

SOUTH AFRICA / JUDGMENT

Nhlengethwa and Others v Ndwadwe and Others (LCC15/2022B) [2024] ZALCC 36 (21 October 2024) [2024] ZALCC 36

COURT

Land Claims Court

BEFORE

Flatela

CASE / FILE NUMBER

LCC15/2022B

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IN

THE LAND COURT OF SOUTH AFRICA

HELD

AT RANDBURG

LCC15/2022B

BEFORE

THE HONOURABLE FLATELA J

Heard on 05 June 2024

Delivered on 21

October 2024

(1) REPORTABLE: YES/NO

(2) OF INTREST TO

OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

In

the matter between:

SIPHO
HAROLD WANDA NHLENGETHWA N. O
First
Applicant
NOMUSA
NOKUKHANYA KINA NHLENGETHWA
N.O
Second
Applicant
PENNINGTON
MANDHLA MHLANZI N. O
Third
Applicant
and
EMELINAH
CASELINAH NDWADWE
First
Respondent
PHUMLANI
NDWANDWE
Second
Respondent
ZANELE
NDWANDWE
MINISTER
OF AGRICULTURE, RURAL
Third
Respondent
DEVELOPMENT
AND LAND REFORM
Fourth
Respondent
MINISTER
FOR HUMAN SETTLEMENTS
Fifth
Respondent
ABAQULUSI
LOCAL MUNICIPALITY
Sixth
Respondent
REGISTRAR
OF DEEDS
Seventh
Respondent
ORDER
The
application is dismissed with no order as to costs.

JUDGMENT

FLATELA J

Introduction

- [1] The applicants, in their capacities as the Trustees of the Nhlengethwa Family Trust, seek rescission of orders granted by this court on 25 February 2019 and on 30 November 2020 under case number 219/2017. The application is instituted in terms of Rules 58 (6) and (7) of the Land Claims Court Rules (“the Rules”).
- [2] On 25 February 2019, this court, per Canca AJ, declared the First Respondent a labour tenant in terms of section 33(2A) of the Land Reform Act 3 of 1996 in respect of the farm described as Vaalbank, No 224, Registration Division HT, Province of Kwa-Zulu Natal (the Farm).
- [3] On 30 November 2020, Spilg J awarded a portion of an immovable property described as the remainder of portion 6 (of 1) of the Farm Vaalbank Number 224, Registration Division HT, Province of KwaZulu-Natal, held under Title Deed number T0645/2010, making up 66.38 of that portion and ancillary relief. This property occupies the center stage in these proceedings.
- [4] The property is currently registered under the name Younis Desai, who is not involved in these proceedings.
- [5] The applicants also seek condonation for the late filing of the rescission application. The First Applicant contends that he was not in willful default. The First Applicant avers that the reason for not opposing the actions was his financial difficulties, and he could not raise the legal fees that persisted for three years after the orders were granted.
- [6] The Applicants aver that orders should be rescinded because they were obtained by fraud in that the First Respondent knowingly, intentionally, wrongfully and unlawfully made false factual misrepresentation to this court that she was employed as a farm laborer. As a consequence of her misrepresentation, this court made an order declaring her a labor tenant.
- [7] The matter came before me on an opposed roll on 05 June 2024. The respondents and their legal representatives were absent in court despite the notice of set down of this application having been served upon the Respondent’s attorneys on 02 May 2024 and to the respondents personally on 21 May 2024.
- [8] It is now an opportune time to describe the parties before me and set out the factual background, the determinable issues, and the legal principles foundational to rescission applications. I will then determine whether, in the applicant's pleaded case, they are entitled to the relief sought.

The Parties

- [9] The First Applicant is Sipho Harold Wanda Nhlengethwa, an adult male, businessman and the trustee of the Nhlengethwa Family Trust ("the Trust") residing at Kliptfontein Farm, Vryheid, KwaZulu-Natal. The Second Applicant is Nomusa Nokukhanya Kina Nhlengethwa, an adult female and trustee of the Nhlengethwa Family Trust, who resides at Kliptfontein farm, Vryheid, KwaZulu-Natal.
- [10] The Third Applicant is Pennington Mandhla Mhlanzi, an adult male and trustee of the Nhlengethwa Family Trust who resides at Ulundi, KwaZulu-Natal.
- [11] The First Respondent is Emelinah Caselinah Ndwandwe, an adult female pensioner, born on 01 September 1940, who resides on the Farm with the Second and Third Respondent. The Second Respondent is Phumlani Ndwandwe, an adult male and the First Respondent's biological son. The Third Respondent is Zanele Ndwandwe, an adult female and the biological daughter of the First Respondent. (the Respondents)
- [12] The Fourth Respondent is the MINISTER OF AGRICULTURE, RURAL DEVELOPMENT AND LAND REFORM, cited herein in his official capacity as the head of the Department of Rural Development and Land Reform. The Fifth Respondent is the MINISTER FOR HUMAN SETTLEMENTS, who is cited herein in its official capacity as the Head of the Department of Human Settlements. The Sixth Respondent is Abaqulusi Local Municipality, a local Municipality, a local authority duly established in terms of the Local Government: Municipal System Act, 32 of 2000. The Seventh Respondent is the Registrar of Deeds, whose office is situated at 241 Church Street, Pietermaritzburg, KwaZulu-Natal. The Fourth to the Seventh Respondents are referred to as the State Respondents and are cited insofar as they have an interest in the matter.

Factual Background

- [13] On 23 August 2017, the First Respondent instituted an action against Nhlengethwa Family Trust and the Director General for the Department of Rural Development and Land Reform for an order in the following terms: -
- a. An order declaring her together with her family as labour tenants in terms of section 33(2A) of the Land Reform Act 3 of 1996;
 - b. An order for an award of land to which they were previously entitled, which is about 85 hectares;
 - c. Subject to the provisions of section 25 of the Land Reform Act 3 of 1996, an order that the Second Defendant is directed to pay the Plaintiff just and equitable compensation for the value thereof
 - d. Costs of suit and;
 - e. Such further and or alternative relief as this court may deem fit.

- [14] The notice of action was served upon the Trust on 30 August 2017. A notice to participate was filed on behalf of the Trust on 03 September 2017, but the Trust failed to plead within the stipulated time. The matter was set down on an unopposed basis. On 25 February 2019, Canca AJ granted an order declaring the First Respondent as a labour tenant.
- [15] Pursuant to the order granted by Canca AJ on 17 November 2019, the First Respondent instituted another action for an auxiliary order in the following terms:
- a. An order for the award of a portion of the immovable property described as the reminder of portion 6 (of
 - 1) of the Farm Vaalbank 224, Registration Division HT, Province of Kwa-Zulu Natal, which is held under Title Deed Number T0645/2010
 - b. The portion of the land referred to above and on which land the applicants seek an order is depicted in Annexure C to the pleadings as the area within the boundaries marked ABDE.
 - c. Annexure C is a copy of a photographic aerial view map of the farm, which depicts the portion of the farm that the plaintiff and four other households have utilized.
- [16] The pleadings and the notice of set down were served to the First Applicant on 21 February 2020 in his capacity as the Trustee. The applicants did not participate in this action. The matter was heard unopposed.
- [17] On 30 November 2020, Spilg J granted an order with the following terms:
- i. An order for an award of a portion of the immovable property described as the remainder of portion 6 (of 1) of the farm Vaalbank Number 224, Registration Division HT, Province of Kwazulu-Natal, which is held under Title Deed number T0645/2010, making up 66.38 hectares of that portion as depicted on annexure "C" in area within the boundaries marked A-`B-C-D-E-F.
 - ii. Subject to the provisions of Section 25 of the Land Reform (Labour Tenants) Act 3 of 1996, an order that the Second Defendant, the DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM, is directed to pay the First Defendant, the NHLENGETHWA FAMILY TRUST, just and equitable compensation for the value thereof, within 90 days of this order.
 - iii. The First and Second Defendants are directed to take appropriate steps to ensure that the property is registered in the name of the Plaintiff within 120 days of this order.
 - iv. Cost in suit.

The relief sought

- [18] The applicants seek an order on the following terms:
1. That the Court orders granted by this Honourable Court on, 25 February 2019, under case number 219/2017 and, on 30 November 2020, marked "SHW 18" and "SHW 30" herein in favour of the First Respondent, respectively are hereby rescinded and set aside.

2. That the action proceedings launched by the First Respondent under the aforementioned case numbers before this Honourable Court are hereby declared fraudulent, wrongful, respectively.
3. That Nhlengethwa Family Trust bearing registration number; IT 1037/01, and Trust Deed. Number T0645/2010 is hereby declared the registered and lawful owner of portion of the immovable property described as the reminder of portion 6 (of 1) of the Farm Vaalbank 224, Registration Division HT, Province of Kwa-Zulu Natal.
4. That the First, Second and Third Respondents are ordered to pay costs of this application on attorney and own client scale, jointly and severally, one paying the other to be absorbed.
5. Further and or alternative relief.

Determinable issues

- [19] The court must determine whether the Applicant's delay in filing this application should be condoned and whether the Applicant has met the jurisdictional requirements for rescission in terms of Rules 58(6) and 7 of the Land Court Rules.

The Applicant's

submissions

- [20] The Third Respondent filed an answering affidavit while she was under the bar. In their replying Affidavit, the Applicants raised numerous points in limine to the Third Respondent's answering affidavit. However, the Applicant's counsel informed the court that the applicant would argue one point in limine, and if granted, there would be no need to deal with other points.

Point in limine

- [21] The Applicants argued that the Third Respondent's answering affidavit should be considered as Pro non-scripto as it was filed after the Third Respondent was barred from further pleading. The Third Respondent filed the affidavit sixteen days after the dies for filing her answering affidavit expired without the leave of the court
- [22] In support of the submission, the Applicant's counsel stated that:
- a. The application for condonation and rescission was served upon the Respondents, including the Third Respondent, on 7 and 13 April 2022.
 - b. This application was initially set down on unopposed roll on 25 April 2022, 30 May 2022 and 29 August 2022. The matter was postponed at the instance of the Second Respondent; however, she failed to comply with the court order and instead filed an opposing affidavit in relation to the interdict application, which was finalised on an unopposed basis on 18 February 2022.

- c. The Applicant launched an application in terms of Rule 32(2)(b) of the land court, and on 28 November 2022, the order was granted unopposed in favour of the Applicants. The Second Respondent's affidavit was set aside as an irregular step.
 - d. On 09 June 2023, the matter was set down for hearing on an unopposed basis, and the Third Respondent, for the first time, sought an adjournment to file her answering affidavit. The matter was adjourned to the opposed roll, with costs reserved.
 - e. The Applicant's counsel submitted that the Third Respondent was ordered to file her answering affidavit within the stipulated period in terms of Rule 33 (4)(b) of the Rules of this court. The Third Respondent failed to file her answering affidavit on 30 June 2023, and on 04 July 2023, a notice of bar was served upon the Third Respondent's attorneys and the respondents personally. The dies for the notice of bar lapsed on 11 July 2023.
 - f. On 31 July 2023, the Third Respondent filed her answering affidavit without the leave of the court.
- [23] Having considered the argument from the applicant's counsel. I granted the order that the Third Respondent's answering affidavit is Pro non scripto. It follows that the application was considered on the strength of the Applicant's founding affidavit. This application was, therefore, considered unopposed.
- [24] I shall now deal with applicable legal principles before dealing with the applicant's pleaded case.

Legal Framework

[25] I now consider the rules governing rescission applications in this Court:

'Rule 58 Hearing where a party is in default

- (6) A party may apply to the Court to rescind or vary any judgment or order granted in her absence, provided the application is filed within twenty days after she or he became aware of the judgment or order.
- (7) An application in terms of subrule (6) may be granted only if the Applicant shows good cause for such rescission or variation.'

"64 Variation and Rescission of Orders

- (1) Subject to section 35 (11) of the Restitution of Land Rights Act, the Court may suspend, rescind or vary, of its own accord or upon the application of any party, any order, ruling or minutes of a conference which contains an ambiguity or a patent error or omission, in order to clarify the ambiguity or to rectify the patent error or omission.
- (2) Any party seeking the rescission or variation of an order in terms of section 35 (11) or (12) of the Restitution of Land Rights Act or in terms of subrule (1) may do so only upon –

- (a) application delivered within ten days from the date upon which he or she became aware of the order; and
- (b) good cause shown for the rescission or variation.”
- (3) Any party applying under this rule must deliver notice of his or her application to all parties whose interests may be affected by the rescission or variation sought.”

[26] Section 35(11) of the Restitution of Land Rights Act, 22 of 1994 (“the Act”) states that:

“The Court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it –

- (a) in the absence of the person against whom that order or judgment was granted;
- (b) which was void from its inception or was obtained by fraud or mistake common to the parties;
- (c) in respect of which no appeal lies; or
- (d) in the circumstances contemplated in section 11(5):

Provided that where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court, as the case may be.”

[27] This application has been instituted in terms of Rules 58 (6) and (7), which provide that an application for rescission must be brought within twenty days from the date the Applicant became aware of the order and on good cause shown. The Applicants approached this court three years after the orders were granted.

[28] For the applicants to succeed with the application for rescission in terms of this rule, they must show good cause or sufficient cause by giving a reasonable and acceptable explanation for their default and, on merits, must show a bona fide defence to the claim which prima facie, carries the prospect of success[1].

[29] Before dealing with the merits of the rescission application, I must first deal with the condonation application to determine whether the Applicants have made a case for condonation.

Legal principles applicable to an application for condonation

[30] The courts, on numerous occasions, had had to deal with the condonation of the non-compliance of the rules. The principles applicable to condonation applications are trite and were enunciated in *Melane v Santam Insurance Co Ltd*,[2] The Court held as follows:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated;

they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked."

- [31] The test for granting or refusing condonation is in the interest of justice. "Whether it is in the interests of justice to condone a delay depends entirely on the facts and circumstances of each case.[3] The relevant factors[4] In that inquiry generally include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the reasonableness of the explanation for the delay, which must cover the whole period of delay, the importance of the issue to be raised, and the prospects of success.

Applicant's explanation for the delay

- [32] The First Applicant avers that he could not oppose the actions because he lacked financial means; he says he had fallen on hard times for three years as his water cartage truck business, his only source of income, had no contracts through which to generate income. He says he is not in willful default in that after he was served with pleadings, he instructed attorneys to oppose the action. However, he could not proceed with the instructions because he could not pay them their fees due to his financial constraints.
- [33] The First Applicant admits that he was served notice of action in which the First Respondent sought to be declared a labour tenant. He instructed attorneys Cox and Partners to defend the action. A notice of intention to participate was filed on behalf of the Trust.
- [34] The First Applicant conceded he was served with the papers, but he did not defend the action due to his financial woes. The applicant's explanation for delay is not satisfactory and insufficient.
- [35] In its application for rescission, the First Applicant avers that he was advised by Cox and Partners that in order to prepare a plea, the following would have to be canvassed;
- a. to investigate the factual background of the matter, in particular by means of conducting an inspection and local on the farm in dispute.
 - b. To trace the whereabouts of previous owners, lessors and lessees of the farm in question cited in the action proceedings;
 - c. To consult with them in order to source in depth background of the matter in question, in particular the following.;
 - i. The exact period of the occupation of the respondents on the farm;
 - ii. the owner, alternative the lessor, alternatively, the lessee who granted the first respondents and her family the right of occupation on the farm;

iii. the basis and or terms upon which the First Respondent was granted occupation on the farm viz to establish whether indeed the First

Respondent was ever a farm labourer thereon.

- [36] The First Applicant avers that his erstwhile attorneys, Cox and Partners, informed him that due to time constraints for filing the plea, it was impractical to file the same without having investigated and accomplished the issues mentioned above. The First Applicant avers that at all material times, he had no clue nor had received any legal advice as to the veracity of the First Respondent's employment background, which prompted her to lodge her claim of labour tenancy status at all, no written report or information was ever furnished to him by officials or employees of the Fourth Respondent who were dealing with the claim herein of the nature and extent of investigation of the factual verification of the respondents claim.
- [37] The applicants aver that Cox and Partners attorneys requested an extension of time to file a notice to oppose, and the First Respondent's attorneys (Ntshalintshali Attorneys) agreed to condone the late filing of the condonation application. Importantly, the applicants aver that no specific period was agreed upon by the parties for filing such a condonation application. This allegation is devoid of any substance. What was clearly communicated was that the Applicants wanted to settle the matter amicably.
- [38] On 13 March 2017, the First Respondent's erstwhile attorneys addressed a letter to the applicants' attorneys regarding the inspection in loco, and they confirmed that both parties have agreed to collect information relating to the extent of rights by its client on the farm, which now belongs to Mr. Nhlengethwa. They further confirmed that until 10 April 2017, the court action will remain suspended and that if the parties are unable to resolve the same, the matter would, therefore, follow due course.
- [39] The First Applicant avers that his business fell on hard times again. As a result, he could not afford to raise legal fees for his erstwhile attorneys of record to proceed with this matter. Consequently, he terminated the instructions with his erstwhile attorneys of record. In the same month of May 2017, The First Applicant appointed a new and second set of attorneys, DAYA SEWJEE and Company, on the basis that he would be able to pay for the requisite legal fees upon receiving a loan of one hundred thousand (R100 000.00) from one of his business colleagues who had promised to lend him such funds. On 18 May 2017, his new attorneys filed a Notice of appearance to defend.
- [40] The First Applicant avers that he could not finance this matter because he did not secure the loan as his business colleague also fell into financial difficulties. As a result, on 24 August 2018, the second attorneys of record also withdrew as attorneys of record. On 29 February 2019, the First Respondent obtained an order declaring her to be a labour tenant on the farm in question.

- [41] The First Applicant avers that on 18 August 2020, he received a new business tender with Abaqulusi Local Municipality worth two million, three hundred and twenty-eight thousand, seven hundred and fifty rands (R2,328,750). Notwithstanding having secured such a contract, he could not pursue the matter by launching an application for rescission of the court order due to the COVID-19 pandemic. The First Applicant avers that he could not access the court file of this matter despite his numerous efforts to do so, mainly due to the COVID-19 pandemic, which also impacted the courts. As a result of the restricted access to the court, he could not access the court file.
- [42] The First Applicant avers further that on 04 November 2021, he discovered that the First, Second and Third Respondents were selling plots and marking boundaries or demarcations with a group of people who refused to identify themselves but informed them that they had bought the plots from the respondents.
- [43] The First Applicant avers that he reminded the respondents that he was still opposed to the court order, the First Respondent's labour tenancy status and that he was in the process of engaging the legal representatives to launch an application for rescission of the court order. He states that he was verbally abused by the respondents, who sought to attack him physically. He then went to South African Police Services to report the matter. He deposed to an affidavit in which he laid criminal charges against the respondents in question. Despite his efforts, it became clear that the respondents continued to sell the plots to the members of the community. As a result, the buyers are erecting their building structures made of concrete and bricks to date.
- [44] The First Applicant avers that on 23 November 2021, his present attorneys of record advised him to investigate the First Respondent's background personally, in particular her original place of birth, marital status, and employment history, to verify the claim of labour tenant's status in the proceeding.
- [45] The First Applicant avers that through his investigations, he discovered that the First Respondent had not worked on the farm at any stage. She was merely the girlfriend of one of the family laborers called Petros Mncube. Mncube passed on in the year 2000. The First Respondent continued to stay in the same hut in which Mr. Ncube stayed on the farm in question to date and holds herself out as a customary wife of the late Mr. Mncube under pretenses. Mr Upton confirms these allegations.
- [46] The First Applicant further avers that he has made a proper case for the relief sought in the main application in that:
1. He had proven that the First Respondent had never been employed by the previous lessee of the farm in question, Mr. Cornelius Johannes Upton; she was merely a girlfriend of one of Mr. Upton's former employees, Petros Mncube. Mr. Mncube is now deceased. The First Respondent continued to live in the hut where Mr. Mncube was staying. A confirmatory affidavit of Mr. Mncube was filed in support of these allegations.

2. The relevant state organs did not launch a proper investigation to verify the First Respondent's claim before she obtained her fraudulent labour tenancy status.
- [47] The First Applicant further averred that he had made out a proper case of the existence of good prospects of success in the main application on one or more following grounds:
- a. That the First Respondent is not the registered owner of the land in question;
 - b. The court order granted on 30 November 2020 in her favour still has not been complied with to date.
 - c. The same order has since lapsed almost one year and two weeks from the last date of its operation, 28 February 2001.
 - d. The First Applicant further advised that even if the land in question had been registered in the First Respondent's name, he would still have launched the application to set aside such an order on the same evidential basis that the First Respondent has fraudulently misled the court.
- [48] The First Applicant averred further that there exists no prejudice on the part of the First Respondent in the event the relief is granted for the following reasons:
- a. The First Respondent had fraudulently acquired the status of being a labour tenant;
 - b. The First Respondent's marital home is approximately 30 kilometers from where she fraudulently acquired the place of residence; the First Respondent still owns a plot of land in her marital home, which is still vacant and can relocate there;
 - c. On the strength of representation by her marital family, the local induna, and his local chief, she and her family are still welcome back in her village. On the premises, it is clear that the First Respondent has no locus standi at all for the land in question.
- [49] The First Applicant averred that the Trust would suffer more prejudice than that of the First Respondent in the event the court refused to grant the relief sought in the main application for the following reasons:
- i. The Trust intends to set up a multi-million Rand project on the farm for financial gain in the near future, the right of which is enshrined in Sections 25 and 26 of the Constitution of the Republic of South Africa.;
 - ii. Any amount that might be considered and offered as a form of compensation to the Trust by the relevant state organ will not constitute sufficient compensation at all. Such compensation might be sufficient for the First Respondent if she does qualify but not the Trust.
 - iii. The distance between the land in question and the First Applicant's farmhouse, where he lives with his family, is less than one kilometer.

iv. The First Applicant averred that he has reasonable comprehension that he will suffer more prejudice should the First Respondent remain on the farm and continue to sell the plots as this will culminate into a village of dwellers from different unknown backgrounds and will potentially pose a wide range of

criminality and social danger to his family ranging from stock theft, robberies, house breakings, rape, car hijackings that are rampant all over the country in our days.

[50] The applicants seek rescission of the orders on the following basis:

- a. The First Respondent knowingly, intentionally, wrongfully and unlawfully made false factual misrepresentation to this court that she was employed as a farm laborer. As a consequence of her misrepresentation, this court made an order declaring her a labor tenant.
- b. The First Respondent has sold about 40 plots to different buyers for a price of fifteen thousand-forty thousand (R15 000.00-R40 000.00).
- c. The First Respondent's fraudulent scheme to mislead this court has caused financial or economic loss to the Trust in that the erection of illegal structures on the land in question has devalued the latter, alternatively, has deprived the Trust of its right to sell or develop the land to its preferred economic value;
- d. As a result, the Trust has suffered irreparable harm in that no amount of money as compensation by any organ of state viz the Fourth Respondent will be sufficient, compared to the Trust's multi-million-rand project it intends to set up on the same land.
- e. The Trust is legally entitled in terms of section 22 and section 25 of the Constitution by virtue of being the lawful and registered owner of the land to determine or choose what it considers or deems best to do with its land, as when it deems it to do so

Discussion

Is the Applicant's explanation reasonable enough to excuse the default?

[51] The applicants' explanation for not bringing rescission of the interdict application is insufficient. The only explanation that the First Applicant proffered is that he had financial constraints. The Applicant does not provide any information about the Trust's financial status as the alleged owner of the property. I found the Applicant's explanation unreasonable. The applicants say that they have shown good cause.

Good Cause

[52] Explaining his default, the First Applicant testified that he wanted to defend the action, but his finances hindered him. However, the First Applicant is silent about the Trust's financial affairs, and he has difficulty separating the Trust's affairs from his own.

[53] It is true that Cox and Partners Attorneys had filed a notice to participate and sought condonation as the plea was going to be filed after the prescribed period. Most importantly, the applicants' attorneys informed the First Respondent of the possibility of settlement. The letter reads as follows:

"Our client had also indicated that there may be possibility to settle the matter as a result we would like to arrange a meeting with all the parties when they are available to arrange a meeting with all the parties when they are available to discuss the possibility of settlement herein.

In light of the above, I propose that you condone the late filing of our client's Notice to Oppose Hearing and hold over the filing of the affidavit until the settlement negotiations can take place.

We place on record that this is not a delaying tactic but a proposal to an amicable solution.

We await your agent's response as soon as possible."

[54] On 15 February 2017, the First Respondent's attorneys acceded to the applicants' request for indulgence and requested to know their proposed dates for settlement.

[55] On 16 February 2017, Cox and Partners Attorneys responded to the First Respondent's Attorneys, and the letter stated:

"the above matter, as well as your visit to our offices on 15 February 2017.

We confirm that we have arranged for 10 March 2017 at 10:30 for inspection in local to take place on our client's property.

We therefore confirm that the filing of all pleadings in this matter will be held over until such time as the inspection has taken place and the settlement proposals have been discussed. We thank you for your assistance in this regard.

Yours faithfully."

[56] On the same day, 16 February 2017, the applicants' attorneys addressed a letter to the First Applicant confirming that a date for an inspection in loco had been arranged between their offices and Mr Ntshalintshali (the First Respondent's attorney. Importantly, the applicants' attorneys stated, "Please note that the inspection of the property on the proposal for settlement will take place on 10 March 2017 at 10:30 on the farm. Please ensure that you are available and supply us with directions to the farm. We thank you for your assistance in this regard".

[57] The inspection in loco and settlement negotiations took place on 10 March 2017.

[58] In *Chetty v Law Society, Transvaal*[5] Miller J, dealing with the concept of "sufficient cause" or "good cause", stated that "these concepts defies precise or comprehensive definition, for many and various factors require to be considered but it is clear that in principle and in the long -standing practise of our Courts ", the two essential elements therefore at are:

‘(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits, such party has a bona fide defence which, prima facie, carries some prospect of success.

...It is not sufficient if only one of these two requirements is met; for obvious reasons, a party showing no prospects of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An orderly judicial process would be negated if, on the other hand, a party who could not explain his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits...’[6] It may be that certain succumb stances, when the question of the sufficiency or otherwise of the defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for recession. But this is not to say that the stronger the prospects of success, the more indulgently will the court regarded the explanation of his default.

[59] At p761, the Court held as follows:

‘broadly speaking, the exercise of a court’s discretion [is] influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case”. One of the most important factors to be taken into account in the exercise of discretion, was whether the applicant has demonstrated “a determined effort to lay his case before the court and not an intention to abandon it” for “if it appears that [an applicant’s] default was wilful or due to gross negligence, the court should not come to his assistance’.

[60] The First Applicant says on 23 November 2021, his present attorneys advised him of record to investigate the First Respondent’s background personally, in particular her original place of birth, marital status, and employment history, in order to verify the claim of labor tenant's status in the proceeding.

[61] It should be noted that the Applicant’s very first attorneys, gave him similar advice. It appeared that the First Applicant did not investigate as advised by his first attorney. There is no explanation for his failure to investigate the First Respondent’s claim in 2017.

[62] At p 767, the Court in Chetty concluded as follows:

‘it appears to me that the most likely explanation of the appellant’s otherwise inexplicable failure to offer any opposition to the respondent’s application is that he was not consonant in his resolve to oppose it. Reviewing his verbal undertakings and his acts and omissions throughout that period, together with his ex post facto explanations, one gets the impression of moods fluctuating between a desire to achieve a particular goal and total indifference to its achievement - of a person now engaged in a flurry of activity, then supine and apathetic. . [his behaviour] is indicative of a high degree of indifference or unconcern on his part in regard to the actions

[being taken] against him, and is of a piece with his apathetic and ineffectual approach to the question of putting up opposition to the [proceedings].’

[63] The same is true in this matter, the applicant was well aware of the relief that the First Respondent was seeking. If regard is had to the correspondence between the party's attorneys, it reveals that the First Applicant intended to settle the matter amicably.

The effect on the administration of justice and other litigants

[64] In *Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape)*[7] , the court held that the guiding principle of the common law is certainty of judgments. Once judgment is given in a matter, it is final. It may not thereafter be altered by the judge who delivered it. He becomes *functus officio* and may not ordinarily vary or rescind his own judgment. (Footnotes omitted).

Further observations

Is the Trust the owner of the property?

[65] It is trite that any party affected by the order may approach the court to seek a rescission application. It is common cause that in both proceedings, the Trust was cited as a registered owner of the farm. It appears that at the time of the institution of the proceedings, the Trust was not the owner of the Farm. In these proceedings, the Applicant asserts that the Trust is the registered owner of the land in question and that it is legally entitled to the land in terms of Sections 22 and 25 of

the Constitution.

[66] In the Founding Affidavit, the applicants aver that the Trust is entitled to the relief sought by virtue of being the lawful registered owner of the property in question. As proof of ownership, the applicant's attached copies of Title Deed T37927/2002 as true and authentic proof of the land in question and averred that a real map attached to the original court order truly and authentically represents the same land in question.

[67] Notably, the order by Spilg J refers to the property held under Title Deed number T0645/2010 and making up 66.38 hectares of that portion as depicted on annexure “C” in area within the boundaries marked A-`B-C-D-E-F. Paragraph 1 of the order reads as follows:

i. An order for an award of portion of the immovable property described as the remainder of portion 6 (of 1) of the farm Vaalbank Number 224, Registration Division HT, Province of Kwazulu-Natal which is held under Title Deed number T0645/2010, making up 66.38 hectares of that portion as depicted on annexure "C" in area within the boundaries marked A-`B-C-D-E-F.

[68] The Applicants filed lengthy affidavits supporting condonation and rescission applications. However, I could not find any averments

supporting the relief sought in either affidavit.

- [69] I engaged the counsel for the Applicants on this issue. Counsel submitted from the bar that the Trust had made a loan to one Desai and registered the property in Desai's name as collateral. The loan was fully repaid, but the property has not been registered in the name of the Trust due to the lack of funds. This information was not disclosed in the applicants' founding papers and the supplementary affidavit.
- [70] It is trite that affidavits constitute both pleadings and evidence in motion proceedings. The applicants must make out their case in the founding affidavit, which must contain sufficient facts to support the relief sought.
- [71] I then requested a copy of the Title Deed number T0645/2010. The Counsel undertook to furnish a copy of the Title Deed in due course. A copy of a Deed Document inquiry was furnished to the court and marked AA1. The owner's summary is recorded as Desai Younus, a natural person married out of a community of property. The purchase date is recorded as 07 December 2009, and the registration date is 13 January 2010. The purchase price was two million, six hundred and fifty thousand rands (R2 650 000.00)
- [72] It is clear from the fact that the Nhlengethwa Trust is not the registered owner of the farm, and its locus standi to bring these proceedings is doubtful.

Interest of justice

- [73] The Applicant avers that homesteads have been built in the demarcated area. However, the First Applicant contends that the owners of the homesteads are not innocent buyers in that:
- a. On 4 November 2021, when he discovered that the Respondents were demarcating the land, he approached the group of people and introduced himself as the land owner of the land in question;
 - b. The group informed him that they had bought the plots from the Respondents;
 - c.
 - c. They should have ceased to build when he informed them of the status of the land. Moreover, they should have demanded proof of ownership of the land from the sellers. Alternatively, they should have approached the Seventh Respondent to verify the ownership of the land.
- [74] On 5 November 2021, the First Respondent's attorneys addressed a letter to the First Applicant regarding his visit to the First Respondent on 4 November 2021. The following issues were addressed in the letter:
- a. The First Applicant's ownership of the farm was disputed;
 - b. It was stated that the First Respondent was awarded the farm in terms of the court order

- c. That on 30 June 2006, the First Respondent and his companions approached the Respondents and allegedly threatened the occupiers to shoot them, and the Respondent reported the incident to the police under case no:455/06/2006;
- d. In 2019, unknown people attacked the First Respondent and burned her foot, robbed her of R10 000 and used wire to bind the other occupiers; during the attack, the First Respondent was told to leave the farm. The incident was reported under case 319/09/2019, and in 2020, the First Applicant visited the First Respondent's premises, assaulted one of the occupiers and demolished one of the First Respondent's houses

[75] On 9 November 2021, the First Applicant replied to the letter and refuted the allegations leveled against him. The First Applicant averred that:

- i. He was a registered and lawful owner of the property;
- ii. The order which declared the First Respondent as labour tenant was obtained in his absence due to the fact that he was not aware of the court process and the date of the hearing; as a result, the matter was heard on an unopposed basis;
- iii. He was advised to apply for the rescission of the court orders as they were granted in error due to fraudulent misrepresentations by the First Respondent
- iv. The Respondents have been selling the plots illegally and have displayed aggressiveness towards the First Respondent, and on 6 November 2021, the First Respondent laid criminal charges against the Respondents under case number 69/11/2021

[76] In an affidavit deposed to by the First Applicant on 6 November 2021, the First Applicant again stated that he was the owner of the farm and that the court order was obtained in his absence because he was not aware of the court date on which the court order was sought and granted. The First Applicant stated that had he been aware, he would have strongly opposed the relief sought by the First Respondent. Interestingly, the reasons advanced for his failure to defend the action in the affidavit to the police differ fundamentally from the reasons advanced in this application.

[77] In any event, I am of the view that it will not be in the interest of justice to grant the relief sought as there are third parties that have built their homes on the demarcated land that was awarded to the First Respondent by this court.

[78] In the result, I order as follows:

1. The application is dismissed with no order as to costs.

L FLATELA

JUDGE

LAND COURT

Date of hearing: 05 June 2024

Date of judgment: 21 October 2024

Appearances

Counsel for the Applicant: A M Kwitshana

Instructed by: Madlanga & Partners Inc. Attorneys

Counsel for the Respondents: No Appearance

[1] Chetty v Law Society, Transvaal 1985 (2) 756 (A) at 765A-D; Government of the Republic of Zimbabwe v Fick

[2013] ZACC 22 at para 85 and Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector

Including Organs of State and Others

[2021] ZACC 28 at para 71.

[2] 1962 (4) SA 531 (A).

[3] Van Wyk v Unitas Hospital and Another [2007] ZACC 24; 2008 (2) SA 472 (CC) para 20.

[4] For the above-listed factors found in Ethekewini Municipality v Ingonyama Trust 2014 (3) SA 240 (CC), para 28; Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) [2007] ZACC 24; 2008 (2) SA 472 (CC), para 22; Camps Bay Rate Payers' and Residents Association v Harrison [2010]

(2) All SA 519 (SCA) para

54. Grootboom v National Prosecuting Authority and Another[4]

[5] 1985

(2) SA 756 (A).

[6] Ibid at 757.

[7] 2003 (6) SA 1 (SCA) at 9F.

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Prepared on 9 October 2026 · Esheria