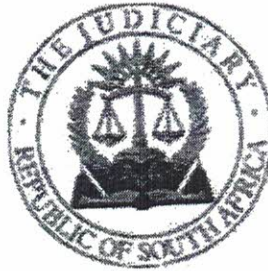


21/9/17

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: ~~GG~~ 55221/2015

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
14. 9. 2017	
DATE	SIGNATURE

In the matter between:

OREBOTSE MOSEKI

Applicant

and

CONRAD ALEXANDER STARBUCK N.O.

First Respondent

HANLIE HENNING N.O.

Second Respondent

In re:

CONRAD ALEXANDER STARBUCK

First Applicant

and

First Applicant

HANLIE HENNING N.O.

And

First Respondent

OREBOTSE MOSEKI

And

Second Respondent

ANY OTHER OCCUPIERS OF THE PROPERTY

KNOWN AS 11 BEGONIA AVENUE, KARENPARK, AKASIA

And

Third Respondent

CITY OF TSHWANE LOCAL MUNICIPALITY

J U D G M E N T

TONJENI, AJ:

INTRODUCTION

- [1]. This is an application for rescission of an eviction order granted on the 7th September 2015.
- [2]. The Applicant is before the Court, unrepresented. The Notice of Motion was filed on the 11th November 2015. Respondents filed an Answering Affidavit to which no Replying Affidavit was filed. No Heads of Argument were filed by the Applicant. Respondent filed theirs on the 22nd March 2017. Respondent served the notice of set down for this matter on the 20th April 2017.
- [3]. On the 5th September 2017, Counsel for the Applicant brought a substantive application for the postponement of the hearing on the basis that they have not had the time to consult with the Applicant to enable them to present his case.

- [4]. Respondent objected to the application for postponement, alleging that this is just another ploy to delay this case. Applicant is *dominis litis* and should prosecute the application. It is noted that there is no Replying Affidavit by the Applicant, and his Heads of Argument have not been filed.
- [5]. It is submitted for the Applicant that the non-postponement of this application would result in serious prejudice for the Applicant because he and his family would be evicted from the premises that is a place of primary residence for them.
- [6]. In deciding the application for postponement, it is imperative to keep the significance of the underlying issues and context in mind. The dispute in this matter arises out of a sale at an auction of the immovable property belonging to the estate of NKACEDI CONSTRUCTION & CATERING CC. Applicant is the son of the girlfriend of the deceased owner of NKACEDI CONSTRUCTION & CATERING CC, who died in 2011. The liquidators of the estate are the respondents in this matter.
- [7]. Applicant bid successfully at the auction to buy the immovable property. This was on 21st October 2014. One of the clauses of the Deed of Sale was : "the balance of the Purchase Price shall be paid in cash and secured, to the satisfaction of the Seller's Attorneys, by a written guarantee from a registered financial institution, payable free from exchange, against registration of transfer of the property into the purchaser's name.
- The aforesaid guarantee shall be presented and/ or cash shall be payable by the Purchaser to the Seller's Attorneys within 30 calendar days from date of acceptance hereof by the seller."
- [8]. In the event of a breach of the terms, the aggrieved party would be entitled to cancel the agreement.
- [9]. To date, Applicant and his family reside on the "property" and the balance of the purchase price has not been paid. In fact, only the deposit was paid to the auctioneer.

After letters were written and sent to the Applicant indicating that he was in breach of the conditions of the sale and later, that the agreement / offer was cancelled, Respondents approached this honourable court for an eviction order on the 7th September 2015, and it was granted.

It is that order that the Applicant seeks to rescind now. And, it is that application that he seeks to postpone because Counsel has not had time to prepare.

- [10]. It is of importance to note that the notice of application for postponement was received by Respondents yesterday afternoon.

In *National Police Service Union and Others v Minister of Safety and Security and Others* 2000 (4) SA CC 1110 at 1112 C-F, Mokgoro J said the following in respect of applications for postponement :

"For postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for postponement seeks an indulgence from the court. Such postponement will not be granted unless this court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the court and cannot be secured by mere agreement between the parties.

In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application was timeously made, whether the explanation given by the application for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed by the court to determine whether it is in the interests of justice to grant the postponement."

- [11]. Turning back to the case at hand, the reasons or explanation tendered for the application for postponement are not satisfactory to the Court. Applicant was aware from the 6th June 2016 that his previous attorney of record, Mr Chris Greyvenstein

had withdrawn and terminated his mandate to represent him. This was more than a year ago. The applicant has failed to show that UNISA Legal Aid Clinic was ever approached and accepted his instructions, and has tendered no proof thereof. The notice of set down of this application was served on 20th April 2017. It is not clear either, why his attorneys, Dyason Incorporated, are not before court today, and applicant has not explained this to court.

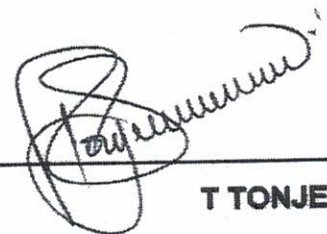
- [12]. It is important for me to record that the property on which Applicant and his family are staying is the property belonging to a Close Corporation that has since been wound up, and as such cannot be a place of primary residence.
- [13]. The court is informed that Applicant is not paying for his occupation of the property in question. This is prejudicial to the estate. Also, the winding up of the estate is being held up and cannot be finalised all because of delays occasioned by the Applicant.
- [14]. The court ruled that it could not be in the interests of justice or even public interest that this application be postponed and accordingly dismissed the application.
- [15]. Counsel for the application withdrew as he said he had no instructions to proceed any further. Application and his mother were present in court and the process forward was explained to them, i.e. that Applicant should then proceed to prosecute his case. After about half an hour, Applicant requested a little bit of time to seek representation for his case. The court acceded to this request and stood the matter down to today the 7th September 2017. A costs order at attorney-client scale was made against the Applicant.
- [16]. On the 7th September 2017 Applicant appears unrepresented. It is explained to him that he needs to proceed with his application for rescission of the order granting eviction against him. He is adamant that all he wants is to be legally represented and that he will not say anything else. It is explained to him that his founding affidavit is in his hands. A lot of time has lapsed since he became aware of the eviction order against him, and a notice of set down of his own application was served on him, and it is not clear why he is not represented, and he is not taking the court into his confidence in respect of that.

- [17]. Respondent applies for the dismissal of the applicant's claim. The Applicant's claim was based on Uniform Rule 31(2) (b) and to sustain it a party seeking relief must present a reasonable and acceptable/ satisfactory explanation for his default; and have a bona fide defence, which prima facie carries some prospect of success on the merits.
- [18]. Applicant received the application for eviction and was aware that the matter was set down for the 7th September 2015. He was in court in person but neglected to make his appearance known when the case was called, as a result of which the order was granted. On his version, he was advised by the presiding judge to seek legal representation and to lodge an application for rescission.
- [19]. At the time, Applicant's attorneys of record were C. Greyvenstein Attorneys. There is no explanation as to why his attorneys were not in court or why no other attorney had been instructed to represent him.
- [20]. Applicant was fully aware of the date of set down in this matter.
- [21]. Applicant's defence seems to be that the "Deed of Sale" was never cancelled, and as such the agreement is still valid and binding.
- [22]. Even on Applicant's version, it is clear that he received Annexure "OMM 4" dated 24th November 2015. This was a reminder that there were documents and information that were outstanding, 30 days after the agreement was signed. The same letter carried the notice that the agreement would be cancelled if the non-compliance with the terms and conditions persisted beyond seven days.
- [23]. Annexure "OMM 5", a letter from the then attorneys of the Applicant dated 15th March 2015 in the last paragraph thereof says :*"Kindly take note that our client has all intention to continue with the sale, that the agreement is still in place as it has not been properly cancelled in terms of the provisions of the agreement, and our client will supply guarantees within a period of thirty days hereof."*
- [24]. The guarantees have not been supplied. Applicant is not advancing any reason that explains his default. During 2016, Applicant's mother Ms. S.M. Lukhelo made an

offer to purchase the property for R 700 000-00. This offer was accepted subject to a pre-condition that a deposit had to be paid. She failed to adhere to the pre-condition of paying a deposit on the purchase price.. The fact that this happened underscores the point that the original agreement between her son, the applicant in this case, and the respondents no longer existed.

- [25]. Applicant before this court today yet again fails to show good cause as to why the eviction order granted on the 7th September 2015 should be rescinded. His founding affidavit does not explain fully why the judgment should be rescinded. There is no bona fide defence that is tendered in the founding affidavit or by the Applicant himself before court today.
- [26]. On the other hand, the property that is in issue is subject to a mortgage bond under Standard Bank. The interests of the liquidators and Standard Bank are being seriously prejudiced by the wilful disregard of the due process of the law, by the Applicant. If there is any prejudice to the Applicant because of this eviction order having been granted, then it seems to be what Applicant attracted to himself.
- [27]. The present case does not require us to decide whether section 26 (1) of the Constitution may be compromised. This is property owned by a Close Corporation that was liquidated because the owner passed away in the year 2011. The property is mortgaged under Standard Bank. Applicant had an opportunity to buy the property and he failed to comply with conditions of the sale. The ownership of the property never passed to him. As such, this cannot be the "primary residence" of the Applicant. The Applicant has showed no right of claim to possession of the property to this court.
- [28]. In view of the foregoing, I make the following order:

Application for rescission of judgment on the eviction order granted on the 7th September 2015 is dismissed with costs.



T TONJENI

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO.: 55221/2015

HEARD ON: 05 SEPTEMBER 2017

FOR THE APPLICANT: ADV.

INSTRUCTED BY:

FOR THE RESPONDENT: ADV.

INSTRUCTED BY:

DATE OF JUDGMENT: SEPTEMBER 2017