

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

29/8/14

CASE NO: 37847/2011

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

29 August 2014

A handwritten signature in black ink, appearing to be 'S. M. M. S. L.', written over a dotted line.

In the matter between:

MOHAMED IDHRIS OSMAN

APPLICANT

and

THE EXECUTOR OF THE ESTATE LATE J S ERASMUS

1ST RESPONDENT

SUSARA MACHTELENA ERASMUS

2ND RESPONDENT**AND**

CASE NO: 42176/2011

In the matter between:

SUSARA MACHTELENA ERASMUS N.O

APPLICANT

and

MASTER OF THE HIGH COURT

1ST RESPONDENT

MOHAMED IDHRIS OSMAN

2ND RESPONDENT

AND

CASE NO: 54325/2011

In the matter between:

SUSARA MACHTELENA ERASMUS N.O.

APPLICANT

and

MOHAMED IDHRIS OSMAN

RESPONDENT

J U D G M E N T

KUBUSHI, J

[1] There are three applications before me with three different case numbers. I intend to deal with them in one judgment. The applications are interrelated in that the parties are almost the same and of importance, the issues are also nearly the same as shall appear from the factual background set out hereunder.

[2] Mohamed Ildhris Osman (Osman) purchased property known as erf 176 Mookgopong, Northern Province, situated at 22 Thabo Mbeki Street, Mookgopong (the property) from Mr Jacobus Stefanus Erasmus (Mr Erasmus) and Mrs Susara Machtelena Erasmus (Erasmus). The parties entered into a written agreement of sale on 6 December 2004 (the agreement).

[3] The purchase price of the property is an amount of R360 000, payable in terms of the agreement as follows:

- a. an amount of R50 000 payable upon signature of the agreement.
- b. the balance of the purchase price to be paid on transfer of the property to Osman.
- c. Osman to provide a guarantee of the balance to Mr and Mrs Erasmus within 30 days from date of signature.

[4] Another term of the agreement is for Osman to take occupation of the property upon payment of occupational rent of R3 600 per month from date of occupation until the property is transferred into his name. Osman took occupation of the property upon signing the agreement, and it is common cause that he is still in occupation of the said property. Osman was also in terms of the agreement liable to pay all the legal fees in respect of the transfer of the property together with the transfer costs thereof.

[5] It is common cause that Osman paid the deposit of R50 000 upon signature of the agreement. On 17 January 2005 Osman paid an amount of R18 424, in respect of the transfer costs and legal fees, upon presentation of an invoice by the Erasmus' then attorneys of record. And on 15 March 2005 a guarantee in the amount of R310 000 was

issued by ABSA Bank in favour of the Erasmus' attorneys on behalf of Osman. The said guarantee was, on 15 July 2005, amended at the request of the attorneys and the guarantee amount was divided between the Municipality and the Erasmus'.

[6] It is indisputable that transfer of the property did not take place. This was occasioned by a dispute that arose between the parties, amongst others, that Osman was in breach of the agreement and that the agreement was not properly cancelled or cancelled at all. On 13 November 2006, the Erasmus issued summons against Osman at the magistrate's court for payment of arrear occupational rental. Osman defended the action. On 12 February 2008, before this action could be finalised, Mr Erasmus died. Erasmus (Mrs Erasmus) was consequently, in terms of Mr Erasmus' will, appointed the executrix of his estate.

[7] Erasmus, in her capacity as the executrix of Mr Erasmus' estate, issued fresh summons against Osman, for the payment of arrear occupational rental and unpaid municipality rates and taxes in respect of the property. These are the proceedings in respect of which judgment has been granted against Osman, which judgment Osman is seeking to rescind.

[8] In the process of the liquidation of Mr Erasmus' estate, Erasmus as the executrix of that estate, instructed her attorneys to include the property in the Liquidation and Distribution Account of Mr Erasmus' estate with the intention to transfer it into her name. The contention being that the property was to be transferred into her name as the sole heiress in the estate of Mr Erasmus. Osman objected to the inclusion of the property in the Liquidation and Distribution Account. The master of the high court (the master) ruled in Osman's favour and directed that the property be removed from the Liquidation and Distribution Account because, according to the master, it does not form part of Mr Erasmus' estate. As a result, Erasmus launched a review application against the master's ruling. In the meanwhile Erasmus applied to this court for an order evicting Osman from the property.

[9] The following applications are therefore before me:

- a. An application for rescission of judgment launched by Osman against the judgment granted against him in favour of Erasmus in her personal capacity and in her capacity as the executrix of the Erasmus' estate. (case number 37847/2011);
- b. A review application launched by Erasmus in her capacity as the executrix in the estate of Mr Erasmus against the decision of the master of the high court (case number 42176/2011); and
- c. An eviction application by Erasmus against Osman (case number 54325/2011).

Erasmus is opposing the rescission application and Osman is opposing the review and eviction applications.

[10] The eviction application is founded on both the judgment which the rescission application seeks to rescind and the review application which seeks to set aside the decision of the master. At the centre of all these applications is the main issue of whether the Erasmus Estate is entitled to the return of the property. The issue hinges on two sub-issues, namely, whether Osman breached the agreement and whether the agreement was properly cancelled. These issues are not per se before me for determination. These issues are in dispute and can only be decided in a fully fledged trial. It is in that sense that I agreed to consider the applications together. I shall deal first with the rescission application, followed by the review application and lastly, the eviction application.

THE RESCISSION APPLICATION

[11] In my opinion, Osman has satisfied the requirements to be granted relief sought in this application.

[12] The requirements for an application for rescission of judgment under uniform sub-rule 31 (2) (b) are:¹

- a. the applicant must give a reasonable explanation of his or her default. The default must not be wilful or due to his or her gross negligence;
- b. the application must be bona fide and not be made with intention to delay the plaintiff's claim; and
- c. the applicant must show that he or she has a bona fide defence to the plaintiff's claim.

[13] The approach adopted by our courts in matters of this kind is to consider these factors in an interrelated manner and to weigh one against the other; a strong factor to compensate for a weaker one.²

[14] Osman's explanation for his failure to enter appearance to defend is that the summons was served on the *domicilium* address as stated in the agreement of sale. He was not aware that the summons had been served. The judgment granted against him first came to his knowledge on 19 September 2011 when the sheriff turned up at his home and enquired about movable assets to satisfy the judgment. He immediately instructed his attorney of record to bring an application for rescission, which was duly served on 21 September 2011.

[15] In opposing the application, Erasmus' contention is that Osman became aware of the action since 11 August 2011 when the application under case number 42176/2011 was served on him. In that application Erasmus makes mention of the present application by

1. Erasmus: *Superior Court Practice* at B1 – 201 and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9E-F

2. *Burton v Thomas Barlow & Sons (Natal)* 1978 (4) SA at 797H.

alleging that, due to the breach of the agreement by Osman, she had to issue summons for the recovery of arrear occupational rental and unpaid municipality rates and taxes.

[16] My view is that, in order for Osman to have been in wilful default, he should have known or been aware that summons has been issued against him and served on him, and he failed and/or neglected to enter appearance to defend. Even if it is accepted that he was aware of the action as contended by Erasmus, this will not suffice for purposes of this application. For him to be in default, the service of the summons should have come to his knowledge and being aware of such failed to file appearance to defend. This is not what happened in this instance.

[17] The common cause facts in this application are that the summons was served at the *domicilium* address provided by Osman to the applicant in terms of the agreement. The uncontroverted evidence of Osman is that he has not been staying at that address since October 2007. There is no evidence that shows that Osman came to know of the service of the summons at that address. Even if it can be accepted that he was in constant contact with the tenants there, as Erasmus wants to suggest, there is still no evidence that establishes that the tenants having received the summons brought it to his attention. In the application under case 42176/2011, Erasmus does not give details of the summons she alleges to have issued against Osman. There is no case number of the summons; there are no details of when and where it was issued; and no details as to where and when it was served.

[18] It is my view that, the fact that Osman did not inform Erasmus of his changed address for service of documents, is of no consequence for purposes of this application. It cannot be said that in his failure to do so, he was grossly negligent or that his explanation is not a reasonable one. What is of importance is that the summons was served at that address and did not come to his attention. It can therefore not be expected that he should have acted on it by entering appearance to defend. Osman only became aware that judgment was granted against him on 19 September 2011 and immediately took steps to have it rescinded by instructing his attorneys to do so. It cannot be said he was in wilful default.

[19] In respect of the issue whether Osman has shown a bona fide defence to the claim or not, it is trite that he was not expected to show a probability of success. It is sufficient if he makes out a prima facie defence by setting out averments which, if established at trial, would entitle him to the relief asked for.³

[20] To my mind, the averments raised by Osman in his founding affidavit, if established at trial, are sufficient to can avail him of the relief he seeks. In that case, a bona fide defence has been set out.

REVIEW APPLICATION

[21] Erasmus, in her capacity as the executrix of the Erasmus estate advertised a Liquidation and Distribution Account of the estate in which she was to transfer the property into her name as the sole heiress in the estate. Osman objected to the account and the master ruled in his favour and decided that the property must be excluded from the Liquidation and Distribution Account because it does not belong to Mr Erasmus' estate. A directive was issued by the master wherein Erasmus was ordered to transfer the property into the name of Osman. Erasmus as a result applied for the review of the master's ruling and directive. Her grounds for the review are that, firstly, the master made his ruling without enquiring into the merits of Osman's objection; and secondly, the master failed to consider her response to Osman's objection to the account.

[22] The review application is, however, filed out of time and Erasmus has as such applied for condonation for the late filing. I shall as a result deal first with the condonation application and shall deal with the review application only if I grant an order condoning the late filing.

³

Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd 1980 (4) SA 573 (W) at 575H.

[23] It has been held that in considering applications for condonation, the court must take into account the adequacy of the explanation, the extent and cause of the delay, any prejudice to the parties, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the avoidance of unnecessary delay in the administration of justice and the applicant's prospects of success on the merits. A litigant who does not comply with the rules is required to show good cause why the rules should be relaxed.⁴

[24] In her review application, Erasmus seeks condonation for launching the application out of time. It is common cause that the extent of the delay has been too long. The parties are agreed that the review application was filed 381 days out of time. Osman's contention is that no reasonable explanation has been provided for the delay and as such the application should be dismissed. In argument before me, the contention by Erasmus' counsel is that the court should consider that what Erasmus set out in her affidavit is indication that a delay of 381 days was reasonable under the circumstances of this application. She also implored me to take into account the importance of the application and the prospects of success when exercising my discretion whether or not to grant the condonation application.

[25] My view, however, is that the reasons provided by Erasmus in her affidavit do not go to the heart of the delay. She has failed to furnish a full and reasonable explanation why she delayed for such a long time. Erasmus' explanation why she filed out of time as set out in paragraph 22 of her founding affidavit does not in my view provide a reasonable explanation. She does not even present the facts of what occurred and presents no proper explanation at all. She only infers that she was busy with the dispute between the parties and that she was attending to the dangerous situation created by Osman on the property. She does not state how this impacted on her inability to file the application within the time limits. The reasons she proffers that she requested the master to reconsider his decision and requested Osman's attorneys of record for an extension of time, do not suffice as well. She does not state when she made the request and what she did when a response was not forth

⁴ *Minister of Safety and Security v Scott* [2014] 3 All SA 306 (SCA) at 307d.

coming. In her own words, as early as 22 September 2010, when the master issued a directive that the property be transferred into Osman's name, she was aware that the master had no intention of reconsidering the matter. There is no explanation why no steps were taken at least immediately after that date. There are, as a result, no enough facts before me to exercise my discretion in favour of Erasmus and I am thus constrained to dismiss the application.

[26] Even though Erasmus condonation application for filing the review out of time is dismissed, it is my view that the directive by the master should be set aside. My grounds for the dismissal are based on different grounds to those raised in Erasmus' review application.

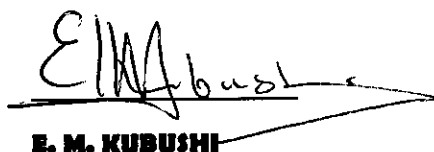
[27] I have already indicated that the three applications before me are interlinked. From the reading of the review application it is clear that Erasmus reached the decision as the executrix of the Erasmus estate, to transfer the property into her name on the basis that Osman breached the agreement and that the agreement of sale was properly cancelled. It is also on this basis that judgment was obtained against Osman for payment of the arrear occupational rental and the unpaid municipality rates and taxes. Since I intend to grant an order rescinding that judgment the basis for Erasmus' decision will now rest on shaky grounds. One of the defences raised by Osman is that the agreement of sale was not properly cancelled. Should a finding be made at the envisaged trial that the agreement was indeed not properly cancelled, it will mean that this ground will fall off. On the other hand, should the court rule that the agreement was properly cancelled, then the master's decision that the property does not form part of the Erasmus estate shall have been wrongly granted. Such a finding, might necessitate an application for the variation or setting aside of the master's decision. To my mind Erasmus should not have included the property in the Liquidation and Distribution Account until such time as the proceedings in case number 37847/2011 has been finalized. In the interest of justice I am of the view that the master's decision should either be set aside or be suspended pending the outcome of the proceedings in case number 37847/2011. I conclude, therefore, that the suspension would better serve the interest of justice.

EVICTON APPLICATION

[28] As already stated, the eviction application is based, firstly, on the judgment granted against Osman for the payment of arrear occupational rental and unpaid municipality rates and taxes; and secondly, on the master's decision to exclude the property from the Liquidation and Distribution Account. As earlier stated in this judgment, I intend to rule in favour of Osman in the rescission application and as such the matter in that case, case number 37847/2011, is to proceed on a defended basis. I also intend to suspend the master's decision pending the outcome in case number 37847/2011. To my mind, on the basis of my findings in these two applications, the eviction application should not be dealt with at this stage. It should, rather, be postponed sine die pending the finalisation and outcome of the proceedings in case number 37847/2011.

[29] In the premises I make the following order:

- a. The default judgment granted against the applicant in case number 37847/2011 is rescinded and the applicant therein is granted leave to defend the action.
- b. The directive of the master of the high court dated 24 June 2010, in case number 42176/2011, is suspended pending the outcome of the action in case number 37847/2011.
- c. The eviction application is postponed sine die.
- d. Costs of the three applications are reserved for adjudication by the court in case number 37847/2011.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearances:**HEARD ON THE****:15 MAY 2014****DATE OF JUDGMENT****: 29 AUGUST 2014****APPLICANTS' COUNSEL****: ADV N ERASMUS****APPLICANTS' ATTORNEY****: THERON & WESSEL PARTNERS INC****RESPONDENTS COUNSEL****: ADV R J GROENEWALD****RESPONDENTS ATTORNEY****: LAUBSCHER ATTORNEYS****c/o GERHARD MARE ATTORNEYS**