

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NUMBER: 2826/21

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED-

A handwritten signature in black ink, appearing to read "Sehapi".

DATE 29 November 2022

SIGNATURE

In the matter between:

THIVHILELI ELLIOT MASHAU

FIRST APPLICANT

and

SHERIFF HALFWAY HOUSE MIDRAND

FIRST RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

[1] An urgent application was launched firstly to deal with Part A, to stop an auction which was to take place on 2 February 2021 in respect of Erf [...] Halfway [...] Extension [...] Township. An order was granted pending the finalisation of a rescission of an order granted in case 67698/18 on 5 November 2020 by Wanless AJ, which cancelled the sale of the immovable property between the Applicant and the Respondent. The sale was suspended by Mabuse and leave was granted to the parties to supplement their papers and to file heads of argument before Part B was heard (the rescission application).

BACKGROUND

[2] The applicant appointed an agent Mr Glen Senwamadi (Senwamadi) of GlenLife Properties to attend the auction scheduled for 26 November 2019 and to bid on his behalf. A deposit of 10% of the purchase price was payable before the auction and Senwamadi was successful.

[3] The balance of 90% of the purchase price was payable within 21 days to the transferring attorneys, Hammond Pole Attorneys. The applicant managed to secure a loan within eight (8) days of the auction. The applicant provided guarantees by 19 Decemeber 2019 .Conditions of sale were completed and presented for signature by the agent and he signed the transferring documents. The lodgement of the transferring documents with the Registrar of Deeds had to be accompanied by a Rates Clearance Certificate.

[4] The applicant was presented with a rates clearance certificate on 20 February 2020, sixty (60) after his bond was approved, with a demand for payment of an amount of R136 578.87. As the latter amount was exorbitant he to registered a

complaint with the transferring attorneys and requested an investigation with the Local Municipality. On being threatened with cancellation of the sale he paid this amount in protest on 11 March 2020. On 12 March 2020 the transferring attorneys requested payment of an amount R22 002.17 in respect of Transfer Duty which amount was paid immediately.

[5] A fresh Rates Clearance Certificate was issued on 13 March 2020 and the transferring attorneys only signed the papers on 23 March 2020 and the transferring documents were lodged with the Deeds Office on 26 March 2020. On 4 June 2020 the transferring attorneys sent a fresh Rates and Taxes Certificate demanding further payment of R 25 631.16. The applicant protested as he was not responsible for the delay in lodging the transferring documents after 23 March 2020. An attempt was made to resolve the problems and this failed to yield a positive result.

[6] On 20 September 2020 the applicant's agent was served with an application by the Sheriff, for the setting aside of the sale in execution held on 26 November 2019 and which authorised the Sheriff to again sell the immovable property. The agent filed a notice to oppose the application in terms of Rule 45 (A) for the setting aside the sale. The agent was under the impression that the impasse would be resolved.

[7] The applicant only became aware of the judgment which was taken in his absence around 8 January 2021. He contends that he was not personally served with the application and that he was not in wilful default as stated in the papers before the order by Wanless AJ was granted. He had fully complied with all the conditions of sale by the 23 March 2020 and as a result he could not be held responsible for the error or negligence in the office of the transferring attorneys

[8] The respondent contends that the applicant's attorney were made aware that

the sale was set aside and that another sale in execution was scheduled to 2 February 2021.

[9] The City of Johannesburg had to resolve an issue raised by Senwamadi who queried the amount to be paid as rates and taxes. An inspector needed to be sent to the property for inspection of the water metre. The Rates Clearance Certificate was only received on 19 February 2020 and these were valid from 1 February 2020 to 31 May 2020. The respondent confirmed payment by the applicant of the rates and transfer duty. The transferring documents were lodged for registration with the Deeds Office on 24 March 2020.

[10] It was only on 26 May 2020 when the applicant was informed that transfer was rejected because the rates clearance figures had lapsed and this was due to the National Lockdown ordered by the Government during March 2020. Clause 9(b) of the Deed of Sale provided that the purchaser would be liable to pay rates and taxes due. The applicant refused to pay the additional amounts as he contended that he had paid all amounts due timeously and that the transfer should have occurred before lockdown.

[11] The transferring attorneys contended that the rates clearance lapsed because of the National Lockdown and they had to apply fresh figures which the applicant refused to pay. The applicant was also in breach of clause 12(b) of the Deed of Sale for refusing to pay 1% occupational rent. It was contended that the applicant was not entitled to transfer as he remained in breach of clause 9(b) of the Deed of Sale. Consequently, an application in terms of Rule 46(11) was launched and served on the applicant and or Senwamadi on 21 September 2020; a notice to oppose was served on 23 September 2020. The answering affidavit was due by 15 October 2020 and the sale was cancelled on 5 November 2020. It was contended that Senwamadi was of the understanding that by filing an intention to oppose meant that the matter had become opposed.

[12] In the urgent application which followed of which this application is Part B

thereof, despite the auction being suspended, the applicant had failed to supplement his founding affidavit and also failed to file a replying affidavit. It is contended that there was proper service and that the applicant has failed to make out a case for the rescission based on the Common Law and furthermore, a case in terms of Rule 31(2)(b) had not been made out. It was contended by the respondent that while there is mention of the applicant's wife she is not cited as a party and no confirmatory affidavit was filed by her.

SUBMISSIONS

[13] It is contended for the applicant that:

- a) the applicant had before lockdown complied with all the conditions of the Deed of Sale and that the application in terms of Rule 46(11) had never been personally served, but that his agent Senwamadi was served Instead; that the application for cancellation was not served at the chose *domicilium* of the applicant;
- b) further, that the power of attorney to Senwamadi was limited only in as far as it allowed him to act as agent for the purpose of buying the house and ensuring that the property was registered in the name of the applicant; the agent did not have the power to accept service of legal processes on his behalf and to oppose same;
- c) that the sheriff in Wanless AJ application served the application in contravention of and in conflict with section 62(1)(c), the Sheriffs Act 90 of 1986, in that a sheriff was not allowed to serve a legal process in which it has an interest;
- d) the applicant had demonstrated that there was good cause for the

rescission or a reasonable explanation for the default; that the application was made bona fide and that a bona fide defence existed;

- e) That the cancellation was unlawful in that the true facts were not placed before the court when cancellation was sought in that, it was clear that transferring attorneys had delayed unreasonably to timeously lodge the transferring documents with the Deeds Office;

[14] It is contended for the respondent:

- a) The applicant has failed to deliver its replying affidavit despite correspondence requesting same therefore the respondent's version as stated in the answering affidavit should stand; as the version of the respondent remains unchallenged.
- b) That the applicant has failed to make out a case either based on the Common Law or in terms of Rule 31 (2)(b) and that the application has to be dismissed on an attorney and client scale.
- c) That the applicant had failed to serve the required notice in terms of Rule 6(5)(d) (iii).

ANALYSIS AND THE LAW

[15] In my view and with regard to the issue raised by the respondent that applicant failed to file its replying affidavit, of importance is to remember that the affidavit constitutes the pleadings. The applicant stands or falls by what he alleges in the founding papers, and that its explanation in responding to the answering affidavit should be such that it does not raise new facts. The founding affidavit has to have

facts which when considered in conjunction with those alleged in answer, be such that a finding in its favour may be made.

[16] It is also trite that where factual disputes arise these are to be determined according to the Plascon-Evan Paints¹ principle as fully explained in the matter of *Wightman t/a JW Constructions v Headfour (Pty) Ltd and Another*² where the following was stated:

“[17] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion, must in the event of conflict accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, and genuine or bona fide dispute of fact or are so far fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon Evans Paints Ltd*....

[18] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the facts to be disputed.....”

[19] It is my view that ordinarily, the applicant having complied with all the requirements necessary after successfully bidding at the auction, was entitled to transfer of the property in his name only if it had fully complied with the conditions in the Deed of Sale. Most important was that transfer would not be effected by the Registrar of Deeds if there was no clearance certificate from the local municipality.

[20] What was not addressed by the parties in argument was the question: what is the law pertaining to clearance certificates and when will a rates clearance be issued to the purchaser. It is therefore accepted that the transferring attorney will calculate

¹ 1984 (3) SA 623 A at 634E-635C

² 2008 (3) SA 371 (SCA)

the amounts due between the seller and purchaser. Section 118 of the Local Government Municipal Systems Act 32 of 2000 provides”

“118(1)A registrar of deeds may not register the transfer of property except on production of a prescribed certificate-

- (a) Issued by the municipality or municipalities in which the property is situated; and
- (b) Which certifies that all amounts that became due in connection with that property for municipal service fees.....during the two years preceding the date of application for the certificate have been fully paid.

1(A) A prescribed certificate issued by a municipality in terms of subsection (1) is valid for a period of 60 days from the date it has been issued.”

[21] The dispute raised by the applicant with the transferring attorneys related to his objection to being asked to pay additional amounts where he had timeously complied with his obligations and that the delay fell squarely on the transferring attorneys and not him, and he was unwilling to pay.

[22] Having regard to the law it is therefore trite that the registrar of deeds will only effect transfer to the purchaser on being satisfied that there is no current debt due by the seller. The purchaser, being the applicant in this instance commences on a clean slate on date of registration.

[23] It then becomes necessary to revisit the Conditions of Sale. The respondent contends that the applicant was in breach of clause 9(b) which reads:

“The purchaser shall be liable for and pay within 10 days of being requested to do so by the appointed conveyancer, the following:

“All amounts due to the municipality servicing the property in terms of the local government municipal systems act, 2000(act no 32 of 2000) for municipal services....where applicable”

This in my view echoes the legislation already quoted above. I am therefore required now to look at the content of the affidavit in compliance with Rule 46 (11).

[24] The sheriff deals with the entire merits in the founding papers especially as set out from paragraphs [9] to [23]. In my view, it is laudable that the applicant complied

with all his obligations emanating from the auction, however, the sheriff is not answerable for the alleged dilatory conduct of the transferring attorneys. The applicant had suitable remedy against them outside of the process of transfer. What was important is that he, through his agent agreed to pay on demand and within 10 days amounts outstanding to the Municipality,

[25] Another issue raised in argument relates to the point taken that it was irregular for a sheriff to serve notices in matters where he had interest.³ This is also provided for in the Code of Conduct of Sheriffs.⁴

[26] Rule 6 (5)(d)(ii) provided for a notice to be served on an opposing party if a question of law was to be relied upon also setting forth such question. Counsel for the respondent contended that such notice had not been served therefore the point of law had to be struck. Counsel for the applicant contended that such notice was not necessary and that a point of law could be raised at any point, even mero motu by the court and he relied on the case of Cusa⁵. In my view the necessity to serve a

³ Du Toit v Grimbeek 1906 TS, Koch v Koch 1947 (2) SA 129 (SWA)

⁴ Code of Conduct- A sheriff shall refrain from performing any act in any manner in which he or she has a direct or indirect interest

⁵ Cusa v Tao Ying Metal Industries and Others 2009 (2) SA 204 (CC) at para [64] “Consistent with the objectives of the LRA commissioners are required to “deal with substantial merits of the dispute with the minimum of legal formalities.....[65] “...what must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature if the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what

notice is peremptory “shall” so as to make the opposing party aware of the point of law relied upon thereby giving the other side an opportunity to respond. The facts and the law as set out in *Cusa*, it being a labour matter is entirely distinguishable and is not authority that a point of law may be raised at any time in civil proceedings which are conducted in terms of the Rules of Court. This authority does not assist the applicant.

[27] The applicant contends that it did not give the agent authority to oppose the application and that the service was in any event irregular as pointed out, being the service of the Notice of Motion and Annexures on the applicant on 21 September 2020 at Unit 60C Carlwald Luxury Apartments 81 Tambotie Road Midrand and that served on one Amanda Paula Rose also on 21 September 2020 18 Pigeon Street Halfway Gardens Ext 7. While irregularity is contended, the agent filed a notice to oppose though not authorised to do so, it was conceded by counsel for the applicant that the application came to the attention of the applicant and the agent on 23 September 2020 and no answering affidavit was delivered.

[28] It stands to be considered in this application for rescission having regard to all the above facts whether a case has been made out for rescission. It is not necessary for the facts to be proved but what is necessary is to show that there was *bona fides*, good cause and whether a *prima facie* defence exists as shown as required by Rule 31(2)(b). The respondent contends that there is no confirmatory affidavit or an explanation from the agent to explain what he understood when he signed the intention to oppose, There is therefore no explanation why the answering affidavit to the Rule 46 (11) application was not served and why same was not filed before the date of hearing.

the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in. (my underlining) [67] “These principles are however subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact obliged, mero motu, to raise the point of law and require the parties to deal therewith” (my underlining).

[29] In terms of the Common Law it has not been shown that judgment was obtained by default, fraud, or mistake common to both parties. I am therefore not satisfied that a case has been made out for rescission either in terms of the common law or in terms of Rule 31(2)(b).

[30] In the result the following order is given:

‘The application is dismissed with costs.’



TLHAPI J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD AND RESERVED ON : 13 April 2022
FOR THE APPELLANTS : Adv. Maphutha
INSTRUCTED BY : Hammond Pole Majola Inc

FOR THE RESPONDENT : Adv. J Minnaar
INSTRUCTED BY : Borman Duma Zitha
DATE OF JUDGMENT : 29 November 2022