IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NUMBER: 51/03

Heard at **JOHANNESBURG** on 25 August 2003
before **Gildenhuys J**

In the matter between:

JAMBLOED PHAKATHI	First Applicant
LIZZIE PHAKATHI	Second Applicant
THOKOZANE PHAKATHI	Third Applicant
SIFISO PHAKATHI	Fourth Applicant
MAREZA PHAKATHI	Fifth Applicant
MAPOPANE PHAKATHI	Sixth Applicant

and

VAN VOS LENS PROPERTY DEVELOPMENT CC	Respondent

JUDGMENT

GILDENHUYS J:

[1] The applicants in this matter are Mr Jambloed Phakathi, his wife and four of his children. I will refer to them as the Phakati family. The respondent is Van Vos Lens Property Development CC, a close corporation. I will refer to it as Van Vos Lens. Van Vos Lens is the owner of Subdivision 2 of Kommissiekraal farm, also known as Saagkuilsnek, district of Utrecht, KwaZulu-Natal. I will refer to it as the farm. Until recently, the Phakathi family lived on the farm.

[2] Van Vos Lens instituted an action in this Court in case no 51/2002 against the Phakati family for their eviction from the farm. The action was not defended. On 17 June 2003 I gave default judgment against the Phakati family as follows:

> "1. Die Eerste tot Sesde Verweerders sowel as hul familielede en Eerste Verweerder se geassosieerdes word hiermee gelas om die plaas Onderverdeling 2 van "Kommissiekraal", ook bekend as "Saagkuilsnek", distrik Utrecht, te ontruim tesame met hulle vee en goedere teen nie later nie as 30 Junie 2003

2. Die Eerste tot Sesde Verweerders en Eerste Verweerder se geassosieerdes word hiermee gemagtig om enige strukture en verbeterings wat hulle op die plaas aangebring het, af te breek en die materiaal wat so herwin word, te verwyder teen nie later nie as 30 Junie 2003.

3 Die Balju van die distrik van Utrecht word hiermee gelas om, indien enige van die Eerste tot Sesde Verweerders sou versuim om te voldoen aan die Bevel in bede 1 hierbo, sodanige Verweerders, hul familielede en enige geassosieerdes (van Eerste Verweerder), asook hul vee en goedere uit te sit van die plaas Onderverdeling 2 van "Kommissiekraal", ook bekend as "Saagkuilsnek", distrik Utrecht.

4. Die Eesrste Verweerder gelas om die Eiser se regskoste, soos getakseer te word tussen party en party, te betaal."

[3] According to a return of service forming part of the record, the Deputy Sheriff purported to serve the eviction order on Mr Jambloed Phakathi on 20 June 2003 -

> "deur die oorspronklike bevel aan Jabulani Phakathi woonagtig saam met verweerder Jambloed Phakathi 'n persoon vermoedelik nie jonger as 16 jaar te toon, 'n afskrif aan hom te oorhandig en terselfdertyd die aard en erns van die saak aan hom te verduidelik."

Mr Jambloed Phakathi alleged that the sheriff served legal documents on his 15 year old daughter Sesi Phakathi during July 2003, and told her that the Phakathi family must leave the farm. Mr Jambloed Phakathi does not know who Jabulani Phakathi is.

[4] On 16 July 2003 Van Vos Lens, through the sheriff, evicted the Phakathi family from the farm. They were moved in a truck belonging to Van Vos Lens to the Wakkerstroom area. They now live in informal structures erected on land which a local family allowed them to occupy on a temporary basis. Their erstwhile dwellings on the farm were demolished by Van Vos Lens.

[5] By Notice of Motion dated 12 August 2003 the Phakathi family applied for the following relief:

"1. ...

2. That the default judgment granted against the Applicants herein on 17 June 2003 in case number: LCC51/02 is hereby rescinded, and the Applicants are granted leave to defend the proceedings.

3. That the Respondent be ordered to pay the costs of this application only in the event that it unsuccessfully opposes this application.

4 Further, other or alternative relief."

The application was opposed. Mr Lens (on behalf of Van Vos Lens) delivered an answering affidavit and Mr Jambloed Phakathi delivered a replying affidavit. I heard the application on an urgent basis on 25 August 2003.

[6] The Phakathi family is comprised of unsophisticated people. Mr Jambloed Phakathi, in his founding and replying affidavits, deals at some length with his family's efforts at preventing an eviction order being granted against them. Mr de Wet, who appeared for the respondent, accused the family members of indifference towards the legal processes instituted against them. I need not go into these accusations in any great detail. Of importance is a meeting during March 2003 between Mr Jambloed Phakathi and Mr Mbugisa, a member of the professional legal team of the Natal University's Campus Law Clinic. At this meeting Mr Phakathi instructed Mr Mbugisa to defend the application brought by Van Vos Lens against them. Mr Mbugisa attested to an affidavit in which he stated that he forgot about his meeting with Mr Jambloed Phakathi and - in error - omitted to carry out his mandate to defend the action.

[7] Mr Jambloed Phakathi alleged that he first became aware of the eviction order against his family in early to mid July 2003, after the sheriff told his daughter that the family must vacate the farm. The legal document served on Sesi Phakathi[1] was in Afrikaans, which nobody in the family could understand. Mr Jambloed Phakathi's wife handed the document to another resident on the farm, a Mr Shabangu, who undertook to take it to the Department of Land Affairs and to get the Department's assistance. Before that could happen, and on 16 July 2003, the Phakathi family was evicted.

[8] It is common cause that, at least until shortly before his eviction, Mr Jambloed Phakathi was a labour tenant as defined in the Land Reform (Labour Tenants) Act.[2] He sets out his family's defence against the eviction application as follows:

> "16.3.1 As mentioned above, I am a 'labour tenant' and the other Applicants are my 'associates' as defined in Act 3 of 1996. As such we may only be evicted in circumstances referred to in section 7(2) of the said Act. I deny that the peremptory circumstances contemplated in that section exist in this matter, in that:

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1 See para [3] above.

2 Act 3 of 1996.

(a) I deny that our family has withheld their services from the Respondent. As explained above, such services have always been tendered, and it is the respondent who has refused to make use thereof. I am advised and I respectfully submit that in terms of section 7(2)(a) of the Act, if the Respondent wishes to rely upon our alleged failure to provide labour to him, as a ground for our eviction, the Respondent is required to furnish us with one month's notice calling on us to provide such labour. As stated above, such a notice has never been delivered to us by the Respondent.

(b) I deny that I or the other applicants are guilty of having committed such a material breach of the relationship between us and the Respondent such that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship. As stated above, the Fourth Applicant is the only person to have been found guilty of a criminal offence, and in any event he denies that he is guilty thereof. Even in the event of indeed being guilty, I respectfully submit that the charges are not of such a serious nature that they would constitute such a material breach of the aforesaid relationship. I submit that the sentence handed-down to the Fourth Applicant in this regard relatively is indicative of this fact.

(c) I deny that it is just an equitable for this Honourable Court to grant an eviction order herein.

16.3.2 An application in terms Section 16 of the aforementioned Act has been lodged by me on behalf of my family and in respect of a portion of the Farm including the land occupied and used by the Applicants until their recent eviction. This claim is still pending. I annex hereto marked "A" copy of a letter from the Department of Land Affairs confirming this fact. Special circumstances do not exist which make it fair, and just and equitable - taking all of the relevant circumstances into account - to evict the First Defendant and his associates, as required by section 14 of the Act. In the premises, I respectfully submit that the Respondent is not entitled to the relief sought herein.

16.3.3 I have also lodged a claim in respect of the Farm in terms of the *Restitution of Land Rights Act 22 of 1994*, pursuant to the dispossession of rights in land in the Farm as previously held by my parents and certain other persons, and as a result of racially discriminatory laws and I or practices after 1913. This claim too is still currently pending with the KwaZulu-Natal Regional Land Claims Commission. My family and I were in occupation of the claimed land as at the date of commencement of the aforementioned Act. I am uncertain as to whether our notice of our claim has been published as required by section 7 of that Act, and I am currently investigating this. I however respectfully submit that if this is the case, in terms of section 7(b) of that Act my family and I may not be evicted from the Farm unless the requirements of that section are met."

[9] Mr Lens, on behalf of the respondent, answered as follows:

"Nadat die Derde, Vierde en Vyfde Applikante gearresteer was op die aanklagte van huisbraak met die opset om te steel en diefstal, het Derde Applikant opgehou om diens te lewer en het die huurarbeidersooreenkoms tussen Respondent en die Eerste Applikant tot 'n einde gekom. Die verhouding tussen die Respondent en die Eerste Applikant is onherstelbaar geskaad deur die optredes van die gemelde Applikante. Eerste Applikant het die huurarbeidersooreenkoms geabandoneer en geeneen van die Applikante het ooit weer gewerk nie. Hulle het ook geen dienste getender nie."

The respondent furthermore denied that an application was lodged under section 16 of the Land Reform (Labour Tenants) Act, or an application for restitution under the Restitution of Land Rights Act.[3]

[10] Van Vos Lens raised two points *in limine*. The first is that in its notice of motion the Phakathi family only prayed that the default judgment in case no 51/2002 be rescinded and that the family be granted leave to defend the proceedings. The family does not ask that their possession be restored. Consequently, even if the default judgment is rescidend, the Phakathi family will not be entitled to return to the farm, at least not before the finalisation of case no 51/2002.

[11] In the case of *Jasmat and Another v Bhana*[4] the respondent obtained a judgment in default of appearance restoring him to the possession of certain premises which he claimed he was entitled to occupy under a lease. He took out a writ to enforce the judgment. The son of the petitioners who then occupied the premises, vacated the premises and the respondent re-occupied them. The petitioners thereafter applied for and obtained recission of the default judgment. The respondent remained in occupation of the premises, despite being requested to vacate. The petitioners applied to the Transvaal Provincial Division of the Supreme Court for an order restoring possession of the premises to the first petitioner and ejecting the respondent from the premises. The matter came before de Wet J, who dismissed the application. The petitioners lodged an appeal to the full bench, and on appeal an order to restore possession of the premises to the first petitioner was granted. In the judgment, Neser J held as follows:[5]

> "Respondent is presently in occupation of the premises solely by reason of the judgment which has been rescinded. That judgment is a nullity and respondent can clearly derive no advantage therefrom nor can petitioners labour under any disadvantage as a result of that judgement. In my opinion petitioners are entitled to claim that any or any disadvantage caused thereby to themselves should be set aside and that the *status quo* prior to the judgment be restored. There is no question of spoliation As the default judgment is now a nullity, first petitioner is entitled to use the premises as she wills."

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3 Act 22 of 1994.

4 1951 (2) SA 496 (T).

5 At 499 F-H.

Lucas J and Bresler AJ, in concurring judgments, came to a similar conclusion. That decision was subsequently followed in the case of *Lottering v SA Motor Acceptance Corporation Ltd.*[6]

[12] It was held in *Maisel v Camberleigh Court (Pty) Ltd*[7] that where an owner has ejected a tenant from premises by means of a judgment which has subsequently been set aside, the tenant is entitled to be put back in occupation of the premises until evicted by proper process of law. The *onus* is on the owner to show that he cannot comply with the order, if such be the case. In that case, an order for the ejectment of the owner from the premises was granted.

[13] In all of the above cases, a specific order for the restitution of possession was prayed for and given. Mr Goddard, who appeared for the Phakathi family, asked for such an order under the prayer for alternative relief. Mr de Wet objected. He submitted that the issues relating to an order for the restoration of possession have not been fully canvassed in the affidavits. There are merits in Mr de Wet's submission. The dwellings which the Phakathi family occupied, were demolished If possession is restored to the family, where will they live? If the dwellings have to be rebuilt, who must rebuild them? May the Phakathi family take building materials (such as thatch) from the farm. In the light of the deteriorated relationship between the parties, Van Vos Lens may decide to bring a counter application under section 15 of the Land Reform (Labour Tenants) Act to secure the absence of the Phakathi family from the farm pending the outcome of proceedings for a final order in case no 51/2002.

[14] It is unfortunate that the Phakathi family may be forced to bring another application to secure their return to the farm, if the eviction order of 17 June 2003 is rescinded. Their legal representatives were, however, made aware of the point *in limine* several days before the hearing. They could have asked for an amendment of their notice of motion to include the requisite additional prayers, even if it would have involved the delivery of further affidavits and a postponement of the hearing. It is to be hoped that, if needs be, the parties will be able to reach a satisfactory agreement between them and that further litigation will be avoided.

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6 1962 (4) SA 1 (ECD).

7 1953 (4) SA 371 (C).

[15] The second point *in limine* taken by Van Vos Lens is that the rescission application was brought out of time. Rule 58(6) of the Land Claims Court Rules reads

> "A party may apply to the Court to rescind or vary any judgment or order granted in his or her absence, provided the application is filed within twenty days after he or she became aware of the judgment or order."
> (My underlining)

There are conflicting allegations as to when Mr Jambloed Phakathi became aware of the eviction order. Be that as it may, I am entitled to condone any non-compliance with the Rules.[8] As will appear from this judgment, the Phakathi family at all relevant times set out to resist their eviction. If it is so that the rescission application was filed later than twenty days after the Phakathi family became aware of the eviction order, I am entitled to condone (as I hereby do) the late filing thereof. That disposes of the second point *in limine*.

[16] I revert to the merits of the rescission application. A default judgment may be rescinded if "good cause" for the rescission is shown.[9] "Good cause" was defined in *Chetty v Law Society, Transvaal*[10] as follows:

> "The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairn's Executors v Gaarn* 1912 AD 181 at 186 *per* INNES JA.) But it 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."

Coetzee J in *Marais v Standard Credit Corporation Ltd*[11] reiterated that "good cause" is made up of two essential elements, *viz* a reasonable and acceptable explanation for the default and a *bona fide* defence, which *prima facie* carries some prospects of success.

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8 Rule 32(4)(b) of the Land Claims Court Rules.

9 Rule 59(7) of the Land Claims Court Rules.

10 1985 (2) SA 756 (A) at 765A-C.

11 2002 (4) SA 892 (W) at 895 G-H.

[17] I now proceed to deal with the first element of "good cause" The explanation tendered for the default is Mr Mbugisa's failure to carry out his instructions to enter an appearance to defend the application. Although Mr Mbugisa's failure is subject to criticism, must be remembered that he took his instructions on Saturday 8 March 2003 at a meeting which took place during a circuit visit by the Campus Law Clinic to the Newcastle area. Mr Mbugiza returned to his office in Durban the following Monday. He then forgot about the matter. His lapse of memory is understandable.

[18] In the case of *de Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd*[12] the gross negligence of a firm of attorneys, consisting of a complete failure to attend to a case over a long period of time, led to a default judgment against their client in a magistrate's court. The client applied for rescission of the judgment. The magistrate refused, and the client appealed to the Supreme Court. The appeal was successful. Jones J described the approach to be adopted as follows:

> "The magistrate's reasons correctly place emphasis on the neglect of the defendant's attorney which is, after all, the most significant feature which resulted in default judgment being taken against their client. But he does so out of context. The correct approach is not to look at the adequacy or otherwise of the reasons for the failure to file a plea in isolation. Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of nature of the defence, which is an all-important consideration, and in the light of all the facts and circumstances of the case as a whole. In this way the magistrate places himself in a position to make a proper evaluation of the defendant's *bona fides*, and thereby to decide whether or not, in all the circumstances, it is appropriate to make the client bear the consequences of the fault of its attorneys as in *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A). An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence, and hence that the application for recission is not *bona fide*. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties, bearing in mind the considerations referred to in *Grant v Plumbers (Pty) Ltd (supra)* and *HDS Construction (Pty) Ltd v Wait (supra)* and also any prejudice which might be occasioned by the outcome of the application. He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised and heard."

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12 1994 (4) SA 705 (E).

[19] Mr de Wet submitted that, after the Phakathi family instructed Mr Mbugiza to enter an appearance to defend the matter, they should have followed up and made sure that he did so. In this connection, the remarks of Smalberger J (as then was) in the case of *HDS Constructions (Pty) Ltd v Wait* are apposite:[13]

> "The defendant's default in the present matter was not due to any neglect or fault on its part or on the part of its officials. On the analogy of the decision in *Webster and Another v Santam Insurance Co Ltd* 1977 (2) SA 874 (A) at 883 it may well be that good cause can be said to exist in a matter such as the present where the default was due solely to the conduct of the attorney, and his negligence, whatever the degree thereof, could not reasonably have been foreseen, appreciated or guarded against by the client, so that such negligence will only operate against a defendant who could reasonably have been expected to have knowledge thereof, and who failed to take reasonable steps to remedy the situation."

The Phakathi family is comprised of unsophisticated people, who live far away from the offices of the Campus Law Clinic. I do not agree that, during the three months which have passed from the date of the instructions to the date of the default judgment, the family had any duty to enquire from Mr Mbugiza about the progress of their defence. In this respect, the facts in the present case differ from the facts in the case of *De Wet and Others v Western Bank Ltd*[14] on which Mr de Wet relied. In the latter case the appellants -

> ". . . . . appear to have manifested a complete disinterest in the conduct of the case after the interim settlement on 19 February 1973, and they have not proffered any acceptable explanation for their failure to keep in touch with Coligiounis, or with Lebos for that matter, as to the progress of the proceedings during the three and a half year period subsequent to the interim settlement."

[20] In the case of *Mnandi Property Development CC v Beimore Development CC*[15] Blieden J held that the purpose of the High Court rule dealing with the rescission of default judgments -

> ". . . is not to punish litigants who have failed to follow the rules and procedures laid down for civil proceedings. It is there to ensure that the defendant, who *bona fide* wishes to defend a case, is given the opportunity to do so despite his not having entered appearance to defend timeously."

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13 1979 (2) SA 298 (E) at 301H-302A.

14 1979 (2) SA 1031 (A) at 1044 B-C.

15 1999 (4) SA 462 (W) at 467C.

In my view, the same reasoning applies to Rule 58 of the Land Claims Court Rules.

[21] That brings me to the second component of "good cause", being a *bona fide* defence. The requirements to be met were described by Coetzee J in *Marais v Standard Credit Corporation Ltd*[16] as follows:

> "It is sufficient if the applicant 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."

[22] I have quoted the defence put up by the Phakathi family members against their eviction from the farm in some detail earlier in this judgment.[17] The defence is not far-fetched or fanciful. If the averments are proved, it would entitle the family to continue living on the farm. It is clear from the facts of this case that the family never acquiesced in the eviction, and at all relevant times intended to avail themselves of their rights under the Land Reform (Labour Tenants) Act and the Restitution of Land Rights Act.

[23] In my view, the application for the rescission of my order of 17 June 2003 must be granted. The Phakathi family should, however, be ordered to pay the wasted costs of Van Vos Lens, being the costs of obtaining the default judgment and for implementing the eviction on 16 July 2003 (including the sheriff's costs). Such costs have become wasted through no fault of Van Vos Lens, and it is not fair that Van Vos Lens should pay it. Apart from such order, and in line with the usual practice of this Court, no order as to costs will be made.

[24] It is ordered as follows:

(i) The default judgment granted against the applicants herein on 17 June 2003 in case number LCC 51/02 is hereby rescinded, and the applicants are granted leave to defend the proceedings.

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16 2002 (4) SA 892 (W) at 895I-J.

17 Para [8] above.

(ii) The applicants herein must, jointly and severally, pay the respondent's wasted costs in case number LCC 51/02, such costs being the costs for obtaining default judgment and for effecting their eviction, as taxed between party and party.

(iii) No order is made as to the costs of this application.

JUDGE A GILDENHUYS

3 SEPTEMBER 2003

For the Applicants:

Adv GD Goddard, instructed by *Campus Law Clinic*

For the Respondent:

Adv A de Wet, instructed by *Cox and Partners*

JAMBLOED PHAKATHI AND 5 OTHERS v VAN VOS LENS PROPERTY DEVELOPMENT CC

(**September 2003)

The case concerns an application for the rescission of judgement taken against the applicant, his wife and 4 children. The respondent instituted action in the Landclaims Court in case no 51/2002 against tha Phakathi family for their eviction from the farm Subdivision 2 of Kommissiekraal (also known as Saagskuilsnek) of which the respondent is the owner. The action was not defended. On 17 June 2003, Gildenhuys J granted default judgement against the defendants. The applicants were evicted from the farm.

The Phakathi family brought an urgent application for rescission of the mentioned judgement which application was defended. A significant fact is that a meeting was held between Mr Jambloed and Mr Mbugisa, a member of the Natal proffessional legal team of the Natal University's Campus Law Clinic, during which meeting, Mr Phakathi instructed Mr Mbugisa to defend the action. Mr Mbugisa later stated that he forgot about the meeting mentioned above and in error omitted to carry out his mandate to defend the action.

The Phakathi family raised several issues in their defence against eviction from the farm. They for example alleged that they only became aware of the eviction order against them in early to mid July 2003, after the sherriff told the family that they must vacate the farm. Mr Phakathi was a labour tenant as defined in the Land Reform (Labour Tenants Act) untill shortly before his eviction. The respondent alleged that the rescission application was brought out of time but the late filing thereof was condoned.

Gildenhuys J found that the defence put up by the Phakathi family was not far-fetched and not fanciful. He furthermore found that the family at all relevant times intended to avail themselves of their rights under the Land Reform (Labour Tenants) Act and the Restitution of Land Rights Act.

The apllication for rescission was granted but the applicants were ordered to pay the the costs of the repondent for obtaining default judgement and for implementing the eviction as such costs became wasted through no fault of the respondent.The applicants were furthemore granted leave to defend the proceedings.

Kindly note that-

1. this summary has been prepared by the staff of the Land Claims Court to assist the parties:

2. it does not form part of the Court's reasons for judgment:

3. the Department of Justice, the Court and its staff cannot accept any liability for any loss resulting from reliance on this document.