

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

**CASE NUMBER: 30726/2009**

**DATE: 26 SEPTEMBER 2014**

**NOT REPORTABLE**

**NOT OF INTEREST TO OTHER JUDGES**

In the matter between:

**THE LAND AND AGRICULTURAL DEVELOPMENT**

**BANK OF SOUTH AFRICA**

APPLICANT

and

**FLIPPEN BEESTE BOERDERY CC**

1<sup>st</sup> RESPONDENT

**PJ VAN ZYL**

2<sup>ND</sup> RESPONDENT

**JUDGMENT**

**MODIBA AJ:**

This is an application for the late filing of an application for a rescission of judgment as well as an application for recession of judgment.

**2.**

The following background facts are common cause between the parties. The applicant's claim against the 1<sup>st</sup> respondent is based on a written loan agreement. The first respondent defaulted on this agreement. In terms of the loan agreement, the balance of the loan became due and payable as a result of failure by the 1<sup>st</sup> respondent to comply with the terms of the loan agreement. Its claim against the 2<sup>nd</sup> respondent is based on a written suretyship in terms of which the 2<sup>nd</sup> respondent bound himself as surety and co-principal debtor for

the due payment of the loan.

3.

The respondents defended the action. Pleadings closed. The matter was enrolled for trial on 11 April 2013 and was postponed at the respondents' instance. On 6 June 2013, the applicant convened a pre-trial conference following which it applied for a trial date. On the same date, it served a notice of application for a trial date on the respondents' attorneys. On 12 June 2013, the applicant's attorney received written confirmation from the office of the registrar confirming that the matter is set down for trial on 21 August 2014. On 21 June 2013, the applicant's attorney served a notice of set down on the respondents' attorneys. The notice of set down erroneously indicated 21 August 2013 as the trial date.

4.

On 21 August 2013, the respondents' attorney attended court. On noticing that the matter was not on the roll, they obtained the court file from the registry, presented it together with the notice of set down to the Deputy Judge President, who then enrolled the matter. The court granted absolution from the instance on application by the respondents. It is the said order that the applicant wants rescinded.

5.

It is the duty of the registrar to enrol matters for trial and to notify the parties accordingly. For some reason, on realizing that the matter was not on the roll of 21 August 2013, the respondents did not approach the registrar office to ascertain why the matter was not on the roll. They instead elected to approach the Deputy Judge President who believing on the strength of the notice of set down dated 21 August 2013 that the matter was erroneously not enrolled for that day, proceeded to enrol the matter. I have no doubt that had the Deputy Judge President known that the notice of set down presented to him reflected an incorrect date, and that the applicant was not at court that day because the matter was properly not on the roll, he would not have enrolled the matter and would not have granted judgment against the applicant. Because the applicant had not enrolled the matter for 21 August 2013, there was no appearance on its behalf on that day. I am satisfied that the applicant has shown good cause for the default.

6.

The plaintiff has made out a prima facie claim against the respondents. The respondents did not except to it. They filed a plea in which they set out a defence that they have paid the amount owing to the applicant. They have discovered but have failed to discover the proof of payment. The onus to prove their defence lies with them. For these reasons, I am satisfied that the applicant has a bona fide claim as well as good prospects of

success.

7.

In the premises, I am satisfied that the applicant has made out a proper case for the judgement granted on 21 August 2013 to be rescinded.

8.

The question of the costs of this application as well as the respondents' wasted costs for 21 August 2013 was highly contested. The error made in the offices of the applicant's attorneys precipitated the wasted costs incurred by the respondents on 21 August 2013. For that reason the applicant ought to bear those wasted costs. It is trite that a party who applies for rescission of judgment seeks an indulgence from the court and for that reason ought to bear the costs of the application. It was submitted on behalf of the applicant that the respondents were mala fides in enrolling the matter for trial on 21 August 2013 and in obtaining judgement against the applicant and for that reason should bear the costs of the rescission application. While I agree with the applicant that the respondents ought to have ascertained the status of the matter prior to approaching the Deputy Judgment President, once approached, the Deputy Judge President exercised a discretion to enrol the matter. The respondents cannot be held accountable for the discretion exercised by the Deputy Judge President.

9.

Given that the error that occurred in the applicant's attorney's offices sparked the chain of events that necessitated this application coupled with the principle that a party who seeks an indulgence from the court bears the relevant costs, ordinarily, the applicant would bear the costs of this application. However, good cause exists that warrants departure from this general rule.

10.

Between the granting of the order for absolution from the instance and 13 October 2013 when the applicant filed the application for rescission of judgment, the parties exchanged various correspondence relating to a request by the applicant that the respondent should abandon the order for absolution from the instance. The applicant gave as the reason for its delay in bringing the application, attempts made to get the respondents to abandon the order for absolution from the instance. The respondents were willing to abandon the order on condition that the applicant abandons a previous court order it had obtained against them.

11.

The respondents have not shown that they stands to suffer prejudice if the Condonation application is not granted.

12.

In my view, the applicant was reasonable in attempting to request the respondents to abandon the order for absolution from the instance. The respondents sought to unfairly gain advantage for the indulgence sought by the applicant by asking the applicant to abandon the costs of a previous order obtained against the respondents. The respondents • conduct was unreasonable as the previous court order had nothing to do with the indulgence sought by the applicant. It is due to unreasonableness on the respondents • part that caused the applicant to incur unnecessary costs by brining this application.<sup>1</sup> To make matters worse, the respondents opposed the application for rescission of judgment. In my view, it was unreasonable for the respondents to oppose the application.

13.

In the premises, it is appropriate to make the following order:

#### **ORDER**

I therefore make the following order:

1. The late filling of the application for recession of judgement is condoned.
2. The judgement granted against the applicant on 21 August 2013 is rescinded.
- 3.The applicant shall pay the wasted costs for 21 August 2013.
4. The respondents shall pay the costs of this application.

**MODIBA AJ**

Counsel for the Applicant: Mr A Voster

Instructed by: Gildenhuis Malatji Inc

For the Respondent: Mr C Rip

Instructed by: Joop Lewies Inc

Date of hearing: 31 July 2014

Date of judgment: 26 September 2014

[footnote1](#)