

SOUTH AFRICA / JUDGMENT

Ncwane v Ncwane NO and Others (12939/2015) [2016] ZAKZDHC 47 (11 November 2016)

[2016] ZAKZDHC 47**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

Madondo

CASE / FILE NUMBER

12939/2015

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****KWAZULU-NATAL DIVISION,****DURBAN****REPORTABLE****Case no: 12939/2015****In the matter between:**

STHEMBISO BAFANA

NCWANE APPLICANT

And

NTOMBIKAYISE ELSIE NCWANE

N.O FIRST

RESPONDENT

REGISTRAR OF DEEDS,

PIETERMARITZBURG SECOND

RESPONDENT

CHIEF MAGISTRATE, VERULAM

MAGISTRATE'S COURT THIRD

RESPONDENT

VERULAM

JUDGMENT

MADONDO DJP

- [1] The applicant seeks an order rescinding and setting aside the order this Court granted on 18 November 1996 under case number 6475/1996 against the applicant in his absence in favour of the first respondent's husband, setting aside the registration of transfer of the property situate at unit J., KwaMashu, Durban, KwaZulu-Natal held under the Deed of Grant no. T004109/96. The applicant grounds his application on that the order in question was granted erroneously. Firstly, in that in granting such order the court proceeded on the premise that the notice had been sent to the applicant and that the applicant, despite having knowledge of the hearing, was in default. Secondly, the court was unaware of facts, if known to it, would have been precluded from granting the order. The first respondent avers that the applicant was in wilful default and she claims ownership of the property in question through acquisitive prescription.
- [2] The applicant is Sthembiso Bafana Ncwane, a major male person, of [...] M. Road, KwaMashu. The first respondent is Ntombikayise Elsie Ncwane, a major female person, of [...] S. Road, KwaMashu, cited herein in her capacity as an executrix in the state of late Nthakazelwa Dominic Ncwane, her husband. The second respondent is the Registrar of Deeds, Pietermaritzburg, cited in these proceedings pursuant to the provisions of section 97 of the Deeds Registry Act 47 of 1937 and having its offices at 300 Pietermaritz Street, Pietermaritzburg, KwaZulu-Natal.
- [3] Bhekebona John Ncwane, Mandlenkosi Ncwane, the previous registered owners of the immovable property in question; Phineas Ncwane, the applicant's father, and Nthakazelwa Dominic Ncwane, the first respondent's husband were residing at KwaMashu Township and the three treated the first respondent's husband as their brother even though, according to the applicant, there was no blood relation but they were only sharing a common surname "Ncwane".
- [4] On 26 June 1963 the property was registered in the name of Bhekebona Ncwane. After the death of Bhekebona Ncwane, the first owner, the ownership of the property passed onto Mandlenkosi Ncwane. In June 1989 Mandlenkosi transferred the property in his name and applied for the issue of a Deed of Grant. Mandlenkosi died on 2 October 1990.
- [5] On the death of Mandlenkosi the ownership in respect of the property in question was transferred in the name of the applicant on 21 October 1994 under the Deed of Grant No. T004109/96. Before the transfer of the property in the name of the applicant, the Local Housing Department advised the applicant that he was the beneficiary in the estate of Mandlenkosi and that he should proceed to the office of the Master of High Court so to obtain the letter of authority.

- [6] The plaintiff avers that during the life time of this father, Phineas Ncwane, and Mandlenkosi the first respondent's husband used to pay his father a visit at [...] M. Road, KwaMashu, over the weekends. When the first respondent's husband fell in love with the first respondent the applicant's father suggested to the first respondent's husband that he should approach Mandlenkosi for accommodation as he was then living alone at [...] S. Road KwaMashu. Mandlenkosi then let a room to the first respondent and her husband. The first respondent and her husband remained therein for sometime and they later moved to Inanda area, where they had found a place of their own.
- [7] After their departure, Gugu Funeka came and asked to rent a room from Mandlenkosi and Mandlenkosi acceded to her request. On the death of Mandlenkosi in 1990 the first respondent and her husband returned to the area for the funeral. It was at that juncture the first respondent and her husband chased away Funeka from the house and they then took occupation of the house. They remained in occupation of the house until the death of the first respondent's husband on 26 September 2002.
- [8] On 11 February 1994 the Manager of KwaMashu Township wrote the first respondent's husband a letter informing him to vacate the premises. The Manager had in a letter dated 30 August 1993 advised the first respondent's husband that the applicant had been appointed representative to the estate of the late Mandlenkosi Ncwane, and that the application for the transfer of the house in applicant's name was being processed. Prior to this, the police had arrived on the premises and told the first respondent and her husband to vacate the premises.
- [9] The Verulam Magistrate's Court forwarded the attorneys of the first respondent's husband a certificate dated 9 October 1993 reflecting that the estate of Mandlenkosi had been dealt with in accordance with the provisions of s1(1)(e) of the KwaZulu Interstate Succession Act 1988. In a letter dated 11 March 1996 the Department of Local Government and Housing advised the first respondent's husband that the property had been transferred from Mandlenkosi's estate to the applicant.
- [10] On 23 September 1996 the first respondent's husband launched application in this Court for an order setting aside the registration of transfer of the property into the name of the applicant. Further, that the estate of the late Mandlenkosi Ncwane, 3703075380084, be remitted for administration in accordance with the provisions of s 1(1) (e) of the KwaZulu Interstate Succession Act, 1988, to the Magistrate's Court, Verulam. The first respondent's husband also obtained an interim order interdicting and prohibiting the applicant from alienating, burdening or dealing with the property situate at Unit J., KwaMashu, pending the finalisation of the application in this regard.

- [11] On 1 October 1996 at 13h30 the Sheriff served the notice of motion proceedings on the applicant's brother, David Ncwane, whom he found present at the applicant's residential address, Unit [...] M. Road, KwaMashu. On 28 October 1996 this Court at the instance of the first respondent's husband issued a Rule Nisi inviting the applicant to show cause that on 18 November 1996 why the order sought in the Rule Nisi should not be granted.
- [12] On the return date the applicant was in default and the order sought was granted in his absence. In his affidavit, Nthakazelwa Dominic Ncwane, the first respondent's husband, had stated that he had since 1960 been living with his cousins Bhekebona Ncwane and Mandlenkosi Ncwane in the house unit [...], KwaMashu. He, the first respondent's husband, Bhekebona and Mandlenkosi referred to each other as brothers.
- [13] The two brothers, Bhekebona and Mandlenkosi, were both suffering from mental illness and unemployed. They were both not married and nor did they have children. They lived with the first respondent and her husband, who cared and provided for them.
- [14] The first respondent's husband made all payments in respect of the house. On 23 June 1963 the first respondent's husband caused the house to be registered in the name of Bhekebona, his eldest cousin. When the latter died the first respondent's husband instructed the local authorities that the ownership of the house be transferred to Mandlenkosi. The first respondent's husband stated that he had paid a deposit and instalments towards the purchase price of the house with the understanding that on the death of Mandlenkosi he would inherit it, as he was then the only surviving relative of Mandlenkosi. He went on to state that he paid for rates, water and electricity. He had purchased the house in the names of his cousins so to provide security for them should anything happen to him.
- [15] He went on to state that sometime after the death of Mandlenkosi, the applicant came to his residence to collect the deceased's identity document and death certificate, on the pretext that he had been sent by the Magistrate to collect same. He undertook to return the documents. But, he did not honour that undertaking. The first respondent's husband stated that the applicant was in no way related to the deceased, Mandlenkosi Ncwane, and that, therefore, he did not have any claim to the deceased's estate. The first respondent's husband stated that he was the one who had a better claim to the estate of Mandlenkosi as he was by then his only surviving relative.

Issue

- [16] The issues arising from the facts of this case are; whether the order in question was erroneously granted and, whether the first respondent is the owner of the property in question through acquisitive prescription.
- (a) Was the order erroneously granted?

- [17] A judgment is erroneously granted if the court granted the judgment or order on the basis that the defendant personally knew of the trial date and yet had not appeared and, if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment. See *De Wet and Others v Western Bank Ltd* 1977(4) SA 770(T); *Myingwa v Moolman* NO 1993
- (2) SA 508 (Tk) at 510 D-G; *Naidoo v Matlala* NO 2012 (1) SA 143 (GNP) at 153C.
- [18] Rule 42(1) of the Uniform Rules of Court grants the court powers, mero mutuo or upon application of any party affected to rescind or vary an order or judgment erroneously sought and granted. However, the court has discretion whether or not to grant an application for rescission under this sub rule. In *Tapol and others v LS Group Management and Services (Pty) Ltd* 1988(1) SA 639(W), the court rescinded a judgment which had been granted on the premise that the defaulting parties had been given notice and were in wilful default whereas they had not in fact been given notice.
- [19] Once it has been established that the judgment was erroneously granted in the absence of a party affected thereby the rescission of the judgment should be granted. See *Mutebwa v Mutebwa* 2001 (2) SA 193 (Tk) at 1991-J. In *Tshabalala and another vs Peer* 1979 (4) SA 27(T) at 30D, the court held that if the court holds that an order or judgment was erroneously granted in the absence of any party affected thereby, it should without further inquiry rescind or vary the order. It is not necessary for a party to show good cause for the sub rule to apply. See *De Wet and other* CASE AT 777. In *Bakoven Ltd vs GJ Howes (Pty) ltd* 1992 (2) SA 466 (ECD) 471G, Erasmus J said:
- ‘Rule 42(1) (a), it seems to me, is a procedural step designed to correct expeditiously an obvious wrong judgment or order’.
- [20] An order or judgment is erroneously granted if it was granted on the basis that a party was in wilful default whereas it was not. In the present case the notice of the intended proceedings was served on the applicant’s brother, David, in applicant’s absence. The applicant avers that his brother did not give him the notice and as a result he was not aware of the proceedings. Upon tender of the return of service the court assumed that the applicant had received the notice and that he was then in wilful default. However, good cause in regard to default has to be shown.
- [21] There are three ways in which a judgment taken in the absence of one of the parties may be set aside, namely in terms of (a) sub rule 42(1) , or (b) Rule 31(2)(b) or (c) at common law – See *Athmaram v Singh* 1989(3) SA 953(D) at 954E. The applicant in this matter has elected to proceed in terms of Rule 42(1). In order to succeed, an applicant for rescission of a judgment taken against him by default must show good sufficient cause. See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9C. This entails three elements; the applicant must (i) give a reasonable explanation for his default (ii) show that his application is bonafide; and (iii) show that on the merits he has bonafide defence which

prima facie carries some prospects of success. See Meadow Feed Mills case at 9E; Naidoo v Matlala case at 152 H – 153.

- [22] The onus of showing the existence of sufficient cause for relief is on the applicant and he has to satisfy the court that there was some reasonably satisfactory explanation why the judgment was allowed to go by default. In *Lodhi 2 Properties Investments v Bondev Developments* 2007(6)SA 87 (SCA) at 95E, the court held that where the matter had been properly enrolled and all the Rules of Court had been complied with the plaintiff is quite within its rights to press for judgment in terms of the Rules. The court further held that where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. In this matter the court was dealing with the scenario where the defendant having given an intention to defend, was not filing a plea and defending the matter. In the circumstances, the plaintiff is entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed cannot transform a validly obtained judgment into an erroneous judgment. In my view this case is distinguishable on facts from the present case since in the present case the order was granted in the absence of the applicant on the basis that he had been notified of the motion proceedings.
- [23] The first respondent contends that the applicant has failed to give a reasonable explanation for his default. According to the applicant the reason for his default was that his brother did not give him the notice. Nothing gainsays the applicant's version that he did not receive the notice instituting motion proceedings against him. It has merely been assumed that since the notice had been served on his brother, the applicant might have received it.
- [24] The plaintiff must furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives. There is no evidence to support an allegation that the applicant had demonstrated a conduct evincing an intention not to defend the motion proceedings by the first respondent's husband. See also *Silber v Ozen Wholesalers (Pty) Ltd* 1954(2) SA 345 (A) at 352C. His intention to defend the first respondent's claim is evident from the applicant's conduct subsequent to his becoming aware of the existence of an order against him. He approached Verulam Justice Centre for legal assistance. Following his initiative his attorneys of record has been instructed at the instance of Judicare to bring the rescission proceedings.
- [25] However, this court has discretion to grant the relief sought, notwithstanding the fact that a good cause is not shown. But the onus is on the first respondent to prove that the applicant did receive the notice and that he deliberately failed to attend court. I am not satisfied that she has discharged such onus.
- [26] The applicant also avers that when applying for an order in question, the first respondent's husband in his founding affidavit deliberately misrepresented the facts to the court so to mislead it. Further, the applicant contends that had the true facts been placed before court,

it would have given a judgment or order other than the one it was induced by the incorrect evidence to give. In his affidavit the first respondent's husband painted a picture of him, in fact, being the purchaser of the property in that he paid the deposit and instalments towards its purchase price. According to him, both Bhekebona and Mandlenkosi were under his control and care. He went on to state that the applicant obtained Mandlenkosi's birth and death certificates in deceit. In applicant's version in this regard is that he was summoned to the Magistrate's office and told that he was an intestate heir to the estate of Mandlenkosi.

[27] If a fraud is committed in that the facts are deliberately misrepresented to the court the order will be erroneously granted. See *Naidoo vs Matlala* NO 2012(1) SA 143 (GNP) at 153 C-E. In order to succeed on a claim that a judgment or order be set aside on the ground of fraud, it is necessary for the applicant to alleged and prove;

- (a) that the successful litigant was a party to fraud;
- (b) that the evidence was in fact incorrect;
- (c) that it was made fraudulently and with intent to mislead; and that
- (d) it diverged to such an extent from the true facts that the court would, if the true facts had been placed before it, have given a judgment other than which it was induced by the incorrect evidence to give.

[28] It is trite that fraud as a ground for the rescission of an order may take any form and is not limited to perjured evidence or fraud committed during the proceedings. See *Rowe v Rowe* 1997(4) SA 160 (SCA) at 166J-I. The first respondent's husband in his affidavit, attached to papers, stated that he purchased the property in question and deliberately caused it to be registered in the name of the first owner, Bhekebona Ncwane, so for it to devolve to Mandlenkosi Ncwane on the death of Bhekebona and eventually to him (the first respondent's husband). He went on to state that he did all this in order to provide security for Bhekebona and Mandlenkosi should he die as they were under his care and control. On the balance of probabilities, it is improbable that the first respondent's husband would purchase the property and cause it to be registered in the name of Bhekebona and on the death of Bhekebona to allow it to devolve to Mandlenkosi with the hope that the property would one day ultimately return to him. It does not appear from his affidavit as to how he knew that both Bhekebona and Mandlenkosi would predecease him. Further; there is no merit in the allegation by the first respondent's husband in his founding affidavit that he did all this in order to provide security for his cousins Bhekebona

and Mandlenkosi. It stands to reason that had the first respondent's husband predeceased them, he would be survived by his wife, the first respondent, who would naturally succeed to him as the owner of the property in question. I am, therefore, satisfied that the applicant has discharged the onus resting on him to prove that the first respondent's husband misrepresented the facts to the court with the intention to induce it to grant the order in his favour.

[29] The facts stated below militate against the allegation that the first respondent's husband had at any stage been the owner of the property in question. It is not in dispute that at the time of his death in 1990 Mandlenkosi Ncwane was residing at J764, Sibhubhu Road, KwaMashu, with the first respondent and her husband. However, between 1990 and before September 1995 there is absolutely nothing to suggest that the first respondent and her husband had ever taken any step to approach the relevant local authority to have the house in question transferred in their name. In the distribution account in respect of the estate of Mandlenkosi reference is made to the applicant as the surviving nephew. Further, it is recorded that funeral expenses totalling R1400 were paid by the first respondent's husband and were as such registered as a claim against the estate. It therefore follows that had the applicant fraudulently claimed that he was the nephew of Mandlenkosi and therefore entitled to inherit intestate the deceased's estate the applicant would not have recorded the claim by the first respondent's husband for funeral expenses in the distribution account. It was only after the applicant had instituted eviction proceedings against the first respondent and her husband, the first respondent's husband launched an application for an order setting aside the transfer of the house in the applicant's

name. Prior to this, no claim relating to the ownership of the house had ever been lodged by the first respondent and her husband.

[30] For her claim to the house in question the first respondent does not rely on that her husband purchased the house in question and that he was therefore the owner of the house in question. Nor does she rely on the ground that, as the only surviving blood relative of Mandlenkosi, her husband had a better claim to the property than the applicant. Instead, she relies on the fact that she and her husband had since 1963 been living in the house in question. As a consequence she and her husband acquired the property through acquisitive prescription.

[31] Section 1 of the Prescription Act 68 of 1969 provides that 'a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years.' In terms of this section acquisitive prescription of land is defined as being the acquisition of ownership by the possession of another's immovable property continuously for thirty years, *noc vi nee claim nec precario*. In *Du Toit and others vs Furstenberg and others v 1957(1) SA 501 (O)* at 503G, De Villiers J defined the phrase *nec precario* as meaning 'not by virtue of a precarious consent' or 'not by virtue of revocable permission' or 'not

on sufferance.'

[32] The onus is upon the first respondent to prove that she and her husband had continuously for thirty years possessed the disputed property openly as if they were owners of the property in question. According to the first respondent she and her husband started living in the disputed house in 1963. At the time they were asked to vacate the property they had had possessed the property continuously for thirty years. It is not in dispute that at the time the

first respondent and her husband were in this house, were living with both previous registered owners of the property with their permission. This remained the position until the previous owners both died in 1988 and 1990 respectively. During their life time they could revoke such permission. On that basis, it could not be said that first respondent and her husband independently and openly possessed the property as if they were its owners. To the contrary, the evidence shows that there were rather lodgers than owners of the property in question.

- [33] According to the applicant the first respondent came into possession of the property during 1984 and remained in possession thereof. With the consent of its registered owner Mandlenkosi, until he, the owner, died in 1990. After the death of the owner they remained in occupation of the house until the death of the first respondent's husband. However, the first respondent denies that she and her husband started living in the disputed house during 1984 and she claims that they started living there in 1963. The onus is consequently upon the first respondent to prove that she and her husband acquired the disputed property by prescription and that accordingly her husband, through whom she claims, was its true owner. It is common cause that in a letter dated 11 February 1994 the office of KwaMashu Township Manager instructed the first respondent and her husband to vacate the disputed property. In the same year, in August, the police also told the first respondent and her husband to vacate the disputed property.

In October of the same year the Department of Local Government and Housing told the first respondent and her husband that the property

had been transferred to the applicant intestate. In 1995 and 2013 the applicant instituted eviction proceedings against the first

respondents' husband and all persons who were then occupying the house through him. It therefore follows that their possession was interrupted in 1884, 1995 and 2013 respectively, and they could not be heard when they say that they continuously occupied the disputed property for thirty years.

- [34] It is common cause that the property is presently registered in the name of the applicant and that it has been so registered since 21 October 1994. The first respondent's husband after obtaining the order, setting aside the transfer of the property in the name of the applicant, he did not give effect to it by having the disputed property transferred in his name until he died in 2002. This affords prima facie proof that the applicant is the lawful owner of the disputed property.
- [35] The first respondent avers that the applicant has failed to bring this case within the reasonable time from the date he became aware of the existence of the order in question. She therefore contends that this application should be dismissed by reason of the long time lapse. What is reasonable time depends upon the facts of each case See therefore *Pro Media Drukkers and Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996(4) SA 411(C) at 421G. In *First National Bank of SA Ltd vs Van Rensburg NO and others* 1994(1) SA 677(T) at 681B-H the

applicant had launched the application more than three years after the appellant's attorney had uplifted the order. The court held that a reasonable time in the case was substantially less than three years. A reasonable time had lapsed and there was no explanation for the delay.

- [36] In the present case the applicant came to know for the first time of the existence of the order in 2013. At the time when he instituted eviction against the first respondent, the applicant was represented by Freedom Mhlongo of Freedom & Associates Attorneys, acting on the instruction of Verulam Justice Centre. After perusing the order Mr Mhlongo was of the view that rescission should be sought first. However, such decision had to be sanctioned by the Justice Centre. Notwithstanding the existence of the order in relation to the property the Justice Centre advised that the applicant should proceed with the eviction proceedings. The application for eviction order was only made on 25 June 2014. Once against the question of the existence of the order came to the fore. On returning to the Centre for assistance in that regard, the Centre told him to wait. The application was only launched on 1 December 2015 by the applicant's attorneys of record acting on the instructions of the Judicare. The applicant was by then unemployed and as a consequence he could not instruct any attorney of his own choice to bring the application for rescission.

From the facts of this case one can deduce that the present application was launched within two years from the time the applicant

became aware the order in question. In the light of the plausible explanation the applicant has given, it could not be said that he has failed to bring the application within a reasonable time, as it is required in law.

- [37] If the defendant fails to show good cause for relief or if the plaintiff shows that the defendant was in wilful default the court is not entitled to rescind the judgment, if good cause has, and wilful default had not, been shown the court has a discretion. See Silber Case, *supra*, at 352H.
- [38] When the question of sufficiency of a defendant's explanation for his default is finally balanced, the fact that his defence carries reasonable or good prospects of success on the merits might tip the scale in his favour. See *Creative Car Sound v Automobile Radio Dealers Association 1989 (Pty) Ltd 2007(4) SA 546(D) at 555C-D*. In the present case, the applicant proceeds in terms of Rule 42(1) and in terms of which showing good or sufficient cause is not a requirement. However, this court has discretion whether or not to grant an application for rescission under Rule 42(1). See *Tshivase Royal Council v Tshivase: Tshivase v Tshivase 1992(4) SA 852(AD) at 862J- 863A*.
- [39] Apart from that at the time of granting the order in question the court was not aware of the fact that the notice of motion proceedings had not come to the notice of the applicant, the first respondent's husband, Nthakazelwa Dominic Ncwane, misrepresented the facts to the court that he had acquired the property in question for the benefit of the two previous owners of the house, Bhekebona Ncwane and Mandlenkosi Ncwane, for they were during

their life time unemployed and suffering from mental illness. He went on to state that he was the only surviving blood relative of the deceased, having a better claim to the property, and that the applicant had obtained transfer of the house in his name by deceit. Had the court been aware of the fact that that was a misrepresentation on his part, it would not have granted the order sought. In the premises, I am satisfied that the applicant has made a case for the relief sought.

Order

[40] (a) The order issued by this Court on 18 November 1996 under case number 6475/96 is hereby rescinded and set aside.

(b) The first respondent is ordered to pay the costs of the application.

Date reserved:

19 October 2016

Date delivered:

11 November 2016

Counsel for Applicant: Mr Mpanza

Instructed by:

Mpanza & Associates

Counsel for Respondent: Adv Sitharam

Instructed by:

I C Meer Kallideen & Co.

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