THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 128/06

In the matter between :

LODHI 2 PROPERTIES INVESTMENTS CC First Appellant

LODHI 3 PROPERTIES INVESTMENTS CC Second Appellant

and

BONDEV DEVELOPMENTS (PTY) LTD Respondent

Before:	**STREICHER, LEWIS, PONNAN, MAYA JJA & SNYDERS AJA**
Heard:	**23 MAY 2007**
Delivered:	**1 JUNE 2007**
Summary:	Rescission of default judgments – Rule 42(1)(a) – default judgment to which plaintiff procedurally entitled cannot be said to have been granted erroneously in the light of subsequently disclosed defence.
Neutral citation:	This judgment may be referred to as *Lodhi 2 Properties v Bondev* [2007] SCA 85 (RSA)

STREICHER JA

STREICHER JA:

[1] The applicants apply for leave to appeal against a judgment in the High Court, Johannesburg in terms of which that court (the court a quo) dismissed an application for the rescission of two separate judgments in favour of the respondent, one against the first applicant and the other against the second applicant.

[2] The applicants are close corporations with one Muhammed Islam Lodhi as their sole member. The respondent is a property developer. On 30 March 2001 and in terms of a written agreement of sale the first applicant purchased Erf 4052, Eldoraigne Extension 40 (at the time a proposed township) from the respondent for a purchase price of R119 000. On the same day the second applicant, in terms of an agreement of sale with identical terms and conditions, purchased Erf 4054, Eldoraigne Extension 40 for a purchase price of R129 000. Ten per cent of the purchase price was payable upon signature of the agreement to attorneys Weavind and Weavind who had to hold the amount in an interest bearing trust account. The interest was to accrue for the benefit of the respondent. The balance of the purchase price was to bear interest at a rate equivalent to the prevailing prime overdraft rate charged by the Absa Bank as from the date of proclamation of the township. The only evidence as to when proclamation took place is a statement by the respondent to the effect that proclamation took place 'during approximately April 2001'. Transfer of the properties was effected on 1 May 2001. The applicants did not disclose when the deposit was paid or what amount, if any, was paid in respect of interest. In the result there is no evidence that any interest was paid by any of the applicants or that any interest was received by the respondent.

[3] The agreements of sale provided that the purchaser had to take occupation of the property sold on date of proclamation of the township and that the purchaser would from that date onwards 'be liable for the payment of all rates and taxes, imposts, or other municipal charges and Home Owners Association levies, levied thereon.' Again the applicants did not disclose what amount, if any, was paid in respect of such levies or rates and taxes and again there is, in the result, no evidence that any amount was paid in respect of levies or rates and taxes.

[4] Clause 11 of the agreements of sale provides as follows:

'BUILDING PERIOD

The purchaser undertakes to erect buildings on the PROPERTY to the reasonable satisfaction of the SELLER within eighteen (18) months of date of proclamation, failing which the SELLER shall be entitled (but not obliged) to claim that the PROPERTY be retransferred to the SELLER at the cost of the PURCHASER against repayment of the original purchase price to the PURCHASER, interest free.'

[5] The applicants failed to erect any buildings on the properties within 18 months of proclamation and for a period of two years thereafter. As a result the respondent on 4 March 2005 served an application on each of the applicants at their registered address in terms of which it claimed retransfer of the properties against payment of the amount of R119 000 in the case of the first applicant and R129 000 in the case of the second applicant.

[6] The registered address of the applicants where the applications were served was the address of the applicants' erstwhile auditors E B Mayat & Associates. By the time that service was effected the applicants had changed their auditors and since September 2001 their auditors had been Moola &

Associates. However, due to an oversight, they had not changed their registered address. The applications only came to the knowledge of the applicants on 24 March 2005 when default judgments for the relief claimed by the respondent had already been granted. The applicants thereupon applied for the judgments to be set aside on the basis that they had been erroneously sought or granted. The court a quo dismissed the application and also an application for leave to appeal against its judgments. The subsequent application to this court for leave to appeal was referred for oral argument in terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959.

[7] Rule 42(1)(a) provides:

'The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) . . . .'

[8] The applicants submit that the judgments were granted erroneously for two reasons. The first error according to them is that a notice in terms of clause 8 of the agreements to rectify the breaches of the agreement was required before retransfer of the properties could be claimed, alternatively that a notice should in any event have preceded the launching of the applications. Secondly they contend that the judgments were granted erroneously because certain facts of which the judge who granted the judgments were unaware would have precluded him from granting the judgments had he been aware of such facts. In this regard they submit that as a result of the respondent's withdrawal from the agreements, and in terms of the agreements, they forfeited the right to restitution of rates and taxes, levies and interest paid under the agreements.

They contend that the forfeiture is subject to moderation in terms of the Conventional Penalties Act 15 of 1962.

[9] None of these submissions were foreshadowed in the affidavits filed by the applicants in support of their application for rescission of the default judgments. In any event there is no merit in either of them.

[10] Clause 8 of the agreements provides as follows:

'If the PURCHASER breaches any of the provisions of this Agreement, and fails to comply with a written notice by the SELLER to rectify such breach, within 7 (SEVEN) days, calculated from the date on which the notice was handed to the PURCHASER or sent to him by prepaid registered post the SELLER shall be entitled without prejudice to any of its rights which the SELLER may have in law, to: . . . '

[11] Clause 11, on the other hand, specifically deals with the failure of the purchaser to perform his obligation to erect buildings on the property to the reasonable satisfaction of the seller within 18 months of date of proclamation and provides that the seller would in those circumstances be entitled to claim retransfer of the property against payment of the purchase price. It is, therefore, clear that in the case of such a breach no notice is required. See in this regard *Consolidated Employers Medical Aid Society v Leveton* 1999 (2) SA 32 (SCA) at 41A-C where Schutz JA agreed with Prof Christie that there is no reason why the maxim *generalia specialibus non derogant* (general words do not derogate from special ones) should not be used also in interpreting contracts.[1]

[12] The applicants failed to perform their obligations to erect buildings on the properties within 18 months of proclamation and a period of two years thereafter whereupon the respondent became entitled to claim retransfer of the

[1] R H Christie *The Law of Contract in South Africa* 5 ed p 223.

properties against repayment of the purchase price. By serving the applications in terms of which it claimed such retransfer at the registered address of the applicants the respondent did what it was entitled to do in terms of the agreements. No other notice of its claim was required.

[13] The submission in regard to the second alleged error amounts to saying that the applicants have a defence, which, if it had come to the knowledge of the judge who granted the default judgments, would have precluded him from granting the default judgments. The defence, presumably in the form of a counterclaim, is for the moderation of what the applicants now contend to be a forfeiture provision in the agreements of sale in respect of rates and taxes, levies and interest paid in terms of the agreements of sale.

[14] As stated above no mention of this 'error' is made in the affidavits filed in support of the application for rescission of the judgments. It is not even alleged that the agreements contain a forfeiture clause in respect of rates and taxes, levies and interest, or that rates and taxes, levies and interest were in fact paid by the applicants or that the applicants are entitled to repayment of an amount that had been paid in respect thereof.

[15] The applicants allege in their founding affidavit that clause 11 'may well be unenforceable for various reasons' and that it is 'vague in its wording and that for this reason it is void and unenforceable'. They allege furthermore that clause 11 'is also silent on the question compensating a Purchaser in respect of improvements to the Erf, rates and taxes and levies to the HOA and other expenses incurred in the time period between transfer to such Purchaser and a retransfer to the Respondent'. To the respondent's answer that this allegation is irrelevant the applicants replied that it is definitely of relevance in that 'Clause 11's silence on the issue of the various types of compensation raised,

contributes to its vagueness'. It is only in the context of clause 11 being vague and unenforceable that mention is made in the affidavits of levies, rates and taxes and it is the unenforceability of clause 11, due to its vagueness, that would appear to be the basis for the allegation in the founding affidavit that the default judgments were erroneously granted. The applicants did not, however, persist with the submission that clause 11 is void and unenforceable.

[16] It follows that the applicants did not make out a case that the judgments by default had been granted erroneously however wide a meaning is given to the word 'erroneously' as used in rule 42(1)(a).

[17] In any event, a judgment granted against a party in his absence cannot be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the judge who granted the judgment. In support of their contention to the contrary the applicants relied on authorities such as *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) and *Stander v Absa Bank* 1997 (4) SA 873 (E) to the effect that in an application for rescission of a default judgment in terms of rule 42(1)(a) a court may in certain circumstances have regard to facts of which the judge who granted the judgement was unaware in order to determine whether the judgment had been granted erroneously.

[18] In *Nyingwa* at 510F-G White J relying on *Topol v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W); *Frenkel, Wise & Co (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd* 1947 (4) SA 234 (C); *Holmes Motor Co v SWA Mineral and Exploration Co* 1949 (1) SA 155 (C) said:

'It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting

of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment.'

[19] In *Topol* an application was dismissed in the absence of the applicants on the basis that the respondent had given notice to the applicant of the setting down of the application and that the applicants despite their knowledge of the hearing were in default.[2] The application for rescission in terms of rule 42(1)(a) was successful. White J, in *Nyingwa,* understood the factual position in *Topol* to have been that notice of the set down of the application had not been given to the applicants and that the dismissal of the initial application was for that reason held to have been erroneous.[3] If that had indeed been the factual position in *Topol* the respondent in that matter would procedurally not have been entitled to a judgment in its favour, the granting of the judgment would for that reason have been erroneous and there could have been no objection in the rescission application to evidence to the effect that proper notice of set down had in fact not been given.

[20] *Frenkel* was a case in which a default judgment was rescinded on the basis that it had been granted under a misapprehension. The misapprehension would seem to have been that the legal representatives wrongly assumed that the capital sum claimed had not been paid. It was, therefore, not a case of a judgment having been granted erroneously but a case of a judgment having been sought erroneously. In *Holmes* the rescission of a default judgment was not granted on the basis of the judgment having been granted erroneously.[4]

[21] Although not altogether clear it would appear that White J misunderstood the factual position in *Topol*. It seems to me that notice of set down had been given in that case but that the judge who granted default

[2] At 648B.
[3] At 510E-F.
[4] At 156.

judgment was held to have granted the judgment erroneously by reason of the subsequently disclosed fact that the defaulting party had not been in wilful default.[5] Erasmus J had shortly before the judgment by White J in *Nyingwa* differed from the finding in *Topol* and said that in the light of the fact that the *Topol* matter had been properly enrolled and that all the rules of court had been complied with, the plaintiff was quite within its rights to press for judgment in terms of the rules (see *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 472D). Bakoven Ltd contended that judgment had erroneously been granted against it in that although the matter had been properly set down for trial it did not have knowledge of such set down.[6] Erasmus J said:[7]

'An order or judgment is "erroneously granted" when the Court commits an "error" in the sense of a "mistake in a matter of law appearing on the proceedings of a Court of record" (*The Shorter Oxford Dictionary*). It follows that a Court in deciding whether a judgment was "erroneously granted" is, like a Court of appeal, confined to the record of proceedings.'

He concluded that the judgment granted against Bakoven Ltd in its absence could not be said to have been erroneously granted 'in the sense contemplated in Rule 42(1)(a), as applicant cannot point to any error or irregularity appearing from the record of proceedings'.

[22] In *Stander* Nepgen J held that *Bakoven* 'was wrongly decided insofar as it was held that a Court, in deciding whether a judgment was "erroneously granted", is confined to the record of the proceedings'.[8]

[23] The applicants in *Stander* applied for the rescission of an order of absolution from the instance which had been granted against them when they failed to appear at the trial of an action which had been instituted by them, the trial having been set down properly. Nepgen J held that it was clear from the judgment of Leach J, who granted the order of absolution from the instance,

[5] At 648A-D.
[6] At 467J and 470J.
[7] At 471F-G.
[8] At 882A-B.

that he had come to the conclusion, on the facts placed before him, that both the applicants were in deliberate default of appearance.[9] He concluded that there could be no doubt that when Leach J made the order of absolution from the instance 'it was, on the basis of the information available to him at that stage, a proper and an appropriate order to make'.[10] He was however of the view that had Leach J been aware of the facts placed before him in the application for rescission Leach J would not have concluded that the applicants were 'in wilful and deliberate default of appearance'[11] and that had Leach J been approached in Chambers later that morning and had it been explained to him what had transpired, the probabilities were that Leach J would have recalled his order.[12] Referring to the above quoted dictum of White J, Nepgen J said:[13]

'If it was intended to convey, by the use of the word "precluded", that the fact has to be of such a nature that the granting of the judgment would have been incompetent, I am of the view that it goes too far. . . .

The conclusion to which I have come, therefore is that I am entitled to have regard to facts, which do not appear from the record of proceedings and of which Leach J was unaware, in considering whether the order he made was "erroneously granted" in the sense referred to in Rule 42(1)(a).'

[24] I agree that Erasmus J in *Bakoven* adopted too narrow an interpretation of the words 'erroneously granted'. Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service

[9] At 876E.
[10] At 880E-F.
[11] At 880C-D.
[12] At 880D-E.
[13] At 884B-D.

wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously.[14] See in this regard *Fraind v Nothmann* 1991 (3) SA 837 (W) where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant's residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously.[15]

[25] However, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the judge who granted the judgment, as he was entitled to do, was unaware, as was held to be the case by Nepgen J in *Stander*. See in this regard *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) paras 9 – 10 in which an application in terms of rule 42(1)(a) for rescission of a summary judgment granted in the absence of the defendant was refused notwithstanding the fact that it was accepted that the defendant wanted to defend the application but did not do so because the application had not been brought to the attention of his Bellville attorney. This court held that no procedural irregularity or mistake in respect of the issue of the order had been committed and that it was not possible to conclude that the order had

[14] *Clegg v Priestley* 1985 (3) SA 950 (W) 954C-J. *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) paras 9-10.
[15] At 839H-I.

erroneously been sought or had erroneously been granted by the judge who granted the order.[16]

[26] Nepgen J found support for his conclusion in *Theron NO v United Democratic Front (Western Cape Region)* 1984 (2) SA 532 (C). In that case an order had been granted against Theron in his absence after short notice of the application and although no papers of any kind had been filed and no papers had been served on him.[17] The order was nevertheless granted on the basis of an assumption on the part of the judge that Theron had been given sufficient notice and that he had deliberately decided not to appear at the hearing of the application. In the application for rescission Vivier J found, on the facts placed before him, that these assumptions were wrong[18] and that the order had for that reason been granted erroneously. In my view the judgment cannot be faulted. Regard was had to evidence external to the record of proceedings as it existed at the time the order was granted in order to determine whether proper notice had been given. Whether Theron wanted to appear at the hearing was a relevant consideration in determining whether sufficient notice had been given. Vivier J in effect found that proper notice had not been given.[19] As a result the UDF was procedurally not entitled to the order sought when it was granted. The order was for that reason erroneously granted. In *Stander* the plaintiffs who obtained an order in their favour was, unlike the UDF in *Theron*, procedurally entitled to the order when it was granted and the fact that it subsequently transpired that the defendants were not in wilful default could not transform that order, which had validly been obtained, into an erroneous order.

[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have

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[16] Para 9.
[17] At 533G-H and 534A.
[18] At 536C.
[19] At 535G and 536C.

been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.

[28] For these reasons the application for leave to appeal is dismissed with costs.

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P E STREICHER
JUDGE OF APPEAL

CONCUR:

LEWIS JA)

PONNAN JA)

MAYA JA)

SNYDERS AJA)