(99)

IN THE HIGH OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE No: 65862/2011

DATE: 6/12/2012

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

6/12/2012
DATE

SIGNATURE

In the matter between:

CHARLES JOSEPH PAYNE *N.O*	**FIRST RESPONDENT/ PLAINTIFF**
AND	
LOURENSTIA GERDA PAYNE *N.O*	**SECOND RESPONDENT/ PLAINTIFF**
AND	
WILLEM NEZAR	**THIRD RESPONDENT/ PLAINTIFF**
THE ISLAND ESTATE PROPERTY DEVELOPMENT COMPANY (PTY) LTD	**APPLICANT/DEFENDANT**

JUDGMENT

RANCHOD J

[1] The applicant applies for rescission of the default judgement granted by the registrar of this court on 8 December 2011 against the applicant and in favour of the respondents.

[2] The applicant says that it applies for the rescission of judgement under Uniform Rules of Court 31(2), alternatively, the common law, for the setting aside of the judgement. Rule 31 (2) provides:

"(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 pea, the plaintiff may set the action down as provided in subrule (4) for default judgement and the court may, after hearing evidence, grant judgement against the defendant or make such order as to it seems meet.

(b) A defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgement and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

[3] The general principles for the rescission of judgement at common law have been restated a number of times. The oft quoted authority is *De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A).* The courts have a wide discretionary power to rescind default judgements. From the authorities it is clear that the courts have gone no further than to state that judgements can be rescinded on "good cause" or "sufficient cause" or on "sufficient cause shown". (*De Wet and Others* (supra)). See also *Colyn v Tiger Food Industries Ltd t/a Meadow Seeds Mills 2003 6 SA 1 (SCA).*

[4] To establish good cause an applicant must accordingly show the following:

1. Give a reasonable explanation of his default;

2. The application is made *bona fide*; and

3. He has a bona fide defence to the plaintiff's claim which, *prima facie*, has some prospect of success.

[5] The respondents, as plaintiffs, issued summons out of this court in their capacities as trustees of the Charles Joseph Payne Development Trust. They sought the re-payment of R250,000 paid in advance to the applicant as a deposit pursuant to an oral agreement for the purchase of certain immovable property. As I said judgement was granted by default.

[6] The applicant for rescission of judgement is a company involved in a larger residential development known as "The Highland Estates Development" at Hartebeespoort Dam.

[7] The main dispute between the parties stems from the proposed purchase of the immovable property known as erf 196, The Highlands Estate Extension 2 by the respondents.

[8] It is common cause that a meeting was held on 6 May 2009, at which an oral agreement was concluded for the payment of a R250,000 deposit which was paid by the Charles Joseph Payne Development Trust to the applicant. It is alleged that a written agreement in compliance with s2(1) of the Alienation of Land Act 68 of 1981 would later be concluded. At the time of the oral agreement for the deposit a further agreement still needed to be reached concerning the shareholding, directorships, and appropriate corporate agreements in a holding company that would own the property under consideration.

[9] I will deal firstly with whether there has been any inordinate delay in the bringing of the application for rescission. Having read the papers, I am satisfied that there has not been any inordinate delay in bringing the application.

[10] The applicant states that it has, *inter alia,* the following valid defences against the respondents:

1. The respondents have no *locus standi in judicio* in respect of the cause of action that they are relying on for the claim;

2. A special plea of non-joinder by the respondents of a Mr De Kock as a co-defendant in the action, alternatively the applicant's right to Institute third party procedure in accordance with Uniform Rule of Court 13;

3. Should it be found that the respondents do have standing, which the applicant denies, the respondents forfeited the claim amount in terms of their written agreement with the applicant;

4. Should the respondents attack on the validity of the oral contract succeed, which remains denied, the oral contract would in any event have been superseded by the written contract;

5. The applicant's counterclaim against the first respondent, in his personal capacity, for a declaratory order and specific performance.

[11] At this point I should mention that the respondents' answering affidavit has been couched in a manner as if this was the forum in which the merits of the applicant's defences were to be decided. It would appear that the respondents have

overlooked the fact that this is an application for rescission in which the test, *inter alia*, is whether he has a bona fide defence to the plaintiff's claim which *prima* facie has some prospects of success. As an example, I quote from the respondents' answering affidavit at paragraph 30 which is in answer to paragraph 10.2 of the applicant's founding affidavit:

> "There is no proof that purchasers, dealing with the applicant, were as a rule required to pay a non-refundable deposit."

The respondents seem to miss the point that the proof is not required at the stage of the application for rescission. It is something that will be dealt with on the merits at a later stage if rescission is granted.

[12] The applicant contends that the oral agreement for the payment of a non-refundable deposit has been superseded by the written contract. The respondents, on the other hand, contend that the oral agreement is separate from the eventual written agreement for the purchase and sale of the immovable property. These arguments are in the context of the Alienation of Land Act 68 of 1981, which provides that any agreement relating to alienation of land must be in writing.

[13] In its founding affidavit deposed to by Mr Andre Johannes Burger the applicant says:

"10.5 Since the outset I, personally, made it clear to Messrs Payne and De Kock that, the purchase price for Erf 196 being R19,280,000.00, the Applicant would before the negotiation and conclusion of an agreement in respect of the purchase of the erf insist on the payment of a non-refundable deposit in the amount of

R500,000.00 by Messrs Payne and De Kock (as partners or through whatever entity they elected to act) to the applicant."

[14] After further negotiations the amount of R500,000.00 was reduced to R250,000.00 which is the amount that was paid by the first respondent at a meeting between the deponent to the founding affidavit and a Mr Pretorius on the one hand and Messrs Payne and De Kock on the other.

[15] The applicant says, at paragraph 10.2 of the founding affidavit that:

> "during or about the period 2004 to 2009 the immovable property market was so thriving that genuine as well as spurious interest by potential buyers of portions in the development was so overwhelming that the Applicant was compelled to protect itself against exploitation by insisting on interested purchasers to pay a 10% portion of the envisaged purchase price as a non-refundable deposit. The requirement of the payment of a non-refundable deposit was, at the time, the norm in the market and Mrs Steyn (who, at the time, acted as the conveyancing attorney of the Applicant) advises that:-
>
> 10.2.1 in respect of the Island Estates Development in excess of 200 transactions, with *inter alia* the condition of payment of a non-refundable deposit, were effected;
>
> 10.2.2. even the banks, such as Absa Bank and Standard Bank, insisted on the payment of a non-refundable deposit as a term, before they would grant a development loan secured by a mortgage bond in respect of the immovable property so sold to potential purchasers and, even, from time to time,

conducted audits at her offices in order to ascertain that the underlying written agreements indeed contained such clauses; . . . ."

These, together with a number of other issues raised in the application, if resolved in applicant's favour would mean that the applicant would succeed in its defence, *inter alia:*

- Whether the first respondent and De Kock were partners and that therefore he had the requisite authority to sign the agreement;
- Whether the respondents have *locus standit*;
- The non-joinder of De Kock;
- That the plaintiffs' claim to have "abandoned" the proposed purchase of the property rather than having the agreement repudiated, resulted in no cause of action on the part of the plaintiffs; and
- Whether the written agreement superseded the oral agreement.

[16] In my view, the applicant has placed sufficient facts before this court to show that it has a bona fide defence to the plaintiff's claim which has some prospect of success.

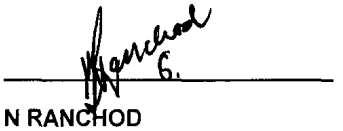
[17] In the circumstances I need not consider all the other issues raised in this voluminous application.

[18] I accordingly make the following order:

1. The default judgment granted by the Registrar of this Court on 8 December 2011 against the applicant is rescinded.

2. The applicant is to file its plea to the respondent' claim within fifteen days of date of this order.

3. The respondents are to pay the costs of this application.



N RANCHOD

JUDGE OF THE HIGH COURT.

Appearances:

Counsel for the Applicant: Adv P Sieberhagen.

Attorney for the Applicant: Geyser Van Rooyen Attorneys, Pretoria.

Counsel for the Respondent: Adv J Vorster

Attorney for the Respondent: Erasmus- Scheepers, Pretoria.