

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

Case Number 77000/10

Date: 7 March 2014

In the matter between

I R PITJE

Applicant

And

J O SHIBAMBO

First Respondent

E V SHIBAMBO

Second Respondent

M H PITJE

Third Respondent

REGISTRAR OF DEEDS

Fourth Respondent

STANDARD BANK (SA) LIMITED

Fifth Respondent

NEDBANK LIMITED

Sixth Respondent

**JUDGMENT**

BAM J

1. The disputes in this matter turn upon the ownership of a property, Erf [...], M[...]. The applicant contends it is his property. Initially the property was apparently part of his father's estate. The third respondent, brother to the applicant, purchased the property in 1992. A bond was thereafter registered in favour of the sixth respondent. According to the respondent he purchased the property from his brother, the third respondent, in 2001, after certain negotiations with the sixth respondent. The applicant averred that he complied with the

agreement pertaining to payments to the sixth respondent until he was advised by the sixth respondent that the bond account had been closed. It appears that in the meantime the third respondent sold the property to the first and second respondents.

2. On 6 April 2011 the first and second applicants issued an application for the eviction of the applicant from the premises. A notice to oppose the application was duly filed by the applicant's attorneys. According to the applicant, who is at present in his seventies, he was ill during May 2011 and for that reason he was advised that it was not "*desirable*" to depose to an opposing affidavit at the time. The respondent's attorneys were accordingly advised.

3. On 29 August 2011, the application for the eviction of the applicant lodged by the first and second respondents was heard in the unopposed motion court and an order for the eviction of the plaintiff from the said premises was granted. It appears that the applicant was represented by counsel who was only instructed to apply for postponement. The application for postponement was however refused and the court proceeded to deal with the matter, presumably on an unopposed basis.

4. It is not in dispute that the applicant did not file any opposing papers, that the application was properly enrolled, and that the Notice of Set Down was served on the applicant's attorneys on 19 July 2011 and on the applicant personally on 25 July 2011.

5. On 14 September 2011 the applicant's attorneys served a Notice of Motion on the respondents praying for the following relief:

(i) That the Order made by the Honourable Court on the 29<sup>th</sup> August 2011 be varied to read that the application is dismissed with costs.

(ii) That the fourth respondent be directed to cancel the registration of the transfer of the property described as Erf [...], M[...], Pretoria, Gauteng Province from the names of the First and second respondents held under Title Deed Number; T[...].

(iii) That the fourth respondent be directed to cancel the registration of the Mortgage Bond Number: B[...] and or any other bond(s) that may be registered against the aforesaid property in favour of the fifth respondent.

(iv) That the fourth respondent be directed to register the transfer of the aforesaid property into the names of the applicant, upon the latter providing a guarantee to pay the outstanding bond amount that was due to the sixth respondent.

(v) That the costs of the application be borne by the respondent(s), provided opposing the same on a punitive scale that may be justifiable in the circumstances.

(vi) That such further and/or alternative relief be granted to the applicant as it may be just in the circumstances.

6. During argument Mr van Rensburg, appearing for the applicant, conceded that the applicant cannot succeed with the relief for the variation of the order as sought, but submitted that the applicant should be entitled to succeed with a rescission of the eviction order of the 29 August 2011, if not in accordance with prayer 1 then under the prayer for further or alternative relief.

7. It was contended by Mr Mostert, appearing for the first, second and third respondents, that the applicant could not succeed with the relief sought for variation or rescission of the judgment in question. The applicant's only remedy was to appeal the judgment. In regards to the submission on behalf of the applicant that the application should be dealt with as an application for the rescission of the judgment and that it should be granted under the prayer of alternative relief, is, on the submission by Mr Mostert, untenable and not justified in law. The judgment, argued Mr Mostert, was in any event not a default judgment because the applicant was in fact represented when the application was considered by the Court.

8. Rule 42(1)(a) of the Rules of Court provides that a court order may be rescinded or varied if it was erroneously granted in the absence of any affected party. In this regard a court has a discretion. In *De Wet & Others v Western Bank Ltd 1979(2) SA 1031 (AD)*, AT 1042F - 104A It was re-stated that the applicant must show good cause and that the considerations of justice and fairness have to be kept in mind by the court hearing the application. Good cause entails a reasonable and acceptable reason for the default and a bona fide defence which carries some prospects of success.

See *Chetty v Law Society, Transvaal 1985(2) SA 756 (AD)* at 765 A-D where Miller JA stated the law and added the following:

*"It is not sufficient only one of these requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in the application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain for the Rules was nevertheless permitted to have a judgement against him rescinded on the ground that he had reasonable prospects of success on the merits."*

9. It is contended by the applicant that the first and second respondents were at all relevant times aware of the fact that he had acquired all the rights in respect of the said premises and that they, despite that knowledge

concluded an agreement with the third respondent to purchase the property. In this regard, as alluded to above, the applicant avers that he is the owner of the property, that he has made payments in respect of the bond, and that he is still residing at the property. The applicant added that the third respondent did not have any right to sell the property to the first and second respondents.

It is clear that there is a material dispute of fact between the applicant and the third respondent, the latter contending that the applicant never became the owner of the property.

10. It has to be stated that this court is not called upon to decide on the merits of the applicant's prospects of success, what has to be considered, as alluded to above, is whether the applicant has a bona fide defence which prima facie carries some prospects of success.

In this regard, in my view, the applicant succeeded.

11. In regards to the question whether the applicant has shown sufficient or good cause for his default, the following issues are relevant. On the applicant's own version it is clear that no opposing papers were filed against the application for his eviction from the property. The explanation of the applicant that he was advised, due to his health condition, that it was not advisable to depose to an opposing affidavit at the time it was due, is a bit flimsy. From the date of the filing of the Notice to Oppose the application for his eviction on 6 April 2011 until the enrolling of the application in July and the hearing on 29 August 2011, the applicant surely had several months to file opposing papers or at least a substantive application for postponement. This did not happen. However, what must be taken into account is the fact that the applicant did file a Notice to oppose the application and that his attorneys did advise the respondent's attorneys of his poor health condition. The applicant was further represented by counsel on the 29 August 2011, but who was apparently briefed solely for an application for postponement.

12. In considering all relevant issues this is not a case where the applicant's explanation can be said to be unreasonable.

13. Accordingly, although the relief claimed by the applicant for the variation of the court order of the 29 August 2011 cannot be granted, the application for the rescission of that order should be granted. The respondents were aware, at all relevant times, that the applicant actually sought an order to rescind the eviction order.

14. This application was enrolled for the 24 February 2014. The applicant's heads of argument were filed on 19 February 2014 without any explanation why it was not filed timeously in accordance with the Practice Rule. On 24 February the matter was stood down until the 26<sup>th</sup> February to enable the applicant's

representative to file an affidavit explaining the late filing of the heads. An affidavit in that regard was handed up by counsel on the 26<sup>th</sup>. I do not deem it necessary to repeat the contents in view of the fact that counsel, Mr van Rensburg conceded that the explanation was clearly insufficient. It suffices to say that that I will express this Court's disapproval of the non-compliance with the Practice Rule with an appropriate order.

15. Accordingly the following order is made:

1. The Court order dated 29 August 2011 for the eviction of the applicant from Erf [...], M[...], is rescinded.
2. The applicant is ordered to file his opposing papers with the Registrar, and serve it on the attorneys for the first, second and third respondents, not later than 17 March 2014.
3. In the event of the applicant failing to comply with the above order, the respondents will be entitled to enroll the application on the unopposed motion court roll.
4. The applicant's attorneys are debarred from taxing and claiming any fee for the drafting and filing of the applicant's heads of argument in this application.
5. The order in respect of the costs of this application is reserved.

A J BAM

JUDGE OF THE HIGH COURT

5 March 2014