REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2021/50854

(1) REPORTABLE: Yes☐/ No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 19 July 2024

[redacted]
WJ du Plessis

In the matter between:

THE BODY CORPORATE SANDTON VIEW	**APPLICANT**
And	
MATHAI JUNIOR MATHEWS	**FIRST RESPONDENT**
THE SHERIFF, RANDBURG SOUTHWEST	**SECOND RESPONDENT**
THE REGISTRAR OF DEEDS, PRETORIA	**THIRD RESPONDENT**
In Re:	
THE BODY CORPORATE SANDTON VIEW	**PLAINTIFF**
And	
BISHWOOD CC	**DEFENDANT**

JUDGMENT

DU PLESSIS AJ

Background

[1] This is an opposed application for the rescission of a judgment granted by Mia J on 18 January 2023. The history of the matter relates to certain properties the First Respondent bought at a sale in execution held on 18 February 2019 by the Second Respondent, the Sheriff, after judgment was given against the Defendant, Bishwood CC. While the First Respondent is the Applicant in the recission before me, the parties will be referred to as they were in the main Application.

[2] The First Respondent purchased four properties through a sale in execution, held on 18 February 2019 by the Second Respondent, pursuant to a judgment granted against the Defendant (Bishwood cc). The conditions of sale stipulated that the purchaser (First Respondent) is responsible for payment of all costs and charges necessary to effect the transfer, including the amounts required by the Municipality to issue a clearance certificate and the levies due to the Body Corporate. The estimated arrear rates and taxes were indicated in the contract, together with a disclaimer that there will not be any claim against the Sheriff or the Applicant if the arrears are greater than estimated.

[3] Despite the demand, the First and Second Respondents failed to comply with the obligations as per conditions of sale. This prompted the Applicant, the Body Corporate, to launch an application against the First Respondent during 2020, to declare the Conditions of Sale valid, binding, and enforceable, and for an order that the First Respondent make payment of the arrear rates and taxes due to the City of Johannesburg Metropolitan Municipality. This application was granted in January 2021 by Crutchfield J (then AJ). The First Respondent then paid R184 788,65 to obtain clearance for the rates and taxes. He also gave a guarantee regarding the anticipated

levy clearance certificate. There was thus compliance with the conditions of sale in March 2021. After obtaining the clearance certificate, the transaction could be lodged with the Registrar of Deeds.

[4] However, the First Respondent, in the meantime, sold unit 38 to a third party. Since the transfer to the First Respondent and the Third Party had to occur simultaneously, the lodgement had to be suspended until the other conveyancers could attend to the transfer. There was a further delay because of the allocation of the exclusive use areas, as the four properties are not transferred to the First Respondent on one notarial deed only.

[5] By the time this delay was attended to, the rates clearance certificate held by the conveyancers had expired. There was also a problem with obtaining the original title deed. When the conveyancers received the extended rates clearance figures, they forwarded it to the First Respondent, who ignored it. They then sent a letter of demand demanding payment of the extended arrears in the sum of R190 372, 22, stating that should this not be paid in seven days, an application would be launched to compel the First Respondent to pay.

[6] A second payment application (the "main application") was thus launched on 25 October 2021, requesting the payment of the arrear rates and taxes. The First Respondent served a Notice of Intention to Oppose on 10 November 2021 and, on 1 December 2021, served a counter-application and answering affidavit and a notice in terms of Rule 41A(2)(b). The counter-application essentially asked that the Applicant pay the City of Johannesburg and effect transfer of the properties, failing which the conditions of sale in execution be cancelled.

[7] The Applicant filed a notice of intention to oppose the counter-application and delivered an answering affidavit. A replying affidavit was filed on the same day. A rejoinder affidavit followed this, as well as a notice to amend, together with a Rule 30 notice (served by the First Respondent). In June 2022, the Applicant served its heads

of argument on the First Respondent. The First Respondent's attorneys then withdrew as attorneys of record.

[8] The First Respondent did not serve their heads of argument. This compelled the Applicant to launch an application to force the First Respondent to file its heads of argument. This application was personally served on the First Respondent. The current attorneys came on record as attorneys for the First Respondent. The order to compel the First Respondent to file their heads of argument was granted on 6 October 2022 by Carrim AJ, granting the First Respondent five days to file its heads of argument, failing which the Applicant can approach the court for their defence to be struck out. This court order was served to the First Respondent's attorney by email and by hand; they did not file their heads of argument within five days.

[9] The Applicant then obtained a date for the hearing of 18 January 2023 for an Application to strike out the defence and opposition of the First Respondent (the "interlocutory application"). The notice of set down for this application was served on the First Respondent's attorney by email and by hand. There was further correspondence about the hearing date.

[10] One day before the hearing, the First Respondent's attorney informed the Applicant's attorney that they would deliver their heads of argument by 8:00 on 18 January 2023. It failed to do so. They also did not appear at the hearing. Thus, Mia J granted the order to strike out the defence and opposition and requested the First Respondent to pay the arrear rates and taxes and sign the documents required to effect the transfer of the properties.

[11] The order was delivered by hand to the First Respondent's attorney on 2 February 2023, along with a letter of demand. On 12 February 2023, the First Respondent served its rescission application, seeking to rescind the Mia J order (the "rescission application").

[12] The First Respondent provides the following reasons for his absence. Two CaseLines profiles were created for the case, and his attorneys were added to the wrong CaseLines profile that did not show the set-down date of the matter. Even if they received the notice of set down per email, they assumed that, since there was no activity on the CaseLines profile since June 2022, the case is not proceeding as proper set down also requires an up-to-date CaseLines profile. During argument, counsel stated that the promise for the delivery of the heads of argument related to the main application, not the interlocutory application.

[13] After the order was given, the First Respondent's attorneys were added to the CaseLine profile for the interlocutory application that served before Mia J. Moreover, Mia J was not alerted to the first CaseLines profile, which contained important documents such as the notice of intention to oppose the main application, the counter application, related documents, and other important annexures.

[14] The First Respondent points out that the Applicant offers no explanation for the creation of two CaseLines profiles or why the attorney was only invited to the second profile after the order was given. Furthermore, if Mia J had been admitted to the first CaseLines profile, she would not have been granted the order. The fact that there was a "compliance affidavit" on the second CaseLines profile stating, falsely, under oath, that there is no other or duplicate CaseLines profile in the matter and that all the necessary parties had been invited to the CaseLines profile before her, created the wrong impression that what served before her were the only documents to consider. The Applicant also did not prefix the profile as "duplicate", as per court directives.

[15] The First Respondent sets out the following defences:

i. The applicant's locus standi. The crux of this argument is that the First Respondent bought four properties in the Applicant's sectional title scheme at a judicial sale in execution. At the sale, a contract came into existence between the Sheriff (the Second Respondent), who gave effect to the court order, and the First Respondent, as the purchaser of the properties. The execution creditor is not a party to such a contract

and does not have locus standi to enforce the conditions of the sale. This is in line with Rule 43(11) of the Magistrates' Court Act or Rule 46(11) of the Uniform Rules of the Court, which gives authority to the Sheriff to act as if they are the owners of the properties. It is thus for the Sheriff to enforce the conditions of sale.

ii. The First Respondent cancelled the agreement due to the increase in the costs of the sale by the Applicant after the sale in execution. There was a counter-application that sought cancellation of the agreement on these grounds.

iii. The *quantum* of the judgment is not due since R 180 431,36 of the arrears – due to the municipality – had previously been paid. This was not disclosed to Mia J. An order was given on an amount that was thus not due and payable.

iv. The application to strike out a defence due to failure to deliver heads of argument is not applicable in motion proceedings, as the affidavits contain both a pleading and the evidence necessary to sustain it. The court cannot just ignore the affidavits and dismiss a claim. Clauses 9.8.2.12 and 9.8.2.12 of the practice manual does not simply displace the court's general duty to apply its mind to the evidence before it. The fact that the Applicant sought the order as granted only based on non-compliance with the practice manual, without referring the court to the First Respondent's defences as on the record, means that there was no exercise of judicial discretion in granting the application to strike out the First Respondent's defence and that the judgment should be rescinded on that ground.

[16] At the hearing, the parties indicated that they sought rescission in accordance with common law. An order can be rescinded based on the common law on the following grounds:[1]

i. Fraud;

---

[1] De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A)

ii. Justus error;

iii. In certain exceptional circumstances when new documents have been discovered,

iv. Where judgment is granted by default;

v. In other circumstances, based on justice and fairness.[2]

[17] I am satisfied that based on the fact that Mia J did not have access to all the relevant papers in the main application, including the notice of intention to oppose, the affidavits relating to that, and the counter application, there is a Justus error, an excusable mistake. Furthermore, it is unjust and unfair to have a matter adjudicated on, where all the relevant documents are not before the court. There is thus a ground for a rescission. The question is whether the First Respondent complies with the requirements of succeeding with the rescission application.

[18] At common law, the court has the power to rescind a judgment obtained on default of appearance if the party seeking the rescission can provide sufficient cause for rescission. This is the same as the requirement for good cause under Rule 31(2)(b). What this entails was set out in *Chetty v Law Society, Transvaal*,[3] namely

> The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. But it is clear that in principle and in the long-standing practice of our courts two essential elements of "sufficient cause" for rescission of a judgment by default are
>
> (i) that the party seeking relief must present a reasonable and acceptable explanation for his default and
>
> (ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success.
>
> It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an

---

[2] Swadif (Pty) Ltd v Dyke NO 1978 (1) SA 928 (A).

[3] 1985 (2) 756 (A) at 764J, reference omitted.

application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.

[19] Similarly, in terms of Rule 31(2)(b), an applicant must show good cause for rescission by giving a reasonable explanation for his default, show that the application is brought bona fide, and show that there is a *bona fide* defence, including a *prima facie* case on the merits. In other words, this court must determine whether there was a reasonable explanation for the default and whether there is a *bona fide* defence.

[20] Creating two CaseLines profiles, with the First Respondent's attorneys not invited to the second profile created for the interlocutory application, led to an injustice to the First Respondent. While the notice of set down may have been emailed to the First Respondent, on a balance of probabilities, the lack of activity on the CaseLines profile created the impression that the matter is not properly set down for hearing. The First Respondent's explanation, considered holistically, is reasonable and acceptable.

[21] This leaves me with the second question: whether, on the merits, the First Respondent has a bona fide defence that, prima facie, carries some prospect of success.

[22] Recently, in *Body Corporate of Marsh Rose v Steinmuller*,[4] the Supreme Court of Appeal confirmed that when property is sold in execution, contracts come into existence between the sheriff, who gives effect to the court order and the purchaser whose bid is accepted. The execution creditor is not a party to the contract. The obligation to pay the purchase price and the monies and comply with the conditions of

---

[4] 2023 JDR 4180 (SCA) para 21.

sale rests upon the purchaser. Thus, the sheriff is empowered to do anything necessary to effect transfer registration.

[23] *Ivoral Properties (Pty) Ltd v Sheriff, Cape Town, and Others*,[5] it was held that When a Sheriff disposes of property in pursuance of a sale in execution he acts as an 'executive of the law" and not as an agent of any person. When a Sheriff, as part of the execution process, commits himself to the terms of the conditions of sale, he, by virtue of his statutory authority, does so in his own name and may also enforce it on his own. A sale in execution of immovable property entails two distinct transactions namely, the sale itself and the passing of transfer pursuant thereto. Although Uniform Rule 46 does not specifically empower a Sheriff to institute proceedings in order to enforce the contract embodied in the conditions of sale, such power is implicit in the duty to see that transfer is passed and the provisions of Uniform Rule 46(13) which impose an obligation upon him to do anything necessary to effect registration of transfer. If that were not so the Sheriff's only remedy, in the event of a purchaser failing to carry out any of his or her obligations under the conditions of sale, would be to approach a Judge in Chambers for the cancellation thereof in terms of Uniform Rule 46(11) and would allow recalcitrant purchasers at sales in execution to avoid their obligations almost with impunity.'

[24] These cases clarify that the right to transfer the property arises from a contract and that the rights operate between the purchaser and the sheriff, not the body corporate. It is for the sheriff to determine whether the conditions of sale have been met, and if not, it is for the sheriff to enforce the contractual obligations of the cancel the sale. Prima facie, there seems to be a bona fide defence that carries some prospects of success. There is thus, on the face of it, a *bona fide* defence.

---

[5] 2005 (6) SA 96 (C) para 66.

[25] The First Respondent states other considerations are at play when striking out a defence in motion proceedings. This was recently captured by Wilson J in *Capitec Bank Limited v Mangena*[6] when he said [own emphasis]:

5 Motion proceedings are different. Every affidavit in motion proceedings contains both a pleading and the evidence necessary to sustain it. When a court is asked to dismiss a claim or strike out a defence for failure to file heads of argument promptly, it does so once all the evidence thought necessary to sustain the claim or defence has been placed before it. *It seems to me that, in these circumstances, a court is not at liberty simply to ignore the affidavits and to dismiss a claim or strike out a defence merely because one of the parties has failed to take an important procedural step.* The court must go further, and satisfy itself that, on the evidence before it, the claim or defence sought to be dismissed or struck out has no intrinsic merit.

6 [...] The failure to file heads of argument does not make relevant evidence irrelevant. Nor does it mean that the substantive law applicable to the application in question no longer applies. Accordingly, the duty to consider whether a claim or defence is meritorious in itself before dismissing it or striking it must, in my view, apply in all application proceedings.

[26] The First Respondent thus has a *bona fide* defence in this respect, too.

[27] In the absence of having access to all the court documents, and not being able to consider the fact that there were already amounts paid to cover arrear rates and taxes, as well as not being aware of the counter application, there is prima facie a bona fide defence there too. This needs to be considered in the main application, with due regard to the pleadings and the evidence. It is not for this court to decide.

[28] In conclusion: The First Respondent provided a reasonable explanation for his non-appearance and raised some bona fide defences that, on the face of it, have prospects of success. The rescission application should thus succeed.

---

[6] 2023 JDR 0779 (GJ).

[29] The First Respondent argued that the attorneys were aware of two CaseLines profiles. Instead of alerting Mia J to it and acting in terms of the Practice Directives, they moved the application. Moreover, they did so by filing a compliance affidavit under oath, which was patently false. The First Respondent states that under such circumstances, the reasonable thing to do would be to allow the application to proceed unopposed. Instead, they opposed it, causing delays in the matter. They ask for costs on a punitive scale.

[30] The administration of justice relies on attorneys doing their work diligently. The court should be able to rely on affidavits deposed by attorneys that state that there are no duplicate files and that all parties have been invited. The fact that the compliance affidavit was incorrect, and despite that, there was persistence in opposing the rescission. In my view, it is something that warrants costs on a punitive scale.

Order

[31] I, therefore, make the following order:

1. The rescission application succeeds, and the judgment and orders granted by Mia J on 18 January 2023 under case number 2021/50854 are rescinded.
2. The Applicant is to pay the costs of an attorney and own client scale.

[redacted]

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines and sending it to the parties/their legal representatives by email.

Counsel for the applicant:	Mr Strydom
Instructed by:	Biccari Bollo Mariano Inc Attorneys
Counsel for the respondent:	Mr DT Maritz
Instructed by:	FJ Swartz Attorneys
Date of the hearing:	20 May 2024

Date of judgment: 19 July 2024