

SOUTH AFRICA / JUDGMENT

Thompson v Investec Bank Ltd (846/2010) [2014] ZAECPEHC 45 (1 July 2014) [2014] ZAECPEHC 45

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

J W Eksteen

CASE / FILE NUMBER

846/2010

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO.: 864/2010

DATE HEARD: 12

JUNE 2014

DATE DELIVERED: 1 JULY 2014
In

the matter between: JEANETTE
THOMPSON
Applicant
and
INVESTEC
BANK LIMITED
Respondent

JUDGMENT**EKSTEEN, J:**

- [1] The applicant herein seeks the rescission of a judgment granted by default in favour of the respondent by the Registrar of this court pursuant to the provisions of rule 31 of the Uniform Rules of Court on 13 May 2010.

Background

- [2] It is necessary at the outset to set out the background to the present application in some detail. The respondent, as plaintiff, had instituted action (the action) against Royden Edward Minto Thompson NO (referred to herein as the first defendant), Jeanette Thompson NO (referred to herein as the second defendant), Robert David Jackson NO (referred to herein as the third defendant), Royden Edward Minto Thompson (referred to herein as Royden Thompson) and Lanor Design and Manufacturing CC (referred to herein as Lanor). The first, second and third defendants in the action were the erstwhile trustees of the Jeandon Trust (herein referred to as the “Trust”) and they were cited in the action in their capacities as trustees (they are herein referred to as the “erstwhile trustees”). The fourth and fifth defendants in the action were cited as sureties for the liabilities of the Trust. Judgment was duly granted against all the defendants jointly and severally, the one paying the other to be absolved.
- [3] The respondent issued a comprehensive combined summons to commence the action. It set out three distinct claims. In respect of the first claim the respondent alleged that it entered into a written loan agreement (referred to herein as “the first loan agreement”) with the Trust on 16 March 2008 at Port Elizabeth. The Trust was duly represented by the first defendant in concluding the loan agreement. In terms of the first loan agreement the respondent lent and advanced to the Trust an amount of R4 100 000,00. The material terms of the agreement are set out in the Particulars of Claim and the

respondent annexed to the Particulars of Claim a copy of a duly signed document which it alleged was a true copy of the first loan

agreement concerned and which contained all the terms of the agreement.

- [4] The respondent alleged that a second loan agreement was concluded on 25 July 2008 at Port Elizabeth and again the Trust was represented by the first defendant who concluded the agreement in writing. In respect of the second loan agreement the respondent alleged that an amount of R1 009 000,00 was lent and advanced to the Trust. Again the material terms of the agreement were set out in the summons and a document was annexed to the summons which the respondent alleged constituted a true copy of the second loan agreement and which contained all the terms of the alleged agreement.

- [5] The respondent further alleged that on 16 July 2008 a third loan agreement was concluded with the Trust at Port Elizabeth. Again the Trust was duly represented by the first defendant and the agreement was concluded in writing. In terms of the third loan agreement the respondent alleged that it had lent and advanced an amount of R7 000 000,84 to the Trust. As was the case in respect of the first and second loan agreements the material terms of the agreement were set out in the Particulars

of Claim and a document annexed which the respondent alleged was a true copy of the agreement and which contained all the terms of the alleged agreement.

- [6] It was alleged that Royden Thompson and Lanor had signed as sureties and co-principle debtors in respect of the Trust's debts to the respondent and a number of immovable properties were bonded in favour of the respondent pursuant to the said loan agreements to serve as security for the indebtedness of the Trust. Copies of the bonds duly registered were also annexed to the Particulars of the respondent's Claim.
- [7] The respondent contended that the Trust had breached its obligations which it had assumed under the loan agreements and accordingly the respondent issued summons on 30 March 2010. It claimed judgment against the Trust in the amount of R12 333 349,86 together with interest thereon calculated in accordance with the alleged loan agreements to the date of payment thereof. In addition, the respondent sought an order declaring all the properties mortgaged in its favour to be executable. It also sought judgment against the sureties.
- [8] It is not in dispute that the summons issued together with the annexure to which I have referred was duly served on the Trust and on its sureties. Whilst the original returns of service are not included in the papers in the present application the respondent has annexed correspondence received by its attorneys of record on 9 April 2010 via email from Royden Thompson. The material portion thereof reads as follows:

"Subject: RE: INVESTEC/JEANDON TRUST/LANOR DESIGNS AND MANUFACTURING CC

Dear Louis,

Reference is made to the above together with the summons that were (sic) served on the writer on Tuesday and as discussed with Natalie we document the following proposal for consideration by Messrs Investec

Bank. ..."

- [9] From the foregoing it is apparent that the summons was in fact received by the erstwhile trustees of the Trust. They did not enter an appearance to defend and judgment was duly granted by default on 13 May 2012.
- [10] Subsequent to the granting of the default judgment interaction between the parties continued and the defendants in the action were represented by Mr M C Botha, an attorney of Messrs Joubert Galphin and Searle. A meeting was scheduled in June 2012 and Royden

Thompson, on behalf of the Trust, requested in advance that a complete bundle of the original documents – the mortgage bonds, the loan agreements and the title deeds concerned – be available. Royden Thompson attended the meeting together with Mr Botha. At the meeting a number of proposals were made for consideration by the respondent, however, the meeting was ultimately terminated without Royden Thompson or Mr Botha showing any interest in the documents which had been requested in advance.

- [11] Early in February 2013, reliant on the judgment granted by default in 2010, the respondent launched an application for the sequestration of the Trust. Prior to the sequestration, however, Ms Carruthers, the current attorney of record for the applicant herein, made enquiries on behalf of the Trust relating to the loan agreements. It was tentatively suggested that the three loan agreements in issue had been securitised and that the respondent accordingly had had no locus standi to move for judgment on the strength of these loan agreements. The sequestration proceedings, however, went ahead and the Trust was finally sequestrated on 14 February 2013. On this occasion, at the hearing of the application for sequestration, Attorney Schoeman, acting on behalf of the respondent, states that he took the three original mortgage bonds to court and gave them to Ms Carruthers, who represented the Trust, requesting her to peruse same in order that she might be satisfied that they were free of endorsement thus verifying that no securitisation had occurred. I shall revert to this issue below. Ms Carruthers, so says Attorney Schoeman, took the documents, paged through them and returned them to him. His version of these events stand uncontradicted.
- [12] As recorded earlier the Trust was finally sequestrated and Werner de Jager, Esme Dorfling and Amaré Adams were duly appointed by the Master as the trustees in the insolvent estate of the Trust.

The application for rescission

- [13] The application for rescission was launched on 4 October 2013, some seven and a half months after the sequestration. The covering page of the Notice of Motion reflects the first, second and third defendants, Royden Thompson and Lanor as the first to fifth applicants respectively. The Notice of Motion, however, records as follows:

“BE PLEASED TO TAKE NOTICE THAT application will be made on behalf of the abovenamed Applicant on Tuesday 12 November 2013 at 09h30 or as soon thereafter as Counsel may be heard for an order in the following terms:

1. That the late filing of the application be condoned;
2. That the Default Judgment granted in favour of the Respondent on ??? (sic) 2010 against the Applicant be rescinded and set aside;
3. That the Applicant be granted leave to defend the action instituted by the Respondent against her;

4. ...”

[14] In the founding affidavit which is deposed to by Jeanette Thompson (herein referred to as “the applicant”), she states:

“1. I am an adult businesswoman, one of the trustees of the above trust and the Applicant herein (and the Second Defendant in the main action).”

[15] It is not clear from the affidavit what “the above trust” is intended to mean as no trust is referred to earlier in her affidavit. It is, however, in the context of the application as a whole, clear that it is intended to refer to the Trust. None of the other “applicants” reflected on the covering sheet to the Notice of Motion are cited in the papers. The applicant does not allege that she is acting in her capacity as trustee nor that she has been authorised by the other erstwhile trustees of the Trust to act on their behalf. Royden Thompson has made a confirmatory affidavit. He records simply that he is married to the applicant and he confirms that the facts deposed to are true and correct insofar as they refer to himself.

He too does not suggest that the applicant was authorised to act on his behalf or on behalf of the Trust. Moreover, the trustees in the insolvent estate of the Trust were not cited in this application nor is there any reference in the founding affidavit to them. There is no indication that notice was given to the trustees in the insolvent estate of the application for rescission of judgment. I revert to this issue later in the judgment.

[16] The founding affidavit records that the application is brought in terms of the provisions of rule 42 of the Uniform Rules of Court. The factual basis appears to be twofold. Firstly it is alleged that the applicant believes that the loan agreement has been endorsed and handed over to an unidentified third party to whom the loan agreement had been securitised and accordingly that the respondent had no locus standi to move for judgment founded upon the loan agreements. Secondly, it is alleged that Royden Thompson has advised that a number of signatures which appear on the original loan agreements “are not the manner in which he signs his signature”. This, the applicant avers, clearly leads to the “only deduction possible” that there has been a reproduction of documents and that same has been manufactured and the signatures forged. Royden Thompson does not, however, deny that he appended the said signatures to the documents in issue. The affidavit proceeds to allege that in the event of it being found that the signatures are forged then the use thereof as an annexure to the summons issued in the action would be fraudulent. I pause to record that strong allegations of fraud and forgery are levelled against the respondent in the founding affidavit.

[17] In answer to the first contention, the alleged securitisation, one Giaconi, the Chief Operations Officer of the respondent in Port Elizabeth has filed an affidavit in which he explains the phenomenon of securitisation. Securitisation, he says, involves the session by the original creditor, in this case the respondent, to some other entity of the right title and interest in and to the instruments of debts, such as the loan agreements relevant to these proceedings. This, of course, is useless unless, in addition to ceding the right title and interest in and to the instruments of debt, the right and title in and to the securities

involved, is also ceded and assigned to the other entity concerned. When this is done, the cessionary is fully in the position in which the cedent previously was and it acquires the locus standi to enforce the instruments of debt and it is the holder of the securities involved. The cedent would then lose its locus standi.

[18] Where the securities involved consist of mortgage bonds, as is the case in the present matter, then, in accordance with the provisions of section 16 of the Deeds Registries Act No. 47 of 1937, as read with the provisions of section 3(1)(f) of the said Act and with section 54 thereof, the transfer of the rights in and to the mortgage bond must be registered by the Registrar of Deeds, who endorses this transfer on the original mortgage bond.

[19] If, after securitisation has taken place there is a default or, for whatever reason, circumstances arise in which action must be taken to enforce the provisions of the relevant instrument of debt, Giaconi explains, such enforcement can take place either in the name of the cessionary concerned or, after the rights in and to the instrument of debt (and to the security concerned) have

been ceded by the cessionary back to the cedent, in the name of the original cedent. Giaconi states that there is no good reason why, to use the facts of this particular matter as an example, if, indeed, the loan agreements concerned had been securitised (which Giaconi denies) and they, and the right title and interest in and to the mortgage bonds had been ceded to some cessionary, that cessionary would not have enforced its rights against the Trust and to its securities in its own name. If, for whatever reason, it had not wished to do so, then a recession would have taken place, and the respondent would have taken the necessary action.

[20] There is in the present instance no endorsement reflected on the original mortgage bonds annexed to the summons in the action and Giaconi states that ever since the said loan agreements were executed in 2008 the right title and interest in and to them, and in and to the securities associated with them, has always remained firmly vested in the respondent.

[21] The second basis for the application for rescission is that “it appears” on the ground set out earlier that the loan agreements have been manufactured and the signatures thereon forged. The applicant does not deny that Royden Thompson, duly authorised in his capacity as an erstwhile trustee of the Trust entered into the three loan agreements relied upon by the respondent in the action on behalf of the Trust. Royden Thompson does not deny that he signed the original loan agreements and he does not dispute that the documents annexed to the summons in the action correctly reflect all the terms of the loan agreements which he signed. Indeed he does not deny that it is his signature which appears on the original loan agreements exhibited to him in the offices of BLC Attorneys nor on the copies of the loan agreements which were annexed to the summons.

[22] The case made in the founding papers is that Royden Thompson advises that “a number of signatures which appear thereon are not the manner in which he signs his signature”. On the strength of this advice Attorney Carruthers demanded to view

the originals of the loan agreements in respect of which copies had been annexed to the summons in the action. These were exhibited to her at the offices of BLC Attorneys in Port Elizabeth on 30 August

2013. The applicant does not deal with this meeting in any detail in the founding affidavit save to say that upon viewing the documents alleged to be the originals Attorney Carruthers and Royden Thompson became suspicious.

[23] Attorney Schoeman, in the answering papers states that at the meeting on 30 August 2013 he personally attended upon Royden Thompson and Ms Carruthers. He had in his possession the bundle of original documents comprised of the three loan agreements and three bonds and his file copy of the summons in the action. In the presence of Royden Thompson and Ms Carruthers, he says, he went through the documentation with care, established that each loan agreement was complete, checked that the original documents accorded with the copies attached to his file copy of the summons, and watched as Royden Thompson and Ms Carruthers worked through the documentation. When they had completed their task they left returning approximately three quarters of an hour

later with transparencies made of copies of the loan agreements, which had presumably been made from the copies attached to the

summons, and compared these transparencies to the original agreements. Again this version of the events which occurred stand uncontradicted.

[24] The applicant alleges that on 25 September, due to it “appearing” that the loan agreements had been manufactured and the signatures thereon forged, a criminal docket was opened with the South African Police Services. Again the applicant does not in the founding papers provide any particularity as to the events which occurred on 25 September 2013. Attorney Schoeman, in his answering affidavits gives a more detailed account of the events of 25 September 2013. On this occasion Ms Carruthers and Royden Thompson again attended on the offices of BLC Attorneys. Again the documents which are alleged to be the original loan agreements and the original of the three bonds registered were provided to them. Ms Carruthers was then able to make transparencies of the original loan agreements prior to them departing.

[25] The applicant contends that upon a consideration of the alleged original loan agreements as compared with the transparencies made of the alleged “true copies” there were several noticeable differences relating to the formats thereof, the placing of words, paragraphs and page numbers and boxes depicted on the page. In addition it is alleged that certain signatures failed to agree in appearance and placing. During argument Ms Carruthers advised me that upon a careful scrutiny of the transparencies as compared to the alleged originals there were differences in placing of words varying 1mm to 5mm. This, she contends cannot occur in the photocopying process. On this basis the applicant contends that there is only one deduction to be made therefrom and that is that the alleged originals of the loan agreement constituted a reproduction and that same were manufactured and

signatures forged.

- [26] On behalf of the respondent it is contended that the documents exhibited are in fact the originals and that the copies annexed to the summons were in fact photocopies made of the originals. Any distortions which may be revealed by the preparation of transparencies or photocopies have occurred as a result of the photocopying process. In this regard one Nicolene Bekker formally employed as a conveyancing secretary by the late Patrick Maybin, an attorney, attested to an affidavit. She states that she has seen the three original loan agreements which were exhibited to her during October 2013. The first loan agreement was in fact executed on behalf of the Trust by Attorney Maybin duly authorised thereto. She states that she was present when Attorney Maybin attached his signature to the document on behalf of the Trust and therefore verifies the execution of the document.

She signed the document as witness to the signatures. In respect of the second loan agreement, it purports to be signed by

Royden Thompson. Ms Bekker states that she and Attorney Maybin were present when Royden Thompson executed the document and that she and Mr Maybin attached their signatures as witnesses to the document in the presence of Royden Thompson. In respect of the third agreement the same procedure was followed and she again testifies that she was present when Royden Thompson attached his signature to the document. She accordingly gives direct evidence of Royden Thompson attaching these signatures which are now contended “to appear” to be forged. One Jeanette van Tonder attested to an affidavit that she was previously employed as a recoveries risk consultant by the respondent and that she prepared the photocopies of the original documents which were forwarded to Attorney Schoeman for purposes of the issue of summons. Attorney Schoeman confirms that all further copies made in the offices of BLC were photocopies of these copies received from Ms van Tonder. None of this evidence is in dispute on the papers.

Application for a postponement

- [27] The application for rescission was set down by the respondent during March 2014 to be heard on 12 June 2014. The respondent duly served heads of argument and a notice in terms of Rule of Practice 15A of the Eastern Cape Rules of Practice was filed on 3 June 2014 confirming that the matter would proceed to argument. On 6 June 2014 Attorney Carruthers unilaterally filed a notice of removal from the roll and re-instatement of the application for a later date. I thereupon requested my registrar to make enquiries from Attorney Schoeman as to whether the matter would proceed in accordance with the notice which he had earlier filed. I was advised that the matter would proceed.
- [28] On 11 June 2005 an application for a postponement was delivered. The sole basis advanced for the application for a postponement was that the applicant required the services of a handwriting expert in order to express a view as to whether the signatures of Royden Thompson were in fact forged. Ms Carruthers, during argument, advised me that the applicant was not able to either confirm or deny the authenticity of the signatures until a

handwriting expert had expressed a view in this regard. There was still no denial by Royden Thompson that he had signed the documents.

[29] The intention to acquire the opinion of a handwriting expert was first set out in the founding papers in the application for rescission in October 2013.

[30] The failure to obtain such an opinion in the interim is explained by the applicant as follows:

“14. ... I advise that our Attorney of Record began to investigate what handwriting experts existed in South Africa in order that we could obtain one of the best handwriting specialists that was available.

15. However due to the time of the year that the discrepancies came to our attention, despite a number of appointments being tentatively arranged for the documentation to be taken to the handwriting expert personally the most sought after handwriting specialists due to the demand on their time were unable to provide a consultation earlier than April.

16. I advise that the latest communication forthcoming from the handwriting specialist is that further signature samples from the time in question when the specific Loan Agreements (were signed) needed to be located and forwarded and thereafter that the original Loan Agreements need to be made available in order for the final report herein to be finalised.

17. These advises (sic) have been forthcoming during the last week and have therefore given (rise to) a need for this matter to be removed from the roll and re-enrolled. ...”

[31] After hearing argument and considering the submissions made on either side I dismissed the application for a postponement and reserved the order for costs for decision together with the main application. I indicated that I would provide my reasons for the dismissal of the application for a postponement together with my judgment in the main action. My reasons are as follows.

[32] In *Persadh and Another v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) at 459E-G Plasket J formulated the following principles applicable where a party seeks a postponement of an application:

“First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has (sic) been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting

his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and, fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.

[33] In respect of the first consideration the applicant is required to show good cause not only for interfering with his opponents procedural right to proceed but also with the general interest of justice in having the matter finalised. In the present instance judgment was granted against the erstwhile trustees of the Trust in May 2010. On the strength of the judgment the Trust was sequestrated in February

2013. The application for rescission was launched in October 2013 more than three years after the judgment was granted. Already at that time the applicant contended that the opinion of a handwriting expert would be obtained. The application for further postponement comes more than four years after the judgment. Suffice it to say that the interests of justice require that applications for rescission of judgment should be brought and heard expeditiously. In *First National Bank Of Southern Africa Ltd v Van Rensburg NO And Others: In re First National Bank Of Southern Africa Ltd V Jurgens And Others* 1994

(1) SA 677 (T) *First National Bank of South Africa Limited v Van Rensburg NO and Others* 1994
(1) SA 677 at 681D-F Eloff JP recorded:

"The need to proceed rapidly to correct an order mistakenly granted was mentioned by Trollip JA in Firestone South Africa (Pty) Ltd v Gentiruco AG 1977

(4) SA 298 (A) at 306H:

'Thus, provided the Court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases . . .'

That was admittedly said in relation to the common-law power of correcting an order of Court, but the reasoning applies equally

well to applications under Rule 42(1).

It is in the interest of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders of Court. Persons affected by such orders should be entitled within a reasonable time after the issue thereof to know that the last word has been spoken on the subject."

[34] I think that these sentiments are particularly apposite in the present case where further proceedings have followed on the strength of the judgment, trustees have been appointed in the insolvent estate of the Trust and the sequestration process has already progressed on the strength of the final order of sequestration for some fifteen months. I do not consider that good cause has been shown to interfere with the respondent's procedural right to proceed and to bring this dispute to finality. In this case the general interests of justice demand that the final word must now be spoken.

[35] In exercising my discretion as to whether or not to grant a postponement I am alive thereto that I should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained. I do not think that they have been fully

explained. I have recorded earlier herein that Royden Thompson does not deny that he signed the original agreements nor does he deny that the signature on the copy of the agreements annexed to the summons is his. At best he states that the signatures on the originals do not look like the manner in which he usually signs his signature. During argument Ms Carruthers acknowledged that the applicant is unable at this stage to state whether it has a defence to the action or not. That will be determined by the opinion of the handwriting expert. In seeking to explain the delay the applicant alleges that her attorney commenced to investigate what handwriting experts existed in South Africa in order that she could obtain one of the best. She does not take the court into her confidence as to the efforts made by her attorney, the identity experts selected nor the time at which such efforts were commenced.

- [36] She proceeds to state that due to the time of the year in which the discrepancies came to light experts were unable to provide a consultation earlier than April. The discrepancies came about in September 2013. Why September should be such an inconvenient time of the year is not explained. The applicant does not take the court into her confidence in advising what experts were in fact approached, when they were approached nor what instructions were conveyed to them. She states that a number of appointments were “tentatively arranged” for documentation to be taken to the handwriting expert personally. She does not confide in the court in respect of the number of appointments made, the dates upon which the appointments were scheduled nor the identity of the experts with whom these appointments had been made. She does not tell me if any documentation was taken to the expert and if so when this was done. The affidavit does not explain what is intended to be conveyed by “tentatively arranged” more particularly in the light of the further averment that such experts were unable to provide a consultation earlier than April. She does not advise the court whether the consultation was taken up in April, which handwriting expert was consulted nor what his advices were.
- [37] The applicant then proceeds to suggest that the latest communication forthcoming from the handwriting specialist was that he required further handwriting samples. Again the court is not advised as to the identity of the said handwriting expert, whether he is the same expert consulted in April or with whom appointments had been “tentatively arranged” during 2013. No supporting affidavit is provided by the handwriting expert and no explanation is provided for this failure. We are not advised whether his communications were oral or in writing. In the event of his communications having been oral the applicant does not confide in the court as to the identity of the person who received these communications nor is there any supporting affidavit from such person to confirm the communications. In the event that the communications were in writing copies of such letters are not annexed.
- [38] In all the circumstances I do not think that the applicant has fully explained the reasons for the delay and accordingly her inability to proceed. In these circumstances I am not satisfied that the application for a postponement is not a delaying tactic.

- [39] For these reasons I dismissed the application for a postponement. It follows that the applicant should be ordered to pay the wasted costs occasioned by the application for a postponement. The difficulty which gave rise to my reservation of the costs order was occasioned by the uncertainty as to who in fact the applicant was.
- [40] I have alluded earlier to the allegations made in the Notice of Motion and the founding affidavit in the main application as to who the applicant is. In the application for a postponement the covering sheet of the Notice of Motion again reflects the five “applicants” reflected on the covering sheet in the application for rescission. Again the founding affidavit is attested to by the applicant. She states that she is an adult female and a trustee of the Trust. She continues to state that her husband, Royden Thompson was previously a trustee of the Trust and has resigned therefrom due to his sequestration brought by the respondent herein. Indeed Attorney Schoeman, in the main application for rescission, confirms that the third defendant too, also an erstwhile trustee of the Trust, has resigned from that position. The Master has appointed Marius Kevin Vincent and Ashley Craig Meier as trustees in the stead of Royden Thompson and Robert David Jackson. There is no averment that either of these trustees have been consulted in respect of the application for a postponement or in respect of the application for a rescission of judgment. The trustees in the insolvent estate of the Trust are not parties to the current litigation.
- [41] In all the circumstances, on the papers before me, the applicant is the only applicant and she is an applicant in her personal capacity. In the circumstances it is appropriate that she pay the costs occasioned by the application for a postponement.

Locus standi of the applicant(s)

- [42] Mr Scott, who appeared on behalf of the respondent argues, in limine, that the applicant, whether Jeanette Thompson or the erstwhile trustees in the Trust has/have no locus standi to bring the application.
- [43] I have set out earlier the relief sought in the Notice of Motion in the rescission application and in particular paragraph 2 thereof. The relief sought is that the applicant, in the singular, be granted leave to defend the action instituted by the respondent against “her”. This accords with the averments made in the founding affidavit where the applicant does not suggest that she acts on behalf of the erstwhile trustees nor that she is mandated to represent any of the other parties cited in the heading on the covering sheet on the Notice of Motion. The relief sought fortifies my finding that the applicant brings the application on her own and only in her personal capacity. Even if I err in this regard and I assume that the applicant brings the application on behalf of the erstwhile trustees in the Trust she could not bring the application for rescission for the reasons that follow.

- [44] The application for rescission was launched some eight months after the final sequestration of the trust. The claim for rescission is not one which falls within the ambit of section 23 of the Insolvency Act, 24 of 1936 and accordingly any benefit which may be obtained from the rescission of this judgment would be for the benefit of the insolvent estate of the Trust and accordingly the trustees in the insolvent estate. (Compare *Voget and Others v Kleynhans* 2003 (2) SA 148 (C) at para [18] p. 152.)
- [45] The consequence of the sequestration of the Trust is that the erstwhile trustees of the Trust lose their locus standi because all the assets in the estate vest in the trustees in the insolvent estate who exercise all the rights in respect of that

property. It is true that where the trustees in the insolvent estate of the Trust refuse to institute proceedings against a debtor for the recovery of any benefit to which the insolvent estate is entitled the right of an insolvent, by virtue of his reversionary interest in the insolvent estate is recognised by our courts. (See *Voget's case supra* at para [22] p. 153 and *Nieuwoudt v The Master and Others* NNO 1988 (4) SA 513 (A) at 524H-525G.)

- [46] In the present instance, however, the applicant does not allege that the trustees in the insolvent estate of the Trust had been requested to move for the rescission of judgment. They have not been cited as parties in the application nor is there an allegation that notice has been given to the trustees in the insolvent estate. The applicant does not make out any case on the papers for any reversionary interest in the insolvent estate of the trust. In all the circumstances I am of the view that the applicant has no locus standi to bring the application for rescission of judgment whether in her personal capacity or on behalf of the erstwhile trustees. On this basis alone the application falls to be dismissed.

Acquiescence in judgment

- [47] Further, in limine, Mr Scott argues, in any event, that the erstwhile trustees in the Trust have acquiesced in the judgment and cannot now seek to rescind it.
- [48] It is well established in law that a party who becomes aware of a judgment and acquiesces therein is precluded thereafter from applying for rescission of the same as the right has become perempted. (Compare *Dabneb v South African Railways and Harbours* 1920 AD 583 at 594; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972
- (1) SA 589 (A) at 600A-B; and *Liberty Life Association of Africa v Kachelhoffer NO and Others* 2001 (3) SA 1094 (C) at 1110H.)
- [49] In *Liberty Life Association of Africa, supra*, at 1111I-1112A the Cape High Court set out the requirements for this defence:

*“The onus to have shown that the applicant abandoned its right of review either expressly or by conduct inconsistent with an intention to enforce it rested on the respondents (see *Laws v Rutherford* 1924 AD 261). Courts take cognisance of the fact that parties do not as a rule lightly abandon their rights (*Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977*

(4) SA 310 (T) at 324A-325A). Where a tacit waiver or abandonment is relied upon there has to be clear proof that the holder of the right acted in a manner inconsistent with the continued existence thereof and consistent with the intention of abandoning it (see *Borstlap v Spangenberg en Andere* 1974

(3) SA 695 (A) at 704 -G).”

[50] In the present instance judgment was granted during 2010. In June 2012, as set out earlier herein, Royden Thompson, assisted by Attorney M C Botha, entered into negotiations with Attorney Schoeman. These came to nought.

[51] Early in 2013 the respondent moved an application for the sequestration of the Trust relying on the judgment. The erstwhile trustees at that time enjoyed the benefit of legal representation. Attorney Carruthers made tentative suggestions that the loan agreements which had formed the basis of the judgment by default had been securitised and that the respondent accordingly had no locus standi. The application for sequestration was, however, granted and on 19 April 2013 Royden Thompson executed a consent to the sale of a Trust asset, an immovable property situated at 1 Harbourview Place, Humeral, Port Elizabeth, on behalf of the Trust (in sequestration) which property was bonded in favour of the respondent.

[52] The question which arises is whether the foregoing conduct constitutes an unequivocal abandonment or waiver of its right to move for the rescission of the judgment granted by default.

[53] I have alluded earlier to the basis upon which the present application is brought. Of particular significance for purposes of the present argument is that it is not in dispute that Royden Thompson concluded the three loan agreements with the respondent. Copies of the alleged loan agreement were annexed to the summons served on the erstwhile trustees of the Trust. Royden Thompson does not deny that he signed the loan agreements nor does he deny that the signature depicted on the copies annexed to the summons is his signature. He chooses rather to evade the issue suggesting merely that on the original it does not look like the manner in which he signs. The terms of the loan agreements as set out in the annexures to the summons, are not placed in dispute in the present application.

[54] I think when all these features are viewed together with the subsequent conduct in respect of the sequestration of the Trust and the consent to sale of immovable properties there is considerable merit in Mr Scott’s submissions relating to acquiescence. By reason of the conclusion to which I have come in respect of the applicant’s

locus standi and in respect of the merits as set out below it is, however, not necessary for me to make a conclusive finding in this regard.

[55] I turn to consider the merits of the application for rescission.

Rule 42

[56] In the founding affidavit the applicant states categorically that the application is brought in terms of the provisions of rule 42 of the Uniform Rules of Court. Rule 42(1) provides that a court may rescind or vary:-

“(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

- (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) an order or judgment granted as the result of a mistake common to the parties.”

[57] Mr Scott submits that on the facts of the matter rule 42 can find no application. Rule 42 applies clearly only to the three situations set out in sub-rule (a), (b) and (c) of subrule (1). Clearly the provisions of rule 42(1)(b) and (c) can find no application.

[58] I have set out earlier herein the facts as they emerge from affidavits in the application and the allegations of fraud and forgery relating to the signature of Royden Thompson. In respect of sub-rule (1)(a), it was held in *Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 (GNP):

“In general terms a judgment is erroneously granted 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 ...

It follows that if material facts are not disclosed in an ex parte application ... or if fraud is committed (i.e. the facts are deliberately misrepresented to the court) the order will be erroneously granted.”

[59] These comments were made in the context of an ex parte application where the respondent has not been afforded the opportunity of placing its case before court and correcting the misrepresented facts. The present application was not brought ex parte and to that extent it is to be distinguished from Naidoo’s case. In any event, I think that the learned judge intended no more in the Naidoo case than to hold that a judgment which could be rescinded for fraud under the common law is one granted in error. I do not think that this argument can succeed in the present case for the reasons which I set out below in my consideration of the alleged fraud.

[60] In the circumstances I find that the relief sought cannot be brought within the bounds of rule 42.

[61] The fact that the application for rescission of judgment is brought under rule 42 does not, however, mean that it cannot be entertained under any other rule, for example, rule 31(2)(b) or under the common law, provided the requirements therefore are met. (See *De Wet and Others v Western Bank Limited* 1977 (4) SA 770 (T) at 780H-781A; *Mutebwa v Mutebwa and Another* 2001 (2) SA 193 (Tk) at 198C-E; and *Swart v Absa Bank Limited* 2009 (5) SA 219 (C).) I turn accordingly to consider the application under the provisions of rule 31(2)(b) and the

common law.

Rule 31(2)(b)

[62] Rule 31(2) of the Uniform Rules of Court provides:

“(2) (a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.”

(b) A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.”

[63] The reference to “such judgment” is reference to a judgments granted in terms of the provisions of rule 31(2)(a), i.e. a judgment granted by a court. The rule does not apply to judgment granted, as in this case, by the Registrar (compare Harms: Civil Procedure in the Superior Court B-203; Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa, vol 1 (5th ed) at 715). The application could therefore not be brought under the rule. Rule 31(5)(d) provides, however, that any party dissatisfied with the judgment granted or direction given by the Registrar may, within twenty days after such party has acquired

knowledge of such judgment or direction, set the matter down for reconsideration by the court. This the applicant has not done.

The common law

[64] At common law the court has a wide discretion to rescind judgments obtained by default of appearance, on “sufficient cause” shown. No rigid limits were set by the common law as to the circumstances which constituted sufficient cause. The courts, however, lay down certain general principles to guide them in the exercise of their discretion. The court’s discretion was influenced by considerations of justice and fairness, having regard to all the facts and circumstances of a particular case. The onus was upon the applicant in each case to show the existence of sufficient cause for the relief sought and he had to satisfy the court, inter alia, that there was some reasonable satisfactory explanation why the judgment was allowed to go by default. (See *De Wet and Others v Western Bank Limited* 1979 (2) SA 1031 (A) at 1042F-H.)

[65] The term “sufficient cause” (or “good cause”) has been recognised to defy precise or comprehensive definition, for many various factors are required to be considered. (See *Cairns’ Executors v Gaarn* 1912 AD 181 at 186 per Innes JA.) In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B-E Miller JA stated:

‘... [I]t is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause"

for rescission of a judgment by default 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. (De Wet's case supra at 1042; PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980

(4) SA 794 (A); Smith NO v Brummer NO and Another; Smith NO v Brummer 1954

(3) SA 352 (O) at 35 -8.)

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 judgment against him, no matter how reasonable and convincing the explanation of his default. An 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 judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”

(My underlining)

[66] In this instance, as I have recorded earlier, it is not in dispute that the three loan agreements were entered into by the Trust or that the money was in fact advanced under the loan agreements. The terms of the loan agreements as they are set out in the copies annexed to the summary are not in dispute nor is it alleged that the amount claimed was not outstanding at the time. As previously explained, Royden Thompson does not deny that he signed the agreements and he does not positively dispute that it is his signature which is reflected on the originals held in the office of BLC Attorneys nor on the copies annexed to the summons.

[67] The defence, as I understand it, is by virtue of the unexplained discrepancies between the transparencies of the alleged original documents and the copies which were annexed to the summons the respondent is unable to prove the authenticity of the loan agreements upon which the matter was based. For this reason it is contended that the erstwhile trustees have no contractual obligation to the respondent as alleged by it in its summons.

[68] Has the applicant then made out a case that it has a bona fide defence to the action? I do not think so. Ms Bekker has provided an affidavit that she was present at the time of the

execution of each of the loan agreements. She witnessed the signatures and she confirms that the persons whose signatures appear on the originals in fact signed the agreement. As stated earlier it is not in dispute that the agreements were in fact concluded on the terms set out in the

documents. Ms van Tonder has provided an affidavit that she made the copies of the agreement from the originals which were provided to Attorney Schoeman and Attorney Schoeman made all further copies from these copies, including the copies annexed to the summons. Their evidence constitutes direct evidence on oath. As against this there is the vague suggestion by Royden Thompson that his signature does not look like the manner in which he usually signs. The copies of the loan agreements annexed to the summons were served on Royden Thompson in 2010. His signature is depicted on each of the documents. He did not raise any suspicion then. In all the circumstances I do not think that the applicant has made out a bona fide defence which prima facie carries some prospect of success. I revert to this aspect below in considering the suggestions of fraud.

Securitisation

[69] The second defence raised is that the applicant suggests, somewhat tentatively, that the loan agreements were securitised. On the papers before me no case is made out for this conclusion to be drawn. It is founded on pure speculation that because there are certain visual differences between the “originals” inspected and the copies annexed to the summons therefore the originals must have been securitised. This, I think, involves a considerable leap of logic. Indeed the deponent to the founding affidavit recognises that “one possible explanation (is) that the respondent has sold/ceded the actual loan agreements into securitisation”. Again, by contrast, there is direct evidence on oath from Giaconi, which is uncontradicted that the agreements have not been securitised and his denial finds support therein that the bond documents have not been endorsed. The evidence of Ms Bekker is that the documents held by Attorney Schoeman are the originals. No reply has been forthcoming to the answering affidavit by Giaconi. In these circumstances I do not think, prima facie, that this defence has any reasonable prospect of success. The dispute, such as it is on the papers, in respect of securitisation is, I think, not a genuine, real or bona fide dispute and a positive finding is justified that the loans have not been securitised.

Delay

[70] Even if I were incorrect in the conclusion to which I have come in respect of the bona fide defence the applicants would further be required to provide a reasonable and acceptable explanation for her default. No explanation is provided save that it was only during September 2013 that she became aware of the discrepancies (more probably distortions) which exist between the photocopies annexed to the summons and the original documents. There is, however, no explanation whatsoever why the erstwhile trustees resolved to let the judgment go by default. The only logical conclusion which can be drawn from the facts of the present matter is that they acknowledged their liability under the loan agreements. The Trust was sequestrated by reliance upon the judgment which remained undisputed. Still the erstwhile trustees of the Trust took no

steps to rescind the judgment. No explanation is provided in the papers for this failure. The inevitable conclusion is that their default was the result of a conscious decision not to oppose the relief.

Fraud

- [71] The applicant raises serious allegations of fraud and dishonesty in the founding affidavit accusing the respondent of having forged signatures. It is well established at common law that a judgment obtained in fraud will not be permitted to stand and may be set aside where the party seeking rescission was unaware of the fraud until after the judgment had been delivered. In such circumstances, however, the party seeking relief must be able to show that because of the fraud of the other party the court was misled into pronouncing a judgment which, but for the fraud, it would not have done. It is accordingly necessary to show that if the court had known of the true facts, the judgment would have been different (see for example *Robinson v Kingswell* 1915 AD 277 at 285; *Paull and Paull v Cullum* 1933 NPD 601 at 606). It is not sufficient to show that there has been a fraud to which the successful litigant was a party, there must be a causal connection between the alleged fraud and the judgment which is sought to be set aside. (See for example *Solomon v R* 1905 TS 711 at 713-714; and *Swadif (Pty) Ltd v Dyke* NO 1978 (1) SA 928 (A) at 939E-F.)
- [72] I have already held that on the papers it may safely be held that the loan agreements have not been securitised. Accepting for present purposes the correctness of the remaining factual averments made by the applicant I do not think a causal connection has been shown between the alleged fraud and the judgment. For the reasons which I have set out earlier herein at para
- [53] I do not think that the judgment would have been any different if the facts as alleged by the applicant had been brought to the attention of the Registrar.

Conclusion

- [73] In all the circumstances the application for rescission of judgment falls to be dismissed firstly by reason thereof that the applicant does not have locus standi to move the application and secondly, even assuming that the application is brought on behalf of the trustees in the insolvent estate of the Trust (which it is not) no case for rescission has been made whether in terms of rule 42, rule 31 or under the common law.

Costs

- [74] For the reasons set out earlier herein I find that the only applicant before court is the applicant in her personal capacity. In these circumstances I consider that it is fair that she should be ordered to pay the costs occasioned by the application in her personal capacity. Again, even if I were incorrect in respect of the identity of the applicants before court and if I were to assume that the applicant is bringing the application on behalf of the erstwhile trustees of the Trust it would nevertheless be unjust to order that the trustees of the

insolvent estate of the Trust are to bear the costs of this application, which would be the inevitable consequence of an order for costs against the Trust.

[75] In the circumstances the following order is made:

1. The application for a postponement is dismissed.
2. The applicant, Jeanette Thompson, in her personal capacity, is ordered to pay the costs of occasioned by the application for a postponement.
3. The application for rescission of judgment is dismissed.
4. The applicant, Jeanette Thompson, in her personal capacity, is ordered to pay the respondent's costs occasioned by the application for rescission.
5. The applicant is ordered to pay interest on the respondent's taxed costs calculated at the legal rate from a date fourteen (14) days after taxation to the date of payment.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicants: Ms B Carruthers instructed by Carruthers Attorneys, Port Elizabeth

For Respondent: Adv P Scott, SC instructed by BLC Attorneys, Port Elizabeth

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