

REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

APPEAL

AR 194/11

FORREST CREST PROPERTIES CC

APPELLANT

and

JOHANNES VENTER MATTHEE

FIRST RESPONDENT

LESTER HALL, SWAN & FLETCHER INC

SECOND RESPONDENT

MINISTER OF JUSTICE & CONSTITUTIONAL

DEVELOPMENT

THIRD RESPONDENT

JUDGMENT Delivered on 30 July 2012

MURUGASEN, J

Introduction

[1] The parties herein are referred to as they were in the court a quo.

[2] This is an appeal against the dismissal with costs by the learned Magistrate, Pinetown of an application for rescission of judgment by default granted in favour of the plaintiff against the defendant on 19 April 2010 for payment of the sum of R400 000 together with costs and interest.

Proceedings in the Court a quo

[3] On 9 March 2010, the plaintiff, Johannes Venter Matthee (first respondent herein), instituted an action under Case Number 3481/10 in the Pinetown Magistrate's Court against the defendant, Forrest Crest Properties CC, Registration Number 1995/018175/23 (appellant herein), for payment of the sum of R400 000 being the purchase price of an immovable property sold by the plaintiff to the defendant in terms of a written agreement of sale dated 9 March 2006 ('the agreement').

[4] It was a material term of the agreement that the purchase price would be paid to the plaintiff by the conveyancers on behalf of the defendant on registration of transfer of the property to a third party.

[5] The registration of the transfer of property to the third party was effected on or about 5 February 2010. The defendant however failed to pay the purchase price in terms of his obligation under the terms of the agreement to the plaintiff. The plaintiff consequently instituted an action against the defendant arising from the defendant's breach of his obligation to pay the purchase price on the registration of transfer of the property.

[6] The summons was served on the defendant by a copy thereof being affixed to the principal door of the registered office at his *domiciliumcitandi et executandi*, being 22 Underwood Road Pinetown on 23 March 2010. The defendant did not enter an appearance to defend the action.

[7] On 15 April 2010 the plaintiff applied for default judgment against the defendant for payment of the sum of R400 000 plus costs in the sum of R896.32, and interest on the capital sum. Default judgment was granted on 19 April 2010.

The Application for Rescission

[8] By way of an application dated 26 April 2010, the defendant applied for rescission of the aforesaid judgment and other relief, *inter alia*, that the second respondent, Lester Hall Swan & Fletcher Incorporated, be directed to retain the funds held by it in trust in

terms of its undertaking dated 1 February 2010 until the final determination of the rescission application and of the action in the Pinetown Magistrate's Court under Case 3481/10, should the judgment be rescinded.

[9] Matthee, in his capacity as sole member of the defendant, deposed to the affidavit in support of the application for rescission. He alleged that the defendant did not defend the action because it did not receive the summons which was served at the offices of its accounting officer and Matthee himself was not in South Africa when the summons was served. Matthee furnished proof thereof by way of copies of his airline ticket and passport. No confirmatory affidavit in respect of the service on the *domicilium* was furnished by the accounting officer.

[10] Matthee contended further that the purchase price became due and payable only when the immovable property was transferred 'during or about March 2010'. He alleged however, that he, in his personal capacity, had a claim against the plaintiff for repayment of the balance of R442 347 and interest which was due and payable by the plaintiff in respect of a loan made to the plaintiff by Matthee in terms of a contract concluded during 1997.

[11] It had therefore been agreed that the purchase price would be held in trust by the second respondent, which consequently issued an irrevocable undertaking dated 1 February 2010, to retain the sum of R400 000 from the proceeds of the sale of the property and to invest the funds in an interest bearing account until presented either with a written agreement between the plaintiff, defendant and Matthee, authorizing the release of such funds and interest or a final court order.

[12] Matthee then instituted an action for repayment of the balance of the loan against the plaintiff in the Durban High Court on 22 February 2010 under Case No 2201/2010, which has been defended by the plaintiff.

[13] Matthee alleged that he was uncertain whether the plaintiff would await the final outcome of that action before reaching an agreement about the disposal of the funds

held by the second respondent. But if the plaintiff instituted an action against the defendant, he had intended to cede his claim for repayment of the loan to the defendant so that it could set up a counterclaim for the aforesaid amount.

[14] Therefore when Matthee learned of the action instituted by the plaintiff against the defendant in the Pinetown Magistrate's Court (and the judgment against the defendant), on 26 April 2010 he ceded to the defendant his right, title and interest in and to his claim against plaintiff for the repayment of the balance of the aforesaid loan. A condition of the cession was that the defendant as cessionary could pursue the action commenced in the Durban High Court in the name of the cedent or in its own name.

[15] The defendant relied further on the provisions of Section 47 of the Magistrate's Court Act No 32 of 1944 to request a stay of the plaintiff's action in the Pinetown Magistrate's court until the proceedings in the High Court instituted by Matthee against the plaintiff, which he had subsequently ceded to the defendant, was resolved either by judgment or agreement.

[16] The plaintiff resisted the application for rescission on the grounds that the defendant did not set out a valid and *bona fide* defence to the plaintiff's claim in compliance with Rule 49 (3) of the Magistrate's Court Rules. He did not oppose the application on the grounds that the defendant had failed to defend the action and was in wilful default, as he appears to have been satisfied with the proof furnished by the defendant that he was out of the country at the relevant time and did not receive the summons served at his *domicilium*, although no confirmatory affidavit was filed by Hain or any member of his firm of accountants about the non-receipt of the summons.

[17] On 6 December 2010 the application for rescission was dismissed with costs by the court *a quo*.

The judgment of the Court a quo

[18] The learned magistrate dismissed the application for rescission on the following grounds :-

- 1 The defendant admitted that the purchase price was due and payable and failed to set out grounds of defence which enabled the court *a quo* to find that the defendant has a *bona fide* defence to the plaintiff's claim and that the application for rescission was not intended merely to harass the plaintiff. The defendant's defence to the plaintiff's claim was therefore not a defence on the merits as it did not establish a *prima facie* case which, if established, would entitle the defendant to the relief sought. There was therefore no triable issue or real dispute between the parties.
- 2 The defendant's reliance on the provisions of Section 47 of the Magistrate's Court Act for a stay of the proceedings pending the outcome of the action in the High Court was 'misguided' as a summons issued in the High Court does not amount to a claim in reconvention in the Magistrate's Court. Therefore, where a defendant does not file a claim in reconvention in an action against him in the Magistrate's Court but issues summons in the High Court, the magistrate is not empowered to stay the action in the Magistrate's Court.
- 3 Further Section 47 applies when the defendant files a plea and alludes to a counterclaim exceeding the jurisdiction of the Magistrate's court, which is yet to be filed in a competent court and not when, as in this case, proceedings had already commenced in the High Court on 22 February 2010 before the action was instituted in the Magistrate's Court on 9 March 2010.
- 4 The action in the High Court was instituted by Matthee in his personal capacity, who, when he became aware of the plaintiff's action 'to which he had no defence', for no apparent reason, ceded his right, title and interest in and to his claim against the plaintiff in the High Court to the defendant. The court *a quo* was of the view that the application for rescission was therefore a strategy to stall the release of the R400 000 held by the second respondent and constituted an abuse of the process of court.

- 5 Consequently the defendant had failed to show good cause or reason why the default judgment fell to be rescinded, and the application fell to be dismissed.

Grounds of Appeal

[19] The defendant now appeals against the dismissal of the application on the grounds that the magistrate in the court *a quo* failed to appreciate that Rule 49 (3) only sets out the requirements when a defendant seeks to defend the action on the merits. It contends that a defendant's procedural rights are not curtailed after the rescission of a judgment against him as Rules 19 (4) and 20 (3) provide for the circumstance when the defendant intends to admit the plaintiff's claim in a dilatory plea, but also intends to file a claim in reconvention so that when judgment is eventually passed on the defendant's claim in reconvention, the claim in reconvention may be set off against the plaintiff's claim.

[20] Subsequent to the filing of the appeal, the defendant launched an application placing in issue the constitutionality of the provisions of Section 47 of the Magistrate's Court Act, contending that Section 47 ought to be declared unconstitutional as it violates the provisions of Section 9 (1) and 9 (3) of the Constitution of South Africa, as Section 47(1) differentiates between litigants who have commenced proceedings in another court and those who have not. At the hearing of the appeal, the defendant's application to join the Minister of Justice and Constitutional Development as Third Respondent in the appeal in compliance with Rule 10A of the Uniform Rules, was granted.

Plaintiff's Grounds of Opposition to the Appeal

[21] The appeal is opposed by the plaintiff on the grounds that the defendant does not have a *bona fide* defence to the plaintiff's action as the cause of action arose when on registration of transfer of the property, the purchase price became payable to the plaintiff. The defendant has admitted that the purchase price was payable on registration of transfer and Matthee does not deny the defendant's indebtedness to the plaintiff. The defendant relies on the cession by Matthee which was effected on 26 April

2010, and is *ex post facto* the commencement of the action in the Magistrate's Court on 23 March 2010 and also the default judgment granted on 19 April 2010. The cession and thus the cause of action in respect of the defendant's counterclaim did not exist at the time the action was instituted by the plaintiff. The plaintiff therefore submits that the reliance on the cession was therefore without merit as the defendant had no valid and *bona fide* defence to the action in compliance with the provisions of Rule 49(3).

[22] The plaintiff is also defending the action in the High Court and has lodged a counterclaim for R1 975 000 plus interest, and costs which was in excess of its claim in the Magistrate's Court and the ceded claim in respect of the loan.

[23] The defendant disputes the correctness of the plaintiff's contention that because the cession was effected after the commencement of his action and the grant of default judgment, it did not have a *bona fide* defence to the action at its commencement. It has submitted in response that the 'proper' legal issue was whether the cession of the action conferred on the defendant a valid and *bona fide* defence to the plaintiff's claim as the validity of the defence is not dependant on the moment in time when the defence arises.

[24] Matthee avers that had he known that the plaintiff had served summons on the defendant claiming payment for the R400 000 he would have ceded his right, title and interest in the High Court action to the defendant, which would have then pleaded that it had taken cession of the claim against the plaintiff, which claim exceeded the jurisdiction of the Magistrate's Court.

[25] This would have constituted a valid and triable defence. On this basis he submitted that the defendant had a *bona fide* and valid defence to the plaintiff's action and was entitled to rescission.

Third Respondent's Grounds of Opposition

[26] The third respondent agrees with the plaintiff that the interpretation of the provisions of Section 47(1) by the court *a quo* is correct and that consequently its dismissal of the application for rescission and the reasons therefor are correct.

[27] He contends that as there was no cession in place when the plaintiff instituted his action against the defendant, the plaintiff's claim is unassailable as the defendant had no defence. The cession was intended merely to ensure compliance with Rule 49(3); there can be no valid cession where the purpose of the cession is immoral or against policy and such cession will be ineffectual even if the intention to cede is genuine. The defendant's application is therefore intended to delay the payment due to the plaintiff.

[28] The third respondent contends further that the appeal can be determined without venturing into the constitutionality of the provisions of Section 47(1). However, should the appeal court find it necessary to consider the constitutionality of the provisions of Section 47(1), the third respondent submits that while Section 47(1) differentiates between a litigant who has already commenced proceedings in another court and a litigant who has not and who is about to institute proceedings in another court following upon the stay of the action in the Magistrate's Court, the pertinent question is whether the differentiation bears a rational connection to a legitimate government purpose and whether it amounts to unfair discrimination under Section 9(3) of the Constitution.

[29] The third respondent submits that the legitimate government purpose of Section 47(1) is to afford the protection of the law and to ensure equal treatment to litigants who are sued in the Magistrate's Court but have counterclaims in excess of the Magistrate's Court jurisdiction by enabling those litigants to apply for a stay of action in the Magistrate's Court. The legitimate government purpose is therefore in accordance with the Constitution in that it promotes and upholds the right to equality enshrined in Section 9 of the Constitution.

[30] A litigant who has already issued summons in another court cannot subsequently avail himself of the procedural right to counterclaim as contemplated in terms of Section 47(1) read with Rules 20 (3), (4) and (5) as he has already exercised his right to access the court and to protection of the law. There is therefore no violation of Section 9 or any of his other rights under the Constitution.

[31] In conclusion the third respondent contends that the defendant has failed to

demonstrate that it has suffered unfair discrimination or prejudice or has been disadvantaged as a result of the provisions of Section 47(1), as it may still pursue its claim in the High Court, and the appeal therefore falls to be dismissed.

Issues for determination on Appeal

[32] The issues that arise for determination on appeal are :

- 1 whether the court *a quo* erred in finding that the defendant had failed to satisfy the requirements of Rule 49 (3) in that it has not set out a *bona fide* defence to the plaintiff's claim.

- 2 whether the court *a quo* erred in finding that the defendant is not entitled to an order staying the plaintiff's action in the magistrate's court in terms of Section 47 (1) as :
 - 2.1 the action in the High Court had been instituted by Matthee prior to the plaintiff's action in the Magistrate's Court against the defendant;
 - 2.2 a stay of proceedings in terms of Section 47(1) was available to a defendant who had a counterclaim exceeding the jurisdiction of the Magistrate's Court;
 - 2.3 the defendant did not have such a counterclaim. At the time when the action was instituted by the plaintiff and judgment granted, the defendant did not have a defence or counterclaim to the plaintiff's claim. The defendant had failed to comply with the requirements of Rule 49 (3).
 - 2.4 The cession was executed on the day on which the application for rescission was launched and was therefore not a valid and legal ground on which the defendant was entitled to rescission or a stay of proceedings.

- 3 whether the provisions of Section 47(1) of the Magistrate's Court Act, No 32 of 1944, are inconsistent with the Constitution and lie to be amended.

The law

[33] The Magistrate's Court Act No 32 of 1944 provides as follows :

Rule 49 : Rescission and variation of judgments

(1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit:.....

(2).....

(3) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim.

Section 47: Counterclaim exceeding jurisdiction

(1) When in answer to a claim within the jurisdiction the defendant sets up a counterclaim exceeding the jurisdiction, the claim shall not on that account be dismissed; but the court may, if satisfied that the defendant has prima facie a reasonable prospect on his counterclaim of obtaining a judgment in excess of its jurisdiction, stay the action for a reasonable period in order to enable him to institute an action in a competent court. The plaintiff in the magistrate's court may (notwithstanding his action therein) counterclaim in such competent court and in that event all questions as to costs incurred in the magistrate's court shall be decided by that competent court.

Rule 20 Claims in reconvention

(3) A defendant may set up by a claim in reconvention any right or claim which he may allege against the plaintiff, whether liquid or illiquid, whether liquidated or unliquidated, whether or not it arises out of or is connected with the subject-matter of the claim in convention and such claim (if within the jurisdiction of the

court) shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action both on the claim in convention and on the claim in reconvention.

(4) A defendant delivering a claim in reconvention may by notice delivered therewith or within 5 days thereafter apply to the court to pronounce that the claim in reconvention exceeds its jurisdiction and to stay the action under section 47 of the Act.

(5) Where the court finds that the claim in reconvention exceeds its jurisdiction, the defendant may forthwith or by notice delivered within 5 days after such finding apply for stay of the action.

An application for rescission

[34] The relevant portion of the provision reads :

‘the court **may**, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit:.....’ (my emphasis)

[35] It is immediately apparent that :

- 1 a court is not entitled to rescind a judgment if the applicant fails to show ‘good cause’ or does not satisfy the court that there is good reason for the rescission of the judgement.
- 2 even if the applicant succeeds in showing good cause, it is still within the discretion of the court whether or not to grant the relief sought.
- 3 This discretion must be exercised judicially in light of all the facts and circumstances of a case.

[36] The approach to be adopted by the court is described in **Jones & Buckle** as follows :

‘An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for

civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence, and that the application for rescission is not *bona fide*. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties, bearing in mind the considerations referred to in **Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)** and **HDS Construction (Pty) Ltd v Wait 1979 (2) SA 298 (T)**, and also any prejudice that might be occasioned by the outcome of the application.'

(see **Jones & Buckle The Civil Practice of the Magistrates' Court in South Africa , 9thed Volume II 49 – 4 - 49 – 5**)

[37] The defendant has conceded that it does not seek to oppose the plaintiff's claim on the merits. The defendant wishes to enter what is in effect a dilatory plea – in that he alleges that the claim should not be paid as the plaintiff owes him more than is due by him to the plaintiff.

[38] Therefore although generally in an application for rescission the defence to the claim must be a defence on the merits and a *prima facie* case should be established setting out the averments in sufficient detail, which if established at the trial would entitle the defendant to relief, the relief sought by the defendant in this case was not premised on the merits as the defendant admitted that the plaintiff's claim was due and payable.

[39] The court *a quo* therefore, in my view, misdirected itself when it found that the defendant's founding affidavit failed to comply with the requirements in Rule 49 (3) because the defendant 'admitted that the plaintiff's claim was due and payable' but 'purports to raise it as a defence that it seeks to rely on the provisions of Section 47 of the Magistrate's Court Act and apply for a stay of the proceedings pending the outcome of the action in the High Court.'

[40] The defendant nevertheless had to persuade the court *a quo* that there was good reason to grant the rescission viz that the defendant could rely on Section 47(1) as it had reasonable prospects of success in respect of a counterclaim that exceeded the jurisdiction of the Magistrate's Court. The defendant sought the rescission relying on the cession of the action instituted by Matthee in the High Court to stay the proceedings, alleging that he had intended to effect the cession of his claim to the defendant to enable it to file a claim in reconvention, should the plaintiff institute an action against the defendant.

[41] There were in my view two problems that the defendant had to overcome in the application for rescission before the court *a quo*.

[42] The first arises from the discretion the provisions of Section 47(1) confer on a court which is requested to stay proceedings as the court **may** only order the stay **if satisfied** that the defendant has *prima facie* a reasonable prospect of obtaining judgment in excess of its jurisdiction on his counterclaim (my emphasis). It is therefore incumbent upon the court to consider the defendant's counterclaim, in order to exercise its discretion judicially. The fact that the defendant has already instituted an action for a claim in excess of the jurisdiction of the Magistrates' Court does not preclude its filing of a counterclaim to the plaintiff's action.

[43] I am fortified in this regard by the judgment in **Esterhuizen v Holmes 1947(2) SA789 (T)**. In that case, while the action in the Magistrate's Court was pending, the defendant instituted an action in the then Supreme Court and requested that the matter be stayed pending the result of his action against the plaintiff in the Supreme Court. The court held per **Neser J** that a claim in reconvention had to be filed before an application in terms of Section 47(1) was competent and that as no claim in reconvention had been filed before the court *a quo*, it had correctly refused an application to stay the proceedings before it although the defendant had instituted an action in the Supreme Court for a claim in excess of the jurisdiction of the Magistrates' Court. The learned judge held further at page 797 :

‘I know of no provision in the Magistrates' Courts Act whereby a magistrate would be empowered to stay an action instituted by a plaintiff against a defendant in the

magistrate's court merely because the defendant had, either previously to or after issue of summons by the plaintiff in the magistrate's court, issued a summons in the Supreme Court against the plaintiff.'

[44] Therefore the only basis upon which an action can be stayed in terms of Section 47 is if a counterclaim has been filed. In my view, the rationale for this decision clearly lies in the aforementioned obligation imposed on the magistrate in the exercise of his discretion by the provisions of Section 47(1).

[45] My view is also not inconsistent with the commentary in **Jones and Buckleon** which the court *a quo* relied :

- (i) a summons issued in the High Court does not amount to a claim in reconvention in the Magistrates' Court;
- (ii) where a defendant who is sued in the Magistrates' Court does not file a claim in reconvention but merely issues summons in the High Court, the magistrate is not empowered to stay the action in his court;
- (iii) a plea alleging facts which would justify a claim in reconvention being made or alleging facts which are used to found a counterclaim in some other Court does not amount to the setting up of a counter claim within the meaning of the section.

[46] Without a counterclaim before it, the court *a quo* herein could not decide on the *prima facie* prospects of the defendant and consequently whether there was good cause or reason to grant the rescission, thereby enabling the defendant to file a counterclaim and stay the proceedings.

[47] However, in my view the court *a quo* erred when it held that the defendant's reliance on Section 47 of the Magistrate's Court Act was 'misguided' because the section only applies when the defendant files a plea and alludes to a counterclaim exceeding jurisdiction, which is yet to be filed in a competent court.' It also erred when it held further that as the defendant referred to 'a claim which was commenced in the High court before the respondent's (plaintiff's) summons was issued, the claim in the High

Court was 'totally separate' and could not 'be connected to these proceedings by employing Rule 49 of the rules of this Court'.

[48] The proper reason is that a claim in reconvention must be filed, **whether before or after** the institution of the claim in another competent court, before a stay may be ordered, as a defendant is not precluded from filing a counterclaim and applying for a stay of prosecution although he has already instituted an action in the High Court.

[49] The issue raised by the defendant in respect of the constitutionality of Section 47 is also resolved. Despite the portentous arguments on this issue, Section 47(1) does not in fact differentiate between litigants who have commenced proceedings in another court and those who have not. There is therefore no merit in the defendant's application to declare Section 47 unconstitutional and for amendments thereto.

[50] The second problem which faced the defendant in the application for rescission, is that when the judgment was granted against the defendant, the cession had not been effected. An intention to cede expressed *ex post facto* did not satisfy the court *a quo*. It noted that although Matthee had commenced the action in the High Court on 22 February 2010 in his personal capacity, once he became aware of the plaintiff's action to which the defendant had no defence, he 'for no apparent reason' effected the cession to the defendant. It consequently held that the cession was 'a strategy designed to stall the release of the R400 000' to the plaintiff pursuant to the judgment in his favour, as Matthee wanted to use the Magistrates' Court to protect his claim in the High Court by ensuring that the plaintiff had the funds to satisfy any judgment Matthee may obtain in the High Court.

[51] While Section 47(1) does provide a legitimate procedure to protect a counterclaim exceeding the jurisdiction of the Magistrates' Court, it is common cause that the counterclaim in favour of the defendant did not exist when the action was instituted and judgment granted, as the cession was effected simultaneously with the application for rescission.

[52] I am consequently in agreement with the court *a quo* that the cession was an abuse of the court process, the dilatory objective of which is consistent with the acrimonious relationship between the parties.

[53] It is also noted that the plaintiff has filed a counterclaim in the High Court in excess of the defendant's claim.

[54] Further the object of rescinding a judgment is to restore the opportunity for a real dispute to be ventilated. But as the court *a quo* was unable to make an informed decision on the prospects of success of any counterclaim, the defendant failed to furnish a good reason for the exercise of the court's discretion in its favour in granting the rescission sought.

[55] Nevertheless there is no undue prejudice to the defendant (or Matthee) by the refusal of the application for rescission as the defendant may pursue the ceded claim, which it intended to set up as a claim in reconvention, in the High Court.

[56] Consequently while the court *a quo* may have erred and misdirected itself in its interpretation and application of the relevant legal principles in its judgment, the refusal of the application for rescission itself is the proper outcome and the appeal therefore falls to be dismissed.

Costs

[57] There is no reason why costs should not follow the result. The plaintiff is therefore entitled to its costs in opposing the appeal.

[58] Insofar as costs of the third respondent is concerned, the defendant chose to raise a constitutional issue, the motivation for which was Matthee's personal and selfish interests. In my view, this was just another attempt to utilise legal proceedings to delay satisfaction of the plaintiff's claim, as Matthee could have simply pursued the High Court action without resorting to conduct which served only to prolong the proceedings in the Magistrates' Court with a concomitant escalation of costs. I am therefore of the

considered view that defendant should not be permitted to escape full responsibility for the costs of the third respondent.

Order

I accordingly propose the following order :

- 1 The appeal is dismissed and the refusal of the application for rescission with costs by the court *a quo* is confirmed.
- 2 The application dated 31 August 2011 for an order in terms of paragraphs 2 & 3 thereof is dismissed.
- 3 The appellant (defendant in the court *a quo*) is ordered to pay the costs of the first respondent (plaintiff in the court *a quo*).
- 4 The appellant is ordered to pay the third respondent's costs of the opposed hearing on 7 May 2012.

SEEGOBIN, J. I Agree

MURUGASEN, J. It is so ordered.

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