REPUBLIC OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 45664/07

DELETE WHICHEVER IS NOT APPLICABLE

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

04/07/2018
DATE

SIGNATURE

In the matter between

LINDA KENNETH MASIKE PULE Applicant

And

ERF 1083 ROOIHUISKRAAL (PTY) LTD Respondent

Judgment

POSWA-LEROTHOLI, AJ

Introduction

[1] This is an application for the rescission of a default judgment issued by Msimeki, J on 17 June 2015 in favour of the respondent, Erf 1083 Roihuiskraal (Pty) Ltd. The applicant, Linda Kenneth Masike Pule avers that he was not in wilful default.

Background

[2] On 26 January 2007, the parties entered into a purchase agreement for the sale of a property. The salient terms of the agreement were the following.

[3] The respondent sold to the applicant sold property at the value of R849 900.00.

[4] The terms of payment *inter alia* included an initial deposit of R10,000.00 payable in cash upon acceptance of the offer. The sum of R849 900.00 or the bond amount is to be provided by arranging a building society bank has to be supported in the meantime by guaranteed or guarantees are acceptable to the said conveyancers within 21 days after signing of this agreement.

[5] In the event that the purchaser is not able to secure a bond, to the value of R849 900.00, the deposit already paid shall be refunded to the purchaser with any interest.

[6] The applicant was only able to secured a bond to the value of R650 000.00 from Standard Bank. Whereafter, based on the said bond, the property was sold and duly registered in the name of the applicant and his late wife. After the conclusion of the sale, and transfer of the property into the applicant's name, the respondent sought the payment of the balance of the purchase price from the applicant a sum of R199 900.00.

[7] The applicant contends that having secured a bond to the value of R650 000.00 he informed the respondent that he could only afford the bond amount approved by the bank. However, the respondent denies this asserting that the applicant

was aware that the balance due on the purchase price was to be paid.

[8] In 2007, the respondent issued summons against the applicant for the payment of the outstanding amount. The applicant failed to file a notice of intention to defend and the respondent obtained judgment by default.

The Issues

[9] The question that arises therefore, is whether the applicant has satisfied the requirements for the granting of a rescission of judgment as contemplated in Rule 31(2)(b) of the Uniform Rules of Court.

[10] In terms of Rule 31(2)(b)-

> *"A defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."*

[11] In order to succeed in an application for rescission; a procedural requirement is, must compliance with the time limits set out in the Rule and substantively, the applicant must show good cause for the rescission of the judgment. I will deal with each of the requirements in turn.

Compliance with the 20-day time limit

[12] The rule permits a defendant to rescind a default judgment, however an application for rescission must be filed 20 days from the time the defendant

became aware of the said judgment. In this matter, the judgment sought to be set aside was delivered on 17 June 2015, the application for rescission was only filed on 02 June 2016. The respondent objected to the application on the preliminary ground that that the applicant had failed to comply with Rule 31(2)(b) in that the application for rescission was lodged outside of twenty-day period permitted by the Rule. Moreover, the applicant had failed to make a substantive application for condonation of the late filing of the default judgment.

[13] The applicant denies that the application for rescission was filed out of time. In his defence, the applicant asserts that in February 2016 he received a Notice from the Pretoria Magistrates Court issued in terms of section 65A (2) and 65J (2) of the Magistrate's Court Act 32 of 1944 ("the Notice"), through registered mail. Whereafter, the applicant approached the Magistrates Court to seek clarity on the said Notice, the file could not be traced due to the incorrect file reference in the Notice. Subsequently, the respondent issued a second section 65 notice in May 2016. The applicant then approached his attorneys of record who explained the Notice. In the final analysis, the applicant only became aware of the default judgement on 5 May 2016. Consequently, the applicant had complied with the time limits set in Rule 31(2)(b).

[14] The respondent did not dispute the applicant's version. Therefore, I find that the application was lodged within 20 days after he had knowledge of such judgment.

Good Cause

[15] There are four components that constitute 'good cause' which the applicant for rescission should satisfy in order to succeed. The applicant must-

(a) give a reasonable explanation for the default;

(b) show that the application for rescission is bona fide; and

(c) show that he or she has a bona fide defence, including a prima facie case on the merits.[1]

A reasonable explanation for the default

[16] The applicant denies that the summons was served on him personally as reflected in the return of service filed by the sheriff dated February 2015. He asserts that he refused to receive documents delivered by a person whom he later learned was the Sheriff. The summons was not served on him personally, due to the Sheriff's failure to explain properly the nature of the documents to be served on the applicant. Thereafter, he heard nothing further until the events of February 2016 recounted above. Consequently, the applicant asserts that he was not in wilful default.

[17] The respondent contended that the refusal of personal service amounts to wilful default. I disagree, the duties of the sheriff when presenting summons to a defendant are well established in our law[2]. Rule 4(1)(d) is peremptory-

> *"It shall be the duty of the sheriff or other person serving the process or documents to explain the nature and contents thereof to the person upon*

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[1] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* 2003 (6) SA 1 (SCA) at paragraph [11]

[2] *See Greeff v Firstrand Bank Ltd* 2012 (3) SA 157 (NCK).

whom service is being effected and to state in his return or affidavit or on the signed receipt that he has done so."

[18] Section 43(2) of the Superior Court Act 10 of 2013 provides that-

"The return of the sheriff or a deputy sheriff of what has been done upon any process of a court, shall be prima facie evidence of the matters therein stated."

[19] It follows therefore, that the contents of the return of service may be challenged. The applicant stated that the sheriff failed to explain to him the documents presented to him. Once service is challenged, the respondent is required to call the sheriff who effected service to testify.[3] Save for contending that applicant's refusal of process constitutes wilful default, the respondent did not refute the applicant's version.

[20] What constitutes wilful default was aptly stated by *Gamble J stated in Scholtz and Another v Merryweather and Others* 2014 (6) SA 90 (WCC) at paragraph [66] citing *Maujean t/a Audio Video Agencies v Standard Bank of SA Limited* 1994 (3) SA 801 (C) at 803H-I

"More specifically in the context of a default judgement "wilful" connotes deliberateness in this sense of knowledge of the action and its consequences i.e. it's legal consequences, and a conscious and freely taken decision, to refrain from giving notice of intention to defend,

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[3] *Greef* supra at paragraphs [13]-[14]

whatever have the motivation for this conduct might be."

[21] The failure by the sheriff to explain to the applicant, resulted in the service being irregular as this was in flagrant disregard of his or her duties as stipulated in the Uniform Rules of Court. Therefore, I find that the applicant provided a reasonable explanation for his default, he was not in wilful default.

The application for rescission is bona fide

[22] It is trite that the application for rescission must be *bona fide* and not made with the mere intention to delay the plaintiff's claim. The respondent alleged that the applicant's constant change of attorneys amounted to *mala fides*. Respondent provided no authority for this proposition. There is no doubt that the dispute between the parties has been protracted, spanning over a decade. However, the cause of the delay cannot be placed at the door of the applicant alone, both parties have been dilatory in certain respects. I find no evidence of applicant's *mala fides* against the applicant.

A bona fide defence on the merits.

[23] In order to overcome the hurdle of a *bona fide* defence on the merits, the applicant need only show that he or she has a *prima facie* case. This means that there must be a triable issue to be adjudicated upon if the application for rescission succeeds. The *bona fide* defence must have existed at the time the default judgment was granted.

[24] The applicant raises three triable issues in this matter; rectification, unfulfilled

suspensive condition and excipiable particulars of claim. Firstly, in its particulars of claim, the respondent relies on the agreement of sale concluded between the parties, there is no mention in the said agreement of the balance due that is claimed by the respondent. Secondly, the agreement was subject to the applicant securing a loan in the amount of R849 900.00 within 21 days thereof. It is common cause that the applicant was only granted a mortgage bond in the sum of R650 000.00 by the bank. According to the applicant, since the suspensive condition was never fulfilled the agreement falls away and the respondent cannot claim damages arising therefrom. Thirdly, the particulars of claim are excipiable in that subsequent to the non-fulfillment of the suspensive condition, no new agreement was concluded between the parties. Consequently, at the time the default judgment was granted, there was no agreement to support the respondent's claim of R199 900.00.

[25] It is important to restate the following principle set out in *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC (1129/2016) [2017] ZASCA 145 (unreported)* at paragraph [28] the supreme court of appeal held that-

> *"It is trite law that an applicant in an application for rescission of judgment need only make out a prima facie defence in the sense of setting out averments which, if established at trial, would entitle her or him to the relief asked for. Such an applicant need not deal fully with the merits of the case and produce evidence that shows that the probabilities are in its favour. That is the business of the trial court."*

[26] I am satisfied that the applicant raised triable issues which have reasonable prospects of success in the main action.

[27] The court has a wide discretion to grant or refuse rescission. The discretion to rescind the judgment must always be exercised judicially, and is primarily designed to enable courts to do justice between the parties,[4] in light of all the facts and circumstances of the case.[5] This Court is called upon to balance the interests of the parties and having regard to the prejudice that might be occasioned by denying the applicant the right to have legitimate issues fully ventilated and properly tried.[6]

[28] Mindful of the threshold the applicant needs to surmount in satisfying the requirements for rescission of judgment, all the requirements for the granting of rescission of judgment have been satisfied.

[29] The following order is made in this matter:

1. The default judgment dated 17 June 2015 and granted under case number 45664/07 is set aside.

2. Costs will be costs in the cause of the main action.

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[4] *Riddles v Standard Bank South Africa* [2009] 2 All SA 40 at paragraph [15]
[5] *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* (1129/2016) [2017] ZASCA 145 (13 October 2017) at paragraph [13]
[6] *Riddles* supra at paragraph [15]

S POSWA-LEROTHOLI
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances:

Heard on:	06 June 2018
Delivered on:	03 August 2018
For the Applicant:	*Adv. J Bhima*
Instructed by:	Scalco Attorneys Inc., Pretoria
For the Respondent:	Adv C Welgemoed
Instructed by:	Van Greunen & Associates Inc.