

In the High Court of South Africa  
KwaZulu-Natal Division, Pietermaritzburg

Case No : 1163/09

In the matter between :

Jennifer Anne Scarr

Plaintiff

and

Rodney Mitchell

First Defendant

Rodney Mitchell NO

Second Defendant

Marie Mitchell NO

Third Defendant

Susan Mary Stanford NO

Fourth Defendant

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Judgment

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Lopes J

[1] This is an application in terms of which the second, third and fourth defendants seek the upliftment of a bar to them being able to file a plea, together with condonation of their failure to file a plea within the time frame provided for in rule 22 of the Uniform Rules of this Court.

[2] The history of the matter may be viewed as follows :

- (a) on the 21<sup>st</sup> December 2009 the plaintiff caused a summons to be issued against the first defendant. The plaintiff's cause of action may be summarised as follows :
  - (i) she was to advance to the first defendant the sum of R2.1m pursuant to what may be termed 'the first agreement';
  - (ii) in exchange therefor the first defendant was to procure transfer to the plaintiff of a 50% share of certain immovable property registered in the name of the Buffelsbosch Farm Trust ('the trust') of which the first defendant is a trustee;
  - (iii) that agreement was cancelled and replaced with a further agreement ('the second agreement') in terms of which the first defendant would repay the sum of R600 000 (by then actually lent and advanced to him) and he would, in addition, procure the sale by the trust of the immovable property, and pay to the plaintiff the sum of R600 000 from the proceeds of such sale;
  - (iv) in breach of the second agreement the first defendant failed to procure the sale by the trust of the property, and the repayment to the plaintiff of the monies due to her;
- (b) on the 11<sup>th</sup> April 2012 the joinder of the trustees of the trust, as defendants in the action, was ordered by this Court;

- (c) pursuant thereto, on the 18<sup>th</sup> May 2012, a notice of intention to defend the action was delivered by the trust;
- (d) as the trust did not plead in accordance with the time limits set forth in the rules, a notice of bar was delivered by the plaintiff on the 21<sup>st</sup> June 2012;
- (e) on the 6<sup>th</sup> August 2012 the plaintiff applied for default judgment against the trust. That application was opposed;
- (f) well after the lapse of the five days provided for in the notice of bar, and on the 13<sup>th</sup> August 2012, the trust purported to deliver its plea;
- (g) affidavits in the default judgment application were delivered, and the opposed default judgment application was heard before Kruger J on the 7<sup>th</sup> March 2013, and he ruled that the default judgment application could not be opposed in the way in which the trust had done so;
- (h) the plaintiff then instituted an application on the 10<sup>th</sup> May 2013 for the condonation of her failure timeously to object to the filing of the plea by the trust (on the basis that it was an irregular proceeding). On the 2<sup>nd</sup> July 2013 an order was granted condoning the plaintiff's failure timeously to deliver a rule 30(2)(b) notice;
- (i) pursuant to the grant of condonation, a rule 30 application was delivered by the plaintiff to declare the defendants' plea irregular, and this application for the upliftment of the bar in terms of rule 27 was delivered on the 6<sup>th</sup> August 2013 by the second, third and fourth defendants, seemingly in reply to the service of the rule 30 application;

- (j) on the 15<sup>th</sup> August 2013 and apparently in recognition of the merits of the plaintiff's rule 30 application, the defendants withdrew the irregular plea;
- (k) it is common cause that the plaintiff has been paid the sum of R400 000, and the balance which she seeks to recover is the remaining R200 000.

[3] With regard to the legal requirements to succeed in such an application, in *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (OPA) Olivier AJ recorded that 'good cause' as set out in rule 27(1) had to be shown and that the Court was accorded a wide discretion in that regard. In principle that discretion should be exercised upon consideration of all of the merits of the case. In *Gumede v Road Accident Fund* 2007 (6) SA 304 (CPD) at 307 D van Reenen J emphasised that the grant of condonation is a matter of discretion that has to be exercised having regard to all the circumstances of the particular case. He referred to the necessary factors to be taken into account in exercising such a discretion, which were identified by Holmes JA in *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720 E – G (albeit in the context of an appeal) as being:

- (a) the degree of non-compliance;
- (b) the explanation for such failures;
- (c) the prospects of success;
- (d) the importance of the case;
- (e) the respondent's interest in the finality of the judgment;
- (f) the convenience of the Court; and
- (g) the avoidance of delays in the administration of justice.

[4] That list is not regarded as exhaustive and the factors are not individually decisive but inter-related in the sense that the strength of one may compensate for the weakness in another.

[5] Considerations which should in my view be borne in mind in arriving at a proper decision in this case as to whether to uplift the bar, are the following :

- (a) there is no dispute that :
  - (i) the plaintiff and the first defendant concluded an agreement in terms of which she would advance to him the sum of R2.1m in exchange for becoming a joint owner of immovable property registered in the name of the trust;
  - (ii) after advancing the sum of R600 000 the agreement was altered, and the parties agreed that the amount advanced would be regarded as a loan repayable upon the sale of the property owned by the trust;
  - (iii) R400 000 of that loan has been repaid by the first defendant;
- (b) the trust has defended the action on the basis that it was not a party to the agreement (the plaintiff alleging that the trust is the alter ego of the first defendant and therefore a party to the loan agreement, together with a further alternative that the doctrine of fictional fulfilment of a contract should operate, and an assumption should be made that the trust's property has been sold thereby entitling the plaintiff to immediate repayment of the loan);

- (c) it is alleged that the trust has been trying to find a buyer for some time, the property has now been sold and the transfer into the name of a purchaser is presently taking place. It is also suggested that the plaintiff's claim against the trust has become prescribed because she only joined the trustees in the action, in April of 2012;
- (d) on the 13<sup>th</sup> February 2012 the defendants' attorney wrote to the plaintiff's attorney recording that the immovable property had been sold and that the R400 000 received was to be paid to the plaintiff, and the second payment was due at the end of June 2012.

[6] In the plaintiff's answering affidavit it is recorded that the third defendant is no longer a trustee of the trust. It is averred that the fact that the trust has now elected, thirteen months after the service of the notice of bar, to withdraw its plea indicates a lack of bona fides on the part of the trust.

[7] Indeed, in the reasons given by Kruger J for his decision of the 7<sup>th</sup> March 2013, he set out that the most prudent way in which the defendants could deal with the matter would be to apply for the upliftment of the bar and thereafter to file a plea. Doing so would prevent the Registrar from granting judgment by default.

[8] In my view the trust has failed to provide any satisfactory explanation as to why it failed to deliver a plea between the time of the service of the notice of bar upon them (on the 21<sup>st</sup> June 2012) and the 13<sup>th</sup> August 2012. With regard to the

merits of the trust's defence to the action one can do no more than refer to the plea which was filed on behalf of the second to fourth defendants. That plea is one paragraph of four lines which requests the incorporation of every averment contained in the first defendant's plea to the plaintiff's particulars of claim.

[9] In terms of the first defendant's plea he admitted the conclusion of the initial contract, the advance of the money, and the conclusion of the amended agreement including that the first defendant would actively market the immovable property for sale. The defendant admits being indebted to the plaintiff but simply denies that the amount is due, owing and payable.

[10] The degree of non-compliance by the second, third and fourth defendants was manifest, the explanation non-existent, and the interest of the plaintiff in the finalisation of the matter is evident from her continual steps to attempt to bring the action to finality. The convenience of the court and the avoidance of further delays requires finalisation of the action.

[11] It is important to my consideration of this application whether any valid and bona fide defence has been raised by the defendants in order to show the necessary 'good cause'. I do not believe that to be the case. In the circumstances I make the following order :

(1) The application is dismissed.

- (2) The costs of the application are to be paid by the second and fourth defendants in their capacities as trustees of the Buffelsbosch Farm Trust.

Date of hearing : 16<sup>th</sup> April 2014

Date of judgment : 3<sup>rd</sup> June 2014

Counsel for the Applicant : C G van der Walt (instructed by Christopher Richard Lee Attorneys)

Counsel for the Respondents : D B Joubert (instructed by Randles Incorporated)