IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: A220/2018

In the matter between:

PAUL DAN IVAN ADENDORFF	**First Appellant**
YOLANDI MARGARIET ADENDORFF	**Second Appellant**
and	
THEEWATERSKLOOF MUNICIPALIY	**Respondent**

JUDGMENT DATED: 10 MAY 2019

LE GRANGE, J:

[1] This is an Appeal against the whole of the Order and Judgment handed down by the Magistrate of Caledon in terms of which the rescission application by the Appellants was dismissed with costs.

[2] The Respondent instituted two separate actions against the Appellants in the Caledon Magistrate's Court under case numbers: 444/2017 and 445/2017, claiming payment of R81 263.81 and R277 481.46, respectively ('the actions'). The amounts claimed were in respect of water, electricity usage; and or services rendered and or property taxes on Erf 1562, Genadendal and Erf 510 Genadendal ('the properties')

[3] On 4 July 2017 Default Judgment was granted by the clerk of the Court in the actions ('the default judgment').

[4] On 12 September 2017 the Appellants launched an application for the rescission of the Default Judgments ('the Rescission Application'). The Rescission Application was opposed by the Respondent, who filed an opposing affidavit. The Appellants did not file a replying affidavit in the Rescission Application. The Appellant's complaint in the court *a quo* was in essence that the Default Judgment was erroneously granted by reason that the Municipality misled the court *a quo*, did not provide a full background of the matter and that the Municipality lacks the necessary *locus standi* to recover municipal services and rates from the Appellants.

[5] The Magistrate in terms of Rule 51 of the Magistrate's Court Rules handed down the reasons for refusing the Appellants Application for Rescission of the said Judgments. The reasons provided can be summarised as follows. The Magistrate found firstly, that the clerk of court correctly granted the Default Judgment as the summonses were properly served upon the Appellants and they omitted to timeously react upon it. Secondly, the Municipality did not mislead the court in the Application as the two erven in question do not form part of the Trust Land referred to in The Transformation of Certain Rural Areas Act 94 of 1988, as the land described as Farm 39 as per the Deeds Officers report that was annexed to the Appellant's papers as "GT1". Thirdly, the Municipality had the necessary *locus standi*, to recover the

outstanding rates and taxes and lastly, it was found that there are indeed persons or individuals who held private and individual Title Deeds in Genadendal.

[6] It needs to be mentioned that the matter was initially set down on 14 September 2017 for hearing. On 12 September 2017, Desai, J et MacWilliam AJ, postponed the matter to a date to be determined by the Registrar and ordered that the Appellants pay the costs of the postponement of the Appeal. It appears that on 20 July 2018, the appeal had lapsed in terms of the Uniform Rules of this Court. On 24 July 2018, the Appellants apparently obtained certain funds from the Genadendal Transformation Committee to prosecute the Appeal and Application was brought to re-instate the Appeal. On 21 February 2019, and by agreement between the parties the Judge President postponed the matter for hearing on 22 March 2019 and there was no order as to the costs. On 7 March 2019, and having filed Heads of Argument, the Appellants legal team withdrew from record. On 22 March 2019, the First Appellant was in person and indicated that the withdrawal of his legal team caught him unaware and created a dilemma to him as they had been on this matter for some time. The First Appellant requested a further postponement to obtain legal representation. Reluctantly, a further postponement was granted to 26 April 2019 and the cost occasioned by the postponement stood over for later determination.

[7] Ultimately, the First Appellant appeared in person. He also had the Second Appellant's interest at heart as they are legally married in community of property. Adv. A Coetzee, a member of the Cape Bar, appeared for the Respondent. Upfront, I wish to express my gratitude to Mr. Coetzee and his attorney for the approach in this matter, having regard to the fact that the First Appellant was in person.

[8] The Appellants in their founding affidavit, apart from the explanation for the Default, essentially advanced two main defences, to which I will return. The background to the area known as Genadendal and its history, where the two erven in question is situated, was also referred to. The First Appellant is also the treasurer of the Genadendal Transformation Committee. The Appellants had further attached a Memorandum from the office of the Minister of Agriculture and Land Affairs (at the time) dated April 2009 ("the Memorandum"). According to the Memorandum (*para. 2.3*), there were 23 Rural Areas, formerly known as non-white reserves situated throughout South Africa of which one is Farm 39 Genadendal, known today as Genadendal and includes the areas of Bereaville, Voorstekraal and Bosmanskloof.

[9] Furthermore, it appears from a report compiled by Walkers Attorneys dated 2 April 2012 "the Walkers Report" to which the First Appellant alluded to during argument, the Farm 39 Genadendal was initially established as a "Missionary Station" in the early 1900's. According to the Walkers Report, a Deeds searched dated 12 April 2012 recorded that the size of Genadendal is

4515.5279 hectares in extent and that the owner is the "Gemeenskap Van Genadendal". It needs to be mentioned that the Walker Report was not part of the appeal record. As the First Appellant was a layperson, Mr Coetzee adopted the attitude, and in my view correctly, not to object to the Court having sight of the Report. The Walkers Report essentially dealt with the "Township Establishment of the remainder of the farm 39 Genadendal" and the subdivision of certain portions of Genadendal from the Mother title. Although, there were no direct large scale subdivision from the Mother title, it appears according to the Walker report that some subdivision did occur of which certain subdivided erven were registered in the Deeds Office and others not. Be it as it may, ultimately the Walker report has at this stage very little to do with the issues for consideration on appeal.

[10] The Rural Areas Act, No. 9 of 1987 currently applies to the area of Genadendal. In the Memorandum *(para 1.1 and 2.1)* a request was made to the Minister by the Department of Land Affairs for approval to commence with the transitional period of 18 months for the area of Genadendal in accordance the provisions of the Transformation of Certain Rural Areas Act, No 94 of 1988, "the Transformation Act". The principal aim of the Rural Transformation Act is to allow the affected communities to decide on different options to secure land tenure. The Transformation Act, s3(13) further provides that if any Trust Land is not transferred at the expiry of the 18 month transitional period, the Minister may continue to hold such land in

trust and s/he may, at any time thereafter, dispose of it in accordance with the provisions of the Transformation Act. *(Memorandum, para 3.7)*

[11] Since December 2000, the Genadendal area falls under the jurisdiction of the Municipality. The Municipality has taken over the functions of the previous Local Transitional Council in accordance with The Rural Areas Act and the Transformation Act. *(Memorandum, para 3.8).*

[12] According to the Memorandum *(para 3.9)*, a pivotal section of the Transformation Act is s 3(2). In terms of that Section*,..." No transfer of land referred to in s 3(1) must take place, unless the Minister is satisfied that, in the event of transfer to-*

(a) a municipality, the legislation applicable to such municipality , or

(b) a communal property association or other body approved by the Minister, the rules of such a communal property or body,

Make suitable provision for a balance of security of tenure rights and protection of rights of use of-

(i) the residents mutually;

(ii) individual members of such a communal property association or other body,

(iii) present and future users or occupiers of land,

and the public interest of access to land on the reminder and the continued existence or termination of any existing right or interest of person such land"

[13] According to Appellants, the Transformation process had not been finalised due to many technical and complicated legal issues. To this end, according to the Appellants, no private property or individual Title Deeds are held, as the whole of Genadendal is still entrusted to the Minister. In support of the latter contention, the Appellants relied on a Settlement Agreement entered into between the Minister, the Municipality and the Genadendal Transformation Committee in 2008 and which was made an order of Court on 17 October 2008. In that agreement the land described in a Deeds Office Report marked "GT1" was regarded as the Trust Land referred to in terms of the Transformation Act. A moratorium was placed on the sale of the said Trust Land and there would also be no distinction between the terms "Binnemeent" and "Buitemeent". In GT1, under the column "Deductions" certain land is described as 'portions' and other land was given 'erf' numbers. Eight of those erven amounting to 206.2451 hectares were recorded as registered in the Deeds Office and have title deeds. The remainder i.e the area not included in the 'portions or 'erven' amounting to 134.994 hectares was recorded as unregistered. A further column in GT1 reflects the following: *"The registered remainder as on 2007/04/25 of Farm 39 = 4566.77 Hectares"* and *"The unregistered remainder as on 2007/04/25 of Farm 39 = 4431.7307 Hectares".* The Appellants hold the view that their property forms part of the land as described in GT1.

[14] The Municipality disagrees with the Appellants on this issue and has a different view. According to the Municipality, the Appellants are the legal title

holders of the said erven since November 1988 and as such the property no longer belongs to the "Community of Genadendal". According to the Municipality, the Transformation Act and its processes are of no assistance to the Appellants as the said properties no longer form part of the Mother Title of Genadendal.

[15] Turning to the defences raised by the Appellants. First, the Appellants explanation for the default was essentially as result of the acrimonious relationship between the Genadendal Transformation Committee and the Municipality, they were under the impression the Municipality issued the summons purely to scare them as this has happened in the past. As a result, the Appellants never entered an appearance to defend. The Appellants in this regard referred to a criminal matter where the Municipality seemed to have been the complainant. The matter was however withdrawn against the First Appellant due to lack of evidence. According to the Appellants it was only after they received a notice in August 2017 from the Municipality that Judgment in Default was granted against them that they approached their erstwhile attorney. Soon thereafter, the Municipality indicated it will not consent to the Rescission of the Judgments. A formal Application was then launched for the Rescission of the Judgements.

[16] The Municipality holds the view that the reasons proffered by the Appellants for their Default is poor and demonstrates their disregard for the legal process in general. According, the Municipality, the reasons for the

default by the Appellants do not hold muster for the purposes of a Rescission Application as matters are on a regular basis instituted against private title holders.

[17] Secondly, the Appellants are of the firm view that the Minister should be a party to these proceedings as all the land in Genadendal is currently entrusted to the Minister. Moreover, as stated in paragraph [13] above, the Appellants verily believe that they are beneficiaries of land that is entrusted to the Minister and as such the Municipality should look to the Minister to recover the rates and taxes. The Appellants also aver that s 17(1) g of the Municipal Property Rates Act, 6 of 2004 is applicable to them. Section 17(1) provides that a Municipality may not levy a rate on a property belonging to a Land Reform beneficiary or his or her heirs, provided that this exclusion lapses *'(i) 10 years from the date on which such beneficiaries title was registered in the office of the Registrar of Deeds; (ii) Upon alienation of the property by the land reform beneficiary or his or her heirs, dependents or spouse.'* The Appellants also complained that the simple summons issued by the Municipality was vague and embarrassing as the liquid amount claimed was not easily ascertainable. According to the Appellants, the summons failed to indicate the period of service rendered and the amounts that it claimed for that period. There was also no summary of the electricity that was delivered, how it was metered, at what price it was metered and for what period.

[18] The Municipality's answer to the Appellants second defence is that the properties in question were registered in the Office of the Registrar of Deeds since 1997 and 1998, in the names of the Appellants. Accordingly, the Municipality held the view that it collects rates and taxes directly from the owner of the land. Moreover, the properties in question do not belong to the "Community of Genadendal". Furthermore, the Municipality is adamant that the Appellants are not beneficiaries from a land reform process, where land was entrusted to the Minister and that the provisions of s 17(1)G do not apply to them. The Municipality also denies the assertion that the claim in the summons was vague and embarrassing. According to the Municipality, a simple summons can be used for claims of that nature and if properly defended a declaration could be filed and the amount can easily be determined by a statement of account.

[19] The third defence of lack of jurisdiction by the Municipality flows directly from the second. According to the Appellants, the Municipality lacks the necessary authority and jurisdiction to enforce legal action against them due to the legislative framework that is currently operating in Genadendal. The Municipality denies this claim on the same grounds as articulated in the answer to the second defence of the Appellants.

[20] Rescission Applications are dealt with in terms of section 36 of the Magistrate's Court Act 32 of 1944 read with Magistrate's Court rule 49. In this

instance Default Judgments were granted in the absence of the Appellants. Accordingly, section 36(1)(a) finds application. It provides that:

'The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), suo motu -

(a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted

[21] Magistrate's Court Rule 49 deals, more fully, with Rescission Applications and prescribes the procedure to be followed and the contents of the Affidavits which must be filed in support of Rescission of the Applications. Rule 49(1) provides as follows:

'(1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon <u>good cause</u> shown, or if it is satisfied that there is <u>good reason</u> to do so, rescind or vary the default judgment on such terms as it deems fit'

[22] The approach adopted by our courts in dealing with abovementioned sub-rule has been fully discussed by the authors Jones and Buckle, in 'The Civil Practice of the Magistrate's Courts in South Africa 10th Edition, Volume II at 49-5.' The approach has been stated as follows: *'In terms of this sub-rule*

the court is not entitled to rescind or vary a judgment if the Applicant fails to show 'good cause' for relief or does not satisfy the court that there is good reason for the rescission or variation for the judgment. If the Applicant succeeds in showing good cause, it is still in the discretion of the court to grant or refuse relief. This discretion must be exercised judicially in the light of all the facts and circumstances of the particular case as a whole. An application for rescission is never simply enquiring whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in the court. The question is rather whether or not they explanation for the default and any accompanying conduct by the defaulter be it willful or negligent or otherwise gives rise to the probable inference that there is no bona fide defence and that the application for rescission is not bona fide. The Magistrate's discretion to rescind the judgments of his/her court is therefore primarily designed to enable him/her to do justice between the parties. S/He should exercise that discretion by balancing the interests of the parties and also any prejudice that might be occasioned by the outcome of the application. It has further been suggested that a measure of flexibility is required in the exercise of the courts discretion and that apparently a good defence may compensate for a poor explanation.'

[23] Applying the abovementioned approach to the Appellants' Application, I respectfully disagree with the Magistrate's reasoning and conclusion that the Appellants failed to show 'good reason' for the Judgments granted in default to be rescinded.

[24] The reasons proffered by the Appellants for their default may, on the one hand be considered as a poor excuse but the fact that they were under the impression the Municipality issued the summons purely to scare them, cannot simply be ignored if one has proper regard to the litigation history between the parties, which included a criminal matter that was later withdrawn against the First Appellant. Moreover, the Magistrate in my view rather adopted an inflexible approach in exercising her judicial discretion and failed to properly appreciate whether the Appellants defence(s) may compensate for what she may have regarded as a poor excuse.

[25] The finding by the Magistrate that the Appellants two erven do not form part of the Trust Land referred to in The Transformation of Certain Rural Areas Act 94 of 1988, is unfortunate. It appears the Magistrate's finding was largely premised on the fact that the erven are registered in the names of the Appellants since 1997 and 1998 and as such they have not shown good cause for the Rescission of the Judgments.

[26] The requirement that the Applicant for Rescission must show the existence of a substantial defence does not mean that s/he must show a probability of success: it suffices if s/he shows a *prima facie* case, or the existence of an issue which is fit for trial. The requirement that the Application to Rescind must be *bona fide* means that it must be made with

the intention of enabling the Applicant to put his/her case before the court and not with some other motive, such as delay.

[27] In my view, the principal defence raised by the Appellants that the land, including their erven, in Genadendal falls within the scope and ambit of the Transformation Act; the Minister needs to be joined as party to the proceedings; that they are beneficiaries of such land reform and in terms of s 17(1) (g) of the Municipal Property Rates Act, 6 of 2004, the Municipality may not levy a rate on their properties, does indeed raise the existence of a substantial defence that is fit for trial.

[28] The fact that the Appellants erven may have been registered in their names since 1997 and 1998 does not summarily mean that they are not Land Reform beneficiaries. It is evident; the Appellants in their founding affidavit have demonstrated a history to Genadendal that simply cannot be down-played or overlooked. To that extent, litigation has been ongoing between the Genadendal Transformation committee, the Municipality and the Minister. To simply suggest that the Municipality can recover the outstanding rates and taxes from the Appellants as there are other persons and or individuals who held private and individual Title Deeds in Genadendal, without the proper ventilation of the core legal and factual dispute(s) as raised by Appellants would be an over simplistic approach to this matter and would not do justice between the parties. Moreover, there are large portions of land as illustrated in G1 with Title Deeds that indeed fall within the ambit of the Trust Land.

Lastly, if granted the opportunity to defend the claim(s), the Appellants would be able to get a proper statement of account from the Municipality as to how the amounts of monies were computed and over what period.

[29] For all the above-mentioned reasons, I am satisfied that the Appellants have shown good cause and reason to Rescind the Judgments granted by Default in their absence.

[30] It follows that the appeal should succeed and that the Default Judgments granted by the clerk of the Magistrate's Court should be set aside and the Appellants be granted leave to defend the claim against them.

[31] As to costs, it is evident that on two occasions the matter was postponed at the request of the Appellants. On the first occasion an order was made on 12 September 2017, that the Appellants pay the costs of the postponement of the Appeal. On the second occasion on 22 March 2019, the issue of costs stood over. On that day, the Appellants wanted to secure legal representation. Having regard to the history of this matter and taking into account that the Appellants are ultimately successful in the appeal, I am of the view that it would be somewhat harsh and unjust to saddle the Appellants with a cost order for merely seeking a postponement to secure legal representation.

[32] In the result the following order is made:

1. The Appeal succeeds with costs. The Default Judgments granted by the clerk of the Magistrate's Court in case numbers 444/17 and 445/17 in the amounts of R 277 481.46 and R 81 263. 81, respectively with costs are set aside and substituted with the following: *"The Application for Rescission of the Default Judgments granted in case numbers 444/17 and 445/17 in the amounts of R 277 481.46 and R 81 263. 81 respectively, succeed with costs. The Applicants are granted leave to defend the action, with the normal Magistrate's Court Rules applying".*

_____

LE GRANGE, J

I agree,

_____

MARTIN, AJ