

SOUTH AFRICA / JUDGMENT

Senong v Dreyer (87562/2019)

[2024] ZAGPPHC 793 (5 August 2024)

[2024] ZAGPPHC 793**COURT**

North Gauteng High Court, Pretoria

BEFORE

H F Oosthuizen

CASE / FILE NUMBER

87562/2019

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Policy**REPUBLIC OF SOUTH****AFRICA****IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG DIVISION,****PRETORIA****CASE NO: 87562/2019****1.****REPORTABLE: NO****2.****OF INTEREST TO OTHER JUDGES: NO****3.****REVISED: YES****DATE:**

5 August 2024

SIGNATURE

OF JUDGE:

In the matter between: MOGOLOGOLO
METRO SENONG
Applicant
and
WILLEM
HENDRIK DREYER
Respondent

In re: WILLEM
HENDRIK DREYER
Plaintiff
THE
REGISTRAR OF
DEEDS
First Defendant
VINCENT
MONYEPAO
Second
Defendant
THABILE
SUZAN MONYEPAO
Third Defendant
MOGOLOGOLO
METRO SENONG
Fourth
Defendant
GRACIOUS
MPOTSENG LEPELESANE
Fifth Defendant
MASHABANE
BRIAN KGARIYA
Sixth
Defendant
MOTALANE
KGARIYA INC
Seventh Defendant

JUDGMENT

H F OOSTHUIZEN AJ

INTRODUCTION

[1] This is an application in terms of rule 31(2)(b) for rescission of a default judgement which was granted on 14 June 2022 by Barit AJ against the applicant, the fourth defendant in the main action. I will for purposes of convenience refer to the parties as in the main action.

- [2] The fourth defendant applies in addition for an order in terms of rule 27(1) extending the period of 20 days in terms of which the application for rescission had to be made, which relief is opposed by the plaintiff.
- [3] The particulars of claim (as amended) contain the following allegations:
- [3.1] The plaintiff is the owner of a property known as erf 8[...], Atteridgeville Extension [...] (“the property”), which was registered in his name during 2006.
- [3.2] The property was transferred fraudulently, alternatively negligently by the registrar of deeds (the first defendant) to the fourth and fifth defendants during 2013.
- [3.3] The property was subsequently sold by the fourth and fifth defendants to the second and third defendants for an amount of R530 000.00 and was registered jointly in their names.
- [3.4] The plaintiff did not conclude an agreement of sale pertaining to the property, did not consent to the transfer of the property and did not receive any purchase consideration for the property.
- [3.5] The plaintiff claims damages from the first defendant in the amount of R600 000.00, being the reasonable market value of the property.
- [3.6] The plaintiff claims in the alternative payment of the amount of R530 000.00 from the fourth and fifth defendants on the ground that they were enriched and the plaintiff impoverished by the fraudulent transfer of the property.
- [3.7] The plaintiff claims in the further alternative an order that the property be re-registered in his name.
- [3.8] The plaintiff claims in the further alternative damages in the amount of R600 000.00 from the sixth and seventh defendants, the conveyancers of the property to the fourth and fifth defendants.
- [4] The summons was served by the sheriff on 12 December 2019 at the fourth defendant’s residence on Peter Msholi, the fourth defendant’s cousin.
- [5] Notwithstanding the fact that the fourth defendant did not deliver a notice of intention to defend, the plaintiff did not initially apply for default judgement against the fourth defendant.
- [6] On 4 September 2020, the plaintiff’s application to join the sixth and seventh defendants in the main action was served by the sheriff at the fourth defendant’s residence on Monene Makobe, the fourth defendant’s partner.
- [7] On 25 August 2021, the plaintiff’s amended particulars of claim was served by the sheriff at the fourth defendant’s residence on Monene Makobe, the fourth defendant’s partner.

[8] On 26 May 2022, the plaintiff's notice of setdown of the application for default judgement against the fourth defendant was served by the sheriff at the fourth defendant's residence on his wife.

[9] The fourth defendant did not take any action pursuant to the service of the court papers set out in paragraphs [6] to [8] above.

RESCISSION AND CONDONATION

[10] An applicant for rescission and condonation must in terms of rules 31(2)(b) and 27(1) show "good cause".

[11] The term "good cause" defies precise or comprehensive definition but it is clear that two essential elements must be demonstrated:

[11.1] the party seeking relief must provide a reasonable and acceptable explanation for their default; and

[11.2] on the merits, such party must demonstrate a bona fide defence which, prima facie, carries some prospect of success.[1]

[12] Miller JA elaborated as follows on these requirements in Chetty:[2]

"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgement against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgement against him rescinded on the ground that he had reasonable prospects of success on the merits..."

[T]he circumstance that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential

requirements for rescission of a default judgement. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a 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 rescission... But this is not to say that the stronger the prospects of success the more indulgently will the court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits."

[13] Miller JA ultimately found that the appellant had satisfied the second of the two requisites for rescission but in view of his failure to satisfy the first requisite, the dismissal of the application for rescission by the court of first instance was upheld and the appeal dismissed.

[14] The principles set out in Chetty has been confirmed by the Constitutional Court in Government of the Republic of Zimbabwe v Fick[3] 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.[4]

[15] Khampepe J held as follows in Zuma:[5]

“[T]he existing common law test is simple: both requirements must be met. Mr Zuma must establish that he had a reasonable and satisfactory

explanation for his failure to oppose these proceedings, and that he has a bona fide defence that carries some prospects of success.”

[16] It accordingly follows that the submission of Mr Sekwawkweng on behalf of the fourth defendant that an unsatisfactory and unacceptable explanation can be overcome by good prospects of success, is wrong.

[17] The decision of Demetrio v Absa Bank Ltd,[6] on which Mr Sekwawkweng relies, does not support his submission. After quoting the dictum in Zuma, which I have quoted in paragraph [15], Mahalelo J held as follows:

“An element of the explanation for the default is that the applicant must show that it was not in wilful default. If the case the applicant makes out on wilful default is not persuasive, that is not the end of the enquiry - the applicant’s case may be rescued if a bona fide defence is demonstrated.”

[18] Support for this dictum is found in Harris v Absa Bank Ltd t/a Volkskas[7] where Moseneke J (as he then was) held that:

“The absence of ‘wilful default’ is not an express requirement under Rule 31(2)(b) or the common law. It is, however, clear law that an enquiry whether sufficient cause has been shown is inextricably linked to or dependent upon whether the applicant acted in wilful disregard of Court rules, processes and time limits...”

I do not agree that once wilful default is shown the applicant is barred; that he or she is then never entitled to relief by way of rescission as he or she has acquiesced. The Court’s discretion in deciding whether sufficient cause has been established must not be unduly restricted. In my view, the mental element of the default, whatever description repairs, should be one of the several elements which the court must weigh in determining whether sufficient or good cause has been shown to exist.”

[19] Neither decision held that an unsatisfactory and unacceptable explanation can be overcome by good prospects of success, which decision would be contrary to the decisions of the Supreme Court of Appeal and the Constitutional Court quoted above. Both decisions in fact referred to these decisions, which were binding on them.

THE FOURTH DEFENDANT’S EXPLANATION FOR HIS DEFAULT

[20] The founding affidavit contains the following explanation for the fourth defendant's failure to give notice of intention to defend the action:

[20.1] The fourth defendant was approached during December 2019 by the sixth defendant, enquiring whether the fourth defendant knew anything about a case against him.

[20.2] The fourth defendant thereafter asked his wife whether she had received any documents from the sheriff. She confirmed that she had received the summons but at that stage the time allowed for delivering a notice of intention to defend had already lapsed.

[20.3] The fourth defendant sought legal advice and was informed that the plaintiff would apply for default judgement and that he would have to apply for rescission of the default judgement. The fourth defendant failed to indicate who provided this legal advice.

[21] The fourth defendant became aware of the default judgement when a writ of execution was executed by the sheriff on 9 August 2022, which implies that the fourth defendant was obliged to institute the application for rescission of judgement by 6 September 2022.

[22] The founding affidavit was deposed to and the notice of motion was signed on 26 September 2022. The application was only served on the plaintiff on 10 October 2022. No explanation for this delay of approximately two weeks is provided.

[23] The only explanation why the fourth defendant failed to apply for rescission of judgement within the prescribed time period is that he was only able to raise funds for such application just after the prescribed time period had expired whereafter he consulted his attorneys. The fourth defendant contends that the delay was not unreasonable.

[24] The fourth defendant failed to deal with the service of the plaintiff's application to join the sixth and seventh defendants and of the amended particulars of claim in either the founding or replying affidavits.

[25] The fourth defendant admits that the notice of setdown of the application for default judgement was served on his wife, but he alleges that he was at that stage in Limpopo and only became aware thereof when the warrant was executed approximately 11 weeks later.

[26] The plaintiff presented evidence in the answering affidavit that the fourth defendant is a member of six close corporations, a director of three companies and that he is the registered owner of four immovable properties, which he purchased between 2007 and 2019 and of which two are unencumbered by mortgage bonds. He moreover purchased and sold nine other immovable properties between 2008 and 2017, some for a substantial profit.

[27] The fourth defendant failed to deny this evidence in the replying affidavit but stated "that [his] inability to prosecute the matter and to institute the rescission application timeously, were not wilful and/or intentional

but as a result of [his] financial position."

[28] The fourth defendant's replying affidavit was approximately 11 months late. The only explanation for the failure to comply with the prescribed time period is that the fourth defendant is "struggling financially". In support of this allegation the fourth defendant attached copies of his personal bank statements for the period 1 March 2019 to 28 March 2019; 29 November 2019 to 28 December 2019; 29 November 2022 to 28 December 2020; and 29 July 2022 to 28 August 2022.

DISCUSSION

[29] The fourth defendant demonstrated the following bona fide defence which, prima facie, carries good prospects of success:

[29.1] The fourth defendant purchased the property via an estate agent for an amount of R120 000.00, which amount is reflected on a deed search, attached to the founding affidavit. The fourth defendant signed the offer to purchase at the seventh defendant's offices.

[29.2] The fourth defendant renovated the property at a cost of approximately R200 000.00 and thereafter sold the property to the fifth defendant for an amount of R430 000.00, which amount is also reflected on the deed search.

[29.3] The deed search indicates that the fifth defendant sold the property to the second and third defendants for R530 000.00.

[29.4] The fourth defendant accordingly denied the plaintiff's version that the property was transferred fraudulently and jointly to the fourth and fifth defendants and that the property was sold jointly by the fourth and fifth defendants to the second and third defendants for an amount of R530 000.00.

[29.5] The fourth defendant's version implies that the fourth defendant made a profit of approximately R110 000.00 from the transaction being the selling price of the property to the fifth defendant (R430 000.00) less the purchase price of the property (R120 000.00) less the renovations (approximately R200 000.00) and he could accordingly not have been "enriched" in the amount of R530 000.00, as pleaded by the plaintiff.

[29.6] Although not on oath, the fourth defendant's version is supported by the sixth and seventh defendants' plea in which it is inter alia pleaded that the plaintiff signed a power of attorney to transfer the property to the fourth defendant.

[30] The fourth defendant has not provided a reasonable and acceptable explanation for his default:

[30.1] The only explanation why the fourth defendant failed to apply for rescission of judgement within the prescribed time period is that he was only able to raise funds for such application just after the prescribed time period had expired, being 6 September 2022. The fourth defendant failed to indicate what the source of this funding was.

[30.2] The fourth defendant attached a copy of his personal bank statement for the period 29 July 2022 to 20 August 2022 to the replying affidavit but not for any period thereafter.

[30.3] The evidence in the answering affidavit that the fourth defendant is a member of six close corporations, a director of three companies and the registered owner of four immovable properties, which he purchased between 2007 and 2019 and of which two are unencumbered by mortgage bonds suggests that the fourth defendant should have access to sufficient funds to finance the litigation.

[30.4] The bald statement that the fourth defendant was unable to timeously raise funds for the legal costs to institute this application is accordingly neither reasonable nor acceptable.

[30.5] It is moreover not explained why it took approximately 13 court days to draft the application and why the application was only served approximately 10 court days after the notice of motion had been signed.

[30.6] On the fourth defendant's version he became aware of the service of the summons (which was served on the fourth defendant's cousin on Thursday, 12 December 2019) during December 2019.

[30.7] The allegation that the time allowed for delivering a notice of intention to defend had at that stage already lapsed falls to be rejected. The combined summons expressly afforded the fourth defendant 20 days after service to give notice of intention to defend.

[30.8] The alleged legal advice that the plaintiff would apply for default judgement and that the fourth defendant would have to apply for rescission of the default judgement, falls to be rejected for the following reasons:

[30.8.1] it is not indicated who provided the advice and when it was provided;

[30.8.2] the advice is not supported by a confirmatory affidavit;

[30.8.3] any attorney would have advised the fourth defendant that the days between 16 December and 15 January are, in terms of rule 19(1), not counted in the time allowed within which to deliver a notice of intention to defend and even if notice of intention to defend is delivered after the prescribed time period, a plaintiff is not entitled to apply for default judgement upon receipt of a notice of intention to defend.

[30.9] The fourth defendant does not deny that the plaintiff's application to join the sixth and seventh defendants and the plaintiff's amended particulars of claim were served on him, which demonstrated that judgement had at that stage not been granted against the fourth defendant.

[30.10] The only explanation why the fourth defendant ignored the notice of set down of the application for default judgement is that he was at that stage in Limpopo, which is clearly neither acceptable nor reasonable.

[30.11] The fourth defendant was accordingly clearly in wilful default.

- [31] During argument, Mr Sekwakweng conceded that the fourth defendant did not provide a reasonable and satisfactory explanation for his default and that he was in wilful default.
- [32] I have already found that the submission of Mr Sekwakweng that an unsatisfactory and unacceptable explanation can be overcome by good prospects of success is wrong. An applicant for rescission / condonation must provide a reasonable and acceptable explanation for their default and a bona fide defence which, prima facie, carries some prospect of success.
- [33] It accordingly follows that the fourth defendant has failed to demonstrate good cause to extend the period of 20 days to institute this application and to rescind the default

judgement.

ORDER

[34] I accordingly grant an order in the following terms:

[34.1] The fourth defendant's application to extend the period of 20 days in terms of which the application for rescission had to be made and the fourth defendant's application for rescission are dismissed with costs on scale A.

H F OOSTHUIZEN AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 5 August 2024.

Appearances

Counsel for the Plaintiff: Adv Bernette Bergenthuin Instructed by Hurter Spies Inc Counsel for the Fourth Defendant: Adv M D Sekwakweng Instructed by Ipeleng Motshegoa Attorneys Date of Hearing: 22 July 2024 Date of Judgment: 5 August 2024

- [1] Chetty v Law Society, Transvaal 1985
- (2) SA 756 (A) at 765A-C
- [2] At 765C-E and 767J-768C
- [3] 2013
- (5) SA 325 (CC) para [85] and [86]
- [4] 2021 JDR 2069
- [5] Para [71]
- [6] (A5083/2021) [2023] ZAGPJHC 649 (06 June 2023)

[7] 2006

(4) SA 527 (T) paras [6] and [9]

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