IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

NOT REPORTABLE

Case No: 16709/2009

In the matter between:

LEONARD MARK PIERCEY **Applicant**

And

ETHEKWINI MUNICIPALITY **1st Respondent**

JUNAYD MAHOMEDY **2nd Respondent**

SHERIFF, DURBAN WEST **3rd Respondent**

JUDGMENT

Gorven J:

[1] Mr Piercey, the applicant, owns an immovable property (the property). He took transfer from his late father in 1997. The address is [1…..] [M…..] [V…] [R…..], [B…..], [D.…]. He has lived there since 1970 and did so at all material

times. After taking transfer, he paid all of the utility accounts for the property, which remained in the name of his father. These were sent to the above address by ordinary post. ABSA Bank limited holds a mortgage bond over the property with an outstanding balance of R104 815.41. He says that his father experienced difficulties regarding the payment of rates. As a result, Mr Piercey arranged that the rates accounts and those for utilities would be sent in the same document. In order to take transfer, a rates clearance certificate was obtained. Thereafter, the rates account was in the name of Mr Piercey because he was now the owner. It is common ground that Mr Piercey did not pay any rates after taking transfer. He says that he did not receive any such accounts and assumed that they were included in the utilities account as had been done with his father. The first respondent (Ethekwini) says it sent the rates accounts annually to the same address by the same means as the utilities account. This simply elicits a bare denial by Mr Piercey. In the light of his having received the utility accounts, it is inconceivable that none of the rates accounts reached the address. This denial must accordingly be rejected but, as will be shown later, nothing turns on it.

[2] Due to the non-payment of rates, Ethekwini sent a letter of demand to the same address and, when that did not achieve the desired effect, served a summons on Mr Piercey for the amount outstanding. This was served on Mr Piercey personally on 31 March 2010. He says that he has no recollection of this because his father died on 1 March 2010. He does not deny receiving it. The third respondent's return indicates that the nature and exigency of the summons was explained to Mr Piercey. This is likewise not denied. Default judgment was granted against him by the registrar under rule 31(5) for rates, penalties and collection charges with interest and costs. The registrar also declared the property to be executable.

[3] A notice of attachment and warrant of execution was sent to the address of Mr Piercey by registered post on 5 September 2010. This document is put up by Mr Piercey as one sent to him by Ethekwini's attorneys but he fails to deal with it at all. Absent a denial that he received it, it must be taken to have reached him. The property was attached by the third respondent on 20 October 2010 by affixing a writ to the main entrance of the property since it was locked and unattended. Mr Piercey simply notes that averment without saying whether or not he received it, other than by blanket averment that he did not know of the judgment until three years later. A sale in execution of the property was advertised for 9 May 2013. Letters advising of the sale were addressed and sent by registered post to the bondholder, Mr Piercey and the occupier, the latter two to the address of the property. Again, Mr Piercey puts these documents up as having been provided to him by Ethekwini's attorneys without any comment. On the advertised day, the property was sold in execution to Mr Mahomedy, the second respondent, for the sum of R341 000. Mr Piercey claims that this is substantially less than the value of the property which he puts at R830 000. He provides no admissible evidence for this assertion.

[4] This application is for rescission of only that part of the judgment which declared the property executable and associated relief. The relief sought is as follows:

'(a) The late filing of this Application be and is hereby condoned;

(b) The Default Judgment granted by the Registrar of this Honourable Court on 27th August 2010 in terms of which the Applicant's immovable property . . . was declared executable (prayer f) be and is hereby rescinded or set aside . . .

(c) The Sale in Execution of the Applicant's immovable property referred to in prayer (b) *supra* by the Third Respondent to the Second Respondent on 9th May 2013 pursuant to the Default Judgment granted by the Registrar on 27th August 2010 be and is hereby set aside;

(d) The Applicant pay the costs of this Application unless unsuccessfully opposed by any of the Respondents.'

Both Ethekwini and Mr Mahomedy oppose the application. Both delivered answering affidavits but only Mr Mahomedy's counsel arrived on the date the matter was set down.

[5] The application is apparently brought under rule 31(2)(*b*). This requires an applicant to launch an application within 20 days of becoming aware of the default judgment. This rule does not seem to apply to judgments by the Registrar. Rule 31(5)(*d*) allows a party against whom a judgment has been granted in terms of rule 31(5)(*a*) to set the matter down for reconsideration within 20 days after becoming aware of the judgment. The application has not been brought for reconsideration but for rescission. However, that is rather matter of form than of substance. This court has held that a reconsideration applies the same test as does rescission under rule 31(2)(*b*).[1] This court has determined that it can substitute its discretion for that of the registrar in such an application.[2] The application may also be treated as one brought under the common law because the rule in essence restates the common law.[3] This court has inherent jurisdiction to rescind any judgment.[4] The test is that there is an onus on the applicant to show good cause:

'(*a*) by giving a reasonable explanation of his default; (*b*) by showing that his application is made *bona fide*; and (*c*) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success . . .'.[5]

[6] The first issue to consider is that of condonation. There is a dispute as to when Mr Piercey became aware that judgment had been granted against him. On any version, however, he was well outside of the required 20 day period of rule 31(5)(*d*). The common law requires an application to be brought within a

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[1] *Pansolutions Holdings Ltd v P&G General Dealers & Repairers CC* 2011 (5) SA 608 (KZD) para 14.
[2] *Pansolutions* para 11. This judgment differed from the view taken that a court can only interfere with the judgment if the Registrar has erred. See *Bloemfontein Board Nominees Ltd v Benbrook* 1996 (1) SA 631 (O) at 633H.
[3] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 para 6.
[4] *De Wet & others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F-G.
[5] *Colyn* para 11.

reasonable time. Absent an indication that the 20 day period is inappropriate, I see no reason why a reasonable time would exceed that period.

[7] Mr Piercey says that he received a statement of rates on 15 April 2013 showing an amount outstanding of R136 015.50. This caused him to approach the accounts department of Ethekwini where he was advised by an official that he would be contacted in due course. The next he heard was on 9 May 2013 when an official from Ethekwini came to his residence and informed him that the property was being auctioned. On 21 May 2013 he contacted an attorney to assist him and was referred to his current attorneys of record. He consulted with them on 25 May 2013 but had no documents. His attorneys attempted to obtain the court file but could not locate it. Surprisingly, there is no affidavit by his attorneys confirming this and the further averments concerning them. The attorneys established that Ethekwini was represented by its current attorneys and requested their assistance in furnishing him with relevant papers, which was only done on 23 July 2013. When he consulted his attorneys on 26 July 2013, they advised that he should raise funds to pay towards the rates should an application for rescission be successful. He started to collect funds. On 13 August 2013 he deposited R100 000 into the trust account of his attorneys to be held for part payment in that event. The application was served on Ethekwini on 17 September 2013.

[8] Ethekwini tells a different story. As I have indicated, according to the return of the third respondent, a notice of attachment and warrant of execution was posted to Mr Piercey by registered post on 5 September 2010. He gives no explanation for not having received that registered post or notice of it. It was sent to his present address, at which he had received utility accounts sent by ordinary mail. In addition, a notice of attachment was affixed to the outer door of the property in October 2010. Once again, Mr Piercey does not give any explanation

as to whether this came to his attention and, if not, why not. Notices of the date of the sale in execution were also sent by registered post to his address. Once again, no credible explanation is given as to why he did not retrieve the registered post. Absent a full and candid explanation, it must be accepted that Mr Piercey became aware of the judgment by October 2010 at the latest.

[9] On his own version, he became aware of it on 9 May 2013 when he was told that a sale in execution was taking place that day. There is no explanation by him why he did not act immediately other than to say that he was accumulating funds towards the admitted rates debt. There was no need to wait until he had deposited money into his attorneys trust account before he could launch the application. In my view, no case for condonation has been made out. The application should fail for that reason alone.

[10] In any event, the same outcome would result from a consideration of the merits. The test for rescission is that a party must show good cause. Because Mr Piercey seeks only to rescind that part of the judgment relating to the order for executability, it must be accepted that he has no defence to the money claim. As regards whether or not he was in wilful default, it is clear that he received personal service of the summons and did nothing. The summons contained a prayer for executability. The only explanation given by Mr Piercey for failing to defend the matter was that he had lost his father and cannot, as a result, recall receiving the summons and that there was a burglary at his house during which the summons must have become misplaced. This is no explanation at all. What is required of an applicant for rescission is a sufficiently full explanation for her or his default to enable the court to understand how it really came about and to assess his conduct and motives.[6] No such explanation has been given.

[6] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A.

[11] A further requirement is that an applicant must put up facts which *prima facie* show that she or he has a defence to the claim. In the present matter, this does not go to the issue of whether or not Mr Piercey received rates accounts. He does not attack the default judgment for rates. As a result, all of the evidence in this regard is irrelevant. The crisp issue is whether he would have succeeded in fending off the prayer for executability of the property. In this regard, he says that the Constitutional Court, some six months after default judgment was granted against him, held that such judgments could not be granted by registrars of the court. This is correct.[7] What that case decided, however, is that an applicant for rescission relying upon that judgment cannot simply rely on the fact that the judgment in question was granted by the registrar. Mr Piercey must show that a court, with full knowledge of all the relevant facts at the time default judgment was sought, would have refused leave to execute.[8]

[12] The only facts which Mr Piercey sets out are the following. The property is his primary residence. There is a possibility that if the facts in the affidavit were placed before a court, it may not have granted an order declaring the property executable. What is clear from the papers is that Mr Piercey was not, and is not, in a position to satisfy the judgment debt without the property being sold. There is a substantial bond over the property and the amount raised by him does not even satisfy the amount due to Ethekwini. In addition, it is clear that Mr Piercey is employed. There is no evidence that Mr Piercey would be unable to afford to either rent or purchase a smaller property. In other words, there is no evidence that Mr Piercey will be rendered homeless as a result of the property being sold in execution. Consideration must also be given to the fact that Mr Mahomedy has been kept out of a property purchased by him over three years ago by reason of this application.

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[7] *Gundwana v Steko Developments & others* 2011 (3) SA 608 (CC).
[8] Paragraph 59.

[13] In my view, accordingly, Mr Piercey has failed to show good cause and, thus, to make out a case for rescission of the judgment and the consequent relief sought by him. This means that the application must fail. On 30 October 2015 the application was adjourned and the wasted costs occasioned by the adjournment were reserved. I see no reason why Mr Piercey should not pay those wasted costs.

In the result, the following order issues:

1 The application is dismissed with costs.

2 The applicant is directed to pay the costs reserved on 30 October 2015.

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GORVEN J

DATE OF HEARING:	12 August 2016.
DATE OF JUDGMENT:	12 August 2016.
FOR THE APPLICANT:	No appearance.
FOR THE FIRST RESPONDENT:	No appearance.
FOR THE SECOND RESPONDENT:	N Moosa, instructed by Yusuf Cassim & Associates.