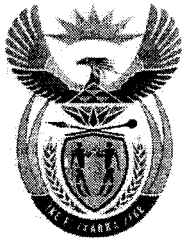

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO.: 18322/2008

In the matter between

HERBERT ANTHONY LEON SMIT Appellant

and

ANTOINETTE OLIVIER Respondent

JUDGMENT DELIVERED ON 27 OCTOBER 2011

ASSHETON-SMITH, AJ

1. This is an application brought by the Applicant to have the default judgment granted against the Applicant on or about 3 February 2009 rescinded in terms of Uniform Rule 42(1)(a). The application is opposed by the Respondent who filed an opposing affidavit.

2. In this matter the Applicant failed to enter an appearance to defend (the summons having been served upon him on 6 November 2008) and also failed

to attend Court when default judgment was sought and granted. Then the Applicant brought an application for rescission, but failed to place such rescission application before the Court. This first rescission application was dismissed by Justice Baartman with costs on an attorney and client scale. Then the Applicant brought a second application for rescission of the same judgment, which came before Judge Fourie on 3 June 2011 which application was dismissed. The Applicant subsequently brought an application for leave to appeal against this latter judgment which leave to appeal was refused by Justice Fourie.

3. This application is the third in the series of applications that the Applicant has brought for rescission of judgment.

4. Rule 42(1)(a) provides that:

> *"(1) The court may, in addition to any other powers it may have, mero motu or upon application of any party affected, rescind or vary:*
>
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."*

5. The prerequisites that the Applicant requires to satisfy under this sub-rule are the following:

5.1. the default judgment must have been erroneously sought or erroneously granted;

5.2. such judgment must have been granted in the absence of the Applicant; and

5.3. the Applicant's rights or interest must be affected by the judgment.[1]

6. The latter two requirements are in this matter obvious and do not warrant further consideration, and can be taken as having been established by the Applicant. However, in order to succeed in seeking rescission of the default judgment in terms of the sub-rule, the Applicant bears the *onus* of establishing that the default judgment aforesaid was erroneously granted.[2]

7. It was submitted by the Respondent's counsel that this application constituted yet another attempt on the part of the Applicant to delay the inevitable. It was also submitted that this application was bordering on an abuse of process. The Applicant's attorney in response to such submissions explained to me that he had recently been appointed as the attorney of record of the Applicant and that he could not understand why the Applicant's erstwhile attorneys and counsel had not picked up on the fact that the default judgment, in his submission, was granted in error, and hence the Applicant was advised to bring the present application.

8. It was also submitted by counsel for the Respondent, that this matter had

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[1] Mutebwa v Mutebwa and Another 2001(2) SA 193 at page 199 F
[2] Bakoven Ltd v G J Howes (Pty) Ltd 1990(2) SA 446 at page 469 B

previously been considered by Judge Fourie, and as such the matter was *res judicata*, and therefore this matter should not be further entertained by this Court. I will deal with this submission below.

9. Thus the essential question to be determined in this matter is whether the Applicant has established that the default judgment aforesaid was erroneously granted.

10. The basis for the Applicant's contention that the default judgment was erroneously granted is that *ex facie* the Particulars of Claim, the Respondent's claim is based on a written deed of sale,[3] that the written deed of sale itself was subject to a suspensive condition that a mortgage loan of R400 000,00 be granted by a bank or financial institution within 30 days of the conclusion of the agreement or such extended period as the parties may agree in writing, but that the Respondent in her Particulars of Claim failed to plead that there was timeous compliance with such suspensive condition, the agreement having been concluded on 22 October 2008 and the suspensive condition was required to be fulfilled 30 days thereafter. The Applicant submitted that as this is an essential averment which was absent from the Particulars of Claim it renders the Particulars of Claim excipiable on the grounds that the Particulars of Claim lack an essential averment to sustain the cause of action. It was submitted by the Applicant's attorney that if the summons is excipiable then it could not sustain the application for default judgment and as such the default judgment was erroneously granted. The question thus arises what is the

[3] Paragraphs 3 and 4 of the Particulars of Claim

meaning of the words *"erroneously granted"*. This is dealt with in the **Bakoven** case[4] where it is stated:

> *"An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of 'a mistake in a matter of law appearing on the proceedings of a Court of record' (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence (Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd (supra) at 578F-G; De Wet (2) at 777F-G; Tshabalala and Another v Pierre 1979 (4) SA 27 (T) at 30C-D). Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission."*

11. Accordingly the words *"erroneously granted"* means that the Court must have committed a mistake in law, which appears from the record of the proceedings itself.

12. The question then arises as to whether the Applicant is correct in its contention that the Court made a mistake in law in granting default judgment in this matter.

13. In this regard the Applicant's attorney referred me to the case of **Marais v**

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[4] Bakoven Ltd v G J Howes (Pty) Ltd 1990(2) SA 446 at page 471 E to H

Standard Credit Corporation Limited 2002 (4) SA 892 which is a case in point. Here the applicant claimed that default judgment was erroneously granted in terms of Uniform Rule 42(1)(a) because the summons was excipiable as it disclosed no cause of action. In this case the respondent had failed to make an essential averment of an initial payment having been made in order for the applicant to enforce the credit agreement upon which it relied. It was held by Coetzee J in this case, that as the summons lacked an essential averment, there was no cause of action and thus nothing to sustain the judgment and accordingly the default judgment that had been granted was rescinded.

14. The facts of the **Marais** case are no different from this matter as *ex facie* the summons an essential averment (which in our law must be pleaded[5]) being the fulfilment of a suspensive condition which was prescribed in the written deed of sale upon which the Respondent based her claim in her Particulars of Claim had not been made. As such, the Respondent's Particulars of Claim do not sustain a cause of action and thus default judgment was erroneously granted.

15. The question then arises should the default judgment granted herein be rescinded by the Court as Rule 42(1)(a) provides the Court may rescind the judgment (my emphasis). If one refers to the **Mutebwa** case, Jafta J stated in that case:

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[5] Resisto Dairy (Pty) Ltd v Auto Insurance Co Ltd 1963(1) SA 632 (A) at page 644 F – H

"Although the language used in rule 42(1) indicates that the Court has a discretion to grant relief, such discretion is narrowly circumscribed. The use of the word 'may' in the opening paragraph of the rule tends to indicate circumstances under which the Court will consider a rescission or variation of judgment, namely that it may act mero motu or upon application by an affected party. The Rulemaker could not have intended to confer upon the Court a power to refuse rescission in spite of it being clearly established that the judgment was erroneously granted. The Rule should, therefore, be construed to mean that once it is established that the judgment was erroneously granted in the absence of a party affected thereby a rescission judgment of the judgment should be granted." [6]

16. Accordingly the discretion the Court has to grant rescission in this matter is an extremely narrow one. As the Applicant has established the prerequisites in terms of Rule 42(1)(a), the Court is obliged to then grant rescission of judgment where it is clear *ex facie* the particulars of claim, as in the position in this case, that no cause of action exists on the pleadings to sustain the judgment and accordingly if default judgment was granted by the Court, it was erroneously granted.

17. Counsel for the Respondent submitted that in circumstances where the Court was confronted with a formal application for rescission, then the Court could give consideration to other facts contained in the affidavits before the Court and was not confined merely to considering the record of the proceedings

[6] Mutebwa v Mutebwa and Another 2001(2) SA 193 at page 194 E – G

only. In this regard the Respondent's counsel referred me to the **Mutebwa** case.[7] I agree with the Respondent's counsel in his submission as for obvious reasons in instances where the Court does not act *mero motu*, but where an applicant seeks rescission of judgment under Rule 42(1)(a), a Court would obviously be faced with affidavits before it which would set out the grounds upon which the rescission is being sought. However, in this case it is not really necessary for the Court to go further than looking at the record of the Court proceedings as *ex facie* the Particulars of Claim no cause of action is sustained by the Particulars of Claim. It is only where the error cannot be determined *ex facie* the record of the proceedings itself, that the Court would need to have regard to the facts set out in affidavits filed of record in order to determine whether or not an error had been committed by the Court. In this regard if one has regard to the facts of the **Mutebwa** case they are distinguishable from the facts of the present case. In the **Mutebwa** case the Deputy Sheriff fraudulently stated in his return of service that summons had been served personally on the defendant. This would obviously not have appeared *ex facie* the particulars of claim. As found in the **Mutebwa** case evidence is only confined to the record of the Court proceedings in cases where the Court acts *meru motu* or on the basis of oral applications made from the bar.[8]

18. In any event, from what is stated above, it is not necessary in this instance for the Court to have regard to the affidavits filed of record in order to make a

[7] Mutebwa judgment at page 201 A – B
[8] Mutebwa judgment at page 201 A – C

determination of whether or not the default judgment granted herein had been erroneously granted as the error appears *ex facie* the record of the Court proceedings.

19. Counsel for the Respondent also referred me to the judgment of Leveson J in **First National Bank of SA Bpk v Jurgens and Another** 1993(1) SA 245 at page 246 to 247 which I quote:

> *"That leaves me only with the task of considering para (a) of the same sub-rule which makes provision for rescission or variation of an order or judgment erroneously sought or erroneously granted. I look first at the remedy available before the rule came into force. Ordinarily a court only had power to amend or vary its judgment if the court had been approached to rectify the judgment before the Court had risen. That relief was available at common law and with the only relief that could be obtained until the provisions of rule 42 were enacted. The proposition at common law is simply that once a court has risen it has no power to vary the judgment for it is functus officio. Firestone South Africa (Pty) Ltd v Genticuro AG, 1977(4) SA 298 (A). A principal judgment could be supplemented if an accessory had been inadvertently omitted, provided that the court was approached within a reasonable time. Here the judgment was granted two years ago and a reasonable time has expired. The question then is whether the limited relief at common law has been extended by this provision. In the first place I must express considerable doubt that power exists in the Rules Board to amend the common law by the creation of a Rule. Leaving aside that proposition, however, the question that arises is whether the present case is one of a*

judgment 'erroneously sought or granted', those being the words used in Rule 42(1)(a). The ordinary meaning of 'erroneous' is 'mistaken' or 'incorrect'. I do not consider that the judgment was 'mistakenly sought' or 'incorrectly sought'. The relief accorded to the plaintiff was precisely the relief that its counsel requested. The complaint now is that there is an omission of an accessory feature from the judgment. I am unable to perceive how an omission can be categorised as something erroneously sought or erroneously granted. I consider that the rule only has operation where the applicant has sought an order different from that to which it was entitled under its cause of action as pleaded. Failure to mention a form of relief which would otherwise be included in the relief granted is not in my opinion such an error."

20. Whilst the passage quoted above suggests that any application that is brought in terms of Rule 42(1)(a) should be brought within a reasonable time, this is not a factor that has a bearing on the plain wording of the sub-rule which provides that the Court may rescind or vary a judgment erroneously granted by it. There are no time limits imposed on the bringing of the present Application, and it is clear from the case law which I have referred to above that provided the prerequisites of Rule 42(1)(a) are met the Court ought to vary a judgment erroneously granted.[9]

21. Rule 42(1)(a) does not in contra distinction to relief that may be sought in terms of Rule 31(2)(b) under the common law require the Applicant to show *"good cause"* for any default in having brought these proceedings or that he

[9] Mutebwa case at page 199 G – H and the Bakoven case at page 471 G – H

has a *bona fide* defence, he simply needs to meet the requisites as set out in the sub-rule enumerated above.

22. In any event, in the **First National Bank** case aforesaid, the facts are distinguishable from this matter in that as the relief granted in that matter was precisely the relief that Applicant's counsel had requested and accordingly the Judge that granted default judgment in that matter did not grant judgment erroneously. It is quite possible to become confused, and I believe that the source of this confusion finds itself in what is stated in **Erasmus**[10] at B1-308B which I quote:

> *"A judgment to which a plaintiff is procedurally entitled in the absence of the defendant cannot be said to have been granted erroneously as contemplated in the sub-rule in light of the subsequently disclosed defence. Such a defence cannot transform a validly obtained judgment into an erroneous one."*

23. Erasmus quotes the case of **Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd** 2007(6) SA 87 (SCA). This statement and reference to the case creates the impression that in this matter by virtue of the fact that the Applicant has now raised the fact that the pleadings are excipiable, that he is now seeking to introduce a defence that was not before the learned Judge when he granted default judgment, and as such his judgment could not have been transformed into an erroneous one.

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[10] Superior Court Practice

24. The attorney for the Applicant, quite rightly pointed out that the **Lodhi** case does not apply in the present instance because the **Lodhi** case related to a rescission of judgment that was applied for by virtue of a defence raised on the merits of the case which had not been disclosed to the Judge who granted the judgment.[11] Accordingly I agree with the Applicant's attorney that the **Lodhi** case does not apply in the present instance, as the basis upon which the Applicant has sought rescission in this matter does not relate to the introduction of a defence on the merits, but is based on a contention that the judgment was erroneously granted *ex facie* the record of the proceedings.

25. Counsel for the Respondent also referred me to **Tom v Minister of Safety and Security** 1998(1) SA 69 (E) where the Court found that the remedy available in terms of Rule 42(1)(a) is confined to the facts and circumstances in the proceedings before the Trial Judge in the granting of the order. Whilst this position is correct, having regard to the record of the Court proceedings for the reasons set forth above, the judgment was erroneously granted and the particulars of claim, albeit that they did not disclose a cause of action, were before the Court at the time.

26. A further argument that was raised by the Respondent's counsel was that by virtue of the fact the matter and the status of the Particulars of Claim had already been raised in the second application for rescission that was

[11] At page 90 B – D

dismissed by Justice Fourie that the matter was *res judicata*. This is how I understood the Respondent's counsel's argument. I have considered the judgment of Justice Fourie and it is clear that the application before him at that point in time was not an application in terms of Rule 42(1)(a) and the learned Judge was thus not required to make any findings in terms of this sub-rule. Whilst he discusses the inelegant wording of the Particulars of Claim Justice Fourie does not make any finding in this regard. What is quite telling is what appears at page 13 line 4 of his judgment where he says:

> *"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."*

27. I am thus of the view that the matter is not *res judicata*.

28. When one refers to the judgment of Justice Fourie,[12] that the Applicant has now brought the third application in order to raise an exception which must have been obvious to the Respondent's attorney, and indeed to the Respondent itself at the commencement of these proceedings. Instead, the Applicant has sought to delay and obfuscate matters in the most dilatory and costly manner. It appears from Justice Fourie's judgment that no acceptable explanations were provided by the Applicant for his failure on two occasions to take the necessary steps to oppose relief sought by the Respondent against the Applicant. I do not intend belabouring the point other than the fact that in

[12] Annexure "AO2" to the Respondent's opposing affidavit

my view the Applicant has acted inappropriately. Accordingly costs are to stand over for determination by the Trial Court. I have no doubt that the Respondent will draw my comments and that of Justice Fourie in relation to the Applicant's conduct in these proceedings to the attention of the Trial Court in this regard.

29. It is ordered that:

29.1. the Applicant's application for rescission in terms of Rule 42(1)(a) is granted;

29.2. the costs of the application are to stand over for later determination by the Trial Court.

ASSHETON-SMITH, AJ