IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: 2359/2013

NOT REPORTABLE

EDWARD NGCWABE **Applicant**

And

JUSTICE ZOLILE NONTENJA **1st Respondent**

KOLEKA ANGELINA MOYAKHE N.O. **2nd Respondent**

THE REGISTRAR OF DEEDS, CAPE TOWN **3rd Respondent**

LLEWELLYN FRANCOIS SHARP N.O. **4th Respondent**

Coram: **Chetty J**

Heard: **23 April 2015**

Delivered: **30 April 2015**

Summary: ***Practice*** *– Judgment – Rescission – Condonation – No acceptable explanation – No bona fide defence – Application dismissed*

JUDGMENT

CHETTY J: -

[1] The applicant seeks the rescission of an order granted in this court on 10 September 2013, in the following terms: -

> "1. That the Third Respondent be and hereby directed to cancel the Deed of Transfer T5…….. in terms of which Erf Number 3…… M……., Port Elizabeth, known as 3... N…… Street, M……. Port Elizabeth (hereinafter referred to as "the property") was ceded and transferred in full and free property to and on behalf of the First Respondent from the estate of the late K…….. P…… D……., with Estate Number 2…… (hereinafter referred to as "the estate of the deceased") on 20 August 2012;
>
> 2. That the Second Respondent, be and is hereby directed to, within 7 days from the date of this Order, take such steps as may be necessary, including, but not limited to the signature of all and any such documents as may be necessary to:
>
> 2.1 cede and transfer in full and free property, the property to and on behalf of the Applicant;
>
> 2.2 renounce all the rights and title which the estate of the deceased has to the property; and
>
> 2.3 acknowledge that the estate of the deceased to be entirely dispossessed of, and disentitled to the property;

3. That in the event that the Second Respondent fails, alternatively refuses, further alternatively neglects to comply with and give effect to paragraph 2 above, within 7 days from the date of this Order, that the Fourth Respondent be and is hereby authorised and directed to,. Within 14 days from the date of this Order, take such steps as may be necessary, including, but not limited to the signature of all and any such documents as may be necessary to:

    3.1 cede and transfer in full and free property, the property to and on behalf of the Applicant;

    3.2 renounce all the rights and title which the estate of the deceased has to the property; and

    3.3 acknowledge that the estate of the deceased to be entirely dispossessed of, and disentitled to the property;

4. That the First and Second Respondents, pay the costs of the application, jointly and severally, the one paying the other to be absolved."

[2] In that application the present first respondent was cited as the applicant, the applicant herein as the first respondent and the remaining respondents in conformity with the present citation of the parties. It is not in dispute that the order was granted in the absence of the two respondents against whom substantive relief was sought i.e. the applicant and the second respondent. By notice of motion filed with the Registrar of this court on 23 September 2014, the applicant, as adumbrated above, seeks rescission of the order granted on 10 September 2013 and ancillary relief. It is evident from the aforegoing chronology that the dilatoriness of this application behoves the applicant to have sought condonation for the delay. The founding

affidavit however attests to a nescience of the need for condonation and its requirements. The legal position is trite. Rule 31 (2) (b) enjoins a defendant to ***"within 20 days after he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet"***. It is common cause that the requirements of the Rule were not complied with. Hence, the applicant was required to furnish a full explanation not only for the delay but for its entire period. The only semblance of any such explanation is the allegation that he had instructed the legal aid board to pursue the matter on his behalf but, in dereliction of their duty to do so, they failed to perform in terms of their mandate.

[3] Apportioning the blame on the Legal Aid Board for the omission to have complied with the prescripts of the Rule has been vehemently disputed. Attorney *Naidu* has deposed to an affidavit complementary to the first respondent's answering affidavit and confirms that the applicant attended at their offices on 20 August 2013 whereupon he informed the latter that he did not qualify for legal assistance given the demerits of his application. It is evident from attorney *Naidu's* affidavit that the applicant did not share his scepticism about the shortcomings in his anticipated challenge to the judgment granted against him. However, for reasons which I will expand upon in due course, I unreservedly accept that *Naidu* in fact advised the applicant that a rescission application would be an exercise in futility and that the Board could consequently not render any assistance to him. Attorney Naidu's evidence that he once more conveyed his opinion to the applicant and his companion, who purported to be a lawyer, on 4 September 2013 is nowhere denied. In my judgment there is no acceptable explanation for the delay in launching these

proceedings and condonation cannot be had for the taking. On this ground alone the application falls to be dismissed.

[4] The application is in any event entirely without merit. In order to succeed, the applicant ***"must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."***[1] The high water mark of the applicant's case is that the Registrar of Deeds has vouchsafed that he is the registered owner of Erf 32468 Motherwell (the disputed property).

[5] It is indeed so that the title deed designates the applicant as the registered owner of the property. *De facto*, however, first respondent had for several years been in peaceful and undisturbed possession of the property. The purchase price had been paid in full but registration of transfer of the property into his name was held in abeyance pending the lapsing of the eight (8) year period governing the sale of RDP houses. Thus, in order to protect the first respondent's right and title to the property an addendum to the sale agreement was concluded between the first respondent and the second respondent which recorded that: -

" ADDENDUM OF DEED OF SALE

[1] Superior Court Practice – Erasmus B1-201-2

Between

ESTATE OF LATE KOLISILE PHILEMON DWANE

IDENTITY NUMBER: 4……

(hereinafter referred to as "the Seller/s")

to

JUSTICE ZOLILE NONTENJA

IDENTITY NUMBER 7……

UNMARRIED

(hereinafter referred to as "the Purchaser")

> It is agreed by the parties that notwithstanding the fact that the seller has applied for the necessary waiver in respect of the 8 year clause D in the Deed of Transfer No. T……., we irrevocably agree that the purchaser shall retain possession of the property until either the necessary waiver has been granted or the 8 year period from date of sale has elapsed to enable registration of transfer to be effected."

[7] Unbeknown to the first respondent however, the applicant and second respondent surreptitiously concluded an agreement of sale in respect of the property. Aggrieved thereby, the first respondent instituted proceedings which culminated in the order reproduced in paragraph [1]. In his founding affidavit therein, the first respondent detailed the circumstances under which the second respondent sold the property to him. He annexed thereto an agreement of sale upon which the second respondent had appended her thumbprint as seller and the aforementioned addendum to the deed of sale upon which the second respondent had likewise appended an "X" representing her signature in her capacity as the seller. Additionally he annexed thereto cheques emanating from the seller's (the second respondent)

conveyancing attorneys' trust account which were duly deposited into the second respondent's banking account.

[8] It is not in dispute that the first respondent took occupation of the property on 10 June 2009 and has continuously lived in the property. At the time the rescission application was launched the applicant and the second respondent were fully aware of the basis upon which the first respondent laid claim to ownership of the property. And yet, the applicant's founding affidavit and supporting affidavit from the second respondent conveniently skirts the issues raised therein. It is evident from the plethora of affidavits filed both in this and the initial application launched by the first respondent that the applicant and second respondent, in concluding the agreement of sale, acted in fraud of the rights of the first respondent. The evidence adduced ineluctably compels the conclusion that at the time the applicant concluded the agreement of sale with the second respondent, he was fully aware, not only that the property had previously been sold to the first respondent, but that the registration of transfer had not been effected for the reason referred to hereinbefore. Such reprehensible conduct can never be countenanced. The legal position vis-à-vis successive sales, as in *casu*, is trite. In ***Cussons en Andere v Kroon***[2], Streicher J.A. articulated it thus: -

> "In die geval van dubbelverkope word 'n beginsel bekend as die kennisleer toegepas. Waar A sy goed aan B verkoop en daarna dieselfde goed verkoop en oordra aan C, wat bewus was van die regte van B, is B geregtig op kansellasie van die verkoping en van

[2] 2001 (4) SA 833 at 839C-D

> die oordrag van die goed, op grond daarvan dat die verkoper en C geag word op 'n bedrieglike wyse teenoor hom op te getree het (Tiger-Eye Investments (Pty) Ltd and Another v Riverview Diamond Fields (Pty) Ltd1971 (1) SA 351 (K) op 358F - H). Werklike bedrog word nie vereis nie. Blote kennis aan die kant van C van die bestaan van B se vorderingsreg is voldoende (Kazazis v Georghiades en Andere1979 (3) SA 886 (T) op 893). Die verwysings na bedrog in sake van hierdie aard dien slegs as aanknopingspunt in die regsisteem ter onderskraging van die kennisleer (Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere1982 (3) SA 893 (A) (ASA Bakeries) op 910E).”

[9] Consequently, the applicant’s *mala fides* per se precludes the grant of the relief sought. As adumbrated hereinbefore, he clearly has no *bona fide* defence and, in the result, the following order will issue: -

The application is dismissed with costs.

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D. CHETTY

JUDGE OF THE HIGH COURT

Obo the Applicant:	*Adv M.E Menti*
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Obo the 1st Respondent:	*Adv R De Vos*
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