**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: 22887/2010

DATE: 8 MARCH 2011

In the matter between:

**HERBERT ANTHONY SMIT** Applicant

and

**ANTOINETTE OLIVIER** Respondent

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**J U D G M E N T**

**FOURIE, J**:

This matter has a long and chequered history and involves two parties who were previously romantically involved with each other. During the relationship they concluded a written agreement of sale on 28 April 2008, in terms of which respondent purchased a two-seventh share in certain immovable property of the applicant for a purchase price of R310 000,00. It is common cause that she paid an amount of R310 000,00 to applicant, but he has failed to effect transfer of this share to respondent, as a consequence of which,

respondent contends, she cancelled the agreement and claimed repayment of the sum of R310 000,00, as well as an amount of R14 500,00 expended by her on improvements to the dwelling on the property.

In November 2008, respondent issued summons against applicant under case number 18322/2008 for payment of the aforesaid amounts, and in view of applicant's failure to deliver a notice of intention to defend, default judgment was granted to respondent on 6 February 2009. I should add that default judgment was only claimed and granted in respect of the claim for repayment of the sum of R310 000,00. The default judgment came to the attention of applicant during February 2009. This prompted an application by applicant under case number 3566/2009 in which he sought the rescission of the default judgment. In the founding papers it was alleged that applicant's attorney, one Potgieter, "unfortunately forgot" to enter an appearance to defend on behalf of applicant. However, no explanation at all was given of the circumstances surrounding the unfortunate lapse of memory of the attorney.

The application under case number 3566/2009 ("the first rescission application") was enrolled for hearing before Baartman, J on 30 August 2010. On this date there was no appearance for applicant. After unsuccessful telephonic

attempts to locate applicant's attorney, Mr Potgieter, Baartman, J dismissed the first rescission application with costs on the attorney and client scale. I should mention that messages were left for Potgieter, to which he failed to respond.

On 18 October 2010, applicant launched the present application in which, *inter alia*, the following relief is sought:

> "3. The writs of execution and/or any sale under case number 18322/2008 be stayed.
>
> 4. The dismissal of the application under case number 3566/2009 be set aside and the applicant be given an opportunity to be heard."

Mr Ferreira, who appeared on behalf of applicant, submitted that the application is brought under the common law and that the court should not only have regard to the allegations in the present papers, but read same with the allegations to be found in the first rescission application. Insofar as the rescission of the order made by Baartman, J is sought, the application clearly falls under the provisions of the common law, as Rules 31(2)(b) and 42(1)(a) do not find application. As far as the

stay of the writs of execution and/or any sale under case number 18322/2008 is concerned, the applicable court rule appears to be Rule 45A, which seems to be based on the provisions of the common law relating to applications to the court to suspend execution of its orders.

As explained in Erasmus, Superior Court Practice, page 330/330A, a court will, as a general rule, grant the stay of execution where real and substantial justice requires such a stay, or put differently, where injustice will otherwise be done. In Road Accident Fund v Strydom 2001 (1) SA 292 (C) at 304G-H, it was held that to persuade a court to exercise its discretion in the applicant's favour in an application to stay execution, it has to be shown by the applicant that there is a well grounded apprehension of injustice being done to the applicant by way of irreparable harm if execution were not suspended. This would require the applicant to place facts before the court regarding the basis for the apprehension of irreparable harm to be caused to applicant, thereby showing that the balance of convenience favours the granting of a stay.

In this matter there is a deathly silence on the part of the applicant as to any irreparable that he may suffer, nor does he suggest that the balance of convenience favours the granting of the order. All that I could find is a throwaway line in

paragraph 9 of the founding papers, to the effect that "applicant will be substantially prejudiced". No flesh has, however, been added to the bare bones of this allegation. For example, no attempt was made to show that the respondent is a lady of straw and that in the event of execution taking place, the applicant will be caused irreparable financial prejudice, as he would not be able to recover the judgment debt in the event of a court thereafter finding in his favour on the merits of the matter.

As I pointed out to Mr Ferreira in argument, it may very well be that respondent is a lady of substantial means, with the result that there is no apprehension of irreparable harm to be caused to the applicant if the stay of execution is refused. I, therefore, conclude that the applicant has failed to place facts before me which show that real and substantial justice requires the granting of the application for a stay of execution and he is, therefore, not entitled to an order in terms of paragraphs 3 of the notice of motion.

This brings me to the application to rescind the order of Baartman, J made on 30 August 2010, in which the learned judge dismissed the first rescission application. It is trite that, in terms of the common law, the applicant has to show "sufficient cause" or "good cause" which requires him to give a

reasonable explanation of his default and to show that the application is not only *bona fide*, but that he has a *bona fide* defence to respondent's claim. Mr Ferreira conceded, correctly in my view, that in regard to the failure to appear at the hearing of the first rescission application on 20 August 2010, the applicant's attorney, Mr Potgieter, was clearly negligent.

In fact, I believe that to describe the attorney's conduct as "negligent", is putting it rather mildly. He was not only informed of the date of the hearing by facsimile messages sent by respondent's attorney on 3 March 2010, 10 March 2010, 14 March 2010 and 17 March 2010, but also advised telephonically by respondent's attorney on 4 March 2010, of the date of the hearing. In addition, respondent's counsel, at the request of his instructing attorneys, faxed his heads of argument to Attorney Potgieter on 27 August 2010, i.e. three days before the hearing of the application, thereby conveying that the hearing of the first rescission application was imminent.

In his affidavit, Potgieter attempts to explain that he did not receive these faxes, due to the fact that the secretary who operated the relevant computer on which the faxes would have appeared, had left his firm and, therefore, the faxes did not

come to his attention. This explanation is rather unconvincing, particularly in view of the content of the affidavit filed by respondent's attorney, pointing out receipt of documentation from applicant's attorney via this fax number. Regarding the two telephone calls made to Potgieter by respondent's attorney on 4 March 2010, as confirmed by the respondent's attorney's contemporaneous note, Potgieter merely says that he "does not recall" receiving these calls.

In view of the evidence provided by respondent's attorney of these telephone calls and their content, I would have expected Potgieter to elaborate by, for example, referring to his system of keeping file notes of telephone calls or the diarising of files upon receipt of a trial date, to show whether or not he had received the calls. The most plausible conclusion in these circumstances is that Potgieter did receive notice of the trial date of 30 August 2010, but for some unknown reason failed to arrange for an appearance on behalf of applicant at the hearing.

Mr Ferreira submitted that the negligence of Attorney Potgieter should not be held against the applicant. I accept that courts are generally slow to penalise a litigant for an attorney's negligent conduct of litigation, but as stated in Colyn v Tiger Foods Industries Limited 2003 (6) SA 1 (SCA) at 9H, there

comes a point where there is no alternative but to make the client bear the consequences of the negligence of his or her attorneys. It should be borne in mind that in this matter the applicant's attorney has failed on two occasions to take the necessary steps to oppose the relief sought by respondent against the applicant, without providing any acceptable explanation for such failures.

However, it is not only Attorney Potgieter who was negligent. The applicant himself did nothing at all to ensure that the first rescission application be heard or at least to check whether his attorney was taking the necessary steps to have it heard. As pointed out by Mr Benade for respondent, the first rescission application was pending for a period of some 18 months before it was heard on 30 August 2010, without any steps being taken by applicant and/or his attorney to ensure that the matter be finalised. I would have expected a concerned litigant, who already had one bad experience when his attorney failed to give notice of his intention to defend the action, to have taken an active interest in his case. However, no explanation at all is forthcoming from applicant of his apparent total lack of interest in the outcome of the litigation. In this regard I am in respectful agreement with the following sentiments expressed by Melamet, J in De Wet v Western Bank Beperk 1977 (4) SA 770 (T) at 780C-G:

"It is argued that in the present instance, if it is found that the court did not grant the order erroneously, or that an order was not erroneously sought, that appellants find themselves in their present predicament because they have virtually been abandoned by their attorney at the last moment without an opportunity to obtain legal assistance. This, in my view, does not explain their default of appearance at the trial. Their default of appearance is due to a failure on their part to remain in communication with their attorney or agent as to the progress of their case. They cannot divest themselves of their responsibilities in relation to the action and then complain *vis-à-vis* the other party to the action that their agents, in whom they have apparently vested sole responsibility, have failed them. Earlier on I referred to a decision in which it was held that failure to remain in communication with one's attorney during the course of legal proceedings, is negligent conduct, but in the present case the conduct amounted to a complete lack of interest in the proceedings. Even if the court did have an inherent jurisdiction to assist the appellants, I am of the opinion that the

circumstances, which I have set out, are such that a court should not come to the assistance of the appellants. They are the authors of their own problems and it would be inequitable to visit the other party to the action with the prejudice and inconvenience flowing from such conduct."

In view of the aforegoing, I find that applicant has dismally failed to provide a reasonable explanation for the failure to appear at the hearing of the first rescission application on 30 August 2010. In fact, for the reasons already furnished, I am of the view that the unconvincing explanation provided by Potgieter and the absence of any explanation on the part of applicant, is fatal and that on this basis alone, the first rescission application should be dismissed.

As a last string to his bow, Mr Ferreira argued that the absence of a reasonable explanation should not preclude applicant from being granted relief, especially in view of his defence to respondent's claim, which he has put up in his affidavit in the first rescission application. In the Colyn case, the Supreme Court of Appeal suggested that, perhaps, a weak explanation may be 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. However, as

explained in Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 767J-769D, it does not mean that the stronger the prospect of success, the more indulgently a court will regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits. Nevertheless, in the interest of fairness, it would normally be desirable to consider the defence raised by a defendant.

In his argument Mr Ferreira relied on the non-fulfilment of the suspensive condition contained in clause 8 of the agreement of sale of 28 April 2008, as the first leg of the defence. He submitted that the agreement terminated upon such non-fulfilment and, therefore, the respondent's claim, which is based on the agreement and its subsequent cancellation due to applicant's alleged default, is bad in law. Mr Benade countered the submission by pointing to the conduct of the parties which shows that, even after the 30 day period referred to in clause 8 of the agreement, they endeavoured to, and did obtain, a loan from a financial institution. To this Mr Ferreira responded by submitting that the 30-day period could not have been lawfully extended due to the non-variation provision found in clause 8.

It appears to me that, on the strength of the conduct of the

parties, it can justifiably be argued that they both waived any right which they may have had in terms of clause 8, to rely upon the non-fulfilment of this condition within the stipulated 30 day period. It seems to me that clause 8 was inserted for the benefit of both parties and either of them could, therefore, waive its provisions as to the time limit, bearing in mind that such waiver had to take place before the expiry of the 30 day period. It further appears to me that, on the facts set out in the answering affidavit in the first rescission application, it can be argued that the parties had, at least by their conduct before the expiry of the 30 day period, consented to waive their respective rights to rely on the 30 day period referred to in clause 8 of the agreement.

In these circumstances, the non-variation provision found in the ultimate sentence of clause 8 of the agreement would, in my view, not come into play. The question is not whether the seller agreed in writing to an extension of the 30 day period, but whether the parties waived their right to rely on the non-fulfilment of the condition within the original 30 day period. Their conduct, as I have mentioned, indicates that they did waive their respective rights as they continued to give effect to the agreement of sale, *inter alia*, by signing mortgage loan documentation and instructing conveyancers to attend to the registration of a mortgage bond as security for the loan

granted by the financial institution.

I have to concede that respondent's particulars of claim do seem to be rather inelegantly worded. It may even be that applicant is correct in saying that, *ex facie* the particulars of claim, the validity of the cause of action as pleaded, may be questioned. But then, again, even on applicant's version that the agreement terminated on the expiry of the 30 day period in clause 8, *restitutio* would have to take place, which should entitle respondent to repayment of the sum of R310 000,00. Be this as it may, I believe that one should take a broader view of the disputes between the parties in order to determine whether a valid defence to respondent's action has been disclosed. On this approach it would appear that the real basis of the defence is to be found in the second leg relied upon by Mr Ferreira, namely that the sum of R310 000,00 was paid by respondent to applicant in terms of an oral agreement concluded between the parties during May/June 2008, and not as the purchase price due in terms of the agreement of sale concluded by them in April 2008.

Applicant alleges that, in terms of this oral agreement, respondent made this payment in the nature of a loan to enable applicant to effect improvements to his dwelling. He further says that the loan would be repaid when he would sell

his property after a period of three years and respondent would then receive a two-seventh share in the net proceeds of such sale. The conclusion of such an oral agreement, judged merely on the face thereof, seems rather improbable. Not only is the applicant unable to provide the specific date of the conclusion thereof, but it seems highly unlikely that respondent wouldl advance such a substantial amount to applicant without any proof in writing as to the terms of the repayment. Respondent would also have no form of security for the repayment of the amount which would now be spent on improving the applicant's immovable property.

There would also be no guarantee that she would be able to recover the amount of the loan, particularly having regard to the unstable property market which has been experienced from approximately 2008 onwards. In fact, as appears from applicant's attorney's letter dated 12 August 2010, the respondent's two-seventh share in the net balance of the sale of the property, would presently only amount to R171 429,00, i.e. only approximately 55% of the amount originally advanced to applicant.

In addition, the objective facts, in my view, gainsay the existence of this oral agreement upon which applicant relies as the true basis of his defence. It is common cause that

respondent paid the sum of R310 000,00 to applicant on 7 June 2008. Thereafter the parties continued to make financial arrangements, which were clearly aimed at giving effect to the original agreement in terms of which a two-seventh share in the property was sold to respondent by applicant. *Inter alia*, the parties applied for a loan on 29 July 2008, which would have replaced the existing loan secured by a first mortgage bond over the property. This loan was granted by the bank. In fact, steps to effect transfer of a two-seventh share in the property continued up to April 2009. Until that time, no notice at all had been given to the transferring attorneys that the agreement of sale would not be proceeded with. Clearly, if it was applicant's contention that the agreement of sale had terminated by the end of May 2008 and that the oral agreement of loan was concluded during May or June 2008, it is inexplicable that the parties would, up to April 2009, have allowed steps to be taken to give effect to the terms of the deed of sale of the property.

In my view the applicant has not put up a defence which has good prospects of success. On the contrary, it seems to me that applicant has not even shown that he has a *bona fide* defence which has some prospect of success. There is, in my view, no basis for a finding that applicant, somehow, has a defence to a claim by respondent for the repayment of this

amount of R310 000,00. It rather seems to me that, on all accounts, it is clear that the agreement of sale has now come to an end, with the result that restitution should take place. Applicant has not shown that he has the right to retain the payment of R310 000,00 made by respondent, particularly not on the strength of the unconvincing defence which he has attempted to build on the alleged oral agreement concluded in May or June 2008.

It follows that the application to rescind the order made by Baartman, J on 30 August 2010 also falls to be dismissed. As far as costs are concerned, I cannot see why respondent should not, in these circumstances, be entitled to an attorney and client costs order to prevent her from being out of pocket. In the result, the application under case number 22887/2010 is dismissed with costs on the attorney and client scale.

FOURIE, J

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