THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 37681/2012

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
13/11/14 DATE SIGNATURE

In the matter between:

BROOKLYN EDGE (PTY) LTD First Plaintiff

PIVOT PROPERTY DEVELOPMENT (PTY) LTD Second Plaintiff

and

12/11/2014

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Defendant

JUDGMENT

1. In this matter the Defendant applies to have a default judgment obtained by the First and Second Plaintiffs, on 9 May 2014, be rescinded and set aside, together with ancillary relief, and an order that the Defendant be ordered to pay the costs of the application.

2. The order that the Defendant applies to this Court, to be set aside, is an order dated 9 May 2014, in terms of which the Defendant's defence under the abovementioned case number has been struck out, and in terms of which judgment was granted in favour of the Plaintiffs, together with a costs order

against the Defendant.

3. The parties are referred to as in the action.

4. In terms of the said Court Order dated 9 May 2014, the Defendant is ordered to take certain steps to close certain erven, and a declarator is ordered that the Defendant are not liable for the payment of certain interest. Further orders were granted to compel the Defendant to sign all transfer documents which are required to pass transfer of certain erven into the name of the First Plaintiff, together with certain ancillary relief.

5. The deponent to the Defendant's founding affidavit is a candidate attorney, one Marike Pretorius. According to her affidavit the order was obtained by default, for the reason that she had inadvertently diarized and noted the Plaintiff's application for the striking out of the Defendant's defence in her diary. The said date of the application was noted wrongly, and on the same day a separate interlocutory application launched by the Plaintiffs had been set down.

6. The Plaintiffs have also launched another application on 14 March 2014, as a result of a special plea filed by the Defendant dealing with the alleged non-compliance with the Institution of Legal Proceedings Against Certain Organs of State Act, No. 14 of 2002, for a declarator that Section 3 of the said Act, does not apply to the pending action.

7. The last-mentioned application with a separate case number (22046/14) was

served approximately seven days after the Plaintiffs' served the application to strike out the defence.

8. The said Pretorius explains that the application brought under case no. 22046/14 was set down for hearing on 22 May 2014 and for purposes thereof the Defendant consulted with its attorneys and counsel, *inter alia* on 9 May 2014. The said deponent to the founding affidavit alleges that the Defendant was in the process of complying with the issues of discovery and pre-trial answers, which formed the basis of the application for striking out and, as put by her:

> *"In this process I erroneously became under the impression that the two aforementioned applications, that is the one for striking out and judgment and the application for leave... (the declarator)... had both been set down for hearing on 22 May 2014 and have advised the Defendant accordingly."*

She says that it was an error and omission on the part of the Defendant's attorneys which should not be held against the Defendant.

9. The action was preceded by an application brought by the Plaintiffs, which has been withdrawn. The deponent states that, as I understand her, due to the previous application, the notice filed by the Plaintiffs for discovery in the action, have regard to facts that *"had already been within the knowledge of*

the parties". She further states that the Defendant, since being called upon to make discovery, (which notice to discover was filed on 12 September 2013) had the implication that voluminous documentation had to be discovered, which documentation spans virtually a whole decade of documents and has been archived in various sections of the Defendant's administration.

10. She says that it was simply impossible for the Defendant to timeously comply with the Plaintiff's notices in terms of Rule 35, and equally impossible for the Defendant to comply with the Court Order referred to hereunder, within ten days from date of service. The said deponent says that the service of the Court Order granted by Baqwa J, referred to hereunder, was served on 17 February 2014. The trial date was still some six months away, so she testifies, and there was no real prejudice to the Plaintiffs whilst the Defendant used all its best endeavours to compile the documents.

11. According to the founding affidavit, the pre-trial conference was held on 4 June 2013.

12. Certain pre-trial questions were furnished and delivered to the Defendant, which were not answered by the Defendant and the Plaintiffs launched an application to compel the Defendant to answer to pre-trial questions and to compel discovery.

13. On 27 January 2014, the Plaintiffs obtained an order, granted by my brother,

Baqwa, in terms of which the Defendant was ordered to deliver its discovery affidavit within a period of ten days from the date of service of the Order, and further to comply with the Plaintiffs' notice in terms of Rule 30A within a period of ten days from date on which the Order is served. This Order was granted on 27 January 2014, more than four months after the notice requiring discovery was filed. It is important to note that paragraph 3 of both sections of the Court Order of Baqwa J reads:

> *"That failing compliance with the Order referred to in paragraph 1, the Applicants* (referring to the Plaintiffs) *shall be entitled to apply to the above Court on the same papers, amplified as may be necessary, for the striking out of the Respondent's* (referring to the Defendant) *defence and the granting of judgment in the main action."*

14. The first part of the order deals with non-compliance in respect of discovery, and the second part of the order was in respect to the non-compliance with a request for particulars for the purpose of the parties' pre-trial.

15. Suffice to say that the importance and urgency of this Court Order, speaks for itself.

16. Thereafter various emails, dated the 27th January 2014 and 6th February 2014 were sent to the Defendant's attorneys, calling on the Defendant to discover and provide the pre-trial answers, all of which were ignored.

17. The Rule 30A notice was delivered pursuant to the failure by the Defendant to answer certain pre-trial questions.

18. Consequently the Plaintiffs launched the strike-out application on 7 March 2014, with notice to the Defendant, and obtained the Court Orders referred to above, on 9 May 2014.

19. As already stated, the Defendant received notice of the strike-out application on 7 March 2014, and no reaction was forthcoming from the Defendant.

20. At the time of the serving of the strike-out application on 7 March 2014, the Order of Baqwa J to compel discovery and to compel the delivery of answers to the Rule 30A notice (which Court Order of Baqwa J was served on the Defendant's attorneys on 17 February 2014) was already outstanding for more than two weeks after the service of the Order granted by Baqwa J.

21. Despite the service of the strike-out application on 7 March 2014, still no reaction was forthcoming from the Defendant or its attorneys and no indication that compliance with the Court Order would be forthcoming, or that the Defendant would request more time to comply with the Baqwa Order.

22. It is important to mention that, after the said Court Order that was granted by Baqwa J, the Plaintiffs' attorneys wrote a letter to the Defendant's attorneys on 27 January 2014 (the same date of the Order) seeking compliance with the request for discovery and request to answer the pre-trial questions, and on 6 February 2014 a further letter was written by the Plaintiff's attorneys to the

Defendant's attorneys, seeking compliance, with no reaction, at all.

23. The contention is raised by the Plaintiffs in their answering affidavit, that the mistakes and neglect of the Defendant is such that the Defendant cannot hide behind the mistakes of their attorneys. It is of importance to note that there is no explanation tendered on behalf of the Defendant why the Defendant did not react to the Court Order of Baqwa J, or why the Defendant did not immediately react when they were served with the Order granted by Baqwa J, and even more so, when the strike-out application was served on them. On the contrary, the Defendant manifested a complete disinterest in the conduct of its defence to the action.

24. There was no effort on behalf of the Defendant to request a postponement in regard to compliance with the Court Order of Baqwa J and no sufficient explanation was forthcoming from the Defendant to enable this Court to assess how all these delays and neglects on the side of the Defendant, came about, or to assess the conduct and the motives of the Defendant.

See: Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A)

25. No official of the Defendant filed any supporting affidavit, supporting the founding affidavit deposed to by Ms. Pretorius.

26. It is also of significance to mention that since the pre-trial questions were delivered by the Plaintiff on 23 May 2013, various letters were written by the Plaintiffs' attorneys, to the Defendant's attorneys, requesting answers in

regard to certain outstanding issues in the pre-trial minutes, which letters were written on 5 June 2013, 19 June 2013, 12 September 2013 and 22 October 2013. The Plaintiffs' attorneys also sought compliance in regard to discovery, in the letter dated 22 October 2013, written to the Defendant's attorneys. No reaction came of this.

27. The indifferent attitude of the Defendant is further illustrated in the fact that no correspondence was received from the Defendant's attorneys after the launching of the strike-out application and prior to the hearing thereof.

28. After the orders were granted in the strike-out application on 9 May 2014, the Defendant eventually brought this rescission application on 28 May 2014, and on 23 June 2014 an answering affidavit was filed by the Plaintiffs.

29. In the meantime, the Defendant responded to the pre-trial questions, only after the 9th of May 2014 orders, on 26 May 2014.

30. The Plaintiffs compiled heads of argument, completed the index and pagination of the papers (the index was completed, apparently by 18 July 2014). The heads of argument filed on behalf of the Plaintiffs, was filed on same date. The set down to hear the application on 10 November 2014, was dated 19 August 2014.

31. It is clear from the above that after the launching of the rescission application, the Defendant has done nothing to proceed with the application. A late replying affidavit was filed, deposed to by one Sithole on behalf of the

Defendant, which affidavit is dated 19 September 2014 (almost three months after the filing of the answering affidavit by the Plaintiffs).

32. It did not come as a big surprise that, despite the late filing of the replying affidavit, no condonation application or even an explanation was filed by the Defendant. No heads of argument or practice note was filed by the Defendant and during argument, the morning of 10 November 2014, I was handed the heads of argument, on behalf of the Defendant.

GENERAL REQUIREMENTS FOR RESCISSION:

33. It seems to me that the requirements for the application for rescission is that the Defendant must show goods cause by:

33.1 Giving a reasonable explanation of the default;

33.2 Showing that the application for rescission is made *bona fide*; and

33.3 Showing a *bona fide* defence to the Plaintiff's claim which *prima facie* has some prospect of success.

See: Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)

34. The Courts are slow to penalize a litigant for his attorney's inept conduct of

litigation, but there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys.

See: Saloojee & Another N.N.O. v Minister of Community Development 1965 (2) SA 135 (A)

35. In **Galp v Tansley N.O. & Another 1966 (4) SA 555 (C)** the Court decided that the expression *"good cause"* as used in Rule 46(5) of the Magistrate's Court's Rules cannot be held to be satisfied unless there is evidence, not only of the existence of a substantial defence but, in addition, a *bona fide* and presently held desire on the part of the Applicant to raise and pursue its defence concerned.

36. A rescission application that is brought in terms of Rule 31 of the Uniform Rules, is only when a Defendant is in default of delivering a notice of intention to defend, or of a plea, which application should be brought within twenty days after the Defendant has obtained knowledge of such judgment.

See: Rule 31(2)(b)

37. In terms of the common law, the Court has a discretion to rescind a judgment, but it has been clearly stated in the **Colyn-matter** that, apart from the other requisites referred to above, the Defendant must put up a defence that had a *bona fide* defence which, *prima facie*, has some prospect of success.

38. The willful or negligent nature of the Defendant's default is one of the considerations which the Court would take into account in the exercise of the discretion to determine whether or not good cause is shown.

See: Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at 530 B – 531 B

39. In my view, the Defendant has not explained to this Court why it waited for such a long time to prepare the answers requested pursuant to the pre-trial conference, or to prepare and compile a discovery affidavit. The Defendant has also not, in any satisfactory manner, explained his totally indifferent attitude towards the orders granted by Baqwa J and, even more serious, why he did not proceed to set the application for rescission down for hearing, by compiling a practice note and heads of argument and by index and paginating the papers. On the contrary, the Applicant, without any explanation or application for condonation, filed a replying affidavit, way out of time, on 3 October 2014.

40. In my view the abovementioned circumstances suffice to make the finding that the application of the Defendant is not *bona fide* and no proper or full explanation for the default has been given. On these grounds alone, so I find, the application should be dismissed.

See: The Colyn-matter, *supra* at 9 H – 10 A, as it was put by Jones AJA:

"Even if one takes benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the Defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success. (Referring to the **Melane-decision, 1962 (4) SA 531 (A) at 532 C – F**)

THE DEFENCES:

41. The defences that is relied upon by the Defendant, is based on hearsay evidence. The affidavit of Pretorius is not supported by any representative of the Defendant. The allegation in the founding affidavit that the closure of the street and subsequent sale of the properties in question, was based on a report and oral and written representations made by the First Plaintiff and its attorneys, *inter alia* that a different corporation would invest and develop the property in a joint venture with the Plaintiff and that there would be a huge influx of foreign capital as part of the development costs, are not supported by any affidavit that can properly verify these facts.

42. It is therefore based on hearsay evidence and cannot be said that there is a good prospect of success in regard to this defence.

43. The fact that such a lengthy report, annexed to the founding affidavit upon which the so called defence of public interest and false representations dealt

with in the report are based, cannot be properly adjudicated in this application. The report itself stems from page 19 to 198 (179 pages) and no proper reference is made to the relevant parts of such report.

See: Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279 (TPD) at 323 G – 325 C

44. I was referred during argument by Mr Labuschagne SC to a minutes of a meeting of the Council of the Defendant, reflecting that the contracting company that would invest in the development, after the street closure, would be Neuw Pivot Investments (Pty) Ltd. I was also referred to a letter of such company dated 14 February 2003, which recorded that the said Company, as developer, must be capable of completing the development within a reasonable time, and it would be intended to occupy during 2004 or early 2005. This, apparently, did not take place and therefore the investor, so I understand, lost interest. I, however, find that the defence of public interest and misrepresentation, was not properly canvassed in the founding affidavit and does not meet the requirements of the **Colyn-matter**.

45. With regard to the defence raised in the founding affidavit of Ms. Pretorius, she briefly referred to the issue of prescription and non-compliance of the Institution of Legal Proceedings Against Certain Organs of State Act, the factual background in regard to the written Deed of Sale, the subject matter of the claims of the Plaintiffs, which sale is dated 31 July 2003, was that

Defendant sold to the Defendant the immovable property known as Erven 161, 163, 164, 165, 193, 194 and Portions 1 and 2 of the remainder of Erf 195, Muckleneuk Pretoria.

46. At the time of the conclusion of the Deed of Sale the property was zoned as "Public Open Space".

47. For this reason the Plaintiffs had to ensure that the street be closed in terms of Section 67 of Ordinance 1 of 1939 and a rezoning had to take place in respect of the said properties.

48. Although a comprehensive application for removal of restrictive conditions and rezoning of the property was submitted to the Defendant during 2003, and despite that the City Planning Committee recommended to the Full Council of the Defendant that it be approved, the Full Council neglected to take decisions which resulted in an appeal to the Department of Local Government, Gauteng Province, during March 2007.

49. Certain other facts are mentioned regarding the obstructive behaviour of the Defendant, who frustrated the closure of the property, according to the evidence of the Plaintiffs which eventually led to the fact that during 2010 an application was served to compel compliance with the Deed of Sale and after taking legal advice, the Plaintiffs opted to withdraw the application and institute these claims by way of action.

50. The Plaintiffs' dealt with the Section 3(2) of the Institution of Legal

Proceedings Against Organs of State Act, 40 of 2002 and raised the point that the word "debt" in the Act, dealt with in Section 3 of the said Act, is only applicable if payment of damages is claimed. No convincing argument was addressed to me that this is not the position and, *prima facie*, it seems to me that the relief sought in the action is not the claiming of a "debt" as provided for in the said Section.

51. With regard to the defence of prescription, the Plaintiffs referred, in the answering affidavit, to monthly Tax Invoices that were issued by the Defendant to the First Plaintiff from the period October 2003 to January 2013 pertaining to the outstanding purchase price, which delivery of monthly statements constitutes an express alternatively tacit acknowledgment by the Defendant, of the liabilities due in terms of the Deed of Sale dated 31 July 2003.

52. In the replying affidavit, filed late by the Defendant (without any condonation application) the point was raised by the Defendant that these invoices were computer generated. I was, however, referred during argument that the question of prescription has been dealt with in the answers, filed by the Defendant and in which answers to a question it was placed on record by the Defendant (one D K Sivela) as follows:

> *"To my knowledge the process to be followed in this situation, is that the office of the Chief Financial Officer of the Municipality will provide the purchaser with an account and has the responsibility to collect these payments."*

It seems therefore that, *prima facie*, the invoices furnished by the Defendant, without qualification, would amount to an acknowledgement of the indebtedness in terms of the said Deed of Sale.

53. Although the Plaintiffs filed, when argument started on 10 November 2014, short heads of argument, I am not convinced that the Defendant has provided sufficient evidence to constitute, *prima facie*, a prospect of success in the action.

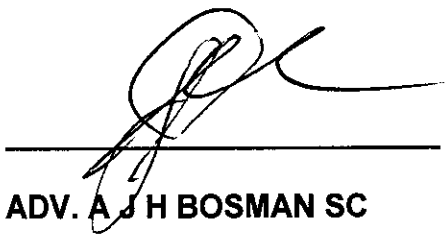
54. A further point of constitutionality was raised by Mr. Davis SC, namely that the provisions of Section 34 of the Constitution, namely access to Courts, was transgressed. I am, however, of the view that due to the fact that the exact consequences of the non-compliance of the Order of Baqwa J was already clearly stipulated in the Order itself, and to determine whether the Constitution has been breached, or not, a proper consideration should be taken into account in regard to all circumstances. I am not convinced that there is any merit in this point. In any event, the provisions of Rule 16(a), by giving notice to the Registrar, together with other formalities, has not been followed by the Defendant.

COSTS:

55. Due to the importance of the matter, for both the Plaintiffs and the Defendant,

the various legal issues raised and having regard to the fact that the Defendant itself employed to Council, I am of the view that the costs of two counsel should be included in the costs order. I therefore make the following order:

The application for rescission of judgment brought by the Defendant is dismissed, with costs, including the costs of two counsel.



ADV. A J H BOSMAN SC

ACTING JUDGE