REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 31452/10

DATE:22/06/2011

NOT REPORTABLE

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

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DATE SIGNATURE

In the matter between:

M G HAMMOND First Applicant

M A HAMMOND Second Applicant

and

FIRSTRAND BANK LTD First Respondent

REAL PEOPLE HOUSING (PTY) LTD Second Respondent

J U D G M E N T

TSOKA, J:

[1] This is an application for rescission of judgment granted by this Court on 18 October 1999, some 11 years ago. The application is opposed.

[2] The approach adopted by courts in deciding applications for rescission of judgment is well set out in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (T). At 765A the court said the following –

> '*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. (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 357 - 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.*'

[3] It is crucial for the success of this application to determine whether the applicant's explanation of a delay of 11 years is reasonable and convincing and whether he has a *bona fide* defence, which *prima facie* carries some prospect of success.

WILFUL DEFAULT

[4] The applicant knew of the default judgment in November of 1999 when the caretaker of the Body Corporate where he lived, informed him that a sale of execution of his property is about to take place. He did nothing. On 2 December 1999 one Mr and Mrs J Levin arrived at his house and instructed him to move out of the house. He moved out without demur. Although he suspected that the Levins bought the house at the public auction, which auction the Body Corporate drew his attention to, he did nothing. He did not even enquire from the bank the nature and the grounds of Levins claim to the property. His explanation that he is a layman rings hallow. In October 2001 he was contacted by a representative of the second respondent who advised him that the bond he had with the first respondent was ceded to the second respondent who was then calling on him to settle the bond arrears.

[5] During the years 2003, 2008 and 2009 in spite of his knowledge that judgment had already been obtained against him, he took no steps to rescind the judgment. It was only on 12 August 2010 that the applicants launched the present application. The gravamen of applicants' explanation is that the first

applicant is a layman who is naïve. Other than this explanation, there are no reasonable and convincing reasons why the applicants were in default.

***BONA FIDE* DEFENCE**

[6] The applicants raise several defences such as prescription and that the first respondent had no right to obtain judgment against the second applicant to whom the first applicant is married out of community of property. The applicants further contended that the amount on which judgment was granted in favour of the first respondent is "*probably wrong*". The applicants, without any evidence, contended that judgment obtained against them was fraudulently obtained.

[7] The defence of prescription is misplaced. Judgment by default was obtained on 18 October 1999. This is the judgment that, according to the applicants, two years later was ceded to the second respondent. On this basis alone, I fail to see how the judgment debt had prescribed by the time it was ceded to the second respondent.

[8] It may be so that the applicants are married out of community of property. It must, however, be pointed out that the applicants were married in terms of the laws of England. In terms of the Deeds Registries Act 47 of 1937, registration of transfer of property of a bond, requires that such parties' marital status must be reflected on both the deed of transfer and the bond as married to each other in terms of the laws of England. The rationale behind

this requirement is to avoid interpreting, without expert evidence, the consequence of a foreign marriage. It is on this basis that at the time the bond was registered in favour of the applicants, their marital status was described as such in the bond. It is on this basis that the first respondent obtained judgment against the applicants.

[9] The contention that the amount on which judgment was obtained against the applicants is "*probably wrong*" is far-fetched and factually baseless. The further contention that the judgment was fraudulently obtained is factually unsustainable. The applicants' contention is premised on the wrong assumption that judgment was obtained on 11 September 2008. The assumption is wrong. This Court granted judgment by default on 18 October 1999. It appears from the court order, Annexure "MGH2" that in 2008 the registrar of this Court was requested a copy of the order of 18 October 1999. On 11 September 2008 the registrar affixed its date stamp on the court order. The contention of fraud is resultantly without merit.

[10] The application is not *bona fide*. The inordinate delay in launching this application, the lackadaisical attitude of the applicants with regard to the launching of this application 11 years after judgment was obtained against them, the disregard of the prejudice that the respondents might suffer, calls into question the *bona fides* of the applicants in launching this application. On the evidence before me, I am unable to find a *bona fide* defence which *prima facie* has some prospect of success. Although the application was brought late, there is no application for condonation. The applicants, dismissively,

suggest that as no prejudice is occasioned to the respondents, this Court should entertain the application and that should the application be opposed, such opposition would be opportunistic. The respondents were entitled to oppose the application. Their opposition is not opportunistic.

[13] The application deserves dismissal.

[14] In the result the application is dismissed with costs.

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M TSOKA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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