REPUBLIC OF SOUTH AFRICA

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

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED ✓

16/10/2015
DATE

SIGNATURE

CASE NUMBER: A3049/2015

In the matter between:

MOZAMANE SOLOMAN KHOBANE — APPELLANT

and

ALAN PAUL LEVY — 1ST RESPONDENT
ALTECH NETSTAR (PTY) LTD — 2ND RESPONDENT
WILLEM JOHANNES VAN WYNGAARDT — 3RD RESPONDENT

JUDGMENT

CHAITRAM AJ:

INTRODUCTION

[1] The issue for determination in this appeal is whether good cause has been shown for setting aside a warrant of execution against property (writ) arising from the following facts and circumstances.

[2] The action was not defended, a default judgment was entered, the writ was issued and executed, a subsequent sale in execution liquidated the judgment debt, the judgment has not been rescinded, the judgment debtor applied to set-aside the writ almost three years after it was issued, the judgment appears to be void ab origine, and the sole purpose for setting aside the writ is that the judgment debtor wishes to perfect a cause of action for damages against those whom he perceives to have wronged him in relation to the execution proceedings.

THE PARTIES

[3] The appellant was the defendant/judgment debtor in the action.

[4] The first respondent is the second respondent's erstwhile attorney, who had represented it in the action. A costs order was sought against the first respondent in the court a quo.

[5] The second respondent was the plaintiff/judgment creditor in the action.

[6] The third respondent had purchased the appellant's motor vehicle at the sale in execution and had been cited in the court a quo merely as an interested party. No order was sought against the third respondent.

[7] For purposes of simplicity, I will refer to the main parties as plaintiff and defendant.

THE FACTS

[8] The key facts, broadly expressed, are the following.

[9] On 13 May 2011 the plaintiff instituted action in terms of a simple summons against the defendant in the Johannesburg Magistrates Court for "*payment of the amount of R16 469-58 in respect of services rendered during the period 2009 to 2011*"

[10] The summons was served on the defendant on 11 July 2011.

[11] Upon receipt of the summons, the defendant did not defend the action but telephoned the plaintiff's attorney's offices and, according to the defendant, concluded the following agreement with an attorney there, a Mr Sacks (Sacks):

[11.1] Sacks would obtain instructions from the plaintiff, firstly, regarding the quantum of the claim, which the defendant disputed, and secondly, about the action having been instituted prematurely as the defendant was still debating the account with the plaintiff;

[11.2] The defendant would commence a monthly payment of one thousand Rand (R1000-00) to the plaintiff's attorney in liquidation of the claim, pending a debatement of the capital;

[11.3] Sacks would furnish the defendant with the firm's banking details for the interim payments;

[11.4] Sacks would suspend further legal action;

[11.5] Sacks would forward the defendant a written recording of these terms of their agreement.

[12] It is common cause that Sacks did not forward any confirmation of this alleged agreement to the defendant.

[13] On 08 August 2011 the plaintiff's attorneys requested the entry of a judgment against the defendant in default of his appearance to defend.

[14] The default judgment was entered against the defendant on 11 August 2011 and a writ was simultaneously issued by the clerk of the court.

[15] The writ was executed by the sheriff at the defendant's home on 29 August 2011 when various of his movable property was attached, including his car which was allegedly worth approximately one hundred and ninety six thousand Rand (R196 000-00).

[16] According to the defendant, he was provided with the plaintiff's attorneys banking details on 27 September 2011, and he commenced paying his monthly instalments, as he had previously undertaken to do, at the end of September 2011.

[17] The sheriff, however, removed the attached property from the defendant's home on 18 October 2011 despite the defendant's vehement protests.

[18] The sheriff sold some of the attached property in execution on 19 October 2011 after the defendant and his then attorney, despite paying the plaintiff's attorney the sum of eight thousand Rand (R8000-00), failed to persuade the plaintiff's attorney to stay the sale.

[19] The sale raised enough money to liquidate the plaintiff's claim.

[20] For all intents and purposes, the action was concluded as no further steps in execution were taken against the defendant.

[21] The defendant subsequently raised a complaint against the sheriff of the court, with the South African Board of Sheriffs during or about February 2012.

[22] The defendant launched an application for the rescission of the judgment on 15 October 2012.

[23] The defendant's attorney enrolled the rescission application for hearing on 10 December 2012, when it was removed from the roll for reasons that are not clear. To date, the rescission application has not been re-enrolled for hearing.

[24] Nothing further of significance seems to have occurred thereafter, until about June 2014 when the defendant launched his application in the Johannesburg magistrate's court to set aside the writ.

[25] The defendant's grounds for setting aside the writ may be summarised as follows:

[25.1] The writ was not competent as the judgment in the action was void ab origine for the following reasons:

i) the plaintiff had fraudulently sued out of the incorrect jurisdiction;

ii) the plaintiff had misled the court by pleading its cause of action incorrectly, and not relying on the written agreement that regulated the relationship between the parties;

iii) the plaintiff's attorney had breached their oral agreement in terms of which it had been agreed that the action would be stayed; and

iv) the Johannesburg magistrate's court lacked the necessary geographical jurisdiction to have heard the action;

[25.2] The defendant had made a valid tender of payment of the claim prior to judgment when he had concluded his agreement with Sacks.

[25.3] In any event, the warrant had been fully satisfied, and this constituted a sufficient reason, by itself, to have the writ set aside.

[26] The defendant suggested that these circumstances gave rise to a cause of action for damages in his favour against the various role-players who had participated in the execution proceedings against him. He, accordingly, contends that he requires an

order setting aside the writ in order to perfect his cause of action for damages.

[27] The plaintiff's position in the matter is the following:

[27.1] The judgment has not been rescinded, the writ has been satisfied, the plaintiff does not intend to execute further, and the matter is at an end;

[27.2] No firm agreement was concluded between Sacks and the defendant over the telephone on the terms alleged by the defendant;

[27.3] The tender of payment that the defendant refers to was, in any event, a conditional tender which did not bind the plaintiff;

[27.4] The defendant's almost three-year delay in launching the application to set aside the writ is unreasonable, unjustified, and amounts to acquiescence to the consequences of the judgment; and

[27.5] The defendant's main reason for seeking the order setting aside the writ relates to an attempt to obtain some sort of tactical advantage in his proposed action for damages, and does not amount to good cause.

The Law

[28] The defendant's application in the magistrate's court to set aside the writ was based on the provisions of section 62(3) of the Magistrate's Court act 32 of 1944 (the MCA), which reads as follows:

> *'Any court may, on good cause shown, stay or set aside any warrant of execution or arrest issued by itself....'*

[29] Some of the popular grounds for setting aside a writ are set out in *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T) at 257 B-H. It is not necessary to list them here. Those grounds, however, are, by no means, a closed list of instances when a writ may be set aside.

[30] The guiding principle remains an assessment of whether the facts relied-upon for the setting aside of the writ amount to good cause.

[31] Our courts have, for obvious reasons, avoided having to define the concept of 'good cause'. In *South African Forestry Co v York Timbers Ltd* 2003 (1) SA 331 SCA at paragraph [14], the court said the following, albeit in a different context, about the concept of 'good cause':

> *'"Good cause" is a phrase of wide import that requires a court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances. As pointed out by Innes CJ in Cohen Brothers v Samuels* 1906 TS 221 *at 224 in relation to the meaning of that phrase...:*
> *"No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits, and decide in each case whether good cause has been shown."'*

[32] In *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 E at 300H - 301A, the court stated:

> *'When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words....The court's discretion must be exercised after a proper consideration of all the relevant circumstances.'*

[33] In yet another context, but of equal application here, the court in *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 AD, at 352H, stated the following:

> *'The meaning of "good cause"... should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief.'*

[34] Importantly, in the context of applications for the rescission of judgments, an applicant is required to prove the existence of good cause, and not merely allege it. (See *Silber*, above, at 352G). I see no reason why the same standard should not be applied in the context of applications to set aside a writ. Indeed, the phrase in section 62(3) of the MCA, reads "on good cause shown" (my emphasis). The phrase must, accordingly, be interpreted as "on good cause proven". I am fortified in my view by the fact that an application to set aside a writ is final in nature, not interlocutory. An applicant has no second chance to expand-upon, or to prove any unsubstantiated allegations at any subsequent hearing. In motion proceedings, it is the supporting affidavits of the parties that constitute the evidence before the court. An applicant must, therefore, ensure that he addresses his facts and evidence with a sufficient degree of particularity so as to enable a court to assess whether, overall, the applicant has discharged the onus of proof of good cause on a balance of probabilities.

[35] The court's assessment of "good cause" will be subject to the court's discretion, and, inevitably, a semblance of a value judgment may also creep into the assessment due to a judicial officer's idiosyncratic thought processes – probably what the Deputy Chief Justice was recently reported as having referred-to as 'the inarticulate premise' which he described as 'that part of a judge's consciousness that comes with who he or she is' and which 'intrudes into decision-making'.[1] However, the court's conclusion as to whether or not good cause has ultimately been established ought to be able to be reasonably objectively justifiable.

ASSESSMENT OF THE FACTS FOR GOOD CAUSE

[36] Turning to the assessment then:

The Judgment being obtained Fraudulently:

[37] The defendant has relied upon a host of reasons to attack the judgment, some of which seem to have been thrown-in merely for good measure. For instance, there were no

[1] Reported online in Legalbrief, 07 October 2015

facts alleged in substantiation of the grounds that the judgment was obtained by fraud, or a common mistake between the parties, or that the plaintiff had fraudulently sued out of an incorrect court. These grounds are, accordingly, summarily rejected.

The Cause of Action having been Pleaded Incorrectly:

[38] The plaintiff has offered nothing of substance to refute the defendant's claim that the cause of action was incorrectly pleaded. This is despite the fact that the plaintiff has sued for '*services rendered between 2009 and 2011*', and the written agreement that the defendant contends constitutes the basis of the cause of action was concluded in 2010. Whereas, at face value, an element of uncertainty arises whether the plaintiff's claim in the summons refers to a different period, or for different services, the parties seem to have been ad idem about the actual services that the summons referred to. The defendant never took this point with Sacks because he knew what the plaintiff's claim was about. The summons, therefore, fulfilled the purpose of a simple summons. It was just the quantum of the claim that the defendant had disputed. Even if the plaintiff's claim was for the services that were referred-to in the defendant's written document, and the plaintiff had omitted to refer to the document in its particulars of claim, the summons may very well have been excipiable, but I do not think that the judgment that was pronounced over such a cause of action would, necessarily, be void ab origine for that reason alone.

[39] In the court's view, therefore, although this point seems to favour the defendant, it is hardly compelling enough in the circumstances of the matter.

The Agreement Concluded with Sacks:

[40] The defendant has related his version of the terms and conditions of the arrangement with Sacks in an unduly sketchy manner. The defendant did not specify what part of the plaintiff's claim he disputed or how much he suggested was appropriate to be due to the plaintiff. It is not clear what aspect of the quantum Sacks was to have obtained instructions on. The defendant does not specify why he suggests that the action was premature, and precisely what Sacks was to obtain instructions on in this regard. The

defendant does not specify when the plaintiff's firm's banking details were to have been supplied to him or when he was to have commenced his monthly interim payments. It is also not clear how, when, and with whom the debatement was to take place. The defendant does not specify the terms and conditions under which the continuation of the action was to remain suspended. The date when Sacks was to have sent the defendant the written recording of the arrangement is not clear. He also does not state why he failed to contact Sacks when he failed to receive Sacks' written recording.

[41] All of this uncertainty invokes scepticism whether any firm agreement was concluded that could be relied-upon by the defendant.

[42] The plaintiff, on the other hand, fails to set-out its version of the telephone communication with the defendant. In his affidavit, Sacks merely states that '*at no stage was a final arrangement entered into in terms of which the plaintiff would accept payment of this debt in instalments*'. What the plaintiff does do, however, is attach a letter written by the defendant, apparently in response to the attachment of his movable property by the sheriff on 29 August 2011, addressed to plaintiff's attorneys, the material parts of which read as follows:

> '*I vow to pay the debt on a monthly basis starting from the 15/9/2011. I will continue to pay on the 15th of every month. I will pay R1000-00 every month for next six months, and review my salary thereafter. Hope my request will be taken into consideration.*'

[43] The contents of the defendant's letter, which are undisputed, are certainly not consistent with the terms of the arrangement that he alleges. If anything, his letter suggests the approach of a recalcitrant debtor who reacts only when faced with the threat of dire consequences.

[44] Furthermore, in the defendant's application for the rescission of the judgment, which he annexed to his application to set aside the writ, he recounts the telephone call with Sacks in paragraph 23 of his founding affidavit merely as follows:

> *'I called the office of Alan Levy, the attorneys of the respondent, a day or so after the summons was served. My spouse...also called there. We told the persons we spoke to, whose names we cannot recall, that were* (sic) *still debating the matter with respondent. However, we said that we would start paying in the meantime and wanted their banking details. The office* (sic) *of the attorneys said that they would look into the matter.'*

[45] This version is also in stark contrast to the detailed version of the call that he sets up, almost two years later, in his founding affidavit of his application to set aside the writ.

[46] It is not reasonably possible, in the circumstances, to infer the existence of any meaningful agreement that was concluded between the defendant and Sacks in terms of which the plaintiff's attorney was disentitled to proceed with the action.

The Court's Lack of Geographical Jurisdiction:

[47] It is common cause that the ground of jurisdiction that the plaintiff had relied upon in the action was that *'the whole cause of action had arisen within the court's jurisdiction'*. It is common cause that neither the plaintiff nor the defendant is subject to the jurisdiction of the Johannesburg magistrate's court for any other reason. The defendant's jurisdictional challenge, accordingly, relates to where the whole cause of action had, in fact, arisen.

[48] In order for a cause of action to have arisen wholly within a court's jurisdiction, all of the material elements (*facta probanda*, as opposed to *facta probantia*) of the cause of action must have taken place within that court's jurisdiction.

[49] According to the defendant, the written agreement that he contends formed the basis of the cause of action, was concluded in Polokwane, and performance in terms of the agreement had taken place in Polokwane. The plaintiff did not respond meaningfully to these allegations. Polokwane is, clearly, not within the geographical jurisdiction of the Johannesburg magistrate's court. On these facts alone, two of the material elements of the cause of action had occurred outside of the court's jurisdiction. On the defendant's version, and in the absence of a version by the plaintiff, all indications are

that the Johannesburg magistrate's court did not have the necessary geographical jurisdiction to have entertained the action.

[50] In addition to merely blandly disputing that the court lacked jurisdiction, the plaintiff contends that the question of the voidness of the judgment relates peculiarly to an application for a rescission of a judgment, and not an application for the setting aside of a writ. The learned magistrate seemed to hold this view as well. I, however, cannot agree. There is no reason, in principle, why, generally speaking, a judgment that has been conceded as having been fatally defective, or one that a court is prepared to find was incorrectly entered, cannot constitute, at least, a factor in the assessment of good cause for the setting aside of a writ, if not constituting good cause by itself. In *Ras En Andere v Sand River Citrus Estates (Pty) Ltd* 1972 (4) SA 504 TPD, it was held that a writ may be set aside if the *causa* (reason or motive) for the judgment has fallen away. The very fact that a judgment is a nullity may be construed as one that is devoid of a *causa* for its existence.

[51] There are a number of authorities that establish that a judgment given by a court that has no jurisdiction to do so is a nullity and may be ignored without the need to have it set aside. See *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 SCA at 207 C, together with the various other authorities cited by the learned author D E Van Loggerenberg in *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa*, 10th ed, vol 1: The Act, p 82.

[52] I would hasten to add, however, that it would be an inherently dangerous practice to ignore court orders on the basis of one's unilateral, misguided assessment that the judgment is a nullity. Parties who are, both, favourably and unfavourably, affected by a court order may ignore it without the need to first approach a competent court to set it aside if they are in agreement that it amounts to a nullity. The authorities above, however, are silent as to what the parties may do when they, in good faith, have opposing views as to the status of a court order.

[53] Van Loggerenberg, above, at p 82, states that '*in the event of the parties disagreeing as to the status of an impugned judgment, the court should be approached for a*

rescission of the ... [order on the basis of it having been void ab origine]'. I agree with the learned author. This will be especially necessary as there is a presumption in law that a judgment, even one that is a nullity, is a good judgment for the purposes of execution until such time as it has been set aside. In *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 ECD, the court said that *'an order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong'.*

[54] A court's lack of jurisdiction is, however, one of three exceptions to this in terms of our law's Roman-Dutch heritage, the other two traditional exceptions being the failure to serve the summons, and the want of power to sue. In *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 CkHC, the court, in a scholarly judgment, questioned whether these exceptions still find application in our law today in the light of the out-dated procedure, namely a "*complaint of nullity*" that a party had to resort to in order to challenge such a judgment. Even though the setting aside of a void judgment in the Magistrate's court, as opposed to the High Court, is now regulated by statute, the exceptions remain a part of our law. The court, above, opined that '[a] *more acceptable approach...is that...the validity of a final judgment is rather to be determined by one of the recognised remedies* [appeal or review] *for the setting aside of such a judgment*', as opposed to merely ignoring the judgment.

[55] I agree with that court's general sentiments. It is perhaps time to relieve the tension between the presumed validity of all court judgments and the traditional exceptions thereto by jettisoning from our law the anachronistic application of the exceptions in terms of which judgments may be ignored, in favour of the more orderly procedure of appeal and review.

[56] The plaintiff's submission on the issue, if I understood it correctly, was that the judgment is not void ab origine, but that even if it is, a court will not necessarily come to the defendant's aid on that basis alone. I agree with the latter part of the plaintiff's submission. In the context of an application for rescission of a judgment, for instance, a judgment debtor who relies on the ground that the judgment is void ab origine is also required to set out a valid defence to the claim. See *Leo Manufacturing CC v Robor*

Industrial (Pty) Ltd t/a Robor Stewarts & Lloyds 2007 (2) SA 1 SCA. The point is that the execution of a writ on a judgment that is void ab origine will be competent if the court declines to assist one in the defendant's position.

[57] In the circumstances, the voidness of the judgment in the present matter is but one factor to be considered in the overall assessment of good cause. At this stage, at least, the point favours the defendant.

The Defendant's Tender of Payment in Satisfaction of the Judgment Debt:

[58] The defendant's contention that he made a proper tender of payment when he concluded his arrangement with Sacks flounders, firstly, on the basis of my findings already that no proper agreement with Sacks is discernable from the defendant's version of events, and, secondly, even if one were to consider the limited terms of the offer that the defendant refers to, the offer is found wanting.

[59] The defendant concedes that his tender was conditional. A plaintiff is not obliged to accept a tender on conditions that are not reasonably suitable to it. A tender of payment of a judgment debt must be objectively reasonable in order to amount to a proper tender. The facts and circumstances of the tender, together with its terms are vitally important in assessing whether a plaintiff is perhaps attempting to overreach the defendant, or acting maliciously, and, accordingly, whether the tender is one that the plaintiff ought to accept.

[60] In an application for the stay of a sale in execution, the court in *Duncan v Duncan* 1984 (2) SA 310 CPD, had to assess whether an offer of payment by the debtor ought reasonably to have been accepted by the creditor. The court first made the following observation:

> *'A...principle which seems to me to be self-evident is that it is the creditor with a writ in hand who has the weight of law on his side to begin with. He has taken all the steps necessary to get his money by means of the rather ponderous legal process involved and the circumstances which are raised in order to prevent him from doing so by due process of law must, in my view, be most unusual',*

and, thereafter, concluded that the creditor who had waited for some ten months for her payment, was not obliged to await the debtor's receipt of the proceeds of certain immovable property that he had recently sold, as opposed to proceeding with a sale in execution on the following day in respect of certain of the debtor's other immovable property.

[61] In *Le Roux,* above, the court confirmed that its discretion was not wide enough to enable it to set aside a writ on the grounds of justice and fairness where the *causa* for the execution, in that case the judgment, still existed.

[62] In the present matter, the salient facts relating to the tender are unknown. At face value, on the defendant's own version, a monthly payment of R1000-00 on a claim of R16 469-58, subject to a debatement of the capital, is certainly not a tender that the plaintiff was reasonably obliged to accept, and cannot form the basis for the setting aside of the writ. At the time of the defendant's conditional and unacceptable tender, the *causa* for the execution still existed.

[63] There was, accordingly, no substance in this ground for setting aside the writ.

Defendant's Need to Perfect a Cause of Action for Damages:

[64] The defendant openly contends that his main purpose in seeking to set aside the writ is to perfect a cause of action for damages against those whom he feels have wronged him in the execution process. His proposed action for damages on the alleged wrongful execution forms the basis of alternative relief that he wishes to claim together with his main claim for damages, instead of instituting two parallel actions that may need to be consolidated later. He states that he '*was...advised that the setting aside of the warrant...is* (sic) *prerequisite to a cause of action based on the invalidity of the warrant*', hence his application to set aside the writ.

[65] The plaintiff contends that this is an improper basis upon which to seek the order setting aside the writ. I agree. The primary purpose behind setting aside a writ is to prevent the consequences of the execution of the writ, usually against the affected

person's property. There is no question of that taking place in this case. The defendant is under no danger of any further execution against his property in relation to the writ in question.

[66] It is not quite clear why the defendant contends that the writ, necessarily, has to be first set aside in order to perfect his cause of action for damages arising from the alleged wrongful execution of the writ. It is, however, not for this court to pronounce on the point. In light of the fact that setting aside the writ may serve no purpose at all, coupled with the fact that defendant's real intention in wishing to set aside the writ are inconsistent with the purpose of the provisions of section 62(3) of the MCA, the court is inclined to resist making the order.

Satisfaction of the Writ:

[67] The defendant, finally, relied on the ground of satisfaction as a ground for setting aside the writ. This ground envisages a scenario where a judgment creditor attempts to execute a writ against a debtor in circumstances where the debtor has already settled the full extent of his obligation to do so in terms of the judgment. Probably thousands of writs are issued in the various courts around the country on a daily basis. Nobody ever applies to court, as a norm, after satisfaction of the judgment debt, to have the writ set aside. That is simply because it is not necessary to do so. It follows that this ground may be relied upon mainly when the judgment debtor is under threat of execution after he has already fulfilled his legal obligation in respect of the judgment debt.

[68] Plaintiff's counsel argued that the judgment and accompanying writ, by virtue of the execution, were *functus officio* and now no longer susceptible of being set aside. I agree. A person or thing is *functus officio* after, '*having fulfilled the function, discharged the office, or accomplished the purpose, and therefore* [is] *of no further force or authority.* [It is] *applied to an officer whose term has expired, and who has consequently no further official authority; and also to an instrument, power, agency, etc. which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.*'
(Black's Law Dictionary, Online Legal Dictionary, 2nd Edition)

[69] In this matter, the writ is *functus officio* and no good purpose would be served by setting it aside. The defendant is under no threat of further execution and is unlikely to ever be. His complaint about the writ has become moot. There is no merit in his reliance upon this ground.

Delay and Acquiescence:

[70] Finally, the Plaintiff has exploited the point that the defendant had taken an unreasonably long time to approach the court for relief. The writ was executed, initially, on 29 August 2011 when the attachment was made, and, finally, on 19 October 2011 when the sale in execution occurred. The defendant, however, applied to have the writ set aside in about June 2014, almost three years after it was issued.

[71] His main reason for the delay is that he did not have sufficient funds to brief his attorney to proceed with the matter. His two secondary reasons are that the court file at the Johannesburg magistrate's court could not be accessed for many months, and that his attorney was rather busy and could not commence with the application to set aside the writ for some three months.

[72] In a country with a relatively high rate of unemployment and poverty, a person's impecuniousness must be taken into account before one deprives him of his access to the court. However, a measure of reasonableness must also be introduced into the assessment. Sporadic periods of a person's lack of funds may explain some of the delay in taking legal steps, but the person must, firstly, set out adequate facts relating to his circumstances, and secondly, the periods of delay for these reasons cannot be unreasonable in relation to those circumstances.

[73] In this matter, the defendant is a medical doctor. He explained his inability to accumulate funds without any facts of substance. He was employed for throughout the period in question. He states that he had saved money from April 2012 to August 2012 in order to brief an attorney, and that these funds were just enough to enable him to proceed with the rescission application. The reasons that he could not instruct his attorney between October 2011 and April 2012 were not addressed. The details of his

income and expenses were not addressed. The legal costs associated with the rescission application, which, at face value, seems to the court ought to have been relatively low, were not addressed. He merely states that he commenced a new job in early 2013 which entailed a *'great reduction in* [his] *monthly income and cash flow'* That is his sole explanation for the entire year of 2013. His explanation is weak.

[74] His excuse about the missing and/or inaccessible court file at the Johannesburg magistrate's court is weaker. A litigant is not without relief merely because a court file has become lost, especially in relation to matters of an urgent nature. If, after a reasonably diligent search, the court file cannot be found, the person who wishes to pursue his relief ought to re-construct the file to the best of his ability, with the co-operation of the opposing party and, especially, the assistance of the court management. Court managers are obliged to put measures in place to ensure that interested parties are properly assisted in reconstructing a lost court file. If necessary, the court management must assist an interested party to secure copies of missing documents or records from an opposing party. The purpose of this exercise is to ensure that a person's access to the court is not sacrificed at the altar of bureaucratic and administrative inefficiency. The judicial officer before whom the matter presents will assess whether he has enough before him in order to deliver a meaningful judgment. If not, he may make an appropriate order against any person, directing what further steps are to be taken before the matter may be heard. A wilful failure to comply with the judicial officer's order in this regard may be met with an appropriate costs order.

[75] In this matter, the defendant's attorney failed to address this issue firmly and decisively enough at the Johannesburg magistrate's court. Whereas he ought to have pursued the matter with the court management and, if necessary, with the Chief Magistrate, he appears to have been quite content to bask in the administrative inefficiency that he complains of. That is not what is expected of an attorney, especially one whose client's case may be subject to time constraints.

[76] The defendant's explanation that his attorney was too busy to give his matter attention for some three months is the weakest of the lot. A single practitioner who is fortunate

enough to be too busy to give a matter the appropriate attention, ought to refer his client to someone who can, especially if any further delay in addressing the matter may compromise the client's case. This reason for the delay is rejected peremptorily.

[77] The court will accept, and generously so, that the defendant's lack of funds, together with his difficulties in accessing the court file assists him in accounting for a little portion of the almost three-year delay. Viewed objectively, though, his delay in the matter has been unreasonably long.

[78] The principle of finality in legal proceedings is fundamental, and is expressed in the maxim *interest reipublicae ut sit finis litium* (in the interests of society as a whole, litigation must come to an end). In the Canadian case of *Richard Atanasoff v Canada (Commissioner of Corrections)* 2001 FCT 411, the court expressed the position as follows, albeit in a slightly different context:

> *'The imposition of time limits to dispute the validity of a legal decision is of course meant to give effect to a basic idea of our legal thinking that, in the interest of society as a whole, litigation must come to an end...,and the general principles adopted by the courts in dealing with applications to extend those limits were developed with that in mind.'*

[79] In the American case of *Desmond v Kramer* 232 A.2d 470 (1967), the Superior court of New Jersey rendered the following meaning to the maxim:

> *'The public interest demands an end to the litigation of the same issue.'*

[80] The maxim is as much a part of our law as well. See *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 CPD at 963I.

[81] The need for litigation to end complements the need for legal certainty in relation to the finality of disputes between citizens. People move on, memories fade, and important documents become lost. It cannot reasonably be expected of a person who has finalised his litigation to still be properly prepared many years later to address issues

arising from that litigation that could and should have been addressed within a reasonable time after the conclusion of the litigation.

[82] In this matter, the action had been concluded, and the plaintiff had indicated its willingness to consent to the rescission of the judgment in September 2012 already. The defendant did nothing of any substance for an unreasonably long time. His attorney argued that he cannot be said to have acquiesced in the matter as he had always been intent on seeking the court's relief and had taken steps that were indicative of his intentions. I cannot agree. All that he really did was to complain to his finance house about the sale of his car which was, apparently, still the subject of a credit agreement between them, he lodged a complaint with the South African Board of Sheriffs, the details of which are unknown, and he merely launched an application for the rescission of the judgment about a year after the sale in execution, without finalising it.

[83] These steps are hardly the type of steps that are indicative of a serious desire by the defendant to challenge the judgment or execution proceedings. He failed to defend the action when he could have. In response to the attachment, he made a written offer to pay. In response to the removal of his attached property, he paid a cash sum of eight thousand Rand (R8000-00). He failed to apply for a stay of the writ or of the sale in execution despite the fact that he was represented by an attorney at that time. He has not sought to enrol the rescission application in almost three years. It also took him some three years just to apply to set aside the writ.

[84] In *Wolstenholme v Boyes* 1878 Buch 175, the facts were that the sheriff had removed and sold in execution, goods belonging to a judgment debtor that the sheriff had not originally attached. The judgment debtor sought to set aside the sale some eighteen months later. The court said the following:

> *'...there was nothing to prevent* [the judgment debtor] *from employing an agent or attorney to appear on his behalf at the sale to protest against a sale of the goods being made which did not appear on the* [sheriff's] *inventory. Nothing of the kind was done. The goods were sold, and eighteen months after the sale the* [judgment debtor] *brings*

this action to have the sale set aside as illegal....He must be held to have renounced his right to have the objection.'

[85] In my view, the circumstances of the sheriff's actions in *Wolstenholme* were of a more serious nature than those in the present case, and the delay in seeking the relief there, was far less than in the present matter. Yet the court in *Wolstenholme* declined to assist the debtor purely because of his delay in seeking his relief.

[86] In the present matter, the defendant had, ostensibly, acquiesced to all of the consequences of the judgment. If not, he was certainly unjustifiably quiescent, and must be taken to have forfeited his entitlement to seek an order setting aside the writ.

[87] Considered as a whole, I do not see how I may reasonably apply my judicial discretion to conclude that the defendant has established good cause for the writ to be set aside. All of the factors that militate against the inference of good cause, cumulatively, trump the sole factor that is in the defendant's favour. Although the magistrate's reasons were ineloquently expressed, his ultimate decision to dismiss the application was correct.

[88] The appeal is, consequently, dismissed with costs.

A CHAITRAM
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

I agree.

M VICTOR
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Appearances:

On behalf of the Appellant:	Mr F Geldenhuys (Attorney)
Instructed by:	Frans Geldenhuys Attorneys
On behalf of the Respondent:	Adv T Lipshitz
Instructed by:	Roy Suttner Attorneys

Date Heard: 06 October 2015
Handed Judgment Delivered: 16 October 2015