IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

11/02/2011

CASE NO: 12989/2004

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

11/02/2011 .....
DATE SIGNATURE

In the matter between:

ANDREW RONALD POTTER Applicant

and

RICHARD DOUGLAS AFFLECK Respondent

J U D G M E N T

MNGQIBISA-THUSI, J:

[1] This is an application in terms of which the applicant is seeking the following order:

1.1 that the default judgment granted against the applicant on 10 May 2010 be rescinded;

1.2 that the warrant of attachment and execution of the applicant's movable property and the subsequent writ of execution and the sale in execution, if any.

[2] The applicant and the respondent were members in three close corporations, namely, Greenland Engineering CC trading as Greenland Engineering; Greenmat Investments CC and Greenland Precision Engineering CC. Each held a 50% member's interest in each of the entities.

[3] On 22 October 2003 the applicant and the respondent concluded a written agreement ("sale agreement") in terms of which the respondent sold his 50% interest in each of the entities. In terms of the sale agreement the three entities were collectively referred to as the close corporation. The agreed purchase for the close corporation was R480 000,00 (clause 1).

[4] Further, the sale agreement provided, inter alia, the following:

5.1 The purchase price would be payable as follows:

5.1.1 R20 000,00 on or before 30 November 2003 and thereafter in equal instalments of R20 000,00 per month payable on or before the 7th of each successive month (clause 2.1);

5.1.2 The purchaser acknowledges that he requires no warranties regarding the membership interest in the close corporation purchased. The purchaser however warrants in favour of the seller that all the movable assets of Greenland Engineering CC will not be encumbered in any way further until the full amount due and payable to the seller has been paid. ("clause 2.1) ("clause 2.1)

5.1.3 The parties specifically agree that should the close corporation be liquidated for any reason and the purchaser receive any credit dividend from the liquidator that the credit dividend will be paid over to the seller to cover any

> outstanding amount due and payable to the seller. If the close corporation however is liquidated and there is no credit dividend payable to the purchaser, the parties specifically agree that the purchaser will not be liable to the seller for any payment in terms of this agreement, and the parties specifically agree that the seller will have no further claim against the purchaser (clause16).

[5] As a result of financial difficulties the applicant allegedly experienced after taking over the close corporation, he liquidated Greenland Engineering CC. In his founding affidavit the applicant contends that after Greenland Engineering was liquidated and since the liabilities of the close corporation exceeded its assets, no dividend was payable from the proceeds of the liquidation of the close corporation. Further that there was a shortfall and an amount of R201 586.17 is still owed to the Standard Bank. It is not clear from the applicant's founding affidavit where he refers to the close corporation whether he is referring to Greenland Engineering or to the three entities which were the subject-matter of the agreement of sale in which they are collectively referred to as the close corporation.

[6] On 2 May 2006 the respondent issued summons against the applicant claiming an amount of R420 000,00, being the balance after the applicant had paid only three instalments towards the purchase price. The applicant filed his plea and the matter was set-down for hearing on 8 July 2008. However the hearing was postponed twice at the instance of the applicant. On the granting of the last postponement the parties were also granted the right to

ask for a preferential date. This was granted and the matter was set-down for 10 May 2010. The notice of set-down was served on the applicant personally on the applicant on 15 March 2010. However, the applicant was not at court nor was he represented. Applicant alleges that he had sent a letter to the Deputy Judge President indicating his inability to attend court as he could not afford legal costs. A default judgment was granted, ordering the applicant to pay the respondent the amount owing plus costs on an attorney and client scale.

[7] In support of his application for the rescission of the judgment of 10 May 2010, the applicant submits that he was unable to attend court for two reasons. Firstly, that his girlfriend was very sick and he had to attend to her. As a result he was emotionally stressed and financially drained as he had to care and support his girlfriend and also pay for her medical bills. He could therefore not afford to obtain the services of a lawyer. He contends that he was not in wilful default as it has always been his intention to defend the action brought against him by the respondent and had also he had alerted the DJP of his non-attendance and had requested a postponement.

[8] The applicant further submits that he has a bona fide defence against the respondent's action in that at the time he took control of the close corporation, its liabilities exceeded its assets. As a result after a few moths he had no choice but to liquidate the close corporation. As indicated in paragraph 5 above, the applicant when making reference to the close corporation in his founding papers does not seem to distinguish between Greenfield Engineering, the liquidated entity and that three entities collectively referred to in the sale agreement as the close corporation particularly as he is

basing his defence on one of the clauses in the sale agreement. As his defence the applicant is relying on clause 16 of the sale agreement the portion of which reads as follows:

> "... If the close corporation however is liquidated and there is no credit dividend payable to the purchaser, the parties specifically agree that the purchaser will not be liable to the seller for any payment in terms of this agreement, and the parties specifically agree that the seller will have no further claim against the purchaser."

[9] It was submitted on behalf of the respondent that the application for the rescission of the judgment of 10 May 2010 should be dismissed in that the applicant was in wilful default since he was aware of the date the matter in the main action was set down and had elected not to appear in court. Further that the applicant had no bona fide defence to the respondent's claim as the clause (16) on which the applicant was relying as his defence is applicable only in the event that the close corporation as defined in the agreement of sale was liquidated. Since the applicant had only liquidated one of the entities making up the close corporation and the other two were still trading, the applicant could not claim that he was no longer liable to pay the respondent the balance of the purchase price for the three close corporations sold to him.

[10] It was further submitted by the respondent that it had come to his knowledge that on 24 November 2004 the applicant had sold the property of Greenmat Investments CC (Greenmat Investments) for an amount of R750 000,00 to an entity known as NJC Engineering Services CC. It appears that Greenmat Investments was the only entity amongst the collective close corporation which owned property.

[11] The Applicant has not filed a replying affidavit and the allegations made by the respondent in his answering affidavit therefore stand as undisputed.

[12] Under the common law, in order for the court to grant an order rescinding a previous order or judgment the applicant has to show sufficient cause. In other words the applicant must give a reasonable explanation for his default, must show that he has a bona fide defence and must also show that he has a bona fide defence which prima facie has some prospect of success. *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765.

[13] The applicant has given an explanation for his default in that although he had every intention to defend the claim against him, he was not in a mental state to attend court since he was emotionally strained as a result of his girlfriend's illness and the support he had to give him and was also financially compromised due to payment of the girlfriend's medical bills. I am prepared to give him the benefit of the doubt that he was not wilful in not attending court particularly because he had taken steps to inform the DJP of his inability to come to court and had requested for a postponement. However, I am of the view that the applicant has not shown that he has a bona fide defence against the respondent's claim which prima facie has some prospect of success. In terms of the agreement between the applicant and the respondent, the applicant would not have been liable to pay the respondent anything had the close corporation as defined in the agreement of sale been liquidated. This means that the applicant would have been absolved had all three close corporations making up the close corporation as defined been liquidate. The applicant in his founding papers does not explain what the position of the other two close corporations, Greenmat Investments and Greenland Precision

Engineering CC is. Further, he does not answer to the allegations that he has sold the property of Greenmat Investments, and if he has, what he has done with the proceeds thereof.

[14] The applicant has clearly not discharged the onus of showing that he has a bona fide defence which, prima facie, carries some prospect of success.

[15] Accordingly the following order is made:

15.1 The application for the rescission of the judgment granted on 10 May 2010 and ancillary relief is dismissed with costs.

MNGQIBISA-THUSI J
JUDGE OF THE NORTH GAUTENG HIGH COURT