IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBER: 07/118566

In the matter between

COLUMBIA RYLAAN 14 NORTHCLIFF CC	First Applicant
MOODLEY, GONASAGREN	Second Applicant

And

ABSA BANK LIMITED	First Respondent
BROWN, I	Second Respondent
THE SHERIFF, JOHANNESBURG WEST	Third Respondent
REGISTRAR OF DEEDS	Fourth Respondent
APPALSAMY, GAYATHREE	Fifth Respondent

Neutral citation: Columbia Rylaan 14 Northcliff CC & Another v ABSA Bank Limited & Four Others (07/18566) (9 February 2015)

Coram: EF DIPPENAAR AJ

Heard: 3 February 2015

Delivered: 12 February 2015

Summary: Rescission of summary judgment; settling aside subsequent sale in execution; setting aside transfer of immovable property and directing registrar of deeds to cancel registration to second respondent and amend records to reflect registration of immovable property in name of first applicant.

ORDER

The application is dismissed with costs.

JUDGMENT

EF Dippenaar AJ

[1] This application relates to the rescission of a summary judgment granted by Van der Merwe AJ on 10 March 2009 in which no opposing affidavits were filed, the setting aside of the subsequent sale in execution of certain immovable property, Erf 2…., N……. Extension 1……. Township, Registration Division IQ, Gauteng, commonly known as 1…… C…… D…….. N……., Gauteng, hereinafter referred to as "the immovable property" (which was declared specifically executable) held on 5 September 2013, the setting aside of the transfer of the immovable property to the second respondent, as purchaser at the said sale in execution effected on 6 November 2013 and ancillary relief.

[2] The first applicant was the registered owner of the immovable property here in issue. The second applicant is a member of the first applicant and further seeks rescission of the summary judgment which had been granted against him in his personal capacity as surety and co-principal debtor with the first applicant.

[3] The applicants seek:

[3.1] Condonation for the late launching of the application;

[3.2] The setting aside of a summary judgment order granted by Van der Merwe AJ on 10 March 2009 in terms of rule 42(1)(b);

[3.3] The setting aside of the sale in execution of the immovable property on 5 September 2013;

[3.4] The setting aside of the transfer of the immovable property into the name of the second respondent on 6 November 2013;

[3.5] An order directing the fourth respondent, the registrar of deeds to cancel the registration of the transfer of the immovable property into the name of the second respondent and to amend its records to reflect the first applicant as owner;

[3.6] Costs only in the event of opposition.

[4] The application is opposed by the first respondent, the judgment creditor. Although, inter alia, the Sheriff and the purchaser of the immovable property at the sale in execution have been cited as second and third respondents respectively, they have not opposed the application. Other than a confirmatory affidavit by the second respondent's attorney of record to the applicants' replying papers, none of the other

respondents have actively participated in this application.[1] A return of non-service was provided in respect of the second respondent. A notice of withdrawal as attorneys of record for the second respondent was served on 22 January 2015, indicating that the second respondent was aware of the application. There is no indication in the file that the second respondent ever opposed the application or filed any papers.

[5] It is apposite to provide a short history of the matter as the facts emerge from the papers.

[6] The first respondent first instituted proceedings against the applicants on or about 16 August 2007 by way of simple summons, for payment of an amount of R607 651,46 together with interest and costs and an order declaring the immovable property specifically executable.

[7] In the simple summons, reliance is placed on '*written agreements*' concluded between the first respondent and the first applicant '*in terms of which monies were lent and advanced to the first applicant as described in the agreement'*. A copy of a mortgage bond, described as '*the agreement securing the aforesaid money lending agreement*', is attached to the simple summons as is a copy of the suretyship relied on for the liability of the second applicant. The mortgage loan agreement is not attached to the simple summons.

[8] The applicants, via a former attorney of record, Naiker, filed a notice of intention to defend the action on 5 September 2007 whereafter the first respondent launched a summary judgment application on 21 September 2007. An affidavit was also filed in support of the declaration of the immovable property as specifically executable. The application was enrolled for hearing on 20 November 2007.

[9] No answering affidavit opposing the summary judgment application was ever filed. It is common cause between the parties that prior to the hearing of the summary judgment application, the applicants paid the then arrear instalments on

[1] Any reference to "the parties" in this judgement, is to be read as a reference to the applicants and the first respondent

the mortgage loan agreement and the application was by agreement withdrawn from the roll on 16 November 2007.

[10] It is undisputed that the first applicant again fell in arrears with its instalments during May 2008 and it was notified to make immediate payment. By February 2009, the arrears had mounted to some R61 214,07, resulting in the first respondent enrolling the application for summary judgment for hearing on 10 March 2009.

[11] It is common cause that the notice of set down was duly served on the applicants' former attorney, Naiker, on 23 February 2009.

[12] It is undisputed that there was no appearance for the applicants on 10 March 2009 and no affidavit resisting the summary judgment was filed. Summary judgment was granted on that date by Van der Merwe AJ and the immovable property declared specifically executable.

[13] The applicants contend that they were not notified of the enrolment for hearing of the summary judgment application on 10 March 2009 although the notice of set down was properly served on their erstwhile attorney Naiker. They further contend that despite request, Naiker has not provided any explanation for his remissness in not notifying the applicants accordingly and that they had removed their files to another attorney as they were dissatisfied with the service they had received.

[14] Pursuant to the granting of the aforesaid judgment a writ of execution was issued and served on the first, second and fifth respondents by registered post. The applicants deny receiving the writ in execution. Insufficient documentary proof has been provided that to establish the applicants indeed received the writ.

[15] A sale in execution was arranged and advertised by the first respondent for 11 June 2009.

[16] It is common cause that on 22 May 2009, the second applicant contacted the first respondent and confirmed that he had settled the then arrears on the bond account. The sale in execution of the immovable property arranged for 11 June 2009, was then cancelled.

[17] The first respondent contends that the applicants were thus aware of the judgment since at least 11 June 2009, being the date on which the first sale in execution would have taken place.

[18] The applicants in reply disavow any knowledge of the said judgment or sale in execution and contend that the second applicant “knew about the arrears and settled same when he was in a position to do so”. The convenient timing of such payment is not explained, nor is any detail provided of the communication between the parties at the time.

[19] It is undisputed that during February 2013, the first applicant again defaulted on the loan account and by July 2013 was in arrears in an amount of R42 537,76, of which the applicants were notified via sms. This default sparked the arrangement and advertisement of a further sale in execution of the immovable property to be held on 5 September 2013. The applicants deny any knowledge of such sms or the subsequent telephonic messages made on behalf of the first respondent to make contact with the applicants.

[20] The applicants contend that the first respondent was not entitled to rely on the 2007 affidavit in support of the application for summary judgment in 2009 as the facts presented therein referred to the position in 2007 which no longer existed at the time summary judgment was sought on 10 March 2009.

[21] On the applicants’ own version the applicants became aware of the proposed sale in execution of the immovable property during August 2013. The second applicant first contacted the first respondent in this regard directly on 27 August 2013 to investigate the matter.

[22] Pursuant thereto the applicants were provided with a history of the litigation, including dates of relevant events. At that time the applicants would by necessary implication also been aware of the fact that a judgment had been granted against them. The second applicant’s mother passed away on 27 August 2013, necessitating his attendance at her funeral in Durban and causing severe emotional distress for the second applicant.

[23] It is common cause that on 2 September 2013, the second applicant addressed an email to the first respondent[2], wherein he advised, inter alia, that he was expecting funds to pay the arrears to be available in late September or early October 2013 at which time he intended settling the outstanding payments and resume regular payments. The first respondent was requested to consider whether it would be prepared to consider settlement of the arrears as offered.

[24] On the same day, the first respondent[3] responded declining the offer and indicating that it would only cancel the sale in execution if the arrear amount of R55 800,96 was paid on or before 5 September 2013. The second applicant on the same date, responded that he was unable to do so and would request the banking ombudsman to intervene.

[25] It is common cause that the applicants did not settle the aforesaid arrears before the sale in execution took place, nor took any legal steps to halt the sale in execution, despite on their version having appointed an attorney to attempt to avoid the immovable property being sold in execution.

[26] It is undisputed that on 4 September 2013, the applicants' attorney addressed a letter to the first respondent's attorneys wherein, inter alia, first respondent was advised that they had received instruction to apply for rescission of the judgment and that the second applicant contended that he was never notified of the sale.

[27] It is also undisputed that on 5 September 2013, the applicants' attorney attended the offices of the sheriff and advised that the applicants would be seeking a rescission of the judgment granted on 10 March 2013.

[28] It is further undisputed that the applicants' attorneys provided attorneys Naidu Richen with copies of the court file on 19 September 2013. Further enquiries were directed to the first respondents' attorneys[4] on 15 and 16 October 2013 pertaining to whether the summary judgment proceedings had been opposed.

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[2] GM9, p88
[3] GM10,p89
[4] GM19, pp103-104; GM21, p108

[29] It is common cause that the applicants took no immediate steps to launch any rescission proceedings prior to the transfer of the immovable property being registered on 6 November 2013. It appears that the second applicant was hospitalised from 8 to 19 November 2013, by which time the transfer of the immovable property had already been registered.[5]

[30] The applicants launched an application under case number 07/18566, similar to the present application on or about 4 December 2013. Thereafter it became apparent that the first applicant had been deregistered during 2010. That application was not persisted with.

[31] It is undisputed that the first applicant was finally reinstated on 20 March 2014. Thereafter the present application was launched on or about 31 March 2014.

[32] The application for rescission of the summary judgment is based on uniform rule 42(1)(a), which provides as follows: '*42(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party effected, rescind or vary: (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby*.'

[33] It is common cause between the parties that the application is based squarely on the provisions of rule 42(1)(a) and is not brought under the common law. As such, the applicants must show that there was a procedural irregularity or mistake in respect of the issue of the summary judgment order.

[34] The applicants seek the rescission of the judgment both on the basis that the summary judgment was erroneously sought and on the basis that it was erroneously granted.

[5] GM23, p111

[35] Despite the apparent failure to advise the applicants of the enrolment of the summary judgment application for 10 March 2009, such lack of knowledge does not avail the applicants and it cannot constitute a ground for relief.[6]

[36] The applicants contend in summary that the summary judgment was erroneously sought as the first respondent could not rely on the 2007 affidavit filed in support of the application for summary judgment as the facts had materially changed. The 2007 affidavit could not confirm the altered facts as they existed during 2008 and 2009 up to the time summary judgment was sought. They contend that it is undisputed that the arrears giving rise to the simple summons had been serviced and that the first respondent had elected to continue with the loan agreement. As such, it is argued, that the summary judgment was erroneously sought. The continuation of the loan agreement is in dispute.

[37] The first respondent in argument points out that the facts underpinning the application for summary judgment still existed at the time the said judgment was sought as the applicants were in arrears at the time and that the first respondent elected to claim the full amount due and payable. It further contends that the applicants could and should have raised changed circumstances and any other defence which the applicants had by way of an affidavit resisting summary judgment, which was never done.

[38] I point out that it is not a requirement of a rescission application under rule 42(1)(a) for an applicant to demonstrate a bona fide defence to the creditor's claim and it is not a consideration to take into account in the present application.

[39] The applicants rely on Nyingwa v Moolman NO[7] in contending that at the time summary judgment was granted facts existed of which Van der Merwe AJ was not aware, and had he been aware of such facts, it would have induced him not to grant the summary judgment, thus rendering the summary judgment erroneously sought and/or erroneously granted.

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[6] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 8F-H, para [9]

[7] 1993 (2) SA 508 (Tk) at 510F-G

[40] Applied to the facts of this matter, this contention cannot be upheld. In Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd[8], the Supreme Court of Appeal[9] held that a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously as envisaged by rule 42(1)(a) by reason of facts of which the learned judge who granted the judgment, as he was entitled to do, was unaware and that the existence or non-existence of a defence on the merits is an irrelevant consideration, which cannot, if subsequently disclosed, transform a validly obtained judgment into an erroneous judgment. It was at all times open to the applicants to raise the changed circumstances when it made payment of arrear instalments after the institution of the action, which it did not do, in circumstances where the action had not been withdrawn.

[41] The applicants' second line of attack is based on an alleged procedural defect existing in the simple summons, at the time summary judgment was granted. They contend that the first respondent's failure to attach the mortgage loan agreement which underpins its' claim to the simple summons falls foul of rule 17(2)(b) and constitutes a procedural irregularity or mistake in respect of the issuing of the summary judgment order, thus rendering rule 42(1)(a) applicable. In support of these contentions, the applicants place great reliance on Absa Bank Limited v Studdard and Another[10] ("Studdard").

[42] In Studdard, Wepener J had to consider the requirements of a simple summons where default judgment was being sought on a claim which was based on a loan agreement secured by a mortgage bond, as in the present instance. The wording of paragraphs 5, 6 and 7 of the annex to the simple summons in the present matter is in substantially the same terms as the wording of the simple summons Wepener J had to consider in Studdard[11].

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[8] 2007 (6) SA 87 (SCA)
[9] at 95D-F, para [27]
[10] [2012] ZAJP JH (26) judgment of Wepener J, followed in Absa Bank Limited v Janse Van Rensburg and Another 2013 (3) SA 173 (WCC) and distinguished in Absa Bank Limited v Zalvest Twenty (Pty) Ltd and Another 2014 (2) SA 19 (WCC), both full bench decisions
[11] Fn 9, supra

[43] Wepener J, relied on, inter alia, Nedbank Ltd v Jacobs and Another[12], wherein Thring J held that summary judgment could not be granted where neither the relevant loan agreement nor the mortgage bond had been annexed to the simple summons, which constituted a failure to comply with the provisions of rule 17(2)(b).

[44] The same principles will accordingly apply whether default judgment is sought or whether summary judgment is sought on an unopposed basis and in the absence of the defendant.

[45] As observed by WepenerJ in Studdard[13]: '*It has been a rule of practice in this Division that copies of both the written agreements of loan as well as the bond document must be attached to a summons, including a simple summons, and to produce the original documents at the time when judgment is requested, whether the matter is brought by way of summons or application'*.

[46] The reasoning in Studdard was further accepted by the full bench in Absa Bank Ltd v Van Rensburg[14].

[47] The first respondent argues that the Studdard judgment should not be applied retrospectively and that, as it had not been handed down at the time the summary judgment was granted, this judgment is not applicable to this matter. This argument however disregards the fact that the judgment of Wepener J did not create a new legal position but simply enunciates the existing principles and practice, which were applicable at the time the summary judgment was granted on 10 March 2009.

[48] In the circumstances, there was a procedural irregularity or mistake in respect of the summary judgment granted as the absence of the loan agreement underpinning the mortgage bond was not attached and there was no compliance with the provisions of rule 17(2)(b) which provides as follows: '*In every case where the claim is for a debt or liquidated demand the summons shall be as near as may be in accordance with Form 9 of the First Schedule'.*

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[12] 2008 JDR 0445 C; [2008] JOL 21940C
[13] para [23]
[14] Fn9, supra

[49] This is however not the end of the enquiry as to whether the summary judgment must be rescinded as it does not follow that the applicants are of right entitled to such relief. Rule 42(1) is a discretionary remedy[15] and it must still be considered whether the applicants have made out a proper case for the condonation sought for the late filing of the application and whether the application was launched within a reasonable time. In its heads of argument, the applicants contend that it was indeed unnecessary for them to seek condonation as the application was launched within a reasonable time as required by rule 42(1)(a).

[50] Whether or not a formal condonation application was required, it must be considered whether the application seeking the rescission of the summary judgment was launched within a reasonable time and whether good cause for the delay has been illustrated.

[51] What is reasonable must be determined having regard of the particular facts of this matter.

[52] I shall return to this issue later. It is also necessary to consider the further relief which the applicants seek in order to determine whether in the circumstances a discretion should be exercised in favour of the applicants.

[53] It is generally accepted that once the judgment is rescinded, the warrant of execution and the sale of execution have no legal basis as between the parties to the litigation and the judgment debtor is entitled to have the status quo ante restored as against the judgment creditor[16].

[54] It is further generally accepted that where a judgment is rescinded after a sale in execution has taken place but before transfer of the property to the purchaser had taken place, the owner of the property is entitled to seek an order setting aside the sale in execution and interdicting the transfer of the property to the purchaser at the

[15] Nkata v Firstrand Bank Ltd and Others 2014 (2) SA 412 (WCC)
[16] Lottering v SA Motor Acceptance Corporation Ltd 1962 (4) SA 1 (E) at 3H-4B; Jasmat and Another v Bhana 1951 (2) SA 496 (T); First National Bank, supra, para [3], 49D-Fl

sale in execution[17] in circumstances where the sale is rendered a nullity by the rescission of the judgment which gave the sale its validity.

[55] It was also accepted in Vosal, supra, that where the purchaser of the property sold in execution became aware of the owner's application for rescission of the judgment, such purchaser was obliged to restore possession back to the owner once the judgment was rescinded, as he was thus aware of the attack on the judgment and that some risk may attach to his rights as buyers of the property.

[56] As a general rule, immovable property validly sold in execution at a judicial sale cannot as a general rule, after registration of transfer be vindicated from a bona fide purchaser[18], provided that the sale in execution was not a nullity.

[57] The applicants contend that the sale in execution was a nullity and could not have served to pass any title to the second respondent[19]. The argument is predicated on the contention that the time lapse of some 71 months since the filing of the summary judgment application and the sale in execution, and the time lapse of some 54 months between the said application and the date of the order declaring the immovable property specifically executable, on the probabilities supported the applicant's contention that circumstances had changed, necessitating a re-evaluation by a court whether the property should be sold in execution. The argument proceeds that in the circumstances the second applicant's fundamental rights to housing was infringed.

[58] I am however not satisfied that the applicants have on these grounds illustrated that the sale in execution was either a nullity or was invalid or that the applicants' constitutional rights had been breached.

[59] In the alternative, the applicants contend that the second respondent, the purchaser of the immovable property at the sale in execution of 5 September 2013, was not bona fide as he was aware that the applicants would seek rescission of the

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[17] Eg Vosal Investments (Pty) Ltd v City of Johannesburg and Others 2010 (1) SA 595 (GSJ)
[18] Sookdeyi v Sahadeo 1952 (4) SA 568 (A) at 571G-572B
[19] Menqa and Another v Markom and Others 2008 (2) SA 120 (SCA) at para [17] and [19] 127H-128A; 128B-C

judgment. In support of this contention, the applicants rely on the inadmissible hearsay contention that the sheriff, the third respondent, made an announcement prior to the sale in execution that the applicants intended applying for rescission of the judgment pursuant to which execution was levied.

[60] No supporting affidavit has been put up by the sheriff in support of the applicants' contentions. The applicants contend that the sheriff should independently have put up an affidavit as he was a party to the proceedings. As the sheriff did not become actively involved in the proceedings, as is the norm, I do not think that this contention has merit and justifies any inference. The applicants were free to approach the sheriff to obtain confirmation of what they contend transpired at the sale in execution. They elected not do so.

[61] The applicants further contend that the hearsay evidence should be admitted under section 3 of the Law of Evidence Amendment Act[20]. I am however not satisfied that the requirements of section 3(1)(c) have been met.

[62] The applicants' contention that the sheriff announced the intended rescission application is further expressly denied by the first respondent who puts up confirmatory affidavits by the attorneys of both the first and second respondents, confirming the averment that no such announcement was made prior to the amendment of the sale in execution[21]. Albeit that such affidavits do not expressly state that those individuals were present at the sale, if the affidavits are read in context, the denial is express that no such announcement was made by the sheriff prior to the sale in execution.

[63] There is thus no cogent evidence before me that the second respondent, as purchaser was mala fide and put at risk when he purchased the immovable property at the sale in execution.

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[20] 45 of 1988
[21] Answering affidavit para 69.4

[64] The applicants further contend that the sale in execution and the transfer of the immovable property in the name of the second respondent is a nullity as the first applicant, the registered owner of the immovable property at the time, had been deregistered and the property at the time of the sale in execution belonged to the State as bona vacantia. These contentions have no merit.

[65] It is common cause that the first applicant was reinstated during or about March 2014 whereafter the present application was brought. The first applicant's reinstatement under section 82(4) of the Companies Act 71 of 2008 retrospectively establishes the company's corporate personality and ownership of property.[22]

[66] For purposes of the present application, the previous deregistration of the first applicant cannot render the sale in execution or the registration of the transfer of the immovable property to the second respondent a nullity.

[67] I am not in the circumstances satisfied that the sale in execution is a nullity and/or invalid and should be set aside on the grounds contended for by the applicants.

[68] I was referred to Knox NO v Mofokeng and Others[23], which concerned, inter alia, the rights of purchasers of immovable property at sales in execution where the judgment under which the sale in execution was carried out was subsequently rescinded by the first respondent.

[69] The applicants argue that Knox is distinguishable on the facts as the purchaser was bona fide in Knox whereas in the present instance the purchaser was not. For the reasons already stated, I am not satisfied that the applicants have illustrated any mala fides on the part of the purchaser.

[70] In Knox it was further held that the fact that a judgment which had been validly granted, is subsequently rescinded after transfer had been effected cannot retrospectively affect the validity of the real agreement in respect of the transfer of

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[22] Peninsula Eye Clinic Pty Ltd v Newlands Surgical Clinic and Others 2014 (1) SA 381 (WCC) para [51] 410F-I

[23] 2013 (4) SA 46 (GSJ), paras [5], [22] and [24], 49I-50C; 57F-H; 58D-I

the property. To hold otherwise would introduce an unacceptable degree of legal uncertainty pertaining to the purchase of property at sales in execution[24]. I am in respectful agreement with these views.

[71] I now turn to consider whether in all the circumstances and considering the facts of the matter, the summary judgment should be rescinded and whether the application was launched within a reasonable time as envisaged by rule 42(1)(a).

[72] The summary judgment was granted by Van der Merwe AJ on 10 March 2009. The present application was launched on 31 March 2014, some 5 years later.

[73] The applicants have disavowed any knowledge of the judgment before August 2013 and have denied receipt of any notifications of the judgment, writ and various sales in execution in June 2009 and September 2013. These denials are in bald terms.

[74] The applicants have attempted to explain various of the delays which occurred in the launching of the present application. The applicants have however in my view not adequately explained all the relevant delays and why a rescission application was not launched earlier and in particular during the very relevant period of 13 August 2013 (when on the second respondent's version, the applicants became aware that judgment had been granted against them) and 6 November 2013 (which is the undisputed date on which the immovable property was transferred to the second respondent), bearing in mind that the applicants already advised the first respondent on 5 September 2013 that such an application would be launched.

[75] On the applicants' own version, they adopted a leisurely pace in making the necessary investigations to enable them to launch the necessary rescission proceedings. The applicants were aware a sale had taken place on 5 September 2013 and that transfer of the immovable property would follow within a reasonable time thereafter. By 19 September 2013, the pleadings had been made available to the applicants' legal representatives, which indicated the date and nature of the summary judgment proceedings and provided a copy of the simple summons.

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[24] Knox, supra, para [24] at 58D-G

[76] No further information was required to enable to applicants to at least raise the deficiencies in the summary judgment proceedings which are raised in the present application. The applicants would further at all material times have been possessed of the necessary knowledge to raise whatever other defences they may have to the first respondents claim. At least an undertaking could have been sought from the first respondent not to effect transfer before the rescission proceedings were launched prior to the registration of the transfer on 6 November 2013. Other than the second applicant's reliance on his hospitalisation during mid November 2013, his mother's death on 27 August 2013 and a vague reference to '*investigations*', no full and satisfactory explanation has in my view been tendered by the applicants for the delays in this very relevant period. The applicants' only attempted to launch any proceedings during December 2013, well after the registration of the transfer of the immovable property to the second respondent, had already been effected. Such delay is attributable to the applicants.

[77] A further factor to consider in the exercise of the discretion is the interests of justice. As stated by Eloff DJP[25]: '*It is in the interest of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders of Court. Persons affected by such orders should be entitled within a reasonable time after the issue thereof to know that the last word has been spoken on the subject. The power created by Rule 42(1) is discretionary (see Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another 1992 (4) SA 852 (a) at 862 in fine – 863A) and it would be a proper exercise of that discretion to say that, even if the appellant proved that Rule 42(1) applied, it should not be heard to complain after the lapse of a reasonable time*.'

[78] In light of all the aforegoing facts and circumstances, including the conduct of the applicant, I am of the view that it would be in the interests of justice not to exercise the discretion in favour of the applicants, despite the applicability of rule 42(1)(a) that the summary judgment should not be rescinded. The applicants did not

[25] First National Bank of Southern Africa Ltd v Van Rensburg NO and Others; In Re First National Bank of Southern Africa Limited v Jurgens and Others 1994 (1) SA 677 (T) at 681E-G, followed, inter alia, in Van der Merwe v Bonaero Park (Edms) Bpk 1998 (1) SA 697 (T)

adopt a proactive approach to protect their interests throughout these proceedings, as is reasonably expected of them and the application was not launched within a reasonable time having regard to the relevant dates.

[79] I am fortified in this view by the grave injustice which would occur if the transfer of the immovable property is set aside after the applicants had an adequate opportunity to timeously launch rescission proceedings prior to such transfer and the absence of a satisfactory explanation why this was not done timeously.

[80] For the reasons already provided I am further not satisfied that the applicants have established that the sale in execution was a nullity or invalid or that purchaser at the sale in execution was not bona fide and that they are entitled to any of the relief sought.

[81] I accordingly make the following order:

[81.1] The application is dismissed.

[81.2] The applicants are directed to pay the first respondent's costs, jointly and severally, the one paying the other to be absolved.

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E F DIPPENAAR
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING	:	3 February 2015
DATE OF JUDGMENT	:	12 February 2015
FOR APPLICANT	:	Adv C Thompson
	:	Naidu Richen Attorneys,

		Johannesburg
FOR FIRST RESPONDENT	:	Adv C Humphries Smit Sewgoolam Inc, Johannesburg