0REPUBLIC OF SOUTH AFRICA

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

CASE NO: 31494/08

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

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DATE SIGNATURE

MONTJANE TREVOR	**1ST APPLICANT**
AACHEM HOMES SERVICES CC	**2ND APPLICANT**
And	
SHERIFF OF THE HIGH COURT JOHANNESBURG SOUTH	**RESPONDENT**
In re:	
CHANGING TIDES 17 (PTY) LTD N. O.	**EXECUTION CREDITOR**
And	
SEGOLE THABO JACOB	**1ST EXECUTION DEBTOR**
SEGOLE LYDIA LETTIE	**2ND EXECUTION DEBTOR**

J U D G M E N T

WENTZEL AJ:

1. This is an application for rescission of the Order granted by Her Ladyship Justice Windell in chambers on 14 June 2014 in terms of Rule 46(11)

cancelling the sale in execution by the Sheriff of this Court which took place on 10 September 2013.

2. Rule 46 (11) (a) provides:

"*If a purchaser fails to carry out any of his obligations under the conditions of sale, the sale may be cancelled by a judge summarily on the report of the sheriff conducting the sale, after due notice to the purchaser, and the property may again be put up for sale."*

3. The respondent argued, *in limine*, that the relief sought was not competent relying on the judgment of His Lordship Mr Justice Sutherland in ***Standard Bank of SA Ltd and others v Ndlovu*** 2012 JOL 28652 (GSJ) where it was said:

> ***"****The act of the judge cancelling the sale in terms of rule 46(11) is not a judgment in any conventional sense. The procedure is sui generis. Its function is to provide judicial oversight to the process of execution of judgments.*
>
> *In my view, once done, a cancellation in terms of rule 46(11) cannot be undone. If the purchaser does not intervene prior to the cancellation then the cancellation is effective and irreversible. An offer to perform cannot trump a cancellation."*

4. However, I believe that the current matter is somewhat distinguishable. The matter before Sutherland J dealt with a situation where there had been no "*indication of opposition*" prior to the matter being heard by the Judge in chambers. There was an indication of opposition in this matter, which was conveyed to the Sheriff and a notice of opposition was filed

prior to the Order being granted (although whether this was sufficient notice was the subject of dispute dealt with below).

5. This, so it has been held by His Lordship Mr. Justice Wallis in ***Sheriff, Hlabisa and Nongomo v Shobede*** 2009 (6) SA 272 (KZP, is all that is required to thwart an Order being granted in chambers and to require that the matter be ventilated in open Court. Wallis J stressed that if the matter is opposed, the judge should refuse an Order under Rule 46 (11) and leave the parties to pursue conventional remedies by way of the ordinary procedure of Court [1]

6. This was accepted by Sutherland J who reiterated that:

> "*If any 'indication of a dispute' exists a judge should refuse a rule 46(11) application*"[2]

7. On the facts before him, the learned judge, however, found that this had not been done; "*the applicant did not file or announce to the Sheriff, the judgment creditor or its conveyancers any form of opposition*"[3].

8. In this matter the applicant did "*indicate its opposition*". This was first done erroneously by way of notice of intention to oppose and affidavit filed at the High Court in Pretoria on 26 February 2014 for appeals (which was not proper notice of opposition). However, such opposition and affidavit was

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1 at 726D-E
2 at para 8.9
3 para 8.9 read with para 7.11

nevertheless received by the Sheriff's attorney on 28 February 2014 and was thus sufficient to "*indicate opposition*" to the Sheriff, if not to the Court. Receipt of this notice was in fact acknowledged by the Sheriff's attorney as notice of opposition by letter dated 4 March 2014 as follows:

> *"Further to the above matter, we are now in receipt of the Notice of Intention to Oppose and 'respondent's Answering Affidavit' and wish to advise that the application for Cancellation has in fact already been lodged.*
>
> *We note, however from the Respondent's Answering Affidavit that there is an Affidavit by Juliana Goodman, which only deals with the request for a postponement, and does not in fact even set out sufficient details in regard thereto.*
>
> *We note that there is in fact no Answering Affidavit to the application for Cancellation.*
>
> *We would accordingly appreciate your urgently contacting the writer on receipt hereof*"

9. The applicant failed to file a notice of opposition in this Court (having erroneously filed such notice in the North Gauteng High Court) and on 9 March 2014, the respondent's attorney again wrote to the applicant's attorney requiring a response to his letter for 4 March 2014. Pursuant to a telephone conversation between the parties on 13 March 2014, the respondent's attorney confirmed by letter of even date that:

> *"We acknowledge receipt of your e-mails of the 13th instant, and note the contents.*

The writer confirms his telephone conversation with yourself on the same date, when we advised that the Application for Cancellation of the Sale in Execution had in fact already been lodged with the Registrar who will in turn forward it to a Judge in Chambers for a decision on the granting or otherwise of the Application.

We must emphasise that the Application will not be heard in Open Court.

Accordingly, if you wish your documents which you have served at our offices to form part of the record before the Judge in Chambers, it is up to you to ensure that such documents are immediately forwarded to the Judge in Chambers who is presently dealing with the matter, as otherwise such documents will probably be 'floating around'."

10. This was responded to by letter dated 14 March 2014 by the applicant's attorney who accepted this obligation as follows;

"Thank you for your letter and telephone conversations, regarding the above matter.

Your input is much appreciated. We will take the necessary action to ensure that all documents are with the Judge in Chambers.

I will notify you if there are any new developments in the matter."

11. On 27 March 2014, having heard nothing further, the respondent's attorney addressed a further letter to the applicant's attorney stating

"Further to your letter of the 14th of March 2014, we note that we have heard nothing further from you, and unless you have notified the Judge, we presume that judgment has in fact already been granted."

12. This galvanised that applicant's erstwhile attorney into action who then filed a notice of opposition with the Registrar of this Court on that date.

13. This was long before the Order was granted by Her Ladyship Windell in chambers which was only granted on 14 June 2014 .

14. It must be accepted, however, that this notice did not come to her Ladyship's attention, otherwise she would not have granted the Order and would have referred the matter to be dealt with in the normal course in open court.

15. Rule 42 (1) (a) permits rescission of a judgment erroneously sought or granted in the absence of any party affected thereby.

16. An order has been held to have been erroneously granted where the court was unaware of facts, which, if known to it, would have precluded it, from a procedural point of view, from making the order. *(* See; *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C); *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP);*Van der Merwe v Firstrand Bank Ltd t/a Wesbank and Barloworld Equipment Finance* 2012 (1) SA 480 (ECG))

17. Not every mistake constitutes an error within the meaning of Rule 42 (1) (a)(*Colyn v Tiger Food Industries Ltd* [2003] 2 All SA 113 (SCA), 2003 (6) SA 1 (SCA)). The Courts have restrictively interpreted the Rule to

cover only procedural mistakes or irregularities such that it may be concluded that the order was erroneously sought by the plaintiff or erroneously granted by the judge. (*De Wet and others v Western Bank Ltd* 1979 (2) SA 1031 (A) ; *Colyn v Tiger Food Industries Ltd supra*).

18. There can be little doubt that had the notice of opposition come to the attention of Windell J, the summary Order would not have been granted by her in chambers. Thus, the granting of the Order in chambers in the face of opposition was erroneous from a procedural point of view within the meaning of Rule 42(1) (a) *prima facie* entitling the applicant to rescission.

19. As rescission is granted as a consequence of a procedural error in terms of the Rule, it is not expressly required that *prima facie* grounds of opposition must also be set out before rescission can be granted. The mere fact of opposition would suffice to entitle applicant to a hearing in open court , at which stage, the applicant would be required to establish its grounds of opposition to the application. This is distinguishable from the situation where rescission is sought at common law or under Rule 31 (1) (b) of an Order granted by default where good cause must be established before rescission can be obtained. This, however, is subject to the overriding discretion of the Court to insist that good cause be established even where an Order was erroneously granted dealt with by me below.

20. The question thus arises whether the Order was indeed erroneously granted in chambers. This requires an examination of whether the notice

of opposition did not come to the attention of Windell J as a result of an error in the Registrar's office or whether the applicant has itself to blame because it erroneously filed its notice of opposition in the archives office, as was contended by counsel for the Sheriff. It this did not constitute proper filing of the notice, the Order given by default would not have been erroneously made in chambers within the meaning of Rule 42(1) (a).

21. What is proper notice of opposition within the meaning of Rule 46 (11)? It is stressed that the requirement that opposition be indicated to avoid an Order being summarily granted in chambers is a judicially created remedy. How and in what manner opposition must be indicated has not been prescribed. It is also not clear whether a formal notice of opposition is required in terms of Rule 6 or whether an informal "*indication of opposition*" to the Sheriff or the Registrar would suffice.

22. Interestingly, Counsel for the respondent stated that a formal notice of motion in terms of Rule 6 was employed to circumvent the procedure and to proceed straight to Rule 6 where it was anticipated that there would be opposition, implicitly acknowledging that it was not a matter which it was contemplated would be dealt with summarily in chambers and that it was anticipated that the matter would be referred to a hearing in open Court.

23. The Sheriff had adopted a similar approach in the matter of ***Sheriff, Hlabisa and Nongoma v Shobede*** *supra*. Although the Court found that the filing of a simple affidavit by the Sheriff was all that was required by the

Rule, it was held that this did not preclude the Sheriff getting summary relief under Rule 46(11) in chambers where there is no opposition as, at the end of the day, the Sheriff is not entitled to costs of such a substantive application. Wallis J explained the rationale for the Rule and held as follows:

> *"[8] The background to this rule is briefly the following. Under earlier rules of court that required that a sale in execution of immovable property be confirmed by the court, it was held that the cancellation of a sale likewise needed to be confirmed by the court.[3] It appears from those cases that the costs of the application to confirm the cancellation were made costs of the resale of the property. When the rules were amended, at least insofar as this division is concerned, to remove the requirement that a sale in execution be confirmed by the court it was held that it was no longer necessary for the sheriff to obtain the leave of the court to cancel a sale and resell the property.[4] It was also held that the defaulting purchaser was liable to pay for the loss that she had caused being the difference between the nett proceeds which would have resulted from the first sale and the nett proceeds actually resulting from the second sale after taking account of the additional costs incurred in conducting that sale. The court also ordered the respondent to pay the costs of the application.*
>
> *[9] One can readily understand why a sheriff would wish to have the security of a court order authorising the cancellation of a sale in execution and authorising him or her to resell the property. However, if conventional procedures have to be followed such applications involve cost and take time, which is prejudicial to all concerned in a situation where it is unlikely that there will be any dispute. It is for that reason that rule 46(11) was promulgated in order to provide a simplified procedure by way of which the sheriff can obtain the necessary assurance that it is safe to resell the property, without incurring additional costs that will burden someone who is already in default of their financial obligations. The rule contemplates a summary procedure based solely on a report by the sheriff. There is no reference to an "application" and it is both unnecessary and inappropriate to follow the procedure laid down in rule 6 when seeking the cancellation of a sale under this rule. All that is required is that the sheriff report to the court that there has been a sale in execution and that the purchaser has failed to carry out their obligations under the conditions of a sale in respects stated in the report, thereby justifying its cancellation. The purpose of this is that the court should oversee the process of execution. This is of*

fundamental constitutional importance.[5]"

24. In ***Sheriff of the High Court v Sithole and Three Similar Cases*** 2013 (3) SA 168 GSJ, His Lordship Mr. Justice Spilg explained the function of the Rule thus :

> *"[6] The purpose of rule 46(11) is plain. It provides an expeditious and cost-effective means of reselling a property pursuant to a judicial sale, without compromising the rights of notice and the audi alteram partem rule. Such an expedited procedure at nominal cost is necessary to ensure that the property is capable of realization for the benefit of both creditors and the debtor, and is sold at least expense in a manner that does not increase the interest on the outstanding debt. This process also does not unnecessarily extend the period of servicing any bond that is still outstanding on the property. No purchaser at a sale in execution should be permitted to achieve the very antithesis, namely the retardation of the realization of the property, and incurring additional debt that would result in a smaller dividend available to creditors and an increased liability of the execution debtor, which may result in additional assets being subjected to attachment and execution.*
>
> *[7] It is also to be borne in mind that the execution debtor has no direct say in how the sale in execution is to take place. While the execution debtor plays a passive role in the process, he or she has a clear interest to minimize any further debt."*

25. The learned judge thus concluded that :

> *" [33]…….. one of the purposes of rule 46(11)(a) is to achieve a cost-effective means whereby the sheriff can resell the property, without prejudicing the defaulting purchaser, the interests of the judgment creditor, the other participating creditors and the judgment debtor. In cases where there is no opposition by the defaulting purchaser, the sub rule provides for a hearing in chambers. The judge allocated to hear*

the matter may then elect whether the matter is to be argued in open court."

26. It is also noteworthy that Spilg J agreed with Wallis J that unless opposition was expected, a formal application in terms of rule 6 was not required.

> *"[37]While it is difficult to contemplate the need for a formal application save in cases where the defaulting purchaser intends opposing, exceptional circumstances cannot be ruled out. The starting point, as pointed out in Hlabisa at paras 9 and 11, is that rule 46(11) itself does not contemplate an application-type procedure. Save in the case of dispute, or possibly some exceptional situation which may require it, the practice in this division is for the sheriff to prepare and serve a notice authorising the cancellation and resale, supported by an accompanying affidavit. On filing, the registrar refers the matter to a judge in chambers."*

27. However, neither Spilg J nor Wallis J dealt with the manner in which opposition should be indicated. In the absence of any express ruling in this regard, I would have thought that a formal notice of opposition should properly be filed with the Registrar of the Court and served on the Sheriff Whether it is necessary that an affidavit setting out the grounds of opposition be filed at this stage or only after the matter is referred to a hearing in open Court is unclear, but at the very least, a formal notice of opposition should be filed at this stage.

28. Where no opposition is filed the rule contemplates that the matter be dealt with expeditiously solely on the basis of the report of the Sheriff and the motion Court does not need to be burdened with matters of this nature.

(see Wallis J in *Hlabisa* para [9] and Splig J in *Sithole* para [35]). It is not appropriate that the procedure laid down in rule 6 be followed. This is an indication that there is no need that an affidavit be filed at this stage and all that is required is that a notice of opposition be filed.

29. However, judicial oversight is an important aspect of this process particularly where the sale agreement provides for retention of the deposit. And where there is an indication of opposition, the practice is then to direct that the matter be heard in open Court and that the matter be placed on the opposed motion roll. It is only at this stage that a formal application in terms of Rule 6 would have to be brought and an affidavit setting out the grounds of opposition would have to be filed.

30. This may be of significance as although an affidavit was filed together with the notice of opposition in the Pretoria Court, no affidavit was filed together with the notice of opposition in this Court.

31. Assuming in the applicants favour that all that was required at this stage was to file a notice of opposition to preclude an Order in chambers being summarily granted and entitling the applicant to a hearing in open Court, it remains to consider whether the filing of such a notice in the archives office as opposed to the main office of the Registrar constituted proper notice?

32. The respondent's counsel urged me to find that the service of the notice of opposition at the archives office was defective inasmuch as it could never have been brought to the attention to the learned judge. The applicant was thus, so it was averred by the Sheriff, the author of its own misfortune. Although this difficulty was raised in the answering affidavit, no reply was filed hereto and the court was left to speculate as to why and under what circumstances the notice was filed in the archives and whether this constituted proper notice.

33. I was told by my Registrar that matters prior to 2013 are transferred to the archives. I surmised, in the applicant's favour, that that this may have been why the notice of opposition was filed in the archives. This was of course speculation and was an issue which the applicant did not seek to clear up in reply. Counsel for the respondent informed from me from the bar that even if the file was archived as it bore a 2008 case number, when the application for cancellation of the sale in execution was brought, the file would have been transferred to the main registrar's office. I asked my registrar to make enquiries and she was informed that this is not in fact the case and that the file would have nevertheless remained in the archives. There was, however, no evidence before me that this was indeed correct.

34. Counsel for the Respondent argued that as the application was for final relief, I was bound to resolve this dispute by applying the rule enunciated in the matter of **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty)**

Ltd 1984 (3) SA 623 AD and to have regard to the facts of the respondent together with the facts of the applicant that are not in dispute.

35. Even applying this rule, however, I am faced with the common cause fact that a notice of intention to oppose was served and that it was served at the archives office. Although it is the Sheriff's view that this is a further explanation of why the documents never reached the relevant Judge in Chambers and thus the applicant is the master of its own misfortune, this does not constitute evidence. No evidence was adduced by either party as to the proper procedure to be adopted apart from submissions made by the Sheriff's counsel from the bar.

36. The Court is mindful of the averments made in the founding affidavit that it was not certain which judge was to be notified which is, as a matter of fact true. I think that the Court can take judicial notice of the fact that in all likelihood when the notice was filed, a judge had not yet been allocated to hear the matter and that there was no way of the applicant noting its opposition to the judge seized of the matter other than by filing a notice of opposition with the Registrar.

37. In *Ndlovu* (*supra*), Sutherland J accepted that there is no prescribed formal procedure for a purchaser making his opposition known, nor is any set out in Rule 46(11) or in the practice manual. The learned judge accepted that the notice in terms of Rule 46(11) before him did not allege a certain date by when notice of opposition should be given and did no

more than alert the purchaser of the intention of the Sheriff to report to a judge that the sale ought to be cancelled. It did not expressly invite opposition[4] .Although the applicant in that case insisted that he contacted the conveyancing attorney dealing with the sale, he did not file or announce to the Sheriff or the judgment creditor or its conveyancers, any form of opposition. It was this fact that convinced the learned judge that no proper notice of opposition had been filed prior to the Order being granted.

38. As such, in the matter before him, the Order was not erroneously granted within the meaning of Rule 42. Indeed, the learned judge found at paragraph [13] that:

> "*If the purchaser does not intervene prior to the cancellation, then the cancellation is effective and irreversible. An offer to perform cannot trump a cancellation) (for example see* ***Moodley v Reddy*** *1985 1 SA 76 D)"*

39. With respect, however, to the learned judge, I cannot accept that where a notice of intention to oppose was properly served at the registrar's office, but due to an error in that office, it does not come to the attention of the Judge to whom the matter is allocated, the applicant would be precluded from obtaining rescission of the Order made in chambers and having the matter determined in open court because such and order is not an Order capable of rescission and is *sui generis* as contended by the learned judge.

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[4] at para 7.10

40. With respect to the learned judge, it cannot be correct that that where due to an error in the registrar's office, an order of cancellation is erroneously summarily granted in chambers, the Order is not capable of rescission and the applicant's remedy is limited to an action for damages in delict. This is contrary to the purchaser's right to a hearing in open court prior to a cancellation being granted where he has indicated his opposition. This is the practice in this division. It would also be contrary to the important oversight role played by the judge in chambers where forfeiture of the deposit is sought.(See Spilg J in *Sithole* at paragraphs [8]-[37])

41. In any event, as I have said, the facts of the present matter are distinguishable from those before Sutherland J where there was no indication of opposition drawn to the attention of the registrar or the judge hearing the matter prior to it being heard as required. In this matter, the action taken was timeous and I cannot find as a matter of fact that the filing of the notice of opposition in the archives office was erroneous when the file had been transferred to archives. I have no evidence that the file would, after the application for cancellation had been sought, be transferred to the general office as contended by counsel for the Sheriff in argument.

42. In the circumstances I am satisfied that the judgment was erroneously granted and the cancellation of the sale in execution to the applicant is capable of rescission under Rule 42 (1) (a) alternatively by the exercise by me of my judicial discretion that a purchaser who has indicated his

opposition is entitled to a hearing in open court before the sale is cancelled: otherwise, innocent purchasers will be prejudiced by the inefficiencies in the Registrar's office.

43. I am alive to the fact that the judgment creditor may also be prejudiced hereby who is in all likelihood, behind the application by the Sheriff for cancellation of the sale in execution (See Sutherland J in *Ndlovu supra* at para 8.2), but the purchaser is entitled to a hearing in open Court and the principles of *audi alteram partem* are well enshrined in our Constitution and in the Promotion of Access to Justice Act, 2000(PAJA). Furthermore, in considering whether a judgment was erroneously granted, commercial prejudice is an irrelevant consideration (*Weave v Absa Bank Ltd 1997 (2) SA 212 (E.),* and particularly that of a third party**.**

44. The purpose of the rule and the policy considerations behind it were aptly described by Sutherland J ,supra in paragraph 14 as follows:

> *"[14] There are a number of policy considerations which bear on the purpose and effect of this summary procedure…..*
>
> > *14.1 The Sheriff's invocation of the rule is to offer to the Sheriff the security of being able to re-advertise and resell without litigation interfering with the swift progress towards disposing of the property and of satisfying the creditor's legitimate interests.*
> >
> > *14.2 The judgment creditor is entitled to be paid its due without collateral fussing about the initial sale causing delays.*

> *14.3 The judgment debtor is also entitled to have his misery brought to a close as soon as possible and be spared the risk of further interest on the principal debt mounting because of delay in execution."*

45. Weighing the prejudice to the applicant against the prejudice to the judgment creditor and the debtor, I am reluctant to find that the applicant, having noted his opposition which, through no fault of his own, fails to come to the attention of the judge hearing the matter, should forfeit its right in rule 46 (11) to a hearing in open Court and have no remedy to set aside or rescind the Order patently erroneously granted in chambers.

46. I am not convinced that the function performed by the judge in chambers is purely perfunctory and is not judicial in nature. That might have been the case were the Registrar to be permitted to grant such Orders but the judge in chambers performs an important oversight function which is only dealt with in chambers where there is no indication of opposition. Where there is opposition, the matter cannot be dealt with in chambers and can only be dealt with in open Court where any Order granted would certainly be judicial and be capable of rescission. It is patently anomalous for there to be such a marked distinction between the nature of the judgment where it is granted in chambers or where it is granted after a hearing in open Court. A draft Order granted in chambers is no less of a judgment than that granted in open Court.

47. The function performed by the Judge in chambers is not the same as that performed by the Registrar in Income Tax matters in terms sections 91 (1)

(b) of the Income Tax Act which it has been held, although having the effect of a judgment, are not judgments in the true sense and are *sui generis* and are thus incapable of rescission. (See *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Services and Another* [2011] ZAWCHC 297 (22 June 2011) at paragraphs 36 to 38, which, approach was approved by the South Gauteng High Court in the matter of *Modibane v* CSARS [2011 ZAGPJHC 152 (20)October 2011] , disapproving the judgment of *Mokoena v Commissioner for South African Revenue Service* 2011 (2) SA 556 (GSJ) which had permitted rescission.)

48. There the court held that it is somewhat misleading to describe the effective invocation of these sections in the Income Tax Act as giving rise to "*judgments*"; on the contrary, they are administrative orders given by the Registrar pursuant to certified statements filed by SARS which are declared, in terms of the relevant Acts, to have the effect of judgments to facilitate the collection process.

49. A "*judgment*" granted pursuant to a statement filed under the provisions of Section 91 is not capable of rescission as it is not in fact a judgment but merely an enforcement procedure that has the effect of a civil judgment; it is but a recovery provision allowing SARS to recover an amount which it certifies as due and payable. Such Orders are not granted by a judge but by the Registrar and are clearly distinguishable.

50. As was explained in the *Modibane* matter (supra), the filing of a certified statement with the Registrar in terms of section 91(1) (b) "*plainly does not*" have "*the rights-determining character of a judicially delivered judgment*" Rather, this is merely a "*recovery provision*" allowing SARS to "*recover an amount which [it] certified as (already) due or payable, despite the fact an objection has been lodged or an appeal may be pending*", that is, even in the face of opposition .

51. There are, however, good policy reasons for this approach which is in line with the majority judgment of the Supreme Court of Appeal in *Singh v Commissioner South African Revenue Service* 2003 (4) SA 520 (SCA) at paragraph [9], the unanimous judgment of the SCA in *Commissioner, South African Revenue Service v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA) at paragraph [16] and [17] and the Constitutional Court in *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC) which endorsed the constitutionality of the "*pay-now argue later"* principle This is clearly distinguishable from the procedure envisaged in Rule 46 (11) and the policy behind same.

52. The Registrar performs a similar function under Rule 31 (5) in granting default judgments where the claim is for a liquidated debt which has, for policy reasons been permitted .However, unlike in income tax matters, the judgment debtor is nevertheless expressly given the right to have the matter reconsidered by the Court in terms of Rule 35 (5) (b) ensuring that a party wishing to oppose is entitled, as of right, to judicial oversight in

open Court and there is thus a remedy provided in the event that the Order of the Registrar was erroneously granted.

53. I am thus satisfied that the Order made by Windell J was erroneously granted in chambers and that this Order is capable of rescission under Rule 42(1) (a).

54. However, even of the filing of the notice at the archives office did not constitute proper notice of opposition and thus that the Order was not erroneously granted , it would nevertheless be competent for the applicant to seek rescission under the provisions of Rule 31 (2) (b) provided the requirements thereof were met.

55. Rule 31 (2) (b) permits rescission of a judgment granted by default in the absence of the judgment debtor provided good cause is established. It is trite that good cause in these circumstances involves establishing that his default is not willful in that he has a reasonable explanation therefor, (see *Subramanian v Standard Bank Ltd* [2013] JOL 30321 (KZP) at [12]; *Ferris v FirstRand Bank Ltd* 2014 (3) BCLR 321, 2014 (3) SA 39 (CC), [2013] ZACC 46 at [24]–[25]), that he has *a bona fide , prima facie* defence (see *Trapel Farms CC and Others v Rodel Financial Services (Pty) Ltd* [2013] JOL 29822 (KZP) at [20]), and that rescission is not sought soley for the purpose of delay. (*Cf Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) 1180–1181.) Similar requirements

would have to be established were rescission to be sought at common law.

56. Good cause for rescission has not been established in this matter.

57. Firstly, there is no reasonable explanation for the applicant's default in filing a proper notice of opposition in the general office as opposed to the archives, assuming that that would have been required. No replying affidavit was filed and the applicant's attorney saw fit not to provide an explanation in reply as to why the notice of opposition was filed in the archives despite this having been expressly raised in the answering affidavit.

58. Second, although it is sufficient to set out facts, which if established at the trial, would constitute a good defence, it is no defence that the applicant now wishes to remedy its default and seeks an indulgence to do so. The applicant does not dispute that it was in default and the Sheriff is entitled to an Order of cancellation if he can establish a breach of the sale agreement. To tender to perform now, after the right to cancel the sale has already arisen, is simply too late.

59. The defence must have existed at the time of the judgment and thus the subsequent remedy of the default would not be sufficient. (See: *Swadif (Pty) Ltd v Dyke* 1978 (1) SA 928 (A) 939 .) Furthermore, the subsequent settlement of the judgment debt is not a cause for setting aside a lawfully

issued judgment. (See *Weave v Absa Bank Ltd* 1997 (2) SA 212 (D); *Saphala v Nedcor Bank Ltd* 1999 (2) SA 76 (W); *Lazarus v Nedcor Bank Ltd* 1999 (2) SA 782 (W); *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C); *Vilvanathan v Louw NO* [2011] 2 All SA 331; 2010 (5) SA 17 (WCC); *Nedbank Ltd v Soneman and Another* 2013 (3) SA 526 (ECP).)

60. Certainly, the mere offer to now remedy the breach, or worse still, be afforded time to remedy the breach, as in this matter, will not suffice.

61. Third, on the applicant's own version, the application for rescission has been brought for the purposes of delay to afford it the opportunity to remedy its breach.

62. Finally, although the court has a wide discretion in evaluating "*good cause*" in order to ensure that justice is done between the parties (See: *Wahl v Prinswil Beleggings (Edms) Bpk* 1984 (1) SA 457 (T)) and the discretion to rescind the judgment must always be exercised judicially and is primarily designed to enable courts to do justice between the parties (See:*Riddles v Standard Bank South Africa* [2009] 2 All SA 407 (T)), rescission will serve little purpose in this matter where the fact of default is admitted. Even if the applicant is now prepared to remedy his default, the Sheriff would nevertheless be entitled to the Order granted were the matter to be decided in open Court. In effect, the applicant has been afforded a hearing in open Court by pursuing its application for rescission.

63. Furthermore, the applicant's attorneys have been shoddy in this matter and no real effort was made to prosecute the application. No replying affidavit was filed. No practice note or heads of argument were filed and counsel appearing appeared late after the respondent's counsel had completed his argument. This tends to confirm my suspicion that the application was not *bona fide* pursued and was pursued soley for the purpose of delay.

64. Although I have been prepared to give the applicant the benefit of the doubt that service of its notice of opposition at the office of the archives would suffice and that the Order in chambers was erroneously granted within the meaning of Rule 42 (1) (a) (See*:Colyn v Tiger Food Industries Ltd* [2003] 2 All SA 113 (SCA), 2003 (6) SA 1 (SCA). See also *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C); *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP).), I am also not inclined to grant rescission in the absence of good cause, notwithstanding that I accept that this is not expressly stated to be a requirement for rescission under this Rule as is the case where rescission is sought in terms of Rule 31 or at common law.

65. The Supreme Court of Appeal has made it clear that the Court retains the inherent jurisdiction to refuse an application for the variation or rescission of a judgment even if the applicant is able to make out a case within the confines of the Rules and that the Rule must be interpreted and applied within the context of the common law from which it derives(See*:Colyn v*

Tiger Food Industries Ltd [2003] 2 All SA 113 (SCA), 2003 (6) SA 1 (SCA).)

66. There the Supreme Court of Appeal explained that :

> "*The common-law before the introduction of rules to regulate the practice of superior courts in South Africa is the proper context for the interpretation of the rule. The guiding principle of the common-law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the judge who delivered it. He becomes functus officio and may not ordinarily vary or rescind his own judgment (Firestone SA (Pty) Ltd v Genticuro AG). That is the function of a court of appeal. There are exceptions. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, justus error. Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause…*
>
> *It is against this common-law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. The rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The rule gives the courts a discretion to order it, which must be exercised judicially (Theron NO v United Democratic Front (Western Cape Region) and others) and Tshivhase Royal Council and another v Tshivhase and another; Tshivhase and another v Tshivhase and another.*
>
> *Not every mistake or irregularity may be corrected in terms of the rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law. That is why the common law is the proper context for its interpretation. Because it is a rule of court its ambit is entirely procedural."*(my underlining)

67. I have already dealt with the reasons why I do not believe that good cause has been established.

68. In the circumstances, although I believe that rescission is competent under Rule 42 (1) (a) in the present circumstances, I intend to exercise my discretion against granting rescission in the absence of good cause.

69. However, because I believe that the applicant was reasonably entitled to apply for rescission as the Order had been erroneously given in chambers within the meaning of Rule 42(1) (a) in its absence, I do not propose penalising the applicant with costs, despite its attorney's tardiness.

70. I accordingly dismiss the application for rescission and Order that each party bear their own costs.

WENTZEL AJ
ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT

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