"[15] The Appellants on no less than six occasions paid the First Respondent monies to have the sale of the property stayed. In my view this conduct amounts to pre-emption (sic) (see Sparks v David Polliack & Co (Pty) Ltd 1963 (2) SA 491 (t) at 496 D-F). The general position is that 'no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate'. In order to show that a person has acquiesced in a judgment, the court must be satisfied upon the*

evidence that an act has been done which is necessarily inconsistent with his continued intention to have the case reopened on appeal.

[16] The Appellants paid monies to the First Respondent as mentioned above to stay the sale of the property on the following dates..... The Appellants conduct in making these payments in my view is entirely inconsistent with an intention to have the case reopened by way of rescission."

[13] Given the above, the defendant's application for a rescission of the order must fail. The other reason why the application should fail, namely that the delay in the defendant launching the application is inordinate and unreasonable is set out below.

[14] In terms of rescission under the common law, the relief must be sought within a reasonable period of time. (see Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at 306H) Likewise the same applies to a rescission under rule 42(1). (see First National Bank of Southern Africa Ltd v Van Rensburg NO and Others: In re First National Bank of Southern Africa Ltd v Jurgens and Others 1994 (1) SA 677 (T) at 681B-G). Determining whether a rescission is sought within a reasonable time period depends on the particular facts of each matter.

[15] The fact that the rescission application was only launched 8 (eight) years after the order was granted speak volumes. The defendant ought to have acted without delay, which he did not do. The guiding principle of our common law is

that there is certainty of judgment. (See Colyn *supra* at par [4]). Was the plaintiff entitled to accept that the order was final? On the facts, I believe so.

[16] In Hlatshwayo *supra* De Villiers CJ at p248 observed that "*Where a Court has ordered a judgment to be carried into execution, the mere payment of the amount or part thereof by a party condemned to pay it is no doubt consistent with the intention not to appeal against it, but it is also consistent with the view that he paid to avoid execution, and where the time for noting the appeal has not expired, he still intends to appeal.* "

[17] Section 34 of the Constitution provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. A judgment granted by default is inimical to this entrenched right. In RGS Properties (Pty) Ltd v Ethekwini Municipality 2010 (6) SA 572 (KZD) at para [12], Ngwenya AJ dealt with section 34 of the Constitution, default judgment and a party seeking rescission thereof. The learned judge held, inter alia, that: -

> "…. *The section provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. Therefore, in my view, in weighing up facts for rescission, the court must on the one hand balance the need of an individual who is entitled to have access to court, and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default judgment being granted in the first instance…*"

[18] The common law is mainly designed to enable a court to do justice between the parties. The decision in RGS Properties *supra* accords with the common law approach. In this regard, a court should exercise it discretion by, *inter alia*, (a) balancing the interests of the parties and having regard to any prejudice that might be occasioned by denying an applicant the right to have legitimate issues fully ventilated and properly tried and (b) doing its best to advance the good administration of justice which involves among others, weighing the need, on the one hand, to uphold judgments of the courts which are taken properly and, on the other hand, the need to prevent the possible injustice of a judgment(Se Riddles v Standard Bank of South Africa Ltd 2009 (3) SA 463 (T) para [15]; Scholtz v Merryweather 2014 (6) SA 90 (WCC) para [11])

[19] The common law is instructive and helps determine what is a reasonable time period in which to launch a rescission application. As a starting point, the 20 (twenty-day) period laid down in Rule 31(2)(b) provides some guidance (Roopnarain v Kamalapathy & Another 1971 (3) SA 387 (D) at 391B-D). The reason for a time limit is that there must be finality in litigation and that prejudice can be caused if rescission is not promptly sought. (See Nkata supra para [10]). In Roopnarain supra at p390G-391D a period of 6 (six) months lapsed from the date on which the applicant had acquired knowledge of the judgment and the Court found that a reasonable period had been exceeded by a large margin. In First National Bank of Southern Africa Ltd *supra* it was found that a reasonable time was substantially less than 3 (three) years. Notwithstanding the aforegoing, the determination of what constitutes a reasonable time remains a fact-bound inquiry (See: Strachan & Co Ltd v Natal

Milling Co. (Pty) Ltd 1936 NPD 327 at 333; Cardoso v Tuckers Land and Development Corporation (Pty) Ltd 1981(3) SA 54 (W) 63E)

[20] On the facts, the plaintiff was entitled to assume that the defendant had assented to the order. The defendant should have launched his application at a much earlier stage. He could have done so after learning of the order but chose not do so. An unreasonable time passed before the defendant sought a rescission. The defendant chose to launch his rescission application after shopping around for advice and eventually receiving legal advice to seek a rescission. It is fair to say that had the defendant not received advice to seek a rescission, the status *quo* of the order being enforceable would have remained. Certainty and the finality of orders must prevail. During the entire period, the plaintiff has been unwavering in that it held the view that it was at all times entitled to proceed on the order and in this regard, it never abandoned its rights. On the facts before me, the plaintiff was entitled to accept that the order was a final order. Seeking a rescission at such a late stage cannot be countenanced or condoned. I conclude that considering all of the applicable factors including the interests of justice, the order should not be rescinded and must be regarded as final as between the parties.

[21] Accordingly, the application is dismissed with costs.

B W MASELLE
ACTING JUDGE OF THE HIGH COURT
23rd October 2018

Applicants' counsel: Adv C. Ascar
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Instructed by: Bezuidenhout Van Zyl and Associates Inc
Delivered on: 25 October 2018