

SOUTH AFRICA / JUDGMENT

Du Preez and Others v Van der Berg and Others; Van der Berg and Others v Du Preez and Others (794/2012, 2326/2009) [2012] ZAFSHC 189 (11 October 2012)

[2012] ZAFSHC 189

COURT

Free State High Court, Bloemfontein

BEFORE

J J Mhlambi

CASE / FILE NUMBER

794/2012, 2326/2009

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No: 794/2012

In the matter between:-

PHILLIP BARTHELOMEUS DU PREEZ1st Applicant

H I DU PREEZ h/a DUCON2nd Applicant

PHILLIP BARTHELOMEUS DU PREEZ N.O.3rd Applicant

(in sy hoedanigheid as trustee van die SANDSTONE

TECHNOLOGY TRUST, IT 44/07)

and

P C W VAN DER BERG1st Respondent

M P TRISOS2nd Respondent

M C VAN DER BURGH3rd Respondent

J M HANEKOM4th Respondent

B G CANTOR N.O.5th Respondent

B G CANTOR N.O.6th Respondent

C GERBER N.O.7th Respondent

(Fifth to seventh respondents in their capacities as

Trustees of the BB FAMILY TRUST, IT 1571/07)

AD HOC BALJU OF THE HIGH COURT,

BLOEMFONTEIN-EAST8th Respondent

IN RE:

Case Nr: 2326/2009

In the matter between:

(Fifth to Seventh Respondents in their capacities as

PHILLIP BARTHELOMEUS DUE PREEZ1st Applicant

PHILLIP BARTHELOMEUS DU PREEZ N.O3rd Applicant

(in his capacity as trustee of the SANDSTONE

GRAHAM CORBETT COETZEE N.O4th Applicant

(in his capacity as trustee of the SANDSTONE

ELIZABETH SOPHIA KELLER N.O5th Applicant

JUDGMENT BY: MHLAMBI, AJ

HEARD ON:

DELIVERED ON: 11 OCTOBER 2012

INTRODUCTION

This is an application in terms whereof the Applicants seek the following:-

- [1] That condonation, if any, be granted in terms of Uniform Rule 27(3) to First, Second and Third Applicants for their failure to apply timeously and in terms of the Rules for the rescission of the Order granted by the Honourable Van Zyl J, under Case Number 2326/2009 on 9 July 2009 in favour of the First to the Seventh Respondents;

That the said Order granted under Case Number 2326/2009 by the Honourable Van Zyl J be set aside;

That no cost order be granted save as against such Respondents that shall oppose this application unsuccessfully;

Such further and/or alternative.

BACKGROUND

[2] Applicants had approached Court on an urgent basis on 7 May 2012 for an order suspending the Warrant of Execution against the movable property issued by First to Seventh Respondents and authorised by the Registrar of the Free State High Court, BLOEMFONTEIN, in terms whereof the Eighth Respondent attached certain property belonging to First and/or Second and/or Third Applicants; and which would have been sold in execution on 7 May 2012 at the premises known as Plot 17, Dealesgift, BLOEMFONTEIN; pending the determination of the relief set out in prayers 1,2 and 3 above.

On 7 May 2012 the said Warrant of Execution against movable property was suspended by agreement between the parties.

On 13 May 2009, all seven Respondents filed an application under Case Number 2326/2009 (for the sake of convenience, the parties will be referred to as in that application); seeking relief as follows:

1. That Sandstone Technology Trust (hereinafter styled STT), as represented by Third Respondent and two other trustees cited as 4th and 5th Respondents, be declared as the alter ego of First and Second Respondents (First and Second Applicants herein).
2. Declaring First and Second Respondents jointly and severally liable for the repayment of any monies paid by the applicants to the Second Respondent, for the benefit of First and Second Respondents.
3. Directing First and Second Respondents to pay jointly and severally, the one paying, the other to be absolved, the amount of:
 - 3.1 R1 4000 000.00 in favour of the First Applicant;
 - 3.2 R500 000.00 in favour of the Second Applicant;
 - 3.3 R500 000.00 in favour of the Third Applicant;
 - 3.4 R200 000.00 in favour of the Fourth Applicant;
 - 3.5 R1 400 000.00 in favour of the Fifth Applicant.

Interest on the aforesaid amount, a tempore morae, at 15,5% p.a to date of payment;

That First and Second Respondents pay the costs of the application jointly and severally.

[3] Applicants filed a Notice of Opposition on 28 May 2009, which was withdrawn on 2 July 2009. An order as per the prayers above was granted on 9 July 2009 by Van Zyl J. This is the order that Applicants seek to rescind.

- [4] Between 12 December 2007 and 30 January 2008, and in BLOEMFONTEIN, written Memoranda of Agreement were entered into by and between Bartherlomeus Du Preez, in his capacity as the Trustee of STTR, and all the seven Respondents, in their personal and representative capacities, called the “investors”. The salient points were that STT, the holder of a patent number 2006/02775 and equipment to manufacture sandstone bricks, had received contracts for the supply of such sandstone bricks. The investor would then invest in the project known as Bloemfontein International Convention Centre (BICC project).
- [5] On signature of the Agreement, the investor would pay the amount agreed upon into the bank account of STT. STT would then buy the material and equipment in order to manufacture the sandstone bricks. 2.5% of the net profit of the projected figures of the BICC project would be payable to the investor on finalisation of the project and not later than May 2009.
- [6] However, on 14 December 2007, P.B. Du Preez, as a representative of STT, nominated under cover of a letter addressed to ‘Geagte Belegger’ dated 14 December 2007, an extract of the contents reading as follows:

”... die volgende Bankrekening genomineer vir inbetalings van die onderskeie beleggings in die sg. Bloemfontein International Convention Centre & STT.

Bank: Nedbank Business Free State

Naam: HI Du Preez t/a Ducon

Rek no: 1662040822

B/kode: 166234

Tipe: Lopend(Tjek)

Met Dank”

- [7] This Bank account belonged to the Second Applicant and according to the affidavits filed of record, the monies deposited into this account were utilised to purchase material and the VAT recovered was for the business of Second Applicant.
- [8] As authorised representative of STT and having, as such, agreed to grant security for his indebtedness arising out of the Investment Agreement referred to as the “Main Agreement”, Third Applicant agreed to pledge to the investors (now termed the pledgees) his rights to, and the proceeds of a certain property identified as plot 47, Sand du Plessis Avenue, Estoire, Bloemfontein; the property of the pledger, whether by sale, rental or any other form of proceeds arising therefrom. The pledge was signed by the parties on 20 December 2007.
- [9] On 3 and 5 February 2009, Respondents caused a letter to be addressed to the Trustee Sandstone Technology Trust c/o Mr PB du Preez and the Second Applicant, bringing it to their attention that it had come to the Respondents’ attention that the Bloemfontein International Convention Centre would not be completed by 31 May 2009; confirming also

the undertaking by the latter to refund the former the amount of the investment plus interest thereon, provided such payment would be effected within fourteen days from the date of the letter.

- [10] Third Respondent, responding through his attorney under cover of a letter dated 12 February 2009, confirmed that the Respondents' investments had indeed been used by the STT for the purchase of material and equipment in order to manufacture the sandstone bricks. In terms of an agreement between the parties, the investments would only become due and payable on 31 May 2009. However, the attorney's instructions were that the Trust was in the process of raising funds to repay the investors their capital amount together with interest at prime plus two from date of the investment to date of final payment. Confirmation of payment would be made on/or before 20 March 2009.
- [11] Third Applicant's attorney failed to address the contents of the correspondence of 3 February 2009 by Respondents' attorneys that the BICC would not be completed by 31 May 2009.
- [12] On 6 March 2009, Respondents' attorneys addressed a letter to Applicants' attorney confirming the following:
- "1. PB du Preez had sold 17 Vlei Avenue, Dealesgift;*
- 2.....
3. Confirmation that the matter be held over until 10 March 2009 when a final offer of the settlement would be made."
- [13] As payment was not forthcoming, Respondents then filed an application to have STT declared an alter ego of the First and Second Respondents on 13 May 2009. Applicants file a Notice of Opposition.
- [14] Negotiations once more ensued between the respective attorneys culminating in a letter from Messrs Honey Attorneys on behalf of the Respondents, undertaking not to proceed with execution within a period of thirty days and that a Notice of Withdrawal of the Opposition should be filed to facilitate the granting of an Order on an unopposed basis. Such notice as filed and the Order was duly granted on 9 May 2009.
- [15] Despite the order and undertakings to pay, no payment was made by the respondents. Several steps towards execution were taken for the recovery of the monies paid over to Applicants culminating in the application by the Applicants under Case Number 1811/2011 in which he Applicants resisted the attachment and sale of property on the basis that the execution against such property was improper. The Honourable Wright J made an order suspending the sale in execution pending the application for the rescission of the judgment/ order and granted a punitive costs order against the applicants.

[16] A further sale in execution was arranged as against the Applicants' movable assets, which led to urgent application of 7 May 2012, being the date on which the sale of execution would have taken place. In this application, rescission of judgment is sought.

CONTENTIONS BY THE PARTIES

[17] Mr Snyman advances the following submissions:

1. Good grounds exist for the Court to grant condonation for the late filing of the application for the rescission of the order, in that:

1.1 Mr Cobus le Roux, the Applicants' erstwhile attorney, created the impression to them that the order granted on 9 July 2009 was decided on the merits and they had to abide by it.

1.2 After the demise of Mr le Roux, the Applicants coincidentally received contrary to his; and due to financial constraints, they could not pursue the matter any further;

1.3 The pursuit of the present application was made possible by the assistance of third parties;

2. The Applicants have presented a reasonable and acceptable explanation for their default and have a bona fide defence which, prima facie, carries some prospect of success, in that:

2.1 Facts were present but withheld at the time of Van Zyl J's decision, which would have moved her not to grant the order as she did;

2.2 The order was erroneously sought or erroneously granted in the absence of the Applicants who were affected thereby;

2.3 The transactions forming the basis of the application under Case Number 2326/2009 were loan agreements rather than investments by unregistered credit providers;

2.4 Such transactions are null and void as they were entered into contrary to the provisions of the National Credit Act, 34 of 2005;

2.5 Had the true nature of the transactions been disclosed, the Court would not have granted the order as it did;

[18] Mr Zietsman, on behalf of the Respondents, submits as follows:

The condonation application should not succeed because of the following:

3.1 The effluxion of a period of three years since the order was granted;

3.2 Despite applications to the Court by the Applicants, no formal application for the rescission of the order was made except in the present application;

3.3 Two years after the order was granted, Applicants approached Court to suspend a sale in execution. Applicants only approach Court when threatened with execution against their property;

3.4 Applicants put the blame on the deceased Mr Le Roux, whom they allege to have given them wrong advice and acting contrary to their instructions in the matter that served before the Honourable Van Zyl J;

3.5 Such allegations constitute hearsay evidence and should not be entertained. The late Le Roux became a trustee of the Third Applicant in December 2009; indicative and confirmative of the close ties between him and the Applicants;

3.6 The declaration by the Court of Third Applicant as the alter ego of both First and Second Applicants was to facilitate payment by the Applicants. Such declaration has no bearing whatsoever on the National Credit Act, 34 of 2005;

3.7 Despite having raised three defences previously, Applicants were now relying on one defence only, namely; that the investments to STT were nothing else but pure money-lending transactions;

3.8 Applicants cannot talk of the order having been obtained fraudulently as they were the ones who drafted documents creating the impression that the Respondents were investing in STT;

3.9 The argument that the transactions were loans is untenable as it is based on the settlement agreement reached at a later stage for purposes of securing the repayment of monies already paid;

3.10 Section 4 of the National Credit Act, excludes the Third Respondent from the operation of the Act.

THE LEGAL POSITION

[19] Mr Snyman submits, correctly so, that an application for the rescission of judgment can be brought in terms of Uniform Rules 31(2)(b); 42(1)(a) and in terms of the common law.

[20] Uniform Rule 31(2)(b) reads as follows;

“A defendant may within 20 days after he 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.”

[21] Uniform Rule 42(1)(a) reads as follows:

“The court may, in addition to any other powers it may have, mero motu or upon the 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;”

[22] The requirements for an application for the rescission of judgment under sub rule 31(2)(b) have been stated as follows in *Grant v Plumber* 1949(2) SA 470(O) at 476-477:

“(a) He (the Applicant) must give a reasonable explanation for his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

- (b) His application must be bona fide and not made with the intention of merely delaying the Plaintiff's claim.
- (c) He must show that he has a bona fide defence to the Plaintiff's claim....”
- [23] The explanation by the defendant must be sufficiently full to enable the Court to understand how it really came about, and to assess the applicant's conduct and motives. See *Silber v Ozen Wholesalers Ltd* 1954 (2) SA 345 (A) at 353.
- [24] Before an applicant in a rescission of judgment application can be said to be in 'wilful default' he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions. *Harris v Absa Bank Ltd t/a Volkskas* 2006(4) SA 527 (T).
- [25] “Good cause” includes, but is not limited to, the existence of a substantial defence....cannot be held to be satisfied unless there is evidence, not only of the existence of a substantial defence, but in addition, of the bona fide presently held desire on the part of the applicant for relief actually to raise the defence concerned in the event of the judgment being rescinded. See *Silber v Ozen Wholesalers* supra at 352; also *Galp v Jansley* NO 1966 (4) SA 555 (C) at 560.
- [26] A judgment is erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the court to have made such an order.
- [27] A judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously within the meaning of this sub rule by reason of facts of which the judge who granted the judgment was unaware; so also is the judgment granted in the absence of the defendant in the light of a subsequently disclosed defence, such a defence cannot transform a validly obtained judgment into an erroneous one. *Lodhi 2 Properties Investments CC v Bonder Investments Developments (Pty) LTD* 2007 (6) SA 87 (SCA) 94E.

FINDINGS

- [28] I find it difficult to believe that applicants firmly believe that their erstwhile attorney, the late Mr Le Roux, acted contrary to their instructions when the notice of withdrawal of the opposition was filed. The correspondence between the attorneys then, which continued over a prolonged period before and after the granting of the order, clearly indicates that such a submission is untenable.
- [29] Months before the granting of the order on 9 July 2009 they had instructed their attorney to negotiate with the Respondents to gain time for purposes of raising money in order to compensate the Applicants for their loss and were unable to raise the requisite capital.

- [30] They regarded the payments to themselves as investments and the defence that such payments were loan agreements came later as an afterthought.
- [31] I agree with Mr Zietsman that the thrust of the order under Case No.2326/2009 was the declaration of STT as the alter ego of 1st and 2nd Respondents; and consequently that the 1st and 2nd Respondents were jointly and severally, responsible for the payment of monies paid by the Respondents to the Applicants.
- [32] As such, the order had far-reaching consequences as shown by the various court applications and steps taken in execution of the judgment. Therefore I find it strange that Applicants, having a bona fide defence as they maintain, never pursued it vigorously to avert the granting of the Order by van Zyl J, which had visited such hardships to their lives. It is equally strange that they place the blame for their non-appearance on the late Mr Le Roux, whom they welcomed as a trustee of STT months after the granting of the order.
- [33] Applicants have failed to disclose what the “merits” were that they had to abide by according to Le Roux. At no stage were the actual circumstances surrounding the “merits” that the court pronounced on revealed. This presupposes that the court should have dealt, and indeed it did, with the matter as set out in the papers before it. They do not describe what their defence was then; as the defence under consideration could not have existed. The Applicants were satisfied to make bare allegations of being inappropriately advised, their attorneys having failed to execute their mandate which they fail to set out in their papers and acquiesced therein.
- [34] Every time there is an execution against property or a threat thereof, the Applicants approach court with defences that are not consistent. The defences raised in their papers indicate in my mind their wish to shirk the responsibility of ultimately owning up. So also the fact that some of the properties judicially attached were nowhere to be found for purposes of completing the execution process. Despite the various execution proceedings against them, Applicants failed to approach Court with an application to rescind the order. This, in my mind, clearly indicates that applicants were delaying Respondent’s claim.
- [35] I am convinced that the Honourable Van Zyl J, was neither misled nor gave a wrong order as she did. Consequently I come to the finding that, as at the granting of the order, the Applicants had no bona fide defence which could later give rise to a successful rescission of judgment. The application should therefore fail on this ground.
- [36] The defence raised, having regard to the above, is without merit and irrelevant as at 09 July 2009 when the order was made. I therefore agree with the submission of Mr Zietsman that STT, as a juristic person as defined in Section 1 of the National Credit Act, 34 of 2005, is excluded from the operation of such Act.
- [37] I can only come but to one conclusion, namely, that the Applicants’ conduct and motives were to evade payment; and that at the time the order was made they had no bona fide defence and their subsequent applications were also not bona fide.

COSTS

[38] Mr Zietsman asked that a special costs order be awarded against the Applicants, jointly and severally, the one paying the other to be absolved.

[39] In the circumstances, and in the light of the Applicants' vexatious behaviour, a special order of costs is warranted.

[40] I therefore make the following order:

The application is dismissed with costs; costs to be paid on an attorney and client scale.

J. J. MHLAMBI, AJ

On behalf of Applicant: Adv.

Instructed by:

BLOEMFONTEIN

On behalf of Respondent: Adv.

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