IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

APPEAL COURT CASE NUMBER: A5023/08

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) ~~REVISED~~
DATE 17.06.09. SIGNATURE

In the matter between:

VOSAL INVESTMENTS (PTY) LIMITED — Appellant

and

CITY OF JOHANNESBURG — First Respondent

SHERIFF OF THE HIGH COURT — Second Respondent

REGISTRAR OF DEEDS, JOHANNESBURG — Third Respondent

SECOND CAPRILEO CC — Fourth Respondent

MEDEL GOLDMAN — Fifth Respondent

The Court

1. The appellant is a property-owning company and it owned a building in the centre of Johannesburg known as the Diamond Exchange. In July 2003 the local municipality ("the council") took a default judgment against the appellant for some R348 000.00 which was allegedly then owed for outstanding assessment rates. It also took an order declaring the property executable. A writ of attachment was issued in August 2003. More than three years later, in March 2007, the property was sold in execution.

   According to the appellant it only became aware of the sale on 11 April 2007 when it learnt of this from its tenants. About a week later it found out

about the default judgment from the council's attorneys.

On 18 May 2007 the appellant launched an application to rescind the judgment and set aside the sale in execution. The application came before the Court a quo which dismissed it. Leave to appeal was refused, but was later granted by the Supreme Court of Appeal following a petition to that Court.

2. In the rescission application the appellant cited the council as first respondent; the Sheriff and Registrar of Deeds as the second and third respondents; the close corporation, which was the buyer at the sale in execution as the fourth respondent while the fifth respondent was cited as the controlling member of the close corporation.

The Sheriff and the Registrar of Deeds took no further part in the ensuing proceedings.

3. The appellant initially sought relief by way of urgency. This included an interdict to prevent transfer of the property to the fourth respondent pending the outcome of the application. A preliminary skirmish between the appellant and the fourth respondent resulted in the striking from the roll of the urgent part of the relief sought in the application. Further affidavits were then exchanged between the parties on the merits of the application and the matter ultimately came before the Court a quo where it was dismissed. The basis for the dismissal was that the appellant had not shown that it had a bona defence to the council's claim; nor had it shown an absence of wilful default on its part.

4. When leave to appeal was sought from the Supreme Court of Appeal, the appellant raised for the first time, in amended grounds of appeal, a new point. This concerned whether the Registrar had the authority, when granting default judgment, also to grant an order declaring the property to be executable. It was not disputed at the appeal hearing that it was open

to the appellant to take such a law point (if indeed it was one) at the appeal stage.

See: Greathead v Commercial Catering and Allied Workers Union 2001 (3) SA 464 SCA at 470A-G

5. In order to understand the issues raised in the appeal it is necessary to go back to the beginning and have regard to the summons which the council issued and which resulted in the default judgment. It was not a simple summons in the usual fashion; rather, it was accompanied by a so-called "Annexure to Simple Summons" which reads more like the particulars of claim found in the usual combined summons. Be that as it may, the following allegations were made:

> *"1. The parties are reflected on the face of the Summons.*
>
> *2. At all material times hereto –*
>
> *a. The Defendant was the registered owner of certain immovable property situated within the municipal area of the Plaintiff being 4873 JOHANNESBURG (hereinafter referred to as "the property").*
>
> *b. The property was rateable property as referred to in the LOCAL AUTHORITIES RATING ORDINANCE 11 OF 1977) (TRANSVAAL) (hereinafter referred to as "the Rating Ordinance").*
>
> *c. Assessment rates, duly levied by the Plaintiff on the property pursuant to and in accordance with the provisions of the Rating Ordinance were due and payable by the Defendant to the Plaintiff on a date stipulated by the Plaintiff.*
>
> *3. In respect of assessment rates together with interest on*

arrear assessment rates at the property for the period up to and including the 21 MAY 2003 the total amount owing, due and payable by the Defendant to the Plaintiff amounted to R348,213.36.

4. *By virtue of a resolution of the Plaintiff in accordance with section 10G(7)(b)(iii) of the Local Government Transition Act, 209 of 1993 and section 229(1) of the Constitution of the Republic of South Africa Act, 108 of 1996, the Defendant is liable to pay to the Plaintiff interest on any arrear monies due to the Plaintiff at the rate of 17% per annum.*

5. *Despite demand the Defendant has failed to pay the Plaintiff the aforesaid sum.*

Wherefore Plaintiff prays for judgement against the Defendant for:

A. Payment of the sum of R348 213.36;

B. Interest on the aforesaid sum at the rate of 17% per annum from the date of service of summons to date of payment;

C. An order declaring Stand 4873 JOHANNESBURG executable;

D. Costs of suit."

6. Since it assumes importance in the appeal it is necessary to observe that the council's claim was based four-square on the entitlement to levy rates under the Rating Ordinance cited in the summons.

Chapter V of that Ordinance provides that *"... a local authority may levy a rate or rates (to be known as a general rate) on rateable property recorded in the valuation roll for a financial year to which* such roll is applicable... " (See: s.21(1))

This section goes on to provide a formula according to which the rates are calculated.

As will appear later the council's standpoint throughout this case has been that the subject matter of its claim was the recovery of "rates" and nothing else.

Such rates are to be distinguished from other charges which a local authority is entitled to levy for services such as the supply of water and electricity, refuse removal and sewerage. The right to levy those charges emanate from other empowering provisions in other Ordinances; they are not catered for in the Rating Ordinance.

7. In order to succeed in its application for rescission the appellant had to establish that it had a bona fide defence to the council's claim. Failure to cross this hurdle would be fatal, irrespective of however reasonable or otherwise the explanation for the default might be.

See: Chetty v Law Society, Transvaal 1985 (2) SA 756 (AD) at 765A-D

8. In its founding affidavit the appellant referred to various other litigation which took place between it and the council at about the same time i.e. 2003. The purpose was twofold. Firstly, the appellant sought to show that it had been engaged in ongoing disputes with the council about monies allegedly owing to the council and that these disputes had not yet been resolved. Thus, argued the appellant, it had a bona fide defence to the council's present claim since there was general uncertainty and dispute as to how precisely the council's claim was made up.

Secondly, in those various legal proceedings the council had served all legal processes on the appellant at its principal place of business, rather than at its registered office. (The present summons had been served at the registered office in consequence whereof, according to the appellant, it

had not come to its attention. The reason was that when appellant acquired the building some time in 1998, it had omitted to change the old registered office to a new office. This evidence was adduced by the appellant to negate the inference that it had been in wilful default of defending the action).

9. In its answering affidavit the council took up the stance that the other legal proceedings involved claims for electricity and water charges and had nothing to do with the present action. The rescission application was concerned with a claim for rates and in respect of that claim the appellant had not shown that it had any bona fide defence. Accordingly, the rescission application was doomed to failure on this ground.

In the context of the above the deponent to the council's answering affidavit stated the following:

> *"The applicant also deals with other entities and other accounts it has with the first respondent, but nowhere does it set out a defence to the claim of the first respondent in respect of assessment rates, which are the amounts in respect of which the judgment was taken."*
>
> Record p. 383
>
> *"At the centre of this matter is the issue of the non-payment by the applicant of its assessment rates account with the respondent. Like any property in Johannesburg, the first respondent provides various services to the property and property owner including the providing of water and electricity, refuse removal, sewerage charges and the billing for assessment rates."*
>
> Record p. 384

10. The deponent then went on to annex copies of the assessment rate accounts in support of its case. In this regard the deponent stated the

following:

> *"... I file simultaneously herewith a full set of accounts for the assessment rates in respect of the applicant for the property commencing in 1998. ... I attach only the assessment rates accounts as it was in respect of these amounts that judgment was taken. I do not attach any other utility accounts as these are irrelevant to the present matter."*

It is necessary and apposite to have regard to these accounts since they constitute the evidence relied upon by the council in support of its case.

See: Mutebwa v Mutebwa 2001 (2) SA 193 (Tk) at 201A-E

11. From these monthly accounts a number of anomalies emerged. In the first five months of 1998 only rates were levied. At the time these amounted to some R2 150.00 per month although later in the same year they appear to have been reduced to some R1 860.00. As at the date of the summons in May 2003 the rates were R1 772.00 per month.

However, after June 1998 the council levied, in addition to these rates, separate charges for sewerage and refuse removal. Thus, the statement rendered as at 12 June 1998 shows the following:-

Bill date	Current	Arrears
1998/06/12	R8 878.17	-R 109.85
1998/06/12	Rates Assessment	R2 150.00
	Refuse Removal	R4 512.00
	Sewer	R1 389.00
	VAT	R 194.59
	VAT	R 631.68
	(TOTAL	R8 878.17)

The above format of account is then repeated over much of the remaining period. Although the amounts claimed for sewerage and refuse charges fluctuated from month to month, they always comprised the major portion of the total monthly charges. On average it seems that the charges for rates represented only about one quarter to one fifth of the total charges.

Thus, according to the April 2000 statements the rates amounted to R1 862.00 while refuse was some R3 000.00 (including VAT) and sewerage was some R8 000.00 (including VAT).

Confusingly, from about the end of 2001 the refuse and sewer charges decreased substantially and only nominal amounts were charged. The reason for this was never explained.

12. These and other anomalies were raised in the appellant's replying affidavit. It pointed out that the total amount due for rates over the entire period covered by the accounts – on the assumption that the rates averaged out at some R20 000.00 per annum – could never have amounted to the sum of R348 000.00 as claimed by the council in the summons. In short, it argued that the amount claimed in the summons included refuse and sewer charges which had not properly been sued for.

13. The council did not seek to file a further affidavit to deal with the issues raised. It adhered to its stance that its claim was in respect of assessment rates only. Mr Both S.C., who appeared for the council at the appeal hearing, submitted as follows in his written heads of argument –

> *"Debits in respect of sewerage and refuse removal are included with assessment rates on one account because they are charges against the land, payable by the owner of the property."*

The above was a reference to the provisions of s.118(3) of the Municipal Systems Act, no. 32 of 2000 which provides *"...a security provision without a time limit..."* in favour of a local authority.

See: City of Johannesburg v Kaplan M.O. and Another 2006 (5) SA10 (SCA) at 15A

However, this does not mean that a local authority can lump together the various charges in a single cause of action.

In the Kaplan case (supra) Heher JA went on to state the following at p.18J – 19A:

> *"[29] The question which now requires to be addressed is the subject matter of the municipalities claim. The appellant's counsel submitted that the effect of s.118(3) is to bring about an innominate lump sum preference under which the separate elements are subsumed and no part can be identified by its original elements. I do not agree. The charge upon the property giving rise to a preference is merely a description of the right arising from one or more of the particular causes of indebtedness mentioned in s.118(3). The existence of the right to security depends upon the existence of those elements, which do not forego their identity by reason of their being labelled "a charge on the property" "*

14. It follows from the above that the indebtedness sued for by the council in its summons of June 2003 comprised three separate and independent causes of action. The first was a claim for rates; The second was for refuse removal; The third was for sewerage charges. None of the three claims were quantified; they were all subsumed under the label of "assessment rates". No doubt, if the problem had been raised at the time the council could have sought an appropriate amendment. However, at no stage during the present proceedings was any possible amendment sought. The consequence of this is that the judgment sought by the council was erroneous both as regards to the amount of the debt and the causes of action upon which it was founded.

Mr Both S.C. relied on an acknowledgement of debt signed by a director

of the appellant company in August 2002. In that document the director acknowledged being indebted to the council for an amount of some R312 000.00 in respect of "outstanding rates/refuse/sewer/water/ electricity, VAT and interest". This document does not assist the council. The amount owing under each separate claim is not identified and it does not solve the problem which the council created in its own summons. In any event, the appellant acknowledged throughout that it was indebted to the council for assessment rates but queried the council's quantification thereof. On receipt of a proper determination the appellant tendered to pay what it owed.

15. Since the judgment granted in favour of the council was erroneously sought it follows that the appellant has demonstrated that it has a good defence to the claim. As for showing absence of wilful default on its part, the appellant's director explained that when he purchased the company some years earlier he had intended to change the old registered address to a new one. Unfortunately, this had not happened. The court *a quo* held that this omission constituted an offence under the Companies Act and was therefore proof of wilful default. There was no basis for this finding. The appellant in fact had a registered address and the council served the summons at that address. It was never contended that such service was bad. In the circumstances, the appellant has made out a proper case for the rescission of the judgment.

16. The next issue which arises is whether it is competent for this court to set aside the sale in execution which followed upon the judgment. At the time when the rescission application was launched the sale in execution to the fourth respondent had already taken place but transfer had not yet been effected. As noted earlier, the appellant sought an interdict, by way of urgency, to stop such transfer. The fourth respondent (but not the council) opposed such urgent relief. The fourth respondent was thus aware of the attack on the judgment and consequent sale in execution and that some risk, at least, might attach to its rights as buyer of the property.

A similar problem was addressed by Alexander J in Jubb v Sheriff, Magistrate's Court, Inanda District 1999 (4) SA 596 (D) where the learned judge stated the following at 605F-G:

> *"If Joosub may be regarded as the high-watermark impugning a sale in execution even after transfer has taken place, it must apply a fortiori in my opinion to a case where a sale of property not followed by transfer is rendered a nullity by reason of the rescission of the judgment which alone gave it validity"*

(The earlier case referred to by Alexander J is Joosub v JI Case SA (Pty) Ltd 1992 (2) SA 665 (NPD))

Counsel for the fourth respondent conceded the legal consequences of the above conclusion in his written heads. As he put it *"... unfortunately for the fourth respondent, transfer of ownership of the property in issue which was sold at a public auction in execution, had not been transferred into the name of the fourth respondent... "* (i.e. at the time when the rescission application was brought).

It was not clear at the appeal whether transfer of the property had already taken place during the intervening period. If transfer has not yet been effected then the ensuing order will simply entail the fourth respondent restoring possession thereof to the appellant. If, on the other hand, transfer has already taken place, then re-transfer will have to be undertaken by the fourth respondent.

17. In view of the above conclusions it is unnecessary to deal in detail with the so-called law point raised by Mr Novick (who appeared for the appellant). He argued that, even if the judgment was not set aside nevertheless the council was not entitled to seek the order which it did declaring the property to be executable. He argued that such relief is derived solely from the provisions of the Municipal Systems Act, 2000. S.118(3) of that Act provides that municipal service fees, surcharges on fees, property

rates and other municipal taxes, levies and duties constitute a charge upon the property in favour of a local authority and confers a preference over any mortgage bond registered against the property. The security provided for under s.118(3) amounts to a lien which has the effect of a tacit statutory hypothec; this lien or hypothec entitles the holder to execute against the property secured thereunder.

See: Kaplan's case (supra) at page 16J, quoting with approval the judgment of Ackerman J (as he then was) in Stadsraad van Pretoria v Letabakop Farming Operations (Pty) Ltd 1981 (4) SA 911 (T) (the latter case dealt with s.50 of the Local Government Ordinance 1939, the forerunner of the present s.118).

18. Mr Novick argued that the summons issued in the present case contained no reference to the provisions of s.118 and it was therefore excipiable for want of such an allegation. In this regard he referred to the well-known case of Yannako v Apollo Club 1974 (1) 614 (AD). In that judgment Trollip JA said the following at 623G-H:

> *"Hence, If he relies on a particular section of a statute, he must either state the number of the section and the statute he is relying on or formulate his defence sufficiently clearly so as to indicate that he is relying on it... and if his defence is illegality, which does not appear ex facie the transaction sued on but arises from its surrounding circumstances, such illegality and the circumstances founding it must be pleaded"*

In Fundstrust (Pty) Ltd (in liquidation) v Van Deventer 1997 (1) SA 710 (AD), Hefer JA quoted with approval the following (at 725H):

> *"It is not necessary in a pleading, even where the pleader relies on a particular statute or section of a statute, for him to refer in terms to it provided that he formulates his case clearly... or, put differently, it is sufficient if the facts are pleaded from which the conclusion can*

be drawn that the provisions of the statute apply... "

19. In the Stadsraad, Pretoria case (supra) the local authority sued for rates and taxes. It alleged in its summons that the defendant was the registered owner of the property and that it was located within its jurisdiction. No specific reference was made to any Ordinance. Ackerman J held that in the absence of any evidence to the contrary, it could be accepted that the claims for rates were based on the 1979 Rating Ordinance or any other relevant Ordinance. Since the local authority was itself a creation of the Ordinance it was difficult to see how it could claim rates and taxes other than by powers conferred under an empowering Ordinance. (At 68A-D). He then went on to deal with s.50 of the Local Government Ordinance 1939 – the forerunner of the present s.118(3) of the Municipal Systems Act. The learned judge appears to have held that sufficient facts had been pleaded to indicate that the relevant Ordinances were relied upon.

The present summons is somewhat different in that the council, in suing for rates as it did, made specific reference to the Rating Ordinance which gave it the power to levy rates. It also pleaded the Ordinance which entitled it to a special rate of interest. There appears to be no good reason why it should not also have pleaded s.118 of the Municipal Systems Act. However, the failure to do so cannot be said to render the summons excipiable. Sufficient facts were before the Court to warrant reliance on the statute.

For these reasons the so-called law point is without foundation.

20. The subject matter of obtaining orders to execute against immovable property has, in recent years, received the attention of the Courts on a number of occasions. In this division new rules of practice have been introduced to alert the Registrar and assist him or her in determining possible abuses of the execution procedure.

See: Nedbank Ltd v Mortinson 2005 (6) SA 462 (WLD) at 473B

The following new rules of practice were introduced.

"In all applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable, the creditor shall aver in an affidavit filed simultaneously with the application for default judgment:

1. *The amount of the arrears outstanding as at the date of the application for default judgment.*

2. *Whether the immovable property which it is sought to have declared executable was acquired by means of or with the assistance of a State subsidy.*

3. *Whether, to the knowledge of the creditor the immovable property is occupied or not.*

4. *Whether the immovable property is utilised for residential purposes or commercial purposes.*

5. *Whether the debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable or not.*

All applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable, where the amount claim falls within the jurisdiction of the magistrate's court, shall be referred by the Registrar for consideration by the Court in terms of Rule 31(5)(b)(vi).

A further rule of practice is laid down that a warrant of execution which is presented to the Registrar for issue, pursuant to an order made by the Registrar declaring immovable property executable, shall contain a note advising the debtor of the provisions of Rule 31(5)(d)."

It may be that the above rules are only intended to apply to cases whether the debtor specifically hypothecated the immovable property to secure a loan to finance the purchase thereof. However, there would appear to be no good reason why a local authority should not similarly comply with the practice rules and file the required affidavit with appropriate amendments.

Accordingly, local authorities will in future adhere to the abovementioned practice.

21. As for costs the main issues in the appeal arose as between the appellant and the council. The latter must therefore pay the costs of the application for rescission together with the costs on appeal. As far as the fourth respondent is concerned it elected to resist the appellant's case both in the Court *a quo* and on appeal. However, it was the innocent buyer at a sale in execution and would be appropriate if no order for costs were to be made against it. It will have to bear its own costs. This is subject to the proviso that if costs of re-transferring the property to the appellant arise, such costs must be borne by the fourth respondent at no cost to the appellant. In the result the following order is made:

21.1 the appeal succeeds and the judgment by default granted on 22 July 2003 is hereby set aside;

21.2 the order declaring Erf 4873 executable is hereby set aside;

21.3 the sale in execution of Erf 4873 which took place in March 2007 whereby the fourth respondent purchased same, is hereby set aside;

21.4 the fourth respondent is ordered to restore possession of Erf 4873 to the appellant within one month of the date of this order; alternatively -

21.5 if transfer of Erf 4873 has already been effected into the name of the fourth respondent then the latter is hereby ordered to take all

necessary steps to re-transfer the said Erf into the name of the appellant, at the sole cost of the fourth respondent.

22. The first respondent is ordered to pay the costs.

MAKHANYA J

JAJBHAY J

BEASLEY AJ

SCHINDLERS ATTORNEYS
Appellant's Attorneys
2nd Floor, 3 Melrose Boulevard
Melrose Arch
Johannesburg

Appellant's Counsel: M Novick

MOODIE & ROBERTSON
First Respondent's Attorneys
9th Floor, UCS Building
209 Smit Street
Braamfontein, Johannesburg

First Respondent's Counsel: J Both S.C.

MERVYN JOEL SMITH
Fourth Respondent's Attorneys
14 Nugget Street
City & Suburban
Johannesburg

Fourth Respondent's Counsel: R Cohen