REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL – DURBAN

CASE NO. 6210/2008

In the matter between:

RGS PROPERTIES (PTY) LTD **APPLICANT**

and

ETHEKWINI MUNICIPALITY **RESPONDENT**

JUDGMENT

Delivered on 22 July 2010

NGWENYA AJ:

INTRODUCTION

[1] This is an opposed application for a rescission of a default judgment. The applicant was represented by Mr A.B.G Choudree and Mr G.D Goddard appeared for the respondent.

THE PARTIES

[2] The applicant is a private company and a registered owner of an immovable property described as Erf 580 Isipingo, Registration Division FT/ Province of KwaZulu Natal, in extent 4669 square metres. Respondent is a local authority in whose area of jurisdiction the applicant's property is situated.

BACKGROUND

[3] Pursuant the default judgment granted against the applicant on 30 October 2007, for the payment of a total sum R435 498-29 together with interest thereon at the rate of 15.5% per annum, respondent sought to execute applicant's property described above. Applicant's sole director deposed to an affidavit contending that he only become aware of the existence of the default judgment for the first time on 6 May 2008. This was when the Sheriff served on him a copy of the Notice of Attachment together with a copy of the Writ of Execution. From then onwards he promptly took the necessary steps to stop all further proceedings against the applicant and also to seek the default judgment set aside.

DISPUTES BETWEEN THE PARTIES

[4] The gravamen of the matter is whether the applicant has disclosed a defence in its papers or not. In the papers filed of record the following facts are either common cause or not placed in dispute.

[5] For sometime prior to the default judgment being obtained, there has been an ongoing perennial dispute about the actual rates the respondent should levy on the applicant's property. This is so because although not subdivided, a portion of the applicant's property was donated to the respondent for road usage. Furthermore there is a municipal drain which runs through the applicant's property. However, it would appear that at all times whenever the respondent values applicant's property, it includes those portions of the property which belong to the respondent. As a

result applicant has lodged for each year an objection with the respondent which remains unresolved.

[6] The objections had not been resolved because, it would appear that the Valuation Appeals Board had not considered any of the objections raised by the applicant. It is not evident from the record whether it was ever constituted in the first place. This notwithstanding respondent sought and obtained judgment by default which is now the subject of this application.

SUBMISSION BY COUNSEL

[7] Mr Choudree for the applicant submitted that there was an obligation on the part of the respondent to ensure that it levies rates accurately in terms of the law before it could enforce it. He conceded that the fact that an objection has been lodged against the valuation on its own is not a good reason why payment of rates should not be enforced[1]. However in the instant matter, he argued the discrepancy between what the respondent sought to recover from the applicant and what it subsequently seeks to enforce as what respondent refers to as a compromised rates, is huge. The amount on which judgment was obtained is R435 498-29. The so called compromised rates amount is R154 000-00.

[8] It was Mr Choundree's further submission that it is unconstitutional for the respondent to rely on a judgment which was obtained on entirely incorrect valuation and for an incorrect amount.

[1] In ***Kungwini Local Municipality v Silver Lakes Home Owners Association 2008 (6) SA 187 (SCA) at 200E*** the Court deplored the notion of pay now and argue later.

[9] For the respondent, Mr Goddard submitted that withholding payment of rates amounts to unlawful self-help. It is his submission that this Court has no jurisdiction to determine whether the rates were correctly assessed or not. In this respect he sought reliance on case law[2]. He submitted that the obligation to pay rates is not affected by any appeal against a rates valuation. He however conceded that there are circumstances in this case which may lead the court to exercise its discretion in favour of the applicant.

APPLICABLE LEGAL PRINCIPLES

[10] In ***Naidoo v Cavendish Transport Company (Pty) Ltd 1956 (3) SA 244 (D)*** the court faced with similar contentious issues as the one before me associated itself with the views expressed in two earlier decisions in ***Joosub v Natal Bank, 1980 TS 375*** and ***Scott v Trustee, Insolvent Estate Comerma, 1938 WLD 129***, where the court's remarks were to the effect that the court should not scrutinize too closely whether the defence is well founded, as long as *prima facie* there appears to the court sufficient reasons for allowing the defendant to lay before court the facts he thinks necessary to meet the plaintiff's claim and that where a defendant has never clearly acquiesced in the plaintiff's claim but persisted in disputing it, the court should be slow to refuse him entirely an opportunity to have his defence heard.

[2] ***Pietermaritzburg Combined Residents and Ratepayers' Association and Others v Pietermaritzburg City Council 1993 (3) SA 371 at 374H--375b***; ***Coronation Freehold Estates, Towns and Mines Ltd and Another v Balfour Municipality 1967 (4) AS 162 TPD at 169H***; ***North and South Central Local Councils v Crystal Upholsterers and Others unreported DCLD case no. 3314/98 at 8***

[11] The principles enunciated in ***Naidoo*** above have been followed in a number of cases. (See for example ***Galp v Tansley N.O 1966 (4) SA 555 (C), at 560; Knitzingerv Northern Natal Implement Company (Pty) Ltd 1973 (4) SA 542 (N) at 546 and Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A).***

[12] I may add to this principle that judgment by default is inherently contrary to the provisions of section 34 of the Constitution. The section provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum. Therefore in my view in weighing up facts for rescission, the court must on the one hand balance the need for an individual who is entitled to have access to Court and have his or her dispute resolved in a fair public hearing against those facts which led to the default judgment be granted in the first instance. In its deliberation the court will no doubt be mindful especially when assessing the requirement of reasonable cause being shown that while among others this requirement incorporates showing the existence of a *bona fide* defence, the court is not seized with the duty to evaluate the merits of such defence. The fact that the court may be in doubt about the prospects of the defence to be advanced is not good reason why the application should not be granted. That said however, the nature of the defence advanced must not be such that it *prima facie* amounts to nothing more than a delaying tactic on the part of the applicant.

CONSIDERATION OF THE ISSUES AT HAND

[13] With the above principles in mind I now consider the defence raised by the applicant against the contentions by the respondent.

[14] From the onset it need to be stated that the provisions of the Ordinance in terms of which the applicant's property was being rated has since been repealed and replaced by the provisions of the Municipal Property Rates Act, 2004 (MPRA). However, should I find for the applicant, this would mean that for the period under dispute the property will have to be valued as if those provisions have not been repealed.

[15] Furthermore, it warrants mentioning that respondent is an organ of State in terms of section 239 of the Constitution and a third tier of government. This obliges the respondent to uphold the rule of law and the Constitution in its conduct.[3] In terms of the Local Authorities Ordinance No. 25 of 1974 ("the Ordinance"), respondent is required at least once in every period of five years or such further period as may be approved by the Premier to cause a valuation to be made by one or more persons competent as valuers of all properties within the borough, other than public streets and public places. Furthermore respondent shall cause a valuation roll to be prepared.

[3] ***City of Cape Town and Another v Robertson and Another 2005 (2) SA 323 (CC), (2005)(C) BCLR 199, Kungwini Local Municipality*** .op cit.

[16] It is evident from the provisions of section 155 of the Ordinance that the valuation must be carried out by people well qualified to do so. The valuation of the property once done remain so for at least five years unless at the instance of council another valuation exercise has been carried out earlier or altered as a result of an appeal process in terms of section 160(1). The Ordinance provides full details of how the valuation exercise shall be carried out. An aggrieved ratepayer is afforded a right of recourse in terms of the Ordinance to file an objection. It is not open to the parties to act outside the provisions of the prescribed law in an attempt to resolve whatever dispute they have pertaining to rates. This means both the rating authority and the ratepayer must find a solution of their rating problems within the confines of the law.

[17] What is common cause here is that at all material times, applicant noted objections to the rating of its property in accordance with the provisions of the Ordinance. In its letter of objection dated 16 August 2000 the applicant states:

"Please be advise that I dispute the amount claimed in your letter.

On numerous occasions I have asked your client to rectify certain outstanding issues, stated below, but received no reply whatsoever.

1. *A portion of the property was donated to the council for road purposes. Please advise how this amount was calculated in the account.*

2. *I require a comprehensive statement of the account, since I disagree with your amount.*

3. *The valuation placed on the property is extremely high. This value has to be reduced.*

4. *A drain runs through the entire property, making it impossible to build of the land.*

In light of the above, I believe it is unfair to charge rates on the property.

I would appreciate if you could get your client to answer my queries herein."

[18] Despite the applicant having written several letters on each subsequent year enquiring about the fate of its objection, it does not appear that respondent followed the provisions of the law as set out in the Ordinance in disposing of this objection. Applicant's letter dated 10 January 2006 reads:

"The appeal dated 20/2/2003, has still not been set down, and I was advised that I must wait. It has been 3 years. I am shocked.

Please advise if I must, lodge an appeal every year."

[19] This of its own speaks volumes of the conduct of the respondent. The Ordinance provides that the valuer or valuers shall be appointed as far as possible from the staff of the valuation or estate department if any. However in the present matter it would appear that the valuers were an outside firm. While this on its own is not irregular, it does give rise to concerns unless there are good reasons for this state of affairs.

[20] Reverting back to the applicant's objection. A letter dated 14 August 2006 by e-Valuations was addressed to the applicant. It reads:

"We act as Official for the South Operational Entity of the eThekwini Municipality and note that you have lodged an appeal against the 2005/2006 Valuation Roll.

We have re-examined our valuation of the abovementioned property taking cognisance of the grounds of your appeal and the basis for assessing the 2005/2006 valuations.

We are willing to offer a reduction in the current valuation, by way of compromise and without prejudice, as follows

	CURRENT VALUE	*PROPOSED COMPROMISE*
LAND	*R467, 000*	*R154, 000*
BUILDING	*R 0*	*R 0*

Kindly advise whether you are willing to accept the proposed compromise by completing the section below and returning this letter to us ***before 01-09-2006****. If you are not willing to accept the proposed compromise the matter may be taken to the Valuation Appeal Board and you will be required to lead evidence in support of your appeal."*

[21] It is disquieting to note that instead of dealing with the appeal in terms of the Ordinance, it was dealt with as set out in this letter. This procedure is not catered for in any legislation. Therefore the respondent in my view has opened itself to challenge as to the exact rate amount owed by the applicant and how that was computed. This is further compounded by the fact that on 9 October 2006, it addressed a letter to the applicant advising it that "the compromise value" has been accepted and processed and that the necessary adjustments had been done. It was further stated that the City Treasurer has been requested to refund applicant's deposit. The enquiry by the applicant only drew blank. Considering all these facts one wonders in the first instance what was the basis of the respondent's claim. I say this because the respondent knew from the onset that its valuation was being challenged. It failed to process the appeal in terms of the law. Its valuers who for purposes of this judgment I treat as its agents changed the amount purportedly payable drastically. This appears to have been accepted by the respondent. However, applicant persisted with his objection insisting that it be dealt with in accordance with the law.

[22] In my judgment, I am satisfied that applicant has satisfied the requirements set out in ***Naidoo*** above showing a *prima facie* defence. As stated above it is not for this court seized with the application for rescission to delve into the merits of the defence. A court seized with the trial will be the appropriate forum to do so. It is obvious in my mind that on the facts at hand the bona fides of the applicant cannot be questioned. One wonders where there is a complete failure to follow the prescripts of the legislation how the rates can be said to have been computed and therefore owing and payable.

RELIEF

[23] The applicant has asked for the rescission of the default judgment, the setting aside of the writ of attachment, that it pays the costs if the matter is unopposed. Otherwise that the respondent pays the costs if the matter is opposed.

[24] In my view a writ of attachment and execution are consequential upon a judgment. Once the judgment is set aside, every legal process consequential upon, the judgment falls away. I am satisfied that this matter warranted that the costs be determined now. I am not persuaded otherwise to depart from the normal rule that says ordinarily cost should follow the result.

ORDER

[25] Having considered all the facts, the authorities referred to and submission by counsel, I make the following order:-

1. Default judgment granted against applicant by default in favour of the respondent under case no 13927/2006 on the 30 October 2007 is hereby rescinded.

2. Respondent is ordered to pay all the costs in this matter which includes the costs occasioned by previous postponements.

NGWENYA AJ

Date of Hearing	:	13 July 2010
Date of Judgment	:	22 July 2010
Applicant's Representative	:	MR A.B.G CHOUDREE
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