IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NUMBER : A3068/16

COURT *A QUO* CASE NUMBER : 39977/16

DELETE WHICHEVER IS NOT APPLICABLE

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

17/2/2017
DATE

SIGNATURE

In the matter between

MOYANA, KOMBO JAMES First Appellant

MOYANA, MARCIA PETRICIA Second Appellant

and

BODY CORPORATE OF COTTONWOOD First Respondent

STEPHAN LOTHAR KUHN N.O. Second Respondent

JOHN MARK DOUGLAS MACLENNAN N.O. Third Respondent

MICHAEL STEFEN KUHN N.O. Fourth Respondent

NEDBANK LIMITED Fifth Respondent

THE REGISTRAR OF DEEDS Sixth Respondent

THE SHERIFF, RANDBURG WEST	Seventh Respondent
THE MASTER OF THE HIGH COURT	Eighth Respondent
SCHWELLNUS INCORPORATED	Ninth Respondent

JUDGMENT

[1] This is an appeal from a decision in the magistrates' court, in an application in which the two appellants were the applicants and the nine respondents were the respondents.

[2] The relief sought by the appellants in the court *a quo* was a declaration that a warrant of execution pursuant to which their immovable property was sold, was invalid, and a declaration that the sale in execution of the property was null and void. An interdict was also sought to prevent the sixth respondent (the Registrar of Deeds) from transferring the property. The application was dismissed by the learned magistrate on the basis that the main relief sought was *res judicata*.

[3] The background facts are the following :

3.1 The applicants were the registered co-owners of a unit (unit 19) in a sectional title scheme known as Cottonwood. The body corporate of Cottonwood (the first respondent) launched an action against the applicants in October 2012 out of the Randburg Magistrates' Court for non-payment of amounts due to the body corporate. Default judgment

was granted on 15 November 2012 for the sum of R10 398.22 together with *mora* interest.

3.2 A writ of execution was issued on 31 January 2013. Since the execution against movables yielded nothing, an application was launched in July 2013 seeking an order in terms of section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 ("the Act") to allow execution against the immovable property. The relief was granted on 29 July 2013. The sale in execution took place on 19 November 2013. The purchaser was the BLC Family Trust, the trustees of which are the second, third and fourth respondents.

3.3 On 11 March 2014, the appellants obtained an urgent interdict in the High Court, granted by consent, to stay the transfer and registration of the property, pending the outcome of an application for rescission of the default judgment which had been launched on 21 February 2014. The rescission application was dismissed on 20 November 2014.

3.4 During March 2016 the appellants launched the application which forms the subject matter of this appeal. The main relief sought was to declare the warrant of execution of the property invalid on the basis that the provisions of section 66(1)(a) of the Act had not been complied with when the warrant of execution had been issued.

3.5 The magistrate who heard the application pointed out that the application for rescission, which had been dismissed, included a prayer 3 that the warrant of execution be set aside. She found that "the application, and issues, placed before me were the same as were placed before me on the 20th of November 2014". No doubt she was referring to the fact that the present application sought to set aside the warrant of execution as being invalid.

3.6 The appellants allege that their legal advisor had been told the day before the application was due to be heard, that it would not be heard on that day, and hence there was no appearance for the appellants on the day of the hearing. The attorneys for the first, second, third and fourth respondents were present, and the magistrate proceeded in the absence of any appearance for the appellants. The application was then dismissed.

[4] The first question to be asked is whether the magistrate's order is appealable at all.

[5] Section 83(a) of the Act provides that a party to a civil suit or proceedings in a magistrate's court may appeal to the relevant provincial or local division against "any judgment of the nature described in section 48". Section 48 in turn provides for five different orders which a court may "as a result of a trial of an action, grant". Section 48(b) reads : "judgment for the defendant in respect of his defence in so far as he has proved the same;". Jones and

Buckle[1] submits that section 48 also applies to proceedings initiated by application.

[6] Section 36(1) provides :

> "36. **What judgments may be rescinded**
>
> (1) The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu* –
>
> (a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;
>
> (b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;
>
> (c) correct patent errors in any judgment in respect of which no appeal is pending;
>
> (d) rescind or vary any judgment in respect of which no appeal lies."

[7] Rule 49 prescribes the procedure to be followed in applications for rescission or variation. It deals with "default judgment", which encompasses a judgment granted in the absence of a "party", being both the litigant and the legal representative[2].

[8] To the extent that rule 49(1) may be limited to default judgments in the strict sense, rule 49(7) broadens the scope of the rule to all judgments. It commences :

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1 The Civil Practice in the Magistrates' Courts in South Africa, tenth edition by Van Loggerenberg, Vol I, p 322.

2 Jones and Buckle, *supra*, Vol II, p 49-3.

"(7) All applications for rescission or variation of judgment other than a default judgment must be brought on notice ...".

[9] I should also draw attention to rule 49(9) (since removed) which provided :

"(9) If such application [to rescind or vary a default judgment] is dismissed, the judgment shall become a final judgment."

[10] The right of appeal in terms of section 83(a) read with section 48(a) (or (b)), is not by implication removed or suspended by section 36.

[11] The question of whether a party is deprived of the right of appeal because the judgment may be rescindable in terms of section 36 was addressed by the full bench of the then Transvaal Provincial Division in Van Graan v Smith's Mills (Pty) Ltd 1962 (3) SA 170 (T). In that case De Wet JP, with whom Bekker J concurred, pointed to the fact that decided cases on this question were not harmonious. He referred to the case of L&G Cantamessa (Pty) Ltd v Reef Plumbers 1935 TPD 56 which supported his view that a judgment susceptible to rescission is not appealable, and to other cases in the Cape, South West Africa, Eastern Districts and Natal to the contrary. A factor which may distinguish the Van Graan case from the present one is that De Wet JP was apparently of the view that a rescission application in that matter would inevitably have failed because the appellant had been in wilful default.

[12] That case was followed by Sparks v David Polliack & Co (Pty) Ltd 1963 (2) SA 491 (T), a judgment of Trollip J with whom Bresler J concurred. In that case defendant's attorney applied for a postponement of the trial, and, when

it was refused, he withdrew from the case. The magistrate thereupon granted judgment by default. It was accepted that this was a default judgment within the meaning of section 36(a)[3] of the Act and could therefore be rescinded under section 36, read with the then rule 46 (now 49). The following principles can I think be extracted from this case :

12.1 The relevant statute and practice of the court granting a judgment may render it provisional while it is rescindable, or could render it final and binding despite its possible rescindability.

12.2 The test of appealability is whether the judgment is final or provisional and not whether another remedy is available in the court *a quo* which should first be exhausted, although the availability of such a remedy may be an important factor in determining whether the judgment is final or merely provisional.

12.3 Rule 46(7) (later rule 49(9) but now no longer in existence) expressly provides that if the court dismisses the application to rescind or vary, "the default judgment shall become a final judgment", indicating that it was not final prior to that.

12.4 The default judgment becomes final, and hence appealable, when it

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[3] Now section 36(1)(a).

is no longer rescindable, which may be either through the lapse of time or by the defendant waiving or perempting his right to rescind, or both.

12.5 It is open to a defendant to waive or perempt his right of rescission if that would suit his purposes better, in which case the default judgment becomes final and appealable.

[13] Doubt was cast on this last principle in the case of Pitelli v Everton Gardens Projects CC 2010 (5) SA 171 (SCA). That case involved a declaration and order to pay money in terms of section 424(1) of the Companies Act No 61 of 1973, made in the absence of the appellant. The appellant had sought a postponement of the application which was refused, whereafter the appellant's counsel withdrew. The learned judge *a quo* then granted the orders that were sought in the application. The appellant filed an application for leave to appeal and later filed an application to rescind the order. They were heard simultaneously and both were refused by the court *a quo*. Nugent JA (writing for the court) stated the principle (at para [20]) that "for an order to be appealable it must have as one of its features that the order is final in its effect, by which I mean that it is not susceptible to being revisited by the court that granted it ...". Nugent JA then took issue with that part of the Sparks decision which held that an order will become appealable when it is no longer rescindable by lapse of time, waiver or peremption (at para [30]). Nugent JA reasoned that the appealability of an order is not dependent upon the action

or inaction of the litigant, but is rather dependent on the nature of the order, i.e. is not dependent upon what the litigant chooses to make of it. However, he pertinently indicated that it was not strictly necessary in that case to pronounce finally upon the view expressed in the Sparks case, and also pointed out that there were cases in both directions. He held that in that case the orders that were made were clearly susceptible to rescission and were not appealable, notwithstanding the fact that the appellant for rescission had failed. He pointed out that the refusal of the rescission was in theory appealable.

[14] The decision in Pitelli that an order which is revisitable by the court *a quo* is not appealable, was necessary for the outcome of that case, and is therefore definitive. However, the aspect of whether a party could elect not to apply for rescission and thereby render the judgment final and appealable was expressly left open by Nugent JA and was in any event *obiter*.

[15] Having due and respectful regard to the persuasive force of Nugent JA's reasoning in regard to this latter point, I am nevertheless not persuaded that he is correct. Although it may be said that every judgment granted in the absence of a party is theoretically susceptible to an application for rescission, that party may have any number of reasons for preferring to take the matter on appeal rather than to bring an application for rescission. By way of example, the party may have been in wilful default, or in great danger of being found to have been so, in which event the application for rescission may be

justifiably perceived to be doomed to failure. There can be no logic in forcing that party to apply for rescission simply because the remedy is theoretically available to him. As pointed out by Trollip J in the Sparks case, there is good authority in the form of Hlatshwayo v Mare & Deas 1912 AD 242 to the effect that a defendant may waive or perempt his right to rescind a judgment. It is therefore not strange that a party should be allowed to decide not to attempt to rescind a judgment, but rather to proceed directly to an appeal. It is not a matter of a party determining appealability so much as allowing a party the choice of different remedies available to it.

[16] In the present case there was, on the face of it, no wilful default on the part of the appellants, and an application for rescission seems to have been an available remedy. Any difficulties on the merits faced by the appellants in this appeal would equally have been faced by them in the application for rescission, but they had two possible remedies. For whatever reason, the appellants chose to appeal rather than to bring an application for rescission. By the time they appealed, they were out of time for the rescission, and the judgment was, in my view, appealable.

[17] It follows that the first respondent's attack on appealability must fail.

[18] The next question to decide is whether the magistrate's court had the jurisdiction to grant declaratory orders such as those sought by the appellants in the application.

[19] The magistrates' courts are creatures of statute and their jurisdiction must be deduced from the four corners of the statute under which they are constituted (Ndamase v Functions 4 All 2004 (5) SA 602 (SCA) at 605G-H; Sibiya v Minister of Police 1979 (1) SA 333 (T) at 337C). There is no provision in the Act which grants the magistrates' courts jurisdiction to grant a declaration of rights. It has been held that it would have that power if it were granted special jurisdiction by statute, such as the jurisdiction with respect to actions in terms of the Close Corporations Act 69 of 1984 (section 29(1)(fA) of the Act, Johnson v A Blaikie & Co (Pty) Ltd t/a FT Building Supplies Manaba 1998 (3) SA 251 (N) at 259D-260A. That is however a special case, and neither section 29 nor any other provision of the Act confers jurisdiction on a magistrate's court to grant any kind of declaration (other than one determining a right of way in terms of section 29(1)(c)).

[20] In the course of her able argument, Ms Howard submitted that the mere fact that an order was sought declaring the warrant of execution against immovable property to be invalid did not make it a "declarator". I have difficulty understanding what else it could be. When a party asks a court to declare something, it is by definition seeking a declarator.

[21] When Ms Howard was asked whether the relief was then simply a setting aside of the warrant of execution on the grounds that it was invalid, she baulked at the idea, on the basis that that would raise problems with regard to *res judicata*. The relief was therefore deliberately framed in the form of a

declarator, as I see it, in order to attempt to escape the spectre of *res judicata*.

[22] Ms Howard further submitted that it was not unusual for magistrates to issue orders "declaring the immovable property to be executable". That may be so. However, section 66(1)(a) of the Act does not require or sanction that. It provides that the judgment "shall be enforceable by execution ... if ... the court, on good cause shown, so orders, ... against the immovable property ...". That does not envisage or demand a declarator. The court would simply order that execution may take place against the immovable property.

[23] I am therefore not persuaded that the magistrate's court had the jurisdiction to entertain the declaratory orders sought by the appellants, and the application should therefore have failed on that ground.

[24] It remains to deal briefly, although this is not strictly necessary, with the merits of the application. I do so lest the appellants would be minded to attempt to rescind the learned magistrate's decision.

[25] Had the warrant of execution against the immovable property been issued contrary to the provisions of section 66(1)(a) of the Act, it would have constituted an illegality which the learned magistrate could not have ignored. I do not think that the dismissal of a rescission application in which the magistrate was not called upon to, and did not, address the issue of illegality of the warrant of execution, could stand in the way of a pronouncement of illegality in a subsequent application, on the basis of *res judicata*.

[26] But was the issue of the warrant of execution against the immovable property invalid? I think not, for the following reasons :

26.1 Section 66(1)(a) of the Act provides as follows :

> "66 **Manner of execution**
>
> (1)(a) Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made."

26.2 The section was declared to be "unconstitutional and invalid" in Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC), which required words to be read into section 66(1)(a), namely "a court, after consideration of all relevant circumstances, may order execution" after the words "so orders".

26.3 Although it is not clear whether the Jaftha decision excluded altogether the issue of a warrant of execution against immovable property without judicial supervision where the constitutional right to "adequate housing" is not infringed or endangered (see Menqa and Another v Markom and Others 2008 (2) SA 120 (SCA)), I do not have to consider that point in this case.

26.4 The appellant sought to cast doubt on whether the court had ordered execution against the immovable property. There is however positive evidence that it had. Firstly, there is a handwritten order which on the face of it was handed down on 29 July 2013 and is signed by the magistrate, declaring the property specifically executable. Whilst the appellants complain that this order made its appearance for the first time in the appeal record, there is no reason to believe that it does not emanate from the file in the court *a quo*. Secondly, there is an application which the first respondent launched in July 2013 in terms of section 66(1)(a) of the Act, which the appellants annexed to their rescission application, which bears the stamps of the clerk of the court and the sheriff. It is dated 1 July 2013 and appears to have been issued on 22 July 2013, for hearing on 29 July 2013. The latter date coincides with and corroborates the date on the handwritten order to which I have just referred. Thirdly, and importantly, the appellants clearly accepted the existence of the order, because in their application for rescission they sought an amendment of their relief to add a prayer to set aside this order as well. There was therefore judicial oversight, and the warrant of execution had been properly issued and was not invalid.

[27] The application would therefore have failed in any event even without regard to the defence of *res judicata*.

[28] The other matters raised do not warrant any mention.

[29] The first respondent asked for attorney and client costs of the appeal. This was sought not as a punitive costs order but as a contractual right, arising out of the rules which govern the sectional title scheme and to which the appellants were bound. Rule 31(5) of annexure 8[4] (the management rules) provides as follows :

> "(5) An owner shall be liable for and pay all legal costs, including costs as between attorney and client, collection commission, expenses and charges incurred by the body corporate in obtaining the recovery of arrear levies, or any other arrear amounts due and owing by such owner to the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act."

The question arises whether the legal costs in this appeal fall within the ambit of "legal costs ... incurred by the body corporate in obtaining the recovery of arrear levies, or any other arrear amounts due and owing by such owner to the body corporate ...". In my view they do, since in substance they are part and parcel of the body corporate's attempt to recover monies owed by the appellants as owners in the scheme.

[30] I would therefore dismiss the appeal, with costs on the attorney and client scale.

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[4] To the Sectional Title Regulations promulgated under the Sectional Titles Act 95 of 1986.

ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

I CONCUR AND IT IS SO ORDERED

ISMAIL
JUDGE OF THE HIGH COURT

Date of hearing	:	30 January 2017
Date of judgment	:	17 February 2017
Counsel for the appellant	:	Ms K Howard
Attorney for the appellant	:	Besong Attorneys Sandton
Attorney for the first respondent	:	Mr C Sutherland (attorney with right of appearance) of Christo Sutherland Attorneys, Randburg
No appearance for the other respondents		