REPUBLIC OF SOUTH AFRICA

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

CASE NO: 46283/13

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

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DATE SIGNATURE

In the matter between:

MAINE TEBOGO GOODMAN Applicant

And

RICHARD TLABI MOSEBO First Respondent

SINDISWA MTHOMBENI Second Respondent

TONY ABRAM DUBE and NOMBAGO ELSIE DUBE Third Respondent

CITY OF JOHANNESBURG Fourth Respondent

CASE SUMMARY: Application for Eviction.

Applicant alleging he is the owner of the premises; purchased at sale in execution. Third Respondents previous owners of the property. Property “sold” to First and Second

Respondent pursuant to illegal transaction [Brusson Scheme]. No intention on part of Third Respondents to sell the property. No intention on part of First and Second Respondents to purchase the property. First and Second Respondents defaulting on bond repayments. Bank obtaining judgment against the First and Second Respondents; property sold in execution. Bank aware that transaction tainted by unlawful Brusson scheme. Despite such knowledge, instructing sheriff to sell. No rights could pass to Applicant as First and Second Respondents had no lawful rights to transfer. Applicant and Bank alleging Third Respondents had waived their rights for failing to set aside sale. Original transaction void *ab initio*; therefore entire transaction unenforceable. Waiver not applicable. Rescission by Third Respondents of judgment against First and Second Respondent. Such right exists. Third Respondent joining Bank and other interested parties. Order for joinder and retransfer of property to Third Respondent granted. Bank ordered to show cause why it should not be jointly and severally liable for costs.

J U D G M E N T

WEINER, J:

[1] The applicant applies for the eviction of the third respondent (the Dubes) in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act).

[2] The third respondent was initially cited as "*the occupants of Erf 8……, D…… Extension 2, Johannesburg*". Mr Dube delivered an answering affidavit as the third respondent (together with his wife). The first and second respondents do not oppose the relief. They do not, and have never, resided at the property. They will be referred to as "the investors".

FORMALITIES

[3] The applicant complied with section 4(1) and 4(2) of the PIE Act. The applicant submits that it is the registered owner of the property situate at Erf 8……., D……. Extension 2, Johannesburg situate at 8…….. M….. Street, D…….. Extension 2 (the property).

[4] The property was registered in the applicant's name on the 10th July 2013.

[5] The applicant describes the Dubes as unlawful occupiers as defined in the PIE Act which provides:

> "'*Unlawful occupier' means a person who occupies land without the express or tacit consent of the owner or person in charge or without any other right in law to occupy such land, excluding a person who is an occupier in terms of Extension of Security of Tenure Act 1997 and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Rights Act 1996.*"

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[6] It is common cause that the applicant became the registered owner of the property by virtue of a sale in execution and that the property was sold without any lease.

[7] The applicant's attorneys requested in a letter of demand that the Dubes vacate the premises and such letter was served by the Sheriff on the 21st November 2013.

<u>THE ISSUES IN DISPUTE</u>

[8] The applicant contends that the respondent's attempts at raising a dispute are ill-conceived and that there is no *bona* factual dispute in relation to the applicant's ownership of the property.

[9] The Dubes, on the other hand, contend that their rights as owner were terminated fraudulently; that a sale to the investors was fraudulent; the mortgage bond was invalid and therefore the sale in execution was invalid, and transfer could not have taken place to the applicant.

THE DUBES INVOLVEMENT IN THE BRUSSON SCHEME

[10] It is common cause that the Dubes were victims of the so-called "Brusson scheme". Mr Dube states that he, on or about and during 2006, approached Brusson Finance (Pty) Ltd (Brusson) as his rates and taxes were in arrears in the sum of approximately R38 000,00. He attended at the offices of Brusson, in order to obtain a loan and signed various documents, which he believed expressed his intention. However, due to Brusson's misrepresentation, the documents he signed had the effect of transferring the property to the investors by virtue of an illicit scheme. Through the scheme, the employees of Brusson deceived the Dubes into signing documents purporting to transfer the property to the investors. The Dubes had been specifically misled by Brusson into believing that the documents were formalities in the conclusion of a loan agreement. The applicant, although having no direct knowledge of these events, does not dispute same.

[11] Dube made certain payments to Brusson.

[12] He was contacted in about May 2010 and informed that he had to make payments directly to the investors. Certain payments were made to them as well. He was contacted in June 2010 by one of the investors and informed that he (the investor) now owned the property.

[13] Much of the factual evidence relating to the Brusson scheme is common cause and has been dealt with in numerous judgments in this and other divisions of the High Court. Chohan AJ in the matter of ***Moore and Another v The Sheriff of the District of Vereeniging and Another*** **Case** No 22082/2013 handed down on the 26th September 2014 in the Gauteng Local Division summarised the previous cases dealing with this scheme.

[14] Reference was made by Chohan AJ to the following cases:

14.1 Ditshego and Two Others v Brusson Finance (Pty) Ltd Case no 5144/09 unreported judgment 2013 JDR 2440 FB;

14.2 Mabuso v Nedbank Ltd and Another Case No 67456/10 Delivered on 24 June 2014 GNP;

14.3 Absa Bank v Boshoff [2012] ZAECPEHC 58;

14.4 Jacobs v Nedbank unreported judgment 2012JDR 1873 GNP;

14.5 RealOboho Innocentia Leshoro v Nedbank and Another [2014] ZAFSHC 89;

14.6 Radebe v Nedbank and Others unreported judgment of Nicolls J handed down on 25 September 2014 .

[15] From all of these judgments the following emerges:

15.1 The applicants fell into financial difficulties and were looking to secure a loan which they could not obtain through a registered financial institution.

15.2 The applicants apparently saw an advertisement by Brusson that they would advance monies to the applicants with certain security.

15.3 The applicants concluded agreements believing that they were concluding a loan agreement when in fact the agreements obliged them to transfer the immovable property to a Brusson investor, who in turn concluded agreements to resell that property back to the applicant in instalments.

15.4 The Brusson investors would utilise the immovable property as security in order to obtain finance from a registered financial institution and a mortgage bond would be registered over the immovable property.

15.5 The Brusson investors invariably defaulted on their payments to the financial institution. Proceedings were instituted by the Banks to reclaim the amounts advanced and orders were sought declaring the properties, that had been secured by the mortgage bonds, executable.

[16] In the various judgments to which Chohan AJ refers there are different approaches that have been taken in relation to the bank's rights. In some of the judgments, the underlying loan agreements were held to be enforceable whilst in others the mortgage bonds were set aside. Chohan AJ found that the loan agreement between the financial institution and the Brusson investor was the "*pivotal element of the scheme*". Accordingly there was a direct link between the loan agreement and the registration of the mortgage bond. This is, in my view, correct.

[17] In the majority of the matters relating to the Brusson scheme, the applicants claimed that they did not intend to transfer ownership of the immovable property to the investor or anyone else. In the absence of such intent, the property would, in the normal course of events, be restored into the name of the applicant. See ***Legotor McKenna Inc v Lea*** **2010 (1) SA 35 (SCA)** at para [22] where it was held that "*in the absence of any intention to transfer ownership, a material requirement of the now established and well-*

recognised abstract theory of transfer of immovable property, would be lacking".

[18] It is common cause that the Brusson scheme and the agreements concluded in terms thereof contained peculiar features which suggested that the agreements comprised a loan against the immovable property being tendered as security. See ***Ditshego*** *supra* at paras [9] to [14]. Jordaan J in ***Ditshego*** found that the only reasonable conclusion to be drawn therefrom was that the real intention was that the applicants obtained a loan from Brusson against the security of their property. He found further that the agreements were simulated transactions (para [28]). Both Jordaan J in ***Ditshego*** and Chohan AJ in ***Moore*** found that the loan agreement and the mortgage bond were inextricably linked and comprised a single interrelated scheme even though the bank was unaware of the Brusson scheme.

[19] The investors who were an integral part of the Brusson scheme would similarly not have had any intention to acquire ownership of the immovable property from the applicants and accordingly, in both cases (and others,) it was held that there was no consensus in relation to the transfer of ownership in respect of the immovable property.

[20] Chohan JA went on to find that the applicants would be entitled to a declaration that the memorandum of agreement signed between them and Brusson and the offer to purchase and sale agreement signed between the

investors and the owner were invalid, unlawful and of no force and effect and thus liable to be set aside.

[21] In relation to the validity of the mortgage bond, reference was made to ***Nedbank v Mendelow* 2013 (6) SA 130 (SCA)** where Lewis JA held:

> "*Where there is no real intention to transfer ownership on the part of the owner or one of the owners, then a purported registration of transfer (and likewise the registration of any other real right such as a mortgage bond) has no effect.*" (at 135 para [13])

Lewis JA further held that, if the underlying agreement was tainted by fraud or had been obtained by some other means that vitiates consent such as duress or undue influence, ownership does not pass (para [14]). Accordingly it was held that the bond registered over the property was not valid.

[22] The applicant relies upon the fact that all of the authorities above only dealt with the investors and the previous owner under the Brusson scheme. In the present case, there is a bona fide third party and according to the applicant's argument, this must affect the position insofar as the validity of the sale to the applicant is concerned.

[23] However, this ignores the fact that as appears from all of the authorities stated above, if there was no intention on behalf of the Dubes to transfer the property to the investors, then that transfer and sale are invalid and the investors had no rights to transfer to the applicant herein.

[24] Several cases have also been decided in relation to *QuarterMark Investments (Pty) Ltd (QuarterMark)* which was a scheme similar to the Brusson scheme. In ***QuarterMark Investments v Mkwanasi and Another* 2014 (3) SA 96 (SCA)** Theron AJ found that as Mrs Mkwanasi has been fraudulently induced to sign a sale agreement although she had no intention to transfer ownership of her property to QuarterMark, she was entitled to rescind that agreement. Accordingly the SCA confirmed that where the underlying transaction was tainted by fraud, ownership would not pass despite the registration of transfer and in those circumstances a party may proceed by way of a *rei vindicatio* for the return of the immovable property.

[25] The applicant states that it is not alleged that he at any time was party to or had knowledge of the alleged Brusson scheme or the fraud. Accordingly the applicant contends that where ownership has passed to a bona fide third party the victim of fraud cannot vindicate the property from such instant third party. See ***Dalrymple, Frank and Feinstein v Friedman and Another (2*) 1954 (2) SA 649 (W)** at 664 and ***Basil Read Sun Homes (Pty) Ltd v Nedperm Bank Ltd* 1999 (1) SA 831 (SCA).** In ***Dalrymple, Frank and Feinstein v Friedman*** supra it was held:

"Where as in that case there was no consent on the part of the owner to the passing of the property to the person who obtained it by fraud. The transaction is void ab initio and the ownership of the property remains in the person defrauded. But if the owner consents to the passing of the property although his consent was obtained by means of fraudulent misrepresentation

the transaction is voidable only. In such case ownership passes to the fraudulent party. In this regard … where the fraud is such that the transaction is void ab initio ownership of the property fraudulently taken or obtained remains in the owner who had had been vindicated in the hands of an innocent third party. Where the transaction is voidable only an innocent third party can acquire good title."

[26] It is common cause that Nedbank had knowledge of the Brusson scheme from at least the 25th of November 2010 when a letter was written to their erstwhile attorneys Lowndes explaining the Dubes' situation and requesting a stay of the summary judgment action against the investors. Despite this and letters sent again to Lowndes and directly to Nedbank informing them of the Dubes position *vis a vis* the Brusson scheme, Nedbank proceeded to obtain default judgment against the investors on the 25th January 2011(when the caveats were still in place) and proceeded thereafter to issue the writ of execution and proceed with the sale in execution after the caveats were lifted in February 2013.

[27] In this regard the judgment of ***Knox NO v Mofokeng and Others* 2013 (4) SA 46 (GSJ)** is pertinent. It held as follows:

"Where there was no judgment, or where the judgment was void ab initio, or where the essential statutory formalities pertaining to the sale of an immovable property had not been complied with, the immovable property in question can in principle be vindicated even from a bona fide purchaser who

had taken transfer of the property. The reason for [this] second rule is that where the sale in execution was invalid, the sheriff had no authority to conduct the sale and to transfer the property to the purchaser. The result is not only that the underlying sale agreement concluded at the sale in execution is invalid, but also that the real agreement is defective, since the sheriff does not have authority to transfer the property to the purchaser. The sheriff only has such authority where a valid sale in execution had taken place." (at para [18])

[28] It is clear that at the time the sale in execution took place both the creditor and the Sheriff were aware that the sale of the property to the investors was an invalid sale and that no rights could arise therefrom. The Sheriff therefore had no authority to conduct the sale or to transfer the property to the applicant. Despite this, they continued with the sale in execution and any damages which may be suffered by the present applicant herein lie, in my view, at the foot of Nedbank and the Sheriff.

[29] The sale in execution was a nullity because the investors were not the owners of the property and the judgment declaring the property specially executable was void *ab initio* because it depended on the sale and mortgage bond being valid.

It is not alleged that the Dubes at any time consented to the transfer of their property. Accordingly, in the present case, the sale and subsequent transfer to the applicant are void *ab initio*.

ESTOPPEL

[30] Whilst the applicants accept in principle that the Brusson scheme was unlawful and that therefore all transactions following therefrom are void ab initio and of no force and effect for the reasons set out above, the applicant argues that the Dubes have, in effect, waived their rights and are estopped from claiming re-transfer of the property. They rely on ***Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others*** **2011 (2) SA 508 (SCA)** at [23]:

"In the context of this case, the appellant is entitled to retransfer of the property but for the fact that it cannot assert its right of ownership because of estoppel. Hence the applicant loses its ownership of the property."

[31] The applicant relies on this dictum and points to the fact that the Dubes must have known from June 2010 that the property had been transferred to the investors but failed to take any steps in relation thereto. It is common cause that the Dubes have been represented by the LRC since approximately November 2010. The applicant contends that the Dubes did not take any steps to set aside the registration of transfer of the property nor to rescind the judgment until the application for eviction was served.

CHRONOLOGY OF EVENTS

[32] In order to assess whether or not the Dubes are estopped from asserting their rights of ownership, an analysis of the chronology events is required.

1. In 2005 the Dubes took transfer of the property.
2. At the end of 2006, the Dubes approached Brusson for the loan.
3. In September 2007, the Dubes attended Brusson's offices to sign documents.
4. In October 2007, the Dubes received a loan pursuant to the agreement with Brusson.
5. On 19 June 2008 the investors took transfer of the property unbeknown to the Dubes and pursuant to an illicit transaction.
6. In May 2010, Mr Dube received a call from Brusson telling him to keep his payments to Brusson on hold until further notice.
7. In June 2010, Mr Dube received a call from one of the investors advising Dube that he was the owner of the property.
8. In August 2010, the Dubes were referred to the LRC.
9. On the 30th August 2010, caveats were imposed on all of the properties affected by the Brusson scheme. Thus, no proceedings could be launched in relation to any of these properties, including the property in question.
10. Despite this, on 13 October 2010 the Dubes received a summons addressed to the investors seeking an order for payment plus an order seeking execution of the property.

11. In November 2010, the Dubes attended at the office of the LRC who confirmed that they were victims of the Brusson scheme.
12. On 25 November 2010, the LRC wrote a letter to Nedbank's erstwhile attorneys (Lowndes) explaining the Dubes' situation. The LRC requested a stay of the summary judgment application against the investors and asked for an urgent response by the 3rd of December 2010.
13. No response was received. On 6 December 2010, the LRC wrote another letter as Lowndes had failed to respond to remind the latter of the urgency.
14. On 13 December 2010, the LRC sent a letter to Nedbank warning it that as a result of the unlawfulness of the Brusson scheme and the liquidation proceedings against Brusson, legal action against the property could not proceed.
15. Again, despite this, Nedbank proceeded to obtain judgment and on the 25th of January 2011, default judgment was granted against the investors. The LRC and the Dubes were not informed of this.
16. On 9 March 2011, the Dubes received a writ of attachment against the property.
17. On the 4th April 2011 the LRC sent a letter to Nedbank's attorney asking that they do not proceed with the sale in execution.
18. Nothing further occurred until the 25th of February 2013 when the caveats that were registered over the property on the 30th

August 2010 were lifted. Again the Dubes and LRC were not aware o fnor informed of this fact.

19. On 19 March 2013, the Dubes received the notice of sale in execution and immediately contacted the LRC.
20. The LRC wrote a letter to Nedbank's attorneys in April 2013 advising that Nedbank should not proceed with the sale in execution as the court had declared the agreements in relation to the Brusson scheme to be invalid. No response was received to this from Nedbank's attorneys.
21. Despite knowing that the relevant agreements had been declared invalid, Nedbank instructed the Sheriff to proceed with the sale in execution.
22. The LRC wrote a letter to the Sheriff's office on the 29th April 2013 requesting that the sale in execution of the property be stayed pending the outcome of imminent litigation against Absa, Standard Bank and First National Bank in various cases in relation to the Brusson scheme..
23. No response was received from the Sheriff's office either.
24. Despite all of the aforesaid warnings, the sale in execution proceeded and the applicant purportedly purchased the property at the sale.
25. He arrived at the property on the 5th May 2013 and introduced himself to Mr Dube. He informed Dube that he had purchased the property at an auction.

26. On 10 July 2013, the property was registered into the name of applicant and the Dubes were informed of this in terms of a letter forwarded to them by the investors.
27. On 1 August 2013, the LRC sent a letter to Nedbank's attorneys, Lowndes Dlamini advising it of the Dube's' entitlement to the property.
28. On 31 October 2013, Mr Dube received a demand calling upon those who occupy the property to vacate it.
29. On 21 November 2013, a further letter of demand that the Dubes vacate the property was served at the property.
30. On 9 December 2013, the LRC responded to the demand to vacate setting out the history of the matter.
31. On 12 December 2013, the eviction application was served on the Dubes.
32. On 21 January 2014, the Dubes delivered a notice of intention to oppose the eviction application.
33. On 11 February 2014, the Dubes answering affidavit was delivered as well as a counter-application incorporating a joinder-application.
34. On 17 February 2014, Nedbank delivered a notice of intention to oppose certain aspects of the counter-application.
35. Thereafter, several notices and affidavits were served resulting in this matter coming before this Court.

[33] Accordingly, the applicant contends that having knowledge of the judgment and not taking any steps to rescind same precludes the Dubes from obtaining rescission (the Applicant also contends later that as the judgment was not granted against the Dubes, they cannot apply for rescission. This aspect is dealt with later). The applicant submits that, by their conduct, the Dubes have, in essence, acquiesced to the judgment granted by default and the transfer pursuant thereto. In this regard they rely on ***Gentiruco AG v Firestone SA (Pty) Ltd*** **1972 (1) SA 589 (A)** and ***Nkata v Firstrand Bank and Others*** **2014 (2) SA 412 (WCC).** In the latter case, the court held that the applicant for rescission had failed to explain the lengthy delay in launching the rescission application. By the time she did so, the property had been sold, in execution, to a purchaser who had then on sold the property to a third party. The court held that clearly there would be prejudice to third parties (the *bona fide* purchaser) if the default judgment were to be rescinded. Although the judgment was reversed on appeal ([2015] ZASCA 44 (26 March 2015), this point was not the subject of the appeal. However, this case did not involve the original sale transaction being fraudulent and void *ab initio* and is therefore distinguishable from the facts in the present case.

[34] It is clear that from the chronology set out above that Nedbank's erstwhile attorneys (Lowndes) and Nedbank were well aware of the fact that the Brusson scheme was unlawful and that several judgments had already been handed down in relation to the scheme. They were also aware of the Dubes' claim to the property and their allegations that the transfer and ownership of same had been obtained through fraud and was void.

[35] The applicant contends that Nedbank was entitled to pursue the sale in execution and ignore the correspondence which they had received because the Dubes had failed to oppose the proceedings or take any legal steps to set aside the sale to the applicant

[36] It is pertinent to state that Nedbank, the Sheriff and the LRC were all aware of the fact that a *caveat* had been placed on all sales involved in the Brusson scheme. It is also common cause that the *caveats* were only lifted on the 25th February 2013. The LRC and the Dubes were not aware of this fact. It was at this time that Dube received the notice of the sale in execution and the LRC wrote a letter to both Nedbank and the Sheriff requesting that the sale in execution be stayed pending the determination of the matter of *Tsotetsi v Standard Bank* in relation to the validity of the Brusson scheme.

[37] Throughout the proceedings, although the Dubes did not institute legal proceedings the LRC, on several occasions, put forward the rights of the Dubes both to Nedbank and to the Sheriff.

[38] In my view, the Dubes, through the LRC, did not show display an unequivocal intention to waive their rights. See **RAF v Mothupi 2000(4)SA38 SCA**@[19], where Nienabber JA stated:

"Because no one is presumed to waive his rights….one, the onus is one the party alleging it and two, clear proof is required of an intention to do so….The

conduct from which waiver is inferred, so it has been frequently stated, must be unequivocal, that is to say, consistent with no other hypothesis".

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[39] There was nothing the Dubes could do up until February 2013 as there were interdicts over all of the properties and there was no legal action that was necessary for them to take at that stage. Very soon after the interdicts were lifted, Nedbank, despite receiving notice and despite knowing that the Brusson scheme was invalid and that a sale transfer could not take place to another party, served the notice of sale in execution and allowed same to take place on the 3rd May 2013 some two months after the caveats were lifted. Accordingly, in my view, to allow the applicant's application to succeed would be to ignore the rights of the Dubes and the effects of the invalidity of the Brusson scheme on the sale and transfer of the property.

THE COUNTER APPLICATION

[40] The Dubes have applied, in a counter-application for the following relief:-

40.1 That the Registrar of Deeds Johannesburg, the three liquidators of Brusson's estate, the Sheriff for the district of Roodepoort and Nedbank Limited, be joined as parties to the proceedings as the fifth to tenth respondents respectively (the counter respondents)

40.2 That the default judgment granted against the investors under Case Number 39356/2010 on 3 March 2013, be rescinded;

40.3 That the Dubes are entitled to restitution of ownership of the property;

40.4 That the mortgage bond granted by Nedbank to the investors be set aside;

40.5 That the sale at the auction of the property be declared invalid, unlawful and of no force and effect;

40.6 That the property be transferred back to the Dubes;

40.7 That all Brusson documents be declared invalid, unlawful and of no force and effect.

[41] Service of the counter application took place in February 2014. Only Nedbank gave notice of intention to oppose prayers 2 3, 4, 5 and 6 of the counter-application. They did not oppose the joinder. It appears from correspondence delivered to the court that service of the counter application was effected on the counter respondents, although formal proof of service on some of them is not evident. However, there is correspondence between the LRC and the Registrar of Deeds in which the LRC has provided the Registrar of Deeds with copies of the counter application, which is sufficient proof that the Registrar has had notice of this application. Although called upon by the LRC to file affidavits if they wished to oppose, they did not do so

[42] The applicants contend that the joinder application should have been brought separately and distinct from the current application and should have

been heard beforehand. The Dubes did, in fact, provide an earlier date for the joinder application to be heard, but as same was not opposed, there appears to be no prejudice in allowing such application to be moved at this stage. Nedbank did not file any further affidavits in opposition to this matter and accordingly this Court is entitled to grant an order that they are joined to these proceedings and have had notice of the relief sought against them. Counsel did represent them at the time of the hearing.

RESCISSION

[43] The applicants contend that the rescission application is ill-conceived for the reason that such judgment was not granted against the Dubes but against the investors and therefore the Dubes cannot apply for rescission of the judgment. (despite relying upon their argument that the delay in bringing the rescission is fatal). The applicant and Nedbank argue that the Dubes do not have locus standi to set aside that portion of the judgment that was obtained by the bank in which the immovable property was declared executable. The Dubes were not party to the action instituted by the bank against the two investors..

[44] A rescission of a judgment may be brought in terms of various rules or the common law. Rule 42(1)(a) applies if a judgment was sought or granted erroneously in the absence of <u>any party affected thereby</u> (emphasis added). The rule is intended to allow a party who was not present when the judgment was granted to be given an opportunity to place before a court facts which,

had the court been aware of the same, would have affected the granting of the judgment. Under the common law, a court may also, on sufficient or good cause shown, rescind a judgment obtained in default of an appearance by a party. The Dubes have a substantial interest in the subject matter of the judgment that was granted and this would entitle them to intervene in the action that gave rise to the order which is now sought to be rescinded. See ***United Watch and Diamond Company v Disa Hotels*** **1972 (4) SA 409 (C) @ 415.** The Dubes are already parties to these proceedings and have sought to join all the relevant parties concerned with the default judgment proceedings under Case No 39356/2010. Although they have not specifically asked to intervene in those proceedings, this Court has the power to grant such order. The Dubes are required to show a "*legal interest in the subject matter of the action, which could be prejudicially affected by the judgment of the Court"* see **United Watch supra** @ 415. They have a direct and substantial legal interest in the property, being the subject matter of the action and have the right to intervene therein and seek rescission of such judgment..

[45] One must assume that, had the judge hearing the default judgment been told of the Brusson scheme and a lack of any intent on behalf of the Dubes to transfer ownership of the property to the investors, the judge would not have granted the order declaring the immovable property executable. The order thus obtained was, in my view, granted erroneously as contemplated by Rule 42(1)(a).

[46] In addition, the court in terms of the common law can set aside a judgment on the grounds of fraud. In the matter of ***Gollach & Gomperts v Universal Mills and Produce Company*** **1978 (1) SA 914 (A)** at 922C-D it was held that, like any contract (and like any order of court), a transaction may be set aside on the ground that it was fraudulently obtained.

[47] The Dubes, in seeking rescission, contend further that Nedbank was reckless in granting credit in terms of section 80 of the National Credit Act (NCA). It appears from the affidavit that the investors, at that stage, had approximately eleven properties registered in their name and that there were outstanding bond amounts ranging between R195 000,00 and R305 000,00. In addition, the investors had an excessive amount of debt under their names and had purchased five properties in 2008. Nedbank did not appear to conduct the required assessments in terms of the NCA in granting the bond. It is not clear whether Nedbank made any investigations in compliance with section 81(2) of the NCA. Had they done so, they would, at the very least, have suspected that the deed of sale documents facilitated by Brusson were suspicious, to say the least.

[48] As stated above, the application to join Nedbank and the Dubes' affidavit supporting such counter-application was served on Nedbank. Nedbank chose to file a notice of intention to oppose certain of the relief however it chose not to file any affidavits explaining their conduct in this matter.

[49] In my view the Dubes are entitled to an order rescinding the portion of the judgment relating to the execution of the immovable property and to relief which flows therefrom.

COSTS

[50] The other parties that the Dubes sought to join in the proceedings and in respect of whom proof of service is lacking are not directly affected by the outcome of this matter, other than in relation to costs. It appears that the two main parties in this matter, being the applicant and the Dubes are innocent parties affected by the Brusson scheme. In my view, Nedbank, the Sheriff, Brusson and the investors were all involved in the consequences of the property being transferred to the applicant in circumstances in which it should not have been done.

This issue was not raised with the parties during argument and accordingly I intend to make a substantial order relating to the issue of costs. Such order will also allow the counter respondents to deal with any other relief they may seek to obtain or oppose.

A IN REGARD TO THE MERITS OF THE APPLICATION, THE FOLLOWING ORDER IS GRANTED

1. The Applicants' application to evict the respondents from the property Erf 8…….. D……. Extension 2 Johannesburg 8……. M….. Street, D……., Extension 2 (the property) is dismissed.

2. The Registrar of Deeds is joined in the proceedings as the Fifth respondent and Nedbank Ltd is joined in the proceedings as the 10th respondent in the counter application.

3. The Dubes are granted leave to intervene in the proceedings under Case No 39356/2010 and the default judgment and order granted under such case number in favour Nedbank, insofar as it relates to the declaration that the property be specially executable, is set aside.

4. The Dubes are entitled to restitution of the property.

5. The mortgage bond granted by Nedbank to the investors in respect of the acquisition of the property is set aside.

6. The memorandum of agreement concluded between the Dubes and Brusson Finance (Pty) Limited (Brusson) as well as the offer to purchase concluded between the Dubes and the investors together with the sale agreement (Annexures TAD 2, TAD 3 and TAD 4 to the Dubes' answering affidavit) are declared invalid, unlawful and of no force and effect.

7. The above agreements are set aside.

B IN RELATION TO COSTS AND/OR ANY OTHER RELIEF WHICH ANY OF THE COUNTER RESPONDENTS MAY SEEK

1. The applicant, the respondents, the counter applicant and the counter respondents are granted leave to file an affidavit by the 15th September 2015 showing cause why the following order should not be made:-

1.1 The sixth to ninth counter respondents are joined in these proceedings;

1.2 The first and second respondents together with Nedbank, the Sheriff for the district of Roodepoort and the liquidators of Brusson Finance are ordered to pay the costs of this application, jointly and severally, the one paying the others to be absolved.

1.3 This order is to be served by the Sheriff on all of the counter respondents.

2. The matter is postponed sine die to a date to be arranged with the registrar of Weiner J for argument in relation to the costs of this application.

3. The further proceedings and filing of any other affidavits, other than those referred to in B 1, shall be dealt with, in Case Management by Weiner J. Any party may approach the registrar of Weiner J to provide a date for such case management to take place.

WEINER J

HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

For the Applicant:	C Van Der Merwe
Instructed by:	Biccari Bollo Mariano Inc
For the Intervening Creditor:	HP Van Nieuwenhuizen
Instructed by:	Cliffe Dekker Hofmeyr Inc
For the Respondent:	O Ben-Zeev
Instructed by:	Legal Resources centre
Date of Hearing:	15 June 2015
Date of Judgment:	13 August 2015