IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

_____ _____
DATE SIGNATURE

CASE NUMBER: 1415/14
DATE: 3 February 2016

RODRIEK NKHENSANI MUSHWANA	First Applicant
CHRYSELDA TLANGELANI MUSHWANA	Second Applicant
V	
BONDEV MIDRAND (PTY) LIMITED	First Respondent
THE REGISTRAR OF DEEDS, PRETORIA	Second Respondent
NEDBANK LIMITED	Third Respondent

JUDGMENT

MABUSE J:

[1] This is an application for a rescission of a judgment that was obtained by default against the applicants on the 14th of May 2014. As the said order was obtained in the absence of the applicant it is therefore a default judgment and subject to be set aside in terms of Rule 31(2)(B) of the Uniform Rules of Court.

[2] On 17 June 2014 the first and second respondents in the main applicant, the applicants in this application for rescission, brought an urgent application consisting of two parts, namely Parts and B. In view of the fact that Part A of the said urgent application is irrelevant for the purposes of this application I will confine myself to Part B of the said application which is a part in which the applicants seek an order of rescission of the aforementioned judgment. This application is opposed by the first respondent who is the applicant in the main application. The first respondent has for that purpose filed an opposing affidavit. For the purposes of convenience I will refer to the parties by the names they chose to call themselves in this application for rescission.

[3] The application for rescission is brought on the ground that the applicants were not served with a copy of the papers that resulted in the default judgment and that therefore they did not know that an application was brought against them. They contend on that basis that they were not in wilful default. Secondly, they blame the delay in the completion of the construction of their house on the difficult challenges that they had in having their house plans approved. Before dealing with the ground upon which the applicants' application is founded, it is only apposite to deal with the preceding events.

[4] The applicants describe themselves as follows, the first applicant as a design technician, and the second applicant as an electronic technician who at the time they launched this application were residing at […] Street, […] Wallberry Hill, Heuwelsig Ext, Celtisdal in Centurion. It is unknown when they started living at the aforementioned address. They are married to each other in community of property. With a financial loan secured from the third respondent, a registered company duly registered as such in terms of the company statutes of this country, the applicants bought the property known as Erf […], Midstream Estate, Extension 19 Township, Registration Division JR, Gauteng, measuring 1144m² ("the property"), from one Josephus Oosthuizen ("Oosthuizen"), on 23 March 2010. They contend that when they purchased the said property it was explained to them that there was a restriction imposed in the title deed in terms of which the construction of their dwelling had to commence sometime during 2006. As they purchased the property in 2010 they believed that the restriction had lapsed. Mainly because of Oosthuizen's failure to comply with the building restrictions they were subjected to the payment of double levies on the same property.

[5] The applicants had a difficulty in having their building plans approved. Here is catalogue of the problems they experienced and the steps they took to obtain approval of their plans:

5.1 After they had received their plans they submitted them for approval to the Midstream Estate, which duly approved them. When they submitted the said plans to the local authority for further approval, it was discovered that the plans were faulty. The fault lay in the fact that, as it stood on the building plans, their dwelling would encroach upon the restriction adjacent to an as yet

to be constructed road. The local authorities then referred the applicants to the Department of Roads and Transport of the Gauteng Provincial Government.

5.2 This process, according to the applicants, took approximately a year. On 25 May 2012 the applicants agreed with Phillip Tine Trading Close Corporation that the Close Corporation should build their house. The relevant written agreement, a copy of which is attached to their founding papers, was signed by the parties on 25 May 2012.

[6] On 7 September 2012 the said Department approved the applicants' building plans. A certificate from National Home Builders Council in respect of the said Close Corporation and without which the building operation could not commence was only obtained on 28 September 2012.

[7] After they had secured the approval of the said Department of their building plans on 29 November 2012 they received a written letter of demand from the first respondent, a company duly registered with limited liability according to the company statutes of this country with its registered office located at Bondev Office Park, 3 Ashford Street, Midstream, Ekurhuleni, in which letter the first respondent demanded that the applicants commence with their building operation on or before 30 January 2013. The said letter stated, *inter alia*, that:

"If you do not start to build soon or on or before the 30th January 2013, we will proceed with legal action to retransfer Erf […], as stipulated in clause 11 of the original Offer to Purchase transaction between yourself and Bondev. No further extension of time will be considered nor granted."

The applicants contend that they understood the letter to mean that they were given a new deadline to commence building their house.

[8] On 18 December 2012 the applicants obtained the local authority's approval of their building plans. They contend that because the building industry had already closed by the time they received the local authority's approval of their building plans, the builders could not commence with the construction of their house.

[9] On 21 February 2013 the second respondent sent a letter to the first respondent's attorneys. It is clear that the said letter was sent in response to the relevant attorney's letter dated 4 February 2013. A copy of the letter has not been attached to their application. In this letter dated 21 February 2013 the second applicant informed the attorneys that:

"A letter dated 29 November 2012 was received from Bondev with regard to the development of Erf […] and instructing that building should start on or before 30 January 2013. The necessary response was sent to the builder and building commenced on January 2013 which is before the given date."

It is equally important to point out that there is no trace in the papers of the necessary responses referred to in the last paragraph.

[10] The applicant testified that on 28 March 2013 the first applicant received a without prejudice letter from Mr. Riaan du Randt of Tim du Toit and Co in which the said attorney indicated that the first respondent granted the first applicant a further extension of the building on certain conditions. All that the applicant in the said email attached to the applicants' papers said is:

"Dear Madam

We refer to the abovementioned matter and your response of 21 February 2013 which you indicated that you have instructed the builder to commence building operations on/before 30 January 2013."

A full copy of this relevant email is however attached to the first respondent's answering affidavit as 'AA7' at page 109 of the papers. The rest of the paragraphs of the email state as follows:

"Please take note that you are in transgression of the relevant Title Conditions for many years and that our client is not prepared to grant a further extension for the building period.

Our client has however noted that you commenced with building in the past few days and our client will consider, without prejudice of its rights, and simply in an effort to curtail the issues, and settle the issue, to consider to extend the building period on the following conditions:

1. *you must sign the attached document and agreement for the extension of the building period on the terms and condition stipulated therein and attach hereto;*
2. *you must submit a building program in respect of the expected time period for the completion of the building;*
3. *a penalty of R50,000.00 (fifty thousand rand) has to paid to Bondev Developments Pty Ltd;*
4. *Proof that finance have been obtained or is available for payment must be submitted.*

Under these circumstances please revert urgently within 7 (seven) days, failing which our client will interdict the building process.

Yours faithfully

Riaan du Randt"

[11] On 10 April 2013 the second respondent sent an email to Mr. du Randt in which she informed him that the building construction commenced on 16 January 2013 and in which reference was made to a letter from Supa Rafts Reinforced Raft Foundation dated 3 April 2013. The rest of the paragraphs state as follows:

"It is however our belief, with all due respect, that whoever is responsible for inspecting sites did not do so on the cut-off date. Should they have done so they would have seen that we had already started by then, and not a few days ago (from 28 March 2013) as indicated in their correspondence.

We fully acknowledge that Bondev has a right to impose conditions and penalties wherever necessary at its discretion and are willing to adhere by the rules of the estate.

It is also our desire that this issue be settle speedily and we therefore kindly request that Bondev reconsider and revise the stipulated conditions as we did adhere to the final starting date.

Your consideration is highly appreciated.

Regards

Chryselda Mushwana"

[12] It is the applicants' testimony that the construction on the property commenced on 16 January 2013; that since then the construction has been on-going without any interruption and that the construction has already reached the first floor stage. It is furthermore their testimony that they have already expended the sum of R907,066.20 towards the cost of the construction. All these details, according to the applicants, explain why the building construction was not completed within the recorded time as required by the conditions of the title deed.

[13] With regard to their failure to oppose the first respondent's application, the applicants state that they were not aware of such an application because they had not received any notice of the application. In principle the applicants contend that they were not aware of the first respondent's application because they had not been served with a copy of the relevant application. The first respondent's application was served at […] Avenue, the Reeds. This is the address that the applicants had chosen in the Extension of Building Period – Midfield Estate.

[14] Evaluation

I prefer to start the evaluation with the applicants' point that they were not aware of the first respondent's application. In their answering affidavit, the first respondent contended that service of its application on the applicants had been properly effected. This was so because it was effected at the applicants' chosen domicilium citandi et executandi. The applicants admit that service took place at their domicilium address but contend that they had not been living there in consequence of which the first respondent's application never caught their eye. On the other hand, the first respondent states that even if the applicant had shifted, they never informed the first respondent that they had moved from their domicilium citandi. Therefore the applicants never chose a new domicilium citandi et executandi.

[15] The law

If a party to be served has chosen an address where he prefers to be served, service of the court papers may be effected by delivering or leaving a copy of such court process or document at the address so chosen. According to **Cohen and Another v Lench and Another 2007 (6) SA 132 (SCA) paragraph 35** service must

be at the exact chosen and not, for instance in the case of a townhouse, at the main gate of the complex. In a dispute as to whether a party served at the domicilium et executandi all that the plaintiff has to do is to prove that the defendant chose the said address. In **Van der Merwe v Bonaero Park Edms Beperk 1998(1) SA 697 TPA at 701** the Court cited with approval the following passage from **Amcoal Colliries Ltd v Truter 1990(1) SA 1(A) at pages 5J-6B**:

"(if a man choses domicilium citandi the domicilium he chooses is taken to be his place of abode: (see **Pretoria Hypotheek Maatschappij v Groenewald 1915 TPD 170**.) *It is a well-established practice (which is recognised by Rule 4(1)(a)(iv) of the Uniform Rules of Court) that, if a defendant has chosen a domicilium citandi, service of processes at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found."* Accordingly service at the *domicilium* will be good even if it is clear that the process has not come to the notice of the applicants. This Court finds as a result that there was proper service of the first respondent's process on the applicants at their chosen *domicilium citandi et executandi.*

[16] In order to succeed with their application for rescission of the default judgment, the applicants must show good cause for the rescission of the judgment. An application for rescission of judgment is not an enquiry about whether or not to penalise a party for the failure to follow the rules and procedures. The question is always whether or not the explanation for the default gives rise to a probable inference that there is no *bona fide* defence. The discretion to rescind the judgment must always be exercised judicially and is primarily designed to enable the Court to do justice between the parties.

[17] Even if the Court finds that service of a copy of the first respondent's process on the applicants was good, the Court still has to determine whether the explanation given by the applicants with regard to their default was reasonable. "A reasonable explanation" is part of the good cause that an applicant for rescission of a judgment must establish in order to succeed. The reasonableness of the explanation does not depend on whether or not service of a legal process was good. It is an issue that the Court must determine separately irrespective of the nature of the service. The fact that the service was effected at the chosen place does not necessarily imply that an applicant for rescission of judgment should not explain his default or that if he does his explanation is automatically unreasonable by reason of the fact that service of the processes on him was good. Therefore the fact that service of a process on a party was proper cannot alone defeat an application for rescission. It is not in dispute that the applicants were in default of delivery of their notice to oppose the first respondent's application but the question still is was such default wilful or did it emanate from gross negligence on their part. 'Wilful' in this context means knowledge by the applicants that the first respondent had taken action against them; appreciation of the legal consequences of such an action and a conscious decision taken freely to refrain from entering an appearance. Schreiner, JA, as he then was had the following to say at **pages 352 to 353** of **Silber v Ozen Wholesalers Pty Ltd 1954(2) SA 345(AD)**:

"The meaning of "good cause" in the present sub-rule, like that of the practically synonymous expression, sufficient cause, which was considered by this Court in Cairns' Executors v Gaarn 1912 AD 181, should not likely be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision for cases not at present in contemplation … it is enough for the present purpose to say that the defendant must at least furnish an explanation of his default

sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives."

[18] The applicants' explanation for their default must pass a test of reasonableness and must not appear that their default was wilful or due to gross negligence. In **Saraiva Const. Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd 1975(1) [D & C.L.D] 612 at page 614** the Court approved of the following passage from **Naidoo v Cavendish Transport Co. (Pty) Ltd 1956 (3) SA 244 D** and **Grant v Plumbers Pty Ltd 1949(2) SA 470 (O) at p 476.**

"It seems to me that what is required in a case such as this is that the applicants must explain his default. He cannot simply claim the Court's indulgence without giving an explanation. The explanation must be reasonable in the sense that the phrase was used in Naidoo's case and Grant's case, supra, namely that it must not show that his default was wilful or was due to gross negligence on his part. If explanation passes that test, then the Court will consider all the circumstances of the case, including the explanation, and will then decide whether it is a proper case for the grant of indulgence."

In my view, the explanation proffered by the applicants is reasonable and the Court accepts it.

[19] I now turn to examining whether the application is *bona fide* and whether the applicants have disclosed a good defence to the claim and whether they would have resisted the first respondent's application. This Court cannot resolve this issue without referring to the building conditions imposed on the applicants.

[20] Clarity on the building restrictions imposed on the applicants was obtained from the testimony of the first respondent when no such could be obtained from the evidence of the applicants. All that the applicants state in their founding affidavit is that:

"12. At the time it was explained to us that there was a time restriction imposed in the title deed in that building operations had to commence some time during 2006. However, as we purchased the property during 2010, the time for building had already lapsed."

In my view the applicants are not honest with the Court. They failed, for no apparent reason, to make reference to the terms of the "Extension of Building Period", which is annexure 'AA2' to the first respondent's affidavit. They pretend that the building restrictions imposed on the property were the ones imposed on Oosthuizen. They do admit though that at the time they bought the property it was explained to them that there were building restrictions imposed in respect of the property. To compound their case, the applicants did not mention the identity of the person who explained this condition to them and how he did it.

[21] According to the testimony of the first respondent, on 13 April 2010, the applicants and the first respondent concluded an agreement for the Extension of the Building Period in terms of which the applicants' dwelling had to be erected within 12 months from 13 April 2011, in other words, before the end of April 2011. This agreement was attached to the answering affidavit as annexure 'AA2'. I proceed to deal *in extenso* with the contents of the said annexure hereunder.

[22] It is the first respondent's testimony that a condition of title was transferred from Oosthuizen and that it remained applicable to the applicants; that the applicants took transfer in accordance with annexure 'AA1' registered with the Register of Deeds at

the time of transfer subject to the condition 'B' of the title deed. Annexure 'AA1' stated, among others, that *"voorwaarde 'B' in die titel is nog nie aan voldoen nie en moet staan as a voorwaarde."* Condition 'B' of the title deed is annexure 'AA2'. For the purposes of completeness I will quote the whole of annexure 'AA2' and do so because the First Respondent's letter dated 29 November 2012.

"I RN and CT Mushwana, ID […] / […] prospective owner of stand number […], Midstream, Extension 19, choose my domicilium citandi et executandi as […] Avenue, The Reeds, Centurion and hereby acknowledge that I am aware that:

1. *Original building period namely 18 (eighteen) months after proclamation expired on 31 December 2007.*
2. *Bondev is entitled to purchase the stand back, at the original selling price which Bondev sold the stand for.*
3. *There are Aesthetical Rules for Midfield Estate.*
4. *The construction period is 9 months.*
5. *Extra levies will be imposed by the Midfield HOA should the original building period be exceeded.*

I undertake to

1. *Immediately proceed with the preparation of building plans and lodge building plans within 45 calendar days hereof at the Aesthetical Committee.*
2. *Appoint a building contractor within 80 days hereof.*
3. *Supply Bondev with a monthly building program within 80 days hereof.*
4. *Start construction within 90 days after acceptance hereof.*
5. *Complete construction within 5 months hereof.*

I understand that this agreement does not negate or affect:

1. *Bondev's rights in terms of the original offer to purchase and the title deed.*

2. *The decision of the whole owners association to charge an extra levy.*

Bondev hereby extends the building period by a maximum of 12 months, on condition that this undertaking is strictly complied with.

Signed at Pretoria on this 13th day of April 2010.

Prospective owner witnesses

Bondev Midrand Pty Ltd witnesses."

[23] According to Mr. Horn, counsel for the first respondent, the first respondent's application was designed to enforce a title condition. He argued furthermore that the applicants were obliged to build their dwelling within eighteen (18) months. It was argued furthermore by Mr. Horn that on 23 June 2010, which is the date on which the property was registered in the names of the first respondent, the applicants received transfer of the property subject to the following title condition contained in the deed of transfer:

"B. Onderhewig aan die volgende voorwaarde opgelê en afdenkbaar deur Bondev Midrand Eiendoms Beperk (2000/027600/07), naamlik:

Transportopnemer, sy opvolgers en titel of regverkrygendes, is verplig om 'n woonhuis op die eiendom op te rig binne 18 (agtien) maande vanaf 28 Junie 2006 by gebreke waarvan die transportgewer geregtig sal wees, maar nie verplig nie, om te eis dat die eiendom aan die tansportgewer op die koste van die transportopnemer getransporteer word teen die betaling van die oorspronklike koopprys, rentevry. Die transportopnemer sal nie die eiendom binne gemelde tydperk mag verkoop of oordra sonder skriftelike toestemming van die transportgewer

nie. Hierdie tydperk kan binne die diskresie van die Ontwikkelaar verleng word."

It was argued by Mr. Horn that the applicants were at the material time aware that the title deed imposed a restriction with regard to the time within which a building on the property had to be erected. It may be so that the title deed imposed a building restriction. In my view, the above restriction or condition did not apply to the applicants at all because at the time the applicants became the successor-in- title, the period of 18 months commencing on 28 June 2006 had already lapsed. That clause was, in my view, invalid. The applicants could not have commenced building on 28 June 2006 long before they were the purchasers of the said property. Accordingly the fact, if it be a fact, that the applicants were obliged to complete building their dwelling within 18 months commencing from 28 June 2006, even if they were aware of it, is debatable.

[24] No other document placed before this Court provides for a period of 18 months reckoned from 23 April 2010 or from the date on which the property was registered into the applicants' names, the period within which the applicants were obliged to complete the construction of their dwelling. The applicants might have been aware, at the relevant time, that the title deed imposed a restriction with regards to the time within which a building on the property had to be erected but certainly that time period was not set out anywhere in the papers after they had purchased the property from the previous owner.

[25] On 13 April 2013 the applicants undertook to immediately proceed with the preparation of building plans and to lodge such building plans within 45 calendar days of 13 April 2013 at the Aesthetical Committee. In their founding affidavit the

applicants testified that they took steps to have the plans drawn up. This evidence has not been contradicted. All that the first respondent states is that it is irrelevant. In my view this evidence is not irrelevant because the applicant had undertaken to do so and they did. They took steps to have their building plans prepared. In other words they fulfilled their undertaking that they would attend to the preparation of the building plans within a period of 45 days.

[26] The applicants undertook, in terms of annexure 'AA2', to complete the construction of their building within 12 months of 13 April 2010. In other words the applicants had from 13 April 2010 to 12 April 2011 to complete the construction of their house. The said period was, however, extended by another period of twelve months. This is clear from the following:

"Bondev hereby extends the building period by a maximum of 12 months on condition that this undertaking is strictly complied with."

Accordingly the applicants had an additional period of 12 months commencing on 13 April 2011 to 12 April 2012 to complete the construction of their building. There can only be an extension of a period of time if there is already an original period set. Come 12 April 2012 the applicants had not finished building their house because of the delay in finalising their building plans. I have already dealt with this evidence. In my view the explanation that the applicants' gave in their effort to get the building plans is reasonable. The drawing of the plans was not within their powers. Even if it was, it still had to be approved by people other than the applicants themselves. It is clear that the undertaking the applicants made on 13 April 2010 did not accommodate such eventualities as the delay in the approval of the applicants' building plans.

[27] Finally, on 29 November 2012 the first respondent sent the applicants an ultimatum to start building on or before 30 January 2013. They threatened to proceed with legal action to transfer the property to themselves as stipulated in clause 11 of the original Offer to Purchase the transaction. It is clear that up to this stage the applicant had not started building their house. It is also clear that a new condition required them to start building their house on or before 30 January 2013. It did not indicate when they should finish building their house. It is their evidence that they started building their house before the end of January 2013. That is all that they were required to do according to the letter dated 29 November 2012 from the first respondent. Secondly, I have already pointed out that no document was placed before this Court containing clause 11 that required them to build their house within 18 months from the date they became the possessors of the property. The Court has a discretion whether or not to grant an application for rescission of default judgment in favour of an applicant who having ascertained that an order has been granted against him *in absentia* takes expeditious steps to challenge the granting of such order and to have it set aside. Firstly I accept that the applicants were negligent in failing to advise the first respondent of their new address for service of legal processes but find that their negligence was not of such a nature as to prevent them from getting the relief they seek. Secondly the applicants have satisfied the requirements relating to bona fide and prima facie defence. In my view there is prima facie proof of good defence to the first respondent's claim. In the premises the default judgment granted against the applicants cannot stand and should be set aside.

Accordingly, the application is granted and the following order is made:

1. The order granted by the Court on 14 May 2014 is hereby rescinded and set aside.
2. The applicants are hereby granted leave to defend the first respondent's application which resulted in the order granted on 14 May 2014.
3. The normal rules of Court with regard to filing of further pleadings hereafter shall apply.
4. The costs of this application for rescission shall be costs in the main application.

_____

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants:	*Adv. JM Roos*
Instructed by:	*BK Msimeki Attorneys*
	c/o Andrea Rae Attorneys
Counsel for the First Respondent:	*Adv. NJ Horn*
Instructed by:	*Tim du Toit & Co. Inc.*
Date Heard:	*2015 August 27*
Date of Judgment:	*2016 February 3*