

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 48241/2010

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISIT D.
(4)	Signature
	Date

2/8/2016

PRO SEVEN PRODUCTS CC

APPELLANT

and

STANDARD BANK OF SOUTH AFRICA

RESPONDENT

KELVIN ROYSTON BRIEDEHANN

THIRD PARTY

In re:

STANDARD BANK OF SOUTH AFRICA

PLAINTIFF

And

PRO SEVEN PRODUCTS CC

DEFENDANT

JUDGMENT

KHUMALO J

INTRODUCTION

[1] This is an Application to rescind a default Judgment granted in the above honourable court by Van der Merwe DJP (as he was then known) against the Applicant in favour of the Respondent on 13 October 2011 for:

[1.1] payment of the sum of R247 890.54; and

[1.2] Interest thereon at the agreed rate of 10%, per annum in terms of the said mortgage bond from 26 June 2010 to date of payment.

[1.3] an order that Portion 109 (A PORTION OF PORTION 20) OF THE FARM ELANDSFONTEIN 334 TOWNSHIP REGISTRATION IQ, THE PROVINCE OF GAUTENG, measuring 8,85653 (Eight Comma Five Six Five Three) Hectares, Held by Deed of Transfer TT43612/1987, ("the property") be declared executable.

[2] The amount is alleged to be the balance due and owing to the Respondent in respect of monies lent and advanced "(loan)" to the Applicant, a Close Corporation ("CC") that was the registered owner of the property, situated at Plot 109 Greendale Estate, Elandsfontein, Walkerville over which a mortgage bond was registered on 4 August 1995 in favour of the Respondent as security for a loan advanced to the CC to buy the property.

[3] The CC's sole member, Samuel Nduduzo Fihlela ("the deceased") had signed a deed of suretyship binding himself as surety and co-principal debtor with the CC for the due settlement of all monies owing on the bond. He passed away on 26 February 2009. The CC was the holder of a home owner's insurance certificate HLB001573305 issued by the Respondent for which on 18 October 2003, it was paying a monthly premium of R253.74 and also paying a life assurance monthly premium of R642 on the life of the deceased as surety and guarantor to secure the CC's indebtedness on the bond. The amounts were charged to the CC home loan account, included in the monthly instalment payable on the bond.

[4] The deceased also had a personal loan protection plan number: 000447862 in terms of which his personal liability as surety or guarantor to the Respondent was protected in the event of something unexpected such as death or incapacity happened to him. There is no tangible contention about the existence of these policies.

[5] The deponent to the Applicant's Founding Affidavit, Fikile Maria Fihlela ("Fihlela"), was married to the deceased in community of property on 20 April 2006. The property is the family's primary residence. Subsequent to the death of the deceased, Fihlela was appointed the executrix of the deceased's estate on 17 March 2009.

FACTUAL BACKGROUND

[6] On 23 August 2011, the Respondent issued and caused to be served by the sheriff, under different case numbers a summons upon the CC and the deceased at the mortgaged property cited as their *domicilium executandi* address (see returns of service attached to the documents). The service upon both was effected on 3 September 2011 by affixing a copy of the summons on the front door of the house situated in the property (plot). The sheriff's return states there was nobody in the premises at the time of service.

[7] The Respondent proceeded on 13 October 2011 to obtain Default Judgment against the CC, separately, for the monetary claim incorporating an order declaring the property executable. Without any further ado the Respondent sold the property in execution to a Third Party on 26 January 2012 for +-R40 950.11 (Forty Thousand Nine Hundred and Fifty Rand Eleven Cents).

[8] Fihlela seeks rescission of the judgment on the grounds summarized as follows:

[8.1] that the default judgment was erroneously sought as:

[8.1.1] the sole member of the CC was deceased at the time of the purported service of the summons on the deceased and the CC,

[8.1.2] the life of the deceased as the sole member, surety and co-principal debtor with the CC was insured against the CC's indebtedness on the bond, to be settled in the event of his death or incapacitation. Also his personal indebtedness covered by the personal protection plan;

[8.2] as the executrix of the deceased's estate (the deceased's 100% member's interest in the CC being under her executorship), responsible for the assets and liabilities of the CC, she never had sight of the summons as same was not served upon her or brought to her attention; and

[8.3] although the sheriff's returns indicate that service of the respective summons was effected on the CC and the deceased by affixing on the front door of the property, she never had sight thereof,

She therefore alleges that there was no willful default and seeks to invoke the provisions of s 42 (1) (a).

[9] Fihlela alleges further, in substantiation of her application to set aside the judgment, that:

[9.1] she became aware of the default judgment obtained against her deceased husband only on 24 April 2012, following an enquiry she made when people arrived at her home to view the property. Her attorneys on 15 May 2012 sought verbally from the Respondent's attorneys of record certain documentation in order to investigate the nature and extent of the judgment, followed by a written letter on 18 May 2012. They were then able to obtain documents in the court file and some from the Respondent's attorneys sent under cover of the letter dated 18 May 2012. The rescission application was served on the Respondent on 14 June 2012.

[9.2] The Respondent was notified of the death of the deceased as early as 26 February 2009, upon which the Respondent paid her an amount of R10 000 for funeral cover. On 17 March 2009 she submitted to the Respondent a **marriage certificate, a copy of the will, death certificate, her identity document and letters of executorship.** The Respondent's Home Loans Department was again notified and furnished with the relevant documents including a copy of a policy number **THLB001573305** by a **Mr Oosthuizen**, an attorney that was assisting her at the time with the winding up of the estate under cover of a **letter dated 19 August 2010 to the Respondent's.** The letter also instructed the Respondent to amend their records accordingly.

[9.3] A response to Oosthuizen's letter attached an internal e-mail sent by a Respondent employee **Kenny Dladla** to another an employee one **Denise Du Swart** advising her that as early as 11 December 2009 the Respondent was aware of the deceased's death and requesting her to assist. Dladla also informed Swart that 'the

home loan account was settled long ago nobody knows when. When account holder passed on 27 February 2009 and Liberty Life had then written a letter to the Respondent requesting cancellation of the cession letter.' Respondent's letter confirming that the cession was cancelled is dated 26 April 2010.

[9.4] There is also a letter from the Respondent dated November 2007 that refers to the deceased's personal loan protection cover that confirms that in the event of his death or permanent disability, or if he is diagnosed with a dreaded disease his personal liability to the Respondent will be settled.

[9.5] She instructed a new attorney, Sithole, who sent another letter to Respondent on 20 October 2010 informing the Respondent of the difficulty they were experiencing in trying to register the property in her name in view of her being the executrix and heir to the deceased estate and asking for further information and the Respondent's corporation. Vilakazi Attorneys acting on behalf of the Respondent responded that the matter is being investigated and had been sent to the Deceased Department of the Respondent for a resolution. He undertook to revert by 24 November 2010. Notwithstanding the undertaking the Respondent did not facilitate the insurance payout but continued to demand payment of the monthly insurance premiums from the deceased and the CC.

[10] Fihlela argues that judgment would not have been granted if all these facts were placed before the above honourable court. According to her, Respondent's issuing of the summons against the non-functioning CC and the deceased sole member of the CC, without citing the executrix of the member's estate to whom the deceased was also married in community of property, notwithstanding being aware of the status quo proceeding to seek default judgment without placing those facts before court resulted in the judgment being erroneously granted or illegal. She alleged that the CC could not function unless under her control.

[11] Furthermore, she alleges that the Respondent's failure to follow up on Liberty Life's pronouncement that the cession of the life cover in Respondent's favour was cancelled to settle the bond or on its own internal policy in terms of which the monthly premiums covering the deceased's life were included in the bond repayments also led to the erroneous granting of the judgment.

REPLYING AFFIDAVIT

[12] The Respondent opposes the rescission of the judgment. In its Answering Affidavit deposed to by one Mthokozisi Vilakazi ("Vilakazi"), Fihlela's status as the deceased's widow and executrix of his estate and also that the deceased was a sole member of the CC is admitted. It is also admitted that the Respondent nevertheless issued summons against the CC as principal debtor and the deceased as surety, **alleging that the death of the sole member of the CC had no direct impact on the CC as it continues to exist separately from the deceased member's estate.**

[13] Vilakazi also contends that Fihlela need not have been a party to the proceedings due to the separate legal status of the CC and maintains that the CC, not the estate was

indebted to the Respondent. It accepted however that if stipulated by the will Fihlela can take over the member's interest.

[14] In addition Vilakazi refutes the allegations that the Respondent was notified of the deceased's death as alleged by Fihlela, instead insists that the deceased remains a member of the CC. He however did not make any factual allegations whether the Respondent was or not aware of the deceased's death and what is the status of the documents annexed by the Applicant emanating from the Respondent.

[15] In respect of the policies Vilakazi argued that the deceased's loan protection plan covered the deceased's personal loan whilst the home loan is in the name of the CC. Moreover the letter referred to by Fihlela does not indicate that the cover is related to the CC's debt. He did not address the contents of Diadla's e-mail or the charge of the life policy premiums that were included in the CC's monthly instalment payable on the loan that covered the CC's indebtedness. The policy was presumably on the life of the deceased.

[16] In addition he refuted the allegation that the CC was non-functioning and the reason proffered by Fihlela for not having taken over the member's interest. At the same time maintained that the CC is a separate entity and therefore the capacity of Fihlela is of no relevance to the matter. In contradiction of himself he disputed that Respondent issued summons against the deceased, although a copy of the sheriff's return indicating service of the summons on the same day and time under a similar case number of the CC summons albeit ending with a 1 instead of a 2 formed part of the documents.

[17] In response to the fact that the court would not have granted default judgment had it been aware that the action was instituted against a CC whose sole member is deceased and on behalf of whom an executor has been appointed and its deceased sole member, Vilakazi alleged that the Respondent was not aware of the death of the deceased and of any claim that was lodged on the policy, pointing out that the claim seem to have been lodged with Liberty Life. He argued that even if the Respondent had knowledge of the deceased's death, such would not have had any relevance to this claim since it was brought against the CC and Fihlela's status as having been married to the deceased in community of property and appointed executor had no effect on these proceedings.

[18] Vilakazi also claims that there is a discrepancy between Fihlela and her attorney on what is supposed to happen with Fihlela saying that she was bequeathed the immovable property when according to the attorneys she would take transfer of the membership of the CC in accordance with the will.

[19] Further the Respondent alleges that since Fihlela has failed to comply with the Administration of Estate Act s 29 and 35 as she has not alleged to have complied with the Act, the CC has not been wound up and had it been wound up the issue of Applicant's indebtedness would have been dealt with.

[20] In the replying affidavit Fihlela only reiterates her denial that the money was owing to the Respondent based on the policy that was in place and supposed to have settled the Applicant's and deceased's debt. She attached the letter the Respondent sent to the CC dated 18 October 2003, (the contents are mentioned as part of the background facts) wherein the monthly instalment that was being debited on the deceased bank account that

comprised the loan amount, the monthly premium on the life assurance and homeowners insurance is set out. According to the letter the balance outstanding on the bond at the time was R170 967.91, with the remaining bond term being only 142 months.

[21] She, in addition attached a letter from the Respondent to Liberty life dated 26 April 2010 stating that they hold no further interest in the policy. The cession in their favour having been cancelled.

[22] She contended that her failure to take up the control of the company was as a result of the attorneys that were not doing what they are supposed to do in terms of registering the taking over of the deceased member's 100% interest from the deceased's estate.

[23] The Third Party in a nutshell in his response agreed with the Respondent, alleging that Fihlela completely disregarded the fact that the CC is a juristic person and as such a totally separate entity responsible for its own assets and liabilities. The fact that she was appointed executor to her deceased husband has no bearing on the CC's and the Respondent was therefore entitled to proceed against the CC. It also averred that her marriage to the deceased has no effect to the proceedings against the CC alleging that the estate of the CC is separate from the joint estate, a fact Fihlela disregarded.

ISSUES TO BE DECIDED

[24] The issues to be decided is whether due to the factual circumstances existing at the time, the judgment was erroneously sought or granted and therefore rescindable. According to *Erasmus Superior Court Practice Vol 2 2nd Edition* by Van Loggerenberg, once the court holds that an order or judgment has been erroneously sought or granted, it should without further enquiry rescind or vary the order, and it is not necessary for a party to show good cause for the subrule to apply.

LEGAL FRAMEWORK

[25] In general terms a judgment is erroneously granted if when it was granted there existed facts that the court was unaware of, which would have precluded the granting of the judgment and otherwise would have induced the court if aware of such facts not to grant the order or judgment; see *Naidoo v Matlala* 2012 (1) SA 143 (GNP) at 153C.

[26] Failure to disclose material facts on a default judgment Application and or deliberate misrepresentation of facts will result in the judgment being erroneously granted: It has also been held that an order granted in an *ex parte* application without notice to a party who has a direct and substantial interest in the matter is an order erroneously granted; see *Naidoo v Matlala* N O 2012 (1) SA 143 (GNP) at 153 C-E.

[27] Without deciding the merits of the matter, I think it is important to refer to the consequence of the death of a sole member of a CC that is married in community of property.

[28] In South African law, the members' interest in the CC forms part of the deceased estates. Due to the fact that all property in the deceased's name, including rights, titles or interest in property to which the deceased would be entitled, is deemed to be part of his deceased's estate. The property can be movable or immovable, corporeal or incorporeal (such

as shares in the company or the member's interest in a CC) as outlined in s 3 of the Administration of Estate Act 60 of 1965 and s 3 of the Estate Duty Act.

[29] Upon the appointment of an executor, he takes the place of the deceased and is then expected to make provisional arrangements regarding the running of the business pending the finalization of the estate. Depending on the circumstances, that could be done by handing over provisionally, the control of the day to day operations of the business to the beneficiaries or do it herself as sole beneficiary. The executor can temporarily act as member of the CC or director of the private company. There need not be sufficient funds, as executor may not incur debt.

[30] Therefore the CC indeed does not lose its legal status, however on the appointment of the executor, the concern forms part of the sole member's deceased estate, by virtue of the deceased 100% member's interest ownership that now falls in his estate. The new owner of the business would be the deceased's estate, as above, at least until the estate was closed and the stock interest distributed as provided by the will or intestacy laws.; see *F J S Painting CC v Absa Bank Ltd* (083/3) [2004] ZASCA 52 28 May 2004. In that case the executor administers the estate that now owns the business, therefore the executor is the one who controls the business. The CC being a juristic person acts through its members and now the member being the estate, before the interest is transferred it would be acting through the executor.

[31] In *casu*, an executor is appointed (who in terms of the will was entitled om enige besigheid voort te sit) see F J S. The CC would have no controlling mind and therefore would not be capable of forming the necessary decisions or taking appropriate actions. Therefore the CC could only function through its executor or legal representative. Once an executor is appointed only he or she is then capable of taking an action or forming an intention on behalf of the CC, whether or not to acquire ownership of the interest, to defend or not defend an action, taking the necessary legal steps. Actions the executor could take include paying all creditors of the estate and transferring all the remaining assets, including the membership interest to the relevant beneficiaries, either in terms of a will or the law of intestate succession.

[32] The executor therefore, due to her/his position as the representative of another, in the sense of having a mandate to perform some or other juridical act, binding on the person he or she represents, has a direct and substantial interest in the business.

[33] In terms of the Close Corporation Act s 15 and 21 of the Close Corporation Act, 1984 (Act No. 69 of 1984,) ("the Act") the actual transfer of the membership interest takes place by registering the transfer with the Registrar of Companies (Cipro). In terms of s 29 (2) of the Act the following persons qualify for membership of a corporation,

- (a) any natural person entitled to the member's interest;
- (b) ... ;
- (c) a natural or jurist person, *nomine officii*, who, in the case of a member who is insolvent, **deceased**, mentally disordered or otherwise incapable of or incompetent to manage his affairs, is a trustee of his insolvent estate or administrator, executor or

curator in respect of such member or is otherwise a person who is his duly appointed or authorized legal representative.

[34] According to s 29 (3) (a), the membership of any person qualified therefore in terms of subsections (2) shall commence on the date of the registration of a founding statement of the corporation containing the particulars required by s 12 in regard to such person and his member's interest. However

(d) The provisions of paragraph © and (d) shall not affect the power of such

(e)

(f) representative, as from the date of assuming office, and whether or not any such amended founding statement has been lodged, to represent the member concerned in all matters in which he himself as a member could have acted, until the interest of that member in the corporation has in accordance with the provisions of this Act been transferred to any other qualified person.

[35] On representation of members Section 32 (3) of the Act provides on ss (3) that:

"A member subject to any other legal disability shall be represented in the corporation by his duly appointed or authorized legal representative referred to in paragraph © of ss (2) of s 29." (my emphasis)

APPLICATION OF THE LAW

[36] On the basis of what has been illustrated above, the Respondent's allegation that **as the CC continues to exist separately from the deceased member's estate, the death of the sole member, holding 100% member's interest had no direct impact on the CC has no merit. The deceased' was the sole member and Fihlela, besides her entitlement to 50 % of the member's interest due to her marriage to the deceased, acting in her capacity as the holder of letters of executorship to the deceased estate under which the member's interest fell on the deceased's death, has a direct and substantial interest.**

[37] The business as a concern falls under the control of Fihlela or is the person in charge of the 100 % member's interest. It is Fihlela's allegation that not only was the Respondent informed of the death of the deceased and furnished with her marriage certificate but also of her appointment as an executor of the deceased's estate. The Respondent was therefore aware of her status as an executor of 100 % of the member's interest which gives her a mandate to be in control of the business. Likewise the Respondent was also aware that she is basically legally authorized to be the legal representative of the CC (controlling 100% of the member's interest that falls under the deceased's estate) until transfer in terms of the will. Fihlela's interest in the matter is very significant and fundamental as obviously she might be prejudiced by the court's decision. On that basis the Respondent were obliged to cite her and bring the proceedings to her attention. Service upon her was necessary.

[38] The court was not appraised of the fact that the action was instituted and judgment sought against a CC and its sole shareholder who is deceased and that an executor who is supposed to run the business has been appointed and not notified of the action. These are material facts which if were known to the court judgment would not have been granted. It is therefore not correct that **the CC's assets are not subject to administration or Fihlela's executorship and that the service effected on 13 September 2011 without bringing the**

action to her attention was proper. Such failure was fatal to the granting of the default judgment.

[39] In addition, the email by Diadla whose contents the Respondent failed to address clearly indicates that the Respondent had received information on the passing on of the sole member under whose control the CC was and had such knowledge as long ago as 2009.

[40] Diadla's email also highlights that the Respondent not only knew of the deceased's demise but also of the existence of the life policy taken by the CC on the life of its sole member and surety as expected. Respondent's own letter of 18 August 2003 corroborates that information outlining the amount that made up the monthly instalment payable on the home loan (bond) account which was comprised of the monthly life assurance and home owners insurance premiums. **The policy was presumably on the life of the deceased as surety or guarantor.** According to Fihlela, she genuinely expected the policy as would be the norm, to pay on the death of the surety and co=principal debtor as insured by the CC. She is at least entitled to an explanation as to what happened to the proceeds of the life assurance. Also had the existence of the life policy been known to the court judgment would not have been granted without consideration of such facts.

[41] The whole purpose for the rescission of judgment is 'to restore a chance to air a real dispute' by giving a party an opportunity to defend the matter; see *Erasmus Superior Court Practice*, 2nd Edition by Van Loggerenberg. Vol 2. This is also to advance the inherent right of every person provided by the Constitution in s 34, that is the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.

[42] Fihlela has, on behalf of the Applicant made a proper case for the setting aside of the default judgment that clearly was granted erroneously by the court not being made aware of the existence of all these material facts. Besides, the issue raised of the life assurance is a triable issue.

[43] I also find the Respondent's opposition not to have been reasonable. It had failed to deal with the pertinent issues raised by the Applicant adequately and sincerely. So although the nature of such an application is an indulgence, so that the Applicant would normally be ordered to pay the costs of the Application, an order for each party to pay its own costs would be appropriate under the circumstances.

It is therefore ordered that:

[43] The whole judgment granted on 13 October 2011 in terms of which an order was made for:

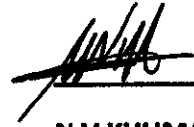
[43.1] payment of the sum of R247 890.54;

[43.2] Interest thereon at the agreed rate of 10%, per annum in terms of the said mortgage bond from 26 June 2010 to date of payment.

[43.3] an order that Portion 109 (A PORTION OF PORTION 20) OF THE FARM ELANDSFONTEIN 334 TOWNSHIP REGISTRATION IQ, THE PROVINCE OF GAUTENG, measuring 8,85653 (Eight Comma Five Six Five Three) Hectares,

Held by Deed of Transfer TT43612/1987, ("the property") be declared executable.

is set aside with no order as to costs.



N V KHUMALO J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA**

For the Applicant: **NOVENI EDDY KUBAYI**

Instructed by: **NOVENI EDDY KUBAYI ATTORNEYS
JOHANNESBURG**

For the Respondent: **W J ROOS**

Instructed by **STRAUSS DALY INC
PRETORIA**